

SENIOR COUNSEL  
C. D. MICHEL\*

SPECIAL COUNSEL  
JOSHUA R. DALE  
W. LEE SMITH

ASSOCIATES  
ANNA M. BARVIR  
SEAN A. BRADY  
SCOTT M. FRANKLIN  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
TAMARA M. RIDER  
JOSEPH A. SILVOSO, III  
LOS ANGELES, CA

\* ALSO ADMITTED IN TEXAS AND THE  
DISTRICT OF COLUMBIA

WRITER'S DIRECT CONTACT:  
562-216-44\*\*  
\*\*\*\*@MICHELLAWYERS.COM



OF COUNSEL  
DON B. KATES  
BATTLEGROUND, WA

RUTH P. HARING  
MATTHEW M. HORECZKO  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

AFFILIATE COUNSEL  
JOHN F. MACHTINGER  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

September 24, 2013

Jeff Amador  
Department of Justice  
P.O. Box 160487  
Sacramento, CA 95816-0487

Sent via Email: jeff.amador@doj.ca.gov

**Re: The Department of Justice proposal to add sections 4200, 4210, 4220, 4230, and 4240 to Title 11, Division 5, Chapter 1, of the California Code of Regulations concerning the Dealer's Record of Sale Entry System**

Mr. Amador:

We write to you on behalf of our clients, the National Rifle Association of America and FFLGuard, LLC, in response to the request for public comment for the proposed regulations published at <http://oag.ca.gov/firearms/proposed>. These changes effect not only firearm dealers but the hundreds of thousands who purchase firearms in the state, a large portion of which are NRA members.

In this letter we address concerns and problems with the proposed changes to California's regulations, as well as the process itself.

For a regulation to be valid, it must, among other criteria, be adopted by an agency with statutory authority to regulate the particular subject matter. (Gov. Code §11349.1.) DOJ lacks such authority with respect to several of the provisions currently being proposed.

### **Charging an Additional \$25 when an FFL Fails to Include all Firearms in a Transaction Is Beyond DOJ's Authority**

Proposed in section 4210(a)(4) is the statement that a dealer will be charged an additional DROS submission fee of \$25 if the DROS user does not indicate that a firearm transaction does not include more than one firearm or, more likely to occur, a user submits a DROS and either forgets to include additional firearms and/or the purchaser chooses to add another firearm to the transaction. The proposed section does not allow for or contemplate inadvertent errors. Nor does it make clear whether the additional charge can, may, or will be transferred to the firearm purchaser.

But California law is clear on this issue, DOJ can only charge a (meaning one) fee to reimburse the DOJ for its expenses. P.C. 28230. The proposed section effectively permits multiple charges for the exact same transaction, even if the reason for the additional firearm being omitted from the original DROS was a simple error. DOJ

### **DOJ Lacks Authority to Place Conditions on the Release of Firearms Beyond Those Prescribed by the Penal Code**

Proposed section 4230(b) provides that an FFL may only deliver a firearm to a prospective purchaser if the DES transaction record reads "Approved." As purported authority for doing so, DOJ cites California Penal Code sections 28105 and 28155, as well as *Mineral Associations Coal. v. State Mining & Geology Bd.*, 138 Cal. App. 4th 574, 589, 41 Cal. Rptr. 3d 544, 554 (2006). We are confused how any of the cited authority would allow the DOJ to alter the process for releasing firearms to purchasers in a manner that would provide legal cover to extended delays of pending firearm transactions; a matter of such profound contention, that DOJ is currently being sued over it. *Schoepf v. Lindley*, Case No. 13CECG01132, filed April 11, 2013 Fresno Superior Court.

The cited Penal Code sections merely concern the forms associated with , and grant DOJ authority to dictate the nature of those forms. Such limited authority does not translate into t

To the extent DOJ is relying on the following passage from the *Mineral* case as somehow being analogous to this proposed regulation, it is mistaken:

Because the Legislature has granted the Board express authority to determine the circumstances under which no financial assurances need be posted to ensure reclamation of mined lands, it logically follows that it also intended the Board to have the implied authority to issue regulations that pertain to the circumstances under which financial assurances already in place may be lifted upon the completion of reclamation.

There is no comparison between the implied authority at issue in the *Mineral* case, and what DOJ purports to assert is its authority. Authority to regulate the nature of forms associated with a regulated transaction, has no relation to regulating the transaction itself. And, that is exactly what DOJ purports to do by requiring an "Approved" by the DES before a firearm can be released to the purchaser.

Moreover, Penal Code section 26815 lays out what criteria must be met before a firearm can be released, and an "Approved" by the DES is not among them. It only requires that the recipient of the firearm not be prohibited. Thus, Proposed section 4230(b) would expand the scope of the statutory regime for releasing firearms to purchasers, which is beyond DOJ's authority.

In interpreting the statute, if an administrative action has in effect altered or amended the statute or enlarged or impaired its scope, a court must declare the regulation void. (*Ass'n for Retarded Citizens v. Dep't of Developmental Servs.*, 38 Cal.3d 384, 391 (1985); accord *Credit Ins. General Agents Asso. v. Payne*, 16 Cal. 3d 651, 656.) It is settled that "[a]dministrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. Nor is the motivation of the agency relevant: "It is fundamental that an

administrative agency may not usurp the legislative function, no matter how altruistic its motives are." (City of San Joaquin v. State Bd. of Equalization (1970) 9 Cal App.3d 365, 374.) This doctrine has been most frequently invoked to strike down administrative regulations in conflict with the statute which created the agency or which the agency is authorized to administer; however, "*the principle is equally applicable when the regulation contravenes a provision of a different statute (emphasis added).*" (Agric. Labor Relations Bd. v. Superior Court, 16 Cal.3d 392, 420 (Cal. 1976); See, e.g., Orloff v. Los Angeles Turf Club (1951) 36 Cal.2d 734; Tolman v. Underhill (1952) 39 Cal.2d 708; Harris v. Alcoholic Bev. etc. Appeals Bd. (1964) 228 Cal.App.2d 1.)

### **Refusal to Release Firearms to Bona Fide Purchasers for Dealer's Non-Payment of DROS Fees Is Illegal and Absurd**

According to proposed section 4240, a firearm dealer will be billed each month for their DROS fees. If a dealer fails to pay the balance due within 30 days of the billing date the dealer's access to the DES will be suspended and while suspended, a dealer "will be unable to submit DROS **and may not deliver firearms for which a DROS was previously submitted.**"

First, as explained above, DOJ has no authority to dictate the criteria for releasing a firearm to a purchaser. In addition to a few administrative duties concerning the form of the register, the DOJ is only charged with determining whether a person is prohibited from firearm ownership or not, period.

Second, this rule is just plainly absurd. It means that a firearm purchaser who has paid for his or her DROS Fee and for the firearm will be denied the delivery of the firearm because the dealer from whom the firearm was purchased failed to transfer the money to the DOJ; something the affected purchaser has no control over. And the absurdity continues. "All other firearms dealer activities, including status on the Centralized List of Firearms Dealers, are unaffected by a suspension for non-payment." In other words, 4240(d) allows a defaulting dealer to engage in other firearm related business (*i.e.*, purchasing firearms from vendors, selling/transferring firearms to other dealers, etc.) while the firearm purchaser, who did nothing wrong, is denied the firearm they lawfully purchased!

Needless to say, if passed, this provision will result in litigation.

### **Savings from the DES System Going to Fund APPS is Unconstitutional**

One of the most troubling proposals is that the savings expected by switching from the Verizon based system to DES will be used for the Armed Prohibited Persons System ("APPS"), rather than returned to the people who paid the money to fund the DROS system in the first place, the law-abiding California firearm owner. The allocation of DROS funds to APPS represents an inappropriate and illegal appropriation of fees to sponsor general law enforcement activities. The DROS Fee is for one purpose only, fund the DROS program.

The use of monies collected from the DROS Fee to fund general law enforcement activities is an illegal tax. The lawsuit filed by our office today, on behalf of clients not apart of this letter, provides more detail concerning this issue. See Complaint attached hereto. Moreover, the NRA has already sued DOJ for this in federal court. See *Bauer v. Harris*.

**Proper Notice of the Comment Period Was Not Provided – the Open Comment Period Should be Extended**

The Administrative Procedures Act is intended to ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly. The Legislature has wisely acknowledged that "the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-69, citing *Armistead v. State Personnel Bd.* (1978) 22 Cal. 3d 198, 204-05 and *Ligon v. State Personnel Bd.* (1981) 123 Cal. App. 3d 583, 588.)

Yet, our clients, who have for years consistently weighed in on proposed rulemaking efforts by the DOJ received no notification of this one. Nor did the various licensed firearm dealers with whom our office has relationships as clients or otherwise. We only discovered the "notification" on DOJ's website by luck. Therefore, "the party subject to regulation" who would know best about the impacts of the proposed regulations have been left out of the process. That is simply wrong, and likely a violation of the APA's notification requirements. *See* Gov. Code section 11346.4.

Therefore, the comment period for the proposed rulemaking discussed herein should at least be extended to a later date, until all stakeholders are given proper notice of the DOJ's proposals.

Sincerely,

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



Sean A. Brady

SAB/CA