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REPORT BY THE CRIMINAL ADVOCACY COMMITTEE AND CRIMINAL LAW COMMITTEE

CONTINUING TO STRENGTHEN NEW YORK'S GUN LAWS

The New York City Bar Association ("City Bar") is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. This report was prepared by the City Bar's Criminal Advocacy Committee and Criminal Law Committee. These committees focus broadly on issues concerning the practice of criminal law and the operation of the criminal justice system. The City Bar has a long-standing history of supporting measures which would further strengthen New York's gun laws and enhance law enforcement's ability to investigate gun-related crimes.¹

BACKGROUND

At this critical juncture in our nation's history, it is imperative that New York continue to lead the effort to strengthen our state's and country's porous gun laws. The spate of recent mass shootings resulting in the death and injury of so many innocent Americans makes painfully clear the urgent need for the adoption of effective gun control measures. In the last few years, brutal shootings throughout our country and in New York City have demonstrated that our political leadership cannot wait to act to protect our citizens. Recent mass shootings involving assault and semi-automatic weapons are all too well known: Newtown, Connecticut, December 14, 2012, twenty-seven people killed, including twenty children; Aurora, Colorado, July 20, 2012, twelve people killed and fifty-eight injured; Oak Creek, Wisconsin, Sikh Temple August 5, 2012, six people killed and four injured; Tucson, Arizona, January 8, 2011, six people killed and thirteen injured, including Congresswoman Gabrielle Giffords.

On the streets of New York City, gun violence continues, resulting in deaths and injuries, including children and young adults: for example, on January 5, 2013, a sixteen-year old was shot and killed for his coat on the Lower East Side of Manhattan;² on January 6, 2013, a thirty-six-year

¹ For example, see "Taking Aim: New York State's Regulation of Firearms and Proposals for Reform", Committee on State Affairs, January 2003. Available at <http://www.nycbar.org/pdf/report/final%20firearms%20v.%203%20with%20wadegey%20changes.pdf>. (Last visited February 15, 2013).

² Teenager Fatally Shot In New York, N.Y. Times, Jan. 6, 2013 at A21. Available at <http://cityroom.blogs.nytimes.com/2013/01/05/on-lower-east-side-corner-mourning-young-athlete-killed-by-a-gunman/>. (Last visited February 15, 2013).

old was shot and killed outside a nightclub in Queens;³ on August 13, 2012, four teenagers were shot at a playground in Brooklyn; on August 2 and July 6, 2012, two shopkeepers in Brooklyn were shot and killed; on July 29, 2012, six people were shot, including a two-year old, in a drive by shooting in Brooklyn; on July 27, 2012, a fourteen-year old boy was shot and killed in a public park in the Bronx; on July 25, 2012, five people were shot at a basketball tournament in Harlem; on July 22, 2012, a four-year old child was killed and several others were injured when gunmen exchanged fire following a basketball tournament in the Bronx; on July 4, 2012, a twenty-one-year old young man was shot and killed a few blocks from his mother's house in Brooklyn.⁴

According to the National Center for Injury Prevention and Control, firearms are used to kill over thirty thousand people in the United States every year, including more than one thousand annually in New York State.⁵ While New York City reported a record low number of murders for 2012 – credited by Mayor Bloomberg as reflecting New York City's commitment to doing everything possible to stop gun violence⁶ – more needs to be done to protect our citizens from senseless violence by supporting broad gun control measures both in New York State and nationally.

“SAFE” ACT

We applaud that, with Governor Cuomo's strong leadership, the New York State Legislature passed the New York Secure Ammunition and Firearms Enforcement Act of 2013 (“the SAFE Act”),⁷ whose purpose is to reasonably regulate guns to reduce gun violence and crime throughout our State.⁸ Its provisions address loopholes in New York State's gun laws, including most importantly: closing the private seller/gun show loophole by requiring universal background checks for all gun sales, making eligibility requirements for firearm licenses more stringent, enacting procedures to remove firearms from people who have been adjudicated incompetent or who have been determined to be dangerous by mental health professionals, prohibiting highly dangerous weapons by expanding the definition of illegal “assault weapon,” and creating new Penal Law offenses and increasing penalties for some current firearm offenses.

The public conversation around the enactment and enforcement of the SAFE Act continues unabated, as a result of which certain technical amendments were enacted as part of the budget and will likely continue into the future. In our view, the Legislature and the Governor should consider even further amendments to the SAFE Act in order to strengthen its reach and impact, namely, 1)

³ Man Shot to Death Outside Queens Nightclub After Argument with Other Partygoers, Cops Say, N.Y. Daily News, Jan. 6, 2013. Available at <http://www.nydailynews.com/new-york/man-shot-death-queens-nightclub-argument-party-goers-cops-article-1.1234224?localLinksEnabled=false>. (Last visited February 15, 2013).

⁴ New York City Council Resolution No. 1494–2012. Available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1194767&GUID=A363EF40-CD2F-464B-BA0F-FD964CC86387&Options=ID|Text|&Search=1494>. (Last visited February 15, 2013).

⁵ Id.

⁶ NYC Expects 2012 to Have Fewest Murders on Record, Associated Press, Dec. 28, 2012. Available at <http://bigstory.ap.org/article/nycs-2012-murder-rate-set-be-lowest-record>. (Last visited February 15, 2013).

⁷ 2013 Sess. Law News of N.Y. Ch. 1 (S.2230) (McKinney 2013).

⁸ A. Comm. Rep. No. 236-2388, 236th Sess., at 2 (N.Y. 2013), reprinted in 2013 NY A.B. 2388 (NS).

defining 50-caliber weapons as illegal “assault weapons”; 2) limiting the number of magazines one can purchase; 3) requiring gun licensees to pass a safety course; and 4) clarifying the effect mental health difficulties may have on gun licensees.

First, the definition of illegal “assault weapons” should be expanded to include 50-caliber weapons.⁹ As written, the SAFE Act’s definition of “assault weapon” does not ban many military-style weapons,¹⁰ including some 50-caliber weapons.¹¹ A 50-caliber weapon is one of the most dangerous weapons in the U.S. military’s arsenal and is used for long-range tactical assaults by the U.S. military. There is simply no legitimate reason for ordinary citizens to possess such lethal weapons.

Second, the number of magazines an individual may purchase should be limited. While the SAFE Act limits the number of rounds a magazine may contain, it allows individuals to buy an unlimited number of magazines. Changing magazines takes seconds, so wrongdoers can still perpetuate widespread assaults by carrying extra magazines. Placing a limit on the number of magazines an individual may purchase could limit mass shootings. Moreover, while the SAFE Act originally prohibited 10-round magazines, recent amendments now provide that a person can still own a 10-round magazine but can only load 7 rounds, unless the individual is on a firing range or in a shooting competition.¹² This means that 10-round magazines will still be freely available, all the more reason to limit the number of magazines an individual may purchase.

Third, individuals seeking to possess a firearm should be required to obtain a firearms safety certificate. Currently, Westchester County requires a safety certificate that, much like getting a driver’s license, involves taking a safety course and completing an examination.¹³ This program should be expanded throughout our entire state to further protect our citizens.¹⁴

⁹ There is also other legislation currently pending in the New York State Legislature that would define 50-caliber weapons as “assault weapons” (S.2028/A.3322).

¹⁰ Erik Kriss & Bill Sanderson, New Gun Law Has a Lot of Holes, N.Y. Post, Jan. 16, 2013 (noting “two Benelli MR1 rifles have equal killing power” yet one is illegal due to “its ‘military’ grip while the other is perfectly fine” under the Act). Available at http://www.nypost.com/p/news/national/new_law_has_lot_of_holes_BORK25RPsC6r4jNwBUdVK. (Last visited February 15, 2013).

¹¹ Weapons Not Classified as Assault Weapons, N.Y. Gov. Office, <http://www.governor.ny.gov/assets/documents/Pistolsthatarenotclassifiedasassaultweapons.pdf> (listing the 50-caliber weapon, Smith & Weston 500, as a non-assault weapon under the Act). (Last visited February 15, 2013).

¹² N.Y. Penal Law §§ 265.20 (7)(f), 265.36 (McKinney 2013). The provision now reads: “Possession and use of a magazine, belt, feed strip or similar device, that contains more than seven rounds of ammunition, but that does not have a capacity of or can readily be restored or converted to accept more than ten rounds of ammunition, at an indoor or outdoor firing range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in arms; at an indoor or outdoor firing range for the purpose of firing a rifle or shotgun; at a collegiate, olympic or target shooting competition under the auspices of or approved by the national rifle association; or at an organized match sanctioned by the International Handgun Metallic Silhouette Association.”

¹³ N.Y. Penal Law § 400.00(1)(i) (McKinney 2013).

¹⁴ This issue may be amended to the Act, or addressed through a different bill, S.573/A.3321, currently pending in our State Legislature.

Fourth, it is critical to keep firearms out of the hands of individuals with mental health issues. The SAFE Act now requires mental health professionals to report, through intermediaries, to the Division of Criminal Justice Services if they believe a person in their care “is likely to engage in conduct that would result in serious harm to self or others.”¹⁵ A search will then be conducted to determine if that person has a firearms license. If so, their license shall be either suspended or revoked and their firearms removed from their possession.¹⁶ Currently, however, the SAFE Act does not specify whether or how this mental health information will be used to determine if a person is eligible to obtain a *new* license.¹⁷ It should be made clear that a person who is unfit to carry a weapon due to mental illness should not be permitted to obtain a new license.

In short, the SAFE Act, while comprehensive, still does not address some areas in need of reform. Currently pending in our state legislature are several bills, described below, that we believe will further strengthen current gun laws by closing existing loopholes that still exist. We respectfully urge the Legislature to support and promote the passage of these life-saving measures.

NEXT STEPS

In August 2012, State Senator Michael Giannaris introduced several bills in the New York State Legislature that seek to create comprehensive gun control laws. These bills were reintroduced into the Legislature in January 2013 and gained companion bills in the Assembly sponsored by Assembly Member Brian Kavanagh. This legislation would: 1) establish a longer ten-day waiting period for the purchase of any firearm (S.571/A.3181); and 2) prohibit the purchase of more than one firearm during any thirty-day period (S.572/A.3186).

Critically, S.571/A.3181 seeks to close gaping loopholes in our existing law concerning background checks conducted on prospective buyers. Under current federal law, firearms dealers must obtain a federal firearms license, which then requires them to contact the FBI to conduct a background check on prospective buyers through the National Criminal Background Check System (“NCIS”) to verify that the buyers have no criminal history or are otherwise unfit to carry a firearm. However, if the FBI is unable to complete the NICS background check within three days, the dealer may sell the firearm to the buyer by default without anyone having thoroughly assessed that buyer’s fitness to own the firearm. S.571/A.3181 would amend the New York State General Business Law to establish a longer, ten-day waiting period to purchase a firearm in order to give law enforcement more time to perform a thorough background check on prospective buyers. This will also to provide a “cooling off” period to help guard against impulsive acts of violence.

Currently, federal law does not limit the number of guns a person may buy in a given period, and studies show that firearms sold in multiple sales to the same individual purchaser are frequently used in crime. ATF crime gun trace data reveals that 22% of all handguns recovered in 1999 had

¹⁵ N.Y. Ment. Hyg. Law § 9.46(b) (McKinney 2013). The Committees are aware that this reporting provision of the SAFE Act has created privacy and other concerns among mental health professionals. This report does not address or analyze those concerns. Regardless of whether mental health professionals are successful in obtaining amendments to the SAFE Act, our point remains the same: any limitations on the ability of an individual to retain a firearm due to severe mental illness should extend to that individual’s ability to obtain a new license.

¹⁶ N.Y. Penal Law § 400.00(11)(b) (McKinney 2013).

¹⁷ See N.Y. Penal Law § 400.00(1), (11)(b) (McKinney 2013).

been transferred to a purchaser involved in a multiple sale, and crime trace data from 2000 shows that 20% of all retail handguns recovered in crime were purchased as part of a multiple sale.¹⁸ Cutting down on the ability of an individual to purchase multiple firearms at one time is critical. S.572/A.3186 would amend the New York State Penal Law by creating the felony crime of unlawful procurement of a firearm when an individual purchases or takes possession of more than one firearm from any firearms dealer during any thirty-day period, or when a firearms dealer sells or transfers a firearm to any person who has purchased or taken possession of a firearm during the previous thirty days.

There are also a number of other critical pieces of legislation pending in the State Legislature which would assist and protect law enforcement while investigating gun related crimes. These bills seek to: 1) require microstamping on new semiautomatic firearms sold (S.68/A.3244); and 2) redefine the terms “armor piercing ammunition” and “disguised gun” (S.4175 and A.3485, respectively).

The City Bar supports S.68/A.3244, sponsored by Senator Peralta and Assembly Member Schimel, which would require microstamping technology to be used on all new semiautomatic firearms.¹⁹ Microstamping is an inexpensive tool that would help solve crimes where semi-automatic handguns are used but not found at the crime scene. Law enforcement would be able to use the technology to identify the retail purchaser of the handguns, trace patterns of trafficking in illegal crime handguns, identify corrupt gun dealers who trade in illegal handguns, and identify straw purchasers.

S.4175 and A.3485 would amend the Penal Law to redefine the definitions of banned “armor piercing ammunition” and “disguised gun,” respectively. Senator Golden sponsors S.4175, which would amend the definition of banned “armor piercing ammunition” to include new deadly technological advances in ammunition. A.3485, sponsored by Assembly Member Lentol, would redefine the Penal Law provision criminalizing a “disguised gun” to include guns that resemble toy guns, thereby helping to protect our children and assist police officers in distinguishing a toy gun from an actual gun.

FEDERAL LEGISLATION

The lack of effective federal gun control measures puts New York City, along with the rest of the nation, in jeopardy. The lapsed federal assault weapon ban and the lack of federally required comprehensive background checks, particularly the private sale loophole that allows guns to be purchased without any background check, are the most pressing problems. But there is also federal legislation pending in the House of Representatives that is particularly dangerous to New York: The Respecting States' Rights and Concealed Carry Reciprocity Act (H.R. 578) would override the laws of every state, including New York, by forcing each state to accept concealed handgun carry permits from every other state, even if the permit holder would not be allowed to carry or even possess a handgun in the state where he or she is traveling.

¹⁸ S.572/A.3186 section “Justification.”

¹⁹ Report on legislation by the Criminal Justice Operations Committee in support of A.1157-B/S.675-C, the Crime Gun Identification Act of 2012, Reissued March 2012, *available at* <http://www2.nycbar.org/pdf/report/uploads/20072124-ReportontheCrimeGunIdentificationActof2011A.1125-AS.675-A.pdf>.

Currently, New York does not recognize any out of state concealed firearm permits. The bill would undercut New York's strong licensing framework by requiring acceptance of a lowest common denominator approach to licenses. For example, anyone denied a license in New York could circumvent the law and obtain a license from another state with more lax standards and carry that gun into New York. Some states have flawed permit schemes that do not track current permit holders or revocations and allow convicted felons to slip through the cracks and carry concealed, loaded weapons. New York would be forced to allow those individuals to carry guns in New York. Simply put, the bill would be a nightmare for New York law enforcement, forcing them to apply the laws of every other state and making it difficult to verify permits because there is no national database to verify concealed carry permits and permits in many states are easily forged. For these reasons, the City Bar opposes H.R. 578.

CONCLUSION

In sum, New York's Legislature has an opportunity and continuing duty to lead our state and nation in the fight against gun violence by strengthening our laws. Although a laudable first step, the Legislature should not stop at passage of the SAFE Act. We urge the Legislature to consider the aforementioned amendments to the SAFE Act, other pending legislation outlined here, and additional legislation that undoubtedly will be proposed in the months ahead. We need strong leadership to protect our citizens from senseless gun violence. New York should be in the forefront of that critical effort.

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