

FIREARMS INDUSTRY CONSULTING GROUP

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South Heidelberg Township
555A Mountain Home Road
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RE: Proposed Firearm Regulation

Dear Gentlemen/Mesdames:

I have been retained by Firearm Owners Against Crime (FOAC) regarding your proposal, as reported by Reading Eagle Reporter Keith Dmochowski, to require C.P. Tactical Solutions Inc. to perform background checks on individuals renting firearms. While everyone agrees that prohibited individuals should be precluded from accessing firearms and ammunition, any such requirement is not only in violation of federal and state law, but as already acknowledged by Solicitor Gombar, additionally constitutes a violation of Pennsylvania's firearm and ammunition preemption statute, if approved.

First and foremost, under both federal and state law, a firearm background check can *only* be performed, where an individual is purchasing or otherwise transferring ownership of a firearm. As declared by the Federal Bureau of Investigations' NICS (National Instant Check System) Licensee Manual:

Unauthorized Use—An FFL is never authorized to utilize the NICS for employment or other type of non-Brady Act-mandated background checks. An FFL must have a signed ATF Form 4473 prior to initiating a NICS check. Per 28 C.F.R. § 25.11 of the NICS Regulations, accessing or using the NICS, or permitting access to or use of the NICS by another, for any unauthorized purpose is a violation of federal law, sanctions for which may include criminal prosecution, a civil fine not to exceed \$10,000, and/or cancellation of the NICS inquiry privileges.

Likewise, the Pennsylvania State Police in its Manual for the Pennsylvania Instant Check System

(PICS) declares:

Firearm dealers may only initiate a background check through PICS on an individual who has completed the proper forms for the purchase or transfer of a firearm through the licensed dealer. Dealer's [sic] who use this system for any other purpose risk being denied access to PICS.

Pursuant to 18 Pa.C.S. § 6111(g)(3), any person who unlawfully utilizes the PICS system, such as inquiring of an individual's background for mere rental purposes, or requests that such unlawful background check be performed, commits a felony of the third degree.

Accordingly, it would be a violation of state and federal law for C.P. Tactical Solutions Inc. to be required to perform background checks on individuals merely renting a firearm for use in its range and implementation of this requirement would result in the commission of felonies by all Supervisors of the Township, which implemented it.

Furthermore, pursuant to 18 Pa.C.S. § 6111(i), all information submitted by an applicant, purchasers or transferee is confidential and not subject to disclosure. The disclosure of confidential information, in addition to the above-mentioned criminal liability, results in civil liability "in the amount of \$ 1,000 per occurrence or three times the actual damages incurred as a result of the violation, whichever is greater, as well as reasonable attorney fees." Since the article references that the Township would be ensuring compliance with its unlawful requirement, it needs to be acutely aware that it is additionally opening itself up to civil liability, if it implements this requirement on C.P. Tactical Solutions Inc. or any other entity.

While an individual could search online docket sheets, less than one percent (1%) of the attorneys in this Commonwealth know what convictions result in an individual becoming a prohibited person, as one must review and comprehend both federal and state law. Moreover, dockets do not reflect whether a particular misdemeanor offense, such as an M3 disorderly conduct, was the result of domestic violence, which would be prohibiting. Additionally, although an involuntary mental health commitment would prohibit an individual, mental health commitments are HIPAA protected and not available publicly. Therefore, there is no way for C.P. Tactical Solutions Inc. to determine whether any particular individual is prohibited from possessing firearms and ammunition.

Turning to the state firearms and ammunition preemption statute, 18 Pa.C.S. § 6120 provides:

(a) General rule. No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

Pursuant to 18 Pa.C.S. § 6119, "an offense under this subchapter constitutes a misdemeanor of the first degree," which, pursuant to 18 Pa.C.S. § 106(b)(6), provides for a maximum of sentence of five (5) years.

In interpreting Section 6120, the Pennsylvania Supreme Court has been "crystal clear" that only the General Assembly can regulate firearms, as the entire field is preempted. *See, Nat'l Rifle*

Ass'n v. City of Philadelphia, 977 A.2d 78, 82 (Pa. Cmwlth. 2009). The Court stated in *Ortiz v. Commonwealth* that "[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. . . . [T]he General Assembly, not city councils, is the proper forum for the imposition of such regulation." 681 A.2d 152, 156 (Pa. 1996). Continuing, the *Ortiz* Court stated that:

. . . the Constitution of Pennsylvania requires that home rule municipalities may not perform any power denied by the General Assembly; the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or transportation of firearms; and the municipalities seek to regulate that which the General Assembly has said they may not regulate. The inescapable conclusion, unless there is more, is that the municipalities' attempt to ban the possession of certain types of firearms is constitutionally infirm.

Likewise, the Commonwealth Court has invariably held that Section 6120 and the *Ortiz* decision prohibit the regulation of firearms and ammunition. *See, National Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78 (Pa. Cmwlth. 2009) (holding that a Straw Purchaser Ordinance and an Assault Weapons Ordinance were preempted by § 6120); *Dillon v. City of Erie*, 83 A.3d 467 (Pa. Cmwlth. 2014) (holding that the prohibition on possession of firearms in city parks violates Section 6120); *Clarke v. House of Rep. of Commonwealth*, 957 A.2d 361, 365 (Pa. Cmwlth. 2008) (holding that "practical considerations do not alter the clear preemption imposed by the legislature"); *Ortiz v. Commonwealth*, 655 A.2d 194 (Pa. Cmwlth. 1995) (holding municipal assault weapons ban invalid and unenforceable); *Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlth. 1978) (holding that municipal regulations on the acquisition and transfer of firearms was preempted by § 6120).

Accordingly, as any agreement is a regulation on the conduct of the business, which Solicitor Gombar already stated he would seek to enforce, if the shop fails to provide background checks, the proposed agreement is violative of Pennsylvania's preemption law.

In the event South Heidelberg Township moves forward with this agreement, FOAC is considering filing suit against the Township, which will result in substantial additional burdens on the taxpayers. Clearly, it is in the best of interest of all of those involved that the agreement not be pursued. In the event the Township pursues this agreement, please let me know whether you will accept service of a complaint or require service by the Sheriff.

Thanking you for your time and consideration in this matter, I am

Yours truly,
Firearms Industry Consulting Group



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jp/web
Matter no. 10196