

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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**BILL:** SB 98

**INTRODUCER:** Senator Baker and others

**SUBJECT:** Regulation of Firearms

**DATE:** April 12, 2010      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Favorable</b>
2.	Daniell	Maclure	JU	<b>Pre-meeting</b>
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

This bill creates the Florida Firearms Freedom Act and provides that a firearm, firearm accessory, or ammunition that is for personal use, is manufactured commercially or privately in Florida, has the words “Made in Florida” on the firearm, and remains within the borders of Florida is not subject to federal law or regulation, including registration requirements. The bill provides that it applies to firearms, firearm accessories, and ammunition manufactured in Florida after October 1, 2010. It also provides exceptions for certain types of firearms.

This bill creates section 790.34, Florida Statutes.

**II. Present Situation:**

**Commerce Clause**

Article I, section 8 of the United States Constitution provides that Congress has the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The commerce clause confers an affirmative grant of power to Congress to regulate commerce, which implicitly restricts states or local governments from regulating commerce. However, states retain exclusive control over commerce that is completely internal, or intrastate. In 1824, the United States Supreme Court provided a broad definition of the commerce clause: “[T]he power to regulate; that is, to prescribe the rule by which commerce is to be governed.”<sup>1</sup>

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<sup>1</sup> Carlo D’Angelo, *The Impact of United States v. Lopez Upon Selected Firearms Provisions of Title 18 U.S.C. s. 922*, 8 ST. THOMAS L. REV. 571, 572 (1996) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824)).

More than 100 years later, the Court limited the definition to encompass the following areas:

First, Congress could set the terms for the interstate transportation of persons, products, or services, even if this constituted prohibition or indirect regulation of single state activities. Second, Congress could regulate intrastate activities that had a close and substantial relationship to interstate commerce; this relationship could be established by congressional views of the economic effect of this type of activity. Third, Congress could regulate – under a combined commerce clause [and] necessary and proper clause analysis – intrastate activities in order to effectuate its regulation of interstate commerce.<sup>2</sup>

The modern interpretation of the commerce clause and how it relates to intrastate commerce requires the application of the rational basis test. Essentially, there just must be some sort of nexus between the activity Congress wishes to regulate and interstate commerce.<sup>3</sup> Accordingly, Congress may regulate activity that is purely intrastate if the activity affects commerce among the states or where the activity so affects interstate commerce, or the exercise of Congress’s power over it, as to make regulation of the activity an appropriate means to attain a legitimate end of Congress.<sup>4</sup>

Additionally, the commerce clause implicitly prohibits certain state regulation even when Congress has failed to legislate on the subject. This restriction, known as the “dormant” commerce clause, severely limits the extent to which states or local governments can regulate commerce by discriminating against, unduly burdening, taxing, or otherwise interfering with interstate commerce or engaging in economic isolationism (i.e., enacting a statute that favors in-state economic interest over out-of-state interests). To survive the dormant commerce clause, a state regulation must abstain from pure economic protectionism, and the state must justify the statute in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives.<sup>5</sup>

### **Right to Keep and Bear Arms**

The right to keep and bear arms is addressed by both the Florida and U.S. Constitutions. The Second Amendment to the United States Constitution states: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”

Article I, subsection 8(a) of the Florida Constitution states: “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.”

Chapter 790, F.S., related to weapons and firearms, recognizes the constitutional right of individuals to own firearms. Specifically, s. 790.335(1), F.S., states:

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<sup>2</sup> *Id.* at 573 (quoting Laurence H. Tribe, *American Constitutional Law* s. 5-4, at 161 (2d. ed. 1988)).

<sup>3</sup> *Id.* at 574.

<sup>4</sup> 15A Am. Jur. 2d *Commerce* s. 22.

<sup>5</sup> 15A Am. Jur. 2d *Commerce* s. 32.

- (b) The Legislature intends through the provisions of this section to:
1. Protect the right of individuals to keep and bear arms as guaranteed under both the Second Amendment to the United States Constitution and s. 8, Art. I of the State Constitution.
  2. Protect the privacy rights of law-abiding firearm owners.

This right, however, is not absolute. A state may enact laws that “regulate the use and the manner of bearing” arms.<sup>6</sup> The Legislature has exercised its “valid police power” many times to regulate the possession of firearms, including such matters as who may possess them, in what manner, of what type, and in what locations.

### **Firearms Freedom Act**

The Firearms Freedom Act (FFA), first introduced in Montana, declares that any firearms made and retained in-state are beyond the authority of Congress under its constitutional power to regulate commerce among the states.<sup>7</sup> Montana passed the FFA in the spring of 2009, and it went into effect on October 1, 2009.<sup>8</sup> In total, seven states have passed a version of the FFA, and 20 other states have introduced, or are planning to introduce, the FFA during their legislative sessions.<sup>9</sup> Wyoming’s law would also subject any government official who attempts to enforce federal law relating to firearms manufactured and remaining in that state to criminal prosecution.<sup>10</sup>

The premise behind the FFA is that Congress has no authority to regulate commerce that is strictly intrastate (that is carried on within the borders of one state). However, there have been instances where the courts have permitted Congress to regulate activities that were purely intrastate.<sup>11</sup> Montana’s FFA is currently being challenged in federal court.<sup>12</sup>

### **III. Effect of Proposed Changes:**

This bill creates s. 790.34, F.S., titled the “Florida Firearms Freedom Act.”

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<sup>6</sup> *Rinzler v. Carson*, 262 So. 2d 661, 665 (Fla. 1972)

<sup>7</sup> Firearms Freedom Act, *The Firearms Freedom Act (FFA) is Sweeping the Nation*, <http://firearmsfreedomact.com/> (last visited Apr. 9, 2010).

<sup>8</sup> Mont. Code Ann. s. 30-20-101 et seq.

<sup>9</sup> Firearms Freedom Act, *supra* note 7. The seven states that have enacted the FFA are: Arizona, Idaho, Montana, South Dakota, Tennessee, Utah, and Wyoming.

<sup>10</sup> See Wyoming HB 95 (2010), available at <http://legisweb.state.wy.us/2010/Introduced/HB0095.pdf> (last visited Apr. 9, 2010); Jeremy Pelzer, *Firearms Freedom Act passes*, Star-Tribune capital bureau (Mar. 4, 2010), available at [http://www.trib.com/news/state-and-regional/govt-and-politics/article\\_2d74efd6-fe23-5a64-80a7-5fe72f5f1d5d.html](http://www.trib.com/news/state-and-regional/govt-and-politics/article_2d74efd6-fe23-5a64-80a7-5fe72f5f1d5d.html) (last visited Apr. 9, 2010).

<sup>11</sup> See *Wickard v. Filburn*, 317 U.S. 111, 128-30 (1942) (holding that the production of wheat for personal use was subject to federal regulation because it competed with commercially grown wheat); *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that it was not a violation of the commerce clause to apply the Controlled Substances Act to intrastate growers and users of marijuana); *U.S. v. Stewart*, 451 F.3d 1071 (9th Cir. 2006) (finding that federal statute criminalizing the possession of homemade machineguns manufactured intrastate was not an unlawful extension of Congress’ commerce powers).

<sup>12</sup> Press Release, *Gun Groups File Lawsuit to Validate Montana Firearms Freedom Act* (Oct. 1, 2009), available at <http://firearmsfreedomact.com/2009/10/01/gun-groups-file-lawsuit-to-validate-montana-firearms-freedom-act/> (last visited Apr. 9, 2010).

The bill provides legislative findings with regard to state and federal rights centered on intrastate and interstate commerce relating to firearms. The bill references the Second, Ninth, and Tenth Amendments to the United States Constitution and provides that the guaranty of the powers in each of them “is a matter of contract between the State of Florida and the citizens thereof and the United States as of the time that the compact with the United States was agreed upon and adopted by Florida and the United States in 1845.”

The bill addresses intrastate commerce and states that Congress has not expressly preempted state regulation of intrastate commerce pertaining to the intrastate manufacture of firearms, firearm accessories, and ammunition.

The bill also makes certain findings regarding the manufacture of firearms, firearm accessories, and ammunition. Specifically, the bill provides that a firearm, firearm accessory, or ammunition that:

- Is for personal use;
- Is manufactured commercially or privately in Florida from basic materials without the inclusion of any significant parts imported from another state;
- With respect to a firearm, has the words “Made in Florida” clearly stamped on a central metallic part of the firearm, such as the receiver or frame; and
- Remains within the borders of Florida

is not subject to federal law or federal regulation, including registration, under the authority of Congress to regulate interstate commerce.

The bill provides the following definitions:

- “Basic Materials” means raw materials, including, but not limited to, unmachined steel and unshaped wood, used in the creation and manufacture of firearms, firearm accessories, or ammunition, but that have other manufacturing or consumer product applications as well.
- “Borders of Florida” means the borders of Florida as described in Article II, section 1 of the State Constitution.
- “Firearm accessories” means items that are used in conjunction with or mounted on a firearm but are not essential to the basic function of a firearm -- for example, telescopic or laser sights, magazines, flash suppressors, folding or aftermarket stocks and grips, speed-loaders, ammunition carriers, and lights for target illumination.
- “Generic and insignificant parts” includes such things as springs, screws, nuts, and pins that may be used in the manufacture of firearms, firearm accessories, or ammunition, but that have other manufacturing or consumer product applications as well.
- “Manufactured” means the creation of a firearm, a firearm accessory, or ammunition from basic materials for functional usefulness, such as forging, casting, machining, or any other processes used to form materials used in the creation of firearms, firearm accessories, or ammunition.

The bill states that the importation of generic and insignificant parts, as well as basic materials, into the state, which may be used to manufacture firearms, firearm accessories, or ammunition, but may also be used for other consumer products, does not subject the firearm, firearm accessory, or ammunition to federal regulation. The bill also provides that firearm accessories that are imported into the state do not subject the firearm to which the accessory is attached to federal regulation under interstate commerce.

The bill does not apply to the manufacture of certain firearms and ammunition. Specifically, the bill provides exceptions for:

- A firearm that cannot be carried and used by one person.
- A firearm that has a bore diameter greater than 1 1/2 inches and that uses smokeless powder, rather than black powder, as a propellant.
- Armor-piercing or exploding ammunition or dragon's breath shotgun shells, bolo shells, or flechette shells.
- A firearm that discharges two or more cartridges or shotgun shells with one activation of the trigger or other firing device.

The descriptions of those firearms and ammunition *not included* within the provisions in the bill appear to match firearms and ammunition regulated by the National Firearms Act of 1934,<sup>13</sup> which does not rely on the commerce clause, but rather federal taxing authority for its power. Therefore, manufacture of the firearms and ammunition in Florida that are not sold outside Florida's borders covered under the bill would seem to be limited to those regulated by the Federal Gun Control Act,<sup>14</sup> which does have its foundation in the Commerce Clause.

The bill requires all firearms manufactured and sold in Florida on or after October 1, 2010, to be stamped "Made in Florida."

The bill shall take effect October 1, 2010.

#### **Other Potential Implications:**

It could be argued that the legislative findings in the bill purport to codify an interpretation of the way the right to keep and bear arms was "understood" at the time Florida was admitted to statehood in 1845. Although the bill does not specify such, the language could be cited as a basis for legal or compliance challenges to state and federal firearm statutes regulating the right to keep and bear arms which have been enacted since 1845.

From a public safety perspective, it could be argued that the bill may have the consequence of exempting firearms made in Florida (and that stay in Florida) from the federal background checks required by federally licensed firearm dealers in Florida before sales are made. Additionally, it appears that firearms manufactured in Florida and that do not travel out of state to be sold would not bear a serial number as required by federal law and therefore would be harder to identify, record, and report by licensed dealers or manufacturers. However, under

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<sup>13</sup> 26 U.S.C. Chapter 53.

<sup>14</sup> 18 U.S.C. Chapter 44.

Florida law a licensed firearms dealer, licensed manufacturer, or licensed importer must follow the requirements of s. 790.065(12), F.S., or risk being charged with a third-degree felony.

Section 790.065, F.S., requires background screening prior to firearm sales and does not exclude “made in Florida” firearms. It states, in part, as follows:

(1) A licensed importer, licensed manufacturer, or licensed dealer may not sell or deliver from her or his inventory at her or his licensed premises *any* firearm to another person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, until she or he has:

(a) Obtained a completed form from the potential buyer or transferee, which form shall have been promulgated by the Department of Law Enforcement and provided by the licensed importer, licensed manufacturer, or licensed dealer, which shall include the name, date of birth, gender, race, and social security number or other identification number of such potential buyer or transferee and has inspected proper identification including an identification containing a photograph of the potential buyer or transferee.

....

(c) Requested, by means of a toll-free telephone call, the Department of Law Enforcement to conduct a check of the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request.

(d) Received a unique approval number for that inquiry from the Department of Law Enforcement, and recorded the date and such number on the consent form.

It is a third-degree felony for a licensed importer, licensed manufacturer, or licensed dealer to violate the above provisions.<sup>15</sup>

Additionally, although not specifically stated in the bill, it could be argued that the bill may exempt firearms manufactured in Florida, that do not leave the state, from the federal excise tax on firearm manufacturing, which could set up a direct conflict with federal law. It does not appear, however, that the provisions in the bill have reached that far in that there are no direct references to Congress’ power to tax the manufacture of firearms.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>15</sup> Section 790.065(12)(b), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

**Commerce Clause**

Congress is expressly permitted by the United States Constitution (Constitution) to regulate interstate commerce. The powers over commerce that are not delegated to the federal government by the Constitution are reserved to the states.

The states retain exclusive control over intrastate commerce, which is commerce that begins and ends entirely within the borders of a single state. In other words, states may control commerce that is completely internal and carried on between one person and another in a state, and does not extend to or affect other states.<sup>16</sup> The power of Congress generally does not extend to the purely internal commerce of the states, and Congress cannot, under the commerce clause, enact a regulation that by its terms applies to intrastate commerce unless the regulated activity exerts a substantial affect on interstate commerce.<sup>17</sup> Congress may control commingled interstate and intrastate operations wherever the interstate and intrastate transactions are so related that the regulation of the one involves the control of the other; otherwise Congress would be denied the exercise of its constitutional authority and the states, not the nation, would be supreme within the national field.<sup>18</sup>

Additionally, states may not enact legislation nominally of local concern, that in reality is aimed at interstate commerce or by its necessary operation is a means of gaining a local benefit by burdening those outside the state.<sup>19</sup> Any state or local regulation that discriminates against out-of-state commerce by providing an advantage to in-state commerce is suspect under the “dormant” commerce clause of the Constitution.<sup>20</sup> For example, the United States Supreme Court held that Ohio’s tax credit for ethanol producers from Ohio, or for states granting a reciprocal tax credit for Ohio-produced ethanol, was constitutionally invalid under the commerce clause as an unlawful burden on interstate commerce.<sup>21</sup>

In *United States v. Stewart*, the court reiterated that Congress can regulate three categories of activity under the commerce clause:

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<sup>16</sup> 15A Am. Jur. 2d *Commerce* s. 29.

<sup>17</sup> 15A Am. Jur. 2d *Commerce* s. 21. Interstate commerce is defined as “trade and other business activities between those located in different states.” Black’s Law Dictionary (2d pocket ed. 1996).

<sup>18</sup> 15A Am. Jur. 2d *Commerce* s. 21.

<sup>19</sup> 15A Am. Jur. 2d *Commerce* s. 29.

<sup>20</sup> 15A Am. Jur. 2d *Commerce* s. 32.

<sup>21</sup> *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

- The use of the channels of interstate commerce;
- The instrumentalities of interstate commerce; and
- Those activities having a substantial relation to interstate commerce.<sup>22</sup>

The question raised in *Stewart* was whether Stewart’s possession of homemade machineguns substantially affected interstate commerce. Stewart made several arguments, including that his possession of the guns was purely an intrastate activity – that the guns themselves never traveled in interstate commerce, only some of the components. The court held that “Congress had a rational basis for concluding that in the aggregate, possession of homemade machineguns could substantially affect interstate commerce in machineguns.”<sup>23</sup> The court came to this conclusion after evaluating several United States Supreme Court cases and found that “‘Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market.’”<sup>24</sup>

It could be argued that this bill creates state regulation that discriminates against out-of-state commerce by providing an advantage to in-state commerce. For example, to the extent that firearm manufacturers and dealers in Florida (who only sell in Florida) are circumventing taxes, fees, registration requirements, and the established federal regulatory scheme governing firearms, which manufacturers and dealers in other states must abide by, the bill may be seen as a discriminatory burden on interstate commerce. Additionally, it could be argued that although the manufacturing and sale of the firearms is only occurring in-state, that it still has a “substantial relation to interstate commerce” and could undercut the regulation of firearms in the interstate market. Thus, it appears that this bill may be subject to a constitutional challenge based on the commerce clause.

### **Separation of Powers**

To the extent that the Legislative findings set forth in the bill could be viewed as “interpreting” the Constitution, the bill may be said to encroach upon the judicial branch’s power to interpret and apply the Constitution.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

None.

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<sup>22</sup> *U.S. v. Stewart*, 451 F.3d 1071, 1073 (9th Cir. 2006).

<sup>23</sup> *Id.* at 1078.

<sup>24</sup> *Id.* at 1075 (quoting *Gonzales v. Raich*, 545 U.S. 1, 18 (2005)).

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

The language in the bill that firearms, firearm accessories, or ammunition “*remaining* in Florida” or that “*remain* within the state” or “*remains* within the borders of Florida” is somewhat unclear if the intent of the bill is that the product be *sold or transferred* within the state.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.