

RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)
Topic: Safety Information for Purchasers
Date: November 2020

Recommendation: Update and strengthen ATF regulations on safety information that federal firearms licensees are required to post and distribute in their stores.

I. Summary

Description of recommended executive action

In 1998, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) promulgated a regulation—at the direction of a 1997 Presidential Memorandum—which currently requires federal firearms licensees (FFLs) to post on premises, and to distribute to gun buyers, specific information about the dangers of allowing juveniles access to firearms.¹

Under this proposal, the ATF would engage in notice-and-comment rulemaking to update and expand this regulation. Specifically, this executive action would eliminate FFLs' current posting and distribution requirements, and replace each with a new FFL requirement to both post and distribute on-premises, and make available to gun buyers via a webpage, consumer safety information addressing the following:

- (1) dangers of allowing prohibited individuals, in addition to juveniles, access to firearms
- (2) illegality of straw purchases
- (3) importance of safe-storage practices to deter theft and access by children
- (4) reporting lost or stolen firearms to law enforcement

As the primary agency that regulates the firearms industry, the ATF is the best agency to require the gun industry to provide additional safety information to consumers.

Overview of process and time to enactment

It may take some time for the ATF to design the updated brochure and the new webpage proposed in this memorandum. Thereafter, the ATF may proceed quickly. The Administrative Procedure Act (APA) requires federal agencies to issue certain rules through the notice-and-

¹See Administration of William J. Clinton, "Memorandum on Enforcing the Youth Handgun Safety Act," June 11, 1997, <https://www.govinfo.gov/content/pkg/WCPD-1997-06-16/pdf/WCPD-1997-06-16-Pg856.pdf>; Posting of Signs and Written Notification to Purchasers of Handguns, 62 Fed. Reg. 45364 (proposed August 27, 1997) (to be codified at 27 C.F.R. pt. 178); Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178).

comment rulemaking (NCRM) process.² To implement this proposal, the ATF will be required to issue a notice of proposed rulemaking (NPRM); provide a 90-day period for receiving public comments; respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly); and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.³ This multi-phase process generally extends for a year.

II. Current state

Gun violence and gun sales in America

Gun violence in America is a public health crisis. In 2018, 39,740 people in the US died from gun-related deaths.⁴ This number represents an increase of 15% from 2014, and means that, on average, over 100 Americans died each day from gun violence in 2018.⁵ Gun violence takes various forms, including suicides, domestic violence, gun homicides (which impact underserved communities of color disproportionately), and unintentional injuries and deaths. One thing many of these forms of gun violence have in common, however, is that they are often enabled by gun purchasers who are poorly informed about the laws regarding prohibited persons' access to firearms, straw purchasing, safe storage, and reporting lost or stolen firearms, as well as the rationale for these laws.

Transfers to prohibited individuals. The Gun Control Act of 1968 (GCA) lists categories of individuals who are generally prohibited from possessing firearms, including people convicted of domestic violence or felony-level crimes, people with certain histories of involuntary mental health treatment, and minors.⁶ The GCA also generally prohibits the transfer of firearms to these individuals.⁷ Far too often, however, these individuals are still able to obtain firearms, which are then used to commit crimes, attempt or cause death by suicide, or unintentionally injure or cause the death of an individual.⁸

Straw purchases. A related problem exists with regards to straw purchasing—transactions in which a purchaser buys a gun on behalf of someone else. Federal law requires federal firearms licensees (FFLs), including gun dealers, manufacturers, and importers, to conduct background

² 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

³ Congressional Research Service, “An Overview of Federal Regulations and the Rulemaking Process,” January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

⁴ Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), “Fatal Injury Reports,” accessed February 20, 2019, <https://www.cdc.gov/injury/wisqars>.

⁵ *See id.*

⁶ 18 U.S.C. § 922(g), (n).

⁷ 18 U.S.C. § 922(d).

⁸ *See* Giffords Law Center to Prevent Gun Violence, “For the Record: NICS and Public Safety, Essential Improvements to the National Instant Criminal Background Check System,” December 2016, <https://giffords.org/wp-content/uploads/2019/06/Giffords-Law-Center-For-The-Record-NICS-and-Public-Safety.pdf>; Giffords Law Center to Prevent Gun Violence, “Trafficking & Straw Purchasing,” accessed October 19, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/#footnote_8_5599.

checks on gun purchasers to ensure they are not prohibited from possessing guns, as described above.⁹ Straw purchases, in which a person other than the actual gun buyer undergoes the background check, evade this requirement. These transactions are common¹⁰ but illegal. While there is not currently a federal crime of straw purchasing, federal law does prohibit the straw purchasing of firearms, because federal law prohibits making a false statement on the firearms transaction form,¹¹ and the firearm transaction form requires the person to certify that they are the “actual buyer” of the gun.¹² More specifically, ATF Form 4473, the form prospective firearms purchasers have to complete, currently includes an explanation of the term:

Question 21.a. Actual Transferee/Buyer: For purposes of this form, a person is the actual transferee/buyer if he/she is purchasing the firearm for him/herself or otherwise acquiring the firearm for him/herself...A person is also the actual transferee/buyer if he/she is legitimately purchasing the firearm as a bona fide gift for a third party. A gift is not bona fide if another person offered or gave the person completing this form money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm.¹³

Notably, the ATF and the industry’s National Sports and Shooting Foundation (NSSF) have a long-standing public safety campaign, “Don’t Lie for the Other Guy,” which includes postcards and posters warning consumers about the dangers of straw purchasing.¹⁴ However, this information misleadingly indicates that a straw purchase is only illegal if the actual buyer is prohibited from possessing guns.

The Supreme Court held in *Abramski v. U.S.* that a straw purchase is illegal regardless of whether the actual buyer is eligible to buy the gun themselves.¹⁵ In that case, the petitioner had purchased a firearm in Virginia on behalf of his uncle, who lived in Pennsylvania. The petitioner was convicted under 18 U.S.C. § 922(a)(6) (which criminalizes knowingly making false statements “with respect to any fact material to the lawfulness of the sale” of a gun) and § 924(a)(1)(A) (which criminalizes making a false statement “with respect to the information required . . . to be kept” in the gun dealer’s records). In a 5-4 decision, the majority rejected the

⁹ 18 U.S.C. § 922(t).

¹⁰ Giffords Law Center to Prevent Gun Violence, “Trafficking & Straw Purchasing,” accessed October 19, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/#footnote_8_5599 (explaining that data from a national survey suggests there are more than 30,000 attempted straw purchases each year).

¹¹ 18 U.S.C. § 922(a)(6).

¹² US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF Form 4473 - Firearms Transaction Record,” revised May 2020, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (Question 21a asking “Are you the actual transferee/buyer of the firearm(s) listed on this form...?”).

¹³ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF Form 4473 - Firearms Transaction Record Revisions,” revised May 2020, <https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions>.

¹⁴ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “Don’t Lie for the Other Guy,” accessed October 16, 2020, <https://www.atf.gov/firearms/dont-lie-other-guy>.

¹⁵ *Abramski v. U.S.*, 573 U.S. 169 (2014).

argument that these federal laws were not intended to apply to straw purchases, and held that the misstatement was material, even though the uncle was eligible to own a gun.¹⁶

Safe storage to prevent unauthorized access. Federal law, specifically the Youth Handgun Safety Act (YHSA), which was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, prohibits anyone from transferring a handgun to someone under age 18, with limited exceptions.¹⁷ In addition to the provisions of the YHSA, federal law encourages the safe storage of firearms to prevent children and teenagers from having access to them, by ensuring that gun dealers transfer safety devices alongside handguns.¹⁸

Despite these provisions, young people continue to commit gun offenses in high numbers. In 2017, 36,024 young people between the ages of 10 and 21 were arrested for weapons offenses, such as illegally carrying or possessing a firearm.¹⁹ This group made up 28% of all arrests for weapons offenses that year.²⁰ Household guns, often the most easily accessible firearms for youth, are a major source of weapons used in school shootings, youth suicides, and unintentional shooting deaths among children.²¹ A modest increase in the number of American homes safely storing firearms could prevent about a third of gun suicides and unintentional shooting deaths among young people.²²

Lost and stolen guns. One gun is stolen from a private gun owner every two minutes.²³ That's some 380,000 stolen guns each year, many of which are later trafficked or used in violent crime.²⁴ The law recognizes that stolen guns can be diverted to the illegal gun market, where they are used to fuel crime across the country.²⁵

¹⁶ *Id.*

¹⁷ Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 922(x)).

¹⁸ 18 U.S.C. § 922(z).

¹⁹ US Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Program, "2017 Crime in the United States: Table 38," accessed October 26, 2020, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-38>.

²⁰ *Id.*

²¹ Deborah Azrael et al., "Firearm Storage in Gun-owning Households with Children: Results of a 2015 National Survey," *Journal of Urban Health* 95, no. 3 (May 2018): 295–304, doi: [10.1007/s11524-018-0261-7](https://doi.org/10.1007/s11524-018-0261-7).

²² Michael C. Monuteaux et al., "Association of Increased Safe Household Firearm Storage With Firearm Suicide and Unintentional Death Among US Youths," *JAMA Pediatrics* 173, no. 3 (July 2019), doi: [10.1001/jamapediatrics.2019.1078](https://doi.org/10.1001/jamapediatrics.2019.1078).

²³ Chelsea Parsons and Eugenio Weigend Vargas, "Stolen Guns in America," Center for American Progress, July 25, 2017, <https://www.americanprogress.org/issues/guns-crime/reports/2017/07/25/436533/stolen-guns-america/>.

²⁴ David Hemenway et al., "Whose Guns are Stolen? The Epidemiology of Gun Theft Victims," *Injury Epidemiology* 4, no. 1 (2017), doi: [10.1186/s40621-017-0109-8](https://doi.org/10.1186/s40621-017-0109-8).

²⁵ 18 U.S.C. § 922(i), (j) (specifically prohibiting anyone from receiving, possessing, shipping, transporting, selling, concealing, and disposing of stolen guns).

Federal law allows law enforcement to trace guns recovered after use in crime to their original owners by requesting gun sales information from FFLs.²⁶ This information can lead to the arrest of individuals who have used these guns in violent crimes. Lost and stolen guns, however, significantly disrupt the gun tracing process, since the gun purchaser is no longer in possession of the gun that is traced to him or her. Reporting of lost or stolen firearms, therefore, plays a crucial role in law enforcement efforts to stop violent crime.

While no federal law requires gun owners to report lost or stolen guns, several states have enacted reporting laws that have assisted in reducing gun trafficking and straw purchasing, as well as recovering and returning lost or stolen guns to their owners.²⁷ In states which do not require non-FFLs to report lost or stolen guns, the ATF nevertheless already recommends contacting the FFL that sold the gun, the local police department, or state firearms registration office for assistance.²⁸

The role of gun dealers

The GCA gives the ATF the responsibility of ensuring FFLs comply with applicable laws and regulations.²⁹ Firearms initially enter the consumer market through FFLs, who are the critical link between manufacturers or distributors and the general public. According to the ATF, as of October 2020, over 52,700 individuals currently have Type 1 federal firearms licenses, which allow them to act as firearms dealers, and over 7,000 individuals have Type 2 licenses, which allow them to buy and sell guns as pawnbrokers.³⁰ About 67,313 individuals have other types of federal firearms licenses.³¹ These FFLs ran approximately 4.9 million background checks via the National Instant Criminal Background Check System (NICS) on gun purchasers between January 1, 2020, and September 30, 2020.³² The rule proposed in this memo would be applicable to any FFL premises where guns are sold to non-licensees.³³

²⁶ 18 U.S.C. § 923(g)(7). See US Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, "National Tracing Center," accessed October 20, 2020, <https://www.atf.gov/firearms/national-tracing-center>.

²⁷ Giffords Law Center to Prevent Gun Violence, "Reporting Lost & Stolen Guns," accessed October 21, 2020, <https://giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/reporting-lost-stolen-guns/>.

²⁸ See US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Report Firearms Theft or Loss," accessed October 16, 2020, <https://www.atf.gov/firearms/report-firearms-theft-or-loss>.

²⁹ 18 U.S.C. Chapter 44, §921 et seq.

³⁰ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Report of Active Firearm Licenses - License Type by State Statistics," accessed October 13, 2020, <https://www.atf.gov/firearms/docs/undefined/ffltypebystate10-13-2020pdf/download>.

³¹ *Id.*

³² US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Month/Year by State/Type," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view.

³³ See Giffords Law Center to Prevent Gun Violence, "Gun Dealers," accessed October 15, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/gun-dealers/#footnote_2_5597 (citing to US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Listing of Federal Firearms Licensees (FFLs) - 2015," accessed October 15, 2020, <http://www.atf.gov/about/foia/ffl-list.html>).

The current regulation

In 1997, President Clinton issued a memorandum directing the ATF to issue a rule requiring FFLs to post and distribute safety information addressing the risks and consequences of juvenile handgun possession,³⁴ and enforcing the recently enacted YHSA.³⁵ The memorandum included critical data, indicating that in 1997:

- guns were responsible for 12% of juvenile fatalities
- gun homicides committed by juveniles quadrupled in the past 10 years
- guns were the fourth leading cause of accidental juvenile deaths, and the primary method used to commit juvenile suicide
- over half of privately owned guns were stored unlocked, and more than a third were stored loaded and unlocked³⁶

The memorandum ordered that the regulation require FFLs to post signs on premises and issue written notification with each handgun sold to non-licensees with the following warnings.

- (1) Federal law prohibits, except in certain limited circumstances, anyone under 18 years of age from knowingly possessing a handgun, or any adult from transferring a handgun to such a minor;
- (2) violation of the prohibition of transferring a handgun to a minor is... punishable by up to 10 years in prison;
- (3) handguns are a leading contributor to juvenile violence and fatalities; and
- (4) safely storing and locking handguns away from children can help ensure compliance with federal law.³⁷

The president's memorandum determined that the ATF's "implementation of this directive would help inform gun purchasers about their responsibility under Federal law to keep handguns from our children... [i]t also will ensure that gun purchasers are warned about the frequency with which handguns kill or injure our kids." Lastly, the memorandum directed the ATF to provide the president with a status report within 60 days of the directive. As such, the ATF timely issued an

³⁴ See Administration of William J. Clinton, "Memorandum on Enforcing the Youth Handgun Safety Act," June 11, 1997, <https://www.govinfo.gov/content/pkg/WCPD-1997-06-16/pdf/WCPD-1997-06-16-Pg856.pdf>.

³⁵ 18 U.S.C. § 922(x).

³⁶ See *id.*

³⁷ Administration of William J. Clinton, "Memorandum on Enforcing the Youth Handgun Safety Act," June 11, 1997, <https://www.govinfo.gov/content/pkg/WCPD-1997-06-16/pdf/WCPD-1997-06-16-Pg856.pdf>.

NPRM on August 11, 1997,³⁸ and after the requisite notice and comment period, promulgated the final rule on September 11, 1998.³⁹

Both the NPRM and final rule cited to 18 U.S.C. § 922(x), the president's memorandum, and legislative history as a basis for the regulation:

The Youth Handgun Safety Act (YHSA), 18 U.S.C. § 922(x), generally makes it unlawful for a person to transfer a handgun to anyone under 18 years of age or for anyone under 18 years of age to knowingly possess a handgun. Certain exceptions are set forth in the statute.

In enacting the YHSA in 1994, Congress found that criminal misuse of firearms often starts with the easy availability of guns to juvenile gang members. In addition, Congress found that individual States and localities may find it difficult to control this problem by themselves. Therefore, Congress found it necessary and appropriate to assist the States in controlling violent crime by stopping the commerce in handguns with juveniles nationwide and allowing the possession of handguns by juveniles only when handguns are possessed and used under certain limited circumstances.⁴⁰

Pursuant to this rule, promulgated in 27 C.F.R. § 478.103, FFLs today must post on their premises ATF Information 5300.1 ("ATF I 5300.1"), which states the following.

- (1) The misuse of handguns is a leading contributor to juvenile violence and fatalities.
- (2) Safely storing and securing firearms away from children will help prevent the unlawful possession of handguns by juveniles, stop accidents, and save lives.
- (3) Federal law prohibits, except in certain limited circumstances, anyone under 18 years of age from knowingly possessing a handgun, or any person from transferring a handgun to a person under 18.
- (4) A knowing violation of the prohibition against selling, delivering, or otherwise transferring a handgun to a person under the age of 18 is, under certain circumstances, punishable by up to 10 years in prison.

Note: ATF I 5300.2 provides the complete language of the statutory prohibitions and exceptions provided in 18 U.S.C. 922(x) and the penalty provisions of 18 U.S.C. 924(a)(6). The Federal firearms license posting this sign will provide you with a copy of this publication upon request. Requests for additional copies of [ATF I 5300.2](#) should be

³⁸ Posting of Signs and Written Notification to Purchasers of Handguns, 62 Fed. Reg. 45364 (proposed August 27, 1997) (to be codified at 27 C.F.R. pt. 178).

³⁹ See Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178).

⁴⁰ See *id.*

submitted to the ATF Distribution Center (<http://www.atf.gov>) or made by calling (202) 648-6420.⁴¹

As promulgated in the final rule and set forth in ATF Information 5300.1, the language in the required posting at FFL premises is similar to the language in the presidential memorandum, with changes in part a direct result of the requisite NCRM process.

Additionally, the final rule required FFLs to provide to handgun purchasers ATF Information 5300.2 (ATF I 5300.2), which recites the exact language in the presidential memorandum, as well as complete provisions, exceptions, and applicable penalties of federal law governing juvenile possession of handguns.⁴²

Opponents to the NPRM voiced specific objections during the comment process, to which the ATF responded as follows in the preamble to the final rule, and which provide instructive guidance for future similar rulemaking.

- First, one congressional representative complained that the ATF was exceeding its statutory authority in requiring FFLs to issue safety information. The ATF rejected this claim, finding that not only was the ATF well within its statutory authority, but precedent for such action included the extensive notices provided to consumers on ATF Form 4473, the form completed by prospective firearms purchasers.⁴³

In fact, the ATF continues to provide important notices to firearms purchasers in ATF Form 4473, and general information in additional ATF publications addressing, among other things, consumer warnings addressing guns and misdemeanor crimes of violence,⁴⁴ mental health prohibitors,⁴⁵ and straw purchasing.⁴⁶ This proposal—like its

⁴¹ 27 C.F.R. § 478.103(e); US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF I 5300.1,” revised April 2004, https://regulations.atf.gov/static/atf_eregs/5300_1.pdf.

⁴² US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF I 5300.2 - Youth Handgun Safety Act Notice,” revised July 2017, <https://www.atf.gov/firearms/docs/guide/atf-i-53002---youth-handgun-safety-act-notice/download>.

⁴³ See Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178); US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF Form 4473 - Firearms Transaction Record Revisions,” revised May 2020, <https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions>.

⁴⁴ US Department of Justice, “Information Needed to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence,” November 2007, http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibitio n.pdf.

⁴⁵ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF I-3310.4 — Federal Firearms Prohibition under 18 U.S.C. § 922(g)(4) - Persons Adjudicated as a Mental Defective or Committed to a Mental Institution,” revised May 2009, <https://www.atf.gov/resource-center/docs/guide/atf-i-33104---federal-firearms-prohibitions-under-18-usc-§-922g4--/download>.

⁴⁶ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “Don’t Lie for the Other Guy,” accessed October 16, 2020, <https://www.atf.gov/firearms/dont-lie-other-guy>.

predecessor—would mandate that FFLs post and make available critical safety information to provide critical notice of the risks and responsibilities of gun ownership.

- Second, other commenters complained about the president’s memorandum and the NPRM language that proposes to warn that “[**H**]andguns are a leading contributor to juvenile violence and fatalities.” The commenters argued “that it was the “perpetrators of the shooting, not the handguns used in the shooting, that contributed to juvenile violence and fatalities.” The ATF responded by changing the language to qualify “handguns” as follows: “**The misuse of handguns** is a leading contributor to juvenile violence and fatalities.” This change is particularly instructive in crafting future consumer protection language.
- Lastly, another commenter complained that the posting did not adequately address the exemptions in section 922(x) to the general prohibition on juvenile handgun possession. The ATF’s response was to recite the complete and lengthy statutory provisions addressing juvenile exemptions in the consumer brochure ATF I 5300.2.⁴⁷

In sum, the June 11, 1997 Clinton memorandum provides a highly instructive model—applicable to a modern executive memorandum—directing the ATF to issue similar regulations requiring broader safety information about the risks and responsibilities attendant to firearms purchases.

Obama administration action

In 2013, the Bureau of Justice Assistance (BJA) awarded \$1 million to the National Crime Prevention Council (NCPC) to support the development of a national public education campaign on the subject of responsible gun ownership and safe gun storage.⁴⁸ A 2017 government accountability report surveyed this and other programs aimed at increasing public awareness about the safe storage of guns.⁴⁹ It found that such programs had not been extensively studied. The programs studied focused on the distribution efforts of locking devices and physician consultations of firearm storage with patients.

Trump administration action

⁴⁷ See US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, “ATF I 5300.2 - Youth Handgun Safety Act Notice,” revised July 2017, <https://www.atf.gov/firearms/docs/guide/atf-i-53002---youth-handgun-safety-act-notice/download>.

⁴⁸ Dep’t of Justice, “Department of Justice Awards \$1 Million to the National Crime Prevention Council to Support Gun Safety Campaign,” March 7, 2013, <https://www.justice.gov/opa/pr/departments-justice-awards-1-million-national-crime-prevention-council-support-gun-safety>.

⁴⁹ Government Accountability Office, “Personal Firearms: Programs that Promote Safe Storage and Research on Their Effectiveness,” September 2017, <https://www.gao.gov/assets/690/687239.pdf>.

The Trump administration has taken no specific action with respect to this issue, other than the routine reissuance of documents to include the 2017 revision of ATF I 5300.2, the information provided to gun purchasers on juvenile handgun possession.⁵⁰

The past year has seen a surge in NICS background checks. The highest number of NICS firearm background checks in a single day and the highest number in a single week since November 30, 1998 (when NICS became operational), both occurred in March 2020, at the beginning of the COVID-19 pandemic.⁵¹ Indeed, five of the 10 highest days and eight of the 10 highest weeks of NICS background checks occurred in 2020.⁵² Even in January and February 2020, there were 19% and 18% increases, respectively, in the number of NICS background checks on gun purchases, compared to January and February 2019.⁵³ In March 2020, however, there was an 85% increase in the number of NICS background checks on gun purchases compared to March 2019. And, astoundingly, in June and July 2020, there were 148% and 135% increases, respectively, in the number of NICS background checks on gun purchases, compared to June and July 2019. Although the increase in NICS background checks on gun purchases has decreased substantially in August and September, September 2020 still had a 66% increase compared to September 2019. In total, 14,848,326 NICS background checks on gun purchasers were conducted from January 1, 2020, through September 30, 2020, which represents a 95% increase compared to the previous year.⁵⁴

One preliminary study found that, in California, first-time buyers made up more than 40% of gun sales since the start of the pandemic.⁵⁵ These new gun owners may be uninformed about their responsibilities as gun owners, increasing the risk of gun violence.

III. Proposed action

The next administration should issue an NPRM amending the ATF's rule, which requires FFLs to post certain safety information clearly in their stores and distribute it to consumers in an updated brochure. Among other things, the new safety information should include a link to a new page on the ATF's website containing more extensive explanatory information.

⁵⁰ *Id.*

⁵¹ US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Top 10 Highest Days/Weeks," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_top_10_highest_days_weeks.pdf/view.

⁵² *Id.* Eight of the 10 highest days of NICS background checks since NICS became operational in November 1998 have occurred during the Trump administration (2017 to present).

⁵³ US Department of Justice, Federal Bureau of Investigation, "NICS Firearm Checks: Month/Year by State/Type," accessed October 13, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view. Calculations include any NICS check conducted by an FFL in relation to the application to purchase a firearm.

⁵⁴ *Id.*

⁵⁵ Nicole Kravitz-Wirtz et al., "Violence, firearms, and the coronavirus pandemic: Findings from the 2020 California Safety and Wellbeing Survey," (2020), doi: <https://doi.org/10.1101/2020.10.03.20206367> (This article is in preprint and has not been peer-reviewed).

This executive action is a logical expansion of current law requiring FFLs to provide consumer product safety information on juvenile handgun possession and would increase compliance with the GCA. This action would have a broader scope than the prior rule, in that it would address a wider range of the dangers of the misuse of purchased guns, and, consequently, a greater number of gun owner responsibilities. Lastly, it would update the posting and distribution requirements that currently only address youth possession of guns.

A. Substance of the new rule

The new regulation should provide clear, precise language for FFL postings and distributions addressing the risks and responsibilities of gun ownership. While other ATF safety information in large part details the statutory prohibitions and legal requirements applicable to gun possession, the proposed FFL posts should provide commonsense language to consumers outlining the attendant risks and responsibilities.

YOUR OBLIGATION TO PREVENT THE DEADLY MISUSE OF GUNS

You cannot buy a gun for someone else. Straw purchasing is illegal. Don't buy a gun for someone else—your gun may be traced to a violent crime.

You should properly secure your gun. Safer storage of firearms could prevent 30% of youth suicides and unintentional deaths. You can help prevent suicides, school shootings, and other tragedies through safe gun storage.

You cannot give your gun to anyone under the age of 18. Young people commit gun crimes in high numbers. Don't give your gun to a teen unless clearly permitted by law.

You cannot give your gun to a domestic abuser or other prohibited person. When an abusive partner has access to a gun, a woman is five times more likely to die. Don't give your gun to a domestic violence offender or any other person prohibited from having a gun.

You should report lost or stolen guns. One gun is stolen from a private gun owner every two minutes—many of which are later trafficked or used in violent crime.

SEE ATF.GOV [insert QR code and/or specific url] FOR MORE DETAILED INFORMATION ABOUT THE RESPONSIBILITIES OF GUN OWNERSHIP.

This proposal recommends requiring FFLs to post this information and an updated version of ATF I 5300.2 at their premises. Both the posted sign and the updated brochure should include a QR code or url to a new page on the ATF's website with background material explaining these warnings in greater detail.

This proposal would replace the current posting and distribution requirements under the 1998 rule. Notably, the 1998 rule required FFLs to *distribute* to each consumer a document different than that which was posted; specifically, one that provided a complete recitation of section 922(x), to include the statutory exceptions to unlawful youth possession.⁵⁶ The ATF required this consumer distribution in response to NPRM commenters' complaints that the store posting did not enumerate each of the particular exceptions.

In 1997, however, when the current regulation was proposed, the internet did not allow for relatively easy public access to statutory provisions, penalties, exemptions, and similar information. Today, expanded internet availability allows consumers ready access to atf.gov for detailed information about the exceptions to unlawful youth gun possession, and to a host of other applicable provisions. This ready internet access obviates the need for the extensive material in the current printed brochure, which recites the section 922(x) provisions, penalties, and exceptions. Instead, the ATF should update and simplify this brochure so it is similar to the posted sign described above.

In addition, the ATF's current website is noticeably devoid of information about the responsibilities of gun ownership; instead, it focuses on services for the gun industry. The ATF should create a new webpage with detailed, clearly accessible information explaining the legal requirements applicable to gun owners, including obligations regarding gun sales and transfers; and people prohibited under federal law from possessing firearms. The webpage may also make recommendations about gun storage and provide the reasoning for the warnings listed above. We suggest that the NPRM should require the new signage and printed brochure to include a QR code that directs consumers to this new ATF webpage.

The consumer warnings proposed above are crafted so that they are clear, concise, and well-grounded in the specific risks and responsibilities they seek to convey. For example, the warnings are based on decades of studies and research assessing the risks and consequences of firearms misuse, and evidence-based findings regarding critical firearm owner responsibilities.

Information provided to consumers on the ATF's website would provide more specific data about the risks and responsibilities of gun ownership, to include the dangers of giving a gun to a domestic abuser or juvenile. For example, the new webpage might mention that young people commit gun offenses in high numbers: youth ages 10 to 21 made up 28% of all arrests for weapons offenses in 2017.⁵⁷

⁵⁶ See US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I 5300.2 - Youth Handgun Safety Act Notice," revised July 2017, <https://www.atf.gov/firearms/docs/guide/atf-i-53002---youth-handgun-safety-act-notice/download>.

⁵⁷ Giffords Law Center to Prevent Gun Violence, "Minimum Age to Purchase & Possess," accessed October 16, 2020, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/#footnote_4_5627 (citing Federal Bureau of Investigation's 2017 data on arrests by age and offense charged).

As noted above, straw purchases are illegal, but this fact is often disregarded. A required public posting at FFL premises, along with the distribution of an updated brochure and a detailed explanation on ATF's website, would provide vetted, concrete consumer safety data to gun buyers on the prevalence and consequences of straw purchasing, including the applicable criminal penalties, and the real-life consequences of gun violence.⁵⁸

When President Clinton issued his 1997 Memorandum, Congress had not yet enacted a federal safe storage law. Today, 18 U.S.C. § 922(z) requires FFLs to provide a secure gun storage or safety device to consumers purchasing a handgun. Still, as indicated above, safe storage practices and gun theft continue to pose serious public safety concerns, and consumers should be warned about the grave consequences of their failure to implement safe storage practices; the consequences include school shootings, youth suicides, and unintentional deaths among children, as described above.

One of the gun owners' most important responsibilities is to ensure against the loss or theft of their guns. Putting gun owners on notice that their guns may be lost or stolen and that this situation requires law enforcement involvement, would strengthen the existing legal system's approach to preventing the use of lost or stolen guns in crime. Requiring FFLs to post the warning described above, and ensuring that the ATF includes information regarding lost and stolen guns on its website are, therefore, appropriate steps the ATF should take to improve public safety.

B. Process

The administration must go through the NCRM process under the APA to promulgate rules requiring FFLs to post notices and distribute information regarding gun risks and responsibilities.⁵⁹

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then, the agency must accept public comments on the proposed rule for a period of at least 90 days.⁶⁰ Comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting proposals, or by modifying the proposed rule to reflect the input.

⁵⁸ See e.g., Giffords Law Center to Prevent Gun Violence, "Trafficking & Straw Purchasing," accessed October 16, 2020, <https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/>.

⁵⁹ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

⁶⁰ 18 U.S.C. § 926(b) (requiring a 90-day comment period for ATF rule-making).

Once this process is complete, the final rule may be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

C. Legal justification

The attorney general has the power to prescribe “such rules and regulations as are necessary to carry out the provisions of” the GCA.⁶¹ In turn, the attorney general has delegated authority to issue rules and regulations to the ATF related to the GCA.⁶² In order for the provisions of the GCA to be effectively enforced, gun owners must be aware of them and understand their rationale. The safety warnings that would be required by the proposed rule are necessary for the full enforcement of the GCA. In addition, the 1997 presidential memorandum and 1997–1998 rulemaking provide clear precedent for the ATF's authority to issue an NPRM proposing to update these safety warnings.

IV. Risk analysis

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority; violating a constitutional right; not following rulemaking procedures; or arbitrary or capricious agency action.⁶³ The Supreme Court has made clear that laws that impose conditions and qualifications on the commercial sale of firearms are presumptively lawful.⁶⁴ Therefore, constitutional challenges are unlikely to succeed. Other challenges are discussed in further detail below.

ATF's statutory authority

ATF regulations already require FFLs to post warnings on their business premises and distribute associated information to consumers. This regulation would only change the content of these warnings. As noted above, there is clear precedent for these warnings. In addition to the current regulation, the ATF has provided similar warnings about other prohibited persons in the past. Below are two examples.

- The ATF and the Department of Justice issued guidance on firearms and misdemeanor crimes of domestic violence (MCDVs) in a November 2007 pamphlet.⁶⁵

⁶¹ 18 U.S.C. § 926(a).

⁶² 28 C.F.R. §§ 0.130, 0.131.

⁶³ 5 U.S.C. § 706.

⁶⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁶⁵ US Department of Justice, “Information Needed to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence,” November 2007, http://www.ncdsv.org/images/MCDV_Info%20needed%20to%20enforce%20the%20firearm%20prohibition.pdf.

- The ATF issued guidance on prohibited persons subject to disqualifying mental-health issues in ATF Information 3310.4.⁶⁶

Adding similar warnings to the posted sign and printed brochure would build directly off the GCA's prohibitions against transferring a gun to a person in a prohibited category.⁶⁷ Notably, the GCA only imposes criminal penalties on people who "knowingly" violate this provision.⁶⁸ Ensuring that gun purchasers have some knowledge of these requirements is essential to enforcing them. While requiring a universal background check is the most important way to address this problem,⁶⁹ ensuring that gun purchasers know that they cannot legally transfer guns to people if they have "reasonable cause to believe" they are prohibited from possessing guns,⁷⁰ would help deter transactions that might fuel gun violence.

Informing gun purchasers that straw purchases is illegal serves a similar purpose. As noted above, the form that gun purchasers must fill out already informs them of this fact. Far from being redundant, however, the proposed regulation would correct existing confusion regarding the issue of whether a straw purchase is legal when the actual buyer is eligible to purchase firearms. The Supreme Court directly addressed this issue in the *Abramski v. U.S.* decision.⁷¹ Consequently, the time is ripe for the ATF to take the necessary action to increase public awareness of this legal requirement.

As noted above, federal law generally prohibits anyone from transferring a handgun to someone under the age of 18.⁷² Federal law also encourages the safe storage of firearms, to prevent children and teenagers from having access to firearms by ensuring that gun dealers transfer safety devices alongside handguns.⁷³ Informing gun purchasers that they should keep their guns properly stored is the missing piece necessary to make these legal provisions effective.

Similarly, informing gun purchasers that they should report lost or stolen guns to law enforcement is essential to the GCA's approach to stolen guns and the ATF's gun tracing abilities, as described above. The ATF already has a webpage describing the actions a gun owner should take in case his or her gun is lost or stolen.⁷⁴ Reminding gun purchasers of this

⁶⁶ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "ATF I-3310.4 — Federal Firearms Prohibition under 18 U.S.C. § 922(g)(4) - Persons Adjudicated as a Mental Defective or Committed to a Mental Institution," revised May 2009, <https://www.atf.gov/resource-center/docs/guide/atf-i-33104—federal-firearms-prohibitions-under-18-usc-§-922g4--/download>.

⁶⁷ 18 U.S.C. § 922(d), (g), (n).

⁶⁸ 18 U.S.C. § 924(a)(2).

⁶⁹ Giffords Law Center to Prevent Gun Violence, "Universal Background Checks," accessed October 20, 2020, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/>.

⁷⁰ 18 U.S.C. § 922(d).

⁷¹ *Abramski v. U.S.*, 573 U.S. 169 (2014).

⁷² Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 922(x)).

⁷³ 18 U.S.C. § 922(z).

⁷⁴ US Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Report Firearms Theft or Loss," accessed October 16, 2020, <https://www.atf.gov/firearms/report-firearms-theft-or-loss>.

recommendation via a concise sign and brochure is a crucial step the ATF can take to ensure that the ATF's gun tracing can yield effective results.

The ATF already requires FFLs to post notices on their business premises and provide a printed brochure to consumers. The notices proposed here are necessary for the ATF to effectively enforce our federal gun laws. A court is therefore not likely to strike down a regulation requiring FFLs to provide these notices as outside the ATF's statutory authority.

Procedural challenges

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.⁷⁵

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.⁷⁶ The agency must address the concerns raised in all non-frivolous and significant comments.⁷⁷ The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.⁷⁸ By reviewing the comments submitted to the 1997 proposal, the next administration can produce a proposed rule that anticipates the types of comments a new NPRM may receive.

For example, the commenters to the 1997 rule complained that the president's memorandum language, "Handguns are a leading contributor to juvenile violence and fatalities," constituted an

⁷⁵ See Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," *N.C.L. Rev.* 92 (2014): 721, 737-38 (describing "first" and "second" order inquiries into an agency's decision making). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

⁷⁶ 5 U.S.C. § 553(c).

⁷⁷ *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).

⁷⁸ *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).

inappropriate “value judgement[], and argued that it was the perpetrators of the shooting, not the handguns used in the shooting, that contributed to juvenile violence and fatalities.”⁷⁹

While the ATF objected to the premise of the commenter’s objections, the ATF did agree with a commenter “who suggested that this provision could be clarified... For example, Sturm, Ruger & Company suggested that the language be modified to refer to the misuse of illegally possessed firearms.”⁸⁰ As a result, the ATF modified the final language to read as follows: “*The misuse of handguns is a leading contributor to juvenile violence and fatalities.*”⁸¹

In sum, the NPRM must choose its words—warning firearms consumers about gun risks and responsibilities—carefully to reduce the likely inevitable challenges, such as those made in 1997.

Arbitrary or capricious challenge under the APA

A court may invalidate an agency action or conclusion if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸²

The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, thus establishing a nexus between the facts and the agency’s choice.⁸³ Further, when a challenged rule reverses or rescinds an existing rule, an agency must provide a “reasoned analysis” in which it acknowledges a change in policy and provides a “good reason” for the proposed change.⁸⁴ However, the additional “reasoned analysis” requirement does not automatically subject rule reversals to a higher level of scrutiny.⁸⁵

Therefore, to withstand a potential judicial challenge that the proposed rule is an arbitrary and capricious action by the ATF, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should explain thoroughly why any anticipated industry concerns are outweighed by the public safety factors outlined above.

⁷⁹ Posting of Signs and Written Notification to Purchasers of Handguns, 63 Fed. Reg. 37740, 37741 (July 13, 1998) (to be codified at 27 C.F.R. pt. 178).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 5 U.S.C. § 706(2)(A).

⁸³ See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁴ See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁸⁵ *Id.* at 515.

A. Facts and data rationale

The first component of the framework, which is applicable to all rulemaking, is the requirement to consider all relevant factors and data, and to articulate a satisfactory explanation that gives “a rational connection” between the findings and the decision.⁸⁶ There are three primary factors implicated in the policy at issue: public health and safety, administrative burden, and regulatory consistency.

i. Public health and safety

The ATF can easily establish a rational connection between the required consumer product safety warnings, and public health and safety. According to a 2014 Law Center and Americans for Responsible Solutions report:

Many consumer products are sold with warning labels or other forms of safety information in order to reduce the risk that consumers will be injured or killed through the use of these products. Warning labels and accompanying safety information have been shown to increase safe behaviors by consumers who are handling the products. Yet, federal law does not require or even encourage the gun industry to include sufficient safety information with firearms.

More specifically, firearms and ammunition are some of the only products specifically exempted from the requirements of the federal Consumer Product Safety Act, which imposes health and safety standards on consumer products. As a result, the Consumer Product Safety Commission lacks the jurisdiction to require firearms and ammunition to be accompanied by safety information.⁸⁷

Under this proposal, the ATF would update and expand its safety rule to require FFLs to warn gun buyers about the wide range of risks and responsibilities of purchased firearms.

Firearms misuse poses clear and present dangers, as demonstrated by the cited studies, research, and any additional background material that the ATF may provide on the new webpage. Gun owners face certain responsibilities to mitigate these dangers, and the point-of-sale is a crucial moment in ensuring that gun owners are aware of these responsibilities.

ii. Administrative burden

This proposal would require the ATF to (1) ensure that FFLs have access to the required sign and brochure, and (2) create the new webpage. The costs would be clearly outweighed by the actual savings in public health and safety of the change in policy.

⁸⁶ *State Farm*, 463 U.S. at 43.

⁸⁷ See Americans for Responsible Solutions & Law Center to Prevent Gun Violence, “Commonsense Solutions: State Gun Laws to Protect Kids from Unintended Shootings,” June 2015, <https://giffords.org/lawcenter/toolkit/law-center-and-americans-for-responsible-solutions-release-commonsense-solutions-toolkit-on-protecting-kids-from-unintended-shootings/>.

iii. Regulatory consistency

This proposal is consistent with the 1997–1998 regulations described above. The undeniable prevalence of today’s gun crime and violence is at a minimum a reasonable basis to compel the expansion of consumer warnings.

B. Reasoned analysis

The second component of this framework is the “reasoned analysis” requirement. There is no burden on the agency to persuade the court that a new policy is superior, but only to acknowledge the change in policy direction, and to point to rational policy justifications for doing so.⁸⁸ Here, the expanded requirement for consumer safety warnings at FFLs for gun consumers is widely supported by a host of data and studies, which clearly provide a rational basis for the proposal.

⁸⁸ *Fox*, 556 U.S. at 515.