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June 16, 2017

Hon. Xavier Becerra
Attorney General of the State of California
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244-2550
BY CERTIFIED MAIL

Re: DOJ's Failure to Implement Regulations to
1) **Establish the Application Process for Ammunition Vendor Licenses;**
2) **Set the Administrative Fee that Ammunition Vendors Can Charge to Process an Ammunition Sale;**
3) **Create a Registry of Licensed Ammunition Vendors as Required by Penal Code Section 30395(b) and**
4) **Update the Certificate of Eligibility Application as Required by Penal Code Section 30347(a)**

Hon. Attorney General Becerra,

We write on behalf of our clients, the National Rifle Association of America ("NRA") and the California Rifle & Pistol Association ("CRPA"), as well as the hundreds of thousands of firearm dealers, instructors, and firearm owners in California.

On November 8, 2016, California voters passed Proposition 63. The new ammunition laws contained in Proposition 63 became effective on November 9, 2016.¹ These new ammunition laws

¹ See SAFETY FOR ALL ACT, 2016 CAL. LEGIS. SERV. PROP. 63 (Proposition 63) (West); see also OFFICE OF THE ATTORNEY GENERAL, FULL TEXT OF PROPOSITION 63, available at

both supplemented and supplanted the ammunition laws stemming from Senate Bill (“SB”) 1235.² SB 1135 was chaptered into law on July 1, 2016. Our clients are very concerned that the California Department of Justice (“DOJ”) has failed to act in a timely manner to adopt regulations and processes necessary to implement the new ammunition laws stemming from the passage of Proposition 63 and other legislation last session.

The deadline by which those who wish to sell ammunition in California must comply with Penal Code section 30347(a) *and* obtain an “ammunition vendor” license issued by DOJ is January 1, 2018. And after that date, “ammunition vendors” can begin charging administrative fees on ammunition sale transactions.³

We also want to prevent the extreme regulatory delay seen in other matters, such as with DOJ’s continued failure since September 18, 2014 to adopt the regulations needed to implement Assembly Bill (“AB”) 2220 (allowing for the acquisition and possession of firearms by “private patrol operators”)⁴ and the delays accompanied by the implementation of regulations relating to the Firearm Safety Certificate program.⁵

As of the date of this letter, DOJ has not submitted any proposed regulations to the Office of

[https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0098%20\(Firearms\)_0.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0098%20(Firearms)_0.pdf) (last visited May 5, 2017).

² See SB 1235, 2015-2016 Leg., Reg. Sess. (2016), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1235 (last visited May 9, 2017).

³ For more information on these deadlines, see Section I, *infra*.

⁴ DOJ has yet to provide the critical information or regulations needed for the full implementation of AB 2220 (Chapter 423, Statutes of 2014). Among other things, AB 2220 added section 28012 to the Penal Code, thereby allowing private patrol operators (i.e., security guard companies) to register firearms with DOJ and to assign the firearms to their security guard employees.

⁵ See Motion for Attorney Fees, *Belemjian v. Harris*, No. 15CECG00029, 2015 WL 11029973 (Cal.Super. Aug. 25, 2015). The Belemjian plaintiffs’ lawsuit charged that DOJ’s failure to comply with the requirements of the APA in announcing rules for the Firearm Safety Certificate Program administration and to adopt the legislatively mandated regulations for the safety demonstrations denied the public their statutory right to notice and an opportunity to be heard. Some time after the plaintiffs brought suit, DOJ voluntarily initiated APA compliance, giving the plaintiffs the relief they sought.

Administrative Law (“OAL”) for 1) the creation of an application process for ammunition vendor licenses, nor for 2) DOJ to set the corresponding license applicant fee or ammunition vendor’s administrative fee. Apparently, DOJ has also not made any of the preparations necessary to implement an ammunition vendor registry showing all licensed ammunition vendors, as required by Penal Code section 30395(b). Nor has DOJ updated the Certificate of Eligibility (COE) application form, as required by Penal Code section 30347(a).

Unless this situation is addressed promptly, as of July 1, 2017, there will be no way for Californians to apply for the “ammunition vendor” licenses that will now be required by law, no way to know the fee that a citizen must pay as an applicant for an “ammunition vendor” license, and no way to determine the administrative fees that “ammunition vendors” can charge to process an ammunition sale. And there will be no way for ammunition vendors to comply with Penal Code section 30347(a) by, *inter alia*, having their agents and employees enter information about them onto the Certificate of Eligibility (“COE”) Application.⁶

Without these processes in place, it may be illegal for *any* ammunition to be sold or purchased in the California after January 1, 2018.

We urge you, as the Attorney General, to instruct DOJ to immediately prioritize this process and to issue the necessary regulations, pursuant to the requirements of the Administrative Procedure Act⁷ (“APA”).

I. ANALYSIS OF DOJ’S STATUTORY OBLIGATIONS

A. An “Ammunition Vendor” Licensing Process Must Be Established by July 1, 2017

One of the new ammunition laws added by Proposition 63 is Penal Code section 30312(a). That section states that “[c]ommencing January 1, 2018, the sale of ammunition by any party shall be conducted by or processed through a licensed ammunition vendor.”⁸ This includes when ammunition is sold between two private parties, neither of whom is a licensed “ammunition vendor.”⁹

A licensed “ammunition vendor” is defined as either “a firearms dealer licensed pursuant to Sections 26700 to 26915, inclusive” or “any person, firm, corporation, or other business enterprise

⁶ See *BOF 4008 (Rev. 10/2014): Certificate of Eligibility Application*, California Department of Justice, Bureau of Firearms, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/coeapp.pdf>.

⁷ Gov. Code, §§ 11340 *et seq.*

⁸ Pen. Code, § 30312(a)(1).

⁹ Pen. Code, § 30212(a)(2).

that holds a current ammunition vendor license issued pursuant to [Penal Code section] 30385.”¹⁰

Penal Code section 30385 states:

- (a) *The Department of Justice is authorized to issue ammunition vendor licenses pursuant to this article. **The department shall, commencing July 1, 2017, commence accepting applications for ammunition vendor licenses.*** If an application is denied, the department shall inform the applicant of the reason for denial in writing.
- (b) The ammunition vendor license shall be issued in a form prescribed by the department and shall be valid for a period of one year. The department may adopt regulations to administer the application and enforcement provisions of this article. *The license shall allow the licensee to sell ammunition at the location specified in the license or at a gun show or event as set forth in Section 30348.*
- (c)(1) In the case of an entity other than a natural person, the department shall issue the license to the entity, but shall require a responsible person to pass the background check pursuant to Section 30395.
- (2) For purposes of this article, a “responsible person” means a person having the power to direct the management, policies, and practices of the entity as it pertains to ammunition.
- (d) Commencing January 1, 2018, a firearms dealer licensed pursuant to Sections 26700 to 26915, inclusive, shall automatically be deemed a licensed ammunition vendor, provided the dealer complies with the requirements of Article 2 (commencing with Section 30300) and Article 3 (commencing with Section 30342).¹¹

Under these new laws and subject to limited exceptions, any individual or business who is not a California-licensed firearms dealer and who wants to continue selling ammunition in California must apply to DOJ for an “ammunition vendor” license starting on July 1, 2017, and have this “ammunition vendor” license in place by January 1, 2018.

Implicit in Penal Code section 30385 is the statement that no ammunition vendor licenses can be issued until DOJ promulgates regulations delineating how “ammunition vendor” license applications are to be completed, submitted, processed, and issued. DOJ is required by law to have the bulk of these regulations in place before July 1, 2017 so that it can accept ammunition vendor license applications beginning on July 1, 2017!

DOJ’s failure to implement regulations pertaining to the issuance of ammunition vendor licenses not only hurts gun owners and ammunition retailers, but it also subverts California law.

¹⁰ Pen. Code, § 16151 (emphasis added).

¹¹ Pen. Code, § 30385 (emphasis added).

Section 30385 unquestionably requires DOJ to have all these regulations implemented prior to July 1, 2017 so that DOJ can start accepting applications for “ammunition vendor” licenses at that time.

In order to meet the statutorily-mandated July 1, 2017 deadline, DOJ needed to have submitted proposed regulations to the OAL by *May 2, 2017*. Because of the APA’s 45-day public comment period,¹² the OAL’s requirement that all proposed regulations be published in the California Regulatory Notice Register for at least 45 calendar days before the close of that public comment period, and the OAL’s requirement that all proposed regulations be submitted at least 10 calendar days before the publication date of the Notice Register (which the OAL only publishes on Fridays),¹³ May 2, 2017 was the absolute last day for which proposed regulations could be submitted to the OAL if they were to be adopted on July 1, 2017. And this deadline assumes that neither DOJ nor the public review will necessitate any changes to the proposed regulations that would alter their meaning¹⁴ (and it assumes that the OAL will immediately approve of the regulations for publication).

¹² See *About the Regular Rulemaking Process*, Office of Administrative Law http://www.oal.ca.gov/rulemaking_participation/ (citing Gov. Code, §§ 11346.5, 11346.8) (last visited May 5, 2017). The APA rulemaking process requires DOJ to: give the public a 45-day opportunity to comment on the proposed regulation (and hold a public hearing if any member of the public requests one within 15 days prior to the close of that 45-day written comment period); consider the public’s comments as it decides whether to amend its proposed regulations; (if it does decide to make amendments,) make the amendments available for public comment for at least 15 or 45 days depending on the substantiality of the amendment; summarize and respond on the record to timely public comments that are directed to it; and then submit a rule-making action to the OAL, which then has 30 days to reach a decision on whether to approve or deny the proposed regulations. See *Guide to Public Participation in the Regulatory Process*, Office of Administrative Law, <http://www.oal.ca.gov/files/2016/10/How-2-Participate-102016.pdf> (last visited May 5, 2017).

¹³ See *California Regulatory Notice Register*, Office of Administrative Law, https://www.oal.ca.gov/publications/notice_register/ (last visited May 9, 2017).

¹⁴ “After the initial public comment period, a rulemaking agency will often decide to change its initial proposal either in response to public comments or on its own. The agency must then decide whether a change is nonsubstantial [or substantial]. [] Nonsubstantial changes do not alter the regulatory effect of the proposed provisions; therefore, no further notice is required. Substantial changes alter the meaning of the regulatory provisions and require further notice to the public[,]” thereby adding additional before the proposed regulation can be officially adopted. Depending on the nature of the “substantial” change, either an additional 15-day comment period is required or the agency must publish another 45-day notice in the California Regulatory Notice Register similar to the original notice of proposed actions. See *About the Regular Rulemaking Process*, Office of Administrative Law http://www.oal.ca.gov/rulemaking_participation/ (last visited May 9, 2017). In addition, the public can submit a request that a government agency hold

Because it is rare for everyone to view a proposed regulation as nearly perfect in meaning—and because ammunition sellers should be provided with advanced notice of the application process so that they can submit completed applications on July 1, 2017—DOJ should have submitted proposed regulations before May 2, 2017.

B. DOJ Must Set “Ammunition Vendor” Licensing and Administration Fees

Because DOJ is required to start accepting ammunition vendor license applications on July 1, 2017, DOJ must also name the fees (if any) it intends to charge such applicants pursuant to Penal Code section 30390. Specifically, Penal Code section 30390 states:

- (a) The Department of Justice may charge ammunition vendor license applicants a reasonable fee sufficient to reimburse the department for the reasonable, estimated costs of administering the license program, including the enforcement of this program and maintenance of the registry of ammunition vendors.
- (b) The fees received by the department pursuant to this article shall be deposited in the Ammunition Vendors Special Account, which is hereby created. Notwithstanding Section 13340 of the Government Code, the revenue in the fund is continuously appropriated for use by the department for the purpose of implementing, administering and enforcing the provisions of this article, and for collecting and maintaining information submitted pursuant to Section 30352.
- (c) The revenue in the Firearms Safety and Enforcement Special Fund shall also be available upon appropriation to the department for the purpose of implementing and enforcing the provisions of this article.¹⁵

DOJ is also required, pursuant to Penal Code section 30312(a)(2), to set an administrative fee that the ammunition vendor can charge to process the ammunition sale. This new law was added by Proposition 63 and specifically states that “[t]he ammunition vendor may charge the purchaser an administrative fee to process the transaction, *in an amount to be set by the Department of Justice*[.]”¹⁶ Accordingly, DOJ is required to set the amount for the administrative fee, and ammunition vendors must naturally wait for DOJ to issue the necessary regulation before they can begin charging the administrative fee to process ammunition sale transactions (e.g., delivering and returning ammunition as necessary and, later, complying with the new requirements of obtaining

a public hearing on a proposed regulation, and the public hearing must be held at least 45 days *after* the notice of proposed action was published. (*Id.*)

¹⁵ Pen. Code, § 30390.

¹⁶ Pen. Code, § 30212(a)(2) (emphasis added).

personal information and running background checks).¹⁷

We urge DOJ to immediately issue a proposed regulation pursuant to the APA that will set the administrative fee that an “ammunition vendor” can charge to process an ammunition sale.

DOJ also needs to set up an “Ammunition Vendors Special Account” to deposit the collected “ammunition vendor” license applicant fees, and DOJ needs to have regulations in place that state the amount of “reasonable fee” it can charge “ammunition vendor license applicants . . . to reimburse [DOJ] for . . . administering the license program, including the . . . maintenance of the registry of ammunition vendors.”¹⁸

So DOJ should immediately draft and submit a proposed regulation that will identify the amount of fees (if any) it plans to charge people applying for an ammunition vendor license, and it should set up an Ammunition Vendors Special Account (if applicable) in which these fees will be deposited.

C. DOJ Must Establish a “Registry of Ammunition Vendors”

DOJ also must have the “registry of ammunition vendors” referenced by Penal Code section 30390 up and running by July 2017. Penal Code section 30395(b) states that DOJ “*shall* keep a registry of all licensed ammunition vendors. Law enforcement agencies shall be provided access to the registry for law enforcement purposes.”¹⁹

Theoretically, DOJ could grant an application for an ammunition vendor license the same day that the application is submitted. Therefore, the registry of licensed ammunition vendors ought to be fully implemented at the same time as the requirements for vendor licenses so that it can immediately reflect the newly-granted “ammunition vendor” licenses.

D. DOJ Must Revise the COE Application Form

DOJ is also required to update the COE Application from pursuant to Penal Code section 30347(a). This new law was also added to the Code by Proposition 63, and it states:

An ammunition vendor shall require any agent or employee who handles, sells, delivers, or has under his or her custody or control any ammunition, to obtain and provide to the vendor a certificate of eligibility from the Department of Justice issued pursuant to Section 26710. *On the application for the certificate, the agent or employee shall provide the name and address of the ammunition vendor with whom the person is employed, or the name and California firearms dealer number of the*

¹⁷ See Pen. Code, §§ 30312(a)(2), 30352.

¹⁸ Pen. Code, § 30390(a).

¹⁹ Pen. Code, § 30395(b) (emphasis added).

*ammunition vendor if applicable.*²⁰

In order for the requirements of section 30347(a) to be effectuated and followed, the current COE Application form must be modified so that it can allow for an agent or employee to write on it “the name and address of the ammunition vendor with whom the person is employed, or the name and California firearms dealer number of the ammunition vendor if applicable.”

Only the DOJ can modify the COE Application form.

Thus, DOJ should amend the COE Application so that it allows the employees and agents of ammunition vendors to write either their employer’s name and address or their employer’s name and California firearms dealer number (if applicable) on the Application. If this is not done before January 1, 2018, well-meaning Californians may accidentally violate Penal Code section 30347.

DOJ should also make the necessary preparations for the expected increase in the number of COE Application forms that will be submitted as January 1, 2018 approaches. Because Penal Code section 30347 requires a COE to be obtained by January 1, 2018 for ammunition-vendor employees and agents who handle, sell, deliver, or have ammunition under their custody or control, DOJ should expect a huge increase in the number of submitted COE applications that DOJ receives.

E. Regulations to Implement SB 1235 Must Also Be Implemented

While DOJ is doing all of these things in response to Proposition 63's new ammunition laws, DOJ should not forget about its statutory duty to adopt the implementing regulations for the new ammunition laws under SB 1235. Among other things, DOJ should adopt necessary regulations to allow ammunition purchasers to undergo the required background check and the regulations to allow ammunition vendors to properly record the personal information of ammunition purchasers onto a form to be submitted to DOJ.²¹ These regulations need to be officially implemented by *July 1, 2019*.²²

CONCLUSION

DOJ should not be relying on an “emergency” exception to the APA requirements to adopt the necessary regulations. We are very familiar with and aware of DOJ’s current staffing and budget concerns. That does not provide a legitimate excuse for DOJ to avoid its legal obligations to the citizens of California. The failure to act in a timely manner neither is, nor creates, the “emergency” needed under the law to bypass the usual notice and hearing/comment procedures set forth in the APA.²³

²⁰ Pen. Code, § 30347(a) (emphasis added).

²¹ See Pen. Code, §§ 30,00, 30352, 30356, 30369, 30370.

²² *Id.*

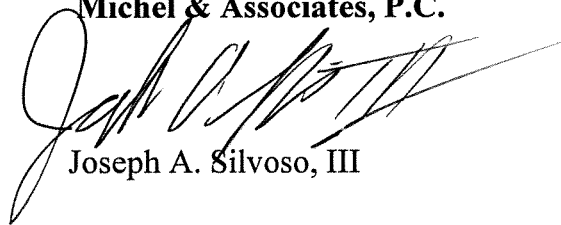
²³ See *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306. In addition, other courts have soundly rejected justifications for emergency promulgation that were based on the agency’s own

It cannot be stressed enough how important it is for DOJ to *promptly* implement *appropriate* regulations pertaining to the new ammunition laws. Because DOJ is statutorily required to do such things, DOJ's continued failure to act may necessitate the filing of a writ of mandate to compel the implementation of regulations, the creation of the ammunition vendor registry, and the modification of the COE Application.²⁴ "A court may enjoin implementation of a statutory scheme for want of administrative regulations."²⁵

Thank you for your time and consideration. Please do not hesitate to contact me directly if you have any questions.

Sincerely,

Michel & Associates, P.C.



Joseph A. Silvos, III

delay. Citing *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177 and *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, an Illinois appellate court found that "it would defeat the purposes of the notice and comments procedures [in that state's APA] if an agency could dispense with such procedures by enacting an emergency rule when the 'emergency' was created by the agency's failure to follow these procedures in the first place." *Senn Park Nursing Center v. Miller* (1983) 118 Ill.App.3d 733, 745. Similarly, in *State of New Jersey v. U. S. Environmental Protection Agency* (D.C. Cir. 1980) 626 F.2d 1038, 1042, where the agency had had ample time to comply with the federal APA by issuing regulations on a regular basis before a congressional deadline passed, the court would not permit emergency promulgation. "[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause" for emergency promulgation. *Id.*

²⁴ See *Piano v. State of California ex rel. New Motor Vehicle Bd.* (1980) 103 Cal.App.3d 412, 423; *Morris v. Harper* (2001) 94 Cal.App.4th 52, 58 [stating that "mandamus lies to compel the performance of an act that the law specifically enjoins, as a duty resulting from an office, trust, or station" and that it has long been recognized that mandamus is the appropriate means to challenge a government entity's refusal to implement a duly enacted legislative measure]. *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503-505 (discussing whether the enforcement of Pen. Code, § 295 et seq. should be enjoined "on the ground that [the new laws] could not be executed without the promulgation of adequate regulations").

²⁵ *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503-505.

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cc.

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