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## MEMORANDUM OF LAW

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**Re:** General Overview of Federal Laws Restricting Reselling of Firearms  
**Date:** July 31, 2013

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There are generally two federal provisions that can result in criminal charges for people reselling firearms in certain situations, Title 18 section 922(a)(1)(A) of the United States Code (Engaging in the Business of Dealing in Firearms Without a License) and Title 18 section 371 (Conspiracy to Make a False Statement with Respect to Firearm Records). Engaging in the business of firearms sales and making false statements on firearm records is illegal regardless of the kinds of firearms transferred. Below is a brief discussion of these two provisions.

### I. DEALING IN FIREARMS WITHOUT A LICENSE

#### A. Federal law

Like California law, federal law allows a person to sell some firearms without a license. But once a person establishes a pattern of firearm sales, the person can be considered in the “business” of selling firearms. If you are in the firearm selling “business” you need to have a federal firearms license. Failure to have one is a violation of Title 18 section 922(a)(1)(A) of the United States Code (Engaging in the Business of Dealing in Firearms Without a License).

In order to prove a willful violation of § 922(a)(1)(A)’s prohibition against

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unlicensed dealing in firearms, the government must present evidence ... [beyond a reasonable doubt]... that the defendant was not a licensed dealer, that he ‘devote[d] 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,’ 18 U.S.C. § 921(a)(21)(C), and that he acted with knowledge that his conduct was unlawful.<sup>1</sup>

In sum, the government must prove the person selling the firearms was “willfully” “engaged in the business” as a firearm “dealer” without a license.

### 1. “Willful”

To secure a conviction, the government must first prove that a defendant’s actions were “willful.”<sup>2</sup> But, “the willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.”<sup>3</sup> “The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.”<sup>4</sup>

This is a fact-specific inquiry. But, “knowing” activities resemble those of a firearm “dealer” could be sufficient to prove that one knew the appropriate federal license was needed to do so, and thus “willfully” violated the law.

### 2. “Engaged in the Business”

It is unlawful for any person (except licensed firearm dealers) to engage in the business of dealing in firearms.<sup>5</sup> A “dealer” is any person engaged in the business of selling firearms at wholesale or retail, and a licensed dealer means any dealer who is licensed under Chapter 44 of the United States Code (aka, the Gun Control Act, or GCA).<sup>6</sup>

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<sup>1</sup> *United States v. Allah*, 130 F.3d 33, 45 (2d Cir. 1997).

<sup>2</sup> 18 U.S.C. § 924(a)(1)(D).

<sup>3</sup> *Bryan v. U.S.*, 524 U.S. 184, 196 (1998); *United States v. Ogles*, 406 F.3d 586, 590 (9th Cir. 2005), *on reh’g en banc*, 440 F.3d 1095 (9th Cir. 2006).

<sup>4</sup> *Bryan v. U.S.*, 524 U.S. 184, 193 (1998).

<sup>5</sup> 18 U.S.C. § 922(a)(1)(A).

<sup>6</sup> 18 U.S.C. § 921(a)(11).

As the term relates to dealers, a person is considered to be “engaged in the business” when they devote 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...” This definition does not include a person who makes occasional sales, exchanges, or firearms for the enhancement of personal collection or for a hobby, or who sells all or part of his personal collection of firearms[.]”<sup>7</sup> And “‘with the principal objective of livelihood and profit’ means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”<sup>8</sup>

This is also a fact-specific inquiry. Some individuals charged for reselling firearms might be able claim that they were interested in obtaining firearms to enhance their own collection and only sold firearms when they lost interest. Such a story may make sense if the person owns lots of firearms and is known to keep more than he sells, and actually used the firearms he resold. Of course when a person is purchasing a few identical firearms and reselling soon after acquiring them, especially if he never used them, that is a more difficult situation to defend. Such repetitive activity is not normally associated with “collecting” by ATF but is considered closer to “dealing.”

## **B. California Law: Dealer License Requirement**

Under California law, it is unlawful for any person to sell, lease or transfer firearms unless he or she has been issued a license pursuant to Cal. Pen. Code Section 26500(a). There are however, a number of exceptions to this restriction.

One exception to the license requirement allows for the “infrequent” sale and/or transfers of firearms.<sup>9</sup>

“Infrequent” sales or transfers of firearms is defined as less than 6 handgun transactions per calendar year and “[f]or firearms other than handguns, occasional and without regularity.” And “transaction,” for this purpose, means a single sale, lease, or transfer of any number of

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<sup>7</sup> 18 U.S.C. § 921(a)(21) (emphasis added).

<sup>8</sup> 18 U.S.C. § 921(a)(22). Proof of profit is not required when a person engages in regular and repetitive purchases and dispositions for criminal purposes or terrorism. *Id.*

<sup>9</sup> Cal. Pen. Code Section 26520. \*\*\*Remember that most firearm transfers must be conducted through a dealer.\*\*\*

firearms.<sup>10</sup>

Note, the above law is different from the federal one. A violation of either can have serious life-changing consequences.

## **II. CONSPIRACY TO MAKE A FALSE STATEMENT WITH RESPECT TO FIREARM RECORDS**

### **A. Conspiracy**

Another crime associated with the reselling of firearms is “Conspiracy to Make a False Statement with Respect to Firearm Records.” “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”<sup>11</sup> In order for a conspiracy conviction to be sustained under section 371, the government must prove:

1. An agreement between two or more people to accomplish an illegal objective;
2. Commission of an overt act by one of the conspirators, in furtherance of that objective; and
3. Specific intent to commit the substantive offense (here 18 USC 924(a)(1)(A))

#### **1. Agreement Between Two or More Persons**

In order to prove this violation, the government must prove that there was an agreement between two or more persons to engage in a crime.<sup>12</sup> An agreement that amounts to a conspiracy need not be formal or express, but may be a tacit understanding; the agreement may be inherent in and inferred from the circumstances especially declarations, acts, and conduct of the alleged conspirators.<sup>13</sup> A conspiracy conviction cannot stand without evidence showing a meeting of the minds to commit illegal act.<sup>14</sup>

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<sup>10</sup> Cal. Pen. Code Section 16730(a).

<sup>11</sup> 18 U.S.C. § 371.

<sup>12</sup> 18 U.S.C. § 371.

<sup>13</sup> *United States v. Dellosantos*, 649 F.3d 109 (1st Cir. 2011).

<sup>14</sup> *United States v. Kottwitz*, 614 F.3d 1241 (11th Cir. 2010).

## 2. Overt Acts in Furtherance of the Objective

Additionally, in order to prove a violation of conspiracy, the government must prove that at least one of the conspirators committed an *overt act* in furtherance of the substantive offense.<sup>15</sup> An indictment need not allege overt acts on the part of each member of the conspiracy.<sup>16</sup> A single overt act by any of the conspirators, in furtherance of the conspiracy, is sufficient.<sup>17</sup> Statements by one conspirator are admissible evidence against all.<sup>18</sup>

### B. Specific Intent to Commit Substantive Offense (False Statement With Respect to Firearm Records)

The substantive offense alleged for these conspiracies is a violation of 18 U.S.C. § 924(a)(1)(A). This law makes it a crime to make a false statement in a record that Federal law requires a licensed dealer to keep. This includes 4473 forms. In order for a person to be guilty of this crime, the government must prove each of the following beyond a reasonable doubt:

1. The defendant made a false statement;
2. The statement concerned information required by law for the records of a federally-licensed firearm dealer;
2. The defendant knew the statement was false.

#### 1. Actual Buyer

The issue in these cases is who is the “actual buyer” of the firearm. When purchasing firearms, an individual is required to fill out ATF Form 4473. Question 11.a on Form 4473 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.** (*See Instructions for Question 11.a.*) . . .

On the second page of the form you are required to certify:

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<sup>15</sup> 18 U.S.C. § 371.

<sup>16</sup> *United States v. Nelson*, 66 F.3d 1036, 1044 (9th Cir. 1995).

<sup>17</sup> *Id.*

<sup>18</sup> FED. R. EVID. 801(d)(2)(E).

I certify that my answers to Section A [which includes question 11.a] are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. . . I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law (See Instructions for Question 16).

Finally question 11.a is explained as follows:

**Question 11.a. Actual Transferee/Buyer:** For the purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself (*e.g., redeeming the firearm from pawn/retrieving it from consignment, firearm raffle winner*). You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. **ACTUAL TRANSFEREE/BUYER EXAMPLES:** Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer “**NO**” to question 11.a. The licensee may not transfer the firearm to Mr. Jones. However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer “yes” to question 11.a. However, you may not transfer a firearm to any person you know or have reasonable cause to believe is prohibited under 18 U.S.C. §(g), (n), or (x).

If a person is purchasing a firearm on behalf of someone else, not only can the purchaser be liable under federal law for lying on the 4473 form, but so can the individual the buyer is purchasing the firearm for. If there is an agreement in place and there has been an overt act, both persons can be charged with conspiring to violate federal law.

While the above activities are similar to “straw purchases” and buying a firearm as a gift for another person there are some distinct differences. These differences, especially when it comes to buying a gift, could be the difference between a lawful act and a violation of federal law.

### III. STRAW PURCHASES AND LYING ON FEDERAL FORMS

There appears to be some confusion about the activity involved in these types of cases versus what constitutes a “straw purchase.”

A straw purchase is generally understood to mean the act of an individual, a “straw man,” purchasing a firearm for a prohibited person (usually a friend or relative). But there is no law prohibiting the buying of the firearm for someone else, the illegal act, as discussed above, is lying on the form. And, like in the present case, the “straw man” becomes susceptible to federal prosecution because they are lying on the 4473 when asked whether they are the “actual purchaser” of the firearm.

The straw man doctrine, which is nothing more than a long-standing construction of the relevant statutes, holds that a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables the ineligible principal to obtain a firearm.

*U.S. v. Moore*, (9th Cir. 1997) 109 F.3d 1456, 1460-61

In a lot of these cases the “straw man” is not charged under section 924(a)(1)(A) but rather section 922(a)(6). Section 922(a)(6) is not much different than 924(a)(1)(A). Section 922(a)(6) makes it illegal:

for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

18 U.S.C.A. § 922(a)(6)

According to cases involving “straw purchases” lying about who the actual buyer is on the 4473 is the material fact to the lawfulness of the sale.<sup>19</sup>

#### A. Buying as a gift v. Buying on behalf of someone else

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<sup>19</sup> *U.S. v. Moore*, (9th Cir. 1997) 109 F.3d 1456

An actual buyer is an individual who is purchasing a firearm for themselves, or who is legitimately acquiring the firearm as a gift for a third party.<sup>20</sup> For example, if Mr. Brown buys a firearm with his own money to give to Mr. Jones as a present, and Mr. Jones does not give Mr. Brown money for the firearm, then Mr. Brown is the actual buyer of the firearm and should answer “yes” to Question 12a.<sup>21</sup>

However, an individual is not an actual buyer, if they buy a firearm and then give that same firearm to a third party for money. For example, Mr. Smith purchases a firearm for Mr. Black. Mr. Black then gives Mr. Smith money for the firearm. Mr. Smith is not an actual buyer of the firearm and must answer “no” to Question 12a.<sup>22</sup>

#### IV. CONCLUSION

This memorandum provides only a brief discussion of the general laws and potential criminal issues that can arise when transferring firearms. It should not be relied on as an exhaustive analysis of these laws and issues. If you have any questions or concerns about the contents of this memorandum, please contact an attorney familiar with firearm laws.

#### For Further Assistance:

For links to free information on firearms laws, the Legal Resources section of our [www.calgunlaws.com](http://www.calgunlaws.com) website has subsections on various firearms law topics. Check it out!

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<sup>20</sup> ATF Form 4473; *United States v. Johnson*, No. 11-10290, 2012 WL 1921974, at \*1 (9th Cir. May 29, 2012).

<sup>21</sup> *Johnson*, 2012 WL 1921974, at \*1.

<sup>22</sup> *Id.*

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