



## POSITION STATEMENT

### A1093/S1715 IMPOSITION OF RESTRICTIVE PRACTICES ON GUN DEALERS

#### CONCEPT

In an effort to reduce illegal trafficking in firearms, the proposed legislation would impose extensive new requirements on dealers for the storage, display and sale of firearms. In addition, the state police would be given the power to issue additional requirements without legislative approval. New business practices would be mandated for insurance, staffing, training and record keeping. While the proposals are expansive in scope, there is little justification for their implementation. New York's handgun licensing laws virtually eliminate "straw man" purchases of handguns, usually the primary concern when addressing diversion. Many of the "new" mandates are redundant with existing State and Federal law or long established industry practices. Nothing in this proposal addresses the illegal underground market, the primary source of crime guns.

#### POSITION

This proposal duplicates existing Federal procedural and record keeping requirements and imposes restrictions with no demonstrable potential for preventing harm or injury that would justify a legitimate State interest. Accordingly, it should not be enacted.

This proposal adds a new Article (Article 40) to the General Business Law (GBL) nominally directed at preventing the sale or other diversion of firearms, rifles, and shotguns from licensed dealers to criminals. It is the contention of the sponsors that poor business practices or intentional evasion of the law by "rogue dealers" or the employees of otherwise responsible dealers are the cause of large numbers of these diversions.

S. 900 contains definitions for the purpose of the Article. These include an overly broad definition of a "gun show", which appears to have no purpose in this Article. Perhaps this is intended as a precursor for other legislation directed at restricting or eliminating gun shows.

S. 901 is directed at developing measures to prevent sales and transfers to criminals. As the transfer of handguns is already tightly restricted by the licensing system, this is presumably directed at the transfer of rifles and shotguns through straw purchases. As sales of this type have been the target of both public and dealer directed programs developed by the Bureau of Alcohol, Firearms, and Explosives (ATFE) and the National Shooting Sports Foundation (NSSF) since 2000, this seems redundant. A straw purchase is already a felony under the Gun Control Act of 1968<sup>1</sup>. This proposal adds nothing of substance to existing efforts.

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<sup>1</sup> 18 U.S.C. § 922(a)(6)

S. 902 mandates that a dealer carry insurance of at least \$1 million against liability for damage, injury, or death resulting from the sale of a firearm, rifle, or shotgun. It is not clear what tort would produce this liability. General business insurance would cover negligence and it is highly unlikely that an insurance company would write coverage for damages for an occurrence in which the policyholder is not a participant, is not negligent, and therefore bears no liability under law. Despite the sponsor's claims to the contrary, it is not clear whether or not this bill is intended to create an additional cause of action.

S. 903 requires that all firearms, rifles, and shotguns be kept in locked cases and only removed singly for customer examination. Outside of business hours, all firearms, rifles, and shotguns are to be kept in a vault. Ammunition would be stored separately and made inaccessible to customers. This proposal presumes that dealers currently have no regard for the security of their inventory and no concern for their own or their customers' safety.

This proposal adds nothing to public safety. These are retail businesses that are used to taking the same security precautions that any dealer in valuable or potentially dangerous merchandise would take. They wish to do so in a manner that allows them to deal with their customers in a comfortable environment that does not suggest that they are engaged in an illicit activity.

S. 904 requires the exclusion of individuals less than 18 years of age from premises where firearms, rifles, shotguns, or ammunition is sold. This would require obtrusive access control and/or age validation procedures and it is not clear to what purpose.

S. 905 provides that dealers may only sell or transfer firearms, rifles, or shotguns at the location listed on the dealer's license or at gun shows. This is redundant as this restriction is already in Federal law.<sup>2</sup>

S. 906 establishes a minimum age of 21 and training requirements for employees covering the compliance with the law, instruction of customers, and affixing required labels. Records of all training would be required as specified by the Superintendent of State Police. This proposal establishes mandates and imposes unnecessary costs for what any businessperson does in the course of normal operations. Compliance with the law and communicating with customers requires neither mandates nor record keeping.

S. 907 entails the dealer completing a number of steps prior to completing the transfer of any firearm, rifle, or shotgun:

Complete instant background check via the National Instant Background Check System (NICS). This requirement is redundant, as it is required by Federal law.

Provide the customer with a gun locking device. This requirement is redundant as it is already required by Sec. 396-ee of the GBL.

Demonstrate the functioning of the firearm, rifle, or shotgun. This is pretty much a standard practice of the sales function and is backed up with a user's manual.

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<sup>2</sup> 18 U.S.C. § 923(a) and (j)

Provide the purchaser with the mandated Federal safe storage warning notice. This requirement is redundant, as it is required by Federal law.

Provide the purchaser with a bill of sale. This is a standard business practice and gains nothing from codification.

Obtain a signed statement from the purchaser that he or she has received all the specified notices and instruction. Again, paperwork with no discernable purpose.

The requirements in this proposal are either redundant, as they are mandated by existing law, or represent an effort to impose bureaucratic overhead on what are customary business practices.

S. 908 provides for the maintenance and retention of records that duplicate records that the dealer is required to maintain under Federal law. All of the information specified in the proposal (and then some) is included either in the dealer's file of completed Firearms Transaction Record (ATF Form 4473)'s or ATFE "bound book"<sup>3</sup>. Form 4473 must be retain for 20 years and the bound book for the life of the business and surrendered to the ATFE if the dealer's license is surrendered. The requirements of this section are completely redundant with the requirements of Federal law.

It has been contended by the sponsors that ATFE examinations of dealers has uncovered thousands of "missing" firearms, rifles, and shotguns. In fact, the vast majority of these have been determined to be record keeping errors. It must be remembered that until a few years ago, the Federal regulations required handwritten records. Now that AFTE approved automated systems are available and are being installed, errors have been significantly reduced. By way of comparison, a 2001 audit of the Federal Bureau of Investigation disclosed that 449 of the agency's 50,000 firearms had either been lost or stolen, including fully automatic weapons.<sup>4</sup>

S. 909 requires to the dealer to provide access to all records involving firearms and employee training to any law enforcement agency with or without any established investigate need. This would allow fishing expeditions, such as that conducted by the City of New York, in the hope of discovering material to support a political agenda.

This section also includes a requirement that dealers assist law enforcement. Any dealer, regardless of legal requirements is going to assist law enforcement with legitimate investigative needs. It is not, however, the function of dealers to perform data analysis and trend tracking. That is an ATFE function.

The requirement to report trace information to the manufacturer is completely redundant, as the manufacturer is where the ATFE trace process starts. When a trace is requested by a law enforcement agency, the ATFE contacts the manufacturer to determine the distributor or dealer to whom the firearm was shipped.

S. 910 requires each dealer to implement procedures to insure compliance with all State and Federal laws and report annually to the Superintendent of State Police that he or

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<sup>3</sup> 27 C.F.R. 478.121 and 478.125

<sup>4</sup> FoxNews.Com (07/18/2001) *Senate Blasts FBI Loss of Computers, Weapons*

she has done so. We know of no other industry that is required to state each year that they are legal.

S. 911 allows the Superintendent of the New York State Police (NYSP) to implement whatever regulations he or she deems necessary to prevent the diversion of firearms, rifles, and shotguns from legal commerce. We believe that this gives the Superintendent much too broad authority to issue regulations without legislative oversight.

The enhanced powers and responsibilities assigned the NYSP by S.910 and S. 911 would require the establishment of an entirely new functional group, which would duplicate the existing responsibilities of the ATFE. There is nothing to be gained by this redundancy and the function should be ceded to the Federal authorities.

## **RECOMMENDATION**

The stated purpose of the proposed legislation is to reduce trafficking in illegal guns and make it more difficult for criminals to obtain firearms, rifle, and shotguns from legitimate dealers. While laudable in intent, the proposed legislation focuses on the wrong part of the supply chain.

The proposed legislation creates obstructions to the lawful operation of gun dealers and presents pointless obstacles to their customers.

Many of the requirements are redundant, duplicating records or actions required under existing State and Federal law. Some of these appear designed solely to require costly duplication by imposing a slightly different form or report.

Other mandates create bureaucratic overhead with no clear relationship to a legitimate State interest.

The sponsors purport that State and local governments will realize substantial savings due to anticipated reductions in firearms related crime. Since this proposal would have no effect on the criminal classes and it would, in fact, increase State expenses due to the establishment of redundant regulatory functions

This legislation should not be enacted.

## **A5696C/S4456A BACKGROUND CHECKS FOR EMPLOYEES OF DEALERS**

### **CONCEPT**

This proposal would require that all employees of a gunsmith or dealer in firearms submit to a background check in the form of a National Instant Check System (NICS) check. This would entail the prospective employee completing an application for submission by the dealer to the Division of Criminal Justice Services (DCJS). DCJS would then run a NICS check and if the individual passes, issue an employment certificate. Existing employees must be checked within six months of enactment. Individuals holding a license under Section 400.00 or 400.01 would be exempt.

It is not clear to what purpose this requirement is intended. The justification stated is that since customers are required by Federal law to submit to a National Instant Check System (NICS) check prior to taking delivery of a firearm, dealer employees should also undergo some form of check.

## **POSITION**

This bill should not be enacted, as it doesn't address any defined problem or failure of the existing regulatory structure. It appears to be a solution in search of a problem.

### **Dealers are already quite careful who has access to and handles firearms.**

Dealers are well aware of the necessity for prudent business practices when handling potentially dangerous merchandise. It is the dealer who is ultimately responsible, both morally and in law, for failure in his or her business practices. They are, by necessity, quite careful as to whom they employ in positions of trust.

### **There will be a cost to both the dealer and the State.**

This proposal would create another form and another set of records to be maintained by the dealer and, presumably, inspected.

The sponsor states that there will be no fiscal impact on the State. How the DCJS is going to set up a procedure for receiving, processing and recording applications and a system for issuing certificates at no cost eludes us.

There is no mention of any fee that might be imposed by DCJS or any other State agency. Given the fact, as stated above, that there will undoubtedly be costs incurred by the State in the administration of this system, the amount of any such fee should be fixed and the amount stated in the proposed legislation.

### **This bill is not clearly written and the sponsors seem to have little comprehension of firearm sale procedures.**

We question whether or not this is permitted under current Federal regulations that limit the use of the NICS system by state and local criminal justice agencies are limited to use in permit or license processing involving firearms or explosives. See 27 CFR §25.6(a) and 27 CFR §25.6(j)(1). This is an attempt to disguise an employment check as a license. The use of the NICS for performing background checks of employees was specifically precluded under Federal regulations.

One of the purposes in licensing dealers in firearms is to make certain that a competent entity or individual is responsible for the operation of the business and ensuring compliance with all legal requirements. This proposal is, in effect, redundant.

## **RECOMMENDATION**

As stated above, this is truly a solution in search of a problem. There does not appear to be any specific difficulty that is being addressed, merely that employees, who handle firearms in a narrow and closely managed environment, should undergo a background check because firearms purchasers, who take actual possession of the firearms, are required to do so.

There is no statement of what failures or potential failures in the existing regulatory system are being addressed. This is a poorly drafted bill that seems designed primarily to impose a financial and regulatory burden a specific type of business for no legitimate governmental purpose.

This legislation should not be enacted.