

Legal Sidebar

President Obama Announces Executive Actions to “Reduce Gun Violence”

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On January 5, 2016, President Obama [announced](#) executive actions aimed at, among other things, “keep[ing] guns out of the wrong hands through background checks” and “mak[ing] our communities safer from gun violence.” These actions include, for example, directing specified executive agencies to conduct or sponsor research into gun safety technology and finalizing a rule requiring firearms shippers to notify law enforcement of any firearms lost or stolen in transit. Of the announced measures, though, the one that arguably may have the most immediate impact on firearm transactions and individual behavior is guidance issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) clarifying what it means for an individual or organization to be “engaged in the business” of dealing firearms for purposes of the Gun Control Act of 1968 (GCA), as amended.

The GCA [makes it unlawful](#) for individuals and organizations to be engaged in the business of dealing firearms without a license from the federal government. Individuals and organizations licensed by the government are known as federal firearms licensees (FFLs). Under the GCA, before FFLs may transfer (e.g., sell) firearms, they must conduct background checks on potential transferees (e.g., purchasers). The GCA also subjects FFLs to multiple recordkeeping requirements. Willfully engaging in the business of dealing firearms without a license can result in [five years imprisonment](#) and/or a fine of [up to](#) \$250,000 for individuals and \$500,000 for organizations.

Under the GCA, individuals or organizations that are engaged in the business of dealing firearms, and thus subject to the act’s licensing requirement and ensuing obligations, are [those](#) that “devote[] 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.” However, federal firearms licenses are [not required](#) for those who: (1) occasionally sell or purchase firearms as a hobby or to enhance their personal firearms collection; or (2) sell all or part of their personal firearms collection. The ATF [regulations](#) implementing the GCA’s definition of “engaged in the business” mirror the act.

There have been a number of court decisions shedding light on what it means to be engaged in the business of dealing firearms under the GCA. Determining whether a person unlawfully engaged in the business of dealing firearms is fact specific and depends on the [particular circumstances](#) of the case before the court. Federal courts have observed that relevant [factors can include](#): (1) the quantity and frequency of firearms sales; (2) sale location; (3) how the sales occurred; (4) the defendant’s behavior before, during, and after the sales; (5) the type of firearms sold and prices charged; and (6) the defendant’s intent at the time of the sales. At least one federal appellate court, though, appears to require less proof. In the Second Circuit, the government must prove only that the defendant [held himself out as a source of firearms](#). And because the number of firearms sold is only one of many factors courts consider, convictions under §922(a)(1)(A) for unlawfully dealing firearms without a license have been sustained for as few as [two](#) or [four](#) firearms sales.

ATF’s [guidance](#) appears to put its imprimatur on the factors generally used by the federal courts to determine whether a person has unlawfully engaged in the business of dealing firearms. For example, the guidance reiterates that whether a person is engaged in the business of dealing firearms depends on “the specific facts and circumstances” of the person’s activity, and is not limited to any particular location, quantity, or frequency of sales. Thus, as the guidance points out,

certain firearms sales at gun shows, flea markets, and Internet sites may—depending on the circumstances—require a federal firearms license.

ATF's guidance is not binding law, but rather appears intended to clarify what it means to be engaged in the business of dealing firearms under the GCA. Changes to the definition of engaged in the business could come via Congress amending the GCA. Additionally, ATF could amend its regulations implementing the GCA's definition. However, in doing so, ATF would seemingly have to comply with the Administrative Procedure Act's notice-and-comment [rulemaking](#) process, and any change could not contradict the GCA.

For additional reading on the President's announced executive actions, see [Gun Violence Reduction Executive Actions, January 4, 2016: Brief Summary](#) by William J. Krouse.

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