



## Firearms Industry Alert: Obama's Executive Order Broadens Regulation, Highlights Compliance Challenges

By: Camden R. Webb & Charles E. "Chuck" James, Jr.

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*This article is a preliminary report on the Obama administration's action on gun control, which was announced on January 5, 2016, and provides a brief overview of the proposed action. We will provide more in-depth analysis of the changes in federal firearms laws in additional articles, which are coming soon.*

The Obama administration yesterday announced **executive action** on the issue of gun control, focusing on expanded regulation of the firearms industry. After a meeting with the United States Attorney General and the Director of the FBI on January 4, Obama announced that his administration would take steps that include expanding the number of persons required to register as a federal firearms licensee, expanding background checks, increasing requirements for reporting lost or stolen firearms, and beefing up inspections of federal firearms licensees.

The administration's executive action is explicitly intended to bypass Congress, and considering the statutory provisions of the Gun Control Act of 1968 and other applicable laws, the President's actions all but assuredly will be challenged. Elected officials and commentators are already questioning this use of an Executive Order and potential legal and legislative challenges. Notwithstanding such issues, industry members (those that the administration wants to make industry members) must take action immediately to address compliance issues that the newly-announced executive action presents. The following summarizes some of the changes and challenges ahead.

### **Expansion of Licensing Requirements by Including More Persons in the Definition of Those Who Are "Engaged in the Business" of Firearms and Ammunition**

The administration intends to expand the types of persons who will be required to obtain a federal firearms license by defining who is "engaged in the business" of dealing in firearms and ammunition. Under 18 U.S.C. 923(a), persons "engaged in the business" of dealing in firearms or ammunition must obtain a FFL. The term "engaged in the business" has not been strictly defined by regulation, although a number of federal court decisions speak to the meaning of this phrase. In the executive action, the

administration announced its intent to define who is engaged in the business of dealing in firearms and ammunition and its intent to apply specified criteria in determining whether someone is indeed engaged in that business. Some who have never been "engaged in the business" will now be considered by the administration to fall within this definition. These newly-defined industry members will have to obtain a FFL.

Yesterday's announcement does little to clarify exactly how the administration will determine who will now be considered "engaged in the business," but in conjunction with the announcement, the ATF published a **guide** entitled "Do I Need a License to Buy and Sell Firearms?" While this guide provides some criteria for a potential licensee to determine whether a FFL is required, there is still significant doubt as to the dividing between activities that must be licensed and those that do not. Moreover, both the administration's announcement and the ATF's new guide refer repeatedly to criminal penalties for selling firearms without a license, so this issue must be taken seriously and analyzed carefully.

### **An Increase in NICS Checks**

The executive action also focuses a great deal on expanding the number of transactions that will be subject to National Instant Criminal Background Check System (NICS) checks. While noting the upward trend in the number of NICS checks, the administration proposes to hire an additional 230 NICS examiners, to run NICS checks 24 hours a day, 7 days a week, and to attempt to modernize the NICS system. At the same time, the administration intends to expand the transactions that will be subject to NICS checks.

The administration's emphasis on NICS checks is undeniable, and it could be considered the centerpiece of the executive action. Industry members should take note, because it is likely that this policy emphasis will translate to field inspections, with the ATF looking closely for compliance with the requirement to run these checks properly.

### **Expanded Requirements for Reporting Lost or Stolen Firearms**

In conjunction with the administration's announcement of its executive action, the ATF issued a final rule that addresses reporting of firearms that are lost or stolen in transit. Under the new rule, when a transferor of a firearm is notified that the firearm was lost or stolen in transit, then the transferor must comply with the ATF's regulations regarding theft/loss reporting. This clarifies that the duty to report falls on the transferor, not the transferee/recipient. The transferor also must record the loss or theft on its acquisition and disposition records as a disposition, and if the firearm is later recovered, then the transferor must notify the ATF and re-enter the firearm in its A&D book. The new regulation takes effect on February 3, 2016, and a link to the final rule is **here**.

Industry members should generally take note of this new emphasis on lost and stolen firearms. The administration's comments, both in writing and orally, emphasize a concern about lost or stolen firearms ending up in criminals' hands. We can anticipate a strong emphasis by the ATF and its Industry Operations Investigators on the issue of lost or stolen firearms.

## Increased FFL Inspections

The administration also will increase inspections. The executive action announces that the forthcoming budget for fiscal year 2017 will include funding for 200 new ATF agents and investigators. While the administration has not specified how many of these positions will be Industry Operations Investigators, the emphasis on regulation of the industry is apparent. Industry members should expect and prepare for more frequent and perhaps more in-depth inspections.

## New Scrutiny of Internet Sales

The administration's written announcement of its executive action contains the following description:

ATF has established an Internet Investigations Center (IIC) staffed with federal agents, legal counsel, and investigators to track illegal online firearms trafficking and to provide actionable intelligence to agents in the field. The IIC has already identified a number of significant traffickers operating over the Internet. This work has led to prosecutions against individuals or groups using the "dark net" to traffic guns to criminals or attempting to buy firearms illegally online.

Few other details regarding the establishment of the IIC were provided, likely because this is an investigative function. This initiative appears to be aimed at activity that is plainly criminal in nature.

Despite the ICC's focus on criminal activity, industry members must be aware of and prepare for new scrutiny of internet sales. The administration's comments on its executive action emphasize strongly a desire to regulate internet commerce in firearms. As we discussed in a **recent article**, e-commerce sales are lawful and, with the right legal planning, are a good option to increase sales. However, the new scrutiny of internet sales warrants caution.

## Regulation (and Potential Elimination) of Gun Trusts

Citing the increased use of gun trusts, the President has ordered ATF to finalize a rule that will require trustees not currently subject to a background check to have one completed before buying a firearm or NFA item through a trust or corporation. "Gun trusts" have become a preferred method for acquiring and owning firearms because they provide a means of doing so without some of the red tape involved with direct purchases of NFA items, and they comply with applicable law. However, the executive action seeks to eliminate some of the ease of obtaining NFA weapons and could set up barriers that make gun trusts an undesirable option, leading to their demise. Yesterday, the ATF issued the **final rule** (see page 238 of the linked PDF), which will allow potential users of gun trusts to evaluate whether to pursue this alternative for purchasing NFA items.

## "Smart Gun" and Other Technology

The administration has pledged to invest substantial sums in research into "smart gun" technology, as well as other technologies that the President describes as promoting gun safety. This aspect of the executive action has no direct impact on current gun laws, and the details of the proposed spending are yet to be seen.

### **Additional Spending on Mental Health and Increased Reporting of Mental Health Issues to NICS**

The executive action proposes spending \$500 million to increase access to mental health care, while at the same time increasing the reporting of mental health issues to the NICS system. The details of the spending are not included in the administration's written announcement of its executive action, but two proposals to increase reporting to NICS are to require the Social Security Administration to report information in its records to NICS and to permit certain entities covered by the Health Insurance Portability and Accountability Act (HIPAA) to report mental health information to NICS.

This brief overview of the administration's announcement scratches the surface of what changes might be ahead for the industry, because the details of much of the policies are yet to be disclosed. As more information develops, we will provide additional updates with in-depth legal analysis.

## **Related People**

- Charles E. "Chuck" James, Jr. ? 804.420.6529 ? [cjames@williamsmullen.com](mailto:cjames@williamsmullen.com)
- Camden R. Webb ? 919.981.4021 ? [crwebb@williamsmullen.com](mailto:crwebb@williamsmullen.com)

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