

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 45 Regulation of Firearms and Ammunition

**SPONSOR(S):** Criminal Justice Subcommittee, Gaetz and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 4 N, As CS	Cunningham	Cunningham
2) Community & Military Affairs Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Section 790.33, F.S., currently preempts local governments from regulating firearms and ammunition unless expressly authorized to do so by general law. Subsection (2) of the statute provides such express authorization by giving counties the authority to adopt an ordinance requiring a waiting period of up to three working days between the purchase and delivery of a handgun.

CS/HB 45 deletes subsection (2) from s. 790.33, F.S. This 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. CS/HB 45 replaces subsection (2) of s. 790.33, F.S., with language prohibiting specified local governmental entities from regulating or attempting to regulate firearms or ammunition in any manner (except as specifically authorized by s. 790.33, F.S., by general law, or by the Florida Constitution) and provides exceptions to this prohibition.

Counties would likely 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.

CS/HB 45 also sets forth various penalties for violating s. 790.33, F.S., including provisions that:

- Make it a 3<sup>rd</sup> degree felony for any person or entity to knowingly and willfully violate s. 790.33, F.S.;
- Specify that a governmental entity in whose service or employ a provision of the statute is violated may be assessed a fine of no more than \$5 million if the court determines that the violation was willful and that any person at the governmental entity with oversight of the person knew or in the exercise of ordinary care should have known the act was a violation;
- Specify that a knowing and willful violation of the statute by a person acting in an official capacity is cause for immediate termination of employment; and
- Authorize a person or organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or enforced in violation of the statute to file suit for declarative and injunctive relief and for all actual and consequential damages attributable to the violation.

CJIC has not yet met to consider the prison bed impact of this bill. However, because the bill creates a new 3<sup>rd</sup> degree felony, it could have a negative fiscal impact on the Department of Corrections. The bill also requires governmental entities who willfully violate the statute to pay a \$5 million fine. This could have a negative fiscal impact on state and local governmental entities who willfully violate the statute.

This bill is effective upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Legislative Intent**

Section 790.33, F.S., preempts local governments from regulating firearms<sup>1</sup> and ammunition<sup>2</sup> unless expressly authorized to do so *by general law*. Subsection (3) of the statute provides that the intent of the section is to:

- Provide uniform firearms laws in the state;
- Declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof;
- Prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and
- Require local jurisdictions to enforce state firearms laws.

#### Effect of the Bill

The bill specifies that the Legislature occupies the whole field of regulation of firearms and ammunition except as expressly provided by *the Florida Constitution* or general law. The bill also adds the following legislative intent language to s. 790.33(3), F.S.:

It is further the intent of this section to deter and prevent the violation of this section, the abuse of official authority that occurs when local enactments are knowingly passed in violation of state law, and the violation under color of local authority of rights protected under the constitution and laws of this state.

#### **What Constitutes Regulation**

As noted above, s. 790.33(1), F.S., preempts local governments from regulating firearms and ammunition unless expressly authorized to do so by general law. The statute specifies that regulation includes the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation of firearms and ammunition. The statute does not currently specify that the *storage* of firearms is included within the term “regulation;” however, recent case law would indicate as such.<sup>3</sup>

#### Effect of the Bill

CS/HB 45 amends s. 790.33(1), F.S., to specify that regulation also includes the storage of firearms and ammunition. Thus, unless expressly authorized by general law, local governments will be preempted from regulating how firearms and ammunition are stored.

#### **Exceptions to Preemption**

Florida law and the Florida Constitution contain exceptions to the general rule that firearm regulation is preempted to the state.

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<sup>1</sup> Section 790.001, F.S., defines the term “firearm” as “any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime.”

<sup>2</sup> Section 790.001, F.S., defines the term “ammunition” to mean an object consisting of all of the following: a fixed metallic or nonmetallic hull or casing containing a primer; one or more projectiles, one or more bullets, or shot; and gunpowder.

<sup>3</sup> In 2000, the City of South Miami passed City Ordinance Number 14-00-1716, which required locking devices on firearms stored within the city. In 2002, Florida’s Third District Court of Appeal held the ordinance null and void stating that local governments were preempted from regulating firearms. *See National Rifle Ass’n of America, Inc., v. City of South Miami*, 812 So.2d 504 (Fla. 3<sup>rd</sup> DCA 2002).

Section 790.33(2), F.S., enacted in 1987, currently authorizes counties to regulate firearms by giving them the option to adopt an ordinance requiring a waiting period of up to, but not to exceed, three working days between the purchase<sup>4</sup> and delivery of a handgun.<sup>5</sup> The statute further specifies that:

- The adoption of a waiting period ordinance, by any county, requires a majority vote of the county commission.
- The authority to enact waiting period ordinances is limited solely to individual counties and to the provisions and restrictions contained in s. 790.33(2), F.S.
- Waiting period ordinances apply to all sales of handguns to individuals by a retail establishment<sup>6</sup> unless an individual is exempt.
- Waiting period ordinances do not require reporting or notification to any source outside the retail establishment.<sup>7</sup>
- The following are exempt from waiting period ordinances:
  - o Individuals who are licensed to carry concealed firearms under the provisions of s. 790.06, F.S., or who are licensed to carry concealed firearms under any other provision of state law and who show a valid license;
  - o Individuals who already lawfully own another firearm and who show a sales receipt for another firearm, who are known to own another firearm through a prior purchase from the retail establishment, or who have another firearm for trade-in;
  - o Law enforcement or correctional officers as defined in s. 943.10, F.S.;
  - o Law enforcement agencies as defined in s. 934.02, F.S.;
  - o Sales or transactions between dealers or between distributors or between dealers and distributors who have current federal firearms licenses; or
  - o Any individual who has been threatened or whose family has been threatened with death or bodily injury, provided the individual may lawfully possess a firearm and provided such threat has been duly reported to local law enforcement.

In 1998, subsequent to the enactment of s. 790.33, F.S., the Florida Constitution was amended to authorize counties to regulate firearms. Article VIII, s. 5(b) of the Florida Constitution authorizes counties 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<sup>8</sup> of any firearm occurring within such county.<sup>9</sup>

#### Effect of the Bill

CS/HB 45 deletes subsection (2) from s. 790.33, F.S. This 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 would likely still have the authority, pursuant to 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.

CS/HB 45 replaces subsection (2) of s. 790.33, F.S., with language prohibiting specified entities, when acting in their official capacity or otherwise under the color of law, from regulating or attempting to regulate firearms or ammunition in any manner, whether by enactment or enforcement of any ordinance, regulation, measure, directive, rule, enactment, order, policy, or exercise of proprietary authority, or by any other means, except as specifically authorized by s. 790.33, F.S., by general law, or by the Florida Constitution. The specified entities include:

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<sup>4</sup> For purposes of s. 790.33(2), F.S., “purchase” is defined as any payment of deposit, payment in full, or notification of intent to purchase.

<sup>5</sup> While the term “handgun” is not defined in s. 790.33, F.S., the term is defined in s. 790.0655, F.S., as “a firearm capable of being carried and used by one hand, such as a pistol or revolver.”

<sup>6</sup> The term “retail establishment” is defined as a gun shop, sporting goods store, pawn shop, hardware store, department store, discount store, bait or tackle shop, or any other store or shop that offers handguns for walk-in retail sale but does not include gun collectors shows or exhibits, or gun shows. s. 790.33(2)(b), F.S.

<sup>7</sup> Records of handgun sales must be available for inspection by any law enforcement agency. s. 790.33(2)(c), F.S.

<sup>8</sup> The term “sale” is defined as “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.” Art. VIII, s. 5(b), Fla. Const.

<sup>9</sup> Concealed weapons permit holders do not have to comply with the waiting periods when purchasing a firearm. Art. VIII, s. 5(b), Fla. Const.

- Local governments;
- Special districts;
- Political subdivisions;
- Governmental authorities, commissions, or boards;
- State governmental agencies;
- Any official, agent, employee, or person, whether public or private, who works or contracts with any state or other governmental entity;
- Any entity that serves the public good when such service is provided in whole or in part by any governmental entity or utilizes public support or public funding;
- Any body to which authority or jurisdiction is given by any unit or subdivision of any government or that serves the public good in whole or in part with public support, authorization, or funding or that has the authority to establish rules or regulations that apply to the public use of facilities, property, or grounds; and
- Any public entity other than those specified above, including, but not limited to, libraries, convention centers, fairgrounds, parks, and recreational facilities.

The bill specifies that s. 790.33, F.S., does not prohibit:

- Zoning ordinances that encompass firearms businesses along with other businesses, except that zoning ordinances that are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are in conflict with this subsection and are prohibited;
- A duly organized law enforcement agency from enacting and enforcing regulations pertaining to firearms, ammunition, or firearm accessories issued to or used by peace officers in the course of their official duties;
- Except as provided in s. 790.251, F.S.,<sup>10</sup> any entity listed above from regulating or prohibiting the carrying of firearms and ammunition by an employee of the entity during and in the course of the employee's official duties; or
- A court or administrative law judge from hearing and resolving any case or controversy or issuing any opinion or order on a matter within the jurisdiction of that court or judge.

The bill adds a new subsection (4) to s. 790.33, F.S., setting forth various penalty provisions for violating the statute. Specifically, the bill:

- Makes it a 3<sup>rd</sup> degree felony<sup>11</sup> for any person or entity to knowingly and willfully violate s. 790.33, F.S.;
- Specifies that, except as provided for by the Florida and United States Constitutions, public funds may not be used to defend the unlawful conduct of a person charged with a knowing and willful violation of the statute unless the charges are dismissed or the person is determined to be not guilty;
- Provides that public funds may be used to provide the services of a public defender or court-appointed conflict counsel as provided by law;
- Specifies that a governmental entity in whose service or employ a provision of the statute is violated may be assessed a fine of no more than \$5 million if the court determines that the violation was willful and that any person at the governmental entity with oversight of the offending official, designee, contractee, or employee knew or in the exercise of ordinary care should have known the act was a violation;
- Requires the state attorney to investigate complaints of criminal violations of the statute and, where probable cause exists, to prosecute violators. The bill provides that state attorneys who fail to do so may be held accountable under the appropriate Florida rules of professional conduct;
- Specifies that a knowing and willful violation of the statute by a person acting in an official capacity for any of the entities listed above is cause for immediate termination of employment or contract or removal from office by the Governor; and

<sup>10</sup> Section 790.251, F.S., related to the protection of the right to keep and bear arms in motor vehicles for self-defense and other lawful purposes.

<sup>11</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

- Authorizes a person or organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or enforced in violation of the statute to file suit for declarative and injunctive relief and for all actual and consequential damages attributable to the violation. The bill requires the court to award the prevailing plaintiff in any such suit attorneys fees as determined by the rate used by the federal district court with jurisdiction over the political subdivision for civil rights actions, liquidated damages of three times the attorney's fees, and litigation costs.

The bill specifies that interest on the sums awarded will accrue at 15% per annum from the date on which suit was filed and that payment may be secured by seizure of any vehicles used or operated for the benefit of any elected officeholder or official found to have violated the statute if such sums are not paid within 72 hours after the order's filing.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 790.33, F.S., relating to field of regulation of firearms and ammunition preempted.

**Section 2.** This bill is effective upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

CJIC has not yet met to consider the prison bed impact of this bill. However, because the bill creates a new 3<sup>rd</sup> degree felony, it could have a negative fiscal impact on the Department of Corrections.

The bill also requires governmental entities who willfully violate the statute to pay a \$5 million fine. This could have a negative fiscal impact on state and local governmental entities who willfully violate the statute.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

1. Currently, the bill is effective upon becoming a law. Generally, bills that impose criminal penalties are effective on October 1 so as to give adequate notice to the public, state attorneys, public defenders, etc.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 8, 2011, the Criminal Justice Subcommittee adopted three amendments to the bill and reported the bill favorably as a Committee Substitute. The amendments:

- Provide that firearm regulation is preempted to the state except as expressly provided by *the Florida Constitution* and general law;
- Remove language specifying that the \$5 million fine should be deposited into the administrative account of the state attorney and the court in the jurisdiction in which the offense occurred;
- Clarify language relating to how interest accrues on sums awarded in any lawsuit filed relating to a violation of the section; and
- Clarify language relating to the seizure of vehicles used by persons who violate the section.

This analysis is drafted to the committee substitute.