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**VIA EMAIL**

**RE: Written Comment for Regulations regarding Firearms: Identifying Information and the Unique Serial Number Application Process for Self-Manufactured or Self-Assembled Firearms**

To Whom It May Concern:

We write on behalf of our clients, the National Rifle Association of America ("NRA") and the California Rifle & Pistol Association, Incorporated ("CRPA"), as well as their respective members throughout California, to oppose the proposal to adopt Chapter 41, sections 5505 through 5522 to Title 11, Division 5 of the California Code of Regulations. (OAL Notice File Number Z-2018-0123-05). This proposal seeks to regulate existing self-manufactured or self-assembled firearms and firearms that a person intends to manufacture or assemble. Unfortunately, these proposed regulations impose numerous confusing and onerous requirements that in many cases conflict with existing rules, make no sense, or otherwise fail to achieve their stated objectives.

As an initial area of concern, we find the proposed regulations so lacking in clarity and thoroughness (for reasons discussed at length below) that these regulations fall far below the level of professionalism that California citizens expect from the State of California and the Department of Justice ("DOJ"). We do not see how these regulations will survive without substantial revisions, the

result of which will require a new 45-day public comment period that will extend beyond the July 1, 2018 deadline for these regulations.[1]

This is not a new or unusual position in which DOJ finds itself. DOJ has blown every deadline for key regulations over the last three years. These include regulations for Firearm Safety Certificate instructors, "assault weapon" registration, and ammunition vendor licenses. The processes and procedures for Private Patrol Operator ("PPO") acquisition and loan of firearms are still not in place and, according to DOJ's letter to firearm dealers, PPOs, and law enforcement[2] they will not be in place until July 1, 2019 (three years after the deadline imposed in the Penal Code[3]).

For the reasons discussed below, these proposed regulations need a substantial rewrite because they lack a basic understanding of California and federal firearms law. The Department clearly does not understand the process and procedures one must follow in creating a firearm, nor do they appear to be sympathetic to the consequences that will befall law-abiding Californians who will be stuck between the proverbial rock and hard place in trying to comply with these new rules.

## I. "BACKGROUND ON SELF-MADE OR MANUFACTURED FIREARMS" REGISTRATION REQUIREMENTS.

### A. Legislature Passed Assembly Bill 857 which regulates self-made or self-assembled firearms.

Less than a month after California passed a large expansion of gun control bills in 2016, including background checks on ammunition purchases and bans on the sale of large capacity magazines, Governor Brown signed an additional bill into law, Assembly Bill 857. This bill, the requirements of which go into effect on July 1, 2018, requires all persons (with some exceptions) who manufacture or assembles a firearm to first apply to the Department of Justice for a unique serial number or other identifying mark. And, by January 1, 2019, anyone who, as of July 1, 2018, owns a firearm without an identifying mark or number is required to have applied to the Department for such a mark or serial number. The law creates a new crime, and California citizens who do not obtain serial numbers for any of their required firearms are subject to misdemeanor charges.

To help people to comply with the new law, California Penal Code 29182 empowered the DOJ to adopt regulations to administer this process.

### B. California and Federal Restrictions on Self-Made Firearms

Nothing under California or federal law prohibits a person who is eligible to possess firearms from making their own firearm for themselves to use. Under federal law it is only illegal to make a

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[1] California Penal Code section 29180 requires DOJ to have the process by which an individual requests and applies a serial number onto their firearm to be in place by July 1, 2018. Therefore, the regulations and system must be in place by that time pursuant to California law.

[2] See Information Bulletin: Assignment of Firearms to Licensed Guards by Private Patrol Operators https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/infobuls/2017-bof-01.pdf? (last visited March 15, 2018)

[3] Cal. Pen. Code § 28012.

firearm with the purpose of selling it.[4] This requires a federal (and depending on the quantity, a state) license. Likewise, a person, without special permission and/or licenses, cannot make or assemble a firearm that is illegal to possess under California and/or federal law (such as machineguns, short-barreled rifles/shotguns, or destructive devices).[5]

DOJ misrepresents California and Federal law within their Notice of Proposed rulemaking by stating that "any prohibited person from owning a firearm could easily circumvent the law by manufacturing or assembling a firearm that could potentially be used in the commission of a crime." The DOJ fails to note that as soon as the prohibited person makes a firearm he or she is violating California and/or federal law (depending on their prohibition) by simply being in possession of the firearm.

Under California and federal law, a firearm frame or receiver (in almost all cases) is considered a "firearm."[6] The frame or receiver is the regulated part of the firearm. It is the one part that requires special marking under federal law.[7] Amongst all the parts of a disassembled firearm, it is the part that is typically subject to state and federal laws relating to transfer and possession. Under federal law, it must be processed through a licensed firearms dealer when transfers occur across state lines.[8] The sale of the frame or receiver by firearm dealers is subject to background checks and record keeping.[9] Under California law, this same part is subject to additional firearm transfer restrictions.[10]

Acquiring a fully functioning firearm can occur in a few distinguishable ways. For example, an individual may obtain a firearm receiver from a licensed firearms dealer and then subsequently order and/or receive the remaining parts of the firearm from various sources and have the parts shipped to the person's residence. Or an individual may purchase a fully functioning firearm from a licensed firearm dealer with no further modification or assembly required.

But when a person *makes* a firearm by themselves, they will typically build or complete a receiver themselves and order/purchase the remaining prerequisite parts. Therefore, under California and Federal law that person has *made* a firearm when they make the frame or receiver. But in general parlance, though not necessarily under the law, a person has still "*made*" a firearm by assembling a fully functioning firearm from a receiver and the required parts.

This distinction, between *making* a "firearm" when a person makes a frame or receiver and making a firearm when a person *assembles* a firearm with the receiver they made and the required parts, is the source of much of the confusion surrounding the proposed regulations and why substantial changes are needed. The regulations, as pointed out later, appear to confuse these two processes and use them interchangeably without realizing that a frame or receiver is a "firearm" under both California and federal law. And a fully functioning assembled firearm is also considered a "firearm."

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[4] 18 U.S.C. § 923(a).
[5] *See* Cal. Penal Code § 32625 (machine guns); § 33210 (short-barreled firearms); § 18710 (destructive devices); *see also* 18 U.S.C. § 922(o)(1) (machine guns); 26 U.S.C. § 5861.
[6] *Cal. Penal Code § 16520(b); 18 U.S.C.A. § 921(a)(3)*
[7] 27 C.F.R. § 478.92(a)(1)(i)
[8] 18 U.S.C. §§ 922(a)(3), 922(b)(3).
[9] 18 U.S.C. § 923(g).
[10] Cal. Penal Code § 16520(b)

## II. THE PROCESS OF REVIEWING REGULATIONS AND HOW THE NECESSITY, CLARITY, AND CONSISTENCY STANDARDS OF GOVERNMENT CODE § 11349.1(a) APPLY TO PROPOSED SECTIONS 5505-5522.

### A. Reviewing Regulations

Any regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage.[11] So, in general, the adoption of regulations by a state agency must satisfy requirements and procedures established by the APA. [12] Any regulation that fails to comply with APA requirements can be judicially declared invalid.[13]

### *B. The Law on the Consistency Standard*

Government Code section 11349.1(a)(4) requires the OAL to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the Consistency standard. Government Code section 11349(d) defines "consistency" to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." If an agency's proposed regulation "is not in harmony with, or in conflict with, existing law, ***the OAL will disapprove of the regulation and prevent it from being adopted.***"[14] And California courts hold that "no regulation adopted is valid or effective unless consistent and not in conflict with [existing] statute[s.]"[15]

### *C. The Law on the Necessity Standard*

Government Code section 11349.1(a)(1) requires the OAL to review all regulations for compliance with the Necessity standard. Government Code section 11349(a) defines "necessity" as follows:

> "Necessity" means the record of the rulemaking proceeding demonstrates *by substantial evidence* the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, *evidence includes, but is not limited to, facts, studies, and expert opinion.*[16]

To further explain the meaning of "substantial evidence" in the context of the Necessity standard, 1 C.C.R. section 10(b) provides:

> (b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

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[11] Cal. Gov. Code, § 11346.
[12] *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.
[13] *California School Boards Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh'g* (Aug. 24, 2010) (internal citations and quotation marks omitted).
[14] *See In re: Medical Board of California*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2014-0827-02 S (October 15, 2014) (emphasis added).
[15] *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321.
[16] Cal. Gov. Code, § 11349(a) (emphasis added).

(1) A statement of the specific purpose of ***each*** adoption, amendment, or repeal[17]

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons.[18] The Initial Statement of Reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed; or, simply restated, the Initial Statement of Reasons must show "why" a regulation is needed and "how" this regulation fills that need.[19]

### *D. The Law on the APA's Clarity Standard*

Agencies must draft regulations "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style . . . ."[20] But the Legislature, in establishing the OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them.[21] For this reason, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.[22] A regulation is drafted with "clarity" when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[23]

"An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void."[24] Therefore, if the OAL finds that an agency's proposed regulation "is vague and does not meet the clarity standard[,]" the regulation will be disapproved and the agency will be prevented from moving forward with the regulation.[25]

## III. APPLICATION

### *The Proposed Regulations Do Not Address Firearms Owned By Individuals Moving to California After July 1, 2018 and January 1, 2019 and Therefore Violate the Consistency and Clarity Standards*

The scope of the law applies to individuals "who own[] a self-manufactured or self-assembled firearm before July 1, 2018 that is not recorded with the Department of Justice (Department), and shall also apply to an individual who intends to manufacture or assemble a firearm on or after July 1, 2018." Proposed regulations section 5505.

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[17] Cal. Code Regs., tit. 1, § 10(b) (emphasis added).
[18] Cal. Gov. Code, § 11346.2(b)
[19] Cal. Gov. Code, § 11346.2(b)(1).
[20] Cal. Gov. Code, § 11346.2(a)(1).)
[21] Cal. Gov. Code, § 11340(b).
[22] *See* Cal. Gov. Code, § 11349.1(a)(3).
[23] Cal. Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be "directly affected" by a regulation.
[24] *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.
[25] *In re: Air Resources Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-0202-05 SR (March 27, 2001); *see In re: Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2012-0918-04 S (November 6, 2012); *see In re: Department of Social Services*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-1231-01 S (February 21, 2002).

These regulations do not address firearms manufactured before or after July 1, 2018 by those who, after January 1, 2018 move to California. As discussed above, generally federal law allows an individual to make a firearm for their personal use. Few states regulate or restrict this practice and nothing under federal law prevents an individual who manufactured one of these lawful firearms from bringing the firearm into California. These regulations do not address this eventuality. California boasts several military bases and members of our military are often firearm enthusiasts. These requirements will also no doubt effect members of our military. The lack of any guidance on this issue will no doubt cause confusion in the future. Therefore, regulations discussing this practice should be proposed.

***Proposed Section 5507 Fails to Define "Firearm" and the Rest of the Proposed Regulations Refer to Firearms Generally but Fails to Define it or Refer to Its Definition in the Penal Code or Elsewhere.***

Section 5507(s) states that a "'[s]elf-assembled' or 'self-manufactured' firearm means a firearm fabricated or constructed by a person, or a firearm the component parts which were fit together by a person to construct a firearm, but does not include:

> "(1) A firearm assembled or manufactured by a firearms manufacturer licensed by the State of California and/or the Federal Government, or
> (2) A firearm with a serialized receiver purchased from a California gun store and later assembled it into a functional firearm. In this case, a licensed Federal Firearms Licensee is the manufacturer of the firearm and has applied its own serial number to the firearm."

The definition used above appears to refer to a fully functioning firearm, which is different from a "firearm" per se. This problem is a recurring one throughout these regulations as the term "firearm" is used repeatedly throughout this proposal. But regulations do not define it or cite to a definition for "firearm" from the Penal Code or federal law.

Under California law, a "firearm" means a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion.[26] Further, a frame or receiver is considered a firearm for Penal Code section 29180.[27] And a receiver, under the proposed regulations, is defined in the proposed regulations as "the basic unit of a firearm which houses the firing and breech mechanisms and to which the barrel and stock are assembled."

Frames and receivers do not, by themselves, discharge ammunition. They typically do not have barrels and often to do not have a specific caliber. But they are "firearms."

As stated above, a regulation is drafted with "clarity" when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[28] Therefore, the above proposed regulations that also refer to "firearms," including the one referenced above, should not be adopted without a clear and easily understood definition of the term. As we will point out, this lack of definition is a problem that permeates these proposed regulations.

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[26] Cal. Penal Code § 16520(a)
[27] Cal. Penal Code § 16520(b)(13).
[28] Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be "directly affected" by a regulation.

***Proposed Section 5507(s), Defining Self-Assembled and Self-Manufactured Firearm, Is Unclear Because of Its References to "Firearm" and "Person"***

The proposed regulations frequently refer to "self-assembled and self-manufactured firearms." These terms are defined as "a firearm fabricated or constructed by a person, or a firearm the component parts of which were fit together by a person to construct a firearm."

The problems with the use of the term "firearm" have been addressed above but they are present here as well. The term "person" here is unclear because the term, in its common usage, refers to an individual. The use of "self" lends one to believe that is the case. But under most laws a "person" can be an individual or company or corporation.[29] Firearms can be made or assembled by an individual or their "fabrication" or assembled can be done by a company. Prior to the Gun Control Act, firearms could have been made by a company and would not have needed a serial number.[30] According to the Penal Code, this could be a firearm requiring a serial number pursuant to the proposed regulations. But due to the use of the term "person" it is not entirely clear which.

***Proposed Section 5507 Is Unclear Because It Fails to Define "Handguns," "Long Guns" and Even "Shotguns" all of which are referred to in These Proposed Regulations.***

In proposed section 5507(r), DOJ defines the term "rifle" as it is defined in Penal Code § 17090.[31] However, DOJ has failed to define the terms "handgun," "long gun," and "shotgun." Definitions of these terms can be found at Penal Code sections 16640, 16865, and 17190 respectively. But, it would behoove regulators to recognize that laypersons (who are as bound by the law as any lawyer or government official) to list and define all relevant terms when drafting regulations that potentially impose criminal liability. We recommend that these regulations should not be adopted without adding further definitions of these terms which are referred to repeatedly throughout the proposal.

***Proposed Section 5508(b) is Inconsistent with California Law Because It Applies the Exceptions in Penal Code 29181 More Narrowly than The Law Allows.***

DOJ proposes the following rule to account for the exceptions provided by the Legislature to the registration requirement for persons who manufacture or assemble their own firearms. However, this regulation is not within the scope allowed by the Legislature and inaccurately cites to the Code. Proposed section 5508(b) states:

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[29] *Robinson v. Southern California Ry. Co.*, 129 Cal. 8, 61 P. 947 (1900); *Merced Bank v. Ivett*, 127 Cal. 134, 59 P. 393 (1899) (corporate entities rights, duties and liabilities do not differ from a natural person under similar conditions.); *see also Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.*, 113 Cal. App. 4th 597, 6 Cal. Rptr. 3d 574 (5th Dist. 2003) (involving 42 U.S.C.A. § 1983) (corporations are "persons" whose rights are protected by federal civil rights laws.)

[30] *See* 18 U.S.C. ch. 44 §§ 921-931.

[31] (r) "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

> A firearm that ***was self-manufactured or self-assembled*** prior to December 16, 1968, as long as the firearm is not a handgun.
>
> (emphasis added)

Penal Code Section 29181 states that Section 29180 shall not apply to "A firearm made or assembled prior to December 16, 1968, that is not a handgun."

If, as questioned above, "self-manufactured or self-assembled" firearms appear to mean a firearm made by an individual, it is narrower than the language found in the Penal Code. Whether the firearm was "self-made" or "self-assembled" by an individual is not the legal distinction here; as long as it is a non-handgun firearm that came into existence prior to December 16, 1968, it must be exempt from these regulations. Unless DOJ amends or clarifies this proposed regulation to match the statutory language, this proposed regulation should not be adopted as it is inconsistent with the Penal Code.

***DOJ's Proposed Regulations 5509 and 5510 Are Improper Because They are Inconsistent with California Law by Limiting the Scope of Firearms to Be Registered and are Unclear.***

Pursuant to proposed section 5509, DOJ has set out that the following persons who will be affected by these regulations:

> (a) An individual who owns a self-manufactured or self-assembled firearm as of July 1, 2018; and
> (b) An individual who intends to manufacture or assemble a firearm on or after July 1, 2018.

Subsection (a) again points out the problems with the terms "self-manufactured or self-assembled firearms." The Penal Code section 29180(c) requires "[b]y January 1, 2019, any person who, as of July 1, 2018, owns a firearm that does not bear a serial number assigned to it pursuant to either Section 23910 or Chapter 44 (commencing with Section 921) of Part 1 of Title 18 of the United States Code and the regulations issued pursuant thereto" (barring limited exceptions) to seek from DOJ a serial number and apply that number to their firearm. This requirement, and the violation of the penal code for failure to follow the requirement applies to all firearms lacking a serial number, not just those that were "self-manufactured or self-assembled" by an individual.

For subsection (b), we deal with an instance where DOJ refers to a "firearm" and fails to specify whether it means a fully functioning firearm or the receiver of the firearm. As stated above, this regulation (and others) should not be implemented unless a suitable definition is provided for the benefit of the public.

The same applies to section 5510. Subsection (a) states that it only applies to "self-manufactured or self-assembled firearms," if these terms only apply to those made by an individual they are inconsistent with the Penal Code because the Code applies to all firearms that do not bear a serial number assigned to it pursuant to "Section 23910 or Chapter 44 (commencing with Section 921) of Part 1 of Title 18 of the United States Code and the regulations." And subsection (b) applies to "firearms" again without defining or clarifying that term.

***Proposed Section 5511 Uses Terms "Self-Manufactured and Self-Assembled firearm" and "Firearm."***

Again, section 5511 employs the phrase "self-manufactured and self-assembled firearm" in subdivisions (a) and (c). The term "firearm" is used again in (a). As stated above, these phrases lack clarity.

***Proposed Section 5511(c) Allows for Applicants to Request a Serial Number Up to One Minute Before 2019.***

According to proposed Section 5511 (c), the website for "request[ing] a unique serial number to record ownership of a self-manufactured or self-assembled firearm that was built prior to July 1, 2018" will be available until 11:59 p.m. of December 31, 2018. This is inconsistent with current law. According to Penal Code section 29180, a person must apply for the serial number, apply it to the firearm, and notify DOJ that the serial number was placed on the firearm by January 1, 2019. Individuals who wait until the last minute will be in violation of California law as they will not have enough time to meet the requirements of Section 29180.

The proposed regulation states: "To be processed, all such applications shall be paid in full and submitted online before January 1, 2019." Failing to provide any notice or guidance that the actual deadline to apply the serial number and notify DOJ prior to January 1, 2019, gives Californians an unrealistic expectation of the registration requirements and sets them up for failure; the consequences here being misdemeanor prosecution pursuant to Penal Code 29182(f).

***Proposed Section 5513(a)(2) is Unclear Because It Does Not Adequately Explain How a Person Can Provide a Suitable Description of a Firearm.***

Here, DOJ has proposed the following:

> "After creating a CFARS account . . . the applicant shall provide the following information . . . (2) A description of the firearm that specifies: date of manufacture or the date its assembly will be complete, firearm type, make, caliber, firearm color, barrel length, type of material used to build the receiver (aluminum, steel, polymer plastic, or other), whether it is a frame or receiver only, all identification marks, and firearm city and state of origin.

There are several problems with this proposed regulation.

***"Firearm"***

Again, we see the term "firearm" used. For the reasons stated above this is unclear.

***"Date of manufacture"***

As stated above, Section 29180 requires the registration of certain firearms lacking in a serial number. (Pen. Code 29180(c).) These firearms could have been made months/years ago. No paperwork was required to be generated when a person created the firearm in the past. And if the firearm, lacking a

serial number, was acquired years ago there may be no indication when it was manufactured. To insist on as specific date of manufacture before issuance of a serial number creates an impossibility.

***"Date its assembly will be complete"***

This is unknown at best because this is out of the hands of the individual. According to the law and proposed regulations DOJ has up to 15 days to complete the background check and issue the serial number. Who's to say when that will be? Consequently, this information cannot be provided with any certainty.

***"Firearm type"***

DOJ wants persons to report the firearm "type." Again, as this comment letter has pointed out multiple times, these regulations do not define the term "firearm" much less how a person is to accurately record its type. According to California and federal law, as soon as a person completes a receiver they have created a "firearm." A receiver typically does not have a "type" and certain receivers can be used in handguns and long guns. Who's to say what type of firearm will be completed by the individual completing a receiver? This term is unclear.

***"Make"***

DOJ wants an applicant to report the "make" of the firearm. This term is not defined. Supposing make refers to a person made the firearm themselves, how could they possibly report the make? If this refers to the type of firearm, it is duplicative to "firearm type" discussed above. This too is unclear.

***"Caliber"***

Certain firearms can be modified to accept different calibers. If a person makes a "receiver" that constitutes their "firearm" for registration the receiver can have multiple calibers. Bare receivers do not have calibers and may not be restricted to only one.

***"Barrel Length"***

Again, a receiver is considered a "firearm" under California and federal law. Receivers almost never have a barrel, therefore a "barrel length" will not be applicable. Also, firearms can come with or accept multiple barrels of varying lengths and/or depending on caliber. This fails to consider the existence of multi-caliber firearms and/or multiple barrels which can be fitted onto an individual firearm.

***"Frame or receiver only"***

DOJ wants applicants to report if the firearm is a frame or receiver only. As discussed above a frame or receiver has no caliber or barrel and a receiver can be installed into varying types of firearms (caliber is defined as the inner diameter of the barrel).

***"Firearm city and state of origin"***

As discussed above, the firearm owner may not have any information or remember where the firearm was made. Certain firearms, required to be registered pursuant to this law may not have a city or state of origin but only a country.

***Proposed Section 5513(b) is Problematic Because There is No Way For Persons to Know Whether Any Part of the Information is Missing or Not.***

Subdivision b of proposed Section 5513 states that "if any part of the identifying information in subdivisions (a), (b), and (c) of this section is missing, the Department shall not approve the applicant's request for a unique serial number."

Subdivisions (a), (b) and (c) require applicants to provide huge amounts of information to the Department of Justice. Conservatively estimated, these subdivisions require each person to provide at least twenty different pieces of personal and technical information (more if one is an immigrant, a current or former military member, or if the firearm is made up of different materials). And as this comment letter has pointed out, the myriad ways in which a firearm can be classified, defined or broken into its constituent parts only exacerbates the problem. Some of the information may well be impossible to know—how many people know the city and state where their firearm originated?

All these things are going to inevitably cause problems for people who seek to comply with the law's registration requirements. Mistakes will be made, and DOJ has not provided any system for allowing people to correct errors and get their firearms properly registered so that they can continue to lawfully possess them. Many people will throw up their hands in frustration and not bother to apply. Without a proper procedure to either define and describe firearms, or pare down the requirements themselves, there is no good reason why this requirement should be implemented.

Finally, once again, DOJ refers to the term "firearm" in proposed section 5513(c)(1) (requiring applicants to agree to the terms of the Department's Privacy Notice) without providing an adequate definition of the term. For the reasons stated above, this regulation (and others) should not be implemented unless a suitable definition is provided for the benefit of the public.

***Proposed Section 5514 Exceeds the Scope of DOJ's Authority by Imposing an Unjustifiable Cost for Registering Firearms.***

In this proposed rule, DOJ establishes the application fee for obtaining a unique serial number at $35.00. This amount exceeds all other state fees required for either registrations or background checks and is unnecessary.

DOJ establishes this fee by stating that the cost of the certificate of eligibility check conducted by the Department is $20. The additional $15 dollars DOJ claims it needs for the issuance of one serial number, and an additional $15 for each firearm thereafter, appears excessive

The regulation states the fee is necessary for the "Certificate of Eligibility Check" but the statement of reasons provide a different story. According to the Statement of Reasons:

> The $20.00 fee for the firearms eligibility check consists of a: $14.00 fee to reimburse the Department for costs associated with conducting the background check (Pen. Code, § 28225); $5.00 for the Firearms Safety and Enforcement Fee (Pen. Code, § 28300); and $1.00 for the Firearm Safety Fee (Pen. Code, § 23690).

The actual cost of the background check is $14. The remaining $6 amounts to a DOJ generated slush fund having nothing to do with the background check associated with the background check and registration of the firearm. The code sections cited do *not* allow for the additional $6 to be collected in this case.

The $5 for the Firearms Safety and Enforcement Fee (cited as Pen. Code, § 28300) allows DOJ to require firearm *dealers* to collect a fee for each firearm transaction. It says nothing about this money being collected for registration of a firearm pursuant to section 29180. The same can be said for the $1 Firearm Safety Fee. Penal Code section 23690 states "The Department of Justice may require each dealer to charge each firearm purchaser or transferee a fee not to exceed one dollar ($1) for each firearm transaction...". Again, this fee is one associated with the purchase and transfer of a firearm requiring a firearm *dealer* to charge the fee. It is not associated with registration of a firearm pursuant to Penal Code section 29180.

The allocation of this money to the Firearm Safety and Enforcement Fund and for the Firearms Safety Fund violation California law. Section 29183 specifically states that the money acquired for the issuance of distinguishing number or mark must be deposited in the Dealers' Record of Sale ("DROS") Special Account of the General fund. Accepting any money and directing it any place other than the DROS Special Account violates California law and the consistency requirement.

These fees are excessive and unnecessary compared to other fees DOJ charges for firearm registration and background checks. The fees associated with the Law Enforcement Gun Release Application (i.e. the process in which one applies to have a firearm returned, that requires a background check and a check to confirm that each firearm sought to be returned is registered to the owner) is $20 for the first firearm and $3 for each additional firearm. Even the process by which individuals register an "assault weapon" (requiring a background check, review of forms and pictures, and register the firearm) is only $15 per firearm.

Yet, DOJ insists the current costs are necessary. This is laughable. Note their explanation:

> The Department projects that 50,000 to 75,000 self-manufactured or self-assembled firearms will be reported to the Department within one year of the commencement of the unique serial number application process. Following the first year, the Department estimates that 2,000 self-manufactured or self-assembled firearms will be reported each subsequent year thereafter. Due to the heavy volume of applications during the first year, the Department anticipates that it will require three Analysts and one Program Technician II, to process the applications. Once the initial volume of applications are processed, the Department will require only one Analyst to process unique serial number applications submitted during subsequent years. In this way, the Department has decided that charging a fee of $15.00 per unique serial number will be sufficient to reimburse the Department of its actual costs for processing the unique serial number applications. The $15.00 fee collected from each unique serial number application will go towards covering the salaries of the staff involved in processing the applications.

DOJ's estimates are at best, a guess. As noted in the legislation, the reason behind this law is because there is no way to know how many of these firearms are in California because they are unregistered, and the sale/assembly of these firearms is not regulated.

Taking DOJ's estimate as true, the projected fees would generate $750,000.00 to $1,125,000 for the serial number alone (this does not consider the $14 DOJ needs for the background checks nor the $6 for which DOJ is not entitled based on the above information). DOJ states that a total of 4 employees will be needed to process these inquires for the first year. Do these salaries amount to more than $187,500 ($750,000 divided by 4) for these individuals to process paperwork? Unlikely. It seems more likely that DOJ is attempting to inflate the fees to direct money towards other actions, actions which one can only speculate as to their nature but would nevertheless be an illegal tax if it were to be allowed. This proposed regulation should not be implemented, and DOJ must not be allowed to charge these fees without providing a more compelling, and frankly, more plausible, justification.

***Proposed Section 5515(b). One Unique Serial Number Issued Per Firearm.***

Proposed Section 5515(b) states:

> If the applicant requests multiple unique serial numbers for multiple self-manufactured or self-assembled firearms during the same transaction on CFARS, each unique serial number received by the applicant will differ from all other unique serial numbers received by the applicant as a part of that transaction or any other future transaction to obtain additional unique serial numbers. Each unique serial number shall be distinct to a particular firearm. If the applicant's request to obtain a unique serial number for multiple self-manufactured or self-assembled firearms is approved, the Department will inform the applicant which unique serial number is specifically assigned to each firearm.

The question is: how? Receivers (which according to these regulations can be registered by themselves) can be identical. And a firearm owner may make or have more than one. This is unclear.

***Proposed Section 5516 and 5518 is Unclear What Will Happen When a Person is "Undetermined"***

Section 5516 states what will happen following a background check if the applicant is eligible or ineligible to possess firearms. Section 5516(b)(2) states that a person who is ineligible to be issued a unique serial number will receive information explaining why. But there is no information about what will happen if DOJ "could not generate a disposition for the applicant's criminal history."

And Proposed Section 5518(a) states:

> After the applicant submits an online application, the Department shall notify the applicant of its approval or denial electronically. An automated email will be sent to the applicant notifying the applicant to log on to the applicant's CFARS account to view the determination letter.

Here the regulations make no allowances for situations where an application is neither denied nor approved, but under further consideration. Firearm purchasers have a history of being left in limbo

in their dealings with the Department, and the lack of guidance with an impending deadline means that applicants may eventually be in possession of illegal firearms if the due date passes without confirmation from DOJ. If approval or denial is not forthcoming in a timely enough manner, applicants will be stuck. These regulations (as written) do not make allowances or set procedures for such an event.

***Proposed Section 5518 Is Inconsistent with California Law Because It Forces Those Who Make Firearms After July 1, 2018 to Apply the Serial Number Within a Set Period of Time After Receiving the Number.***

> According to Proposed Section 5518:
>
> (b) If the applicant's request for a unique serial number is approved, the applicant shall do the following:
> . . .
>
> (2) An applicant intending to manufacture or assemble a firearm on or after July 1, 2018 shall engrave, cast, stamp (impress), or permanently place in a conspicuous location on the receiver or frame of the firearm the unique serial number issued by the Department within 30 calendar days of receiving the unique serial number from the Department. The applicant's date of receipt of the unique serial number shall be the date on the email containing the electronic notice that tells the applicant to log into the applicant's CFARS account to view the electronic correspondence sent by the Department.

California law requires, for those who make a firearm after July 1, 2018, to apply to DOJ for the serial number, to place the serial number on the firearm within 10 days of making the firearm, and to report to DOJ that the serial number is placed on the firearm. Pen. Code 29180(b). But nothing in the code limits the time a between applying for the serial number and when the serial number must be placed on the firearm. DOJ is essentially creating a ticking clock that is not specified in the code. If such a limitation were to be required, the Legislature would have created it.

***Proposed Section 5518 is Unclear Because It (Once Again) Fails to Define the Term "Firearm."***

DOJ refers to the term "firearm" in proposed section 5518 (invalidating applicants who fail to engrave, cast, stamp or permanently press a unique serial number) without providing an adequate definition of the term. For the reasons stated above, this regulation (and others) should not be implemented unless a suitable definition is provided for the benefit of the public.

***Proposed Section 5520(a)(2)(B)(ii) is Unclear Because It Assumes that the Firearm will have Only One "Caliber."***

This requirement is vague because it fails to account for the existence of multi-caliber firearms. "Caliber" is defined as the internal diameter of the barrel of a firearm. The word "gauge" is a less formal term which indirectly refers to the internal diameter of a firearm barrel. But many firearms—particularly those that are self-assembled—can be swapped with multiple barrels (which are freely available and legal to purchase). And this requirement gets to the heart of the problem; these regulations are effectively useless without a suitable definition of the word "firearm." Under certain circumstances,

a receiver is considered a firearm. But a receiver by itself has no barrel and can therefore not have a "caliber" or a "gauge." Therefore, this requirement should not be adopted.

***Proposed Section 5521 Fails to Define "Firearm" or Refer to Its Definition in the Penal Code or Elsewhere.***

Here, DOJ refers to the term "firearm" in proposed section 5521 (regulation requiring the submission of digital images of self-manufactured or self-assembled firearms.) without providing an adequate definition of the term. For the reasons stated above, this regulation (and others) should not be implemented unless a suitable definition is provided for the benefit of the public. Furthermore, the term '[s]elf-assembled' or 'self-manufactured' firearm identified here again appears to refer to a fully functioning firearm, which is different from a firearm per se. As we have made clear, these regulations do not define "firearm" or cite to a definition from the Penal Code or federal law.

Again, "a regulation is drafted with "clarity" when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[32] Therefore, for the reasons stated above, this regulation (and others) should not be implemented unless a suitable definition is provided for the benefit of the public.

***Proposed Section 5521 Is Unclear Because It Fails to Define "Long Guns" and "Pistol" all of which are referred to in These Proposed Regulations.***

In proposed section 5521(a), DOJ refers to "long guns" and "pistols." However, DOJ has failed to define the term "long gun," and "pistol" or refer to their definitions in the Penal Code. Definitions of these terms can be found at Penal Code sections 16865, and 17010 respectively. We recommend that these regulations should not be adopted without adding further definitions of these terms which are referred to repeatedly throughout the proposal.

***Proposed Section 5522 Is Unnecessary Because It Unreasonably Prevents Citizens from Making Lawful Modifications and Repairs to Their Own Property.***

Here, DOJ has proposed the following regulation concerning modifications of the firearm between the time an applicant has submitted his or her application and the issuance of a serial number.

> If the applicant wishes to make changes to the configuration of the firearm while the applicant is manufacturing or assembling the firearm, the applicant may do so as long as all changes are made within the 30-day period following the date the Department issued the unique serial number to the applicant. The applicant shall record all changes made to the firearm in the applicant's original unique serial number application in CFARS when reporting the firearm to the Department. The uploaded digital images shall reflect the final version of the firearm, including any changes that were made to it by the applicant.

Again, "firearm" is used in this section. For the forgoing reasons, that term is vague. And in this instance appears to refer to a fully functioning firearm because receivers rarely have a "configuration."

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[32] Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be "directly affected" by a regulation.

This section states that if an applicant wishes to make changes to the configuration of the firearm they may do so only in the 30-day period following the issuance of the serial number. This implies that a firearm owner cannot modify the firearm after 30 days have passed.

Why?

Nothing under California or federal law prevents this, unless the firearm owner makes something that is illegal to possess. Firearm owners may modify, finetune, and/or change the configuration of their firearms as they seem fit. No agency is required to be notified.

This restriction also does not contemplate the fact that a firearm can break. According to this section if a part were to break it could not be fixed. This section does not even take into consideration cosmetic changes to the firearm. According to this, an owner couldn't even change the grips of a firearm.

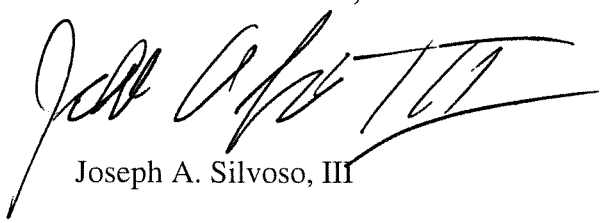
Last, if the firearm registered is a receiver, the firearm is a piece of metal until it is assembled into a functioning configuration. If 30 days pass the owner is left with a nonfunctioning hunk of metal. The lack of any guidance on this issue will undoubtedly cause confusion in the future. Therefore, this proposed regulation should not be adopted.

## IV. CONCLUSION

Due to the above reasons, DOJ's proposed regulations for Self-Made or Self-Assembled Firearms cannot be implemented as they are currently written. These proposed rules violate the APA's Consistency, Necessity, and Clarity Standards. It is not only unlawful, but it is also plagued with other problems that make its administration, interpretation, and enforcement highly problematic. Allowing proposed section 5505 thru 5522 to be implemented would cause irreparable harm to countless thousands of Californians and subvert the basic minimum procedural requirements that the APA was enacted to protect. Furthermore, it is highly likely that a substantial revision of these rules will set the implementation of any regulations beyond the deadline set by law.

We look forward to the OAL and DOJ's cooperation and hope litigation will not once again be necessary to address our clients' concerns. If you have any questions, please do not hesitate to contact us.

Sincerely,
**Michel & Associates, P.C.**



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