



March 4, 2024

District Attorney Rick Tedrow
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SENT VIA EMAIL TO: RTedrow@da.state.nm.us; ferraris@sjcso.com

Dear District Attorney Tedrow:

In response to an inquiry sent to our office about the lawfulness of non-profit gun buy-back programs and, specifically, about whether such an event would result in a crime for selling a firearm without a background check, as proscribed in NMSA 1978, § 30-7-7.1 (2019), we provided our analysis to you in a letter dated January 9, 2024. Subsequently, we received a second inquiry requesting additional analysis on gun buy-back programs that are not supervised by or conducted in conjunction with a law enforcement agency. We are providing your office our legal analysis of the issue because both inquiries referred to gun buy-back events in Farmington. We previously concluded that gun buy-back events using best practices, which include the involvement of law enforcement and the simultaneous shredding of the firearm, do not violate Section 30-7-7.1. Without the participation of law enforcement, a gun buy-back event might violate this provision if the non-profit entity provides consideration in exchange for the transfer of a firearm and does not conduct a background check; however, such an event would not require background checks in the absence of providing consideration.

As we observed in our previous letter, gun buy-back events are designed to function as a community safety tool during which firearms are surrendered for their destruction in order to remove the firearms from the community. An individual surrendering one or more firearms will typically receive a gift card in an amount that may reflect the number of firearms surrendered but not the value of the firearm or firearms surrendered.

We previously discussed the statutory requirement of background checks accompanying the transfer of firearms. Section 30-7-7.1 requires a federal instant background check with the sale of a firearm subject to certain exceptions and makes it a misdemeanor if a buyer or seller violates the provision. Section 30-7-7.1 does not apply to the transfer of a firearm as a gift or donation. Section 30-7-7.1 instead requires a "sale." A "sale" is "the delivery or passing of ownership, possession or control of a firearm for a fee or other consideration." The statute further defines "consideration" as "anything of value exchanged between the parties to a sale." Section 30-7-7.1(C)(1). A firearm for purposes of this statute means "any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; and includes any handgun, rifle or shotgun; but shall not include an antique firearm as defined in 18 U.S.C. Section 921(16), a powder-actuated tool or other device designed to be used for construction

purposes, an emergency flare *or a firearm in permanently inoperable condition.*” (Emphasis added.) The statute does not define “possession” or “permanently inoperable.”

This statute excludes from the background check requirement the sale of a firearm “by or to a person who holds a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a),” “to a law enforcement agency,” “between two law enforcement officers authorized to carry a firearm,” and “between immediate family members.” Section 30-7-7.1(B)(1)-(4). If a firearm is purchased by a business or other entity, “each natural person who is authorized by the buyer to possess the firearm after the sale shall undergo a federal instant background check before taking possession of the firearm.” Section 30-7.7.1(A)(1).

The goal of statutory construction is to give effect to the intent of the Legislature. *Leger v. Leger*, 2022-NMSC-007, ¶ 26. The plain language of a statute is the primary indicator of legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11. The Legislature’s intent may also be discerned through the history of the statute and the purpose the Legislature sought to accomplish. *Leger*, 2022-NMSC-007, ¶ 26.

Based on the language of the statute and the Legislature’s intent, we previously concluded that gun buy-back events conducted under the supervision of or in conjunction with law enforcement do not require a background check because law enforcement does not provide consideration for the transfer of the firearm and law enforcement acts as an intermediary in charge of the destruction of the firearm. If law enforcement is not involved, however, a different analysis applies. A background check may be required depending on how the gun buy-back is conducted.

As noted above, Section 30-7-7.1 requires a background check for the “sale” of a firearm. When a non-profit entity exchanges a gift card for a firearm, the gift card is “consideration” that makes the exchange a sale. This is true even if the amount of a gift card is unrelated to the value of the firearm because “consideration” refers to “*anything* of value exchanged between the parties to a sale.” Section 30-7-7.1(C)(1) (emphasis added). As a result, a background check would be required.

The same would not be true, however, if an individual surrenders a firearm to a non-profit entity without consideration. Thus, if a non-profit entity accepts a surrendered firearm, destroys it such that it is no longer a firearm, and provides, after destruction, a gift card in appreciation for the surrender, the gift card may not meet the definition of consideration under Section 30-7-7.1 because it would be provided in exchange for a destroyed item excepted from the definition of a firearm. This scenario would assume, however, that the non-profit entity makes no promise of something of value to the individual surrendering the firearm before the exchange occurs. It also assumes destruction to the point that the firearm is “permanently inoperable.”

Section 30-7-7.1 does not define the phrase “permanently inoperable.” The statute, however, borrows from federal law its definition of a firearm as a weapon “which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C. § 921(a)(3). In context, it appears that the Legislature intended for “permanently inoperable” to mean, at a minimum, a condition that would prevent readily converting the item to expel a projectile by the action of an explosive. Given the similarity of the definition of firearm in New Mexico and federal law, New Mexico would likely turn to interpretations of federal law as persuasive authority. See *Hammack v. N.M. Taxation & Revenue Dep’t*, 2017-NMCA-086, ¶ 29 (relying on persuasive interpretations of a federal analog to New Mexico law). At one time, federal firearm laws contained an exception for “permanently inoperable” firearms. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 110102, 108 Stat. 1796 (repealed 2004).

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The Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) implemented regulations that define this term as follows:

Permanently inoperable. A firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition. An acceptable method of rendering most firearms permanently inoperable is to fusion weld the chamber closed and fusion weld the barrel solidly to the frame. Certain unusual firearms require other methods to render the firearm permanently inoperable.

27 C.F.R. § 478.11. The ATF has also provided other potentially useful guidelines. See “How to Properly Destroy Firearms,” available at <https://www.atf.gov/resource-center/infographics/how-properly-destroy-firearms>. The ATF notes that melting, shredding, or crushing the receiver are sufficient. *Id.* Barring that, slices through three critical locations on the receiver are necessary, with the precise locations on the receiver being dependent on the model. *Id.* Significantly, a band saw is not sufficient; an oxy/acetylene torch must be used. *Id.* These ATF regulations, while not binding on New Mexico, are persuasive in interpreting the legislative intent in Section 30-7-7.1.

Even though there may be limited situations in which a gun buy-back event operated without law enforcement’s participation would not trigger the requirement of a background check, we emphasize that it would be prudent to conduct such events only in association with law enforcement. A law enforcement presence provides an added measure of safety in conducting such an event. In addition, police officers have the authority to enter the serial number of a firearm into the National Crime Information Center to determine whether a firearm has been reported stolen, and police officers can determine whether a firearm should be preserved in the event it is later found to be evidence of a crime. Law enforcement officers are also able to determine whether a certain destruction method satisfies ATF regulations. In sum, there may be lawful methods of conducting a gun buy-back event without the presence of law enforcement and without conducting background checks, but it would be a better practice to have law enforcement present and involved in these events.

This construction of Section 30-7-7.1 is consistent with the purpose of the statute, which is to prevent dangerous individuals such as felons from possessing and using firearms. The gun buy-back program advances this same goal. We hope that our analysis of Section 30-7-7.1 is helpful to your office in its evaluation of the lawfulness of gun buy-back events. If you have any questions about this analysis, please do not hesitate to contact me.

Sincerely,



James Grayson
Chief Deputy Attorney General

cc: R. Shane Ferrari, San Juan County Sheriff