



LCAV Model Law **Universal Background Checks for Firearms Sales**

August 2010

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 entities 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. Jurisdictions using this model must integrate it with existing laws as appropriate.

This model law does not offer, and is not intended to constitute, legal advice.

Executive Summary

This model law requires anyone selling or transferring a firearm to process the transfer through a federally licensed firearms dealer, who must conduct a background check on the prospective purchaser and maintain a record of the sale. This model law is intended to close the gap in federal law known as the "private sale" loophole.¹ This loophole allows persons other than licensed gun dealers to sell or transfer firearms without complying with requirements applicable to licensed gun dealers, including a background check on the purchaser and the creation of a record. By mandating that all firearms sales and transfers be processed through a licensed dealer, this model law requires these requirements are met before any transfer of a firearm.

As set forth in the findings below, background checks have been extremely effective in blocking felons and other legally prohibited purchasers from obtaining firearms. Unfortunately, federal law and the laws of most states do not require an unlicensed seller to conduct a background check on a firearm purchaser. Such "private sales" account for about 40% of all guns transferred. Gun traffickers take advantage of this loophole to sell firearms without a background check to prohibited purchasers. Federal, state, and local laws also impose other requirements on licensed

¹ Although this private sale loophole is frequently referred to as the "gun show" loophole (because of the particular problems associated with gun shows), it applies to all firearm sales, regardless of where they occur.

dealers that are inapplicable to unlicensed sellers, such as record-keeping requirements. As explained in the model's findings, requiring a licensed dealer to keep a record of every firearm sold enables law enforcement to trace firearms that are later misused, lost, or stolen.

Currently, only California, Rhode Island, and the District of Columbia have closed the private sale loophole and prohibit all firearm sales without a background check and the maintenance of a record. Connecticut, Maryland, and Pennsylvania impose these requirements prior to the sale of a handgun, but not most long guns. Colorado, Illinois, New York, and Oregon have closed the loophole only with respect to firearm sales at gun shows.²

The American public overwhelmingly supports requiring background checks before all firearm sales. A nationwide poll conducted in March and April 2008 found that 87% of Americans, including 83% of gun owners, favor requiring everyone who sells guns to conduct criminal background checks on prospective purchasers.³

This model law is designed specifically for use by state and local governments. Please note, however, that any jurisdiction considering firearms legislation must carefully tailor the legislation to ensure conformity with existing law. For more information and assistance in drafting a law, please contact LCAV.

² For more information about existing state and local laws regulating private firearms sales, see Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* 162-168 (Feb. 2008), at http://www.lcav.org/library/reports_analyses/regulating_guns.asp.

³ Greenberg Quinlan Rosner Research & the Tarrance Group for the Mayors Against Illegal Guns, *Americans Support Common Sense Measures to Cut Down on Illegal Guns* 3, 6, (Apr. 10, 2008), at http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf.

Text of Model Law

CHAPTER 1 **UNIVERSAL BACKGROUND CHECKS FOR FIREARM SALES** **[ACT/ORDINANCE]**^{*}

Sec. 1	Title
Sec. 2	Legislative findings, purpose and intent
Sec. 3	Definitions
Sec. 4	All firearm sales to be conducted through a licensed dealer
Sec. 5	Exceptions
[Sec. 6]	Additional sections]
Sec. 7	Penalties

Sec. 1 Title

This Chapter may be cited as the Universal Background Checks for Firearm Sales [Act/Ordinance].^{*}

Sec. 2 Legislative findings, purpose and intent

[Findings regarding the need for and benefits of this law should be included. General findings regarding gun violence throughout the U.S. and the benefits of universal background checks are provided below. However, findings in support of a law are most effective when they are specific and localized. Whenever possible, data from the jurisdiction adopting the law, including data from law enforcement, the public health community and descriptions of particularly relevant incidents, should be added.]

The [Legislative Body] hereby finds and declares:

- (a) In 2007, the most recent year for which statistics are available, over 31,000 Americans died from firearm-related injuries – an average of more than 85 deaths each day⁴ – and nearly 70,000 others were treated for non-fatal gunshot wounds.⁵
- (b) Guns were used to commit over 385,000 crimes in the U.S. in 2007, and nearly 70% of all murders that year were committed with a firearm.⁶ Records kept by the Federal Bureau of Investigation (FBI) show that in 2007, 190,514 robberies and 183,153 aggravated assaults were

^{*} Where the words “[Act/Ordinance]”, “[Jurisdiction]”, “[Legislative Body]”, or similar variations appear, simply select the appropriate designation for your jurisdiction.

⁴ U.S. Dep’t of Health & Human Servs., Centers for Disease Control & Prevention, Nat’l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2007* (2010), at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html .

⁵ U.S. Dep’t of Health & Human Servs., Centers for Disease Control & Prevention, National Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Nonfatal Injury Reports* (2010), at <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>.

⁶ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2007*, at <http://bjs.ojp.usdoj.gov/content/glance/tables/guncrimetab.cfm>.

committed with firearms.⁷ That year, 12,632 people were victims of firearm homicide – 68.8% of all homicides nationwide.⁸

(c) Guns were the number one cause of death for law enforcement officers in 2009.⁹

(d) Federal law requires anyone engaged in the business of selling firearms to obtain a federal firearms license.¹⁰ These licensed dealers are required to conduct a background check on a prospective gun purchaser before transferring the firearm.¹¹ Firearms dealers aren't the only individuals who can transfer guns, however. Due to a huge loophole in federal law¹² – the private sale loophole – unlicensed sellers are not legally required to conduct a background check or document transaction information prior to transferring a firearm. This loophole accounts for up to 40% of all U.S. gun sales¹³ – that means 40% of all gun transfers in the U.S. take place *without* a background check on the purchaser. Because of this loophole, criminals and other prohibited persons can easily buy guns throughout most of the country.

(d) Background checks are a proven method to keep guns out of the hands of prohibited persons. Since the federal background check requirement was adopted in 1994, nearly 1.8 million prohibited persons have been denied a firearm transfer or permit.¹⁴ In 2009 alone, 70,656 gun transfers were denied using the federal background check system.¹⁵

(e) Private sales are a significant public safety concern. The Bureau of Alcohol, Tobacco, Firearms & Explosives (“ATF”) found that for the period July 1996 through December 1998, unlicensed sellers were involved in about one-fifth of illegal trafficking investigations and

⁷ *Id.*

⁸ U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2007* (2010), at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html. 2007 is the most recent year for which such data are available.

⁹ National Law Enforcement Officers Memorial Fund, *Research Bulletin: Law Enforcement Officer Deaths: Final 2009 Report – A Tale of Two Trends: Overall Fatalities Fall, Fatal Shootings on the Rise* (Apr. 2010), at http://www.nleomf.org/assets/pdfs/law_enforcement_officer_fatalities_2009_end_year_report_apr10.pdf.

¹⁰ 18 U.S.C. § 922(a)(1)(A).

¹¹ 18 U.S.C. § 922(g). 18 U.S.C. § 922(t)(1).

¹² The Gun Control Act of 1968 provides that persons “engaged in the business” of dealing in firearms must be licensed. 18 U.S.C § 921(a)(21)(C). Although Congress did not originally define the term “engaged in the business,” it did so in 1986 as part of the McClure-Volkmer Act (also known as the “Firearms Owners’ Protection Act”). That Act defined the term “engaged in the business,” as applied to a firearms dealer, as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.” *Id.* Significantly, however, the term was defined to *exclude* a person who “makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.” It is such private sellers that jeopardize public safety.

¹³ Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997).

¹⁴ Bureau of Justice Statistics, U.S. Dep't of Justice, *Background Checks for Firearm Transfers, 2008 - Statistical Tables*, at <http://bjs.ojp.usdoj.gov/content/pub/html/bcft/2008/bcft08st.pdf>. These statistics cover the period March 1, 1994 – Dec. 31, 2008.

¹⁵ U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Justice Information Services Division, *CJIS Annual Report 2009* 10, at http://www.fbi.gov/hq/cjisd/cjis_annual_report2009.pdf. These denials were out of 14.4 million NICS background checks in 2009.

associated with nearly 23,000 trafficked guns.¹⁶ Roughly 20% of gun trafficking investigations involve transfers by unlicensed sellers who are not required to conduct background checks.¹⁷

(f) According to a 2008 report by Mayors Against Illegal Guns, states that do not require background checks for sales of handguns at gun shows are the sources of crime guns recovered in other states at more than twice the rate of states that require background checks. None of the ten states that are most frequently the sources of crime guns have any universal background check or gun show background check requirement.¹⁸

(h) Implementing universal background checks would reduce illegal trafficking and treat all transfers equally, whether the purchaser is buying from a licensed gun shop, at a gun show, or from a neighbor. Universal background checks would help ensure that persons buying guns are legally eligible to do so.

(i) In addition to the requirement of a background check, federally licensed firearms dealers must also record information about each sale or transfer of a firearm.¹⁹ The information that is recorded helps law enforcement track the owners of guns recovered in crimes, and remove guns from the hands of people who have been convicted of a crime or otherwise become ineligible to possess them.

(j) In a 2007 report, the International Association of Chiefs of Police found that applying the record-keeping requirement to all sales “would allow law enforcement to trace the gun to the last point of sale should it be criminally misused, lost or stolen.” According to the report, guns that are not sold or transferred through a licensed gun dealer “become more difficult to trace if lost, stolen or criminally misused, making crimes involving them more difficult to solve.” The report concluded that, “Congress, as well as state, local and tribal governments should enact laws requiring that all gun sales and transfers proceed through” a federally licensed dealer.²⁰ The report also cited the “mandatory background check” required when a federally licensed dealer performs the transfer.²¹

(k) California,²² Rhode Island²³ and the District of Columbia²⁴ have instituted universal background checks and require that, prior to any firearm transfer, a licensed dealer or law enforcement agency conduct a background check on the prospective transferee. Connecticut,²⁵

¹⁶ Bureau of Alcohol, Tobacco and Firearms, U.S. Dep’t of Treasury, *Following the Gun: Enforcing Federal Laws Against Firearm Traffickers* xi (2000).

¹⁷ *Id.*

¹⁸ Mayors Against Illegal Guns, *The Movement of Illegal Guns in America: The Link between Gun Laws and Interstate Gun Trafficking* 10-11 (Dec. 2008), at http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_report_final.pdf.

¹⁹ 18 U.S.C. § 923(g); 27 C.F.R. §§ 478.124, 478.125.

²⁰ International Association of Chiefs of Police (IACP), *Taking a Stand: Reducing Gun Violence in Our Communities* 16, 22 (Sept. 2007), at http://www.seattle.gov/mayor/issues/gunviolence/docs/IACP_Report.pdf.

²¹ International Association of Chiefs of Police (IACP), *Taking a Stand: Reducing Gun Violence in Our Communities* 16, 22 (Sept. 2007), at http://www.seattle.gov/mayor/issues/gunviolence/docs/IACP_Report.pdf.

²² Cal. Penal Code §§ 12072(d), 12082.

²³ In Rhode Island, the background check requirement does not apply to persons licensed to carry a concealed handgun. R.I. Gen. Laws §§ 11-47-35 – 11-47-35.2.

²⁴ D.C. Code Ann. §§ 7-2502.01, 7-2502.03, 7-2505.01, 7-2505.02.

²⁵ Conn. Gen. Stat. § 29-33(c).

Maryland²⁶ and Pennsylvania²⁷ impose universal background checks on handgun purchasers. Colorado,²⁸ Illinois,²⁹ New York,³⁰ and Oregon³¹ require background checks with respect to all firearm sales at gun shows.

- (l) Americans overwhelmingly support background checks for all prospective gun purchasers:
- A nationwide poll conducted in early 2008 found that 87% of Americans, including 83% of gun owners, favor requiring everyone who sells guns to conduct criminal background checks on prospective purchasers.³²
 - A poll conducted shortly after the 2008 presidential election found that 83% of voters, including 84% of gun owners, favor background checks for all sales.³³
 - A national survey conducted for Mayors Against Illegal Guns in January 2007 found that 92% of Americans – including 91% of gun owners – favor mandatory criminal background checks for all people purchasing guns.³⁴
- (m) It is the purpose and intent of the [Legislative Body] in enacting this Chapter to require all firearm sales in [Jurisdiction] to be conducted through a licensed firearms dealer, so that all legal requirements are met, including a background check on the prospective purchaser and the creation of a record. The [Legislative Body] believes that this Chapter will help protect public safety by preventing gun deaths and injuries.

Sec. 3 Definitions

As used in this Chapter:

- (a) “Firearm” means any weapon or device designed to be used as a weapon, which will, is designed to, or may readily be converted to expel a projectile or projectiles by the action of an explosive, explosion, or other means of combustion, or the frame or receiver of such a device, 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, or a weapon that has been rendered permanently inoperable (incapable of being readily restored to a firing condition).

²⁶ Md. Code Ann., Pub. Safety §§ 5-101(r), 5-124(a), 5-130(j).

²⁷ 18 Pa. Cons. Stat. §§ 6111(b), 6111(c), 6111(f)(1), (2).

²⁸ Colo. Rev. Stat. §§ 12-26.1-101 – 12-26.1-108.

²⁹ 430 Ill. Comp. Stat. 65/3, 65/3.1.

³⁰ N.Y. Gen. Bus. Law §§ 895-897; N.Y. Penal Code § 400.00.

³¹ Or. Rev. Stat. §§ 166.432 – 166.441.

³² Greenberg Quinlan Rosner Research & the Tarrance Group for the Mayors Against Illegal Guns, *Americans Support Common Sense Measures to Cut Down on Illegal Guns* 3, 6, (Apr. 10, 2008), at http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf.

³³ Penn, Schoen, & Berland Associates, Inc. for Brady Campaign to Prevent Gun Violence, *Post-Election Analysis: Sensible Gun Laws Builds Bridges not Burns Them to Moderates, McCain, and Even Gun Owners in Post-Heller World* (Nov. 18, 2008), at <http://www.bradycampaign.org/xshare/pdf/memo-11-18-08.pdf>.

³⁴ 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)* 12, 18 (Jan. 23, 2007), at http://www.greenbergresearch.com/articles/1849/2630_MAIGslides.pdf.

(b) “Law enforcement” means any person employed by the United States, or a state, county, city, municipality, village, township, or other political subdivision as a police officer, peace officer, or in some like position involving the enforcement of the law and protection of the public interest.

(c) “Licensed firearms dealer,” “licensed dealer,” or “dealer” means a person who has a valid federal firearms dealer license, and all additional licenses required by state or local law to engage in the business of selling or transferring firearms.

(d) “Person” means any individual, corporation, company, association, firm, partnership, club, organization, society, joint stock company or other entity.

Sec. 4 All firearm sales to be conducted through a licensed dealer

(a) No person shall sell, lease, transfer, or loan a firearm unless:

- (1) The person is a licensed firearms dealer;
- (2) The purchaser, lessee, transferee, or person being loaned the firearm is a licensed firearms dealer; or
- (3) The requirements of subsection (b) are met.

(b) Where neither party to a prospective firearms transaction is a licensed firearms dealer, the parties to the transaction shall complete the sale, lease, transfer, or loan through a licensed firearms dealer as follows:

- (1) The seller, lessor, transferor, or the person loaning the firearm shall deliver the firearm to the dealer, who shall retain possession of that firearm until all legal requirements for the sale, lease, transfer, or loan have been met, including any state or local waiting periods.
- (2) The dealer shall process the sale, lease, transfer, or loan as if he or she were the seller, lessor, transferor, or lender of the firearm. The dealer shall comply with all requirements of federal, state, and local law that would apply if he or she were the seller, lessor, transferor, or lender of the firearm.
- (3) The dealer shall conduct a background check on the purchaser, lessee, transferee, or the person being loaned the firearm, in accordance with section 922(t) of Title 18 of the United States Code, and state and local law, and, if the transaction is not prohibited, deliver the firearm to that person after all legal requirements are met.
- (4) If the dealer cannot legally deliver the firearm to the purchaser, lessee, transferee, or the person being loaned the firearm the dealer shall conduct a background check on the seller, lessor, transferor, or the person loaning the firearm in accordance with section 922(t) of Title 18 of the United States Code, and state and local law, and, if the return transaction is not prohibited, return the firearm to that person.

(5) If the dealer cannot legally return the firearm to the seller, lessor, transferor, or the person loaning the firearm, then the dealer shall deliver the firearm to [local law enforcement] within 24 hours.

(6) The purchaser, lessee, transferee, or the person being loaned the firearm may be required by the dealer to pay a fee covering the administrative costs incurred by the dealer for facilitating the transfer of the firearm, plus applicable fees pursuant to federal, state, and local law.

Sec. 5 Exceptions

Section 4 does not apply to the following:

(a) The activities of:

(1) A law enforcement or corrections agency; or

(2) The United States Marshals, members of the Armed Forces of the United States or the National Guard or federal officials required to carry firearms while engaged in the operation of their official duties; or

(b) The following activities, unless the lawful owner knows or has reasonable cause to believe that federal, state, or local law prohibits the transferee from purchasing or possessing firearms, or that the transferee is likely to use the firearm for unlawful purposes:

(1) The delivery of a firearm to a gunsmith for service or repair, or the return of the firearm to its owner by the gunsmith;

(2) The transfer of a firearm to a carrier, warehouseman, and other person engaged in the business of transportation or storage, to the extent that the possession, receipt, or having on or about the person of any firearm is in the ordinary course of business and in conformity with federal, state, and local laws, but not for the personal use of any such person;

(3) The loan of a firearm solely for the purpose of shooting at targets, if the loan occurs on the premises of a properly licensed target facility, if the firearm is at all times kept within the premises of the target range;

(4) The loan of a firearm to a person who is under eighteen years of age for lawful hunting, sporting, or educational purposes while under the direct supervision and control of a responsible adult;

(5) The loan of a firearm to a person who is eighteen years of age or older so long as the firearm remains in the person's possession only while the person is accompanying the lawful owner and using the firearm for lawful hunting, sporting, or recreational purposes; or

(6) The loan of a firearm to an adult family member of the lawful owner of the firearm if the lawful owner resides with the family member but is not currently present in the residence, provided that the family member does not maintain control over the firearm for more than [ten] consecutive days.

Sec. 6 Additional sections

Each jurisdiction should consider including additional provisions on the following topics:

Prohibited Purchasers: Background check laws prevent firearms from falling into the hands of persons prohibited by law from purchasing or possessing them. Federal law prohibits certain persons from purchasing or possessing firearms, and leaves to the states the power to determine additional prohibited persons.³⁵ Jurisdictions adopting this model law may therefore wish to include sections prohibiting additional classes of persons, such as violent misdemeanants, from legally purchasing or possessing firearms. LCAV is available to assist with the drafting of these provisions, if requested.

The Scope of the Background Check: While federal law requires federally licensed firearms dealers to conduct a background check on the purchaser prior to sale of a firearm, the few databases that federal law requires to be searched during that background check do not contain comprehensive information about persons prohibited from possessing firearms. As a result, a jurisdiction should consider requiring dealers to contact the jurisdiction's law enforcement agency, who should conduct a more comprehensive background check on the purchaser prior to sale of a firearm. LCAV is available to assist with the drafting of these provisions, if requested.

Waiting Periods: A jurisdiction may wish to include a provision imposing a waiting period prior to the sale or transfer of a firearm. LCAV is available to assist with the drafting of such a provision, if requested.

Sec. 7 Penalties

[Penalties for the violation of provisions of these laws may vary based on the law enforcement and policy needs of each jurisdiction. The language below makes each violation of any provision of these laws a misdemeanor; however, states have the authority to make a violation a felony and should consider doing so. Jurisdictions are encouraged to consult with law enforcement to develop appropriate penalties.]

(a) Any person violating any of the provisions of this Chapter 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

³⁵ Many states have adopted such laws. For more information about state and local laws prohibiting the purchase or possession of firearms by certain persons, see Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* 69-80 (Feb. 2008), at http://www.lcav.org/library/reports_analyses/regulating_guns.asp.

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, law enforcement shall report any violation of this Chapter by a licensed firearms dealer to the Bureau of Alcohol, Tobacco, Firearms & Explosives within the U.S. Department of Justice.