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**RE: Written Comment for the California Department of Justice's Proposed
Regulations Regarding Dealer Record of Sale Entry System.**

Dear Ms. Dosch:

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 the Dealer Record of Sale ("DROS") Entry System ("DES") (OAL Notice File Number Z-2018-0306-01) proposed by the California Department of Justice.

California Department of Justice ("DOJ") proposes adopting new regulations relating to the DES system. The DES system is where firearm dealers and their employees input information about firearm purchasers and the firearm when a firearm is sold, transferred, or lent from the dealer or between two unlicensed individuals. This system is currently the primary access portal for firearm dealers and their employees to conduct their business under California law.

I. The Process of Reviewing Regulations and How the Consistency, Necessity, and Clarity Standards Apply to DOJ's Proposals for Regulating the DES.

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.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

B. Consistency, Necessity, and Clarity Standards

1. 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.*”⁴ And California courts hold that “no regulation adopted is valid or effective unless consistent and not in conflict with [existing] statute[.]”⁵

2. 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.*⁶

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 repeal⁷

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.⁸ The Initial Statement of Reasons must include a statement of the

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 *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).

⁵ *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321.

⁶ Gov. Code, § 11349(a) (emphasis added).

⁷ Cal. Code Regs., tit. 1, § 10(b) (emphasis added).

⁸ Gov. Code, § 11346.2(b)

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.⁹

3. 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”¹⁰ 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.¹¹ For this reason, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.¹² 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.”¹³

“An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void.”¹⁴ 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.¹⁵

II. Section 4210 is Inconsistent and Unclear Because it Allows Ammunition Vendors and Ammunition Vendor Associates To Create a DES Account But There Is No Other Reference To These Individuals In the Proposed Regulations.

Proposed section 4210 establishes a way for ammunition vendors and ammunition vendor associates to access DES but there is no further reference to ammunition or ammunition vendors in the proposed regulations. These regulations are inconsistent with the regulations currently being proposed.

California law requires almost all sales of ammunition to be conducted by or through an ammunition vendor (Cal. Pen. Code § 30312). Beginning July 1, 2019, ammunition vendors and their employees must electronically submit ammunition purchaser information to DOJ for purposes of registering the transaction and conducting a background check (Cal. Pen. Code § 30370). Licensed firearm dealers are automatically considered ammunition vendors (Cal. Pen. Code § 16151(b)) and these requirements will be placed on firearm dealers as well. But there are certain businesses that sell ammunition only that require the ammunition vendor license. It is apparent by this regulation that DOJ plans to use the DES system for the ammunition background and purchaser registration process but

⁹ Gov. Code, § 11346.2(b)(1).

¹⁰ Gov. Code, § 11346.2(a)(1).

¹¹ Gov. Code, § 11340(b).

¹² See Gov. Code, § 11349.1(a)(3).

¹³ Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be “directly affected” by a regulation.

¹⁴ *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.

¹⁵ *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).

there is no further reference to this requirement or access by ammunition vendors (and their employees) in the proposed regulations.

Proposed section 4200 states, “This chapter, which shall be known as the “DROS Entry System,” pertains to access and use of the DROS (Dealer Record of Sale) Entry System (DES) for the submission of information concerning the sale, transfer or loan of firearms pursuant to Penal Code section 28205.” (strikethroughs omitted). If the proposed chapter covers firearm transfers only, why are ammunition vendors and their employees mentioned at all? Likewise, the rest of proposed section 4210, mentions firearm dealers and their authorized associates or sales persons repeatedly with no reference to ammunition vendors and their employees.

Under the sub heading “AUTHORIZATION” located in proposed section 4210(a)(2) it requires the person agreeing to the terms of use to certify they are “the licensed firearms dealer Certificate of Eligibility (COE) holder authorized associate or salesperson of the firearms dealer and am authorized to use DES on behalf of the firearms dealership dealer.” Lack of commas notwithstanding, this authorization is specific to firearm dealers, not ammunition vendors or their employees.

Do these countless references to firearm dealers and their authorized associates or sales persons throughout the proposed regulations apply to firearm dealers and their employees only? If so, then why include ammunition vendors at all in proposed section 4210? If the regulations are meant to apply to firearms dealers *and* ammunition vendors, the proposed regulations should be amended now rather than having to resubmit revisions to these regulations later.

Thus, this reference to ammunition vendors and their employees is both inconsistent with the other proposed regulations and unclear.

III. The Use of “Authorized Associate or Sales Person” is Unclear and Inconsistent with Current law

The proposed regulations make repeat references to an “authorized associate or salesperson” (in proposed sections 4210, 4220, 4230, 4240) without referring to what these terms mean. The terms used in the Penal Code for individuals who are required to possess a Certificate of Eligibility when they are working for licensed firearm dealers and licensed ammunition vendors are “agents and employees.” (Cal. Pen. Code, § 26915, and Cal. Pen. Code, § 30347.) These individuals are the ones who handle, sell, deliver, and have in their custody and control firearms and ammunition on behalf of their employers. It stands to reason that they will be the ones accessing the DES with the permission of their employers. But due to the lack of definition for “authorized associate or sales person” it is unclear if these are the same individuals referenced in the Penal Code. And if they are, at a minimum, this distinction is unclear, and these terms are inconsistent with California law.

IV. The Term “Dealer COE Holder” is Undefined, and Therefore its Continued Use Throughout These Regulations is Unclear.

Current section 4210(a)(2) states, “I am the licensed firearm dealer (“Dealership COE Holder”), or an...” But the *proposed* regulation strikes out (“Dealership COE Holder”) and leaves the phrase to read “licensed firearms dealer Certificate of Eligibility (COE) holder. The term “Dealer COE Holder” is frequently used throughout the propose regulations and is, as a result of the strikethrough, undefined. California firearm dealer licenses are issued to individuals not a company or business.

Multiple individuals can and do possess California firearm dealer's licenses for the same location to protect against one license holder dying or quitting the business. All California licensed firearm dealers must possess a COE. Thus, it remains unclear which individual(s) is referred to in the proposed regulations using this term. Later, in proposed section 4210(a)(3), it states "The DES enables the Dealer COE Holder to authorize the functions each user is able to access." Who is *the* Dealer COE Holder when a business selling firearms can have multiple licensed firearm dealers possessing COEs?

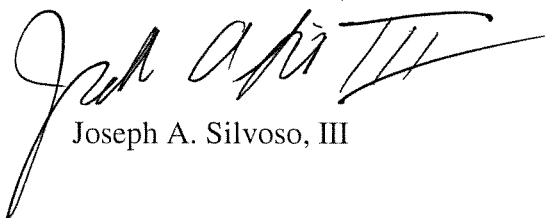
V. Suspension of Accounts for the "Dealer COE Holder(s), Authorized Associate(s), and Salesperson(s)" is Unnecessary Because it Potentially Suspends Entire Businesses From Accessing the DES On Account of One Employee.

Proposed section 4230(e) states, "Effective January 1, 2019, on the 31st day from an original transaction date, the DES will suspend accounts associated to the Dealer COE Holder(s), authorized associate(s), and salesperson(s) until delivery or cancellation information is updated in the DES for an incomplete transaction." This is unnecessary. Why do the actions of one employee effect the entire business? Also, a licensed firearm dealer can have multiple licenses covering multiple locations. Does this mean that all the stores and all of the employees for those stores cannot access DES until the transfer of one firearm is resolved? This is also unclear. Wouldn't notice be a more appropriate response? Or just locking the account of the individual who conducted the transaction?

VI. CONCLUSION

For the aforementioned reasons, DOJ's proposed regulations discussed above for the DROS Entry System cannot be implemented without modification or implementation.

Sincerely,
Michel & Associates, P.C.

A handwritten signature in black ink, appearing to read "Joseph A. Silvos, III". The signature is fluid and cursive, with a large initial "J" and a stylized "A" and "S".

Joseph A. Silvos, III