



LEGISLATIVE ALERT
Tuesday, March 13, 2018

Regarding: Assembly Bill 1927 (“AB 1927”) (as proposed to be amended)
Amendment markups dated March 13, 2018
Position: OPPOSED

AB 1927 would create Chapter 6 within Division 9 of Title 4 of Part 6 of the Penal Code,¹ enact § 30180, et seq., and therein establish a new “Voluntary Do Not Sell List” to render a person ineligible to purchase or receive a firearm. While this measure (based on amendment markups dated March 13) seems to be a well-*intentioned* bill, it is one that nonetheless suffers from a few serious flaws that requires us to maintain our opposition.

First, AB 1927 would “require” the California Department of Justice (DOJ) to “ensure that this Internet-based platform is easily accessible, user-friendly, and does [a number of listed items] credibly.” It is difficult to imagine the DOJ’s Bureau of Firearms doing a *credible* job of anything; but with respect to technology, it is impossible. And what does “credibly” mean? It is, to be sure, simply a polite way of saying that there is no real, objective, or enforceable standard at all.

Relatedly, in an unsettling display of bureaucratic “C.Y.A.,” the DOJ has been including a “Non-Liability” provision in take-it-or-leave-it contracts of adhesion that is required to be submitted to before any person can use its electronic firearms systems. *See, e.g.,* 11 C.C.R. § 5473(b)(1):

“The Department is not responsible for and will have no liability for any hardware, software, information, or other items or any services provided by any persons other than the Department. Except as may be required by law, in no event shall either party be liable to the other or any third party, under any theory of liability, including, but not limited to, any contract or tort claim for any cause whatsoever, for any indirect, incidental, special, or consequential damages, including loss of revenue or profits, even if aware of the possibility thereof.”

The California Firearms Application Reporting System (CFARS) “Enrollment Conditions of Use Agreement states that, “If you do not agree to the conditions, you will be denied access to the California Firearms Application Reporting System (CFARS).”² Q.E.D. Even if someone wanted to voluntarily place themselves into a “Do Not Sell List,” such an outrageous set of terms as part of the registration process would surely provide ample cause for even an irrational person to re-think—or abandon—the idea altogether.

AB 1927 says that “[i]nclusion on the List shall render a person ineligible to purchase or receive a firearm, but shall not subject a person on the List to any criminal or civil penalty for purchasing, receiving, or possessing a firearm.” But that may not be true, even if the State of California wishes it to be so, because the State has no authority to shield List registrants from *federal* criminal or civil liability that flows from List inclusion. And AB 1927 would mandate, “to the extent practicable,” that the California Department of Justice “ensure that information from the List is regularly

¹ All further references are to the Penal Code unless otherwise noted.

² The Agreement can be viewed at <https://cfars.doj.ca.gov/termsOfUse!displayTermsOfUse.do>.

transmitted to the FBI for inclusion in the National Instant Criminal Background Check System.” (Proposed § 30180(c)(2).) This raises a number of questions:

- (1) Does federal law allow the FBI to accept List information?
- (2) Would the FBI accept the information and include it in their systems?
- (3) If the FBI did accept and include it, would such necessarily mean that federal law would operate as the bill appears to desire it to?
- (4) Would List data reporting to FBI and/or inclusion into the NICBCS trigger a federal prohibition notwithstanding the declaration that List inclusion “shall not subject a person on the List to any criminal or civil penalty for purchasing, receiving, or possessing a firearm?”

To be sure, AB 1927 also provides that inclusion on the List “shall not cause a person to be entered into the Armed Prohibited Persons System.” (I.e., APPS.) But such a statutory provision relating to the *State’s* systems and laws is entirely within the *State’s* authority and the Legislature’s powers. And though a person may *request* to have his or her name removed from the List, AB 1927 does not expressly require the DOJ to transmit removal of a person from the List (or the request itself, for that matter) to the FBI. And even if it did, the State simply does not have any legal authority to direct or compel the FBI to do anything at all. Thus, proposed § 30180(c)(2) cannot be saved.

Adding insult to injury, AB 1927 would proscribe people and dealers from knowingly transferring firearms to a person on the List. But it does nothing to separate a mentally-ill or suicidal person on the List from firearms already in their possession. Indeed, as noted above, “[i]nclusion on the List shall not cause a person to be entered into the Armed Prohibited Persons System.” And, nonsensically, AB 1927 would not punish a person who voluntarily places him or herself into the List for attempting to purchase or receive a firearm. But, for anyone else, “[a] violation of this [transfer proscription] is punishable by imprisonment in a county jail not exceeding one year, or by imprisonment in a county jail pursuant to subdivision (h) of Section 1170.” And “[a] violation of this [transfer proscription] by a licensed firearms dealer may result in a revocation of the dealer’s license.” Everyone but person on the List [and presumably DOJ] bears risk in AB 1927’s arrangement of liability.

Finally, we note here some additional concerns about AB 1927 that include, but are not limited to:

- AB 1927 does not require positive, human-verified identification for proving identity of List registrants or requests for removal.
- There is no provision in AB 1927 to punish or penalize—criminally, or civilly—abuses of the system (i.e., List “swatting”).
- There is no provision for allowing people on the List to change or remove notification emails added under proposed § 30180(b)(4)—a serious privacy issue.

For these and other reasons, FPC requests your “NO” vote on AB 1927.

Please contact us at policy@fpchq.org or (916) 378-5785 if you have any questions or would like discuss this further.