Legal Community Against Violence
expertise, information & advocacy to end gun violence

LCAV Model Law

REGULATING FIREARMS DEALERS AND AMMUNITION SELLERS (LOCAL GOVERNMENTS IN CALIFORNIA)

November 2009

About LCAV and Our Model Laws

Legal Community Against Violence (LCAV) is a national public interest law center dedicated to preventing gun violence. As the first and only lawyers' organization in the gun violence prevention movement, LCAV focuses on policy reform at the state and local levels, marshaling the expertise and resources of the legal community in support of gun violence prevention.

LCAV serves governmental and nonprofit organizations nationwide. Our services include legal and technical assistance in the form of legal research and analysis, development of regulatory strategies, legislative drafting, and in certain circumstances, calling upon our network of attorney members to help secure *pro bono* litigation assistance. We also engage in educational outreach and advocacy, producing reports, analyses and model laws. Our website, www.lcav.org, is the most comprehensive resource on U.S. firearm laws in either print or electronic form.

Model laws provide a starting point: a framework from which state or local legislation can be drafted, reviewed, debated, and ultimately adopted. California jurisdictions using this model must integrate it with existing ordinances as appropriate.

This report and model law do not offer, and are not intended to constitute, legal advice.

Executive Summary

LCAV has developed a model law for California jurisdictions to regulate firearms dealers and ammunition sellers. As detailed in the findings below, federal and state regulation of these entities is currently inadequate to protect the public safety.

Although federal law requires firearms dealers to obtain a license from the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"), ATF does not have the resources or authority to properly oversee the more than 100,000 firearms dealers, manufacturers, collectors, and others that it licenses ("FFLs").[1] In fact, on average, ATF inspects each FFL only once every 17 years, and the Office of the Inspector General has concluded that inspections by ATF are not fully effective for ensuring that FFLs comply with federal firearms laws. In addition, federal law is silent regarding many important aspects of the dealer's business, such as its location (leaving dealers free to operate out of their homes and near schools and other places children frequent) and on-site security requirements.

[1] References for the facts identified in the Executive Summary can be found in the "Findings" portion of the model law below.

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ATF has found that FFLs are the largest source of trafficked firearms. In addition, during fiscal year 2007, ATF found that over 30,000 firearms were missing from FFLs' inventories with no record of sale. In 1998, ATF found that 56% of randomly inspected dealers and 30% of pawnbrokers selling 50 or more guns had violated federal firearms law.

As of November 24, 2008, there were 2,043 federally licensed firearms dealers and pawnbrokers in California. California is among a minority of states that impose additional licensing requirements on firearms dealers, but even there the standards are minimal. As confirmed by a California Court of Appeals in *Suter v. City of Lafayette,* 67 Cal. Rptr. 2d 420 (Cal. Ct. App. 1997), California law authorizes local regulation in this area. Dozens of local governments in California have exercised this authority and now require firearms dealers to obtain a license or permit and impose additional requirements on dealers.

While firearms dealers are licensed at both the federal and state level, neither federal nor California law requires sellers of ammunition to obtain a license. A number of California cities, however, including Berkeley, Los Angeles, Richmond, Sacramento, and San Francisco, now require sellers of ammunition to obtain a license. Moreover, more than a dozen local jurisdictions in California have adopted ordinances requiring ammunition sellers to maintain records of ammunition sales. As detailed in the findings below, jurisdictions that have adopted such ordinances have had great success utilizing such records to identify people who illegally possess firearms, as well as ammunition. The state recently adopted a law, AB 962 (De Leon), modeled after these ordinances, mandating that such records be made statewide for the sale or transfer of handgun ammunition. This model law, like many of the existing local ordinances, extends this requirement to long gun ammunition as well.

This model law is intended to fill the gaps in the federal and state regulatory oversight of firearms dealers and ammunition sellers. More specifically, the goals of this model law are to help: 1) ensure that dealers' operations will not be detrimental to the public health and safety; 2) prevent and detect illegal trafficking of firearms and ammunition by dealers and their employees; 3) prevent the loss and theft of firearms and ammunition from dealers; and 4) prevent and detect the sale of firearms and ammunition by dealers to persons who are prohibited by law from possessing these items.

The principal elements of this model law include:

- Findings. Findings describe the legal background and policy basis for the law.
- Law Enforcement Permit. Anyone selling firearms, firearm components or ammunition is required to obtain a local law enforcement permit.
- Employee Background Checks. Every employee with access to or control over firearms, firearm components or ammunition is required to undergo a background check.
- On-site Security. Security standards for the business premises include the maintenance of an alarm system and surveillance cameras, and requirements for the safe storage of firearms, firearm components and long gun ammunition when the store is both open and closed for business.
- Inventory Reports. Firearms dealers must submit a report to law enforcement detailing their inventory every six months.

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- Liability Insurance. Firearms dealers must carry liability insurance with limits of at least $1 million per incident.
- Prohibition on Operating in Sensitive Areas. Firearms dealers and ammunition sellers are prohibited from operating in residential neighborhoods or near other sensitive areas, such as schools, daycare centers, or parks.
- Land Use Permit. Firearms dealers and ammunition sellers must obtain a land use permit to ensure that the location of the business complies with the jurisdiction's general plan and the business operations will not be detrimental to the public health and safety of those nearby.
- Ammunition Sales Records. Sellers of long gun ammunition are required to make and maintain records of sales that are available to law enforcement.

This report is based on LCAV's review of existing laws, judicial decisions, policy research, studies, and other gun violence prevention data, and it should answer many questions about the options available to communities regarding firearms dealers and ammunition sellers.

This report contains our nonpartisan analysis, study, and research on gun violence prevention case law and policies, and is intended for broad distribution to the public. Our presentation of this report is based upon our independent and objective analysis of the relevant law and pertinent facts and should enable public readers to form their own opinions and conclusions about the merits of this sample legislation.

Part I of these materials provides the text of the model law. Part II provides examples of legal challenges typically brought against firearms laws and explains that in the majority of cases, courts reject these arguments. Part III describes and responds to anticipated opposition arguments.

LCAV is ready to provide additional legal research, analysis, and drafting assistance to those seeking to enact a law regulating firearms dealers and ammunition sellers, or other laws to reduce gun violence. Please see www.lcav.org for more information about our services.

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I. Text of Model Law

CHAPTER 1 REGULATION OF FIREARMS DEALERS AND AMMUNITION SELLERS

ARTICLE 1 SALE OF FIREARMS AND AMMUNITION

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Sec. 1 **Firearm and ammunition sales**
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Sec. 3 **Severability clause**

Findings

[Findings regarding the need for and benefits of these regulations should be included. Findings in support of a law are most effective when they are specific and localized. When possible, local data from law enforcement, the public health community, and the media should be added. General findings are provided below.]

[*] Where the words "Chief of Police/Sheriff," "City/County" or similar variations appear, simply select the appropriate designation for your jurisdiction.

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Findings Regarding Gun Violence in General

Whereas, in 2006, 3,253 people died from firearm-related injuries in California[2] and 4,305 other people were treated for non-fatal gunshot wounds,[3]

Findings Regarding Current Federal Regulation of Firearms Dealers

Whereas, federal regulation of firearms dealers and ammunition sellers is currently inadequate to protect the public safety,

Whereas, although federal law requires firearms dealers to obtain a license from the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"),[4] ATF does not have the resources or authority to properly oversee the more than 100,000 firearms dealers, manufacturers, collectors and others that it licenses ("FFLs"),[5]

Whereas, ATF reported in 2007 that it inspects each FFL, on average, only once every 17 years,[6]

Whereas, between 1975 and 2005, ATF revoked, on average, fewer than 20 federal firearms licenses per year,[7]

Whereas, ATF faces numerous obstacles that limit its ability to enforce the law; for example, ATF may conduct only one unannounced inspection of each FFL per year, the burden of proof for ATF's prosecution and revocation of licenses is extremely high, serious violations of firearms law have been classified as misdemeanors rather than felonies, and ATF has historically been grossly understaffed,[8]

Whereas, the Office of the Inspector General has concluded that inspections by ATF are not fully effective for ensuring that FFLs comply with federal firearms laws,[9]

Whereas, ATF has found that FFLs are a major source of trafficked firearms. In June of 2000, ATF issued a comprehensive report of firearms trafficking in this country. That report analyzed

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[2] California Dep't of Health Servs., Epidemiology & Prevention for Injury Control Branch (EPIC), EPICenter California Injury Data Online, *Fatal Injury Data Custom Data Tables* (2009), at http://www.applications.dhs.ca.gov/epicdata/content/TB_fatal.htm.

[3] California Dep't of Health Servs., Epidemiology & Prevention for Injury Control Branch (EPIC), EPICenter California Injury Data Online, *Nonfatal Injury Data Custom Data Tables* (2009), at http://www.applications.dhs.ca.gov/epicdata/content/tb_nonfatal.htm.

[4] 18 U.S.C. § 922(a)(1)(A).

[5] The U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives provided the total number of federal firearms licensees as of November 8, 2007.

[6] Mayors Against Illegal Guns, *The Movement of Illegal Guns in America: The Link between Gun Laws and Interstate Gun Trafficking* 18, December 2008, available at: www.mayorsagainstillegalguns.org/downloads/pdf/trace_report_final.pdf.

[7] Brady Center to Prevent Gun Violence, *Shady Dealings, Illegal Gun Trafficking From Licensed Gun Dealers* 23 (Jan. 2007), available at: http://www.bradycenter.org/xshare/pdf/reports/shady-dealings.pdf. In 2006, ATF increased its total revocations to 131. *Id.*

[8] *Id.* at 24-26.

[9] Office of the Inspector General, Evaluation and Inspections Division, U.S. Department of Justice, *Inspection of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives* i (July 2004), available at: http://www.usdoj.gov/oig/reports/ATF/e0405/exec.htm.

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1,530 trafficking investigations during the period July 1996 through December 1998, involving more than 84,000 diverted firearms.[10] ATF found that FFLs were associated with the largest number of trafficked guns – over 40,000 – and concluded that "FFLs' access to large numbers of firearms makes them a particular threat to public safety when they fail to comply with the law,"[11]

Whereas, during fiscal year 2007, ATF found over 30,000 firearms missing from licensees' inventories with no record of sale,[12]

Whereas, in 1998, ATF found that 56% of randomly inspected dealers and 30% of pawnbrokers selling 50 or more guns had violated federal firearms law,[13]

Whereas, federal laws are silent regarding many important aspects of the dealer's business, such as its location (leaving dealers free to operate out of their homes and near schools and other places children frequent) and security requirements during business hours,

Whereas, according to a 1998 ATF random sample of FFLs nationwide, 56% of all dealers operated out of their homes, and 33% were located in businesses that are not usually associated with gun sales, such as funeral homes or auto parts stores,[14]

Findings Regarding Current State and Local Regulation of Firearms Dealers

Whereas, as of November 24, 2008, there were 2,043 federally licensed firearms dealers and pawnbrokers in California,[15]

Whereas, California is among a minority of states that impose licensing requirements on firearms dealers, but the standards are minimal,[16]

Whereas, the Court of Appeals in *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 428 (Cal. Ct. App. 1997) held that state law authorizes local governments in California to impose additional licensing requirements on firearms dealers,[17]

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[10] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* ix (June 2000), available at: www.atf.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf.

[11] *Id*. at x.

[12] Brady Center to Prevent Gun Violence, *U.S. Gun Shops "Lost" More than 30,000 Firearms Last Year*, June 17, 2008, available at: http://www.bradycampaign.org/media/release.php?release=988.

[13] Brady Center to Prevent Gun Violence, *"Trivial Violations"? The Myth of Overzealous Federal Enforcement Actions Against Licensed Gun Dealers* 1 (Sept. 2006), available at: www.bradycenter.org/xshare/pdf/reports/trivial-violations.pdf.

[14] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Commerce in Firearms in the United States* 16 (Feb. 2000), available at: www.mayorsagainstillegalguns.org/downloads/pdf/Commerce_in_Firearms_2000.pdf.

[15] The total number of federal firearms licensees in California as of November 24, 2008 was provided by the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives.

[16] *See* Penal Code §§ 12070-12071.

[17] The court in *Suter* struck down a provision of Lafayette's ordinance imposing additional security requirements on firearms dealers. That part of the opinion has been superseded by the adoption of Cal. Penal Code § 12071(b)(15).

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Whereas, FFLs are required by federal law to comply with all state and local dealer laws as a condition for retaining their federal licenses,[18]

Whereas, the International Association of Chiefs of Police recommends that local governments impose their own licensing requirements on firearms dealers because local requirements can respond to specific community concerns, and local review of licensees provides additional resources to identify and stop corrupt dealers,[19]

Whereas, a 2009 study found that cities in states that comprehensively regulate retail firearms dealers and cities where these businesses undergo regular compliance inspections have significantly lower levels of gun trafficking than other cities,[20]

Whereas, no federal or California law imposes security requirements on firearms dealers during business hours or requires firearms dealers or ammunition sellers to install burglar alarms or surveillance cameras. California law explicitly allows local jurisdictions to impose security requirements on firearms dealers that are stricter or at a higher standard than those imposed by state law,[21]

Whereas, no federal or California law requires agents and employees of firearms dealers or ammunition sellers to undergo background checks. California law explicitly permits local jurisdictions to require firearms dealers to perform such background checks,[22]

Whereas, no federal or California law requires firearms dealers to obtain liability insurance, prohibits firearms dealers or ammunition sellers from operating in residential neighborhoods or near schools, daycare centers, or parks, or requires firearms dealers or ammunition sellers to obtain a land use permit,

Whereas, California law requires firearms dealers to report the loss or theft of any firearm within 48 hours of discovery to the local law enforcement agency where the dealer's business premises are located, but does not otherwise require dealers to provide inventory reports to local law enforcement agencies,[23]

Whereas, according to a survey of local jurisdictions in California conducted in 2000 by Legal Community Against Violence (LCAV):

- 29 cities and three counties in California require firearms dealers to obtain a license or permit,
- 21 cities and two counties in California require firearms dealers to obtain liability insurance,

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[18] 18 U.S.C. § 923(d)(1)(F).
[19] International Association of Chiefs of Police (IACP), *Taking a Stand: Reducing Gun Violence in Our Communities* 14 (Sept. 2007), available at: http://www.theiacp.org/LinkClick.aspx?fileticket=%2Fs0LiOkJK5Q%3D&tabid=302.
[20] Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearms Trafficking,* J. Urb. Health (July 2009).
[21] Cal. Penal Code § 12071(b)(15).
[22] Cal. Penal Code § 12071(b)(20).
[23] Cal. Penal Code § 12071(b)(13).

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- 34 cities and four counties in California prohibit firearms dealers in residential areas,
- 14 cities and two counties in California prohibit firearms dealers near sensitive areas, such as daycare facilities, schools, parks, places of worship and community/recreation centers, and
- 31 cities and two counties in California require firearms dealers to conduct background checks on employees,[24]

Findings Regarding Public Support for the Regulation of Firearms Dealers

Whereas, a national poll conducted in March and April 2008 found that:

- 91% of Americans and 88% of gun owners favor requiring gun stores to perform background checks on employees;
- 86% of Americans and 83% of gun owners favor requiring gun retailers to inspect their inventories every year to report stolen or missing guns;
- 88% of Americans favor requiring gun stores to keep all guns locked securely to prevent theft; and
- 74% of Americans favor requiring gun retailers to videotape all gun sales,[25]

Whereas, in a nationwide poll conducted in January of 2007, 86% of gun owners reported that a gun store's decision to videotape all gun sales would not impact their decision to buy a gun at that store,[26]

Findings Regarding the Regulation of Ammunition Sellers

Whereas, federal law prohibits possession of ammunition by the same categories of persons it prohibits from possessing firearms,[27]

Whereas, California law requires persons who sell, loan or transfer firearms within California to obtain a license, but does not require persons who sell, loan or transfer ammunition to do so,[28]

Whereas, the Cities of Berkeley, Los Angeles, Richmond, Sacramento, and San Francisco are among the jurisdictions that now require sellers of ammunition to obtain a license or permit,

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[24] For lists of the jurisdictions with the each of these requirements and prohibitions mentioned, see LCAV's publication, "*Communities on the Move 2000: How California Communities Are Addressing the Epidemic of Handgun Violence*," available at: http://www.lcav.org/library/surveys_local_ords/com2000_pdf.pdf. Please note that jurisdictions may have amended their ordinances since LCAV conducted that survey. For example, the City of Inglewood now prohibits firearms dealers in residential areas, but is not listed as such in that survey. LCAV has not completed an exhaustive search for ordinances requiring sellers of ammunition to obtain a license or permit.

[25] Greenberg Quinlan Rosner Research and the Tarrance Group, *Americans Support Common Sense Measures to Cut Down on Illegal Guns* 3, April 10, 2008, available at: http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf.

[26] Greenberg Quinlan Rosner Research & The Tarrance Group for the Mayors Against Illegal Guns, *Strong Public Support for Tough Enforcement of Common Sense Gun Laws (Graphs)*, January 23, 2007, available at: http://www.greenbergresearch.com/articles/1849/2630_MAIGslides.pdf.

[27] 18 U.S.C. § 922(g).

[28] Cal. Penal Code § 12070(a).

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Whereas, 14 cities (Beverly Hills, Carson, Hayward, Inglewood, Los Angeles, Oakland, Pomona, Sacramento, San Anselmo, San Francisco, Santa Ana, Santa Monica, Tiburon, and West Hollywood), and two counties (Contra Costa and Marin) require ammunition sellers to keep records of their ammunition sales,

Whereas, law enforcement agencies in jurisdictions that require ammunition sellers to keep records of their ammunition sales have been able to detect illegal possessors of firearms and ammunition by cross-referencing the information in these records with California Department of Justice-maintained information regarding persons prohibited from such possession,

Whereas, a two-month study of Los Angeles' ordinance requiring ammunition purchasers to present identification prior to purchase and requiring ammunition sellers to maintain a sales log found that prohibited purchasers accounted for nearly 3% of all ammunition purchasers over this period, acquiring roughly 10,000 rounds of ammunition,[29]

Whereas, the Los Angeles ordinance led to 30 investigations, 15 search warrants, nine arrests, and the confiscation of 24 handguns, 12 shotguns, and nine rifles that were illegally possessed between 2004 and the first half of 2006, as well as 39 investigations in 2007, and at least 24 investigations in 2008,[30]

Whereas, a report issued one year after Sacramento enacted an ordinance requiring ammunition sellers to record the thumbprint of each purchaser and to electronically transmit the records of ammunition sales to the Sacramento Police Department ("SPD") found that:

- The SPD and allied agencies use the information gathered as a result of the ordinance in criminal investigations regularly,
- These requirements have allowed the SPD to electronically check the legal firearms rights status of transferees, and
- The electronic system for transfer of purchaser information has proven to be secure, effective and reliable,[31]

Whereas, between January 16 and December 31, 2008, the Sacramento ordinance led to the identification of 156 prohibited persons who had purchased ammunition, 124 of whom had prior felony convictions, 48 search warrants and 26 additional probation or parole searches. In addition, the ordinance led to 109 felony charges, 10 federal court indictments, 37 felony convictions and 17 misdemeanor convictions. The ordinance allowed law enforcement to seize a total of 84 firearms, including seven assault weapons, and thousands of rounds of ammunition,[32]

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[29] George E. Tita et al., *The Criminal Purchase of Ammunition*, 12 Inj. Prevention 308, 308 (2006).
[30] LCAV obtained these numbers from Lieutenant Steve Nielsen of the Los Angeles Police Department's Gun Unit in May 2007 and May 2008.
[31] Sacramento, Cal., City Code, Chapters 5.64, 5.66; Sacramento Chief of Police Rick Braziel et al., *Report to Council, Ammunition Sales Records Study* (Aug. 12, 2008), at: http://sacramento.granicus.com/MetaViewer.php?view_id=8&clip_id=1590&meta_id=155275.
[32] These statistics were obtained from Captain Jim Maccoun, Office of Technical Services, Sacramento Police Department on January 27, 2009. For the statistics for the period between January 16 and June 29, 2008, see *id.*

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Whereas, on October 11, 2009, Governor Schwarzenegger signed a new law, AB 962 (De Leon), to require handgun ammunition sellers to create and maintain records of handgun ammunition sales and transfers, effective February 1, 2011. No federal or state law, however, requires ammunition sellers to create or maintain records of sales or transfers prior to that date, or requires vendors to create or maintain records of sales or transfers of ammunition that is not principally for use in handguns, and

Whereas, AB 962 (De Leon) also requires handgun ammunition sellers to store handgun ammunition so that it is inaccessible to customers without assistance from the seller or an employee, effective January 1, 2010. No federal or state law, however, governs the way sellers store ammunition that is not principally for use in handguns,

Therefore, the jurisdiction/governing body hereby adopts the following:

ARTICLE 1 SALE OF FIREARMS AND AMMUNITION

Sec. 1 Definitions

"Applicant" means any person who applies for a law enforcement permit, or the renewal of such a permit, to sell, lease or transfer firearms, firearm components, or ammunition.

"Chief of Police/Sheriff" means the Chief of Police/Sheriff or the Chief's/Sheriff's designated representative.

"Firearm" means any device, designed to be used as a weapon or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of explosion or other means of combustion, provided that the term "firearm" shall not include an "antique firearm" as defined in section 921(a)(16) of Title 18 of the United States Code.

"Ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm, and any component thereof, but shall not include blank cartridges or ammunition that can be used solely in an "antique firearm" as that term is defined in section 921(a)(16) of Title 18 of the United States Code.

"Permittee" means any person, corporation, partnership or other entity engaged in the business of selling, leasing, or otherwise transferring any firearm, firearm component, or ammunition, which person or entity has obtained a law enforcement permit to sell, lease or transfer firearms, firearm components, or ammunition.

To "engage in the business of selling, leasing, or otherwise transferring any firearm, firearm component, or ammunition" means to conduct a business by the selling, leasing or transferring of any firearm, firearm component, or ammunition, or to hold one's self out as engaged in the business of selling, leasing or otherwise transferring any firearm, firearm component, or ammunition, or to sell, lease or transfer firearms, firearm components, or ammunition in quantity, in series, or in individual transactions, or in any other manner indicative of trade.

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Sec. 2 Law enforcement permit

[This model requires both firearms dealers and ammunition sellers to obtain a land use permit as well as a law enforcement permit. Alternatively, jurisdictions may choose to make the land use permit requirement in Article 2 of this model applicable only to firearms dealers, and not to persons and entities that sell only ammunition.]

It is unlawful for any person, corporation, partnership or other entity to engage in the business of selling, leasing, or otherwise transferring any firearm, firearm component, or ammunition within City/County without a law enforcement permit, as required by this Article**,** and a land use permit, as required by Article 2.

Sec. 3 Application for permit

(a) An applicant for a permit or renewal of a permit under this Article shall file with the Chief of Police/Sheriff an application in writing, signed under penalty of perjury, on a form prescribed by the City/County. The applicant shall provide all relevant information requested to demonstrate compliance with this Article, including:

(1) The applicant's name, including any aliases or prior names, age and address;

(2) The applicant's federal firearms license and California firearms dealer numbers, if any;

(3) The address of the proposed location for which the permit is sought, together with the business name, and the name of any corporation, partnership or other entity that has any ownership in, or control over, the business;

(4) The names, ages and addresses of all persons who will have access to or control of workplace firearms, firearm components, or ammunition, including but not limited to, the applicant's employees, agents and/or supervisors, if any;

(5) A certificate of eligibility from the state Department of Justice under Penal Code Section 12071 for each individual identified in Sec. 3(a)(4) demonstrating that the person is not prohibited by state or federal law from possessing firearms or ammunition;

(6) Proof of a possessory interest in the property at which the proposed business will be conducted, as owner, lessee or other legal occupant, and, if the applicant is not the owner of record of the real property upon which, the applicant's business is to be located and conducted, the written consent of the owner of record of such real property to the applicant's proposed business;

(7) A floor plan of the proposed business which illustrates the applicant's compliance with security provisions, as outlined in Sec. 6 of this Article;

(8) Proof of the issuance of a land use permit at the proposed location;

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(9) Proof of compliance with all applicable federal, state and local licensing and other business laws;

(10) Information relating to every license or permit to sell, lease, transfer, purchase, or possess firearms, firearm components or ammunition which was sought by the applicant from any jurisdiction in the United States, including, but not limited to, the date of each application and whether it resulted in the issuance of a license, and the date and circumstances of any revocation or suspension;

(11) The applicant's agreement to indemnify, defend and hold harmless the City/County, its officers, agents and employees from and against all claims, losses, costs, damages and liabilities of any kind pursuant to the operation of the business, including attorneys fees, arising in any manner out of the negligence or intentional or willful misconduct of:

(A) The applicant;

(B) The applicant's officers, employees, agents and/or supervisors; or

(C) If the business is a corporation, partnership or other entity, the officers, directors or partners.

(12) Certification of satisfaction of insurance requirements, for applicants applying for a permit to sell firearms or firearm components;

(13) The date, location and nature of all criminal convictions of the applicant, if any, in any jurisdiction in the United States.

(b) The application shall be accompanied by a nonrefundable fee for administering this Article as established by City Council/County Board of Supervisors resolution.

Sec. 4 Investigation by Chief of Police/Sheriff and employee background checks

(a) The Chief of Police/Sheriff shall conduct an investigation to determine, for the protection of the public health and safety, whether the law enforcement permit may be issued or renewed. The Chief of Police/Sheriff shall require the following individuals to provide fingerprints, a recent photograph, a signed authorization for the release of pertinent records, and any additional information which the Chief of Police/Sheriff considers necessary to complete the investigation:

(1) The applicant;

(2) All persons who will have access to or control of workplace firearms, firearm components or ammunition, including but not limited to the applicant's employees, agents and/or supervisors, if any.

(b) Prior to issuance or renewal of the permit, the Chief of Police/Sheriff shall inspect the premises to ensure compliance with this Article.

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(c) The Chief of Police/Sheriff may grant or renew a law enforcement permit if the applicant or permittee is in compliance with this Article and all other applicable federal, state and local laws.

Sec. 5 Grounds for permit denial or revocation

(a) The Chief of Police/Sheriff shall deny the issuance or renewal of a law enforcement permit, or shall revoke an existing permit, if the operation of the business would not or does not comply with federal, state or local law, or if the applicant or permittee:

(1) Is under 21 years of age;

(2) Is not licensed as required by all applicable federal, state and local laws; [*A jurisdiction may choose to replace this language with:* "**(2) Is not licensed as a dealer in firearms under all applicable federal, state and local laws.**" *This option would prohibit the sale of ammunition by persons not engaged in the business of selling firearms, such as hardware and convenience stores.*]

(3) Has made a false or misleading statement of a material fact or omission of a material fact in the application for a law enforcement permit, or in any other documents submitted to the Chief of Police/Sheriff pursuant to this Article. If a permit is denied on this ground, the applicant is prohibited from reapplying for a permit for a period of five years;

(4) Has had a license or permit to sell, lease, transfer, purchase or possess firearms or ammunition from any jurisdiction in the United States revoked, suspended or denied for good cause within the immediately preceding five years;

(5) Has been convicted of:

(A) An offense which disqualifies that person from owning or possessing a firearm under federal, state or local law, including, but not limited to, the offenses listed in Penal Code Sections 12021 and 12021.1;

(B) An offense relating to the manufacture, sale, possession or use of a firearm or dangerous or deadly weapon or ammunition therefor;

(C) An offense involving the use of force or violence upon the person of another;

(D) An offense involving theft, fraud, dishonesty or deceit;

(E) An offense involving the manufacture, sale, possession or use of a controlled substance as defined by the state Health and Safety Code;

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(6) Is within a class of persons defined in Welfare and Institutions Code Sections 8100 or 8103; or

(7) Is currently, or has been within the past five years, an unlawful user of or addicted to a controlled substance as defined by the Health and Safety Code.

(b) Employees, agents or supervisors of the applicant or permittee may not have access to or control over workplace firearms, firearm components or ammunition until the Chief of Police/Sheriff has conducted an investigation pursuant to Sec. 4(a)(2), and verified that none of the conditions listed in Sec. 5(a)(1), (4), (5), (6) or (7) exist, as applied to those employees, agents or supervisors. A new law enforcement investigation and background verification of such persons must be conducted each time the permittee renews his or her permit, or applies for a new permit. Except as provided in subsection (c), the Chief of Police/Sheriff shall deny the issuance or renewal of a law enforcement permit, or shall revoke an existing permit, if the applicant or permittee allows any employee, agent or supervisor to have access to or control over workplace firearms, firearm components or ammunition prior to the completion of the law enforcement investigation and background verification of those persons, or if those persons have not undergone the law enforcement investigation and background verification process within the last 365 days.

(c) Where an applicant is applying for a law enforcement permit to sell, lease or transfer firearms, firearm components or ammunition within the first 90 days of the effective date of this Article, and where the applicant has a pre-existing firearms dealer business which complies with all applicable federal, state and local laws, or is not a firearms dealer but is already engaged in the sale of ammunition:

(1) The applicant's current employees, agents or supervisors may continue to have access to or control over workplace firearms, firearm components and ammunition pending the completion of the Chief of Police's/Sheriff's investigation and background verification.

(2) Where one or more of the applicant's employees, agents or supervisors are found to be in violation of the conditions enumerated in subsection (b), the applicant shall have 21 days from the mailing of written notification from the Chief of Police/Sheriff to verify that such persons have been removed or reassigned so that they no longer have access to or control of workplace firearms, firearm components or ammunition. Failure of the applicant to comply with this subsection shall cause the Chief of Police/Sheriff to deny the application for a law enforcement permit.

(d) The law enforcement permit of any person or entity found to be in violation of any of the provisions of this Article may be revoked.

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Sec. 6 On-site security

(a) If the proposed or current business location is to be used at least in part for the sale of firearms or firearm components, the permitted place of business shall be a secure facility within the meaning of Penal Code Section 12071(c)(2).[33]

(b) If the proposed or current business location is to be used at least in part for the sale of firearms or firearm components, all heating, ventilating, air-conditioning, and service openings shall be secured with steel bars or metal grating.

(c) Any time a permittee is not open for business, every firearm or firearm component shall be stored in one of the following ways:

(1) In a locked fireproof safe or vault in the licensee's business premises that meets the standards for a gun safe implemented by the Attorney General pursuant to Penal Code Section 12088.2; or

(2) Secured with a hardened steel rod or cable of at least one-fourth inch in diameter through the trigger guard of the firearm. The steel rod or cable shall be secured with a hardened steel lock that has a shackle. The lock and shackle shall be protected or shielded from the use of a boltcutter and the rod or cable shall be anchored in a manner that prevents the removal of the firearm from the premises. No more than five firearms may be affixed to any one rod or cable at any time.

(d) Any time a permittee is open for business, every firearm shall be unloaded, inaccessible to the public and secured using one of the following three methods, except in the immediate presence of and under the direct supervision of an employee of the permittee:

(1) Secured within a locked case so that a customer seeking access to the firearm must ask an employee of the permittee for assistance;

(2) Secured behind a counter where only the permittee and the permittee's employees are allowed. During the absence of the permittee or a permittee's employee from the counter, the counter shall be secured with a locked, impenetrable barrier that extends from the floor or counter to the ceiling; or

(3) Secured with a hardened steel rod or cable of at least one-fourth inch in diameter through the trigger guard of the firearm. The steel rod or cable shall be secured with a hardened steel lock that has a shackle. The lock and shackle shall be protected or shielded from the use of a boltcutter and the rod or cable shall be anchored in a manner that

[33] A "secure facility" is defined by Penal Code § 12071(c)(2) as a building that meets certain specifications, including: certain types of locks on all doorways; steel bars on all windows; and steel bars, metal grating, or an alarm system on all heating, ventilating, air-conditioning, and service openings. State law allows a firearms dealer to avoid these requirements by utilizing other security features. *See* Penal Code § 12071(b)(14). Penal Code § 12071(b)(15) explicitly allows local jurisdictions to impose security requirements on firearms dealers that are stricter or at a higher standard than those imposed by state law.

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prevents the removal of the firearm from the premises. No more than five firearms may be affixed to any one rod or cable at any time.

(e) Any time a permittee is open for business, every firearm component, and any ammunition that is not principally for use in pistols, revolvers, or other firearms capable of being concealed upon the person, as that term is defined in Penal Code § 12001(a), shall be inaccessible to the public and secured using one of the methods mentioned in subsection (d)(1) or (2), except in the immediate presence of and under the direct supervision of an employee of the permittee.[34]

(f) The permitted business location shall be secured by an alarm system that is installed and maintained by an alarm company operator licensed pursuant to the Alarm Company Act, Business & Professions Code Sections 7590 *et seq.* The alarm system must be monitored by a central station listed by Underwriters Laboratories, Inc., and covered by an active Underwriters Laboratories, Inc. alarm system certificate with a #3 extent of protection.[35]

(g) The permitted business location shall be monitored by a video surveillance system that meets the following requirements:

(1) The system shall include cameras, monitors, digital video recorders, and cabling, if necessary.

(2) The number and location of the cameras are subject to the approval of the Chief of Police/Sheriff. At a minimum, the cameras shall be sufficient in number and location to monitor the critical areas of the business premises, including, but not limited to, all places where firearms, firearm components or ammunition are stored, handled, sold, transferred, or carried, including, but not limited to, all counters, safes, vaults, cabinets, cases, entryways, and parking lots. The video surveillance system shall operate continuously, without interruption, whenever the permittee is open for business. Whenever the permittee is not open for business, the system shall be triggered by a motion detector and begin recording immediately upon detection of any motion within the monitored area.

(2) In addition, the sale or transfer of a firearm, firearm component or ammunition shall be recorded by the video surveillance system in such a way that the facial features of the purchaser or transferee are clearly visible.

(3) When recording, the video surveillance system shall record continuously and store color images of the monitored area at a frequency of not less than 15 frames per

[34] Penal Code § 12061(a)(2) addresses the storage of handgun ammunition by sellers. That provision is effective January 1, 2010. *See* AB 962 (De Leon). "Handgun ammunition" is defined as ammunition principally for use in pistols, revolvers, or other firearms capable of being concealed upon the person, as that term is defined in Penal Code § 12001(a). Penal Code § 12060(b).

[35] Underwriters Laboratories, Inc. uses the term "extent of protection" to refer to the amount of alarm protection installed to protect a particular area, room or container. Systems with a #3 extent of protection include complete protection for all accessible openings, and partial motion and sound detection at certain other areas of the premises. For more information, see Central Station Alarm Association, *A Practical Guide to Central Station Burglar Alarm Systems* (3rd ed. 2005).

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second.[36] The system must produce retrievable and identifiable images and video recordings on media approved by the Chief of Police/Sheriff that can be enlarged through projection or other means, and can be made a permanent record for use in a criminal investigation. The system must be capable of delineating on playback the activity and physical features of persons or areas within the premises.

(4) The stored images shall be maintained on the business premises of the permittee for a period not less than one year from the date of recordation and shall be made available for inspection by federal, state or local law enforcement upon request.

(5) The video surveillance system must be maintained in proper working order at all times. If the system becomes inoperable, it must be repaired or replaced within fifteen calendar days. The permittee must inspect the system at least weekly to ensure that it is operational and images are being recorded and retained as required.

(6) The permittee shall post a sign in a conspicuous place at each entrance to the premises that states in block letters not less than one inch in height: THESE PREMISES ARE UNDER VIDEO SURVEILLANCE. YOUR IMAGE MAY BE RECORDED.

(h) The Chief of Police/Sheriff may impose security requirements in addition to those listed in this section prior to issuance of the law enforcement permit. Failure to fully comply with the requirements of this section shall be sufficient cause for denial or revocation of the law enforcement permit by the Chief of Police/Sheriff.

Sec. 7 Liability insurance

(a) If the proposed or current business location is to be used for the sale of firearms or firearm components, no law enforcement permit shall be issued or reissued unless there is in effect a policy of insurance in a form approved by the City/County and executed by an insurance company approved by the City/County, insuring the applicant against liability for damage to property and for injury to or death of any person as a result of the theft, sale, lease or transfer or offering for sale, lease or transfer of a firearm, firearm component or ammunition, or any other operations of the business. The policy shall also name the City/County and its officers, employees and agents as additional insureds. The limits of liability shall not be less than $1,000,000 for each incident of damage to property or incident of injury or death to a person; provided, however, that increased limits of liability may be required by the City Attorney/County Counsel if deemed necessary.

(b) The policy of insurance shall contain an endorsement providing that the policy shall not be canceled until written notice has been given to the City Manager/County Administrator at least 30 days prior to the time the cancellation becomes effective.

(c) Upon expiration of the policy of insurance, and if no additional insurance is obtained, the law enforcement permit is considered revoked without further notice.

[36] Television in the U.S. has 30 frames per second. However, 15 frames per second is generally described as viewable, and is used in similar regulations. *See, e.g.*, 02-392-013 Me. Code R. 6(6).

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Sec. 8 Location of business premises

(a) The business shall be carried on only in the building located at the street address shown on the permit. This requirement does not prohibit the permittee from participating in a gun show or event which is authorized by federal, state and local law upon compliance with those laws.

(b) The business premises shall not be located in any district or area that is zoned for residential use, or within 1,500 feet of any school, pre-school, day-care facility, park, community center, place of worship, liquor store, bar, youth center, video arcade, amusement park (not including a temporary carnival or similar event), other permittee as defined in Sec. 1 or residentially zoned district or area.

Sec. 9 Ammunition sales records

(a) No permittee or any agents, employees, or other persons acting under the permittee's authority shall sell or otherwise transfer ownership of any ammunition without verifying the identity of the transferee and recording the following information on a form to be provided by the Chief of Police/Sheriff:

(1) The date of the transaction;

(2) The name, address and date of birth of the transferee;

(3) The number of the transferee's current driver's license or other government-issued identification card containing a photograph of the transferee, and the name of the governmental authority that issued it;

(4) The brand, type, caliber or gauge, and amount of ammunition transferred;

(5) The transferee's signature; and

(6) The name of the permittee's agent or employee who processed the transaction.

(b) The permittee and any agents, employees, or other persons acting under the permittee's authority shall also, at the time of purchase or transfer, obtain the right thumbprint of the transferee on the above form.

(c) Within five calendar days of a firearm ammunition transfer, the permittee and any agents, employees, or other persons acting under the permittee's authority shall electronically transmit to the Police/Sheriff's Department all of the information set forth in paragraph (a). The electronic transmittal shall be by a method, and in a format, approved by the Chief of Police/Sheriff.

(d) The records created in accordance with this section must be maintained on the business premises of the permittee for a period not less than five years from the date of the recorded transfer and shall be made available for inspection by federal, state or local law enforcement upon request.

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(e) Within one year of the effective date of this section, the Chief of Police/Sheriff shall submit a report to the City Council/County Board of Supervisors regarding the ammunition sales records maintained since the effective date of this section. The report shall state information including, but not limited to: the number of prohibited persons who had purchased ammunition and who were identified through use of these records, as well as the number of searches, arrests, and investigations performed, charges filed, convictions obtained and firearms, firearm components and ammunition seized, as a result of these records.

(f) This section shall not apply if the transferee is:

(1) A "peace officer" as that term is defined in Penal Code § 830 *et seq.*, or a federal law enforcement officer; or

(2) A person licensed as a dealer or collector in firearms pursuant to Chapter 44 (commencing with Sec. 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.

(g) Effective February 1, 2011, this section shall not apply to the sale or transfer of ammunition that is principally for use in pistols, revolvers, or other firearms capable of being concealed upon the person, as that term is defined in Penal Code § 12001(a).[37]

Sec. 10 Restricted admittance of minors and other prohibited purchasers

(a) Where firearm sales activity is the primary business performed at the business premises, no permittee or any of his or her agents, employees, or other persons acting under the permittee's authority shall allow the following persons to enter into or remain on the premises unless accompanied by his or her parent or legal guardian:

(1) Any person under 21 years of age, if the permittee sells, keeps or displays firearms capable of being concealed on the person; or

(2) Any person under 18 years of age, if the permittee sells, keeps or displays only firearms other than firearms capable of being concealed on the person.

(b) Where firearm sales activity is the primary business performed at the business premises, the permittee and any of his or her agents, employees, or other persons acting under the permittee's authority shall be responsible for requiring clear evidence of age and identity of persons to prevent the entry of persons not permitted to enter the premises pursuant to subsection (a) by reason of age. Clear evidence of age and identity includes, but is not limited to, a motor vehicle operator's license, a state identification card, an armed forces identification card, or an employment identification card which contains the bearer's signature, photograph and age, or

[37] Penal Code § 12061(a)(3)-(7), (b) addresses records of the sale or transfer of handgun ammunition. Those provisions are effective February 1, 2011. *See* AB 962 (De Leon). "Handgun ammunition" is defined as ammunition principally for use in pistols, revolvers, or other firearms capable of being concealed upon the person, as that term is defined in Penal Code § 12001(a). Penal Code § 12060(b).

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any similar documentation which provides reasonable assurance of the identity and age of the individual.

(c) The permittee shall post the following conspicuously at each entrance to the establishment in block letters not less than one inch in height:

(1) If the permittee sells, keeps or displays firearms capable of being concealed on the person, the sign shall state, "FIREARMS ARE KEPT, DISPLAYED OR OFFERED ON THE PREMISES, AND PERSONS UNDER THE AGE OF 21 ARE EXCLUDED UNLESS ACCOMPANIED BY A PARENT OR LEGAL GUARDIAN."

(2) If the permittee sells, keeps or displays only firearms other than firearms capable of being concealed on the person, the sign shall state, "FIREARMS ARE KEPT, DISPLAYED OR OFFERED ON THE PREMISES, AND PERSONS UNDER THE AGE OF 18 ARE EXCLUDED UNLESS ACCOMPANIED BY A PARENT OR LEGAL GUARDIAN."

(d) Where firearm sales activity is the primary business performed at the business premises, no permittee or any of his or her agents, employees, or other persons acting under the permittee's authority shall allow any person to enter into or remain on the premises who the permittee or any of his or her agents, employees, or other persons acting under the permittee's authority knows or has reason to know is prohibited from possessing or purchasing firearms pursuant to federal, state, or local law.

Sec. 11 Inventory reports

Within the first five business days of April and October of each year, the permittee shall cause a physical inventory to be taken that includes a listing of each firearm and firearm component held by the permittee by make, model, and serial number, together with a listing of each firearm and firearm component the permittee has sold since the last inventory period. In addition, the inventory shall include a listing of each firearm lost or stolen that is required to be reported pursuant to Penal Code Section 12071(b)(13). Immediately upon completion of the inventory, the permittee shall forward a copy of the inventory to the address specified by the Chief of Police/Sheriff, by such means as specified by the Chief of Police/Sheriff. With each copy of the inventory, the permittee shall include an affidavit signed by an authorized agent or employee on behalf of the permittee under penalty of perjury stating that within the first five business days of that April or October, as the case may be, the signer personally confirmed the presence of the firearms and firearm components reported on the inventory. The permittee shall maintain a copy of the inventory on the premises for which the law enforcement permit was issued for a period of not less than five years from the date of the inventory and shall make the copy available for inspection by federal, state or local law enforcement upon request.

Sec. 12 Display of law enforcement permit

The law enforcement permit, or a certified copy of it, shall be displayed in a prominent place on the business premises where it can be easily seen by those entering the premises.

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Sec. 13 Issuance of law enforcement permit -- Duration

(a) A law enforcement permit expires one year after the date of issuance. A permit may be renewed for additional one-year periods if the permittee submits a timely application for renewal, accompanied by a nonrefundable renewal fee established by City Council/County Board of Supervisors resolution. Renewal of the permit is contingent upon the permittee's compliance with the terms and conditions of the original application and permit, as detailed in this Article. Police/Sheriff's department personnel shall inspect the permitted business premises for compliance with this Article prior to renewal of the permit. The renewal application and the renewal fee must be received by the Police/Sheriff's department no later than 45 days before the expiration of the current permit.

(b) A decision regarding issuance or renewal of the law enforcement permit may be appealed in the manner provided in Sec. 20 of this Article.

Sec. 14 Nonassignability

A law enforcement permit issued under this Article is not assignable. Any attempt to assign a law enforcement permit shall result in revocation of the permit.

Sec. 15 Compliance by existing businesses

A person engaged in the business of selling, leasing, or otherwise transferring any firearm, firearm component, or ammunition on the effective date of this Article shall, within 90 days of the effective date, comply with this Article. However, any person whose business is located in any location described in Sec. 8 of this Article may continue to sell, lease, or transfer firearms, firearm components, or ammunition for up to one year after the effective date of this Article. After the one-year period has expired, all such persons are prohibited from selling, leasing or transferring firearms, firearm components, or ammunition in the named locations.

Sec. 16 Law enforcement inspections

Permittees shall have their places of business open for inspection by federal, state and local law enforcement during all hours of operation. The Police/Sheriff's department shall conduct periodic inspections of the permittee's place of business without notice. Permittees shall maintain all records, documents, firearms, firearm components and ammunition in a manner and place accessible for inspection by federal, state and local law enforcement.

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Sec. 17 Warning regarding secondary sales

A permittee shall post conspicuously within the licensed premises the following warning in block letters not less than one inch in height: WITH FEW EXCEPTIONS, IT IS A CRIME TO SELL OR GIVE A FIREARM TO SOMEONE WITHOUT COMPLETING A DEALER RECORD OF SALE (DROS) FORM AT A LICENSED FIREARMS DEALERSHIP.

Sec. 18 Penalties

[*Penalties for the violation of provisions of this ordinance may vary based on the law enforcement and policy needs of each community. Jurisdictions are encouraged to consult with local law enforcement to develop appropriate penalties. While the language below makes each violation of any provision of this Article a misdemeanor, jurisdictions may choose to make violations of particular provisions an infraction instead.*]

(a) Any person violating any of the provisions of this Article shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this Article shall be punished by a fine of not more than $1,000 or by imprisonment for a period not exceeding six months, or by both. Each such person shall be guilty of a separate offense for each and every day during any portion of which a violation of any provision of this Article is committed or continued by such person and shall be punishable accordingly.

(b) In addition to any other penalty or remedy, the City Attorney/County Counsel may commence a civil action to seek enforcement of these provisions.

Sec. 19 Report of permit revocation to federal and state authorities

In addition to any other penalty or remedy, the City Attorney/County Counsel shall report any person or entity whose law enforcement permit is revoked pursuant to this Article to the Bureau of Firearms of the California Department of Justice and the Bureau of Alcohol, Tobacco, Firearms & Explosives within the U.S. Department of Justice.

Sec. 20 Hearing for permit denial or revocation

(a) Within ten days of the Chief of Police/Sheriff mailing a written denial of the application or revocation of the permit, the applicant may appeal by requesting a hearing before the Chief of Police/Sheriff. The request must be made in writing, setting forth the specific grounds for appeal. If the applicant submits a timely request for an appeal, the Chief of Police/Sheriff shall set a time and place for the hearing within 30 days.

(b) The Chief of Police/Sheriff shall provide a written decision regarding the appeal within 14 calendar days of the hearing. An applicant may appeal the decision of the Chief of Police/Sheriff to the **[appropriate government body. The appeal process should also be detailed or referenced here].**

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Sec. 21 Severability clause

If any section, subsection, sentence or clause of this Article is for any reason declared unconstitutional or invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the constitutionality, validity or enforceability of the remaining portions of this Article or any part thereof. The City Council/County Board of Supervisors hereby declares that it would have adopted this Article notwithstanding the unconstitutionality, invalidity or unenforceability of any one or more of its sections, subsections, sentences or clauses.

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ARTICLE 2 LAND USE PERMITS

[This model requires both firearms dealers and ammunition sellers to obtain a land use permit as well as a law enforcement permit. Alternatively, jurisdictions may choose to make the land use permit requirement in Article 2 of this model applicable only to firearms dealers, and not to persons and entities that sell only ammunition.]

Sec. 1 Firearm and ammunition sales

(a) Purpose. The purpose of this section is to provide for the appropriate location of any person, corporation, partnership or other entity engaging in the business of selling, leasing, or otherwise transferring any firearm, firearm component or ammunition (hereinafter "firearms dealer or ammunition seller") through the permitting process.

(b) Permit Requirement. It is unlawful for any firearms dealer or ammunition seller to sell, lease or transfer firearms, firearm components or ammunition unless the dealer or seller has obtained a land use permit pursuant to this chapter and a law enforcement permit as provided under Article 1 of this chapter. Subject to the restrictions listed below, firearms dealers and ammunition sellers are permitted in **[enumerate permitted districts, e.g., commercial, industrial, etc.]**. Firearms dealers and ammunition sellers are prohibited in all other land use districts.

(c) Procedure. An applicant for a land use permit shall apply to the planning commission by application prescribed by the City/County in the manner provided.

(d) Location. A land use permit for the sale of firearms, firearm components or ammunition will not be issued if the proposed business premises are located in any district or area that is zoned for residential use, or within 1,500 feet of any school, pre-school, day-care facility, park, community center, place of worship, liquor store, bar, youth center, video arcade, amusement park (not including a temporary carnival or similar event), other firearms dealer or ammunition seller or residentially zoned district or area.

(e) Other Criteria. The planning commission shall approve or conditionally approve a land use permit application only if, on the basis of the application, plans, materials, and testimony submitted at the hearing, the planning commission finds:

> (1) The location of the proposed land use is in accordance with the general plan of City/County; and
>
> (2) The location, size, design, and operating characteristics of the proposed use will be compatible with and will not be detrimental to the public health, safety or welfare of persons residing or working in or adjacent to the proposed land use and the surrounding neighborhood.

(f) Public Hearing and Notice Required. A public hearing shall be held with reference to an application for a land use permit. Notice for the public hearing shall be set forth as follows:

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(1) The contents of a public notice must include the following:

(A) Date, time, and place of the public hearing;

(B) Identity of the hearing body or hearing officer;

(C) General explanation of the matter to be considered and where more specific information may be obtained;

(D) General description in text or by diagram of the location of the real property/parcel or building which is the subject of the hearing; and

(E) A statement that any interested party or agent may appear and be heard.

(2) **[Insert any additional desired notice provisions.]**

(g) Conditions. An approved land use permit is not effective until the applicant satisfies the following terms and conditions:

(1) Possession of a valid law enforcement permit as required under Article 1;

(2) Possession of all licenses and permits required by federal, state and local law; and

(3) Compliance with the requirements of the City's/County's building code, fire code and other technical codes and regulations which govern the use, occupancy, maintenance, construction or design of the building or structure. The use permit shall require that the applicant obtain a final inspection from the City/County building official demonstrating code compliance before the applicant may begin business at the premises at issue.

Sec. 2 Nonconforming uses

A firearms dealer or ammunition seller located in any location described in Sec. 1(d) may continue to sell, lease or transfer firearms, firearm components and ammunition for up to one year after the effective date of this Article, provided the dealer or seller obtains a law enforcement permit from the City/County, pursuant to Article 1, within 90 days of the effective date of that Article. After the one-year period has expired, all firearms dealers and ammunition sellers are prohibited from selling, leasing or transferring firearms, firearm components and ammunition in the named locations.

Sec. 3 Severability clause

If any section, subsection, sentence or clause of this Article is for any reason declared unconstitutional or invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the constitutionality, validity or enforceability of the remaining portions of this Article or any part thereof. The City Council/County Board of Supervisors hereby declares that it would have adopted this Article notwithstanding the unconstitutionality,

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invalidity or unenforceability of any one or more of its sections, subsections, sentences or clauses.

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II. Common Legal Challenges to Gun Violence Prevention Laws

Litigation challenging firearm laws has become a routine strategy of the gun industry, the National Rifle Association and other "gun rights" groups. These challenges sometimes raise the following issues: (1) the Second Amendment to the U.S. Constitution and state right to bear arms provisions; (2) equal protection; (3) due process; (4) the privilege against self-incrimination; and (5) in the context of local gun regulations, preemption and local authority to regulate firearms. This section provides an overview of these issues.

A. The Second Amendment and State Right to Bear Arms

The Second Amendment and state right to bear arms provisions are often raised as a bar to gun violence prevention laws and regulations. In fact, these provisions permit a broad range of gun violence prevention measures.

1. The Second Amendment

The Second Amendment to the U.S. Constitution states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Until recently, the courts, including the United States Supreme Court, interpreted and applied the Amendment to protect a right to keep and bear arms only in relation to service in a well-regulated militia.[38] However, the Supreme Court issued a historic decision in *District of Columbia v. Heller* on June 26, 2008, holding that the Second Amendment confers an individual right to possess handguns in the home for self-defense, unrelated to service in a well-regulated state militia.[39]

In *Heller*, the Court struck down the District's ban on handgun possession, finding that "the inherent right of self-defense has been central to the Second Amendment" and that handguns are "overwhelmingly chosen by American society" for self-defense in the home, "where the need for defense of self, family, and property is most acute."[40] The Court also struck down the District's requirement that firearms in the home be stored unloaded and disassembled or bound by a trigger lock or similar device, because the law contained no exception for self-defense.

Although the *Heller* decision established a new individual right to "keep and bear arms," the opinion made it clear that the right is not unlimited, and should not be understood as "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[41]

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[38] Prior to June 2008, the U.S. Supreme Court last addressed the scope of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939). In that case, the Court rejected a Second Amendment challenge brought by two individuals charged with violating a federal law prohibiting the interstate transportation of sawed-off shotguns. The Court held that the "obvious purpose" of the Amendment is to "assure the continuation and render possible the effectiveness" of the state militia, and the Amendment "must be interpreted and applied with that end in view." *Id.* at 178. After *Miller*, the scope of the Second Amendment was addressed in more than 200 federal and state appellate cases. These decisions overwhelmingly rejected Second Amendment challenges to firearm laws. *See* LCAV's web site, www.lcav.org, for summaries of over 200 federal and state appellate cases prior to *District of Columbia v. Heller* rejecting Second Amendment challenges to firearms laws.

[39] *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

[40] *Id.* at 2817.

[41] *Id*. at 2816.

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The Court provided examples of gun laws that it deems "presumptively lawful" under the Second Amendment, including those which:

- Prohibit the possession of firearms by felons and the mentally ill;
- Forbid firearm possession in sensitive places such as schools and government buildings; and
- Impose conditions and qualifications on the commercial sale of firearms.

The Court made clear that this list is not exhaustive.[42] The Court also concluded that the Second Amendment is consistent with laws banning "dangerous and unusual weapons" not "in common use at the time," such as M-16 rifles and other firearms that are most useful in military service.[43] Finally, the Court declared that its analysis should not be read to suggest "the invalidity of laws regulating the storage of firearms to prevent accidents."[44]

The *Heller* decision failed to articulate a legal standard of review, or test, to be applied in evaluating other laws under the Second Amendment. In addition, because *Heller* considered laws of the District of Columbia (a federal enclave), the Court stated that the question of whether the Second Amendment applies to the states is "a question not presented by this case."[45] While the *Heller* Court did not rule on whether the Second Amendment applies to state or local governments, the Court did note its earlier decisions holding that "the Second Amendment applies only to the Federal Government."[46] However, in September 2009, the Supreme Court announced it will consider this issue in the course of its review of the Seventh Circuit's decision in *McDonald v. Chicago*, which held that the Second Amendment does not apply to state or local governments.

Although questions remain as to the standard of review, the *Heller* decision leaves no doubt that regulation of firearms remains legally permissible. Even after *Heller*, most common sense gun violence prevention measures, such as those contained in this model law, are likely to be upheld. As mentioned above, the Court made clear that the right to bear arms is not unlimited and that its list of presumptively lawful regulations was not exhaustive. Moreover, the Court specifically declared that its analysis should not cast doubt on laws imposing conditions and qualifications on the commercial sale of firearms.[47]

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[42] *Id*. at 2817 n.26.
[43] *Id*. at 2817.
[44] *Id*. at 2820. In addition, the *Heller* Court did not invalidate D.C.'s requirement that firearm owners be licensed. Mr. Heller's attorney conceded that the licensing scheme was not, in itself, unlawful. Therefore, the Court did not address this requirement. *Id.* at 2819.
[45] *Id.* at 2813 n.23.
[46] *Id*., citing *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876). Following these decisions, lower courts considering challenges to state and local gun laws also have held that the Second Amendment constrains only the federal government, and not actions by state or local governments. *See also* LCAV's website, www.lcav.org, for additional appellate court cases reiterating this position.
[47] *Heller*, 128 S. Ct. at 2816-2817.

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2. State Right to Bear Arms

The constitutions of most states recognize a "right to bear arms." However, the California Constitution contains no "right to bear arms" provision. In *Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000), the California Supreme Court rejected a challenge to the state ban on assault weapons, confirming that "no mention is made in [the California Constitution] of a right to bear arms," and "regulation of firearms is a proper police function."

B. Equal Protection

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." However, when a law makes a classification neither "involving fundamental rights nor proceeding along suspect lines," the law will withstand constitutional scrutiny so long as it bears a rational relationship to a legitimate governmental interest.[48]

In *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420 (Cal. Ct. App. 1997), a firearms dealer brought an equal protection challenge against a law prohibiting minors from entering premises where the sale of firearms is the primary business performed at the site. The court held that "[b]ecause minors have a legitimate reason for entering sports or department stores that sell merchandise other than weapons or weapons-related goods, a rational basis exists for distinguishing between such businesses and those that primarily sell weapons."[49] The dealer also claimed that the requirement that firearms dealers carry liability insurance was a denial of equal protection because it discriminates between firearms dealers and other businesses selling products that can and do cause injury, and because it fails to discriminate between firearms dealers on the basis of size and probable volume of sales. The court also rejected these claims.[50]

In *Koscielski v. Minneapolis*, 435 F.3d 898 (8th Cir. 2006), a firearms dealer brought an equal protection challenge against the City of Minneapolis's zoning ordinance requiring firearms dealers to obtain conditional use permits and locate within particular zones and only in locations sufficiently distant from day care centers and churches. The court first held that the dealer's claim involved neither a suspect classification nor a fundamental right. Therefore, the law would be found constitutional if it bore a rational relationship to a legitimate governmental interest. Upholding the law, the court concluded, "the implications for public safety warrant regulating and zoning firearms dealerships differently than other retail establishments."[51]

The majority of cases also have rejected equal protection challenges to firearms laws under the U.S. Constitution and analogous state constitutional provisions.[52]

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[48] *Heller v. Doe*, 509 U.S. 312, 320 (1993), *see also Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Classifications along "suspect lines" can include a suspect class (e.g., race) or quasi-suspect class (e.g., gender). *See, e.g., Lavia v. Pennsylvania*, 224 F.3d 190, 200 (3d Cir. 2000).
[49] *Suter*, 67 Cal. Rptr. 2d at 434.
[50] *Id.* at 435-436.
[51] *Koscielski*, 435 F.3d at 902.
[52] *See, e.g., United States v. Lewitzke*, 176 F.3d 1022 (7th Cir. 1999) (rejecting equal protection challenge to federal law banning possession of firearm by person convicted of domestic violence misdemeanor); *United States v. McKenzie*, 99 F.3d 813 (7th Cir. 1996) (rejecting equal protection challenge to federal law banning possession of

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Note that the decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) did not address an equal protection claim, but the Court's *dicta* suggests that the rational basis test is not appropriate for reviewing firearms regulation under the Second Amendment.[53] The Court did not set a standard for reviewing firearms laws. The Court also did not consider whether the Second Amendment right is a fundamental right for purposes of equal protection review. It is likely that future cases will resolve these issues.

C. Due Process

The due process clause of the Fourteenth Amendment to the U.S. Constitution provides that no person shall be deprived of "life, liberty, or property, without due process of law…." Courts have held that the due process clause includes both substantive and procedural guarantees.

Substantively, a law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or failing to provide explicit standards for those who apply the law, violates due process under the federal constitution. As the U.S. Supreme Court has explained, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[54] Note, however, that clearly written laws also can violate due process when they are overbroad, impinging on constitutionally-protected conduct.[55]

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the due process clause of the Fifth or Fourteenth Amendment.[56] Courts have held that the due process clause generally requires the government to provide the affected person with the opportunity to be heard at a meaningful time and in a meaningful manner, before the deprivation of the liberty or property interest.[57]

In *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 433 (Cal. Ct. App. 1997), a firearms dealer challenged the City of Lafayette's requirements that firearms dealers obtain land use and police permits, and the city's zoning ordinance, which limited firearms dealers to areas zoned for retail or general commercial uses. The court held that these restrictions do not violate the substantive due process clause, noting that:

> As the operation of a firearms dealership is a commercial enterprise, there is a rational basis for confining that operation to commercially zoned areas. In addition, because dealerships can be the targets of persons who are or should be excluded from possessing

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firearm by felon); *California Rifle and Pistol Ass'n. v. City of West Hollywood*, 78 Cal. Rptr. 2d 591, 605-606 (Cal. Ct. App. 1998) (rejecting equal protection challenge to ban on the sale of "junk guns"); *Olympic Arms v. Buckles*, 301 F.3d 384 (6th Cir. 2002) (rejecting equal protection challenge to the definition of "assault weapon" in the 1994 federal assault weapon ban, which expired in 2004). *But see Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998) (upholding equal protection challenge against federal law banning possession of firearms by government employees convicted of domestic violence misdemeanors but allowing possession by government employees convicted of domestic violence felonies).

[53] *Heller*, 128 S.Ct. at 2818 n.27.

[54] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[55] *Id.* at 114-15.

[56] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[57] *Id.*

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> weapons, it is reasonable to insist that dealerships be located away from residential areas, schools, liquor stores and bars.[58]

The court also noted that substantive due process allows for imprecise zoning or licensing ordinances, because of the need for government "in large urban areas to delegate broad discretionary power to administrative bodies."[59]

In *Baer v. Wauwatosa*, 716 F.2d 1117 (7th Cir. 1983), a licensed gun dealer brought an action against a city, mayor, and council members, alleging that by taking away his license to sell guns, the defendants had deprived him of property without due process of law. The city had revoked the license when the dealer was convicted of a felony. The court held that the dealer was deprived of "property" within the meaning of the due process clause when the city revoked his license, but that the procedures used for the revocation were adequate.[60] The court also held that the revocation of the license did not violate the substantive due process clause, stating:

> The sale of guns is fraught with both short-term and long-term danger to the public -- or so at least the Wauwatosa authorities could rationally conclude, and no more is required to uphold the substantive validity of their action under the due process clause. The short-term danger is that the guns will be sold to criminals, children, and others who are, for excellent reasons, forbidden by law to have them; the long-term danger is that the circumstances of sale will encourage people to think of guns as weapons of aggression.[61]

Most courts have rejected due process challenges to firearms laws under the U.S. Constitution and analogous state constitutional provisions.[62]

Note that the decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), did not address a due process claim, but the Court's *dicta* suggests that the rational basis test is not appropriate for reviewing firearms regulation under the Second Amendment.[63] The Court did not set a standard for reviewing firearms laws. It is likely that future cases will resolve these issues.

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[58] *Suter*, 67 Cal. Rptr. 2d at 433.
[59] *Id.* at 431.
[60] *Baer*, 716 F.2d at 1122-1123.
[61] *Id.* at 1123.
[62] *See, e.g., United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000) (rejecting due process challenge to federal law prohibiting possession of firearms by persons convicted of misdemeanor crimes of domestic violence); *United States v. Lim*, 444 F.3d 910 (7th Cir. 2006) (rejecting due process challenge to federal law requiring registration of sawed-off shotguns); *United States v. Edwards*, 182 F.3d 333 (5th Cir. 1999) (rejecting due process challenge to federal law banning possession of firearm by an unlawful user of a controlled substance); *City of Cincinnati v. Langan*, 640 N.E.2d 200 (Ohio Ct. App. 1994) (rejecting due process challenge to local assault weapon ban). *But see Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994) (upholding a due process challenge to portions of the definition of "assault weapon" in local assault weapon ban); *United States v. Vest*, 448 F. Supp. 2d 1002 (S.D. Ill. 2006) (upholding as applied due process challenge to law enforcement exception to federal laws restricting transfer and possession of machine guns).
[63] *Heller*, 128 S.Ct. at 2818 n.27.

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D. Privilege Against Self-Incrimination

The Fifth Amendment to the U.S. Constitution provides in part that no person "shall be compelled in any criminal case to be a witness against himself." Record-keeping requirements violate the "privilege against self-incrimination" when they are directed principally at persons "inherently suspect of criminal activities."[64]

As discussed below, opponents of this model law may argue that the requirement that ammunition sellers maintain a record of each ammunition sale violates the privilege against self-incrimination because it requires purchasers, even those who are prohibited by law from possessing ammunition, to admit they purchased ammunition. However, the type of information recorded pursuant to this model law is neutral on its face, and this part of the model law is directed at ammunition purchasers generally, not a group inherently suspect of criminal activity. This requirement therefore does not violate the privilege against self-incrimination.

E. Preemption and Local Authority to Regulate Firearms

Preemption occurs when a higher level of government removes regulatory power from a lower level of government. For example, Congress may remove legislative authority from the states in certain areas. Likewise, state governments may, in some cases, remove local legislative authority.

1. Federal Preemption

Under the Supremacy Clause of Article VI of the U.S. Constitution, a federal law is binding on all state and local governments so long as Congress duly enacted the law pursuant to one of its limited powers. When federal law removes state authority (and thus local authority) to regulate a specific subject matter, the process is called "federal preemption." Federal preemption of state law is uncommon in the area of firearms regulation.

Congress may make its intention to preempt an area of state law clear by expressly stating its intent in the language of a statute. Absent such a statement, when considering a challenge to a state or local law based on the claim that regulation of the subject has been preempted by Congress, courts presume that the federal government does not intend to preempt state and local authority.[65] When the challenged law is within an area of traditional state authority, the reviewing court will find preemption only when the court is "absolutely certain" that Congress intended to take away that authority.[66] Courts look for the existence of a pervasive scheme of federal legislation of the particular subject, or an irreconcilable conflict between the federal regulation and the challenged law, to determine congressional intent.[67]

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[64] *Haynes v. U.S.*, 390 U.S. 85 (1968), *Garner v. U.S.*, 424 U.S. 648 (1976); *California v. Byers*, 402 U.S. 424 (1971).
[65] *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 285 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681 (2d Cir. 1996) (upholding New York City's assault weapon ban against a federal preemption challenge).
[66] *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (rejecting a federal preemption challenge to a Missouri constitutional provision setting mandatory retirement age for state judges).
[67] *Richmond*, 896 F. Supp. at 285.

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Congress has not expressly preempted the broad field of firearms regulation.[68] Furthermore, courts have held that congressional regulation of firearms does not create a scheme so pervasive that it leaves no room for state and local law.[69] Thus, absent a specific, irreconcilable conflict between a challenged state or local firearm law and a federal enactment, there is no federal preemption of that state or local law.

2. State Preemption

Most state constitutions allocate authority to local governments to regulate in the interests of the public health, safety and welfare (which generally includes regulation of firearms). "State preemption" occurs when a state government removes a portion of a local government's legislative authority. States differ considerably in how and to what extent they preempt the regulation of firearms.

Article XI, § 7 of the California Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." A local government's police power under this provision includes the power to regulate firearms.[70] Ordinances enacted pursuant to the police power are valid unless they conflict with state law.[71] A conflict exists if the ordinance contradicts, duplicates, or enters an area occupied by general law, either expressly or by legislative implication.[72]

The California Legislature has expressly preempted the following areas of firearms law: 1) licensing or registration of commercially manufactured firearms; 2) licensing or permitting with respect to the purchase, ownership, possession or carrying of a concealable firearm in the home or place of business; and 3) regulation of the manufacture, sale or possession of "imitation firearms."

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[68] Rather, courts have cited 18 U.S.C. § 927 for the proposition that Congress has expressed an intent *not* to preempt the field of firearms. *See, e.g., Oefinger v. Zimmerman,* 601 F.Supp. 405 (W.D. Pa. 1984) (rejecting a federal preemption challenge to a state law banning machine guns and sawed-off shotguns); *C.D.M. Products, Inc., v. City of New York,* 350 N.Y.S.2d 500 (N.Y. Sup. Ct. 1973) (rejecting a federal preemption challenge to a local ordinance requiring licensing of wholesale firearm manufacturers and assemblers). 18 U.S.C. § 927 provides that "No provision of this chapter [18 U.S.C. § 921 *et seq*. which contains provisions regulating the licensing of firearms manufacturers and dealers, firearms possession, the carrying of weapons, and armor piercing ammunition] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." Note, however, that 18 U.S.C. § 926A provides that, notwithstanding state or local law, a person may transport firearms "from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm" so long as he or she complies with the specified safety standards. Courts have found this provision to supersede local laws regulating transportation of firearms. *See, e.g., Bieder v. United States,* 662 A.2d 185 (D.C. 1995) (reversing conviction for multiple violations of District firearms laws on grounds that trial court failed to allow defense based on 18 U.S.C. § 926A); *Arnold v. City of Cleveland*, 1991 Ohio App. LEXIS 5246 (Ohio Ct. App. 1991) (upholding federal preemption challenge to local law banning transportation of assault weapons). *But see Fresno Rifle & Pistol Club, Inc. v. Van de Kamp,* 746 F. Supp. 1415 (E.D. Cal. 1990) (rejecting federal preemption challenge to state law banning transportation of assault weapons).
[69] *Richmond,* 896 F. Supp. at 285.
[70] *Galvan v. Superior Court of San Francisco,* 452 P.2d 930 (Cal. 1969).
[71] *Sherwin-Williams Co. v. City of Los Angeles,* 844 P.2d 534, 536 (Cal. 1993).
[72] *Id.* at 536-7.

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California Government Code § 53071 provides:

> It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in section 1721 of the Labor Code.

California Penal Code § 12026(b) provides:

> No permit or license to purchase, own, possess, keep, or carry…shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.

California Government Code § 53071.5 provides:

> By the enforcement of this section, the Legislature occupies the whole field of regulation of the manufacture, sale, or possession of imitation firearms, as defined in section 12550 of the Penal Code, and that section shall preempt and be exclusive of all regulations relating to the manufacture, sale, or possession of imitation firearms, including regulations governing the manufacture, sale, or possession of BB devices and air rifles described in subdivision (g) of Section 12001 of the Penal Code.[73]

Courts will not infer preemption unless the circumstances clearly indicate the Legislature intended to preempt the field.[74]

Suter v. City of Lafayette, 67 Cal. Rptr. 2d 420 (Cal. Ct. App. 1997) involved a preemption challenge to an ordinance regulating the location and operation of firearms dealers, and requiring firearms dealers to obtain local land use and police permits. The court of appeal dismissed the action, holding that local governments are not generally excluded by state law from imposing additional requirements on firearms dealers.[75] In fact, the court noted that California Penal Code § 12071 explicitly contemplates local regulation of firearms dealers, including local licensing requirements.

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[73] In addition, California generally permits local regulation of sport shooting ranges, but provides that local jurisdictions may not enforce new or amended noise control laws on shooting ranges that are in operation and not in violation of existing law at the time of the enactment of the new or amended noise control ordinance, if there has been no substantial change in the nature or use of the range. Cal. Civ. Code § 3482.1(d).

[74] *California Rifle and Pistol Ass'n, Inc. v. City of West Hollywood*, 78 Cal. Rptr. 2d 591, 600 (Cal. Ct. App. 1998) (holding that state law did not preempt a local ordinance banning the sale of Saturday Night Specials).

[75] *Suter*, 67 Cal. Rptr. 2d at 427.

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The court in *Suter* found that the ordinance did not conflict with, duplicate, or enter into a field fully occupied by state law and was not, therefore, preempted, with one exception. The court struck down the portion of the ordinance regulating firearm storage, stating that it was preempted by the storage requirements in Penal Code § 12071(b)(14). However, subsequent to that case, the Legislature added Penal Code § 12071(b)(15), which states, "The licensing authority in an unincorporated area of a county or within a city may impose security requirements that are more strict or are at a higher standard than those specified in paragraph (14)." Hence, California law does not preempt local governments from imposing requirements on firearms dealers, including licensing and security requirements, to supplement state law.[76]

The California Legislature has not expressly preempted any field related to ammunition sellers or sales. California adopted a law in 2009, AB 962 (De Leon), that governs certain aspects of ammunition sales and transfers, specifically requiring ammunition sellers to create and maintain records of handgun ammunition sales and transfers, and to store handgun ammunition so that it is inaccessible to customers without the assistance of the seller or an employee. However, there is no evidence that the Legislature intended through this law to remove local authority to regulate long gun ammunition sales. While this is an open question for the courts, we believe strong legal arguments exist in support of a variety of local ammunition-related ordinances.

[76] Note that, in *Fiscal v. City and County of San Francisco*, 70 Cal. Rptr. 3d 324 (Cal. Ct. App. 2008), a court of appeal held that Proposition H, a municipal ordinance prohibiting all handgun possession and the sale, distribution, transfer and manufacture of all firearms and ammunition in San Francisco, was preempted by state law.

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III. Responses to Common Opposition Arguments

Opponents of this model law might argue that it creates undue burdens for firearms dealers and ammunition sellers, especially small businesses, by increasing the costs of doing business. However, the provisions of this model law impose modest costs to businesses. Furthermore, the benefits to public safety detailed in the findings of this model law clearly outweigh the costs imposed on the gun industry. In addition, the security measures required by the law prevent the theft of merchandise and protect the dealer's inventory. Responsible firearms dealers and ammunition sellers already use these measures and should welcome the elimination of competition from irresponsible dealers who present a danger to the public.

Several arguments are sometimes raised specifically in opposition to the record-keeping requirement for ammunition purchases. Some of the most common arguments are that:

- The record-keeping requirement for ammunition purchases will significantly delay transactions and drive customers outside the jurisdiction.
- Congress repealed a similar requirement in 1986, presumably because it was ineffective or costly to enforce.
- The requirement violates the purchaser's right to privacy and will lead to identity theft.
- The requirement is unconstitutional because it violates the privilege against self-incrimination.

These arguments lack merit, as shown by California's recent adoption of a law (AB 962- De Leon) imposing this requirement on all handgun ammunition purchases. The record-keeping requirement will not significantly delay transactions or drive customers outside the jurisdiction. The Sacramento Police Department has estimated that this requirement only adds two minutes to a transaction, significantly less time than if the customers got in their cars and traveled elsewhere to purchase ammunition. The inconvenience to law-abiding citizens is minor and is warranted by the lethal nature of the product being purchased.

It is true that the Firearm Owners' Protection Act of 1986 (FOPA) repealed several ammunition-related provisions of the Gun Control Act of 1968. However, the elimination of almost all federal regulation of ammunition sales and transfers constituted only a fraction of FOPA's sweeping changes to federal firearms regulations.[77] FOPA was sponsored by the gun lobby, and the NRA website currently states that its lobbying arm worked for more than a decade to secure FOPA's passage.[78] The NRA's argument that the ammunition record-keeping provisions of federal law were ineffective is also undermined by California's recent adoption of AB 962. This law is based on the experiences in Los Angeles and Sacramento (discussed above), which showed that a record-keeping requirement for ammunition sales can be quite effective. In addition, technological advances since the date of FOPA now allow records to be transmitted electronically, making enforcement less burdensome. Moreover, the federal record-keeping law

[77] FOPA also limited the number of inspections of dealers' premises ATF could conduct without a search warrant; prevented a central federal database of firearms, firearms owners, or firearms transactions; legalized sales by dealers at gun shows within the same state; and loosened the requirement of a federal license for persons engaged in the business of firearms sales. Pub. L. No. 99-308.

[78] National Rifle Association, *About NRA-ILA, Who We Are, And What We Do*, at http://www.nraila.org/About/.

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was difficult to enforce because state and local law enforcement agencies were required to petition the Secretary of the Treasury for access to the sales logs. AB 962 and this model law, in contrast, allow state and local law enforcement to independently access the records.

The record-keeping requirement does not violate the purchaser's right to privacy or lead to identity theft. Only the seller and law enforcement are granted access to the information that the ammunition purchaser must provide. This information is identical to the information that a person purchasing a firearm must provide. There is no evidence that identity theft has ever occurred in connection with a firearm sale. Accordingly, there is no reason to believe that ammunition sellers or law enforcement officers will steal an ammunition purchaser's identity.

Moreover, the requirement that ammunition sellers maintain a record of each ammunition sale does not violate the privilege against self-incrimination. As noted above, record-keeping requirements violate the "privilege against self-incrimination" when they are directed principally at persons "inherently suspect of criminal activities."[79] However, the type of information recorded pursuant to this model law is neutral on its face, and this provision is directed at ammunition purchasers generally, not a group inherently suspect of criminal activity. This requirement therefore does not violate the privilege against self-incrimination.

Finally, opponents of the requirement that firearms dealers provide an inventory of their merchandise to local law enforcement every six months sometimes argue that this requirement constitutes "registration" of commercially manufactured firearms and is therefore preempted by California Government Code § 53071. However, "registration" refers to a system that records the *identity* of the purchasers or owners of firearms along with information about the firearms purchased or owned by those individuals. The inventory requirement described in this model law does not involve recording information about the purchasers or owners of firearms. As a result, it is not a registration requirement and is not preempted.

[79] *Haynes v. U.S.*, 390 U.S. 85 (1968); *Garner v. U.S.*, 424 U.S. 648 (1976); *California v. Byers*, 402 U.S. 424 (1971).

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Conclusion

LCAV hopes that this report will be useful to local jurisdictions in California considering the adoption of ordinances to regulate firearms dealers and/or ammunition sellers. LCAV is available to provide additional legal research, analysis, and drafting assistance to those seeking to enact this or other laws to reduce gun violence. Please see www.lcav.org for more information about our services, and contact us at 415-433-2062 if we can be of assistance.

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