

Explaining the President's Executive Actions on Guns

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President Obama recently announced a package of executive actions intended to reduce gun violence and make our communities safer. In a nation where 33,000 Americans die by gun every year, these common sense regulations seek to give teeth to our existing gun laws, some of which have been nearly impossible to enforce as written. Though these actions include more than a dozen components, including increased funding for mental health treatment, the addition of more law enforcement agents and background check examiners, and the foundation of an Internet Investigations Center to track online gun trafficking, four are particularly likely to raise the ire of the National Rifle Association (NRA) and its allies. This memo breaks down each: examining the flaws in our current enforcement system and explaining how these actions remedy them.

Tightening the definition for who is “engaged in the business” of selling guns.

The Problem

In 1968, Congress made it a violation of federal law “for any person except...a licensed dealer to engage in the business of...dealing in firearms.” And for nearly 50 years, anyone “engaged in the business” of selling guns has been required to obtain a federal firearms license and follow the common sense rules that regulate them. Since 1993, those rules have included running a background check on all gun purchasers to ensure they are not criminals, terrorists, or dangerously mentally ill. In that time, more than 200 million background checks have been completed, and more than 2 million illegal gun sales have been stopped before a gun could get into the wrong hands.

However, the test for determining whether someone is “engaged in the business” of selling firearms is extremely difficult thanks to its murky definition. Federal regulations define someone who is engaged in the business as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms,” excluding occasional sales, purchases for

personal collections or as a hobby, and the sale of a personal collection. Because these guidelines are so vague, it's hard to draw the line between private sellers who are exempted from background check laws and the federal dealers who aren't—and it's even harder to enforce that law when someone tries to skirt it. Even when prosecutors think they can prove someone is engaged in the business without a license, courts have come up with widely different interpretations of when someone is “engaged in the business.”

Today it's estimated that 34% of guns are purchased in private sales—meaning no federally licensed dealer is involved, and no background check is required. The genesis of this private sale loophole can be traced back to the toothless “engaged in the business” standard. Thanks to the lack of clarity in the law, people can sell an unlimited number of guns—in person, at guns shows, and anonymously online—to complete strangers, without a background check. When these gun laws were written, today's internet was unimaginable, but now the virtual loophole of guns sold online without background checks has surpassed even the infamous gun show loophole as the easiest way to obtain guns illegally. Our [studies](#) of one online gun bazaar, [Armslist.com](#), found that at least 1 in 10 sellers were listing at least 4 guns for sale at a given moment, and some were advertising 20 or more. Another review found nearly 1 in 3 (29%) were “high-volume sellers,” and 58% of those gave other indications that they were in the business of selling guns (including selling new guns or those in the original packaging).¹ And many of these online listings pointed to the lack of background checks as a key selling point.

How the President's Action Fixes It

It is already illegal under federal law to be *engaged in the business* of selling guns without a license and without running background checks on every purchaser. What the President's actions do is clarify where the line is drawn between those who are engaged in the business and those who aren't. That ensures our ambiguously-worded laws neither punish well-meaning and law-abiding private sellers nor protect those with nefarious motives who are trying to skirt the background check requirement by claiming they aren't engaged in the business despite selling dozens, hundreds, or even thousands of guns every year. The actions don't set an arbitrary “magic” number of guns sold that triggers being engaged in the business—it instead requires law enforcement to take a comprehensive look at the seller's behavior, using factors like the quantity and frequency of sales, whether guns are being sold in their original packaging, and how long after purchase a gun is re-sold. A widow selling a dozen of her late husband's guns is unlikely to be “engaged in the business,” while someone who has sold half a dozen but has a website and business cards could be required to perform background checks just like any other gun business.

The President's actions bring enforcement of our gun laws into the 21st century by clarifying that having a brick and mortar gun store is no longer necessary to determine that someone is “engaged in the business” of selling guns—it's about what sellers do, not where they do it. Because no one

should be able to hide behind murky laws to avoid running background checks when they are clearly engaged in the business of selling firearms.

Adding mental health records from the Social Security Administration to the background check system.

The Problem

As many as 75,000 people in the Social Security Administration system have been flagged as lacking the capacity to contract for themselves or manage their own affairs. That classification already prohibits them from purchasing firearms under the federal firearms regulations. But because the Social Security Administration does not share those records with the National Instant Criminal Background Check System (NICS), even if a gun seller runs a background check, it won't stop that person from being able to purchase a gun. This means some dangerously mentally ill people can buy dozens of guns without a second thought—even though the law technically prohibits them from doing so.

Identifying persons who should be disqualified from possessing or purchasing firearms based on mental illness is extremely difficult. But where one agency has already done the legwork to make a determination under our laws to prohibit a person from owning or buying a gun, there shouldn't be red tape that gets in the way of sharing that information with the Department of Justice and NICS.

How the President's Action Fixes It

People who lack the capacity to contract for themselves or manage their own affairs are already prohibited gun buyers. It is already illegal for them to possess or purchase firearms. The President's new executive actions don't add anyone to the list of prohibited buyers—they merely ensure that the list the Social Security Administration has already made of those who should not be able to buy a gun is entered into the background check system. With these actions, the President has ordered the Social Security Administration to begin a rulemaking process to make that happen in the most effective way. The Social Security Administration will be issuing a proposed rule and taking comments from experts and the public to make sure that this process only flags those who are dangerously mentally ill and should not possess or purchase a firearm under federal law. Additionally, the President has required that the process include a way for people to appeal this prohibition if they choose to challenge it.

Clarifying that it does not violate privacy laws to submit mental health records to the background check system.

The Problem

The *Health Insurance Portability and Accountability Act*, known as HIPAA, was passed in 1996 to protect patient privacy in our country. It plays a crucial role in our health care system, particularly in protecting against the stigma of mental illness. However, the law is long and complicated, and few doctors understand when and why they can share limited patient information. Though NICS has tripled the number of mental health records in its background check system since the Sandy Hook massacre in 2012, still only 6,000 people have been stopped from buying a gun because of mental illness. That's because doctors, hospitals, and states often err on the side of limiting their potential legal liability under the privacy law, rather than flagging those who should not be able to buy a gun under federal law.

How the President's Action Fixes It

The HIPAA Privacy Rule already explicitly allows exceptions for law enforcement purposes. The President's actions—which simply finalize a rule that has already gone through the full public notice and comment process—serve to assure state officials that it is not a violation of HIPAA to submit certain mental health records to NICS. Only limited demographic and other necessary information is needed for NICS purposes—no diagnostic or clinical data of any kind. And if a background check is failed for reasons of mental health, none of that information—nor even the fact that mental health was the disqualifying factor—is made available to the gun seller. The background check is simply pass/fail.

When this rule goes into effect next month, no medical professional will have to fear legal repercussions for sharing crucial information with NICS that identifies a person who a state or doctor already knows is dangerously mentally ill. That means fewer dangerously mentally ill people will be able to get their hands on guns.

Making technology work *for* gun safety instead of against it.

The Problem

A child who can't open a bottle of aspirin should not be able to pull the trigger of a gun—and last year, toddlers shot themselves or someone else on average once a week. Rapidly advancing gun technology could lead to smarter, safer guns— Some technologies require a fingerprint or bracelet to activate the gun, ensuring that it can only be shot by its rightful owner, and others ensure it won't go off accidentally. But the current supply of smart guns available for sale is virtually non-existent in the U.S., largely because the gun dealers who have considered stocking them have been met with boycotts and death threats by gun rights activists. With no reliable purchasing base and the

chance that selling smart guns could put them out of business, few gun dealers are willing to take the risk. That makes these smarter weapons difficult to purchase and slows down research and development into their advancement. If no one had bought the iPhone when it first debuted in 2007, we'd never be on version 6s Plus today.

How the President's Action Fixes It

The federal government is the single largest purchaser of firearms in the country. And thanks to these executive actions, the Departments of Defense, Justice, and Homeland Security will now be required to regularly review the state of smart gun technology and the ways it can be used to improve gun safety. These agencies will also be required to work with other federal agencies that purchase firearms to take steps to determine if and when such technology could meet the government's operational needs—an action that alone could revolutionize the smart gun R&D and retail sales market. We already have invisible guns that can't be seen by metal detectors and 3-D printed guns people can make at home. It's about time technology was used to make guns safer, not just easier to conceal or illegally obtain.

Conclusion

President Obama's executive actions on guns are well within the scope of his authority. It is the responsibility of the executive branch to enforce our laws—and these actions merely help make that possible. What we need, and what the overwhelming majority of the American people want, is to close the remaining loopholes in our gun laws. But only Congress can do that, and they have failed to act over and over again. What the President can do, and what he's done in these actions, is make sure the law is being enforced in a way that makes those loopholes as narrow as possible and prevents bad guys from hiding behind unclear and outdated enforcement standards. If the NRA doesn't like it, they have only themselves to blame. The President made his intention to act on guns clear since even before the terrible tragedy at Sandy Hook Elementary School more than three years ago. The gun rights lobby pressed Congress to refuse to do anything to make our communities safe from the carnage of gun violence. Since they wouldn't act, the President has.

Endnotes

1. Mayors Against Illegal Guns, "In the Business, Outside the Law: How Unlicensed Sellers Are Flooding the Internet With Guns," Report, Everytown for Gun Safety, December 12, 2013. Accessed January 5, 2016. Available at: <http://everytownresearch.org/reports/in-the-business-outside-the-law/>.