



# Gun Control Proposals in the 113<sup>th</sup> Congress: Universal Background Checks, Gun Trafficking, and Military Style Firearms

**William J. Krouse**

Specialist in Domestic Security and Crime Policy

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## Summary

Congress has debated the efficacy and constitutionality of federal regulation of firearms and ammunition, with strong advocates arguing for and against greater gun control. The mass shooting in Newtown, CT, along with other mass shootings in Aurora, CO, and Tucson, AZ, has restarted the national gun control debate. Members of the 113<sup>th</sup> Congress could consider a range of legislative proposals, including several that President Barack Obama has announced his support for as part of his national gun violence reduction plan. The most salient of the President's legislative proposals would (1) require background checks for intrastate firearms transfers between unlicensed persons at gun shows and nearly any other venue, otherwise known as the "universal background checks" proposal; (2) increase penalties for gun trafficking; and (3) reinstate and strengthen an expired federal ban on detachable ammunition magazines of over 10-round capacity and certain "military style" firearms commonly described as "semiautomatic assault weapons," which are designed to accept such magazines. This report examines these proposals and provides an overview of federal firearms law.

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## Developments in the 113<sup>th</sup> Congress

The 113<sup>th</sup> Congress could consider several legislative proposals supported by the Administration in the wake of the Newtown, CT, tragedy. In this mass shooting, a 20-year-old male entered Sandy Hook Elementary School and shot 20 first graders and 6 adult staff members to death. He allegedly also shot his mother to death. According to press accounts, the firearms he used in the shooting included a .223 caliber Bushmaster (M16-style) semiautomatic rifle, and two semiautomatic pistols, a 10mm Glock and 9mm Sig Sauer.<sup>1</sup> These firearms were reportedly owned legally by his mother, and were registered under Connecticut state law.<sup>2</sup> When first responders entered the building, the gunman, who reportedly suffered from profound mental incapacity, shot himself to death with the 10mm Glock pistol.<sup>3</sup> According to a Connecticut State Medical Examiner, the shooter mostly used the Bushmaster rifle, reloading it with detachable 30-round magazines several times, to murder the children and staff at Sandy Hook.<sup>4</sup> “Dozens and dozens” of spent .223 cartridges were found at the crime scene, along with additional, unused magazines filled with ammunition.<sup>5</sup>

On December 20, 2012, President Barack Obama established a Task Force on Gun Violence under the leadership of Vice President Joseph R. Biden. On January 16, 2013, the Administration released a plan to reduce gun violence that includes 18 legislative proposals and 23 executive actions.<sup>6</sup> For the purposes of this report, the most salient legislative proposals include the following:

- require background checks for private firearms transfers at gun shows and any other venue, or “universal background checks”;
- strengthen and reinstate a ban of semiautomatic assault weapons and magazines of over 10 rounds (cartridges);
- increase penalties for gun trafficking;
- re-examine and strengthen restrictions on armor piercing ammunition;
- Senate confirmation of Minnesota U.S. Attorney, B. Todd Jones, as Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); and
- repeal an ATF appropriations rider and strengthen that agency’s authority to deny importation permits for 50-year-old military surplus firearms that fall under the regulatory definition of “curio or relic.”<sup>7</sup>

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<sup>1</sup> Emily Flitter and Dan Burns, “Connecticut Gunman Had Hundreds of Rounds; Obama to Console Newtown,” *Reuters*, December 16, 2012.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Paul Duggan, David A. Fahrenthold, and Steve Vogel, “Obama Speaks at Memorial in Shaken Town,” *Washington Post*, December 17, 2012, p. A1 and A11.

<sup>5</sup> *Ibid.*

<sup>6</sup> White House, *Now is the Time: The President’s Plan to Protect our Children and our Communities by Reducing Gun Violence*, January 16, 2013, <http://www.wh.gov/now-is-the-time>.

<sup>7</sup> For FY1996 and every fiscal year after, Congress has included a limitation on the ATF salaries and expenses appropriation that prohibits that agency of changing the regulatory definition of “curios or relics.” This provision was (continued...)

Other legislative proposals primarily consist of requests for additional funding to

- maintain 15,000 police officers on the streets of the United States, otherwise known as the COPS (Community Oriented Policy Services) program<sup>8</sup> (\$4 billion);
- train state, local, tribal, and territorial law enforcement officers in responding to shootings (\$14 million);
- allow the Centers for Disease Control (CDC) to conduct additional research on the possible nexus between video games, media images, and violence (\$10 million);
- expand the National Violent Death Reporting System (NVDRS)<sup>9</sup> from 18 to all 50 states;
- improve incentives to encourage states to provide the FBI with prohibiting records on individuals who fall under the definition of “mental defective” (\$50 million); and
- improve school security (\$230 million).

The Administration’s 23 executive actions, under the plan, range from directing the Attorney General to work with U.S. Attorneys to ensure that firearms-related criminal cases are prosecuted to directing the CDC to research the causes and prevention of gun violence.<sup>10</sup>

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in response to an ATF proposal to amend the definition of “curio or relic,” because of concerns about the volume of surplus military firearms that could be imported into the United States. ATF has consistently opposed the importation of certain World War II era, surplus military firearms.

<sup>8</sup> For further information on COPS, see CRS Report R33308, *Community Oriented Policing Services (COPS): Background and Funding*, by Nathan James.

<sup>9</sup> For FY2002, Congress appropriated funding for CDC to establish the NVDRS, a system that has been built upon a pilot program sponsored by private foundations and coordinated by the Harvard School of Public Health’s Injury Control Research Center.

The NVDRS aims to create a comprehensive individual-level data set in each state that links data from medical examiners and coroners, police departments, death certificates, and crime labs on each death—resulting from violence (homicide, suicide, unintentional firearms-related deaths, and undetermined causes).

*See* National Research Council, *Firearms and Violence: A Critical Review* (Washington, DC: 2005), p. 33.

<sup>10</sup> For fiscal years 1997-2012, Congress has included a provision in the Departments of Health and Human Services, Labor, and Education appropriations that has prohibited that agency from spending any appropriated funding to “advocate or promote gun control.” This rider is known as the “Dickey amendment,” for the Member, Representative Jay Dickey, who attempted to redirect \$2.6 million away from a CDC firearms injury program during committee markup of the FY1997 Departments of Labor, Health and Human Services (HHS), and Education Appropriations bill (H.R.3755). While the Dickey amendment was rebuffed (6-8), the committee Chairman, Representative Robert L. Livingston, inserted into the reported bill the following limitation on the CDC salaries and expenses appropriation language: “That none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.” Report language noted further:

The bill [H.R. 3755] contains a limitation to prohibit the National Center for Injury Prevention and Control at the Centers for Disease for Disease Control from engaging in any activities to advocate or promote gun control. The CDC may need to collect data on the incidence of gun related violence, but the Committee does not believe that it is the role of the CDC to advocate or promote policies to advance gun control initiatives, or to discourage responsible private gun ownership. The

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This report does not focus on the President’s plan in its entirety. Rather, this report provides an overview of federal firearms laws as a basis for examining the three most salient legislative proposals included in the President’s plan. Those proposals would (1) require background checks for intrastate firearms transfers between unlicensed persons at gun shows and nearly any other venue, otherwise known as the “universal background checks” proposal; (2) increase penalties for gun trafficking; and (3) reinstate and strengthen an expired federal ban on detachable ammunition magazines of over 10-round capacity and certain “military style” firearms commonly described as “semiautomatic assault weapons,” which are designed to accept such magazines.

## **Federal Regulation of Firearms: Background**

Two major federal statutes regulate the commerce in and possession of firearms: the National Firearms Act of 1934 (26 U.S.C. §5801 et seq.) and the Gun Control Act of 1968, as amended (18 U.S.C. Chapter 44, §921 et seq.). Supplementing federal law, many state firearms laws are stricter than federal law. For example, some states require permits to obtain firearms and impose a waiting period for firearms transfers. Other states are less restrictive, but state law cannot preempt federal law. Federal law serves as the minimum standard in the United States.

### **The National Firearms Act (NFA)**

The NFA was originally designed to make it difficult to obtain types of firearms perceived to be especially lethal or to be the chosen weapons of “gangsters,” most notably machine guns and short-barreled long guns. This law also regulates firearms, other than pistols and revolvers, which can be concealed on a person (e.g., pen, cane, and belt buckle guns). It taxes all aspects of the manufacture and distribution of such weapons, and it compels the disclosure (through registration with the Attorney General) of the production and distribution system from manufacturer to buyer.

Machine guns—or fully automatic firearms—have been banned from private possession since 1986, except for those legally owned and registered with the Secretary of the Treasury as of May 19, 1986.<sup>11</sup> According to one estimate, as of November 2007, there were approximately 182,600 machine guns available for transfer to civilians in the United States based upon an audit of the ATF-maintained National Firearms Registry and Transfer Record (NFRTR).<sup>12</sup> Under the NFA, a machine gun is defined as:

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Committee expects research in this area to be objective and grants to be awarded through an impartial peer review process. (H.Rept. 104-659, p. 49.)

This limitation was first enacted as part of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208; September 30, 1996; 110 Stat. 3009, 3009-244). For FY2012, Congress expanded this limitation so that it applies to all HHS funding in addition CDC in the Consolidated Appropriations Act, 2012 (P.L. 112-74; November 18, 2012; 125 Stat. 786, 1086 (Section 218), 1110 (Subsection 501(c))). The Administration’s plan maintains that research on the causes of gun violence does not constitute “advocacy,” and such research would not be in violation of the Dickey amendment. For further information, please contact Sara Lister at 7-7320.

<sup>11</sup> P.L. 99-308, §102(9); 100 Stat. 449, 452-453; codified at 18 U.S.C §922(o)(1).

<sup>12</sup> John Brown, “182,619—Is That All There Is,” *Small Arms Review*, vol. 13, no. 9, June 2010, p. 22.

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term also includes the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.<sup>13</sup>

To deal in NFA firearms, a person is required to be a federally licensed gun dealer (federal firearms licensee, or “FFL”) under the Gun Control Act of 1968 (described below) and also be a special occupational taxpayer (SOT) under the NFA. Class I SOTs are importers of NFA firearms; Class II SOTs are manufacturers of NFA firearms; and Class III SOTs are dealers. NFA firearms are often referred to as Class III weapons, for Class III dealers. The NFA imposes a \$200 manufacturing tax and a \$200 transfer tax each time a firearm is transferred from an unlicensed individual.<sup>14</sup> For non-tax exempt transfers, ATF places a tax stamp on the tax paid transfer document upon the transfer’s approval. The transferee may not take possession of the firearm until he holds the approved transfer document. Private persons, who are not otherwise prohibited by law, may acquire an NFA firearm in one of three ways:

- a registered owner of an NFA firearm may apply for ATF approval to transfer the firearm to another person residing in the same state or to a FFL in another state;
- an individual may apply to ATF for approval to make and register an NFA firearm (except machine-gun); or
- an individual may inherit a lawfully registered NFA firearm.

It is a felony to receive, possess, or transfer an unregistered NFA firearm. Such offenses are punishable by a fine of up to \$250,000, imprisonment for up to 10 years, and forfeiture of the firearm and any vessel, vehicle, or aircraft used to conceal or convey the firearm.<sup>15</sup> To the extent it can be known, legally registered NFA machine guns are rarely, if ever, used in crime.

## **The Gun Control Act of 1968 (GCA)**

As stated in the GCA, the purpose of federal firearms regulation is to assist federal, state, and local law enforcement in the ongoing effort to reduce crime and violence. In the same act, however, Congress also stated that the intent of the law is not to place any undue or unnecessary burdens on law-abiding citizens in regard to the lawful acquisition, possession, or use of firearms for hunting, trapshooting, target shooting, personal protection, or any other lawful activity. Under the GCA, the term “firearm” means:

any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (b) the frame or receiver of any

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<sup>13</sup> 26 U.S.C. §5845(b).

<sup>14</sup> Transfers of NFA-covered firearms incur a tax of \$200 except for those classified as “any other weapon,” which are taxed at a reduced \$5 rate. Certain NFA firearm transfers are tax-exempt. They include transfers to a lawful heir from an estate; transfers between federal firearms licensees, who are also SOTs; and transfers of “unserviceable firearms.”

<sup>15</sup> 26 U.S.C §5861(d) and (j); 26 U.S.C §5872; 49 U.S.C §§781-788.

such weapon; (c) any firearm muffler or firearm silencer; or (d) destructive device. Such term does not include an antique firearm.<sup>16</sup>

The GCA, as amended, contains the principal federal restrictions on domestic commerce in firearms and ammunition.

The statute requires all persons manufacturing, importing, or selling firearms *as a business* to be federally licensed; prohibits the interstate mail-order sale of all firearms; prohibits interstate sale of handguns generally and sets forth categories of persons to whom firearms or ammunition may not be sold, such as persons under a specified age or with criminal records; authorizes the Attorney General to prohibit the importation of non-sporting firearms; requires that dealers maintain records of all commercial gun sales; and establishes special penalties for the use of a firearm in the perpetration of a federal drug trafficking offense or crime of violence.

As amended by the Brady Handgun Violence Prevention Act, 1993 (P.L. 103-159), the GCA requires background checks be completed for all unlicensed persons seeking to obtain firearms from federal firearms licensees. Private transactions between persons “not engaged in the business” are not covered by the recordkeeping or the background check provisions of the GCA. These transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances.

### **Firearms Transfer and Possession Eligibility**

Under current law, there are nine classes of persons prohibited from shipping, transporting, receiving, or possessing firearms or ammunition:

- persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- fugitives from justice;
- unlawful users or addicts of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802));
- persons adjudicated as “mental defective” or committed to mental institutions;<sup>17</sup>
- unauthorized immigrants and nonimmigrant visitors (with exceptions in the latter case, which have changed—effective July 9, 2012—as described below);
- persons dishonorably discharged from the U.S. Armed Forces;

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<sup>16</sup> 18 USC §921(a)(3).

<sup>17</sup> Under the enacted NICS improvement amendments, VA beneficiaries who have been determined to be mental defectives could appeal for administrative relief and possibly have their gun rights restored if they could demonstrate that they were no longer afflicted by a disqualifying condition. Under 27 C.F.R. Section 478.11, the term “adjudicated as a mental defective” is defined to include

a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to himself or others, or (2) lacks the mental capacity to manage his own affairs. The term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).

This definition was promulgated by an ATF final rule (*Federal Register*, vol. 62, no. 124, June 27, 1997, p. 34634).



- persons who have renounced their U.S. citizenship;
- persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner; and
- persons convicted of a misdemeanor crime of domestic violence.<sup>18</sup>

In addition, there is a 10<sup>th</sup> class of persons prohibited from shipping, transporting, or receiving firearms or ammunition:

- persons under indictment in any court of a crime punishable by imprisonment for a term exceeding one year.<sup>19</sup>

It also unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any of the prohibited persons enumerated above, if the transferor (seller) has reasonable cause to believe that the transferee (buyer) is prohibited from receiving those items.<sup>20</sup>

### **Age Eligibility**

Federal firearms licensees are prohibited from transferring a long gun or long gun ammunition to anyone less than 18 years of age, or a handgun or handgun ammunition to anyone less than 21 years of age.<sup>21</sup> Since 1994, moreover, it has been a federal offense for any unlicensed person to transfer a handgun or handgun ammunition to anyone less than 18 years-of age. It has also been illegal for anyone under 18 years of age to possess a handgun or handgun ammunition (there are exceptions to this law related to employment, ranching, farming, target practice, and hunting).<sup>22</sup>

### **Licensed Dealers and Firearms Transfers**

Persons who are federally licensed to be engaged in the business of manufacturing, importing, or selling firearms are known as “federal firearms licensees (FFLs).”<sup>23</sup> Under current law, FFLs may ship, transport, and receive firearms that have moved in interstate and foreign commerce. FFLs are currently required to verify with the FBI through a background check that non-licensed persons are eligible to possess a firearm before subsequently transferring a firearm to them. FFLs must also verify the identity of non-licensed transferees by inspecting a government-issued identity document (e.g., a driver’s license).

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<sup>18</sup> 18 U.S.C. §922(g).

<sup>19</sup> 18 U.S.C. §922(n).

<sup>20</sup> 18 U.S.C. §922(d).

<sup>21</sup> 18 U.S.C. §922(b)(1).

<sup>22</sup> 18 U.S.C. §922(x).

<sup>23</sup> 18 U.S.C. §923(a)(1)(A).

FFLs may engage in interstate transfers of firearms among themselves without conducting background checks. Licensees may transfer long guns (rifles and shotguns) to out-of-state residents, as long as the transactions are face-to-face and not knowingly in violation of the laws of the state in which the unlicensed transferees reside. FFLs, however, may *not* transfer handguns to unlicensed out-of-state residents.<sup>24</sup> Since 1986, there have been no similar restrictions on the interstate transfer of ammunition. Furthermore, a federal firearms license is not required to sell ammunition; however, such a license is required to either manufacture or import ammunition.

Also, FFLs are required to submit “multiple sales reports” to the Attorney General if any person purchases two or more handguns within five consecutive business days. As described below, FFLs are required to maintain records on all acquisitions and dispositions of firearms. They are obligated to respond to ATF agents requesting firearms tracing information within 24 hours. Under certain circumstances, ATF agents may inspect, without search warrants, their business premises, inventory, and gun records.

### **Private Firearms Transfers**

Unlicensed persons are generally prohibited from acquiring firearms from out-of-state sources (except for long guns acquired from FFLs under the conditions described above).<sup>25</sup> Unlicensed persons are also prohibited from transferring firearms to anyone who they have reasonable cause to believe are not residents of the state in which the transaction occurs.<sup>26</sup> In addition, since 1986 it has been a federal offense for non-licensees to knowingly transfer a firearm or ammunition to prohibited persons.<sup>27</sup> It is also notable that firearms or ammunition transfers initiated through the Internet are subject to the same federal laws as transfers initiated in any other manner.<sup>28</sup>

### **Universal Background Checks**

As noted above, the President’s plan to reduce gun violence includes a legislative proposal to require “universal background checks.” Under current law, intrastate transfers between unlicensed persons, who are not “engaged in the business” of dealing in firearms “as a regular course of ... business with the principal objective of livelihood and profit,” are not covered by the recordkeeping or the background check provisions of the GCA. Nevertheless, such private transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances.

Proponents of greater gun control view the fact that unlicensed persons engaging in intrastate firearms transfers are not subject to the recordkeeping and background check requirements of the GCA as a “loophole” in the law, particularly within the context of gun shows. This circumstance arguably flowed from two developments. One, in 1986, Congress amended the GCA to allow FFLs to transfer firearms to unlicensed persons at gun shows located within the state of their business; however, prohibitions on interstate transfers still applied. Two, in 1994, Congress passed the “Brady Act” and amended the GCA to require background checks be completed for all

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<sup>24</sup> 18 U.S.C. §922(b)(3).

<sup>25</sup> 18 U.S.C. §923(a)(3).

<sup>26</sup> 18 U.S.C. §923(a)(5).

<sup>27</sup> 18 U.S.C. §922(d).

<sup>28</sup> For further information, see CRS Report R42687, *Internet Firearm and Ammunition Sales*, by Vivian S. Chu.

unlicensed persons seeking to obtain firearms from FFLs. As described above, in November 1998, the FBI brought NICS online to facilitate firearms background checks whenever an FFL transfers a firearm to an unlicensed person. However, federal law does not require background checks for intrastate (in-state) firearms transfers between unlicensed persons.

In the 113<sup>th</sup> Congress, several proposals have been introduced that would require background checks for private, intrastate firearms transfers between unlicensed persons at gun shows or any other venue. These proposals would require an unlicensed transferor (seller) to engage the services of an FFL, who would conduct a NICS check on the unlicensed transferee (buyer). FFLs facilitating such transfers would also be required to maintain a record of all transfers in a bound volume, as well as individual transfers on a form prescribed by the Attorney General. For example, Senator Frank Lautenberg and Representative Carolyn McCarthy have introduced similar but separate proposals to require background checks for firearms transfers between unlicensed persons at gun shows (S. 22 and H.R. 141). Representative McCarthy has included a provision that would require background checks for transfers between unlicensed persons at any venue in the Fix Gun Checks Act (H.R. 137).

## Gun Trafficking

Criminal “gun trafficking” essentially entails the movement or diversion of firearms from legal to illegal markets.<sup>29</sup> Therefore, it follows that the entire GCA is arguably a statutory framework designed to combat gun trafficking domestically, particularly interstate gun trafficking.<sup>30</sup> ATF has developed a nationwide strategy to reduce firearms trafficking and violent crime by preventing convicted felons, drug traffickers, and juvenile gang members from acquiring firearms from gun traffickers.<sup>31</sup> Gun trafficking cases include, but are not limited to, the following activities:

- straw purchasers or straw purchasing rings;<sup>32</sup>

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<sup>29</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Project Gunrunner: The Southwest Border Initiative*, ATF P 3317.6, March 2009, available at <http://www.atf.gov/publications/download/p/atf-p-3317-6.pdf>.

It is noteworthy that in 2006 the U.S. Sentencing Commission amended its guidelines to include the following definition: “firearms trafficking” occurred if an offender, “regardless of whether anything of value was exchanged,” engaged in the following activities: (1) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and (2) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual (a) whose possession or receipt of the firearm would be unlawful; or (b) who intended to use or dispose of the firearm unlawfully. See United States Sentencing Commission, *Guidelines Manual*, §2K2.1(b)(5) (November 2006).

<sup>30</sup> With regard to Southwest Border gun trafficking, it is significant to note that the GCA does not include any provisions that directly address smuggling firearms out of the United States, across international boundaries, to countries like Mexico. However, the Arms Export Control Act (AECA; 22 U.S.C. §2778 et seq.) does include provisions that directly address such cross-border illegal arms trafficking.

<sup>31</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Field Operations, *Project Gunrunner: A Cartel Focused Strategy*, September 2010.

<sup>32</sup> As described in greater detail below, a “straw purchase” occurs when an individual poses as the actual transferee, but he is actually acquiring the firearm for another person. In effect, he serves as an illegal middleman. As part of any firearms transfer from a gun dealer to a private person, current law requires them both to fill out jointly an ATF Form 4473. In addition, the federally licensed gun dealer is required to verify the purchaser’s name, address, date of birth, and other information by examining a government-issued piece of identification, most often a driver’s license. Among other things, the purchaser attests on the ATF Form 4473 that he is not a prohibited person, and that he is the “actual (continued...)”

- trafficking in firearms by corrupt federally licensed gun dealers;
- trafficking in firearms by unlicensed dealers (i.e., persons who deal in firearms illegally as the principal source of their livelihood);
- trafficking in stolen firearms; and
- trafficking of secondhand firearms acquired from unlicensed persons at gun shows, flea markets, and other private venues.<sup>33</sup>

Unlike other forms of contraband, almost all illegal firearms used criminally in the United States were diverted at some point from legal channels of commerce.<sup>34</sup> ATF works to reduce firearms-related crime with two approaches, industry regulation and criminal investigation.

### ATF Regulation

ATF regulates the U.S. firearms industry by inspecting FFLs to monitor their compliance with the GCA and NFA, and to prevent the diversion of firearms from legal to illegal channels of commerce. Despite its crime-fighting mission, ATF's business relationships with the firearms industry and larger gun-owning community have been a perennial source of tension, which from time to time has been the subject of congressional oversight.<sup>35</sup> Nevertheless, under current law, ATF Special Agents (SAs)<sup>36</sup> and Industry Operations Investigators (IOIs)<sup>37</sup> are authorized to inspect or examine the inventory and records of an FFL *without search warrants* under three scenarios:<sup>38</sup>

- in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL;

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transferee/buyer.” Hence, straw purchases are known as “lying and buying for the other guy.” Straw purchases are illegal and can be prosecuted under two provisions of the Gun Control Act of 1968, as amended (18 U.S.C. 922(a)(6) and 18 U.S.C. §924(a)(1)(A)). It is also illegal for any person to sponsor a straw purchase, because it is a federal offense for any person to aid, abet, counsel, command, or solicit a criminal act (18 U.S.C. §2); or engage in a conspiracy to defraud the United States (18 U.S.C. §371). It is also illegal to smuggle firearms out of the United States (18 U.S.C. §554).

<sup>33</sup> U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Following the Gun: Enforcing Federal Laws against Firearms Traffickers*, June 2000, p. 11.

<sup>34</sup> Greg Ridgeway, Glenn L. Pierce, and Anthony A. Braga et al., *Strategies for Disrupting Illegal Firearms Markets: A Case Study of Los Angeles*, RAND Corporation, 2008, p. 1.

<sup>35</sup> For example, in the 109<sup>th</sup> Congress, the House Judiciary Crime subcommittee held two oversight hearings examining ATF firearms enforcement operations at gun shows in Richmond, VA, in 2005. ATF agents reportedly provided state and local law enforcement officers with confidential information from background check forms (ATF Form 4473s), so that officers could perform residency checks on persons who had otherwise legally purchased firearms at those gun shows. Questions were also raised as to whether ATF agents had profiled gun purchasers at those gun shows on the basis of race, ethnicity, and gender. See U.S. Congress, House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *Oversight Hearing on the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) Parts I & II: Gun Show Enforcement*, February 15 and 28, 2006. Also see Department of Justice, Office of the Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' Investigative Operations at Gun Shows, I-2007-007*, June 2007.

<sup>36</sup> For FY2012, Congress provided ATF with funding for 2,539 SA positions.

<sup>37</sup> For FY2012, Congress provided ATF with funding for 834 IOI positions.

<sup>38</sup> 18 U.S.C. §923(g)(1)(B).

- to ensure compliance with the record keeping requirements of the GCA—not more than once during any 12-month period, or at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or
- when such an inspection or examination is required for determining the disposition of one or more firearms in the course of a criminal investigation.

By inspecting the firearms transfer records that FFLs are required by law to maintain, ATF SAs and IOIs are able to trace crime guns from their domestic manufacturer or importer to the first retail dealer that sold those firearms to persons in the general public, generating vital leads in homicide and other criminal investigations. In addition, by inspecting those records, ATF investigators sometimes discover evidence of corrupt FFLs dealing in firearms “off the books,” straw purchases, and other patterns of illegal behavior.

### **Anatomy of a Firearms Straw Purchase**

A “straw purchase” occurs when an individual poses as the actual transferee, but he is actually acquiring the firearm for another person. In effect, he serves as an illegal middleman. As part of any firearms transfer from an FFL to a private person, the GCA requires them to fill out jointly an ATF Form 4473. In addition, the FFL is required to verify the purchaser’s name, address, date of birth, and other information by examining a government-issued piece of identification, most often a driver’s license. Among other things, the purchaser attests on the ATF Form 4473 that he is not a prohibited person, and that he is the “actual transferee/buyer.”<sup>39</sup> Hence, straw purchases are known as “lying and buying for the other guy.” Straw purchases are illegal under two provisions of the GCA.

If the purchaser makes any false statement to a FFL with respect to any fact material to the lawfulness of a prospective firearms transfer, it is a federal offense punishable under 18 U.S.C. 922(a)(6). This provision also captures misrepresentations such as presenting false identity documents. Violations are punishable by up to 10 years’ imprisonment.<sup>40</sup>

It is also illegal for any person knowingly to make any false statement with respect to the records that FFLs are required to maintain under 18 U.S.C. §924(a)(1)(A). This provision, however, also captures misrepresentations related to licensure and other benefits under the GCA. Violations are punishable by up to five years’ imprisonment.<sup>41</sup>

Straw purchases, however, are not easily detected, because their illegality only becomes apparent when the straw purchaser’s true intent is revealed by a subsequent transfer to the actual buyer (third party). In many cases, the actual buyer may be a prohibited person, who would not pass a background check. Under such a scenario, if the straw purchaser knew or had reasonable cause to know the actual transferee was a prohibited person, he would also be in violation of 18 U.S.C. §922(d), for which the penalty is up to 10 years’ imprisonment.<sup>42</sup> It would also be a violation for

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<sup>39</sup> On the ATF Form 4473, question 11a reads: “Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.”

<sup>40</sup> 18 U.S.C. §924(a)(2).

<sup>41</sup> 18 U.S.C. §924(a)(1)(D).

<sup>42</sup> 18 U.S.C. §924(a)(2).

the prohibited person to possess or receive the firearm under 18 U.S.C. §922(g), for which the penalty is also up to 10 years' imprisonment.<sup>43</sup>

Alternatively, the actual buyer may not be a prohibited person, but may be seeking to acquire firearms without any paper trail linking him to the acquisition of the firearm. Under such a scenario, however, the straw purchase and subsequent illegal transfer would be even less apparent for several reasons. Under federal law, it is *legal* for an unlicensed, private person to purchase firearms and then resell them or give them away, as long as the

- transferees *are not* prohibited or underage persons;
- transferors *do not* deal in firearms in a volume that would require licensing; and
- transfers are *intrastate*, as generally only federally licensed gun dealers can legally transfer firearms *interstate*.

Hence, individuals may buy several firearms at a time with the intention of giving those firearms away as presents to anyone, as long as they do not present those firearms to persons who are underage, out-of-state residents, or prohibited persons. They may also buy firearms and, then, sell those firearms at any time, as long as selling firearms is not the principal objective of their livelihood and profit, in which case they would be required to be federally licensed to deal in firearms. Furthermore, no federal background checks are required for recipients of subsequent intrastate firearms transfers.

On the other hand, if the suspected straw purchaser were observed departing the licensed gun dealer's place of business and traveling immediately to another locale, where he transferred the firearm(s) to another person, there would be a reasonable suspicion that he was a straw purchaser. However, the actual buyer would not have committed a crime unless it could be proven that he had sponsored the straw purchase.<sup>44</sup> Usually, such illegal arrangements become clear when the straw purchaser is interviewed by agents and admits to having bought the firearms for the third party, non-prohibited person. Moreover, depending on the time that elapses between the initial straw purchases and subsequent transfers to the actual buyer (third party), the illegality of the transfers may not become apparent until the actual buyer's true intent is revealed, when he either transports those firearms across state lines to be sold or bartered, attempts to smuggle them across an international border, or engages in some other illegal act.

Sometimes, the behavior of the prospective transferee (straw purchaser) may raise reasonable suspicions. For example, during a controversial ATF Phoenix-based investigation known as "Operation Fast and Furious," several of the individuals under indictment made multiple purchases from the same FFL of multiple semiautomatic firearms. Raising suspicions further, they paid for these firearms with thousands of dollars in cash. Indeed, FFLs contacted ATF about these suspicious transfers, prompting the investigation. They did so, in part, because they realized that these firearms might be traced back to their businesses and they probably wanted to avoid any negative attention that those traces might bring back on them. It is notable that if an FFL believes a firearms transfer to be suspicious, he may choose not to sell those firearms to the individuals in question. If he should proceed with the transfer, however, as long as he had conducted the required criminal background check on the prospective buyer, and he and the

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<sup>43</sup> Ibid.

<sup>44</sup> It is unlawful for any person to aid, abet, counsel, command, or solicit a criminal act (18 U.S.C. §2).

prospective buyer had filled out the proper paperwork, his obligations under federal law would have been fulfilled.

In summation, with regard to interstate transfers, it is unlawful for any person who is not federally licensed to deal in firearms to transport or receive a firearm into his own state of residence that was obtained in another state.<sup>45</sup> In addition, it is unlawful for any person who is not federally licensed to deal in firearms to deliver a firearm to another unlicensed person who resides in a state other than the transferor's state of residence.<sup>46</sup> Violations of either provision are punishable by a fine and/or not more than five years' imprisonment.<sup>47</sup> It is also unlawful to smuggle firearms, or any other merchandise contrary to U.S. law from the United States.<sup>48</sup> Violations are punishable by a fine and/or not more than 10 years' imprisonment.<sup>49</sup>

## **Gun Trafficking Proposals**

The President's plan to reduce gun violence calls for increased penalties for gun trafficking. Although the Administration has not transmitted any specific proposal or language to Congress, several bills that address gun trafficking and/or straw purchases have been reintroduced in the 113<sup>th</sup> Congress.

### **Stop Illegal Trafficking in Firearms Act of 2013 (S. 54)**

On January 22, 2013, Senator Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary, introduced a proposal (S. 54) that would create a specific straw purchasing provision that would prohibit persons from purchasing firearms on behalf of, or with the intent to transfer the firearm, to another person. Offenses under this proposed provision would be punishable by up to 20 years of imprisonment, or up to 30 years if the transferor reasonably believes the recipient intends to use the firearm to commit an act of violence. The bill would also make it unlawful for a transferor to dispose of a firearm to a person (1) who he reasonably believes is prohibited under state law, (2) who intends to transfer a firearm or ammunition to a prohibited person, or (3) who intends to transfer the firearm in furtherance of a crime of violence, drug trafficking, or arms smuggling. Exceptions would be provided under the bill for gifts and winners of prizes or auction.

### **Gun Trafficking Prevention Act of 2013 (S. 179/H.R. 452)**

On February 12, 2013, Senator Kirsten E. Gillibrand introduced a proposal (S. 179) that would amend the GCA to establish a standalone federal "trafficking in firearms" offense under two provisions. The first provision would make it unlawful for any person to receive, transfer, or otherwise dispose of two or more firearms that have been shipped or transported in interstate or foreign commerce (regardless of whether anything of value is exchanged), while *knowing, or having reasonable cause to believe*, that one or more of those firearms would be transferred

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<sup>45</sup> 18 U.S.C. §922(a)(3).

<sup>46</sup> 18 U.S.C. §922(a)(5).

<sup>47</sup> 18 U.S.C. §924 (a)(1)(D).

<sup>48</sup> 18 U.S.C. §554.

<sup>49</sup> *Ibid.*

subsequently to another person whose receipt of a firearm would be unlawful, or who intends to or will use, carry or possess, or dispose of the firearm unlawfully. The second provision would make it unlawful for any person knowingly to direct, promote, or facilitate such conduct. Violations of either provision would be punishable by a fine and/or not more than 20 years of imprisonment. Moreover, it would provide that any person who acts in the capacity of an organizer, a supervisory position, or any other management position in concert with five or more other persons would be subject to not more than 25 years of imprisonment. In addition, S. 179 would make it unlawful to conspire to violate the first provision, and would make such a conspiracy punishable by a fine and/or not more than 10 years of imprisonment. Exception would be provided under the bill for transfers of gifts or by bequest. Representative Carolyn B. Maloney has introduced a similar bill (H.R. 452).

### **Straw Purchaser Penalty Enhancement Act (H.R. 404)**

On January 22, 2013, Representative Adam Schiff reintroduced a proposal (H.R. 404) that would create a two-year mandatory minimum sentence for straw purchasing. This bill would amend the GCA to create a mandatory minimum sentence of two years of imprisonment for any person who makes a false statement in violation of either 18 U.S.C. §§922(a)(6) or 924(a)(1)(A) in the firearms transfer records (ATF Form 4473) that FFLs are required to maintain under current law, if the transferee

- knows or has reason to believe that the false statement will further the transfer of two or more firearms to a prohibited person; and
- has the intent to conceal the identity of the prohibited person to whom the firearm is to be transferred.

### **Detectives Nemorin and Andrews Anti-Gun Trafficking Act of 2013 (H.R. 722)**

On February 14, 2013, Representative Peter T. King introduced a proposal (H.R. 722) that would also amend the GCA to create a standalone federal “trafficking in firearms” offense punishable by a fine and/or imprisonment of not more than 20 years for committing certain existing offenses under the GCA under one of two sets of conditions. The first set of conditions would be the offering for sale, transfer, or barter of two or more handguns, semiautomatic assault weapons,<sup>50</sup> short-barreled shotguns, short-barreled rifles, or machine guns, of which at least one was transported, received, or possessed by that person and stolen or had the importer’s or manufacturer’s serial number removed. The second set of conditions would be the offering for sale, transfer, or barter of two or more handguns, semiautomatic assault weapons, short-barreled shotguns, short-barreled rifles, or machine guns, of which at least one was offered by sale, transfer, or barter to another who is either prohibited by federal or state law from possessing a firearm, not at least 18 years of age, is in a school zone, or is not a resident of the state in which he has attempted to acquire the firearms.

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<sup>50</sup> It is notable that a statutory definition for “semiautomatic assault weapon” no longer exists. The 1994 Semiautomatic Assault Weapons (SAW) Ban, which expired in 2004, had defined, for example, a rifle as a semiautomatic assault weapon if it was able to accept a detachable magazine and included two or more of the following five characteristics: (1) a folding or telescopic scope, (2) a pistol grip, (3) a bayonet mount, (4) a muzzle flash suppressor or threaded barrel capable of accepting such a suppressor, or (5) a grenade launcher. (Former 18 U.S.C. §921(a)(30)). Similar definitions existed for semiautomatic pistols and shotguns.



If someone committed one of the offenses already punishable by the GCA,<sup>51</sup> each of which carries its own penalty, under either of these conditions, such a person could be prosecuted under this separate gun trafficking crime and face a fine and/or imprisonment of not more than 20 years. This bill is silent as to whether the sentences for the proposed “gun trafficking” crime and the individual predicate GCA offenses, if a person was prosecuted under both provisions, would be served consecutively or concurrently.

## **Military Style Firearms**

Under the Violent Crime Control and Law Enforcement Act of 1994, Congress banned for 10 years the possession, transfer, or further domestic manufacture of semiautomatic assault weapons (SAWs) and large-capacity ammunition feeding devices (LCAFDs) that hold more than 10 rounds that were not legally owned or available prior to the date of enactment (September 13, 1994). The SAW ban prohibited the further manufacture for, and transfer to, private persons certain firearms that (1) were listed by make and model as SAWs, or (2) met a SAW “military-style” features test for rifles, pistols, and handguns. Semiautomatic assault weapons and LCAFDs that were legally owned prior to the ban were grandfathered, meaning they were not restricted and remained available for transfer under applicable federal and state laws. The SAW-LCAFD ban expired on September 13, 2004.

Senator Lautenberg and Representative McCarthy have introduced the Large Capacity Ammunition Feeding Device Act (S. 33/H.R. 138), a bill that would prohibit the manufacture or importation of detachable magazines of over 10-round capacity. While this proposal would grandfather existing magazines, it would also make those grandfathered magazines non-transferable, meaning that those magazines could not be sold or traded and would become contraband upon the owner’s death. This bill would require that any newly produced magazines, or large-capacity ammunition feeding devices, be identified by a serial number that clearly shows that the device was manufactured after enactment.

Senator Dianne Feinstein and Representative McCarthy have introduced similar proposals (S. 150 and H.R. 437), both titled the Assault Weapons Ban of 2013. These similar proposals would build upon and modify the expired federal ban. These proposals, like S. 33/H.R. 138, would ban ammunition magazines with a greater than 10-round capacity and would grandfather existing

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<sup>51</sup> The GCA offenses in title 18 that would have been implicated in this new gun trafficking crime were (1) §922(a)(1)(A), unlawful to willfully engage in business of dealing firearms without a license; (2) §922(a)(3), unlawful for non-licensee to willfully transport or receive a firearm obtained in another state into his state of residence; (3) §922(a)(6), unlawful to knowingly make a materially false statement to a FFL; (4) §922(b)(2), unlawful for an FFL to willfully deliver a firearm to a person where the purchase or possession would violate state law; (5) §922(b)(3), unlawful for an FFL to willfully deliver a firearm to a person residing in a state other than the FFL’s; (6) §922(b)(5), unlawful for an FFL to willfully dispose of a firearm without making entries required by law; (7) §922(d), unlawful for any person to knowingly dispose of a firearm to a prohibited person; (8) §922(g), unlawful for any prohibited person to knowingly receive or possess firearm or ammunition; (9) §922(i), unlawful for any person to knowingly transport or ship a stolen firearm; (10) §922(j), unlawful for any person to knowingly receive, possess, conceal, store, barter, sell, or dispose of a stolen firearm; (11) §922(k), unlawful for any person to knowingly transport, ship, or receive a firearm that has an obliterated or altered serial number; (12) §922(m), unlawful for an FFL to knowingly make a false entry in or improperly maintain records required by law; (13) §922(n), unlawful for any person to willfully ship or receive firearms or ammunition if under indictment for felony; (14) §924(c), unlawful for any person to use or carry a firearm during or in relation to a federal crime of violence or drug trafficking crime; (15) §924(h), unlawful for any person to transfer a firearm knowing it will be used to commit a crime of violence or a drug trafficking crime.

magazines, as did the expired federal ban, but they would also ban any further transfer of those magazines. For semiautomatic firearms, these proposals would establish separate “one military feature” tests for rifles, pistols, and shotguns that are in many ways similar to California state law, instead of the “two military features” tests that was included under the expired 1994-2004 federal ban (see the tables below). They would prohibit the future manufacture and importation of firearms that fell under these tests, as well as 157 firearms specifically named in the proposal by make and model. The proposals would grandfather any existing firearms that met the “one feature” tests, but they would require background checks for any future transfers of grandfathered “assault weapons” by an unlicensed person to another unlicensed person. Finally, the proposals would exempt from the ban over 2,200 firearms by make and model.

**Table I. Expired and Proposed Definitions of Semiautomatic Assault Rifle Compared**

<b>Expired 1994-2004 Federal Definition for Semiautomatic Assault Rifle (a two features test)</b>	<b>Proposed Assault Weapons Ban of 2013 Definition for Semiautomatic Assault Rifle (a one feature test)</b>
<p>A semiautomatic rifle that had an ability to accept a detachable magazine and had at least two of the following:</p> <ul style="list-style-type: none"> <li>(1) a folding or telescoping stock;</li> <li>(2) a pistol grip that protruded conspicuously beneath the action of the weapon;</li> <li>(3) a bayonet mount;</li> <li>(4) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; or</li> <li>(5) a grenade launcher.</li> </ul>	<p>A semiautomatic rifle that has the capacity to accept a detachable magazine and any one of the following:</p> <ul style="list-style-type: none"> <li>(1) a pistol grip;</li> <li>(2) a forward grip;</li> <li>(3) a folding, telescoping, or detachable stock;</li> <li>(4) a grenade launcher or rocket launcher;</li> <li>(5) a barrel shroud; or</li> <li>(6) a threaded barrel.</li> </ul> <p>Also, any semiautomatic rifle that has a fixed magazine with the capacity to accept more than 10 rounds, except for an attached tubular device designed for and only capable of accepting .22 caliber rimfire ammunition.</p>

**Source:** See expired 18 U.S.C. §921(a)(30)(B) and S. 150 and H.R. 437 as introduced in the 113<sup>th</sup> Congress.

**Table 2. Expired and Proposed Definitions of Semiautomatic Assault Pistol Compared**

<b>Expired 1994-2004 Federal Definition for Semiautomatic Assault Pistol (a two features test)</b>	<b>Proposed Assault Weapons Ban of 2013 Definition for Semiautomatic Assault Pistol (a one feature test)</b>
<p>A semiautomatic pistol that has an ability to accept a detachable magazine and at least two of the following characteristics:</p> <p>(1) an ammunition magazine that attached to the pistol outside of the pistol grip;</p> <p>(2) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;</p> <p>(3) a shroud that was attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;</p> <p>(4) a manufactured weight of 50 ounces or more when the pistol is unloaded; or</p> <p>(5) it was a semiautomatic version of an automatic firearm.</p>	<p>A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following characteristics:</p> <p>(1) a threaded barrel;</p> <p>(2) a second pistol grip;</p> <p>(3) a barrel shroud;</p> <p>(4) the capacity to accept a detachable magazine at some location outside of the pistol grip; or</p> <p>(5) it was a semiautomatic version of an automatic firearm.</p> <p>Also, any semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.</p>

**Source:** See expired 18 U.S.C. §921(a)(30)(C) and S. 150 and H.R. 437 as introduced in the 113<sup>th</sup> Congress.

**Table 3. Expired and Proposed Definitions of Semiautomatic Assault Shotgun Compared**

<b>Expired 1994-2004 Federal Definition for Semiautomatic Assault Shotgun (a two features test)</b>	<b>Proposed Assault Weapons Ban of 2013 Definition for Semiautomatic Assault Shotgun (a one feature test)</b>
<p>A semiautomatic shotgun that had at least two of the following:</p> <p>(1) a folding or telescoping stock;</p> <p>(2) a pistol grip that protruded conspicuously beneath the action of the weapon;</p> <p>(3) a fixed magazine capacity in excess of five rounds; or</p> <p>(4) an ability to accept a detachable magazine.</p>	<p>A semiautomatic shotgun that has one of the following:</p> <p>(1) a folding, telescoping stock, or detachable stock; or</p> <p>(2) a pistol grip;</p> <p>(3) a fixed magazine with the capacity to accept more than five rounds;</p> <p>(4) the ability to accept a detachable magazine;</p> <p>(5) a forward grip; or</p> <p>(6) a grenade launcher or rocket launcher.</p> <p>Also, any shotgun with a revolving cylinder.</p>

**Source:** See expired 18 U.S.C. §921(a)(30)(C) and S. 150 and H.R. 437 as introduced in the 113<sup>th</sup> Congress.

## **Author Contact Information**

William J. Krouse  
Specialist in Domestic Security and Crime Policy  
wkrouse@crs.loc.gov, 7-2225