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**RE: Written Comment for the California Department of Justice's Proposed
Regulations Regarding Certificates of Eligibility.**

Dear Ms. Dufor:

We write on behalf of our clients, the National Rifle Association of America and the California Rifle and Pistol Association, Incorporated, as well as their representative members throughout California, to oppose certain proposed regulations for Certificates of Eligibility (OAL Notice File Number Z-2018-0227-01) that the California Department of Justice ("DOJ") has proposed.

DOJ proposes adopting new regulations regarding the issuance, maintenance, renewal, and termination of Certificates of Eligibility. A Certificate of Eligibility (commonly referred to as a "COE") typically must be obtained by those who wish to acquire licenses to deal in ammunition and firearms. They are also required for federally licensed collectors of curios and relics to operate in California with their licenses. As of January 1, 2018, all employees of California licensed firearm dealers and licensed ammunition vendors who handle and sell firearms and ammunition must possess a COE. Due to California's requirements on possessing a COE for the forgoing purposes, we strongly advise the DOJ to expedite the processing of COE applications and make COEs available as soon as possible. Countless Californians rely upon these certificates for their livelihood and delays in processing results in the loss of income for the individual and tax revenue for the State.

I. The Process of Reviewing Regulations and How the Authority, Consistency, Necessity, and Clarity, Standards of Government Code § 11349.1(a) Apply to DOJ's Proposals for Regulating Certificates of Eligibility

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.¹ So, in general, the adoption of regulations by a state agency must satisfy requirements and procedures established by the APA.² Any regulation that fails to comply with APA requirements can be judicially declared invalid.³

a. *The Law on the Authority Standard*

“The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.”⁴ To serve this purpose, courts “have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”⁵ It is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature.⁶

To ensure the promulgation of legally valid regulations, and to ensure that agencies act within the scope of their rulemaking authority, Government Code section 11349.1 tasks the OAL with reviewing proposed regulations for compliance with the Authority standard of the APA. Government Code section 11349(b) defines “Authority” as meaning “the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” Section 14 of title 1 of the C.C.R. provides in pertinent part:

(a) Sources of “Authority.” “Authority” shall be presumed to exist only if an agency cites in its “authority” note proposed for printing in the California Code of Regulations:

- (1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or
- (2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.

(b) [. . .]

(c) Review of “Notes.” In reviewing “notes,” OAL shall use the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.

- (1) For purposes of this analysis, an agency's interpretation of its regulatory power, as indicated by the proposed citations to “authority” or “reference” or

¹ Gov. Code, § 11346.

² *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.

³ *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).

⁴ *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297.

⁵ *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 493 (internal quotation marks and citation omitted).

⁶ *California Emp. Com. v. Kovacevich* (1946) 27 Cal.2d 546.

any supporting documents contained in the rulemaking record, shall be conclusive unless:

- (A) *the agency's interpretation alters, amends or enlarges the scope of the power conferred upon it; or*
- (B) *a public comment challenges the agency's "authority" . . .*⁷

Proposed section 4036 alters, amends and/or enlarges the scope of power conferred upon DOJ. Additionally, this public comment is submitted to challenge DOJ's rulemaking authority concerning that section. Therefore, DOJ's the specified section cannot be approved for publication in the C.C.R.⁸

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.***"⁹ And California courts hold that "no regulation adopted is valid or effective unless consistent and not in conflict with [existing] statute[.]"¹⁰

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.*¹¹

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:

- (1) A statement of the specific purpose of ***each*** adoption, amendment, or repeal¹²

⁷ Cal. Code Regs., tit. 1, § 14 (emphasis added).

⁸ See *In re: Board of Equalization*, OAL Determination Decision of Disapproval of Regulatory Action, OAL Matter No. 2016-0104-01 (Feb. 24, 2016).

⁹ 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).

¹⁰ *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321.

¹¹ Gov. Code, § 11349(a) (emphasis added).

¹² Cal. Code Regs., tit. 1, § 10(b) (emphasis added).

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.¹³ 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.¹⁴

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”¹⁵ 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.¹⁶ For this reason, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.¹⁷ 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.”¹⁸

“An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void.”¹⁹ 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.²⁰

II. References to a Single California Firearm Dealer Are Confusing and Lack Clarity

Proposed section 4031(c) references “California Firearms Dealer” or “CFD” and defines that term to mean “a person having a valid license to sell firearms issued pursuant to Penal Code section 26700.” And throughout the proposal, the regulations refer to a dealer’s CFD number. (See proposed sections 4035(b)(1)(A), 4035(b)(1)(C), and 4036(b)).

The problem here is that California law only issues firearm dealer licenses to *individuals*, and businesses selling firearms often have multiple licensees and licenses to prevent problems if a single licensee were to die or change employment. If a firearm business only had one licensee and that licensee died, the business could no longer legally sell firearms under California law. Thus, responsible firearms businesses often have multiple licensees to protect against this potential problem.

The proposed regulations then beg the question: Which CFD number should prospective COE

¹³ Gov. Code, § 11346.2(b)

¹⁴ Gov. Code, § 11346.2(b)(1).

¹⁵ Gov. Code, § 11346.2(a)(1).)

¹⁶ Gov. Code, § 11340(b).

¹⁷ See Gov. Code, § 11349.1(a)(3).

¹⁸ Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be “directly affected” by a regulation.

¹⁹ *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.

²⁰ *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).

holders use when a CFD number is required by the proposed regulation? The proposed regulations do not specify this, nor do they provide any guidance when there are multiple CFD numbers for one location employing multiple COE holders. Without further guidance these proposed regulations (4035(b)(1)(A), 4035(b)(1)(C), and 4036(b)) lack clarity.

III. Proposed Sections 4031, 4032, and 4041 Do Not Apply to “Gun Violence Restraining Orders” and Are Inconsistent with State Law

Proposed sections 4031, 4032, and 4041 reference firearm prohibiting categories located under California and federal law. COEs act as continuing background checks, confirming a person’s eligibility own and possess firearms and ammunition. Noticeably absent from the referenced California and federal code sections is Penal Code Section 18205 which restricts a person from owning and possessing firearms because of a “Gun Violence Restraining Order” (“GVRO”). These types of protective orders are not covered by the Penal Code sections referenced in proposed sections 4031(d), 4032(b), and 4041(a). Thus, an individual could be prohibited from possessing firearms because of a GVRO and still obtain, keep, and renew a COE. This oversight is inconsistent with California law.

IV. Proposed Section 4036 is Unclear Because It Does Not Provide What Documents Are Necessary or Sufficient to Prove Modifications to a Person’s Application Information

Proposed Section 4036(a)(1) requires COE holders to notify DOJ when there are any changes to the person’s “name, date of birth, gender, driver license type/identification number, or citizenship” from what was originally provided during the application process. The COE holder is required to “electronically upload documents verifying the change as prompted by CFARS” but the code is silent on what types of documents are acceptable for this purpose. DOJ’s initial statement of reasons just refer to these as “verifying documents to prove the change.” This proposed regulation leaves it up to DOJ to determine what types of documents are acceptable and does not specify what options, if any, a COE holder has when DOJ determines the information is insufficient for this purpose. Thus, this proposed regulation is unclear and does not meet APA requirements.

V. Proposed Section 4036, Which Requires Firearm and Ammunition Dealers to Modify a Person’s Employment Status Within CFARS, is Unnecessary, Redundant, Issued Without Authority and the System to Implement It Is Unsupported by Any Other Law or Regulation and Thus Constitutes an Underground Regulation

a. Section 4036(b)(2) is Unnecessary and Redundant, and Issued Without Authority

Proposed Section 4036(b)(2) requires firearm and ammunition dealers to update the CFARS system when an employee who holds a COE is hired and no longer works for the licensee. But this requirement is unnecessary because in the proceeding subsection (b)(1), DOJ already requires employees to update the CFARS database when they are hired or no longer employed by their employer. DOJ is placing identical burdens on two different people to do the same thing. It is unnecessary.

b. Proposed Section 4036(b)(2) is Also Issued Without Authority

The proposed Section 4036(b)(2) requirement also exceeds DOJ’s authority to issue, renew, and revoke COEs. According to Penal Code section 26710 DOJ is authorized to issue COEs that certify the Department of Justice has checked its records and determined that the recipient of the COE

is not prohibited from possessing firearms. The DOJ is also, according to section 26710, required to adopt regulations to administer the COE program. This application and background check process is conducted between the individual and DOJ. To add a requirement for licensed firearm and ammunition dealers, who are not part of this process, places an additional burden on firearm and ammunition vendors that is unsupported by California law and exceeds DOJ's authority.

c. Proposed Section 4036(b)(2) References an "Employer CFARS Account" Unsupported by Any Law or Regulation.

Proposed section 4036(b)(2) references an "employer CFARS account." It does not make any further or additional reference to this account anywhere in the proposed regulations. Nor does this account appear to be anywhere in the Penal Code or anywhere else in the California Code of Regulations. The account therefore appears to exist only for this subsection.

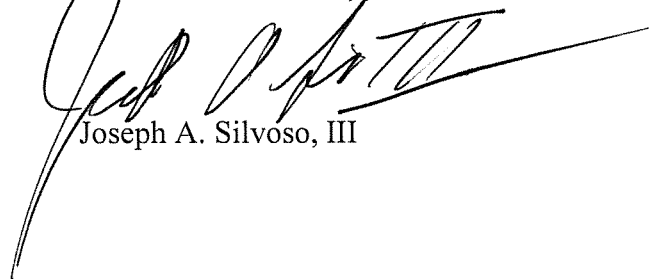
The reference to this "account" raises several troubling questions. For instance, where does DOJ obtain the authority to create this account? Who has access to it? How is this account established, verified, suspended, maintained, and/or renewed? As mentioned above, multiple CFD holders may employ multiple COE holders. Which CFD holder is responsible for this account? None of these questions are addressed anywhere because there is no regulation creating or controlling this account.

We are informed and believe that this account already exists in the CFARS system, if this is the case it constitutes an underground regulation and raises substantial privacy concerns relating to access of confidential employee information. The proposed regulations should be amended to create and clarify the requirements of this "employer CFARS account." Without supporting regulations, proposed section 4036(b)(2) exceeds DOJ authority to implement.

VI. Conclusion

The proposed regulations discussed above for Certificates of Eligibility cannot be implemented without modification. Allowing these sections to be implemented would disrupt countless Californians' jobs and businesses. It would also subvert the basic minimum procedural requirements of the APA. We look forward to the OAL and DOJ's cooperation in addressing these issues. If you have any questions, please do not hesitate to contact us.

Sincerely,
Michel & Associates, P.C.



Joseph A. Silvos, III