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Congress of the United States

House of Representatives

Washington, DC 20515-2107

January 9, 2013

The Honorable Joe Biden
Vice President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20501

Dear Mr. Vice President:

I commend you for leading the development of a comprehensive plan to address the scourge of gun violence in our nation. There is no single solution that will prevent tragedies such as the horror inflicted upon the victims and their families and loved ones in Newtown, but the rapid advancement in firearms technology should compel lawmakers to take a hard look at the laws governing these deadly weapons. Each of us has a responsibility to fight for saner, safer gun laws that uphold the Second Amendment while protecting the security of our schools, streets, and communities. As you work with leading law enforcement officials, mayors, gun-control advocates, gun owners, and others to develop a comprehensive proposal to address gun violence, I ask that the Task Force include the following recommendations:

- 1) **Implement a ban on assault weapons and high capacity ammunition clips.** The basis of any commonsense gun reform proposal should be to prohibit the sale of military assault weapons and high capacity ammunition clips. The weapons of choice by criminals and the mentally ill involved in many high profile mass shootings are military style assault weapons and large capacity ammunition clips. These are weapons designed for war – not for hunting or protecting one's home – and have no purpose except to kill as many people as possible without the need to reload. During the period of 1994-2004 when the previous federal assault weapon ban was in effect, there was a 66% reduction in the use of the 19 banned weapons used in crimes.

In 1994, I urged President Clinton to impose an emergency moratorium on the importation of military style assault weapons from China, including the AK-47 and Uzi. At the time, it was estimated that between 425,000 and two million modified rifles had been imported into the U.S. since 1991, selling for under \$130 a piece. President Clinton agreed and implemented the ban through issuance of an Executive Order as part of the renewal of China's Most Favored Nation trading status.

I ask that you include in your recommendations a new assault weapons ban that includes all semi-automatic weapons capable of accommodating an ammunition magazine greater than 10 rounds. In addition, the recommendations should call for a ban on "drums" or "magazines" of

ammunition that carry more than 10 bullets, which were used to deadly effect in both the Newtown and Aurora killings.

- 2) **Require background checks for all gun sales – not just those from federally licensed dealers.** Current law allows “private” individuals, including non-federally licensed gun dealers, to sell an unlimited number of firearms to anyone without a criminal background check or detection. Approximately 50% of guns sold each year are legally sold by “private” dealers at gun shows and from back packs and car trunks where no background check is required. In addition to closing this loophole, we must also remove the current prohibition on the Bureau of Alcohol, Tobacco and Firearms (ATF) from regulating secondary “private” gun sales.

I ask that you recommend closing the “gun show loophole” and require all gun dealers to conduct background checks, including unlicensed dealers who are responsible for 40 percent of all sales at gun shows.

- 3) **Improve the National Instant Criminal Background Check System (could be accomplished by Executive Order).** Under the Brady Law, federally licensed gun dealers are required to run a background check through the National Instant Criminal Background Check System (NICS) on anyone seeking to purchase a firearm. Among those prevented from acquiring a gun are individuals who have been involuntarily committed to a mental institution or judged to be “mentally defective” due to a finding of insanity by a court in a criminal case, incompetent to stand trial, or not guilty by reason of insanity. NICS relies on states to submit the relevant mental health data for inclusion in the federal database.¹

State reporting to NICS is voluntary, and rates of reporting vary widely across the country. In the wake of the mass shooting at Virginia Tech, which was carried out by an individual who obtained guns despite his history of severe mental illness, Congress passed the NICS Improvement Amendments Act of 2007 (NIAA). Congress intended the new law to incent states to increase their rate of reporting to NICS. However, a recent report by the Government Accountability Office (GAO) describes a number of obstacles that limit states’ ability to provide NICS the information needed to ensure a complete and reliable database.²

Although some states have vastly increased the number of mental health records provided to NICS in recent years, technological barriers and resource constraints have limited the ability of others to follow suit. According to GAO, the number of relevant mental health records that states provided to NICS increased from 126,000 to 1.2 million records (or nearly 800%) from 2004 through 2011. However, this increase was driven by reporting from just 12 states. Other states lag behind, with almost half of them increasing the number of mental health records they provided to NICS by just 100 or fewer. This disparity suggests that if other states could adopt the practices of the 12 states that vastly expanded their reporting, the NICS database could potentially become a more reliable tool in the effort to ensure that firearms do not fall into the wrong hands.

¹ For the purposes of this letter, “relevant mental health records” or “mental health records” refers only to the information that a state would send to NICS, which comprises the individual’s name, date of birth, and a code that indicates the reason that person is disqualified from purchasing or possessing a firearm. The information transferred to NICS does not include the person’s complete medical record or details about their mental health condition.

² U.S. Government Accountability Office. *Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks*. July 2012. (Publication No. GAO-12-684).

To address gaps in the database used to conduct firearms background checks, I ask that your Task Force include the following policies in your recommendation to the President:

- a) **Set a deadline for DOJ to identify and disseminate best practices of states that are successfully reporting the relevant mental health records to NICS:** According to the GAO report, technological challenges such as aging computer systems and a lack of integrated record systems are among the primary reasons that states are unable to provide records to NICS regarding individuals who are prohibited from possessing firearms due to a mental health-related adjudication, including a finding of insanity by a court in a criminal case, incompetent to stand trial, or not guilty by reason of insanity.³ To overcome these technological barriers, NIAA authorized the Department of Justice (DOJ) to make NICS Act Record Improvement Program (NARIP) grants available to states to improve their reporting practices.⁴ However, given the barriers they face, only a small number of states are able to meet the eligibility requirements for NARIP funding. As a result, DOJ awarded only a fraction of the \$10 million appropriation Congress provided for FY 2009 and the \$20 million for FY 2010.

Sharing proven strategies, best practices, and other information between states could help guide future policy decisions and improve reporting rates among states that lag behind. GAO recommended – and DOJ concurred – that the agency needs to “provide additional support by identifying and sharing information on promising practices on what worked for the states that have made progress sharing mental health records as well as what lessons they have learned.”⁵ In written comments included in the GAO report, DOJ noted that its Bureau of Justice Statistics (BJS) is in the process of identifying promising state practices.

I ask that you establish a deadline by which DOJ must complete its process of identifying best practices of states that are successfully providing mental health records to NICS and disseminating this information for use by all states. Further, I ask that DOJ review and implement recommendations for changing NARIP eligibility to allow more states to qualify for the funding.

- b) **Establish a deadline for DOJ to create a more workable system of incentives for states to report relevant mental health data to NICS.** Because state reporting to NICS is voluntary, NIAA included incentives – and penalties – to increase the availability of state records in the federal background check database. If a state provides at least 90% of its records relevant to the determination of whether a person is disqualified from purchasing a firearm, the state does not need to contribute the normal matching requirement for the DOJ’s National Criminal History Improvement Program (NCHIP).⁶ However, if the state fails to report at least 50% of its

³ Ibid.

⁴ To be eligible for NARIP grants, a state must (1) provide DOJ with a reasonable estimate of the number of NICS-related records it possesses and (2) establish a program that allows individuals who have been prohibited from possessing firearms due to a mental health-related adjudication or commitment to seek relief from the associated federal firearms prohibition.

⁵ U.S. Government Accountability Office. *Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks*. July 2012. (Publication No. GAO-12-684).

⁶ The program through which BJS provides direct awards and technical assistance to states and localities to improve the quality, timeliness, and immediate accessibility of criminal history records and related information.

available records, it may lose up to 3% of the amount it would normally be allocated under the DOJ Edward Byrne Memorial Justice Assistance (JAG) Program formula.⁷

According to GAO, the incentive/penalty provisions have resulted in limited success. The states it sampled report that they all received NCHIP grants, but none of them used it to improve the submission of mental health records. Instead, they used it to improve the quality of criminal history records in state databases. Others indicated that the incentive – waiving 10% of NCHIP's matching requirement – is insufficient because states have other ways to obtain the waiver. DOJ agrees that it needs to review the current incentive/penalty structure and investigate whether modifications to the provisions would make them more effective. The agency plans to convene a working group to conduct this review and determine whether there are alternative, viable methodologies.

I ask that you establish a deadline for DOJ's task force to complete its investigation into alternative, viable methodologies that could be used to implement incentives based on the states' reporting rates. In addition, we ask that you recommend allocating the resources necessary to ensure DOJ is able to complete this analysis.

c) Ensure the privacy of individuals' mental health records that states provide to NICS.

Some states have reported that they are reluctant to provide mental health information to NICS out of legitimate concern for their residents' privacy. These state legislatures have chosen either to prohibit the sharing of mental health data with NICS or at least not to explicitly permit it. A lack of explicit authority causes some state officials to be concerned about the prospect of litigation based on HIPAA's Privacy Rule, which lays out the minimum requirements for the treatment of protected health information, such as mental health records. Recognizing this challenge, DOJ has asked the Department of Health and Human Services (HHS) to "consider a potential change to the [HIPAA] Privacy Rule that would specifically allow disclosure of mental health records for NICS reporting purposes."⁸ Again, the disclosure of records would pertain only to mental health data that is relevant to NICS: the individual's name, date of birth, and a code that indicates the reason that person is disqualified from purchasing or possessing a firearm.

DOJ may have another option it could pursue to encourage states to provide relevant mental health data to NICS without violating patient privacy or running afoul of the Privacy Rule. In testimony before the Committee on Oversight and Government Reform, a DOJ official noted that mental health records that would prohibit an individual from purchasing or owning a firearm can be placed in the Denied Persons File, which "allow a state to share this information for the purposes of NICS checks without necessarily identifying the person whose name is entered as having a mental health history."⁹ In other words, a NICS background check would reveal only that the person is barred from purchasing a firearm and would not specify that this is the case due to mental illness.

⁷ JAG funding supports all components of the criminal justice system, including law enforcement programs, prevention and education programs, and drug treatment programs.

⁸ U.S. Government Accountability Office. *Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks*. July 2012. (Publication No. GAO-12-684).

⁹ Testimony of Rachel L. Brand, Assistant Attorney General for Legal Policy for the Department of Justice: *Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws*, May 10, 2007.

I ask that you instruct HHS to expedite consideration of DOJ's request regarding a potential change or clarification to the Privacy Rule, whether it is necessary, and whether such a change can be made while still protecting the privacy of patients who seek mental health care, as required by our health privacy laws and medical ethics. In addition, I ask that you instruct DOJ to investigate whether – barring a change in the HIPAA Privacy rule or an explicit state law permitting the transfer of mental health data to NICS – there is an avenue for states to share this information without violating HIPAA, other applicable state and federal laws, and any Supreme Court decisions that establish Americans' strong right to health information privacy (i.e., through the use of the Denied Persons File). If DOJ determines that there is such an avenue, it should expeditiously disseminate this information to the states.

DOJ should also take any additional steps needed to protect the privacy of individuals whose mental health records are included in NICS. For example, DOJ could increase collaboration with health privacy experts and advocates to ensure that mental health records sent to NICS are transferred and used in a manner that protects patient privacy.

- 4) **Repeal restrictions imposed by “Tiahrt Amendments”, which hinder the ability of law enforcement to pursue gun-related crimes.** Named for their original sponsor, Representative Todd Tiahrt (R-KS), the Tiahrt Amendments are provisions attached to federal spending bills that limit law enforcement's ability to investigate gun crimes, identify criminals who buy and sell illegal firearms, and prosecute unscrupulous gun dealers. A concerted campaign by national and state law enforcement, Mayors Against Illegal Guns, and other advocates has succeeded in lifting some of the most onerous limitations imposed by the Tiahrt Amendments, such as the restriction that state and local law enforcement could only access ATF's crime gun trace data in connection with a specific investigation. However, certain aspects of the Tiahrt Amendments that remain in effect continue to hamstring law enforcement.

- a) **Allow the FBI to maintain gun purchase records beyond 24 hours.** Among the most damaging provisions is the requirement that the Federal Bureau of Investigation (FBI) destroy all approved gun purchase records within 24 hours. When a federally licensed dealer conducts a background check through NICS, the system creates an audit log of the purchase, which the FBI must destroy the next day. This hinders the bureau's effort to prevent gun crimes and acts of terrorism. It also limits the FBI's ability to verify that the gun dealer ran a background check properly and to retrieve an illegally purchased gun. Prior to the 24-hour rule going into effect, the FBI frequently relied on audit logs to retrieve illegally possessed guns. GAO reported that, in just six months, the FBI used retained records to retrieve 235 illegal guns. Had the 24-hour limit been in effect during that time period, 228 of those retrievals would have been impossible.¹⁰

I ask that the Task Force recommend lifting the requirement that NICS background check logs are destroyed within a day, in order to support the FBI's efforts to confirm gun dealers' compliance with background check laws and to retrieve guns purchased illegally.

- b) **Allow ATF to require dealer inventory checks to detect lost or stolen guns.** In 2000, ATF reported that just 1% of federally licensed gun dealers were responsible for selling 57% of guns used in crimes. Because some dealers sell such a high volume of firearms, their products are statistically more likely to be linked to a crime. However, other dealers may be less scrupulous when selling firearms, willfully ignoring straw purchasers or selling firearms

¹⁰ U.S. Government Accountability Office (GAO). *Potential Effects of Next-Day Destruction of NICS Background Check Records*. Washington DC, July 2002. (Publication No. GAO-02-653).

"under the table". Yet the Tiahrt Amendments restrict ATF from requiring gun dealers to conduct annual physical inventory checks in order to detect firearms that have been lost or stolen, providing a dangerous source for criminals in the market for illegal guns or individuals who would fail a background check. According to Mayors Against Illegal Guns, ATF reported in 2007 that it found 30,000 guns missing from dealer inventories based on its inspection of just 9.3% of firearms dealers.¹¹

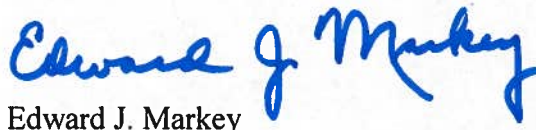
I ask that the Task Force recommend lifting the prohibition on ATF's ability to require that firearms dealers conduct annual physical inventory checks.

- 5) **Lift the prohibition on federally funded firearms research.** In the mid-1990s, the Center for Disease Control and Prevention (CDC) was researching gun-related injuries and deaths as a public health issue. The studies funded by the CDC's National Center for Injury Control and Prevention did not promote a gun control agenda; federal regulations already bar the use of research funding to advocate for or against legislation. Yet in 1996 a rider to the CDC appropriations bill was added stating 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." According to a 2011 New York Times article, no other field of research is singled out in the same way as firearms research. Furthermore, even though firearms research that does not promote legislation may technically be permitted by law, "the upshot is clear inside the centers [CDC]: the agency should tread in this area only at its own peril."¹² More recently, Congress imposed a similar restriction that targets firearms research conducted by the National Institutes of Health, further limiting researchers' ability to answer basic questions such as whether background checks on individuals seeking to purchase a firearm reduce gun-related violence.

I ask that the Task Force recommend lifting the prohibition on federally funded firearms research so that we can pursue an evidence-based response to what is clearly a public health issue.

While this list of recommendations is not intended to be exhaustive, it highlights some of the basic and fundamental improvements that should be included in any proposal to reform the laws governing the sale, purchase, or ownership of firearms. It is imperative that we move thoughtfully and expeditiously on the effort to reform our nation's gun laws, and I thank you for your leadership on this vital issue and your consideration of these recommendations. If you have any questions, please contact Sara Schaumburg in my office at 202-225-2836 or sara.schaumburg@mail.house.gov.

Sincerely,


Edward J. Markey

¹¹ <http://www.mayorsagainstillegalguns.org/html/federal/tiahrt.shtml>

¹² Luo, Michael. "N.R.A. Stymies Firearms Research, Scientists Say." The New York Times 25 Jan. 2011: A1. Print.