



January 2016 Executive Actions

On January 4, 2016 the Administration unveiled a series of executive actions it is taking to better enforce existing law. These actions will improve the background check system and empower law enforcement to crack down on gun traffickers and keep guns out of dangerous hands. The Administration divided these actions into four categories: (1) improving the background check system, (2) community-based fixes, (3) mental health, and (4) gun safety technology.

I. IMPROVING THE BACKGROUND CHECK SYSTEM

- **Clarifying which gun sellers are “engaged in the business” and, therefore, required to get dealer licenses and conduct background checks. This will better enable law enforcement to crack down on unlicensed high-volume sellers and gun traffickers who funnel illegal guns to our streets.**
 - **The Problem:** The blurred boundary between professional gun dealers and occasional sellers made it easy for unlicensed, high-volume sellers to operate in a grey area, evade the law and transfer thousands of guns without background checks and little risk of punishment.
 - Gun sellers only have to get a dealer license if they are “engaged in the business” of selling firearms. And under federal law only licensed dealers have to run background checks when they sell guns—people who are not licensed dealers can sell guns to strangers online and at gun shows with no background checks, no questions asked.
 - Sellers and law enforcement had little guidance as to what “engaged in the business” meant, making the law difficult to enforce and leaving people confused as to when they must get a dealer license.
 - [High-volume sellers and gun traffickers took advantage of the lack of clarity and sold guns in large quantities and to criminals](#)—since they did not have dealer licenses, they were not required to conduct background checks or keep records of their sales.
 - **The Solution:** The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued new guidance clarifying which gun sellers are “engaged in the business” and therefore required to get a license and run background checks on prospective buyers.
 - The guidance highlights several factors used to determine whether a person is engaged in the business, including whether the seller re-sells guns shortly after purchasing them and whether the seller sells new guns in original packaging.
 - The guidance makes clear that while quantity and frequency of sales is a factor, a person may be engaged in the business even if he or she sells as few as two guns.
 - This guidance will help ensure that people who are “engaged in the business” conduct background checks, but millions of guns will continue to transfer hands each year between unlicensed buyers and sellers who are not “engaged in the business” with no background check, no questions asked. Congress and state legislatures must act to close that gap.



- **Alerting local authorities when criminals try to buy a gun and fail a background check. This will protect communities by enabling law enforcement to stop dangerous people before they obtain guns illegally.**
 - **The Problem:** It is illegal for a person who is prohibited from buying firearms to attempt to purchase a gun by lying about his or her prohibited status on the background check form.¹ But these so-called “lie-and-try” offenses are rarely prosecuted—even though evidence shows prohibited people are more dangerous after failing a background check.²
 - Prohibited people who attempt to buy guns are extremely dangerous. Prohibited people who fail background checks are at a 28 percent higher risk of arrest in the five years after the denial than in the five years preceding it.³
 - In most states prohibited purchasers can buy guns with no background check from unlicensed sellers, so it is crucial that law enforcement know when dangerous people are attempting to obtain guns.
 - Federal officials rarely investigate and prosecute lie-and-try offenses. In 2009 only 6.6 percent of “lie-and-try” denials that year were referred for investigation, and only 140 of the total 71,000 denials were recommended for prosecution.⁴
 - **The Solution:** In partnership with the U.S. Digital Service, the FBI is developing a plan to notify local authorities when certain prohibited persons unlawfully attempt to buy guns—enabling local law enforcement to fill the enforcement gap by investigating failed background checks.
 - Some “point of contact” states like Pennsylvania and Virginia—where in-state authorities conduct background checks, instead of the FBI—already have programs in place to pursue people who break these laws, and the results are impressive:
 - In 2014 alone, Virginia law enforcement arrested more than 500 criminals, fugitives, and others who tried to buy guns illegally.⁵
 - In 2013, failed background checks in Pennsylvania gave rise to 620 investigations. These, in turn, resulted in 346 arrests and more than 200 convictions.⁶
 - DOJ notification when people break the law and try to buy firearms will give state and local law enforcement the intelligence necessary to stop criminals who are trying to obtain guns illegally.
- **Preventing criminals from accessing machine guns without a background check. The administration closed the gun trust loophole by finalizing ATF Rule 41P.⁷**
 - **The Problem:** Felons and other dangerous people could obtain machine guns without a criminal background check by creating a legal entity called a gun trust.
 - Machine guns, short-barreled rifles and shotguns, and other powerful weapons have been regulated by the National Firearms Act for over 80 years (and are commonly known as “NFA firearms”). Before a person may buy one of these guns, he or she must pass a criminal background check.
 - But if a person uses a gun trust⁸ to complete a purchase, these requirements do not apply. And a gun trust may designate an unlimited number of people to possess its property—potentially giving criminals and other people legally prohibited from having guns access to machine guns and other powerful weapons.



- **Use of the gun trust loophole has spiked:** While fewer than 1,000 applications to transfer NFA weapons were made in 2000, **over 40,000** applications were made in 2012.⁹
- **The Solution:** The new rule applies the same policies for gun trust transfers as are already in place for sales to individuals—blocking criminals from taking advantage of the existing loophole to arm themselves with machine guns.
 - As is the case with individuals, trusts and other entities may purchase NFA firearms after meeting the regulatory requirements, including passing a criminal background check.
- **Asking 50 governors to work towards submitting all prohibiting records into the National Instant Criminal Background Check System (NICS).**
 - **The Problem:** The gun background check system is only as good as the records in it. Missing or incomplete records enable criminals and other prohibited people to pass background checks and buy guns.
 - **The Solution:** The Department of Justice (DOJ) has asked state officials to focus on closing any and all record reporting gaps that enable criminals and other people who are prohibited from having guns to pass background checks due to missing records.
 - The federal government has multiple state grant funding programs to help build the infrastructure for reporting records to NICS.
- **Increasing the number of NICS staff by 50 percent. Hiring over 230 new personnel will help NICS complete more background check investigations before three business days elapse and the gun sale may proceed by default.**
 - **The Problem:** A gap in federal law allows a licensed firearms dealer to transfer a gun once three business days have elapsed—even if the buyer’s background check is not complete.
 - FBI data shows that this gap in the background check law has resulted in default gun sales to more than 15,000 criminals and other prohibited people over five years.¹⁰
 - **The Solution:** Though an executive action cannot resolve the underlying legal loophole that allows gun dealers to sell guns to prohibited people once three days have passed, increasing the number of NICS examiners by 50 percent—hiring over 230 new personnel—will enable the FBI to complete more background checks within the three-day window.

II. COMMUNITY-FOCUSED FIXES

- **Giving law enforcement another crime-solving tool by requiring gun dealers to report guns that are lost or stolen in transit. The administration will close a dangerous loophole that frustrates law enforcement and enables gun trafficking by finalizing ATF Rule 40P.**¹¹
 - **The Problem:** Current law does not require federal firearm licensees (FFLs) to report guns that are lost or stolen in transit.
 - FFLs are already required to report all guns lost or stolen from their inventory. But regulations do not require FFL reporting of loss or theft that occurs while guns are in transit after having been shipped.



- Lost-and-stolen guns account for a large share of guns that are illegally trafficked and involved in firearm crimes.¹² A large number of these guns are lost or stolen from FFL inventory—including nearly 20,000 guns in 2013 alone.¹³
- **The Solution:** The new rule clarifies that FFLs are responsible for reporting to ATF and local authorities when they attempt to send a firearm and it is lost or stolen in transit.
- Lost-and-stolen reporting ensures law enforcement is aware of missing guns, helping them to solve crimes and uncover trafficking rings.
- Everytown submitted a comment in support of the rule in November 2014.¹⁴

□ **Directing personnel, funds, and other gun resources to reducing violence.**

- The President's FY2017 budget will include funding for 200 new ATF agents and investigators, an increase that would enable the agency to more effectively enforce our gun laws.
- ATF will dedicate \$4 million and additional personnel to its ground-breaking work with ballistics evidence, enabling law enforcement to link violent crimes and bring criminals to justice.
- The Attorney General directed US Attorneys to renew their focus on prosecuting gun traffickers and other gun criminals.

III. MENTAL HEALTH

□ **Removing perceived legal barriers for the reporting of prohibiting mental health records. The Administration will ensure there are no legal barriers to NICS reporting of mental health records by finalizing Health and Human Services (HHS) Rule 2015-33181.**¹⁵

- **The Problem:** State officials have expressed concern that the Health Insurance Portability and Accountability Act (HIPAA) blocks them from reporting prohibiting mental health records into the NICS system.
 - In 2011, officials from at least 25 states reported they were not submitting prohibiting records into the background check system at least in part due to concerns about the privacy of mental health information—including a misconception that HIPAA did not allow such submission.
 - This misconception contributed to a dangerous reporting gap wherein 23 states and the District of Columbia had each reported fewer than 100 such records total.¹⁶
- **The Solution:** The new rule clarifies that HIPAA permits the disclosure of mental health records for the purpose of submitting them into the gun background check system.
 - HIPAA does not block the submission of mental health records to NICS. Indeed, federal law strictly limits the disclosure of mental health records in NICS, and the system does not disclose any underlying information when denying a sale to a prohibited individual.
 - Mayors Against Illegal Guns submitted a comment in support of the rule in March 2014.¹⁷



□ **Submitting records for social security recipients prohibited from possessing guns due to severe mental illness. This will help ensure that dangerous people cannot pass background checks and purchase firearms.**

- **The Problem:** The background check system is missing prohibiting mental health records from people deemed mentally incompetent by the Social Security Administration (SSA).
 - These individuals are currently able to pass a background check and complete a purchase even though they are legally prohibited from purchasing guns.
- **The Solution:** SSA will close this gap by beginning the rulemaking process to submit prohibiting records into the gun background check system.
 - Social Security recipients are entitled to extensive due process, including a right to hearings before an administrative law judge, an appellate panel of administrative law judges, and federal district court.

IV. GUN SAFETY TECHNOLOGY

□ **Directing DOJ, along with the Department of Defense and the Department of Homeland Security, to promote smart gun technology.**

- A Presidential Memorandum directs the departments to (1) conduct or sponsor new research into technologies that will reduce unintentional shootings and unauthorized use of firearms and (2) regularly review the availability of smart gun technology and how to further its use and development.

¹ 18 U.S.C. § 922(a)(6).

² James Tien et al., Structured Decisions Corporation, Recidivism of Denied Prospective Firearm Purchases, May 2008, at <http://1.usa.gov/1Dm1ISG>.

³ *Id.*

⁴ Ronald J. Frandsen, Enforcement of the Brady Act, 2010: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2010, at <https://www.ncjrs.gov/pdffiles1/bjs/grants/239272.pdf>.

⁵ Virginia Firearms Transaction Center Statistics, Aug. 2014.

⁶ Pennsylvania State Police, 2013 Firearms Annual Report, at http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2013_Firearms_Annual_Report.pdf.

⁷ <http://1.usa.gov/1Z24WzW>

⁸ Entities other than gun trusts may also be used, including business organizations such as partnerships, corporations, and limited liability companies.

⁹ There were 40,700 such transfers in 2012, compared with 840 in 2000. <http://1.usa.gov/1AjmhOA>

¹⁰ In 2010, FBI referred 2,955 denials to ATF for firearm retrieval actions because the sale was denied after the three-business-day period. 3,166 such referrals were made in 2011; 3,722 in 2012; 3,375 in 2013; and 2,511 in 2014. FBI, NICS Operations Reports, 2010-2014

¹¹ <http://1.usa.gov/1OHZ1AK>

¹² See ATF, *Following the Gun: Enforcing Federal Law Against Firearms Traffickers* 10 (2000).

¹³ ATF, *FFL Thefts / Losses United States* (Apr. 2014), available at <http://1.usa.gov/1IQ3ORj>.

¹⁴ <http://1.usa.gov/1S0HWCg>

¹⁵ <http://1.usa.gov/1mwh1x5>

¹⁶ <http://every.tw/1GVITk>

¹⁷ <http://1.usa.gov/1OI3t2v>