

# Commonsense Solutions:

State Laws to Expand Background Checks  
for Unlicensed Gun Sales

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THE **COMMONSENSE**  
GUN LAWS PARTNERSHIP

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## EXECUTIVE SUMMARY

**G**un violence takes an unacceptable toll on individuals and communities throughout the United States. While most American gun owners take their responsibilities seriously, the constant news reports about shootings demonstrate that dangerous people can access guns too easily. These dangerous people often obtain guns through a gap in our nation's gun laws – the loophole for unlicensed sales – which enables many gun sellers to avoid conducting background checks.

This report describes how criminals and other dangerous people exploit this loophole in the federal law. They know that, in many states, they can attend a gun show or search online and easily find people willing to sell a gun without a background check.

It doesn't have to be this way. Requiring a background check before the sale or transfer of a gun is a commonsense solution to this problem that respects the rights of law-abiding, responsible gun owners, and protects public safety.

As of December 2014, the following 18 states have extended a background check requirement to at least some unlicensed gun sales:

- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Iowa
- Maryland
- Massachusetts
- Michigan
- Nebraska
- New Jersey
- New York
- North Carolina
- Oregon (gun shows only)
- Pennsylvania
- Rhode Island
- Washington

This product provides arguments in support of this proposal, along with the legal and factual background. It also provides a list of the features of a strong law on this topic. It is our hope that this report will provide a “toolkit” for legislators and advocates who want to move forward with closing the loopholes in the background check system in their states and communities.

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# INTRODUCTION

## WHY AMERICA NEEDS BACKGROUND CHECKS FOR GUN SALES

Many Americans in the United States lawfully and responsibly own guns for recreation, collection, and self-protection. Gun ownership is part of our national heritage and is constitutionally protected by the Second Amendment. Laws that keep guns in the hands of law-abiding, responsible citizens enhance this tradition of responsible gun ownership. Unfortunately, a glaring loophole in our nation's gun laws allows people who don't respect our laws to easily acquire guns and use them to threaten the safety of the American public.

The **resulting gun violence is taking an enormous toll** on our country. Over 100,000 people are victims of a gunshot wound every year.<sup>1</sup> More than 30,000 of these victims lose their lives, and for every person who dies, two others are injured.<sup>2</sup>

These tragedies occur in large part because **dangerous people can easily acquire guns from unlicensed sellers**. Federal law does not require a license for the sale of a firearm. Unlike licensed gun dealers, unlicensed "private" sellers are not required to conduct background checks on gun purchasers. This loophole allows thousands of dangerous people to acquire guns every year, despite being legally ineligible to possess them.

Gun offenders overwhelmingly obtain their guns through unlicensed sales. A survey of state prison inmates in 13 states who were convicted of gun offenses found that only 13.4% obtained the gun from a gun store or pawnshop, where background checks are required. Nearly all (96.1%) of those inmates who were ineligible to possess a gun at the time of the crime obtained the firearm through an unlicensed seller.<sup>3</sup>

**There is a simple solution to this problem.** Unlicensed sellers can use the same system that licensed dealers already use to conduct background checks on gun purchasers. Americans overwhelmingly support laws requiring unlicensed sellers to do so. As described below, a growing number of states have adopted this approach, saving American lives, and making these states demonstrably safer places to live.

## LOOPHOLE FOR UNLICENSED SELLERS

In April 2011, John Karnis posted a classified ad in a newspaper offering to sell two semiautomatic handguns. Thirty-year-old John Schick responded. Four months before, Mr. Schick had attempted to buy a gun at a gun store in Portland, Oregon, but failed the background check. Federal law prohibited Mr. Schick from possessing guns because he had been committed to a mental institution in Oregon in January 2010. Mr. Karnis did not run a background check on Mr. Schick, however. New Mexico law didn't require him to do so, so Mr. Karnis sold Mr. Schick the handguns in the parking lot of an Albuquerque strip mall.

On March 8, 2012, Mr. Schick used the guns he had bought from Mr. Karnis when he started shooting inside Western Psychiatric Institute and Clinic in Pittsburgh, Pennsylvania. Family members of a 25-year-old therapist named Michael Schaab said they had been talking to him on the phone when the connection suddenly got cut off. He was killed in the shooting, and five other people were injured, before police shot and killed Mr. Schick.<sup>1</sup> Schaab's fiancée, whom he had proposed to a few weeks before (on Valentine's Day), was a nurse at a nearby hospital and was coincidentally in the trauma unit when the shooting victims arrived. Schaab's mother, Mary, said her only other child, Nancy Schaab, had been slain at age 26 during a domestic dispute in October 2010.<sup>2</sup>

**The shooting that took Michael Schaab's life, like so many other shootings in America, was preventable.**<sup>3</sup> In an interview after the shooting, Mr. Karnis indicated that he intended to comply with the law when he made the sale to Mr. Schick. If a background check had been required, Mr. Karnis may very well have not sold the guns to Mr. Schick, and the shooting may not have occurred.<sup>4</sup>

Under federal law, certain categories of dangerous individuals, such as convicted felons, convicted domestic abusers and some dangerously mentally ill people are prohibited from purchasing or possessing firearms. A person cannot legally sell a gun to someone he or she knows or has "reasonable cause to believe" falls within one of these categories.<sup>5</sup> Federal law requires licensed dealers to conduct a background check on all gun purchasers to ensure that they don't sell guns to these people.<sup>6</sup>

This background check involves a search through the National Instant Criminal Background Check System ("NICS"), a system of databases maintained by the FBI. State and local courts and law enforcement agencies voluntarily submit information about prohibited gun purchasers to these databases. When a person attempts to purchase a gun from a licensed dealer, the dealer must run a check through NICS and determine whether the potential buyer is prohibited from purchasing firearms. If the information in the NICS system indicates that the person cannot legally possess a gun, the dealer must deny the sale.

**Since the background check system was created:**

- Over 196 million background checks have been conducted,<sup>7</sup> and
- **Over two million firearms sales to prohibited purchasers have been denied.**<sup>8</sup>

Despite the success of the background check system, federal law still allows gun sales and transfers by unlicensed sellers to occur without these background checks. Federal law provides that persons “engaged in the business” of dealing in firearms must be licensed.<sup>9</sup> However, a person is not “engaged in the business” within the meaning of the law if he or she only “makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”<sup>10</sup>

Unlicensed sellers often claim they only make occasional sales as a hobby or are selling their personal collection of firearms, and are therefore not required to conduct background checks on purchasers. These unlicensed sales take place at gun shows, over the internet, through classified ads, and by word of mouth with shocking frequency. A 1997 report for the National Institute of Justice estimated that about 40% of gun sales occur through unlicensed sellers without a background check.<sup>11</sup> That would mean that an estimated 6.6 million guns are sold each year without a background check.<sup>12</sup>

According to the U.S. Department of Justice, because federal law and the laws in most states do not yet require background checks for unlicensed sales, “individuals prohibited by law from possessing guns can easily obtain them from private sellers and do so without any federal records of the transactions.”<sup>13</sup> “The private-party gun market,” one study observed, “has long been recognized as a leading source of guns used in crimes.”<sup>14</sup>

Unlicensed sales are also linked to gun trafficking:

- The Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) found that during one 29-month period, unlicensed sellers were involved in about one-fifth of illegal trafficking investigations nationwide and associated with nearly 23,000 trafficked guns.<sup>15</sup>

- A 2009 GAO report found that “secondary firearms — firearms resold following the first retail purchase from a federal firearms licensee (FFL), or ‘used guns’ — are commonly trafficked to Mexico.”<sup>16</sup>

- Another report observed that the lack of background check and other requirements for private gun transfers “continue to make it much easier for prohibited persons to purchase firearms and much harder for U.S. authorities to successfully trace how a firearm illegally reached Mexico.”<sup>17</sup>

In a 2007 report, the International Association of Chiefs of Police (IACP) stated that, because individuals who fail a background check can easily access firearms from unlicensed sellers, “... guns are far too easily acquired by prohibited possessors, and too often end up being used in gun crime and gun violence.” The IACP concluded that “Congress, as well as state, local and tribal governments, should enact laws requiring that all gun sales and transfers proceed through” a federally licensed dealer, who conducts a background check.<sup>18</sup>

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## THE SOLUTION:

### EXPANDING THE BACKGROUND CHECK REQUIREMENT

Research consistently shows that Americans overwhelmingly support expanding background check requirements for gun sales.<sup>1</sup> There are several straightforward ways that states can do this. In fact, 19 states have already enacted laws expanding the background check requirement to at least some unlicensed sales.

#### **Utilize the System That Already Exists**

The simplest, most effective approach to expanding the background check requirement involves utilizing the system that already exists. There are now over 55,000 licensed gun dealers throughout the country, each one set up to conduct background checks.<sup>2</sup> Unlicensed individuals can easily go to a gun dealer's place of business and the dealer can conduct a background check on the seller's behalf.

Gun stores – licensed gun dealers – are a common feature in many American communities.– 98.4% of Americans live within 10 miles of a licensed gun dealer.<sup>3</sup> Licensed gun dealers conduct background checks on gun purchasers over 10 million times each year.<sup>4</sup> This network of gun dealers constitutes an established system for conducting background checks. States do not need to create a new system; all that a state needs to do is require unlicensed sellers to use this same system.

California and Rhode Island have used this approach for over two decades. Four more states (Colorado, Connecticut, Delaware and New York) adopted this approach in 2013, and one more state (Washington) in 2014.<sup>5</sup> Maryland and Pennsylvania use this approach for handguns, but not yet for long guns.<sup>6</sup> Simple, straightforward language like the language discussed at the end of this report can be used to adopt this commonsense approach.

In fact, in January of 2013, the Bureau of Alcohol, Tobacco, Firearms & Explosives issued a guidance document setting forth a streamlined procedure for gun dealers to use to conduct background checks on behalf of unlicensed sellers of firearms. This procedure eliminates excess paperwork. It also frees the parties from the complicated procedure that had been previously required for returning a gun to an unlicensed seller if a potential buyer fails a background check. Under this document, a dealer may choose not to accept a gun into its inventory, but still conduct a background check on a potential buyer.<sup>7</sup>

In April 2013, Senators Joe Manchin (D-WV) and Pat Toomey (R-PA) proposed an amendment to a federal bill that would have required a licensed dealer to take possession of a firearm and



conduct a background check on the purchaser for any gun transfer “at a gun show or event, on the curtilage thereof,” or “pursuant to an advertisement, posting, display or other listing on the Internet or in a publication by the transferor of his intent to transfer, or the transferee of his intent to acquire, the firearm.”<sup>8</sup> Fifty-four members of the Senate voted in favor of the amendment; however, a vote of at least 60 is necessary to pass a bill.<sup>9</sup>

### **Record-keeping Requirements**

Record-keeping requirements help enforce background check requirements. When a person has transferred a gun to someone else, the person may falsely claim to have conducted a background check. Law enforcement officers can disprove this claim if a record is required to be kept for every background check.

Currently, when a person buys a gun from a licensed gun dealer, he or she fills out a form known as Form 4473. Licensed dealers are required to maintain these forms in their places of business as records of the background check and gun sale or transfer.<sup>10</sup> Except in a few states that require reporting of gun sales, licensed dealers do not generally provide these records to law enforcement or a government agency. With prior legal authority, law enforcement officers can view these records to enforce the background check requirement and to trace guns that have been used in crimes. But federal law enforcement officers do not collect these records for other purposes.

### **In fact, federal law protects these records from government collection.**

Federal law explicitly prohibits federal law enforcement agencies from: (1) using dealers’ records of sales to establish a centralized system for the registration of firearms, firearm owners, or firearm transactions; or (2) requiring dealers’ records of sales to be recorded in, or transferred to a centralized facility.<sup>11</sup> In addition, federal law explicitly requires the federal government to destroy any record that it has of a successful background check within 24 hours.<sup>12</sup> By ensuring that records of gun sales remain at gun dealerships, and are not collected by the federal government, these laws enable states to adopt background check requirements without creating a system of gun registration.

Under a law requiring a background check before an unlicensed gun sale, a licensed dealer who conducts a background check on behalf of an unlicensed seller would create a record of the sale, using Form 4473. Law enforcement officers would then be able to access this record to verify that a background check was conducted or to identify the owner of a gun used in a crime. Federal law enforcement would not, however, be legally allowed to collect these records for other purposes.

### **An Alternative for States with Strong Licensing Law.**

A handful of states have another kind of system that can be used for background checks. These states regulate unlicensed sales of firearms primarily by prohibiting sales to purchasers who do not have the requisite state license or permit, and requiring a background check before issuing the license or permit.<sup>13</sup> Four states (Hawaii, Illinois, Massachusetts, and New Jersey) have such laws for all firearm purchases, and four more states (Iowa, Michigan, Nebraska, and North Carolina) do the same only for handguns.

These permits and licenses vary greatly in duration; as a result, there is a risk in some of these states that a person will become prohibited from purchasing a firearm after obtaining the license or permit but before purchasing a firearm. This situation may arise, for example, if a man obtains a permit to purchase a firearm; one week later, his ex-wife obtains a protective order against him, and then he uses the permit to buy a gun even though the protective order makes him legally ineligible to do so. As a result of this problem, in 2013 and 2014 respectively, Illinois and Massachusetts passed laws requiring a seller to contact law enforcement and verify the validity of the purchaser’s permit at the time of the sale.<sup>14</sup>

In states that already have a permitting system in place, this approach makes sense. Most states do not have this system, however. The 33 states that have not addressed the loophole for unlicensed sellers should first consider requiring sales to be processed through licensed dealerships.

## HOW THE SOLUTION PREVENTS CRIME

When properly utilized, the background check system that already exists works well. There is ample evidence that requiring a background check before any sale of a gun reduces crime and saves lives. Based on an analysis conducted by Everytown for Gun Safety, in states that require background checks on all handgun sales:

- 38% fewer women are shot and killed by their intimate partners,
- 49% fewer people commit suicide with a gun,
- There are 17% fewer aggravated assaults with guns,
- 39% fewer police officers are killed with handguns, and
- 64% fewer guns are trafficked to be used in out-of-state crimes.

A study using crime gun trace data from 53 U.S. cities for the years 2000–2002 also found that laws regulating unlicensed handgun sales are strongly associated with fewer trafficked guns.<sup>16</sup>

What happens when a background check is not conducted? In 2007, Missouri repealed its requirement that handgun purchasers obtain a permit after a background check. Since that repeal:

- The share of crime guns recovered in Missouri that were originally purchased in-state has grown by 25%;
- A key indicator of crime gun trafficking – the share of crime guns that were recovered within two years of their original sale – has doubled; and
- Gun murders in the state have risen nearly 25%.<sup>17</sup>

The data is overwhelming. **States must enact this commonsense law.** Americans should not have to wait any longer to prevent dangerous people from accessing guns.

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# GUN SHOWS

## HOW THE LOOPHOLE IS EXPLOITED AT GUN SHOWS

Kevin Dawson of Ooltewah, Tennessee frequently traded and sold firearms at gun shows. He didn't have a federal firearms license, even though the ATF had advised him to obtain one due to his regular and frequent gun sales.<sup>1</sup> In 2011, Dawson sold a handgun to convicted felon Jesse Mathews without a background check at a gun show.<sup>2</sup> A few months later, Mathews held up the U.S. Money Shops in Chattanooga with the handgun he purchased from Dawson. When law enforcement arrived at the scene, Mathews shot and killed Chattanooga Sergeant Tim Chapin before being apprehended.<sup>3</sup>

Gun shows are an iconic part of American culture, and an extremely popular marketplace for guns. Usually held on the weekends, gun shows provide an opportunity for gun enthusiasts to gather and view a wide variety of firearms and firearm accessories for sale from a variety of sources. A 2007 report by the Office of the Inspector General of the U.S. Department of Justice reveals the number of gun shows in the U.S. each year ranges from 2,000 to 5,200.<sup>4</sup> At some gun shows, over 1,000 guns can be sold over the course of one weekend.<sup>5</sup>

Most gun shows are operated and attended by law-abiding persons who legally purchase or transfer guns. The problem is that criminals exploit gun shows by taking advantage of the fact that, in most states, no background check is required when a gun is sold by someone who is not licensed as a dealer. **These criminals use gun shows as an opportunity to find people willing to sell a gun without a background check.**

Because they provide a convenient venue for unlicensed sellers to conduct business, gun shows have become a key source of crime guns and guns acquired by persons who are prohibited from purchasing or possessing firearms. A 1999 ATF study found that 25 to 50% of gun show vendors are unlicensed.<sup>6</sup> These unlicensed sellers frequently rent table space at gun shows and carry or post "Private Sale" signs, signaling that their guns may be purchased without a background check, paperwork, or record-keeping.<sup>7</sup>

A 2009 undercover investigation by the City of New York at gun shows in Nevada, Ohio, and Tennessee "observed many unlicensed sellers doing brisk business at gun shows."<sup>8</sup> The investigators tested whether licensed and unlicensed sellers would conduct what appeared to be illegal transactions, and found:

- When investigators claimed that they "probably" could not pass background checks, 19 of 30 unlicensed sellers (63%) were still willing to complete the firearm sale<sup>9</sup>; and

- When investigators approached licensed dealers and appeared to conduct straw purchases on behalf of prohibited people, 16 of 17 dealers (94%) were willing to complete these transactions.<sup>10</sup>

In a subsequent investigation conducted at a Phoenix gun show, an investigator successfully purchased guns from two unlicensed sellers despite informing both of them that he “probably couldn’t pass” a background check.<sup>11</sup>

Federal law defines “gun show” as a “function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection competitive use, or other sporting use of the firearms community.”<sup>12</sup> In 1986, Congress passed the so-called Firearm Owners’ Protection Act (“FOPA”), which expressly permitted dealers to conduct business at a gun show.<sup>13</sup> FOPA is also the federal law that weakly defined the “engaged in the business” threshold that determines whether a firearms seller must be federally licensed, increasing the overall number of unlicensed sellers.<sup>14</sup>

Federally licensed firearms dealers may sell guns at gun shows that are located in the same state as the dealer’s place of business.<sup>15</sup> Licensed dealers must conduct background checks on all attempted purchasers and maintain sales records of any transactions, whether made at gun shows or elsewhere.<sup>16</sup>

Unlicensed sellers may also sell guns and conduct business at gun shows. However, they are not subject to the same regulations as licensed dealers, and are therefore not required to conduct background checks on purchases or maintain sales records.

## HOW BACKGROUND CHECKS WORK AT GUN SHOWS

The most comprehensive approach to ensuring that sales are only made to eligible purchasers is through a requirement for a background check prior to any firearm transfer. Eleven states have this requirement for all guns, and six other states do the same only for handguns.<sup>17</sup>

Four of the ten states that require background checks for all gun transfers (Connecticut, Colorado, Illinois, and New York) also have laws expressly requiring background checks at gun shows.<sup>18</sup> These laws were already on the books before these states adopted their broader background check laws.

In contrast, Oregon continues to require a background check when a firearm is sold by an unlicensed seller at a gun show only.<sup>19</sup> This approach leaves open the possibility that unlicensed gun sellers will use other methods of connecting with potential purchasers, such as through online advertisements, rather than gun shows. Consequently, the best approach is to require a background check whenever a gun is sold or transferred, with limited exceptions as described at the end of this report.

Twelve states specifically impose other kinds of regulations on gun shows, with California having the most comprehensive regulation of gun shows. These regulations include security, record-keeping, and signage requirements, and can help encourage compliance with background checks requirements and other gun laws.<sup>20</sup>

**State background check requirements can effectively prevent dangerous individuals from buying guns at gun shows.** According to a 2010 report by Mayors Against Illegal Guns, states that do not require background checks for all handgun sales at gun shows are the sources of crime guns recovered in other states at more than two and a half times the rate of states that do require background checks for all handgun sales.<sup>21</sup> None of the ten states that are most frequently the sources of crime guns, when population is taken into account, require background checks at gun shows.<sup>22</sup>

A 2007 study compared gun shows in states that do not require background checks on unlicensed gun sales, such as Arizona, Nevada, Texas, and Florida, with gun shows in California, which does require background checks for unlicensed sales.<sup>23</sup> The study found that California’s

regulatory policies were associated with a lower incidence of anonymous, undocumented gun sales at gun shows.<sup>24</sup>

Background check requirements can be enforced at gun shows with ease and the cooperation of all those involved. For example, the New York Attorney General's Office conducted an investigation that revealed that gun show attendees were regularly violating the state's background check law. This investigation resulted in the gun show operators formally agreeing to comply with the above requirements, and:

- Require that all guns brought into the gun show by unlicensed sellers are tagged so that, upon exiting, the operator can determine if the guns were sold and a background check was performed.
- Inform all gun show staff of the requirements of posting signs and conducting background checks.
- Limit the number of access doors at the show so that sellers and buyers have to enter and exit through an area where the background check procedures can be monitored.
- Use reasonable means to prevent illegal gun sales outside of the building, including the parking lot.
- Alert local law enforcement that a show will be held in their area, and request periodic patrols in the parking lots to deter illegal sales.
- Call local law enforcement if illegal sales are observed or suspected.<sup>25</sup>

States can continue to allow gun shows to flourish without providing criminals and other prohibited people an opportunity to obtain guns illegally. A background check requirement will help accomplish this goal and save lives.

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## INTERNET GUN SALES

### HOW THE LOOPHOLE IS EXPLOITED ON THE INTERNET

In October 2012, Zina Daniel obtained a restraining order against her estranged husband, Radcliffe Haughton, after he slashed her tires and threatened to kill her. Because of the restraining order, Haughton was prohibited from purchasing or possessing guns under federal law and would have failed the background check that licensed gun dealers are required to conduct. Later that month, he purchased a Glock .40 caliber semiautomatic handgun from an unlicensed seller he found on Armslist.com – a popular website where tens of thousands of guns are listed for sale. The seller did not conduct a background check. The next day, Haughton arrived at the salon where Daniel worked, shot and killed her and two other women and injured four others before killing himself.

Dangerous persons like Haughton often turn to online, unlicensed sellers to circumvent the law and obtain guns. In most states, these online sellers are currently not violating any laws by failing to conduct a background check on a purchaser. As described above, federal law only requires licensed dealers, and not unlicensed sellers, to conduct background checks on purchasers. Because of the lack of a background check requirement for unlicensed sales, criminals and other individuals who are prohibited from possessing guns can nonetheless obtain them.

The online marketplace facilitates these transactions. In the past, an unlicensed person who wanted to find a buyer for a gun would probably put the word out by contacting family and friends or posting a classified ad in a newspaper. He might also go to a gun show, if one happened to occur in a location near him, and look for a buyer there.

Because of the Internet, an unlicensed person no longer needs to wait for a gun show or for word to spread to sell his or her gun. The advent of the Internet multiplies the audience for advertisements offering to sell a gun, thereby increasing the likelihood that the person will sell the gun to someone with whom he has no interpersonal connection. Today, a person seeking to sell a gun need only post a listing on one of thousands of websites, and wait for a response.

Similarly, an ineligible individual who wants to buy a gun must no longer ask people he knows or go to a gun show. He only has to turn on his computer, go to a website, and look for listings by unlicensed sellers who are not required to conduct background checks. In fact, after agreeing to a simple disclaimer, buyers on Armslist.com can limit their searches to listings by “private,” unlicensed parties in their city or state. These listings often provide a phone number, enabling the parties to easily arrange a meeting for the exchange of cash and guns.



Our current national system of gun regulation imposes virtually no limitations on these transactions.<sup>2</sup> In fact, it allows these transactions to take place almost anonymously. This system of regulation has not been updated to reflect the existence of the Internet, and the only significant federal law that applies to private gun sales limits sales across state lines.<sup>3</sup>

***The number of websites that facilitate gun sales is staggering:***

- As long ago as the year 2000, the U.S. Department of Justice estimated that there were about 80 online firearm auction sites, and 4,000 other sites where firearms were sold.<sup>4</sup>
- A three-month investigation by the New York Times in 2013 determined that more than **20,000 ads were being posted on Armslist.com every week.**<sup>5</sup>
- As of December 2011, there were about 12,000 separate guns-for-sale listings on Armslist.com.<sup>6</sup> By October 2014, that number had ballooned to over 80,000 listings.<sup>7</sup>

***Some of these listings involve licensed dealers who comply with the law and conduct a background check for every gun sale. Others involve unlicensed parties trying to sell guns usually without background checks:***

- Three out of four listings of guns-for-sale on Armslist.com in October 2014 were posted by unlicensed, “private” sellers. This amounts to over 60,000 listings by unlicensed sellers.<sup>8</sup>

*To see how many listings there are in your state, see Armslist.com Power Search, at <http://www.armslist.com/classifieds/powersearch>.*

- In fall 2013, 29% of ads by unlicensed sellers on Armslist.com – nearly one in three – were posted by high-volume unlicensed sellers who posted five or more ads over an eight-week period.<sup>9</sup>
- According to an undercover investigation conducted by the City of New York in 2011:
  - o **62% of unlicensed online firearm sellers (77 of 125) agreed to sell a firearm to a buyer who said that he or she probably could not pass a background check.**
  - o 54% of the online unlicensed sellers were willing to sell to someone who admitted he was legally prohibited from possessing a gun.<sup>10</sup>

Certain websites also allow potential gun buyers to post ‘want-to-buy’ ads. In October 2014, there were over 5,000 want-to-buy ads on Armslist.<sup>11</sup> These ads allow people who have a particular kind of gun to sell to look through listings for buyers interested in that kind of gun.

Unfortunately, many of these online buyers are ineligible to possess guns. An analysis of these ads conducted by Mayors Against Illegal Guns (now Everytown for Gun Safety) found that:

- At least one in 30 want-to-buy ads (3.3%) had been posted by someone who had previously been convicted of a crime that disqualified him from legally having guns.<sup>12</sup> In contrast, fewer than one in 100 people who attempt buy guns from licensed gun dealers (<1%) fail the background check for this reason.<sup>13</sup>
- People posting want-to-buy ads included a 25-year-old male in Columbus, Ohio who had been named as a defendant in 15 felony or misdemeanor cases between 2007 and 2013, including pending charges for aggravated robbery and drug possession. He also pled guilty to possession of crack cocaine in 2010, a felony that prohibited him from buying guns. (The investigation by Mayors Against Illegal Guns revealed several similar individuals.)<sup>14</sup>
- Criminals know that they can avoid background checks by using websites like Armslist.com. The share of potential gun buyers who are ineligible due to their criminal history is four times higher on Armslist.com than at gun dealerships.<sup>15</sup>
- Given the rate at which unlicensed sellers list guns for sale on Armslist.com, and the rate at which prohibited people seek them, **gun sales through Armslist.com may put 25,000 guns in the hands of criminals each year.**<sup>16</sup>

# HOW BACKGROUND CHECKS WORK OVER THE INTERNET

States can effectively prevent dangerous individuals from purchasing guns online through a requirement for a background check prior to any firearm transfer. As noted above, eleven states have this requirement for all firearms, and six other states do the same only for handguns.

Background check requirements do not shut down Internet gun sales. Even in a state that has enacted a background checks requirement for private gun sales, a private person who wishes sell his or her gun can still use the Internet to find a buyer. He or she must only arrange to meet the buyer at one of the 55,000 licensed gun dealers in order to conduct a background check and complete the sale.

Nonetheless, these laws have a significant effect on online gun sales. A report published by Third Way in conjunction with Americans for Responsible Solutions in September 2013 found that online sales of firearms by private parties are far more prevalent in states that do not require a background check than among states that do. The report was based on a survey of every for-sale listing on Armslist.com on a single day, which amounted to 90,000 for-sale listings. The report found that on a per capita basis, there were nearly twice as many online gun ads in states that don't require background checks compared to states that do.

The report also analyzed listings seeking to buy a gun specifically from an unlicensed "private" seller - a clear indication that the buyer wishes to avoid a background check. The report found that the per capita average number of these ads is **240% higher in states that don't require background checks on those sales compared to states that do.**<sup>17</sup> This statistic demonstrates the difference a background check requirement can have on online gun sales.

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## A NOTE ON SECOND AMENDMENT LITIGATION

In 2008, the Supreme Court held for the first time that the Second Amendment protects the individual right of “law-abiding, responsible citizens” to possess an operable handgun in the home for self-defense.<sup>1</sup> However, the Supreme Court cautioned that this right is “not unlimited,” and provided examples of “presumptively lawful” regulations, including “longstanding prohibitions on the possession of firearms by felons and the mentally ill.”<sup>2</sup> The Court further clarified that its list of presumptively valid regulations was “not exhaustive,” meaning that other gun regulations may also be valid.<sup>3</sup>

Since the 2008 decision, courts across the country have been faced with challenges to many kinds of gun regulations. Courts have overwhelmingly upheld strong gun laws and rejected these challenges. For example, in June 2014, a U.S. district court upheld a background check requirement enacted by Colorado in 2013, finding this law constitutional.<sup>4</sup> Plaintiffs filed a notice of appeal to the Tenth Circuit on July 28.

### (ENDNOTES)

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## FEATURES OF A STRONG BACKGROUND CHECKS LAW

**A strong law requiring background checks for unlicensed gun sales includes the following features:**

***The Basic Requirement:*** Every sale or transfer of a gun must be processed by a licensed gun dealer, who must conduct a background check on the purchaser, with the exceptions mentioned below. This means that a person who is transferring a gun must ensure that a licensed dealer runs this background check, and a person cannot legally acquire a gun unless he or she has first undergone a background check.

***Record-keeping:*** As noted above, record-keeping is important to ensure that law enforcement officers can enforce the background check requirement. A law that requires a gun sale or transfer to be processed by a licensed dealer would require the dealer to create and maintain a record of sale that can be used for this purpose. The dealer should also record "Private Party Transfer" on the record of sale to avoid confusion in its records.<sup>1</sup>

***Costs:*** A gun dealer who conducts a background check on behalf of an unlicensed transferor should be compensated for processing the sale. Consequently, many background check laws allow a gun dealer to charge a fee for conducting the background check. In order to ensure that dealers do not overcharge for this service, the fee should be equivalent to the dealer's reasonable costs for conducting the background check.

***Scope of the Requirement:  
"Transfers" versus "sales"***

Almost all of the existing state laws requiring unlicensed sellers to conduct background checks on gun buyers apply this requirement to "transfers," as well as sales. This is because unscrupulous people sometimes distribute guns to others without expecting to be paid for those guns. For example, the leader of a criminal enterprise may provide members of the enterprise with guns in order to allow them to use force in furtherance of their crimes. In other circumstances, guns may be traded for drugs, rather than money. In order to allow prosecutors to bring charges against a person for failing to conduct a background check in these circumstances, the state's background check requirement must apply to "transfers" as well as "sales."

The term "transfer" is commonly used to refer broadly to situations in which a person allows another person to possess something. States have wisely chosen to require background checks when guns are transferred, as well as sold, because guns are often distributed to people who do not pay for them.

## **Temporary transfers**

When a law enforcement officer determines that a person received a firearm without undergoing a background check, the person may claim that he or she was “just borrowing it.” A background check requirement that only applies to permanent, but not temporary, transfers of firearms creates this problem of “plausible deniability”: the transferee may claim that his or her possession of the firearm was not intended to be permanent, that he or she intended to transfer the gun back to the transferor at some point in the future. To avoid this problem, most state laws that require a background check for gun transfers apply to temporary transfers of guns, and provide limited exceptions for temporary transfers under particular circumstances, as described below.

### **Exceptions:**

Existing state laws that require a background check before the unlicensed sale of a firearm usually include certain specified exceptions. As described below, a background check should not generally be required in the following situations:

#### **The Licensed gun dealers, importers, and manufacturers**

Federal law already requires licensed firearms dealers, importers and manufacturers to conduct background checks on transferees, and a person cannot obtain a federal license as a gun dealer, importer, or manufacturer without undergoing a background check. Consequently, the requirement should not apply if either party to the transaction is a licensed firearms dealer, importer, or manufacturer.

#### **Gifts or loans among family members**

Most state laws that require a background check for the unlicensed sale or transfer of a firearm contain an exception for gifts or loans among close family members. There seems to be widespread agreement in favor of this exception. Colorado, for example, exempts any bona fide gift or loan between immediate family members, which are limited to spouses, parents, children, siblings, grandparents, grandchildren, nieces, nephews, first cousins, aunts, and uncles.<sup>2</sup>

#### **Transfers made from a decedent’s estate**

Most background check laws provide an exception for transfers that occur when a gun owner dies. In this situation, the gun will transfer to another owner automatically, either pursuant to a legal will or by “operation of law” (when there is no legal will), and a background check is not possible.

#### **Law enforcement and members of the military**

Many laws regarding sales and transfers of firearms have exceptions for law enforcement officers and the military. If the law enforcement officer or member of the military is acting within the course or scope of his or her employment or official duties, these exceptions make sense.

#### **Handling in the presence of the transferor**

There are many situations where a person may allow another person to handle his or her gun. A person may hand his or her gun to another person so that he or she can evaluate it for potential purchase, as part of a gun safety class, or when necessary for immediate self-defense. In these situations, where the transferor remains in the transferee’s presence as he or she is handling the gun, no background check should be required.

#### **Loans for lawful purposes**

State background check requirements usually provide an exception that allows a gun owner to loan his or her gun to a friend for lawful purposes for a short period of time. While the exact parameters of these exceptions vary, they are generally limited to situations where: (1) the parties are personally known to each other, (2) the loan is for a lawful purpose, and (3) the loan is limited in duration. In Delaware, for example, these loans are limited to 14 days. In other states, these exceptions are more protective of public safety. The background check law that Colorado enacted in 2013 only allows loans no greater than 72 hours, and states that the gun owner may be civilly

liable if the person he or she loaned a gun to uses it unlawfully. In June 2014, a U.S. district court rejected a challenge to this provision, and held that it does not infringe on Second Amendment rights.<sup>3</sup> That ruling is currently pending on appeal.

### **Hunting and target shooting**

Special provisions in some state background check laws provide exceptions allowing temporary transfers for hunting or target shooting purposes. These exceptions overlap with the exceptions listed above, but may also allow loans between parties that are not necessarily personally known to each other and where the parties are not necessarily in each other's presence. Consequently, they are carefully limited to ensure that the guns are only used for lawful hunting or target shooting. So, for example, a hunter may possess someone else's gun if he or she is in an area where hunting is lawful and if he or she has any necessary hunting permits. Similarly, a person may engage in target shooting with someone else's gun in a properly licensed target shooting range, so long as he or she does not leave the premises with the firearm.

### **Repair and cleaning of a firearm**

A gun owner may give his or her gun to another person for repair or cleaning. If the parties are not personally known to each other, the person must be a licensed gunsmith. The gunsmith may then give the gun back to its owner without conducting a background check.

### **Self-defense in the home**

Violent encounters that occur in the home may leave no time for background checks. Consequently, there should be an exception for circumstances where a firearm is needed for immediate self-defense in the home. This exception should be limited to situations that occur in the transferor or transferee's home, where the need for self-defense is greatest.

### **Antique firearms**

Federal law defines an 'antique firearm' as any firearm manufactured in 1898 or earlier, and any imitation of such firearm. These firearms are not frequently used in crimes. States may therefore wish to allow sales and transfers of antique firearms without background checks.

### ***Prohibiting Transfers When There Is a Reason to Believe the Transferee is Ineligible***

State laws should mirror federal law<sup>4</sup> by making it illegal to provide any person, even a family member or other person listed in the exceptions above, with a gun if the transferor has reason to believe the person is ineligible to possess firearms, or is likely to commit a crime. This provision would allow law enforcement to address the situation where a person has transferred a gun without a background check under one of the exceptions listed above, but the person clearly should have known the transferee was prohibited from possessing guns, or likely to commit a crime.

### ***Prohibiting Others from Facilitating Gun Sales without Background Checks***

States that require a background check before any sale of a gun may wish to consider the civil or criminal liability of third parties that knowingly facilitate gun sales that occur without background checks. These third parties may include some gun show promoters and websites that are designed to connect parties that do not plan on conducting background checks. There should be a legal mechanism to hold these third parties responsible for "aiding and abetting" these sales.<sup>5</sup>

**(ENDNOTES)**

1. See Bureau of Alcohol, Tobacco, Firearms & Explosives, *Record-keeping and background check procedures for facilitation of private party firearms transfers*, ATF Proc. 2013-1, at [https://www.atf.gov/sites/default/files/assets/pdf-files/atf\\_proc.\\_2013-1\\_-\\_private\\_firearms\\_transfers\\_through\\_ffls.pdf](https://www.atf.gov/sites/default/files/assets/pdf-files/atf_proc._2013-1_-_private_firearms_transfers_through_ffls.pdf)
2. Colo. Rev. Stat. § 18-12-112(6)(b).
3. *Colo. Outfitters Ass'n v. Hickenlooper*, 2014 U.S. Dist. LEXIS 87021 (D. Colo. June 26, 2014).
4. 18 U.S.C. § 922(d).
5. See Ann Daniels, *The Online Gun Marketplace and the Dangerous Loophole in the National Instant Background Check System*, 30 J. Marshall J. Info. Tech. & Privacy L. 757 (2014) (discussing immunity under the Communications Decency Act for websites that facilitate unlicensed gun sales). , 666 F.3d 1216, 1220 (9th Cir. Cal. 2012)(holding the CDA did not provide immunity to a website for violating the Fair Housing Act since it enabled users to screen out listings by gender, sexual orientation, and familial status).