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Universal Background Checking – New York State’s SAFE Act

James B. Jacobs & Zoe Fuhr*

“When we passed the SAFE Act, just days after the tragedies in Newtown and Webster, New York proved to the nation that it is possible to enact sensible gun control that coexists with the Second Amendment. We showed that it can be done with bi-partisan support from both urban and rural communities. And we took a fundamental step forward to help end the stream of senseless killings by keeping guns out of the hands of criminals and the dangerously mentally ill....New York has set the example – and it’s far past time for Washington to follow suit and pass a sensible national gun control policy” – Governor Andrew M. Cuomo.¹

“Numerous studies conducted by academic researchers and by the federal government have shown that criminals do not use legal markets to obtain guns....They do not buy guns in gun stores. They do not get guns at gun shows. They do not buy them from Internet sources. The study even found that criminals only rarely steal guns.” – National Rifle Association, Institute for Legislative Action.²

The December 13, 2012 Sandy Hook Elementary School massacre in Newton, Connecticut ignited a new round of controversy over gun controls.³ At the federal level, a presidential task force, headed by Vice President Biden, recommended a number of familiar gun controls, including universal background checking for all firearms purchasers.⁴ At the state level, New York State’s Governor Andrew Cuomo, promised to pass the “toughest gun

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¹ Governor Andrew M. Cuomo, *Statement from Governor Andrew M. Cuomo on Decision by U.S. Court of Appeals Regarding NY SAFE Act*, THE OFFICIAL WEBSITE OF NEW YORK STATE, Oct. 19, 2015, available at <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-decision-us-court-appeals-regarding-ny-safe-act>.

² National Rifle Association Institute for Legislative Action, *Study: Criminals Don’t Get Guns from Legal Sources*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, Sept. 4, 2015, available at <https://www.nra.org/articles/20150904/study-criminals-don-t-get-guns-from-legal-sources>.

³ New York State has experienced two mass shootings in the past two decades: 1) the 1993 Long Island Rail Road massacre with six people killed and nineteen injured and 2) 2009 attack at an immigration center in Binghamton with 13 fatalities and four wounded; See Los Angeles Times Staff, *Deadliest U.S. Mass Shootings 1984-2015*, L.A. TIMES, Dec. 2, 2015, available at <http://timelines.latimes.com/deadliest-shooting-rampages/>.

⁴ Office of the Press Secretary, *Remarks by the President and the Vice President on Gun Violence*, THE WHITE HOUSE, Jan. 16, 2013, available at <https://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence>.

control law in the nation.⁵ To this end, on the evening of January 14, 2013, just one month after the Sandy Hook massacre, and before federal legislation could be drafted and introduced into Congress, he submitted the Secure Ammunition & Firearms Enforcement Act (SAFE Act) into both houses of the state legislature under a message of necessity. In this way, the bill was exempt from the state mandatory minimum three-day period for consideration of new legislation.⁶ The New York State Senate, despite its Republican majority, passed the SAFE Act that night; the Democrat-controlled Assembly followed suit the next day.⁷ Neither gun rights, nor gun control advocates had a chance to provide input into the process. Governor Cuomo immediately signed the bill into law.⁸

The SAFE Act is an extraordinarily comprehensive gun control law that includes provisions for universal background checking; prohibitions on new assault weapons and large capacity magazines; registration requirements for grandfathered assault weapons; mandatory reporting obligation for health care professionals who believe that a patient is likely to engage in conduct that will cause serious harm to self or others; seizure of guns from persons subject to orders of protection; and new substantive firearm-related crimes and sentence enhancements.

This article focuses on the SAFE Act's requirement that all sellers, indeed all transferors, of firearms and ammunition initiate background checks for their purchasers (transferees). These universal background checking provisions are important, not just for New York State but for the whole country, because they provide an opportunity to examine gun control proponents' number one policy priority, a policy which, even after Sandy Hook, the Obama administration was unable to get Congress to pass.⁹

Part I describes New York State's background checking laws prior to passage of the SAFE Act. Part II explains the SAFE Act's universal background checking requirements. Part

⁵ New York State Governor M. Cuomo, *Governor Cuomo Signs Groundbreaking Legislation That Will Give New York State the Toughest Protections Against Gun Violence in the Nation*, NEW YORK STATE, Jan. 15, 2013, available at <https://www.governor.ny.gov/news/governor-cuomo-signs-groundbreaking-legislation-will-give-new-york-state-toughest-protections>.

⁶ Governor Cuomo insisted that: "If there's an issue that fits the definition of 'necessity' in the state of New York today, I believe it's reducing gun violence." See Jimmy Vielkind, *Gun Control Bill Advances*, TIMES UNION, Jan. 15, 2013, available at <http://www.timesunion.com/local/article/Gun-control-bill-advances-4192358.php>.

⁷ New York State Senate, *Senate Bill S2230*, NEW YORK STATE SENATE, <https://www.nysenate.gov/legislation/bills/2013/s2230>.

⁸ Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES, Jan. 15, 2013, http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html?_r=0 and Jen Chung, "N.Y. State Senate Passes "Most Comprehensive" Gun Control Bill in U.S.," THE GOTHAMIST, Jan. 15, 2013, http://gothamist.com/2013/01/15/ny_state_senate_passes_most_compreh.php.

⁹ See Ted Barrett and Tom Cohen, "Senate rejects expanded gun background checks", CNN, Apr. 18, 2013, available at <http://www.cnn.com/2013/04/17/politics/senate-guns-vote/>.

III examines challenges in implementing universal background checking, while Part IV illuminates challenges of enforcing such a scheme. Part V considers the SAFE Act's impact on firearms homicides, suicides and crime. Part VI analyzes New York's unique, and unsuccessful, effort to subject ammunition sales to universal background checking.

I. Pre-SAFE ACT: Background Checking in New York

New York State has a strong gun control tradition. The 1911 Sullivan Law, a landmark in 20th century gun control legislation, obliged New Yorkers to obtain a license (permit) to purchase or *possess* a handgun.¹⁰ This licensing requirement continues to apply to handguns, except in New York City (NYC) where it also applies to rifles and shotguns.¹¹ Possession of a handgun (and, in NYC, a long gun) without a license has long been a criminal offense.¹²

In order to obtain a handgun license, the local county licensing officer¹³ must find the applicant to be of "good moral character".¹⁴ Historically, in evaluating an applicant's character for purposes of this restrictive licensing regime, the licensing officer checked the applicant's criminal record as well as the applicant's self-reported history of mental illness and drug use.

New York firearms possessors are also subject to federal law. Since 1938, it has been a federal crime (subject to a maximum ten year prison sentence) for a person ever convicted of a felony to possess a firearm.¹⁵ Over the years, Congress added other disqualifications, including if an individual had been committed to a mental institution or adjudicated "mentally defective";¹⁶ addicted to controlled drugs;¹⁷ illegally or unlawfully in the United

¹⁰ A separate license was required to *carry* a firearm in public. Michael A. Walsh, "The Strange Birth of NY's Gun Laws", NEW YORK POST, Jan. 16, 2012, available at <http://nypost.com/2012/01/16/the-strange-birth-of-nys-gun-laws/>.

¹¹ Peter Duffy, "100 Years Ago, the Shot that Spurred New York's Gun Control Law", N.Y. TIMES, (Jan. 23, 2011), available at http://cityroom.blogs.nytimes.com/2011/01/23/100-years-ago-the-shot-that-spurred-new-yorks-gun-control-law/?_r=0.

¹² N.Y. PEN LAW, §400.00(15).

¹³ N.Y. PEN LAW, § 265.00(10) defines "licensing officer" as "...in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance."

¹⁴ N.Y. PEN LAW, §400.00(1)(b).

¹⁵ 19 U.S.C. §922(g)(1).

¹⁶ 19 U.S.C §922(g)(4).

¹⁷ 19 U.S.C §922(g)(3).

States;¹⁸ had their U.S citizenship renounced;¹⁹ convicted of misdemeanor crimes of domestic violence;²⁰ subject to a domestic violence restraining orders;²¹ dishonorably discharged from the armed forces;²² or a fugitive of justice.²³ A prospective purchaser, seeking to acquire a firearm from an FFL, had to swear on a federal form, administered by the licensed firearms dealer, that he or she was not disqualified from possessing a firearm. However, until 1993, a prospective purchaser's sworn statement of eligibility to possess a firearm was not independently verified.

The 1993 Brady Law (Handgun Violence Prevention Act) strengthened the federal regulatory regime²⁴ by requiring FFLs to submit prospective purchasers' names to the Chief Law Enforcement Officer (CLEO) in the FFL's jurisdiction.²⁵ The CLEO had five business days to conduct a background check, and if a disqualification was found, to notify the FFL not to complete the sale. In November 1998, the National Instant Background Checking System (NICS), run by the FBI, replaced this interim scheme.²⁶ The CLEOs' role was eliminated.²⁷ FFLs were now required to send (by fax or phone) the prospective firearms purchaser's name and other identifying information (but not fingerprints) to NICS. NICS personnel check the purchaser against its various databases of firearms prohibited persons.²⁸

¹⁸ 19 U.S.C §922(g)(5).

¹⁹ 19 U.S.C §922(g)(7).

²⁰ 19 U.S.C §922(g)(9).

²¹ 19 U.S.C §922(g)(8).

²² 19 U.S.C §922(g)(6).

²³ 19 U.S.C §922(g)(2).

²⁴ The Brady Law was amended twice between 1994 and 1998 to extend the categories of persons ineligible to purchase firearms. The amendments made firearms ineligible 1) persons convicted of a "domestic violence misdemeanor" and 2) persons subject to domestic violence restraining order. See JACOBS, *CAN GUN CONTROL WORK*, at 82-83.

²⁵ 18 U.S.C. §922(s).

²⁶ U.S. Department of Justice, Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS) Operations*, FEDERAL BUREAU OF INVESTIGATION, 2014, available at <https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report>.

²⁷ The 1998 transition to the National Instant Check System was fortunately timed - in *Printz v. United States* 521 U.S. 898 (1997), the United States Supreme Court declared that the CLEO background checking requirement was an unconstitutional violation of the Tenth Amendment and the Constitution's "dual sovereignty" principle: see JACOBS, *CAN GUN CONTROL WORK*, at 83-94.

²⁸ NICS searches three databases: the (i) Interstate Identification Index (The FBI criminal record database, which contains information on federal and state felony and some misdemeanor arrests) (ii) National Crime Information Center (The central database of crime-related information maintained by the FBI's Criminal Justice Information Services Division) and (iii) the NICS Index. The NICS Index contains information provided by local, state, tribal and federal agencies of persons prohibited from receiving firearms under federal or state law. See <https://www.fbigovt/about-sue/cjis/nics/general-information/nics-index-brouchure>. The NICS Improvement Amendments Act of 2007 (passed in January 2008) provides financial incentives for states to submit information relevant to whether a person is prohibited from purchasing or possessing a firearm. States are eligible to receive a waiver of the 10% matching requirement for National Criminal History Improvement Grants if they provide at least 90% of relevant records concerning persons who are prohibited from purchasing or possessing a firearm

The Brady Law applies only to firearms sales by FFLs. Private sellers are not required to initiate background checks. This limitation frequently is referred to as “the gun show loophole” because gun shows are convenient locales for private (non-FFL) sellers to do business. In 2000, New York became the first state to extend required background checks to individuals who purchase guns from private sellers at gun shows.²⁹ Gun show operators must “conspicuously post signs” at the show stating that a background check must be completed prior to all firearm sales or transfers,³⁰ and must ensure that an FFL is available to initiate such background checks.³¹ The seller and prospective purchaser must take the firearm to an onsite FFL who, after inspecting the purchaser’s identification documents, initiates a NICS background check. If NICS approves the transfer, the sale can be completed.

The Shooter’s Committee on Political Education (SCOPE), a gun owners’ rights advocacy organization, immediately lodged a constitutional challenge against New York’s attempt to close “the gun show loophole”.³² SCOPE argued that the state’s definition of “gun show” was so broad that it potentially encompassed all gun club events, such as pig roasts and political rallies.³³ Under the definition, the transfer of a firearm that was agreed to, or even discussed, at a gun club meeting or social event and consummated weeks later would be unlawful unless brokered by an FFL. The federal district court found this definition of gun show to be unconstitutionally overbroad on first amendment grounds.³⁴ The SAFE Act eliminates the overbreadth concern because it requires every firearm transfer to be processed through an FFL.

within specified deadlines. See James B. Jacobs and Daniel M. Heumann, “Extending Brady to Gun Shows and the Secondary Market”, 37(3) Criminal Law Bulletin, May/June 2001: 248-262.

²⁹ N.Y. GEN. BUS. LAW §§895-897 (Art. 39-DD). See Associated Press, *N.Y.’s Ground-Breaking Gun-Control Bill Signed*, Aug. 10, 2000, available at <http://articles.latimes.com/2000/aug/10/news/mn-2008>. “Gun show” was defined in §895(1) as an “event sponsored, whether for profit or not, by an individual, national, state or local organization, association or other entity devoted to the collection, competitive use, sporting use, or any other legal use of firearms, rifles or shotguns, or an event at which (a) twenty percent or more of the total number of exhibitors are firearm exhibitors or (b) ten or more firearm exhibitors are participating or (c) a total of twenty-five or more pistols or revolvers are offered for sale or transfer or (d) a total of fifty or more firearms, rifles or shotguns are offered for sale or transfer. The term gun show shall include any building, structure or facility where firearms, rifles or shotguns are offered for sale or transfer and any grounds used in connection with the event.

³⁰ The FFL would provide the non-licensed seller with Alcohol Tobacco and Firearm) Form 4473 (Firearms Transaction Record) , which the gun purchaser must fill out and the gun seller send to NICS. If the sale is approved and recorded on the Form, the seller must retain the form H

³¹ 27 C.F.R. §478.129.

³² *Scope, Inc. v. Pataki* 386 F. Supp. 2d 184 at 194-5(W.D.N.Y, 2005).

³³ http://www.leagle.com/decision/2005570386FSupp2d184_1548/SCOPE,%20INC.%20v.%20PATAKI

³⁴ *Id.*, at 17.

II. The SAFE Act's Universal Background Checking

The SAFE Act requires that a NICS background check be carried out for purchasers and other transferees engaged in “all sales, exchanges or disposals of firearms, rifles or shotguns,”³⁵ except those which occur between “immediate” family members (provided the transferring family member does not know that the transferee is prohibited by law from possessing a firearm because of a prior conviction or some other disability that renders them ineligible to possess a firearm).³⁶ It also requires that ammunition transferors initiate a background check on ammunition transferees.³⁷

The SAFE Act obliges a prospective firearm transferor and transferee to process the sale via an FFL.³⁸ However, the Act does not mandate that FFLs play this processing role.³⁹ An FFL, who does elect to provide the service, may not charge the parties more than \$10 per transaction.⁴⁰ The seller may leave the gun with the licensed dealer, but the purchaser must appear in person to show identification and fill out an ATF Form 4473.⁴¹ A background check is required even though the prospective purchaser may already hold a New York State handgun license. If NICS approves the transfer, the FFL must retain the completed Form 4473 for twenty years⁴² and make it available for inspection by federal, state and local law enforcement officers.⁴³ If the prospective purchaser fails the NICS background check, the sale cannot proceed. The FFL must then initiate a background check on the gun's owner (the

³⁵ GEN. BUSINESS LAW, ART. 39-DDD §898. The Act does not define what constitutes “exchange” or “disposal” of a firearm.

³⁶ N.Y. PEN. LAW §265.17(3).

³⁷ N.Y. PEN. LAW §400.03.

³⁸ New York requires persons who engage “in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any assault weapon, large capacity ammunition feeding device, pistol or revolver” to obtain a state license. N.Y. PEN. LAW §§265.00(9), 400.00(2).

³⁹ California law requires firearms licensees to perform background checks for private firearms transfers as a condition for holding a state license: see CAL. PEN. CODE §§28050 and 28065. The licensed dealer may charge a maximum of \$10 for facilitating a private sale: §28055(a).

⁴⁰ N.Y. GEN. BUSINESS LAW, ART. 39-DDD, §898(4).

⁴¹ ATF Regulations governing recordkeeping and background check procedures for private party firearm transfers suggest that a prospective transferor may leave the firearm to be transferred with the licensed dealer: ATF Proc. 2013-1“Background”. The dealer must provide the purchaser with a secure gun storage or safety device. 18 U.S.C. 922(z). ATF Proc. 2013-1“Procedure – Secure Handgun Storage or Safety Devices”. The purchaser must appear personally to show ID and fill out forms.

⁴² N.Y. GEN. BUSINESS LAW, ART. 39-DDD, § 898(3). Pursuant to ATF Ruling 2008.2, A and D records may now be kept in computerized form.

⁴³ If the NICS blocks the transaction, the FFL must retain the ATF 4473 Form for five years. 27 CFR 478.129(b). See also GEN. BUS. LAW, ART. 39-DDD § 898(3) – (5). These forms are not subject to public disclosure under NYS's Freedom of Information Law, but the dealer must make them available for police inspection. FFLs are required to maintain Acquisition and Disposition (A&D) records, including information about the acquisition and disposition of all firearms transactions that occur on their premises: see 18 U.S.C. § 923(g).

seller) to determine whether he or she is eligible to repossess the gun. If the seller also fails the check, the FFL must transfer the gun to the police.⁴⁴

The SAFE Act expanded the categories of persons prohibited from possessing a firearm on grounds of mental illness. While federal law disqualifies persons who have been civilly committed to a mental institution or adjudicated as a “mental defective,” the SAFE Act also disarms, for five years, persons who have been reported by a medical professional as “likely to engage in conduct that will cause serious harm to self or others.”⁴⁵ More than forty thousand New Yorkers have had their Second Amendment rights suspended via this procedure.⁴⁶

III. Implementation Challenges

The success of the SAFE Act’s universal background checking scheme depends upon the participation of FFLs and on the compliance of private sellers and purchasers.

FFL Participation

The SAFE Act scheme relies on FFLs voluntarily processing secondary sales. In order to assess the extent of FFL willingness to process secondary firearms sales, we interviewed (by phone) 50 randomly selected FFLs across New York State. Forty-two dealers (84%) said they are willing to process at least some secondary sales. However, some respondent FFLs said that they are only prepared to facilitate secondary firearm sales for regular customers. Some FFLs objected to facilitating secondary sales because, without access to a stolen firearms database, they risk becoming embroiled in a police investigation.

Only eight (16%) respondent FFLs refuse to facilitate firearms sales by private sellers. However, one of these non-participating FFLs is the giant retailer Walmart, which is concerned about private firearm sellers bringing possibly loaded firearms into their stores, thereby endangering customers and employees. Most respondent FFLs who reported unwillingness to process secondary sales expressed general opposition to the SAFE Act, especially its ban on the sale of new assault weapons.⁴⁷ They also speculated that processing

⁴⁴ ATF Proc. 2013-1 “Procedure – Delayed Transactions with a Subsequent Denial”.

⁴⁵ N.Y. MEN. HYG. LAW §9.46.

⁴⁶ See James B. Jacobs and Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York’s SAFE Act*, 2016 GJLPP (forthcoming).

⁴⁷ See Brief of Empire State Arms Collectors, Inc. as *Amicus Curiae* in Support of Plaintiffs-Appellants-Cross-Appellees, Nojay et al. v. Cuomo, No. 13-46-cv(L) at 27 (2nd Cir. May 2, 2015). Similarly, the National Shooting Sports Foundation has argued that: “[t]he universal background check is a pure cost to the retailer, most of which are small “mom-and-pop” businesses”; “licensed retailers would be forced to use paid staff hours or to hire additional infrastructure to accommodate such transactions, including, but not limited to additional surveillance equipment, secure firearm storage, parking, IT

secondary sales might be bad for business if secondary sales compete with sale of new guns. In addition, they called the \$10 fee cap⁴⁸ insufficient compensation for the time and effort⁴⁹ required for processing a secondary sale.⁵⁰ (In contrast, FFLs typically charge \$30 – 40 for facilitating an interstate firearms transfer.⁵¹) Empire State Arms' Collectors, an organization which operates gun shows in New York, and whose membership includes licensed dealers, explained in a legal brief challenging the SAFE Act:

“Generally speaking, in a private firearm sale a proposed seller places the firearm into the FFL’s inventory, requiring the FFL to process the firearm into the Acquisition & Disposition book, assume liability for the firearm, and be potentially unable to clear the firearm back out of inventory [sic]. If the proposed buyer fails a background check, the FFL is then required to run a background check on the proposed seller. (Once a firearm is placed in the FFL’s inventory, it cannot be released without the next owner (even the original seller) passing a NICS background check. If the proposed seller likewise fails the background check, the FFL is not permitted to release the firearm from its inventory.”⁵²

infrastructure, and acquisition and distribution records. National Shooting Sports Foundation, *Universal Background Checks – Key Facts to Consider*, NATIONAL SHOOTING SPORTS FOUNDATION (2013), available at <http://nssf.org/factsheets/PDF/UBC.pdf>.

⁴⁸ Jessica Alaimo, “Some Gun Dealers Balking at Transfers”, DEMOCRAT AND CHRONICLE, Apr. 23, 2013, available at http://www.democratandchronicle.com/article/20130423/NEWS01/304190082?fb_comment_id=fbc_322307921230327_6485954_322560001205119.

⁴⁹ Our survey respondents claimed that it takes 20-30 minutes per firearm to complete the secondary sale.

⁵⁰ Empire State Arms Collectors’ amicus brief on behalf of the plaintiffs in *Nojay et. al v. Cuomo*, said: “The State wants FFLs [to] facilitate private firearm sales for \$10. Gen. Bus. L. §898(4). To say “facilitate” is a misnomer. Taking just the two core elements of the NICS federal background check and the A&D book into consideration, the FFL has significant federal compliance to perform in order to conduct the background check in the context of the private firearm sales”

See Brief of Empire State Arms Collectors, Inc. as *Amicus Curiae* in Support of Plaintiffs-Appellants-Cross-Appellees, *Nojay et al. v. Cuomo*, No. 13-46-cv(L) at 27 (2nd Cir. May. 2, 2015).

⁵¹ Jessica Alaimo, “Some Gun Dealers Balking at Transfers”, DEMOCRAT AND CHRONICLE, Apr. 23, 2013, available at http://www.democratandchronicle.com/article/20130423/NEWS01/304190082?fb_comment_id=fbc_322307921230327_6485954_322560001205119.

An FFL in East Rochester, NY described the required process as follows: “the store has to take the gun in, book it in, give you a receipt for selling it, give them a receipt for taking it, do a background check, book it out of our logbooks, save the background check forever in our records, and give them a lock with it, all for \$10.” See Robert W. Hunnicutt, “New York: Dealers Resist Private Background Checks”, FIREARM NEWS, Apr. 24, 2013, available at <http://www.firearmsnews.com/politics/new-york-dealers-resist-private-background-checks/>.

⁵² Brief of Empire State Arms Collectors, Inc. as *Amicus Curiae* in Support of Plaintiffs-Appellants-Cross-Appellees, at 28.

No doubt, the SAFE Act's drafters wanted to keep the FFL's processing charge low in order to encourage gun sellers' and purchasers' compliance, but the fee cap may also discourage some FFLs from processing secondary sales. A few dealers admitted to (unlawfully) circumventing the fee cap by charging an additional \$20 - \$50 "paper work" fee; others get around the \$10 cap by buying the firearm from the seller and then reselling it to the purchaser for \$50 or \$60 more than they paid. (Of course, such conduct probably discourages some sellers and purchasers from using an FFL.)

Private Seller Compliance

There are several reasons why private sellers may violate the law by ignoring the SAFE Act's universal background checking requirement.⁵³ (In ignoring the SAFE Act's background checking requirement, a seller commits a Class A misdemeanor.)⁵⁴ First, they may wish to avoid the inconvenience of locating a FFL, especially in rural counties where there is no nearby dealer.⁵⁵ Second, many firearm owners are ideologically opposed to the SAFE Act. (To say the least, the SAFE Act, is not popular with gun owners; indeed, it has provoked vociferous protest around the state.)⁵⁶ Third, if the FFL tries to extract a fee greater than \$10, the seller and purchaser might decide to avoid the FFL altogether.

The prevalence of private sellers ignoring the SAFE Act's universal background checking requirement is unknown. However, an undercover investigation conducted by then NYC Mayor Michael Bloomberg's office found in 2011 that 62% of persons who advertised firearms online agreed to make the sale even after the undercover purchaser admitted that he or she "probably could not pass a background check."⁵⁷

A fourth reason why sellers might violate the SAFE Act is that sellers who already routinely sell firearms to criminals have no reason to alter their conduct; they are the

⁵³ City of New York, *Point, Click, Fire: An Investigation of Illegal, Online Gun Sales*, Dec. 2011, at 3, available at http://www.nyc.gov/html/cjc/downloads/pdf/nyc_pointclickfire.pdf.

⁵⁴ N.Y. GEN. LAW §898(6).

⁵⁵ Indeed, in some counties FFLs reported that government officials urged them to "volunteer" to process secondary sales because not enough FFLs were voluntarily participating. [Author's Interview]

⁵⁶ New York State's 52 of 62 counties passed resolutions opposing the SAFE Act's assault weapons ban. See NY SAFE RESOLUTIONS, www.nysaferesolutions.com. Dave Urbanski, *New York Gov. Andrew Cuomo: Some Conservatives 'Have No Place in the State of New York'*, THE BLAZE (Jan. 18, 2014), <http://www.theblaze.com/stories/2014/01/18/andrew-cuomo-if-extreme-conservatives-are-right-to-life-pro-assault-weapon-anti-gay-then-they-have-no-place-in-the-state-of-new-york/>. The New York Sheriffs' Association has criticized the ban: see Brief for *Amici Curiae* NYS Sheriffs' Association et. al. at 18, *Nojay et al. v. Cuomo*, No. 13-46-cv(L) (2nd Cir. May 6, 2015). See also James B. Jacobs and Zoe Fuhr *The SAFE Act's Assault Weapons Ban*, 2017 Criminal Law Bulletin (forthcoming) and James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV.681 (2015)

⁵⁷ City of New York, "Point, Click, Fire: An Investigation of Illegal Online Gun Sales," (Dec. 2011), <https://everytownresearch.org/documents/2015/04/point-click-fire.pdf>

firearms equivalent of drug dealers. Indeed, their business may increase if ineligible firearms purchasers, on account of the SAFE Act, find it more difficult to buy guns in the secondary market.

Purchaser Compliance

In New York State, all handgun purchasers must obtain a handgun permit (license).⁵⁸ Rifle and shotgun purchasers, except in New York City, do not need a license. Unlicensed possession of a handgun (and unlicensed possession of a long gun in New York City) is a criminal offense. It is likely that the vast majority of people who violate the firearms licensing law cannot meet the “good moral character” licensing requirement. If they cannot pass the background check necessary for obtaining a handgun license, they will also not be able to pass the background check.⁵⁹ Consequently, an unlicensed person who wants to obtain a firearm must seek out a gun seller willing to ignore the SAFE Act’s universal background checking requirement. There are black market sellers who specialize in serving this clientele. Alternatively, an individual who cannot pass a background check can recruit a “straw purchaser,” someone with a clean record who is willing, either as a favor or for compensation, to purchase a firearm and turn it over to the prohibited person. (Straw purchasing is itself unlawful. It is also a crime to transfer a firearm to a person whom the transferor knows is a firearms prohibited person.)

An individual who cannot obtain a firearms license or pass a purchaser background check could (illegally) obtain a gun⁶⁰ from a criminal associate or steal one,⁶¹ some “theft victims” may even collude with the firearms prohibited person, i.e. turning a blind eye or accepting compensation for the “theft.” Yet another option for the firearms ineligible individual who wants a gun is to get one from a family member as a gift, loan or sale. The SAFE Act exempts transfers between immediate family members from background check requirements. This exemption does not apply when the transferor “knows that [the transferee] is prohibited by law from possessing a firearm...because of a prior conviction or

⁵⁸ N.Y. PEN. LAW §400.00.

⁵⁹ N.Y. PEN. LAW §400.00.

⁶⁰ In *Chow v. State*, 393 Md. 431, the Maryland Court of Appeals held that because loaning a firearm to a friend does not constitute a permanent exchange of title or possession, Maryland law does not require the lender to initiate a background check.

⁶¹ It has been estimated that approximately 500,000 guns are stolen each year from private citizens: see Philip J. Cook and Jens Ludwig, *Guns in America: Results of a Comprehensive Survey of Gun Ownership and Use*. Washington, DC, February 2000. A 2012 Bureau of Justice Statistics report stated that from 2005 to 2010, 1.4 million firearms were stolen during household burglaries and other theft crimes. See U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *2012 Summary: Firearms Reported Lost and Stolen*, Jun. 17, 2012 <https://www.atf.gov/file/11846/download>.

because of some other disability which would render him or her ineligible to lawfully possess a firearm.”⁶² However, the police are unlikely to find out about, much less be able to prove, that a firearms prohibited individual obtained his gun from a family member who knew of his ineligibility.⁶³

IV. Challenges of Enforcement

To a significant extent, compliance with the SAFE Act’s universal background checking requirement depends upon prospective firearms sellers perceiving a significant risk of apprehension, prosecution and punishment for violating the law. The actual risk is very low. The most likely way for the police to identify a SAFE Act violator is to persuade a person arrested for an armed offense to name the person who supplied him his gun. (Prosecutors may be willing to make concessions to catch a major seller, but probably not to catch a casual seller.) Of course, the gun crime arrestee probably does not know the name, especially the real name, of the person from whom he purchased the firearm. Even if he did know and still remembers the seller’s real name and whereabouts, the person he identifies will almost certainly deny it. What proof is there? The current owner (the criminal defendant in this scenario) is highly unlikely to have a signed receipt (!). Since January 2013 (when the SAFE Act became effective) until the end of June 2015, there has not been a single arrest statewide for knowing failure to comply with the SAFE Act’s universal background checking requirement.⁶⁴

Enforcement of universal background checking would be greatly facilitated if police had access to a comprehensive firearms registry which enabled them to identify the last owner of a firearm recovered from an armed criminal or at a crime scene. Without a registry, it is very difficult, except by means of a sting operation, to prove that a particular

⁶² N.Y. PEN. LAW §265.18(3).

⁶³ The manner in which Sandy Hook shooter, Adam Lanza, obtained his firearm would have fallen within this exception as he “borrowed” firearms from his mother before fatally shooting her. See Michael Melia and Ted Shaffery, *Adam Lanza, Newtown Gunman, Had an Arsenal of Weapons, Gun Safe, Swords, Search Warrants Reveal*, HUFFINGTON POST, Mar. 28, 2013, http://www.huffingtonpost.com/2013/03/28/newtown-shooting-search-warrants_n_2970351.html.

⁶⁴ Under-enforcement of New York background checking laws parallels federal under-enforcement of the Brady Act. A study conducted for the U.S. Department of Justice found that in 2010 only 62 cases nationwide were referred for prosecution (22 of those were for falsified information when buying firearms, and 11 for possession of a firearm by a convicted felon. See Ronald J. Fransen, *Enforcement of the Brady Act, 2010: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2010*, Aug. 2012, at 7-8. Further, Cf. Washington State, where in the year following enactment of universal background checking, there were no arrests or prosecutions for violating the law. See Austin Jenkins, “One Year later, No Reports of Prosecutions Under Wash. Background Check Law”, N.W. NEWS NETWORK, Dec. 10, 2015, <http://nwnewsnetwork.org/post/one-year-later-no-reports-prosecutions-under-wash-background-check-law>.

individual sold someone a specific firearm.⁶⁵ Unfortunately, there is no national firearms registry. Only the District of Columbia and Hawaii have one.⁶⁶ New York State has a de facto registry for handguns since a handgun permit holder must list all his or her handguns on the permit. A private rifle or shotgun seller, who ignores the SAFE Act's universal background checking requirement, faces practically no risk of apprehension unless he sells his gun to an informant or police undercover. Of course, some non-licensed sellers will comply because they are habitually law abiding or because they do not realize that the chance of being apprehended for an unlawful sale is so low.

V. Crime and Suicide Reducing Potential of Universal Background Checking

Given the many options that a firearms ineligible person has for obtaining a gun, even after passage of the SAFE Act, it seems implausible that an individual, strongly motivated to acquire a gun, will have any real difficulty acquiring one. Gun owners' rights advocates insist that criminals will always be able to get guns, especially professional and highly active criminals who want guns to ensure victim compliance and to protect themselves from criminal rivals. However, a firearms ineligible individual, only weakly motivated to acquire a gun, might be deterred if several private sellers tell him that they comply with the SAFE Act's requirements. For example, an individual with a history of mental illness considering suicide may lack the motivation, energy, knowledge, and competence to locate a seller willing to ignore the Safe Act's universal background checking provision.

Evaluating the impact of the SAFE Act's universal background checking for firearms purchasers presents a significant challenge. Some analysts have compared firearm homicides and suicides for a few years before and after enactment of a particular gun control.⁶⁷ This methodology is by no means conclusive. There are many other variables likely to contribute to or mask changes in the number and rate of firearm homicides and suicides. Nevertheless, pre and post-SAFE Act crime data do not make a strong case for the SAFE Act's efficacy.

⁶⁵ JACOBS, *CAN GUN CONTROL WORK?* at 147 (2002)

⁶⁶ Hawaii and the District of Columbia require the registration of all firearms. See Law Center to Prevent Gun Violence, *Registration of Firearms Policy Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/registration-of-firearms-policy-summary/>.

⁶⁷ This is not a sound methodology because other variables, changing during that same time frame, might be causally responsible for the change in number of armed crimes and firearm suicide. Ideally, we would like to control for all variables except changes in the state's gun law, a tremendous challenge and one we will have to leave to others.

Table I shows that firearm and non-firearm homicides both declined in 2013 and 2014, in line with the state's two-decade decline in homicide levels.⁶⁸ The percentage of firearm homicides as a fraction of all homicides has fallen slightly since 2013, but in line, with the downward trend since 2009.

Table 1: New York Firearm-Related Homicide Rates 2009-2014

Year	Total State Homicides	Firearm homicides	Firearm percentage
2009	784	483	61.6%
2010	866	522	60.3%
2011	770	448	58.2%
2012	688	412	59.9%
2013	644	366	56.8%
2014	616	348	56.5%

Table 2 shows that both total suicides and firearm suicides decreased slightly after passage of the SAFE Act.⁶⁹ There is no reason why the SAFE Act would have had a depressing effect on non-firearm suicide. Moreover, both firearm and non-firearm suicide increased again in 2014, contradicting the hypothesis that the SAFE Act reduced suicides by keeping guns out of the hands of suicidal individuals.

Table 2: New York Firearm-Related Suicide Rates 2009-2014

Year	Firearm suicides	Rate / per 100,000	Total suicides	Rate / per 100,000	State Population
2009	422	2.19	1,417	7.34	19,307,066
2010	459	2.37	1,547	7.98	19,378,102
2011	505	2.59	1,658	8.49	19,521,745
2012	516	2.63	1,708	8.71	19,607,140

⁶⁸ New York State Division of Criminal Justice Services, *New York State Crime Report: Crime in New York State 2014 Final Data*, Sep. 2015 at 13, available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/indexcrimes/nys-crime-report-2014.pdf>.

⁶⁹ Centers for Disease Control and PREVENTION, *Fatal Injury Reports 1999-2014*, Injury Prevention & Control: Data & Statistics (WISQARS), CENTER FOR DISEASE CONTROL AND PREVENTION, <http://webappa.cdc.gov/cgi-bin/broker.exe>.

2013	465	2.36	1,687	8.57	19,695,680
2014	474	2.40	1,700	8.61	19,746,227

The proportion of firearm-related violent crimes has not been steadily decreasing.⁷⁰ In fact the proportion of robberies and aggravated assaults, which are firearm-related, has *increased* since the passage of the SAFE Act, indicating that universal background checking has not prevented criminals from obtaining firearms.

Table 3: New York Firearm-Related Crime Rates 2009-2014

A. Rape

Year	Total Rape	Firearm-related Rape	Firearm Percentage
2009	1,733	23	1.3%
2010	1,730	14	0.8%
2011	1,680	20	1.2%
2012	1,672	32	1.9%
2013	1,502	32	2.1%
2014	1,465	27	1.8%

B. Robbery

Year	Total Robbery	Firearm-related Robbery	Firearm Percentage
2009	9,466	2,807	29.7%
2010	8,796	2,550	29.0%
2011	8,578	2,520	29.4%
2012	8,365	2,454	29.4%
2013	8,004	2,438	30.5%
2014	7,407	2,281	30.8%

⁷⁰ See New York State Division of Criminal Justice Services, *2014 Crime Statistics by County*, THE OFFICIAL WEBSITE OF NEW YORK STATE, available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/countycrimestats.htm>.

C. Aggravated Assault

Year	Total Aggr. Assault	Firearm-related Aggr. Assault	Firearm Percentage
2009	16,961	2,282	13.5%
2010	16,490	2,331	14.1%
2011	15,740	2,217	14.1%
2012	16,020	2,266	14.1%
2013	14,273	2,131	14.9%
2014	13,743	2,139	15.6%

VI. SAFE Act's Ammunition Background Checks

In the wake of the Sandy Hook massacre, Governor Andrew Cuomo stated that “just controlling guns isn’t enough.”⁷¹ On the day he signed the SAFE Act into law, he issued a press release extolling the value of universal ammunition background checking, by enabling police to monitor high-volume ammunition transactions.

“...each sale will require both a state background check and transmission of a record of the sale to State Police, so as to enable alerts of high volume purchases....Ammunition ordered over the internet must be delivered in a face-to-face transaction with a firearms dealer and the purchaser will be subject to the state background check. The Aurora [Colorado movie theater] shooter reportedly amassed 6000 rounds through direct online purchases.”⁷²

The Governor’s rationale for ammunition background checking is prevention of mass killings. Presumably, he believes that monitoring ammunition purchasers might identify a high volume purchaser planning a mass shooting. Of course, mass shootings are extremely rare events.⁷³ Despite controversy and confusion over how mass shooting should be defined,

⁷¹ “Seller of Ammunition” is defined as “any person, firm, partnership, corporation or company who engages in the business of purchasing, selling or keeping ammunition: see N.Y. PEN. LAW § 265.00(24). See Thomas Kaplan, “Plan to Require Background Checks for Ammunition Sales is Suspended in New York”, N.Y. TIMES, Jul. 10, 2015, <http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html>.

⁷² New York State, *Governor Cuomo Signs Groundbreaking Legislation That Will Give New York State the Toughest Protections Against Gun Violence in the Nation*, Jan. 15, 2013, <https://www.governor.ny.gov/news/governor-cuomo-signs-groundbreaking-legislation-will-give-new-york-state-toughest-protections>

⁷³ New York has only experienced three mass shootings in the last 25 years: the killing of two firefighters in West Webster in 2012; the shooting at an immigration center in Binghamton in 2009, in which 13 people were killed and four wounded; and the 1993 Long Island Rail Road massacre, in which six people were killed and nineteen injured. See further Jacobs, “Why Ban ‘Assault

there have been very few such incidents in New York State in the last decade. Moreover, a large ammunition purchase is hardly a strong indication of intent to carry out a rampage killing. Target shooters routinely purchase large amounts of ammunition. Mass killers may also accumulate arsenal over time, and in any event do not need and almost never have time to fire more than a few dozen bullets. Nevertheless, monitoring the ammunition market for large ammunition purchases *might* lead the police to a person planning to perpetrate a massacre.

The SAFE Act requires a prospective ammunition purchaser to appear in person before an FFL or registered ammunition seller, so that the dealer can examine the purchaser's ID and notify the State Police who will conduct a background check.⁷⁴ Gun clubs and firing ranges, accustomed to purchasing bulk shipments of ammunition from manufacturers and wholesalers, complained about the cost and inconvenience of having to visit a dealer every time they wanted to purchase ammunition. The Superintendent of State Police issued an "Open Letter" exempting businesses and organizations that distribute ammunition on their premises from having to comply with the face-to-face requirements.⁷⁵ (Since the Superintendent cannot amend legislation, his pronouncement amounted to a promise not to enforce.) Exempted businesses and organizations, once registered, will be allowed to receive ammunition from manufacturers and wholesalers.⁷⁶

The licensed ammunition dealer must initiate the background check by sending to the State Police the prospective purchaser's name and identification as well as information about the ammunition, including "amount, caliber, manufacturer and serial number, if any..."⁷⁷ (Ammunition is not manufactured with serial numbers.) If the State Police does not notify the ammunition seller that the prospective purchaser is prohibited from possessing

Weapons"?", 37 Cardozo L. Rev. 681, at 710 (2015) for a discussion of the difficulties of defining mass shooting events.

⁷⁴ N.Y. PEN. LAW, § 400.03(7). The SAFE Act regulates only commercial ammunition; and transactions involving a seller of ammunition (defined as any person, firm, partnership, corporation or company who engages in the business of purchasing, selling or keeping ammunition) or a FFL; an unlicensed person who transfers ammunition as a gift or loan is not required to initiate a background check: see N.Y. PEN. LAW §400.03(2)-(8).

⁷⁵The Superintendent's Open Letter explained that this exception should be of "particular interest to shooting ranges, hunting clubs, and youth safety and education programs, as it will allow those groups to continue to receive discounted ammunition directly from the manufacturer." Joseph A. D'Amico, *Open Letter from New York State Police Superintendent Joseph A. D'Amico*, N.Y STATE GOVERNOR, Jan. 2014, http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/governor_files/documents/nysafeact/OpenLetterfromNewYorkStatePoliceSuperintendent.pdf.

⁷⁶ Registration forms were available at www.nysafeact.com. http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/governor_files/documents/nysafeact/OpenLetterfromNewYorkStatePoliceSuperintendent.pdf.

⁷⁷ N.Y. PEN. LAW § 400.03(3).

ammunition under federal law, it provides the seller with a unique identification number in respect of the particular ammunition transfer.⁷⁸ The licensed dealer or registered ammunition seller must inform the State Police that the ammunition transaction has been completed and record the sale's details in the seller's record book,⁷⁹ which must be made available for inspection by police.⁸⁰ The SAFE Act authorized the State Police to keep ammunition transaction information for up to for one year, after which it would have to be destroyed.⁸¹

However, under federal law,⁸² NICS is not authorized to conduct background checking for ammunition purchases. Therefore, New York State Police could only check the prospective ammunition purchaser against state databases of persons disqualified from purchasing ammunition.⁸³ But in what appears to be a serious oversight, the SAFE Act does not prohibit any categories of persons, other than those younger than 16, from possessing ammunition; nor is it a state crime to possess ammunition in violation of federal law.

The Collapse of Ammunition Background Checking

The implementation date for the SAFE Act's ammunition control scheme was set for January 14, 2015, a full year after the SAFE Act's passage. The scheme assumed the existence of databases populated with names of person disqualified from possessing ammunition, but the State Police were unable to create the necessary database and information system and they soon estimated that the cost of doing so would be prohibitive. In June 2015, 24 Republican and 2 Democratic state senators co-sponsored a bill⁸⁴ to repeal the SAFE Act's ammunition background checking provisions. While the bill did not obtain a floor vote in either house, it apparently got the attention of the Cuomo administration,⁸⁵

⁷⁸ N.Y. PEN. LAW §400.03(4)(a) and (b).

⁷⁹ N.Y. PEN. LAW § 400.03(2) and (5). In the absence of a serial number, the seller must record "any other distinguishing number or identification mark on such ammunition."

⁸⁰ N.Y. PEN. LAW, § 400.03(2) and (8). A first offense for failing to keep required records constitutes a violation punishable by a fine of up to \$500; a second offense constitutes a class B misdemeanor, punishable by registration revocation and up to three months in jail.

⁸¹ N.Y. PEN. LAW, § 400.03(5).

⁸² Federal law does not require private ammunition sellers (non-FFLs) initiate a background check of the ammunition purchaser.

⁸³ DCJS maintains and populates a database records include persons deemed too dangerous to possess a firearm on account of mental illness under §9.46 of the Mental Hygiene Law. See Jacobs and Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York's SAFE Act*, 2016 GJLPP (forthcoming).

⁸⁴ S.5837/A.8196. <http://assembly.state.ny.us/leg/?sh=printbill&bn=A8196&term=2015>.

⁸⁵ See Michael F. Nozzolio, "Giant Step Forward Toward Repeal of the SAFE Act", THE NEW YORK STATE SENATE, Jul. 10, 2015 <https://www.nysenate.gov/newsroom/press-releases/michael-f-nozzolio/giant-step-forward-toward-repeal-safe-act>.

which decided to suspend implementation. According to a Memorandum of Understanding (MOU) Regarding the Statewide License and Record Database Utilization for Eligibility to Purchase Ammunition, signed by the Republican majority leader of the State Senate and the State Director of State Operations, the ammunition purchaser database “[could] not be established and/or function in the manner originally intended at this time” due to “lack of adequate technology.”⁸⁶ Therefore, the parties agreed that “no expenditures of state monies shall be allocated for the purposes of purchasing and installing software, programming and interface required to transmit any record for the purpose of performing an eligibility check” for the database’s future development without bilateral agreement.”⁸⁷

Sen. James Seward called the suspension of the ammunition regulation “a clear victory for Second Amendment rights in New York”.⁸⁸ Republican Assemblyman Bill Nojay said that: “All this does is state something that we’ve know to be true for the last two years, which is that they don’t have the technology to do the database.”⁸⁹ An NRA lobbyist called the MOU “a step in the right direction to restore a degree of sanity after the SAFE Act’s over-the-top demonization of lawful New York gun owners.”⁹⁰ By contrast, some Democratic senators called the MOU an unconstitutional subversion of the SAFE Act. For example, Deputy Minority leader Michael N. Gianris (D-Queens) argued that “[t]he notion that one house of the Legislature [Senate] will have greater powers than another and that the governor, with one house only, can agree to change state law, turns our democracy on its head.”⁹¹ A spokesperson for Senator Minority Leader Andrew Stewart-Cousins (D-Westchester) said: “This two-way agreement is outrageous. I’m looking forward to the

⁸⁶ See Memorandum of Understanding Regarding the Statewide License and Record Database Utilization for Eligibility to Purchase Ammunition, available at N.Y. Times, <http://www.nytimes.com/interactive/2015/07/10/nyregion/document-order-delaying-new-york-ammunition-checks.html>.

⁸⁷ Sen. Catharine Young reported in a press release following the announcement of the MOU that Senate Republicans had already been successful in removing ammunition database allocations proposed by the Governor in state budgets, but sought a more official solution. See Catharine Young, *SAFE Act Ammunition Database Suspended*, THE NEW YORK STATE SENATE, Jul. 10, 2015, <https://www.nysenate.gov/newsroom/press-releases/catharine-young/safe-act-ammunition-database-suspended>.

⁸⁸ Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales is Suspended in New York*, N.Y. TIMES, Jul. 10, 2015, available at http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html?_r=0.

⁸⁹ Associated Press, “Questions whether SAFE Act deal changes anything” UTICAOD.COM, (Jul. 13, 2015), available at <http://www.uticaod.com/article/20150713/NEWS/150719769/?Start=2>.

⁹⁰ Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales is Suspended in New York*, N.Y. TIMES, (July 10, 2015), available at http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html?_r=0.

⁹¹ Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales is Suspended in New York*, N.Y. TIMES, (July 10, 2015), available at http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html?_r=0.

MOUs on the minimum wage, paid family [...] and the numerous other things that the Senate Republicans are blocking.”⁹² Assembly Speaker, Carl E. Heastie (D-Bronx) criticized the MOU as “an ill-advised end run around the legislature and the SAFE Act.”⁹³

Governor’ Cuomo’s counsel sought to clarify the MOU’s legal effect:

“There have been concerns raised that the State should not implement the database prematurely as it could cause unmanageable disruption in retail establishments and could cause undue delays. We agree. In fact, over the last two years the Superintendent of State Police has clearly said no system would be implemented until it is ready...Members of the Republican Senate have indicated that, despite those prior statements, they continue to be questioned by the public and want to answer definitively that we are aware of the concerns and will act responsibly. The MOU issued by the Director of Operations simply restates that point.... To be clear, the memorandum reiterates the administration’s intention to implement a functional database when it is ready and reinforces that the system cannot be launched prematurely. The memorandum can in no way supersede the law as passed by the legislature and further, there is nothing in the memorandum that is inconsistent with the letter, spirit or intent of the law.”⁹⁴

This statement suggests that the Cuomo Administration has not, at least publicly, given up its commitment to implementing the SAFE Act’s ammunition regulation provisions.

VI. Conclusions

In principle, it makes no sense to require people who purchase firearms from a licensed gun dealer to pass a background check, but not require background checks of persons who purchase firearms from non-licensed sellers. If background checking is an important strategy for keeping firearms out of the hands of dangerous and unreliable people, it should apply to all purchasers, indeed to all transferees, regardless of from whom they obtain them. However, extending background checking to all firearm transfers faces significant

⁹² Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales is Suspended in New York*, N.Y. TIMES, Jul. 10, 2015, available at http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html?_r=0.

⁹³ Thomas Kaplan, *Plan to Require Background Checks for Ammunition Sales is Suspended in New York*, N.Y. TIMES, Jul. 10, 2015, available at http://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html?_r=0.

⁹⁴ Liz Benjamin, “Cuomo Admin Clarifies SAFE Act Changes” STATE OF POLITICS, Jul. 12, 2015, available at <http://www.nystateofpolitics.com/2015/07/cuomo-admin-clarifies-safe-act-changes/>.

implementation and enforcement obstacles. Firearms ineligible individuals can easily circumvent the SAFE Act's universal background checking requirements by obtaining a firearm from a family member, straw purchaser, black market dealer or private gun owner interested in selling a gun and willing (in exchange for a premium) to ignore the background checking law. It is hard to believe that a firearms disqualified person who has a fixed desire to acquire a firearm will have difficulty obtaining one. New York's violent crime statistics support this conclusion.

Ammunition background checking raises all the same implementation and enforcement problems as firearms background checking. On the one hand, ammunition is easier to regulate than firearms because bullets are destroyed upon use and must be constantly replenished. On the other hand, bullets are easier than firearms to make in the basement and garage and, lacking serial numbers, much harder, if not impossible to track and trace. No state has so far successfully implemented ammunition background checking. New York State's pioneering effort to regulate ammunition sales has encountered significant, perhaps fatal, implementation problems. The potential efficacy of ammunition background checking as a gun control strategy remains to be seen.