FIRST DRAFT DO NOT PUBLISH-
Regulations on Firearms: Confessions From a Gun Salesman

Beau W Cross, The Ohio State University
Over the past year, there has been a heated debate on Capitol Hill about the regulation of firearms and accessories such as high capacity magazines. With many school massacres and other acts of violence due to gunfire taking place in the past few decades, change in regulations was inevitable. A total ban on firearms was not feasible, as a citizen’s right to bear arms is protected through the Second Amendment of the United States Constitution. However, in 2005, President Bush took a stance; he created change in policy by signing the Protection of Lawful Commerce in Arms Act (Arms Act) into office. The Arms Act was essentially immunity for manufacturers of firearms and establishments with federal firearms licenses. As a salesman, I have been able to see the positives and the negatives of this immunity. Sometimes, one cannot simply detect the risk of selling a firearm to a person who plans to commit an act of violence; therefore the salesman should not be held liable for an event of such type. On the other hand, straw purchases, or other methods of negligent distribution need to hold someone liable for transferring a gun into the wrong person’s hands. However, the Arms Act of 2005 states that no one would be responsible in the instance of a straw purchase. While there are some exceptions to the immunity, proving the Arms Act does not protect the dealer or manufacturer in court is difficult. Through personal experience as well as observations, I have seen both sides of the spectrum. This paper will address a solution to the Arms Act of 2005 involving the liability of federal firearms licensed dealers and ways to deter negligent sales in one of the largest, and certainly most controversial, industries in the United States of America.

* Beau William Cross is a fourth year undergraduate student at The Ohio State University in Columbus, Ohio. Currently, he is majoring in Sport and Leisure Studies while pursuing minors in Economics and Legal Foundations of Society. In addition, Beau is employed as a firearms salesman by a Federal Firearms Licensed dealer, which is where the idea for this law review article arose. Following completion of his undergraduate studies in May, 2014, Beau plans to attend law school and pursue a career as either a sports agent or working as a corporate law attorney.
PART I: INTRODUCTION

It is estimated that more than 270 million firearms are privately owned in America.\(^1\) No other country on the planet is even remotely close to that statistic. Every day, thousands of guns are sold by dealers with a Federal Firearms License (FFL) issued through the United States Bureau of Alcohol, Tobacco, and Firearms.\(^2\) In 1968, the Gun Control Act limited interstate trade of firearms almost entirely to those with an FFL, which still accounts for about 140,000 possible locations to purchase a gun.\(^3\) However, these dealers are not the only place one can acquire firearms: in most of the United States, private party sales are legal as well.\(^4\) These sales can be dangerous, and have been linked to some of the most violent gun crimes of the past few decades.\(^5\) For example, the Columbine High School shooting in 1999 involved guns acquired through private party transactions.\(^6\) This separate market requires no necessary paperwork or background checks, but rather cash for the exchange of the firearm and that is all. Beyond the private gun market are other ways of placing guns in the hands of dangerous people, such as straw sales or FFL dealers making mistakes on required documentation to transfer a firearm to the buyer. Following the Washington DC sniper killings of 2002, the National Rifle Association

\(^{1}\)www.reuters.com/article/2013/04/18/us-usa-guns-future-idUSBRE93H06420130418. The number of 270 million is a rough estimate with a growing market. It is hard to determine how accurate the value is.

\(^{2}\)See generally http://www.atf.gov/content/Firearms/firearms-industry. The ATF is the bureau responsible for all firearms transfers and the federal firearms licenses. If a compliance issue occurs on a Form 4473, the ATF is who must be contacted in order to resolve any discrepancies.

\(^{3}\)Michael A. Bellesiles, Arming America: Origins of a National Gun Culture.

\(^{4}\)http://www.huffingtonpost.com/2012/12/21/private-gun-sales-sandy-hook_n_2347420.html. This article pointed out major flaws in the United States legal system and how private gun sales are creating a lot of controversy. More than three-fourths of states do not have a rule on private party sales, dictating that no documentation needs to be completed prior to transferring a firearm outside of a FFL dealer.

\(^{5}\)Id.

\(^{6}\)Id.
(NRA) lobbied for change in legislation. When Bushmaster, a firearms manufacturer, and Bull’s Eye Shooter Supply had to spend nearly $1 million in a settlement over the incident, President George W. Bush signed the Protection of Lawful Commerce in Arms Act. Generally speaking, the Arms Act of 2005 granted immunity to firearms manufacturers and FFL dealers from negligent transfers of their products. Recently, this topic has resurfaced, and President Obama’s administration is calling for change. Some of the main points of debate on Capitol Hill relate to high capacity magazines in handguns and rifles as well as a possible ban on semi-automatic assault rifles. Although the ban for the assault weapons was thrown out through deliberations, change still needs to take place. While the United States Constitution grants us the unalienable right to bear arms via the Second Amendment, immunity has been given to FFL dealers, which allows them to place firearms in the hands of less-than-qualified buyers. In order to limit the number of firearms which are negligently transferred, the sellers need to be held liable for their actions.

PART II: PERSONAL REFLECTIONS

IIa: Being Trained To Sell Firearms

With the firearms industry being a prominent source of revenue in America, it is important that the associates who place guns in the hands of citizens know what they are doing. There is no set standard on how employees should be trained, but every FFL dealer should follow a similar protocol. For example, gun transfer rules vary state-by-state, so it is very important that the employer properly trains their workers on state regulations. In addition, it is important for sales associates to understand who is qualified for a firearm; some restrictions, such as age and the Bureau of Alcohol, Tobacco, and Firearms 4473 responses will help the novice employees learn some basics about properly selling firearms.

Many large corporations in the firearms industry (Cabelas, Gander Mountain, et cetera) have changed their methods of training employees. These stores use 3point5, an online source which features basic company training with educational quizzes at the end of each to see if the employee actually paid attention. However, it is easy to just click through the slides of information, skip to the test, and take it multiple times until the result is 100% correct answers. This is not an effective training method. When working with a product such as firearms, employees need the hands-on experience such as a short apprenticeship or shadowing experience to see how other associates perform their duties.

http://www.nra.org/Article.aspx?id=4228. The National Rifle Association called this a monumental victory in their efforts for reform in the gun industry. The Protection of Lawful Commerce in Arms Act ended politically motivated lawsuits which were designed to bankrupt gun manufacturers and FFL dealers. There was limited objection to the Act, as it passed in both the House of Representatives and the Senate by a substantial margin. By signing the Arms Act into office, President George W. Bush placed Full Faith and Credit upon those involved with firearms transactions as well as the law abiding citizens who want to exercise their constitutional right to bear arms.


NRA, supra note 7.

See Generally http://www.gpo.gov/fdsys/pkg/BILLS-109s397enr/pdf/BILLS-109s397enr.pdf. This is the full script of the Arms Act from Congress, including all applications of the act as well as its exceptions, purposes, et cetera.

http://www.law.cornell.edu/constitution/second_amendment.

Supra, note 10. FFL dealers have been granted immunity against most civil liability action lawsuits resulting from negligent transfers of firearms.

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Through my personal experience, I received limited training besides the 3point5 online company policy and procedure tests. Before going to the sales floor, I also watched a video on detecting straw purchases, but it was very brief and only described a couple of the more obvious tactics to watch for. My first day on the job was short, and only gave me about four hours of time on the sales floor to learn from one of the older associates. The following day I was, figuratively, thrown to the wolves. After helping my first customer make his selection, I had to learn the proper way to complete the Form 4473 with limited assistance. Due to the online training, I remembered some of the basics, such as checking the buyer’s state identification or driver’s license for a current address and a valid expiration date. However, after completing the transaction, I accidentally handed the Form 4473 to the customer as he walked out the door. Basically, I participated in a negligent transfer of a firearm¹³. The Form 4473 must be kept by the FFL dealer in order to maintain an accurate record of all firearms transferred from the store in order to evade a situation like the Washington DC sniper incident of 2002¹⁴.

Incidents like the one which happened to me are common with new employees at our store. I am certain it happens in other stores as well, which is a serious concern. This is another reason FFL dealers need to be held more accountable for their actions; the employers would have to take more time to properly train their employees to handle firearms and deter more negligent transfers of guns.

IIb: Detecting Straw Purchases

One of the biggest challenges faced in age-restrictive markets is detecting straw purchases¹⁵. Generally speaking, a straw purchase of a gun is when a qualified buyer transfers a firearm in their name for someone who is not qualified¹⁶. Every customer who is looking to buy a firearm needs to be carefully examined by the salesman to determine if this person is buying for their own personal use with no intent to use the firearm recklessly¹⁷. Detecting straw purchases are not always obvious, but preventing their occurrence can keep guns off of the street and out of the hands of dangerous people. In our store, we stop straw purchases every week. However, for every sale that the store catches, at least two or three more happen without question. Straw purchases are almost a common practice, and most associates do not know how to ask the proper questions in order to determine potential straw buyers¹⁸.

¹³ Luckily, the customer who received the Form 4473 returned it to the store within a couple days. Since then, it has been filed in its proper place with all other 4473s from our store.
¹⁵ Straw purchases became such a problem in the firearms market that the ATF created a video, titled: Don’t Lie for the Other Guy to show FFL dealers and their associates how prevalent straw purchases are in the industry.
¹⁶ A qualified buyer of a firearm is one who answers the Bureau of Alcohol, Tobacco, and Firearms Form 4473 with no discrepancies. Also, to finish qualifying for the transfer of the firearm, the buyer must also pass a background check, provided by NICS. The only acceptable response is proceed, as defined by the BATF. Any other response, such as denied or delayed, is a no sale.
¹⁷ There are two exceptions to the personal purchase rule: buying a firearm for a spouse as a gift, and buying for one’s child.
¹⁸ Questions such as, “What is the purpose of buying this firearm? Is it for concealed carry? To hunt with?” as well as, “How about we take a look at (another name of a firearm) to do a comparison to get you the best fit?” Questions like those can typically determine if the potential buyer is indeed qualified to own. For example, if one
The easiest form of a straw purchase to notice is when the buyer of the firearm is different than the person who filled out the Form 4473. If two people enter a gun store together, the official buyer of the firearm, in which all cash must be their own, and credit/debit cards or personal checks used for the sale must be in their name. If one wants to have another person pay for the firearm, all necessary paperwork must be completed again; otherwise, a straw purchase has been detected, which will result in a no sale.

Another detectable form of a straw purchase is when a group of people come into a store, and the person who says they are the actual buyer barely handles the firearm as compared to the rest of the group. If this occurs, it is best for the sales associate to encourage the potential buyer to handle the firearm more to make sure it is the right fit. If the buyer does not feel the need to do so, then it is in the best interest of the sales associate to reject the sale to protect the store against the possibility of a dangerous sale.

IIc: Other Illegal Purchases

Besides straw purchases, there are other ways of illegally acquiring firearms. Along with federal laws, such as transferring a handgun across state lines, there are state laws which place further restrictions on buying firearms. In the middle of April, 2013, I was told one of our employees successfully transferred multiple handguns across state lines. Two weeks following the incident, the guns were still not returned to the store, and the Bureau of Alcohol, Tobacco, and Firearms began their investigation on the situation.

Another method of an illegal purchase is when the store selling the firearm chooses to transfer a gun to a person with a response of denied or delayed on their National Instant Criminal Background Check System (NICS) background check. This is a rare occurrence; similar to selling across state lines, it is one which has happened before. In these situations, it is important to find the person and the firearms immediately, especially in a situation of a denial on the NICS check. Those who are denied could be convicted felons or previously charged and convicted of domestic violence, which means a negligent transfer of a firearm into their hands could result in harm being caused to innocent people.

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19 While this sounds easy to detect, it is not always simple. If cash is paid, the sales associate would have to pay attention to the buyer’s every move to see if they receive cash from another individual in the store. With credit or debit cards, the sales associate has to check the name on the receipt to match it to the Form 4473.

20 A person, who is a permanent resident of a state, cannot lawfully purchase a handgun in another state, unless an active member of the United States Armed Forces stationed in the state of purchase.

21 Some restrictions are caliber-specific, such as 5.56 NATO and 223 Remington in a semi-automatic rifle (AR-15 style); also included in these restrictions are high capacity handgun magazines, banned individual weapons, and limits on the quantity of guns which can be transferred to a person in one day.

22 In order to do that, not only was the sales associate responsible for improperly looking over the paperwork, but the associates who performed the background check via NICS and the manager or BATF associate who reviewed the documentation before the firearm exited the store also did not pay attention to the Form 4473, which clearly stated the person buying the firearm was from a different state. Since then, our store has stepped up its policies on reviewing the Form 4473 with a large checklist for associates to review before interacting with a customer.

23 Luckily, when the sale of a firearm to a person who is delayed or denied happens, the firearms are always retrieved within a short period of time, usually hours, following the transfer.

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IIId: Commission Based Bonuses

The emergence of commission based pay has revolutionized the market for salesmen in many areas of business. However, most markets do not have strict limits on them similar to the firearms industry. Recently, our store began its commission-based pay with a $10 million store renovation to accommodate for an average of 3,500 firearms in the store at any given time. Due to the recent gun market stimulation, salesmen at our store are making nearly double what they were before commission incentives factored in to paychecks. Although the commission based associates are enjoying giant checks every two weeks, there is also a double-edged sword when it comes to detecting a straw purchase. From an ethical stance, the salesman should be on the lookout for selling to unqualified buyers; however, the reality involves the commission bonus, and now straw purchases are undoubtedly easier to perform. While there is still a base pay given to all employees, the thoughts of an extra $5 to $20 per firearm as well as accessories and their commission raise the stakes to sell more than everyone else, no matter how negligently the sales are performed. Thankfully, none of the transactions since the commission-based incentives began have resulted in violence. I do feel, however, that FFL dealers which have switched their pay scales to include commission need to take responsibility and retrain all employees on the importance of stopping straw purchases in order to remind salesmen that the selfish commission off of a negligent sale could also result in the death of another human.

PART III: GUN SALE TERMINOLOGY

IIIa: Bureau of Alcohol, Tobacco, and Firearms Form 4473

When a registered FFL establishment transfers a firearm, the seller is responsible to file a Form 4473. Generally speaking, the 4473 is a guide for the dealer to determine if the buyer is qualified to purchase a firearm. For example, a series of questions pertaining to a person’s legal history is presented to the buyer with the possibility of yes/no responses, such as: denouncing one’s United States citizenship, dishonorable discharge from the United States Armed Forces, conviction of a felony, conviction of a misdemeanor domestic violence, being the true transferee of the firearm, addiction to drugs, and being diagnosed with a psychological disorder. In addition, the buyer must have valid identification, such as a state issued driver’s license, with their current address listed. Also, as the seller of the firearm looks over the identification, they must also pay attention to what type of firearm is being transferred. For example, rifles and shotguns have restrictions by state on which residents they can be sold to as well as an age restriction of 18 years. Handguns, on the other hand, cannot be transferred out of state for any reason, and the buyer must be 21 years of age. After listing the buyer’s identification

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24 It could be safe to say that no successful straw purchases have taken place inside our store since the pay scale change since there is no evidence to prove its opposition. However, in a day which our store generated $425,000 in revenue, one would speculate at least a single straw sale took place.
25 http://www.atf.gov/files/publications/download/p/atf-p-5300-15.pdf. If an FFL dealer does not collect a Form 4473 for every customer transferring firearms in a single point of sale, then the store could lose their license to sell guns.
26 See generally O.R.C. 2923.13 and O.R.C. 2923.21
27 ATF, supra, note 25. This is another situation in which if a dealer sells a firearm to someone with invalid identification, the FFL could lose their license.
28 Id.
29 Id.

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information, the FFL dealer must contact NICS in order to obtain official information about the person’s legal history. There are three possible responses from NICS: proceed, delayed, denied. If a person receives a response of proceed, the seller may then continue to transfer the firearm to the buyer. However, if the response is delayed, then the buyer must wait for a response from the Federal Bureau of Investigation (FBI) which could be anywhere from 30 seconds to eight days. In an instance when there is no response within eight days, the buyer may then have the firearm transferred to them at that time. In the instance when the reply from NICS is a denial, the firearm may not be transferred to the buyer under any circumstance. Denials typically create the most controversy out of all responses, and usually correlate to straw purchases taking place shortly after.

**IIIb: Preventing the Transfer of a Firearm**

At any time during a transaction, under any circumstance, the salesman may stop the transfer of a firearm. Whether the associate does not feel comfortable performing the sale, or has a feeling of a possible straw purchase, it is always better to say no than have a negligent transfer occur, which could result in violence. There are other instances when an employee needs to refuse a sale, such as: the buyer’s current address does not match the one on their identification and no other acceptable form is present, the identification is expired, or the buyer does not respond the appropriate way to a series of yes/no qualification questions. The simple prevention of a firearm being sold negligently could save many lives, and potentially keep another gun from ending up in the underground market of private sales. Although a denied or delayed response from NICS automatically results in a denial of a sale, there are occurrences when the salesman will not pay attention to the status of the background check, and proceed with the point of sale transaction. When this happens, it is up to the management team to perform a second check of all required documentation before the firearm leaves the establishment. The second check is the last line of defense against a negligent sale, and although the firearm has passed through the point of sale portion of the transfer, the FFL dealer can still issue a refund for the buyer if the manager performing the second check wants to refuse the sale.

**PART IV: PROTECTION OF LAWFUL COMMERCE IN ARMS ACT OF 2005**

**IVa: Overview of the Statute**

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30 *Id.* In order to legally sell a firearm, a background check must be completed before an FFL dealer transfers a firearm to a person. If a dealer does not perform a NICS check, it is almost a guaranteed loss of a license to sell firearms, and a major violation of the law.

31 Proceed is the ONLY possible response a person can receive to have a firearm transferred to them at that time. Any other response will indicate a “no sale”, at least for the time being.

32 The Bureau of Alcohol, Tobacco, and Firearms has an official rule of three business days. However, at Gander Mountain, the company policy is eight days.

33 Most of the time, if one is denied, they will send a spouse, roommate, or close friend in to the FFL dealer to purchase a firearm in the form of a straw purchase. It is important for all dealers to keep an active log of all denials and the firearms which were attempting to be purchased.

34 This means that the firearm cannot be transferred to the potential buyer at this time. Denial means no transfer at any time; a delay results in a short period of time in which the potential buyer must wait to purchase their firearm. *Supra*, notes 31,32.
On October 26, 2005, the Arms Act became a lawful barrier of immunity for firearms manufacturers and FFL dealers from reckless behavior occurring with their products. Any qualified civil liability action against the companies producing or selling guns may no longer be brought in any State or Federal court. During deliberations, the United States Congress found the following: lawsuits against firearms manufacturers and sellers affect the flow of commerce, the trade of firearms and ammunition is already heavily regulated at all levels of the law, and the possibility of imposing liability on an entire industry for the negligent actions of others is an abuse of the legal system. By exercising the Full Faith and Credit Clause as mentioned in the United States Constitution, the Arms Act preserves a citizen’s rights through the Fourteenth Amendment as well as solidifying a citizen’s access to a supply of firearms for all lawful purposes in conjunction to the Second Amendment.

IVb: Exceptions

There are some limited exceptions to the Lawful Commerce in Arms Act which do not qualify as civil liability action lawsuits. For example, a seller of a firearm may not perform a transfer to anyone who has motives to commit acts of violence, or drug trafficking, with the use of the firearm. However, the transferor had to of been aware of the motives prior to the transfer to have a civil suit brought against him/her. Also, the seller can also face a civil suit if they perform a sale to someone with negligent entrustment. In order to determine negligent entrustment, the seller would have to knowingly transfer a firearm to someone who plans on using the firearm for an unreasonable risk, to the buyer or others, which should never happen with proper training. Furthermore, negligent entrustment lawsuits are based on state laws, and vary across the United States.

Predicate exceptions relate to the sale or marketing of firearms, and can only be determined with a proximate cause of harm. In order for this exception to suffice, the seller would have to knowingly sell a firearm to a person who could not have one under state or federal law. For example, if the buyer was a convicted felon, or met any of the requirements on Form...
4473 which would result in a no-sale, the FFL dealer is not allowed to transfer a firearm to that person. In addition, if the seller knowingly committed a straw purchase for someone who cannot possess a firearm, a civil action suit could occur. However, proving the seller knowingly transferred the firearm is nearly impossible, which makes this exception irrelevant. Breach of contract and the sale of a defective item are two exceptions which are straightforward and the most common to see in a courtroom. Although the two appear to be easy to prove, there is an exception within the defective item/warranty exception: if the firearm was used in a criminal act, and the victim was shot due to a gun malfunction after the trigger was pulled, the dealer and/or manufacturer could not be held liable. However, if the gun fired without the trigger being pulled, even during a criminal act, a civil suit could still take place. The final exception applies to past legislation, and the Attorney General’s ability to enforce the Gun Control Act or National Firearms Act. Although there are many exceptions to the Arms Act, the majority are hard to prove in court because the salesman must knowingly engage in the transfer of the firearm in a negligent way.

PART V: CONCLUSION

It is clear that the gun industry, specifically Federal Firearms Licensed dealers, need to be held accountable for their actions in a growing market. Employers of gun stores recognize the possibility for increased revenue, and are encouraging their employees to sell as many firearms as they can. With commission based incentives for selling firearms, ammunition, and other accessories, salesmen are more inclined to engage in dangerous behavior without seeing the consequences of selling a firearm to unqualified individuals. The chances of negligent sales taking place is astronomical when no one is held responsible and everyone wants to gain profit. Although the Lawful Commerce in Arms Act protects manufacturers and distributors from civil liability action suits, someone needs to be held accountable for guns ending up in the hands of the wrong people when purchased from a licensed dealer. As a salesman, I have witnessed both ends of the spectrum, from a legal transfer of a gun to straw purchases of others. If the FFL dealers were held accountable for their actions, then the employees would be trained better, and taught all of the proper ways to detect straw (and other) negligent purchases before the firearm exits the store. This is a multi-billion dollar industry on the rise with no liability placed on manufacturers or dealers for the majority of risks and dangers associated with firearms; someone

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46 Id. Straw purchases where the seller is aware of the situation are common, especially in a commission based environment. Many FFL dealers have to find ways to protect themselves against an audit from the ATF showing that straw purchases occur in their store(s). The FFL can be removed from the store if found to commit straw purchases.

47 See https://www.fas.org/sgp/crs/misc/R42871.pdf. This document lists all exceptions to the Lawful Commerce in Arms Act and outlines scenarios involving each exception and how they can be applied. However, it is very difficult to prove an FFL dealer guilty of any of the exceptions, therefore leading in few civil liability action suits being brought against gun dealers.

48 Id. If a criminal negligently handles a firearm and causes a round to discharge, then the issue at-hand cannot be placed on the distributor of the firearm nor the FFL dealer who transferred the firearm.

49 Id. Although the firearm was used in a criminal act, the accused of the crime never pulled the actual trigger on the firearm, and it mysteriously “malfunctioned” on its own. While this is a defined exception to the Arms Act, it is nearly impossible to prove this is the court of law.

50 Id. Case precedence, past legislation, and the power of the Attorney General can override the Lawful Protection in Arms act in most situations. If the Attorney General sees reason to associate previous rulings, such as the Gun Control Act of 1968, with a particular case, then his/her ruling will create an exception.
needs to be held responsible for using poor judgment and placing guns in the hands of the wrong people.