

## Private Sales

### Background

Private sales are firearm sales by persons other than federally licensed firearms dealers. Private sellers are not subject to federal laws governing licensed dealers.

Although the "private sale" loophole is frequently referred to as the "gun show" loophole (because of the particular problems associated with gun shows), it applies to all firearm sales, regardless of where they occur.<sup>1</sup>

### Summary of Federal Law

Federal law imposes various duties on federally licensed firearms dealers. Firearms dealers must, among other things: (1) perform background checks on prospective firearm purchasers; (2) maintain records of all gun sales; (3) make those records available to law enforcement for inspection; (4) report multiple sales; and (5) report the theft or loss of a firearm from the licensee's inventory.<sup>2</sup> Federal law imposes none of these requirements on *unlicensed* sellers, however.

The Gun Control Act of 1968 provides that persons "engaged in the business" of dealing in firearms must be licensed.<sup>3</sup> Although Congress did not originally define the term "engaged in the business," it did so in 1986 as part of the McClure-Volkmer Act (also known as the "Firearms Owners' Protection Act"). That Act defined the term "engaged in the business," as applied to a firearms dealer, as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."<sup>4</sup>

Significantly, however, the term was defined to *exclude* a person who "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>5</sup>

Consequently, unlicensed sellers may sell firearms without conducting background checks or documenting the transaction in any way. In addition, because federal law does not require private sellers to inspect a buyer's driver's license or any other identification, there is no obligation for such sellers to confirm that a buyer is of legal age to purchase a firearm. As a result, convicted felons, minors and other prohibited purchasers can easily buy guns from unlicensed sellers.

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<sup>1</sup> Issues specific to gun shows are discussed in the section on [Gun Shows](#).

<sup>2</sup> 18 U.S.C. §§ 922(t), 923(g).

<sup>3</sup> 18 U.S.C. § 921(a)(21)(C).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

According to a 1999 report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the current definition of “engaged in the business” often frustrates the prosecution of “unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons.”<sup>6</sup> A June 2000 ATF report found that unlicensed sellers were involved in about a fifth of the trafficking investigations and associated with nearly 23,000 diverted guns.<sup>7</sup> A national survey of firearm ownership conducted in 1994 determined that 60 percent of all firearm sales in the U.S. involved federally licensed dealers, while the remaining 40 percent of firearms were acquired from unlicensed sellers.<sup>8</sup>

## SUMMARY OF STATE REGULATION OF PRIVATE SALES<sup>9</sup>

Five states (California, Connecticut, Maryland, Pennsylvania and Rhode Island) and the District of Columbia require universal background checks on firearm purchasers, including purchases from unlicensed sellers. In California, Rhode Island and the District of Columbia, universal background checks are required for transfers of all classes of weapons; Maryland’s law applies only to handguns and assault weapons; the Connecticut and Pennsylvania laws are limited to handguns. Delaware, Nevada and Oregon have laws allowing voluntary background checks by unlicensed sellers.

Alaska, Illinois, Massachusetts and Washington have a variety of recordkeeping requirements that apply to private transactions.

### Universal Background Check States

[California](#)

[Connecticut \(handguns only\)](#)

[District of Columbia](#)

[Maryland \(“regulated firearms” only\)](#)<sup>10</sup>

[Pennsylvania \(handguns only\)](#)

[Rhode Island](#)

**Cal. Penal Code §§ 12072(d), 12082**

**Conn. Gen. Stat. § 29-33(c)**

**D.C. Code Ann. §§ 7-2502.01, 7-2502.03, 7-2505.01, 7-2505.02**

**Md. Code Ann., Pub. Safety §§ 5-101(r), 5-124, 5-130(j)**

**18 Pa. Cons. Stat. §§ 6111(b), 6111(c), 6111(f)(1), (2)**

**R.I. Gen. Laws §§ 11-47-35 – 11-47-35.2**

### Voluntary Background Check States

[Delaware](#)

[Nevada](#)

[Oregon](#)

**Del. Code Ann. tit. 24, § 904A**

**Nev. Rev. Stat. Ann. § 202.254**

**Or. Rev. Stat. § 166.436**

<sup>6</sup> U.S. Department of Justice & Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Gun Shows: Brady Checks and Crime Gun Traces* 13-14 (Jan. 1999).

<sup>7</sup> Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* xi (June 2000).

<sup>8</sup> Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997), at <http://www.ncjrs.org/pdffiles/165476.pdf>.

<sup>9</sup> Colorado, Connecticut, Illinois, New York and Oregon have partially addressed the private sale loophole by requiring background checks on all purchasers at gun shows. Additional information about background checks and other requirements at gun shows is contained in the section on [Gun Shows](#).

<sup>10</sup> In Maryland, “regulated firearms” are defined to include handguns and assault weapons.

## **States Imposing Recordkeeping or Reporting Requirements on Private Sellers**

<a href="#">Alaska</a>	<b>Alaska Stat. § 08.76.010</b>
<a href="#">California</a>	<b>Cal. Penal Code §§ 12071(b)(17), (b)(18), 12076(b)</b>
<a href="#">Connecticut (handguns only)</a>	<b>Conn. Gen. Stat. § 29-33(e)</b>
<a href="#">Illinois</a>	<b>430 Ill. Comp. Stat. 65/3(b)</b>
<a href="#">Maryland (regulated firearms only)</a>	<b>Md. Code Ann., Pub. Safety §§ 5-101(p), 5-123(d), 5-124(e)</b>
<a href="#">Massachusetts</a>	<b>Mass. Gen. Laws ch. 140, §§ 128A, 128B</b>
<a href="#">Pennsylvania</a>	<b>18 Pa. Cons. Stat. § 6111(b)(1)</b>
<a href="#">Rhode Island</a>	<b>R.I. Gen. Laws § 11-47-35(a)(2)</b>
<a href="#">Washington</a>	<b>Wash. Rev. Code Ann. § 19.60.020</b>

## **Description of State Laws Regulating Private Sales**

1. *Universal Background Checks for All Firearm Transfers:* The most comprehensive approach to ensuring that sales are only made to eligible purchasers is through a requirement for universal background checks prior to all firearm transfers. California, Rhode Island<sup>11</sup> and the District of Columbia require that, prior to any firearm transfer, a licensed dealer or law enforcement agency conduct a background check on the prospective firearm transferee.

In California, all transfers must be processed through licensed dealers. Processing transfers by private sellers through licensed dealers helps to ensure that a background check will be conducted prior to any transfer. Rhode Island requires all sellers to obtain a completed application form from the prospective purchaser, and to submit the form to law enforcement for purposes of conducting a background check. In the District of Columbia, no person may take possession of a firearm until he or she applies for and obtains a registration certificate. To obtain a registration certificate, an applicant must pass a background check conducted by the Chief of Police.<sup>12</sup> Registered firearms may be transferred only to a licensed dealer.

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<sup>11</sup> In Rhode Island, the background check requirement does not apply to persons licensed to carry a concealed handgun. R.I. Gen. Laws §§ 11-47-35.1, 11-47-35.2.

<sup>12</sup> The District of Columbia's registration law serves as a ban on most classes of firearms within the District. Sawed-off shotguns, machine guns (including certain semiautomatic assault weapons), short-barreled rifles, and handguns not registered to the current owner before September 24, 1976, may not be registered. D.C. Code Ann. § 7-2502.02. Note that in 2007, the U.S. Court of Appeals for the District of Columbia Circuit struck down the District of Columbia's strict laws banning most handgun possession in the District, and requiring lawfully owned firearms to be kept unloaded and disassembled or bound by a trigger lock or similar device. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). The court held that the laws violate the Second Amendment, interpreting the Amendment to protect an individual right to keep and bear firearms unrelated to service in the militia. The U.S. Supreme Court granted *certiorari* on the following question: Whether the challenged provisions violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes? *District of Columbia v. Heller*, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007). The Supreme Court is expected to issue its ruling in the case by June 2008. Additional information on the District of Columbia's registration law is contained in the section on [Registration of Firearms](#).

Maryland requires a background check on every prospective transferee of “regulated firearms” (defined as handguns and assault weapons), which may be conducted by a licensed dealer or a designated law enforcement agency. Connecticut requires a background check prior to any handgun transfer. Pennsylvania requires that all handgun sales be completed by licensed dealers (thereby necessitating a background check).

2. *Voluntary Background Checks by Private Sellers:* In Delaware, Nevada and Oregon, private sellers are not required to conduct background checks on purchasers (except, in Oregon, at gun shows), but they may request a background check of the purchaser. In Delaware, the seller makes the request to a licensed dealer, who must facilitate the transfer. In Oregon and Nevada, the seller makes the request to the relevant state agency, which must process the request. In Oregon, subject to certain exceptions, a transferor who receives notification that the transferee is eligible to complete the transfer is immune from civil liability for any use of the firearm after the time of transfer.

3. *Recordkeeping and Reporting Requirements for Private Sellers:* In California (all firearms) and Pennsylvania (handguns), because all transfers must be processed through a licensed dealer, private transfers are subject to the recordkeeping and sales reporting requirements for licensed dealers. Licensed dealers are required to maintain records of all transfers (including transfers by private sellers).<sup>13</sup> California and Pennsylvania also require dealers to report handgun sales to law enforcement.<sup>14</sup>

Connecticut requires all sellers of handguns to maintain records of all handgun transfers for at least five years, and to send copies of the transfer receipt to the Commissioner of Public Safety and the Chief of Police. Illinois requires any person who transfers a firearm to keep records of all such transfers for 10 years. Maryland requires all sellers of regulated firearms to report the completed transaction to the Secretary of the Maryland State Police.<sup>15</sup> Massachusetts requires all private sellers to submit a written report documenting each firearm transfer to the executive director of the state’s Criminal History Systems Board. Purchasers of firearms from private sellers are also required to submit the same information. In Rhode Island, all sellers of handguns must maintain records of transfers for six years. Alaska and Washington require pawnbrokers and second-hand dealers to maintain written records of all firearms transactions.

4. *Other State Regulation of Private Transactions:* A number of states prohibit private transferors from selling firearms to purchasers who do not have the requisite state license or permit, or who are ineligible under state law. State permits to purchase firearms that have a short duration require purchasers to undergo background checks

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<sup>13</sup> Federally licensed firearms dealers are required to maintain sales records indefinitely. 27 C.F.R. §§ 478.124(b), 478.125(e). State laws in California and Pennsylvania also require dealers to retain sales records. Additional information about recordkeeping requirements on licensed dealers is contained in the section on [Dealer Regulations](#).

<sup>14</sup> Pennsylvania’s requirement applies to transfers of handguns, and rifles and shotguns of specified dimensions. Additional information about sales reporting requirements is contained in the sections on [Dealer Regulations](#) and [Retention of Firearm Sales and Background Check Records](#).

<sup>15</sup> Maryland also requires sellers to submit copies of any firearm application to the Secretary of State Police. Md. Code Ann., Pub. Safety § 5-120.

within a short time prior to taking possession of the firearm. These permits are required for purchases from dealers and private sellers. Hawaii, for example, requires all handgun purchasers to obtain a handgun permit prior to transfer.<sup>16</sup> Handgun permits in Hawaii are valid for 10 days and may be used for purchase of only one handgun. Massachusetts and Michigan also issue 10-day handgun purchase licenses to some, but not all, handgun purchasers.<sup>17</sup> These and other state licensing requirements are discussed in detail in the section on [Licensing of Gun Owners or Purchasers](#).

## **SUMMARY OF SELECTED<sup>18</sup> LOCAL LAWS REGULATING PRIVATE SALES**

### **Local Laws Regulating Private Sales<sup>19</sup>**

<b>Chicago</b>	<b>Chicago, Ill., Code § 8-20-170</b>
<b>Columbus</b>	<b>Columbus, Ohio, Code §§ 2323.20, 2323.21</b>
<b>New York City</b>	<b>New York, N.Y., Admin. Code §§ 10-131(i)(1), 10-303, 10-304; New York, N.Y., Rules tit. 38, § 5-26</b>
<b>Omaha</b>	<b>Omaha, Neb., Code §§ 20-198(a) – 20-202</b>

*Chicago:* Chicago requires that all firearm transfers, including those by private sellers, be conducted through licensed dealers, and that ammunition transfers go through a licensed shooting gallery, licensed gun club, or licensed dealer.<sup>20</sup>

*Columbus:* Columbus prohibits any person from: (1) knowingly exhibiting for sale a firearm in a show window; (2) selling a firearm to another person unless the transferee has obtained a valid weapon transaction permit; and (3) knowingly failing to report to law enforcement “forthwith” the loss or theft of any firearm in the person’s possession or control. Columbus also prohibits any person from: (1) selling any firearm to a person under age 18; (2) selling any handgun to a person under age 21; and (3) furnishing any firearm to a person under age 18 (narrow exceptions to this prohibition exist).

*New York City:* New York City prohibits any non-firearms dealer from transferring ammunition to any person other than a firearms dealer.

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<sup>16</sup> Haw. Rev. Stat. Ann. § 134-2.

<sup>17</sup> Mass. Gen. Laws ch. 140, §§ 131A, 131E; Mich. Comp. Laws §§ 28.422, 28.422a. In both states, certain license holders need not obtain a handgun purchase permit, and would not be subject to a background check within 10 days of purchase from a private seller.

<sup>18</sup> This section is based on research and analysis of existing firearms laws in: Boston, Massachusetts; Chicago, Illinois; Hartford, Connecticut; Los Angeles, California; Newark, New Jersey; New York, New York; Omaha, Nebraska; and San Francisco, California. LCAV selected these cities because they are located in states that grant local jurisdictions broad authority to regulate firearms. It also includes existing laws in Cleveland and Columbus, Ohio. Note, however, that in 2006, the Ohio Legislature passed House Bill 347 (overriding the Governor’s veto), which created Ohio Rev. Code Ann. § 9.68(A), a provision that purports to preempt all local authority to regulate firearms with few, limited exceptions. Legal challenges to the law are pending. Additional information about state laws governing local authority to regulate firearms is contained in the section of this report titled [“The Legal Background.”](#)

<sup>19</sup> Local requirements regarding licensing and permitting of firearm purchasers are detailed in the section on [Licensing of Gun Owners or Purchasers](#).

<sup>20</sup> Note that Chicago prohibits the transfer of handguns, assault weapons and assault ammunition. See Chicago, Ill., Code §§ 8-20-030(h), (i), 8-20-040, 8-20-050, 8-24-025.

With limited exceptions, no person other than a licensed dealer may transfer a rifle or shotgun unless he or she has a certificate of registration for the firearm. An individual may transfer a rifle or shotgun only to a licensed firearms dealer, the holder of a permit to possess and purchase a rifle or shotgun, a person who is exempt from the permitting requirement, or a non-resident of the city. Any person who transfers a rifle or shotgun must report information about the firearm, the seller and the purchaser to the police commissioner within 72 hours of the transfer.

Any person lawfully in possession of a handgun may transfer it only after providing written notice to law enforcement.

*Omaha:* Omaha prohibits any person from selling or otherwise transferring any firearm, component parts or ammunition to any person under age 18, or any concealable firearm, or component parts or ammunition for that type of firearm, to any person under age 21. No person may sell or rent a concealable firearm to any person who has not obtained a written permit. Omaha prohibits any person from pawning, pledging or storing a concealable firearm, or accepting such a firearm in pawn or as a pledge or for storage from any person who has not registered the firearm. Any person engaged in the sale, pawning, exchange, loan, rental or delivery of firearms is required to preserve and provide a record of such transactions daily to the Chief of Police. Omaha prohibits any person from “purposely or knowingly” exhibiting for sale or transfer in a display window or any other place which can be seen from a public thoroughfare any firearm or ammunition for a firearm.

## **FEATURES OF COMPREHENSIVE LAW REGULATING PRIVATE SALES**

The features listed below are intended to provide a framework from which policy options may be considered and debated. LCAV has not attempted to include every provision or every creative approach identified in the analysis above, nor have we addressed appropriate exceptions so that the regulation does not produce unintended consequences. A jurisdiction considering modifying existing, or developing new legislation in this area should consult with counsel to ensure its legal sufficiency and compatibility with existing codes and statutes, as appropriate.

- For all firearm transfers, private sellers are subject to similar requirements as licensed dealers, including background checks and recordkeeping requirements:
  - The most comprehensive option requires all firearm transfers to be conducted through licensed dealers, so that background checks will be completed on all purchasers (including purchases from unlicensed sellers), and sales records will be maintained (*California, District of Columbia, Chicago*)<sup>21</sup>

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<sup>21</sup> A 2007 report by the International Association of Chiefs of Police (IACP) recommended that all gun sales be proceed through an FFL, thereby ensuring that a mandatory background check will be conducted on the transferee. International Association of Chiefs of Police, *Taking a Stand: Reducing Gun Violence in Our Communities* 14 (Sept. 2007). IACP also noted that the requirement that FFLs keep a record of gun sales would allow law enforcement to trace the gun to the last point of sale should it be criminally misused, lost or stolen.

- If the jurisdiction does not require that all firearm transfers be conducted through licensed dealers, private sellers are required to:
  - conduct background checks through a central law enforcement agency that has access to federal and state databases of prohibited purchasers (*Rhode Island requires private sellers to conduct background checks through licensed dealers or law enforcement*);
  - maintain records of all firearm transfers for a lengthy period (*Illinois requires all sellers to retain sales records for 10 years*); and
  - report all transfers to state and local law enforcement (*Massachusetts and New York City require reporting of firearm transfers to law enforcement*)