

The Honorable Merrick Garland
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Attorney General Garland,

We write today to request that the United States Department of Justice (DOJ) promulgate regulations pertaining to the implementation of Section 12005 of Public Law 117-159. We applaud Congress for taking a critical first step in addressing the ‘dating loophole.’ However, the bill introduces new and undefined terms that require rulemaking for consistent and effective applications nationwide. Rulemaking is also necessary to prevent exhaustive litigation to determine the prescribed criteria of intimate relationships.

The undersigned organizations, representing the collective expertise of the domestic violence field, ask that the regulations address the following issues.

General Considerations

The primary challenge faced by lawmakers in drafting Section 12005 was how to define a ‘dating relationship’ to ensure that it encompasses dating relationships as represented by the lived experiences of survivors of dating violence, while excluding acquaintances outside of the context of a romantic or intimate relationship. While Section 12005 introduces the new term of ‘dating relationship,’ the term was intended to be more performative than substantive. It should be broadly interpreted to encompass dating relationships as commonly experienced in the lives of survivors and as understood in both the Violence Against Women Act and applicable state domestic violence laws.

Definition of Dating Relationship

Elements

Because every relationship is unique, it is impossible to empirically define a dating relationship. While many dating relationships are easy to identify, because the individuals involved hold themselves out as dating partners, this is not the case in all dating relationships (ex. extramarital affairs). Moreover, relationships involving domestic violence are often more intense than healthy relationships and move more quickly than healthy relationships, so arbitrary requirements for a certain number of dates, a certain relationship length, etc. would exclude many relationships involving abuse, as well as ignoring cultural factors, the rise of online courtship and online dating, and other developing trends in dating.

Instead of attempting to empirically define a dating relationship, Section 12005 provides a roadmap to guide judges in determining whether or not a dating relationship exists. As such, the key guideposts are contained in subparagraph (B) - the length, the nature, and the type and frequency of interaction between the parties.

Cultural context

Cultural context should be considered when determining the existence of a dating relationship. A dating relationship in a traditional community looks very different from a dating relationship in a more progressive community. This is particularly true when considering the role physical affection and also sexual contact play in establishing a relationship. Sexual contact should never be required to establish a dating relationship.

'Recently'

The purpose of defining 'dating relationship' is to determine whether 'dating violence' occurred. Thus, in interpreting what constitutes a 'dating relationship,' DOJ must consider the dynamics of intimate partner violence, including post-separation violence. Consider the two following examples. 1) Two individuals are in a dating relationship. They break up and lose contact. Three years later, they both attend the same party, and one individual assaults the other due to insulting comments the second individual made. 2) Two individuals are in a dating relationship that involves violence. The victim leaves the perpetrator, but the perpetrator continues to harass the victim. Over five years, the harassment escalates to stalking which escalates to assault.

While scenario one, with its gap of three years after the relationship ended, is not 'dating violence,' scenario two, with a longer period since the relationship ended, very clearly is. Thus, when considering what constitutes 'recently' for the purpose of establishing a 'dating relationship,' courts should consider not only the question of temporal proximity to when the survivor said the relationship was over (which may be different from when the perpetrator acknowledged the end of the relationship) but also post-separation abuse predating the court proceedings. This includes any recent or current threat posed by the perpetrator to the victim, which threat is associated with the previous dating relationship.

'Recently had a continuing serious relationship'

The terms 'serious' and 'continuing' are included in the definition of 'dating relationship' to differentiate between such a relationship and an acquaintanceship outside the context of a romantic or intimate relationship. They should not be interpreted to establish new criteria that must be proven in order to establish the existence of a dating relationship beyond a common understanding of what constitutes a dating relationship in the lives of survivors and relationships that already qualify as dating under federal, state, or tribal law. Rather, 'serious,' 'continuing,' and 'recent' should be broadly understood as modified by 'casual acquaintanceship or ordinary fraternization in a business or social context.'

As such, Congresswoman Debbie Dingell noted in colloquy with Representative Mike Thompson, when discussing their shared understanding of the intent of the inclusion of such terms, "The introduction of 'serious,' 'continuing,' and 'recent' should not be read to require judges to include specific findings of seriousness or continuity. Instead, the existence of a dating relationship must be determined based on the enumerated factors set forth in subparagraph (B) of this section, with the acknowledgement that a finding of a dating relationship under a state

law with a definition that is substantially similar to federal law constitutes a finding of ‘dating relationship for the purpose of this section.’”¹

Thus, DOJ must clarify that courts do not need to make specific findings as to the recency, seriousness, or continuity of a dating relationship to establish the existence of such a relationship.

Relationship to State, Tribal, and local laws

Almost all adjudications related to domestic violence, whether between spouses or dating partners, occur in State, Tribal, or local court, and those courts will be making determinations about the relationship between the victim and the perpetrator based on State, Tribal, or local law, respectively. As noted above, Representative Dingell and Representative Thompson indicated that a finding of a dating relationship under State law (which term can in this case be read to mean the adjudicating jurisdiction, in the case of an adjudication under Tribal or local law) constitutes a finding of a dating relationship under federal law for the purposes of the federal firearms code. Senator John Cornyn, one of the primary sponsors, publicly said as much: “this doesn’t limit law-abiding gun owners’ rights unless somebody is convicted of domestic abuse under their state laws.”² If an individual is convicted of domestic abuse against a dating partner under the laws of their State, Tribe, or locality, this prohibitor is intended to apply.

Definition of Misdemeanor Crime of Domestic Violence

‘Current or recent former’

As discussed in reference to the definition of ‘dating relationship,’ the term ‘recent former’ is contextual. Moreover, because ‘recent’ serves a different purpose in the definitions of ‘dating relationship’ and ‘misdemeanor crime of domestic violence,’ ‘recently’ and ‘recent former’ need not be understood to be synonymous.

In cases in which post-separation abuse is absent, for the purpose of the definition of a misdemeanor crime of domestic violence, we recommend ‘current or recent former’ be interpreted as a lapse of at least three years since both parties recognized the relationship ended. However, if the victim reports ongoing abuse, if there is an active order of protection, if there is a history of violations of a protective order, if there is an otherwise established current or recent threat to the victim, or if the actions of the offender indicate that the misdemeanor offense was related to their prior dating relationship, ‘recent former’ should be interpreted more expansively to ensure the safety of the victim.

Relief from disability

¹ 168 Cong. Rec. H5881 (daily ed. Jun. 24, 2022) (colloquy between Rep. Dingell and Rep. Thompson). <https://www.congress.gov/117/crec/2022/06/24/168/108/CREC-2022-06-24-house.pdf>

² Delaney, A. (2022, June 22). Senate gun bill closes ‘boyfriend loophole,’ gives abusers chance ‘to straighten up.’ *Huffington Post*. https://www.huffpost.com/entry/senate-gun-bill-boyfriend-loophole_n_62b327f4b0cf43c85eb6e9

We request that DOJ reemphasize that the new relief from disability provision in Section 12005 is available only to first-time offenders who are convicted of a misdemeanor crime against a dating partner - neither repeat offenders nor individuals who are convicted of a misdemeanor crime against any other person described in 18 USC 921(a)(33)(A) are eligible for automatic relief from disability after five years. We further request that DOJ clarify that a previous dating violence conviction before the date of enactment disqualifies an individual from the relief from disability, and that such a conviction does not need to be for violence against the same dating partner.

Moreover, we ask that DOJ clarify that a conviction for a misdemeanor offense in the five years after the completion of a sentence having, as an element, the use or attempted use of force or the threatened use of a deadly weapon, disqualifies the individual from the automatic restoration of their firearms access, regardless of the perpetrator's relationship to the victim of this second offense. We also ask DOJ to interpret 'if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence' to mean that the individual must also have complied with all court-ordered treatment and other court orders accompanying the conviction.

Finally, we ask that DOJ emphasize that the new relief from disability only applies to the Federal disability. Disabilities imposed under State, Tribal, or local law are not affected. Moreover, the federal relief from disability should not be considered to encourage States, Tribes, and local jurisdictions to weaken their protections for survivors by creating analogous processes under their laws.

No retroactive application

While we recognize the title of subsection (b) of Section 12005 has no impact on the interpretation of this law, we object to the use of the term 'retroactive' in the context of the federal firearms prohibitors. 'Retroactive' implies the imposition of a criminal punishment based on conduct that occurred before the bill passed - in this case, the possession of firearms before the possession of such firearms was illegal. The further implication is that the prohibitors without date of enactment clauses are 'retroactive' and thus in violation of the ex post facto clause of the Constitution. Courts have repeatedly ruled that that is not true,³ but we have also recently seen courts rejecting precedent in cases relating to firearm access. We very strongly urge DOJ *not* to use this problematic language in its regulations or formal or informal communications.

Please contact Rachel Graber (rgrab@ncadv.org) with any questions.

Sincerely,

³ *United States v. Brady*, 26 F.3d 282 (2d Cir.), cert. denied, 115 S.Ct. 246 (1994), *United States v. Waters*, 23 F.3d 29 (2d Cir. 1994), *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998); *United States v. Mitchell*, 209 F.3d. 319 (4th Cir. 2000).

Asian Pacific Institute on Gender-Based Violence
Esperanza United
Jewish Women International
Just Solutions
Legal Momentum, the Women's Legal Defense and Education Fund
National Alliance to End Sexual Violence
National Coalition Against Domestic Violence
National Council of Jewish Women
National Domestic Violence Hotline
National Network to End Domestic Violence
National Resource Center on Domestic Violence
National Resource Center on Domestic Violence and Firearms
Ujima Inc., The National Center on Violence Against Women in the Black Community