Firearms, county waiting period/background checks

Number: INFORMAL

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Mr. Robert J. Wilder
Miami Field Division Counsel
Bureau of Alcohol, Tobacco, Firearms
and Explosives
U.S. Department of Justice
11410 Northwest 20th Street, Suite 200
Miami, Florida 33172

Dear Mr. Wilder:

You state that the Bureau of Alcohol, Tobacco, Firearms and Explosives (AFT), United States Department of Justice, has received a number of inquiries from licensees regarding recent amendments to section 790.33, Florida Statutes. You note that ATF regulates the firearms-related trade of federal firearms license holders in Florida and that Title 18 United States Code section 922(b)(2) provides that it is unlawful for a federal firearms licensee to sell or deliver a firearm to any person where the purchase or possession of such firearm by the person would be in violation of any state law or ordinance applicable at the place of delivery or sale.

Chapter 2011-109, Laws of Florida, amended section 790.33, Florida Statutes, to clarify and reorganize the provisions of that statute preempting to the state the entire field of regulation of firearms. Section 790.33(1), Florida Statutes, provides:

"PREEMPTION.—Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void."

The underscored language was added by Chapter 2011-109, *supra.*[1] The act also removed provisions in the statute authorizing counties to adopt an ordinance requiring a waiting period of up to three working days between the purchase and delivery of a handgun. [2]

According to your letter, questions have been raised regarding the continued validity of county ordinances imposing a waiting period or a background check in connection with the sale of a firearm within the county in light of the above changes. As you are aware, however, Article VIII, section 5(b), Florida Constitution, provides:

"Each county shall have the authority to require a criminal history records check and a 3 to 5-day waiting period, excluding weekends and legal holidays, in connection with the sale of any firearm

occurring within such county. For purposes of this subsection, the term "sale" means the transfer of money or other valuable consideration for any firearm when any part of the transaction is conducted on property to which the public has the right of access. Holders of a concealed weapons permit as prescribed by general law shall not be subject to the provisions of this subsection when purchasing a firearm."

As noted *supra*, section 790.33(1), Florida Statutes, was amended to recognize the preemptive authority of the Legislature in the area of firearms "[*e*]*xcept* as expressly provided by the State Constitution." (e.s.) The Constitution expressly recognizes the authority of a county to require a criminal history records check and a 3–5 day waiting period in connection with the sale of a firearm within the county. As discussed in the staff analysis for the 2011 legislation:

"The bill removes the statutory language that authorizes counties to adopt an ordinance requiring a waiting period of up to three working days between the purchase and delivery of a handgun (counties still have the authority, pursuant to Art. VIII, Section 5(b) of the Florida Constitution to require a criminal history records check and a 3 to 5-day waiting period in connection with the sale of any firearm occurring within such county)."[3]

Thus, it appears that the 2011 legislation specifically recognizes as an exception to its terms the provisions of the Constitution granting counties the authority to conduct a criminal history records check and impose a waiting period in connection with the sale of any firearm occurring within such county as provided therein.

I trust that the above informal comments are of assistance to the ATF in carrying out its duties under federal law.

Sincerely,

Joslyn Wilson
Director, Division of Opinions

JW/tsh

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[1] The act also deleted language in the subsection stating that it did not affect certain zoning ordinances.

[2] *See* s. 1, Ch. 2011-109, Laws of Fla.

[3] *See* Final Bill Analysis on CS/CS/CS/HB 45 (enacted as Ch. 2011-109, supra), available online at: /files/pdf/page/D3442532735698158525794B007B1EEB/h0045z.JDC.PDF.