

SENIOR PARTNER
C. D. MICHEL*

MANAGING PARTNER
JOSHUA ROBERT DALE

SPECIAL COUNSEL
W. LEE SMITH

ASSOCIATES
ANNA M. BARVIR
SEAN A. BRADY
TIFFANY D. CHEUVRONT
MATTHEW D. CUBEIRO
ALEXANDER A. FRANK
LOS ANGELES, CA

* ALSO ADMITTED IN TEXAS AND THE
DISTRICT OF COLUMBIA



OF COUNSEL
JOSEPH DI MONDA
SCOTT M. FRANKLIN
CLINT B. MONFORT
MICHAEL W. PRICE
TAMARA M. RIDER
LOS ANGELES, CA

WRITER'S DIRECT CONTACT:
562-216-4465
MCUBEIRO@MICHELLAWYERS.COM

January 31, 2019

Jessie Romine
Bureau of Firearms
Division of Law Enforcement
Department of Justice
P.O. Box 160487
Sacramento, CA 95816-0487
Ammoregs@doj.ca.gov
VIA EMAIL AND U.S. MAIL

**Re: Comments Regarding Proposed Regulations Regarding Ammunition
Purchases or Transfers – OAL File No. Z-2018-1204-08**

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, in opposition to the proposed regulations regarding “Ammunition Purchases or Transfers,” which if adopted would add sections 4300-4309 to Title 11 of the California Code of Regulations (“C.C.R”).

For the reasons discussed below, our clients oppose the regulations as currently drafted.

I. CALIFORNIA’S ADMINISTRATIVE PROCEDURES ACT

The APA is designed to provide the public with a meaningful opportunity to participate in the making of regulations by California state agencies and to ensure the creation of an adequate record for review.¹ Every regulation is subject to the rulemaking procedures of the APA unless expressly exempted by statute.²

¹ Office of Administrative Law, *Guide to Public Participation in the Regulatory Process*, <https://www.oal.ca.gov/wp-content/uploads/sites/166/2017/05/How-2-Participate-102016.pdf> (Oct. 2016).

² A “regulation” is defined as every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state

Under to the APA, California's Office of Administrative Law ("OAL") is tasked with reviewing all regulations that have been submitted to it for publication in the California Code of Regulations Supplement and for transmittal to the Secretary of State.³ Specifically, OAL will review any proposed regulation to ensure it satisfies the following criteria:

- **Necessity** – meaning 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 the law that the regulation implements, interprets, or makes specific, taking into account the totality of the record (where evidence includes, but is not limited to, facts, studies, and expert opinion);
- **Authority** – meaning the provision of law which permits or obligates the agency to adopt, amend, or repeat a regulation;
- **Clarity** – meaning written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them;
- **Consistency** – meaning being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law;
- **Reference** – meaning the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation; and,
- **Nonduplication** – meaning that a regulation does not serve the same purpose as a state or federal statute or another regulation.⁴

Should a regulation fail to comply with the above requirements, OAL may disapprove the regulation.⁵ And any person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief.⁶

II. DOJ'S PROPOSED REGULATIONS ARE INCOMPLETE AND LACK SUFFICIENT CLARITY AS REQUIRED BY THE APA

As a threshold matter, DOJ's proposed regulations are incomplete. Key aspects of the proposal are missing, such as how licensed ammunition vendors are to determine which proposed background check process to use for a particular customer due to the varying options. Both our clients and our office have been informed by multiple DOJ representatives that DOJ intends to propose additional

agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. Cal. Gov. Code § 11342.600.

³ Cal. Gov. Code § 11349.1.

⁴ Cal. Gov. Code §§ 11349, 11349.1(a)(1-6). OAL may also consider the clarity of the proposed regulation in the context of related regulations already in existence. Cal. Gov. Code § 11349.1(b).

⁵ Cal. Gov. Code § 11349.3.

⁶ Cal. Gov. Code § 11350.

regulations regarding the sale or transfer of ammunition beyond this proposal. Presumably, those regulations will address the many gaps in this current proposal.

Under the APA, the clarity of a proposed regulation may be considered in the context of related regulations already in existence.⁷ Following that same logic, the clarity of a proposed regulation may be considered in the context of related regulations that have yet to be proposed. Without the anticipated additional regulations that have yet to be proposed, the meaning of the regulations cannot be said to be easily understood by those persons directly affected by them.

As a result, DOJ's proposal as currently written fails to satisfy the clarity requirement of the APA. The public is entitled to see the entire regulatory package together, not in this piecemeal fashion. DOJ should amend the proposal to include any and all additional regulations to ensure the proposal satisfies the clarity requirement of the APA as well as providing members of the public a meaningful opportunity to comment.

III. PROPOSED SECTION 4301 – DEFINITIONS: AFS RECORDS DO *NOT* IDENTIFY AN INDIVIDUAL AS AN OWNER OF A FIREARM

Included with DOJ's proposed regulations are definitions for terms used throughout. One such definition is provided for the term "AFS Record," which reads:

[A] firearm record on file with the Department that identifies an individual as an owner of a firearm. An AFS record has been established with the Department when an individual has purchased or transferred a rifle or shotgun from a firearms dealer on or after January 1, 2014, or an individual that has purchased or transferred a handgun from a firearms dealer at any time. An AFS record may also be established after the Department processes an individual's assault weapon registration or an individual's report of firearm ownership.

But there is a fundamental flaw in DOJ's proposed definition—AFS records do *not* identify an individual as an owner of a firearm. Indeed, the former head of DOJ's Bureau of Firearms Division, Stephen Lindley, recently testified as an expert witness to that effect. In his report, Mr. Lindley stated that "no local law enforcement agency should rely upon AFS as the sole basis for establishing ownership of a firearm or rejecting a claim of ownership" because "AFS merely serves as a database of transaction records related to a firearm."

Mr. Lindley's testimony echoes a prior information bulletin authored by DOJ's Division of Law Enforcement submitted to all California Sheriffs and Chiefs of Police.⁸ As noted by DOJ in this bulletin, it is likely that many long guns are not recorded in AFS for various reasons. And because not all handguns were required to be sold through a California licensed firearms dealer prior to 1991, there are a great number of lawfully owned handguns that were not subject to any requirement that the transaction be recorded in AFS. As a result, DOJ's bulletin emphasizes that:

⁷ Cal. Gov. Code § 11349.1(b).

⁸ 2009-BOF-03: *Critical Changes to the Law Enforcement Gun Release (LEGR) Program*, California Department of Justice, Division of Law Enforcement, <http://michellawyers.com/wp-content/uploads/2019/01/Info-Bulletin-re-Changes-to-LEGR-Program.pdf> (Jan. 4, 2010).

[An] AFS transaction record simply means that on the date of transaction (DOT), the individual was eligible to own/possess firearms. It does not indicate ownership of the firearm.

DOJ's Initial Statement of Reasons ("ISOR") claims the proposed definitions "will help to eliminate any misunderstandings between the Department and the public." Given DOJ's clear, prior interpretations (at least one of which was expressed to all California law enforcement professionals), DOJ should ensure consistency to help eliminate any misunderstanding. To that end, we suggest the definition for "AFS Record" instead read:

[A] firearm record on file with the Department that indicates on the date of the transaction, the individual was eligible to own and possess firearms. An AFS record has been established with the Department when an individual has either purchased or transferred a rifle or shotgun through a California licensed firearms dealer on or after January 1, 2014, or an individual has purchased or transferred a handgun through a California licensed firearms dealer at any time. An AFS record may also be established after the Department processes an individual's assault weapon registration or an individual's report of firearm ownership.

IV. PROPOSED SECTION 4302 - "STANDARD AMMUNITION ELIGIBILITY CHECK"

Proposed section 4302 concerns what DOJ refers to as the "Standard Ammunition Eligibility Check." As stated in proposed subsection (a), "the fee for a Standard Ammunition Eligibility Check is \$1.00." In addition to citing subdivision (e) of Penal Code section 30370 for authority, DOJ states in their ISOR that subdivision (a) is necessary to specify the fee assessed and to recover the total cost of implementation.

Section (e) of Penal Code section 30370 states that DOJ "shall recover the reasonable cost of regulatory and enforcement activities related to this article by charging ammunition purchasers and transferees a per transaction fee not to exceed one dollar (\$1)" and "not to exceed the reasonable regulatory and enforcement costs."⁹ In its ISOR, DOJ states that the fees collected pursuant to this subsection "will be used to repay the loan for start up costs" as well as "salaries of the 73 permanent employees." DOJ has not specified, however, if the fee will be reduced once the initial loan for start up costs is paid in full. What's more, DOJ has not specified how the 73 employees will be used, if at all, when processing what is presumably a fully automated check of the AFS system.

As a result, the proposed \$1 fee exceeds DOJ's regulatory authority as it is not consistent with the authorizing statute.

⁹ DOJ's authority to impose a fee is also generally limited by subsection (b)(1) of Government Code section 11010, which states that no state agency "shall levy or collect any fee or charge in an amount that exceeds the estimated actual or reasonable cost of providing the service, inspection, or audit for which the fee or charge is levied or collected."

A. Lack of Established Procedures for Licensed Ammunition Vendors

The proposed regulations lack crucial information as to when or how a licensed ammunition vendor must use the Standard Ammunition Eligibility Check process. As discussed below, potential ammunition purchasers may also undergo a “One-Time Ammunition Transaction” involving a more comprehensive “Basic Ammunition Eligibility Check,” or a “COE Verification Process” in addition to the Standard Ammunition Eligibility Check when attempting to purchase ammunition. Yet the proposed regulations are silent as to how a licensed ammunition vendor is to determine what procedure to use.

The proposed regulations also state that DOJ “shall instruct the ammunition vendor to approve or reject the purchase or transfer,” and that if rejected, “the ammunition vendor shall provide the purchaser or transferee with an ATN that can be used to obtain the reason for the rejection.” What the proposed regulations do not specify, however, is how DOJ determines whether to approve or reject a Standard Ammunition Eligibility check. There are no criteria a prospective purchaser or licensed ammunition vendor can refer to.¹⁰

As a result, both licensed ammunition vendors and their customers are incapable of easily understanding the effects of the proposed regulations as currently drafted. DOJ should amend its proposal to address these lack of clarity concerns before moving forward.

i. Use of Out-of-State or Other Identification

In connection with the proposed regulation requiring additional purchaser information, purchasers will be required to provide their driver license or other government identification number “in the manner described in Penal Code section 28180.” Penal Code section 28180 requires purchasers to provide this information electronically from the magnetic strip on the purchaser’s driver’s license or identification.¹¹ The only exceptions to this requirement are for military IDs or when the magnetic strip reader is unable to obtain the required information.¹²

The proposed regulation lacks crucial information as to how exactly licensed ammunition vendors are to process ammunition transactions for out-of-state residents and individuals providing government ID that may not be compatible with DOJ’s electronic system. For example, the current firearm background check system in California will generate a “DMV Reject Notice” when the driver’s license or identification card used is not valid, or when the information provided is in conflict

¹⁰ While it is true that an individual can request a copy of their AFS records from DOJ, the process for obtaining those records requires individuals to submit a notarized form with a copy of a valid identification card. It is our understanding, however, that the current processing time for obtaining such records is between 3 and 4 months, well beyond that which would make this a feasible option for prospective purchasers to determine if they have a valid AFS record.

¹¹ Cal. Penal Code § 28180(a).

¹² Cal. Penal Code § 28180(b)(1-2).

with the files maintained by the California Department of Motor Vehicles (“DMV”).¹³ Because DOJ has stated the ammunition background check process will be “essentially the same” as a firearms eligibility check, it can only be assumed individuals with out-of-state or other identification not compatible will result in similar “DMV Reject Notices.” What’s more, nothing in either the Penal Code or DOJ’s proposed regulations require licensed ammunition vendors who are not otherwise California licensed *firearms* dealers to possess a magnetic strip reader.

DOJ’s proposed regulations need to clarify how licensed ammunition vendors are to process transactions involving individuals from out of state who may not have a government identification compatible with DOJ’s electronic system, and how DOJ intends to conduct a background check on individuals with out-of-state identification to ensure they are not automatically rejected as would occur under DOJ’s current system. Otherwise, this regulation is void for lack of clarity.

V. PROPOSED SECTION 4303 - “ONE-TIME AMMUNITION TRANSACTIONS”

For unknown reasons, DOJ has chosen to label proposed section 4303 as “One-Time Ammunition Transactions.” But DOJ’s chosen label is likely to create unnecessary confusion. This is because Standard Ammunition Eligibility Checks, as described and labeled in proposed section 4302, are also “one-time” transactions which are used for purposes of conducting a single transaction. As a result, DOJ should instead label this section “Basic Ammunition Eligibility Check” to be consistent with section 4302, and otherwise remove the unnecessary “One-Time Ammunition Transaction” definition and other uses of the term throughout the proposal.

The proposed regulation concerning One-Time Ammunition Transactions also suffers from the same flaws as the Standard Ammunition Eligibility Check in that it lacks crucial procedural information. This includes when and how licensed ammunition vendors are to utilize the One-Time Ammunition Transaction process and how to handle out-of-state identification. Without this crucial information, both licensed ammunition vendors and their customers are incapable of easily understanding the effects of the proposed regulations as currently drafted, making Section 4303 void for lack of clarity.

A. Conflict with Federal Law

At the outset, the proposed regulation conflicts with federal law and regulations. Under federal law, access to federal databases for purposes of conducting a background check is strictly limited to *firearm* transactions. Accessing these databases “for any other purpose,” including ammunition transactions, is “strictly prohibited.”¹⁴

Because California is a “Point-of-Contact” state, California has agreed to implement and maintain its own background check system and conduct the required background checks by accessing federal databases on behalf of California licensed firearm dealers. But California is prohibited from

¹³ See *DROS Entry System (DES) Firearms Dealership User Guide*, California Department of Justice, Bureau of Firearms at 36 (12/29/2017 Rev. 3), available online at https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/dros_entry_guide.pdf.

¹⁴ See 28 C.F.R. § 25.6.

accessing these federal databases for purposes other than conducting a background check in connection with a firearm transaction.

B. Proposed \$19 Fee

Proposed subdivision (a) of section 4303 would establish a \$19 fee for a Basic Ammunition Eligibility Check. DOJ states in their ISOR that this check “is essentially the same background check as a firearms eligibility check” and that the proposed fee “is consistent with the fee paid for a firearms eligibility check.” DOJ also cites to subdivision (c) of Penal Code section 30370 for authorization, which reads in part:

*The department shall recover the cost of processing and regulatory and enforcement activities related to this section by charging the ammunition transaction or purchase applicant a fee **not to exceed the fee charged for the department’s Dealers’ Record of Sale (DROS) process**, as described in Section 28225 and not to exceed the department’s reasonable costs.*¹⁵

In 2017, the Sacramento County Superior Court issued a decision affirming DOJ’s ministerial duty under Penal Code section 28225 to perform a reassessment of the Dealers’ Record of Sale (“DROS”) fee.¹⁶ That fee, which is currently set at \$19 per DOJ’s regulations, has remained unchanged for over 15 years since 2004.¹⁷ During litigation, DOJ failed to identify any internal process that would trigger the mandatory review of the current fee, and failed to produce any documentation to substantiate its claim that it performs “regular monitoring” of the DROS fee as required by law. What’s more, DOJ’s DROS account “amassed a surplus of over \$35 million, primarily consisting of DROS Fee revenues at the time the case was originally filed.”¹⁸

The fact that the current DROS fee is generating such a substantial surplus is clear evidence that DOJ’s proposed \$19 fee exceeds DOJ’s regulatory authority for two important reasons. First, it is wholly improper for DOJ to propose a fee based on that which a court has ordered DOJ to reassess. To do so otherwise demonstrates a clear disregard for the Court’s ruling

Notwithstanding that ruling, the proposed \$19 fee far exceeds DOJ’s reasonable costs for the proposed Basic Ammunition Eligibility Check. As DOJ has expressly stated, the process is “essentially the same” as a firearms eligibility check. And because the fee for a firearms eligibility check has consistently generated a surplus, it cannot be said the proposed fee does not exceed DOJ’s “reasonable costs.” Indeed, if the process is so substantially similar, the proposed fee will generate a similar surplus.

¹⁵ Emphasis added.

¹⁶ *Gentry v. Harris*, Case No. 34-2013-80001667. A copy of the Court’s ruling can be viewed online at <http://michellawyers.com/wp-content/uploads/2017/08/2017-08-09-Ruling-re-Mtns-for-Adjudication.pdf>.

¹⁷ 11 C.C.R. § 4001.

¹⁸ See http://michellawyers.com/wp-content/uploads/2013/12/Gentry_Complaint-for-Declaratory-and-Injunctive-Relief-and-Petition-for-Writ-of-Mandamus.pdf

To date, DOJ has yet to perform the required reassessment of the DROS fee as ordered by the Court. But the fact remains that the proposed \$19 fee clearly exceeds DOJ's reasonable costs, and for that reason exceeds DOJ's regulatory authority under the APA.

C. Proposed Purchaser Information to Be Collected

Subdivision (b) of proposed section 4303 concerns the required information a licensed ammunition vendor must collect from the purchaser when processing an ammunition transaction. Penal Code section 30352 expressly states what information is to be collected, which includes:

- The date of the sale or other transfer;
- The purchaser's driver's license or other identification number and the state in which it was issued;
- The brand, type, and amount of ammunition sold or otherwise transferred;
- The purchaser's full name and signature;
- The name of the salesperson who processed the sale or other transaction;
- The purchaser's full residential address and telephone number; and,
- The purchaser's date of birth.¹⁹

The information required under Penal Code section 30352 is exclusive and does not allow for the collection of additional information to be collected by the licensed ammunition vendor. Any information collected in addition to this information, therefore, would be in violation of Penal Code section 30352.²⁰ Yet DOJ's proposed regulation requires the following information to be collected in addition to the above:

- Gender;
- Hair color;
- Eye color;
- Height;
- Weight;
- United States citizenship status;
- Federal Alien Registration Number or I-94 (if applicable);
- Place of birth;
- Alias name(s); and,
- Race.²¹

¹⁹ Cal. Penal Code § 30352(a)(1-7).

²⁰ This is due to the doctrine of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). Because the legislature has specifically listed what information must be collected, without providing for any additional information to be collected by the licensed ammunition vendor, it is presumed the legislature intended only this information to be collected.

²¹ 11 C.C.R. § 4303(b) (proposed).

Given the exclusive nature of Penal Code section 30352, the proposed regulation as written exceeds DOJ's statutory authority and is otherwise inconsistent with the statute it purports to implement. And because DOJ has expressly stated the process is "essentially the same" as a firearms eligibility check, it can only be assumed the reason for collecting a purchaser's citizenship status, federal alien registration number, and place of birth are for purposes of accessing these federal databases. As explained above, to do so for purposes of conducting an ammunition background check would violate federal law.²²

DOJ's proposed requirement for citizenship information also violates recently enacted state laws pertaining to immigration enforcement. In 2017, the California Legislature enacted Senate Bill No. 54 ("SB 54"), prohibiting state agencies from using funds or personnel to "investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes," including "[i]nquiring into an individual's immigration status."²³ None of the exceptions to this restriction allow DOJ to inquire into an individual's citizenship status for purposes of conducting an ammunition background check.²⁴ As a result, the proposed regulation requiring additional information regarding a person's immigration status is in direct violation of existing state law, thereby exceeding DOJ's regulatory authority.

D. Proposed ATN Numbers

Subdivision (c) of proposed section 4303 states that the ammunition vendor will provide the purchaser or transferee with an Ammunition Transaction Number ("ATN") "to monitor the status of the Basic Ammunition Eligibility Check through the Department's CFARS website. DOJ's ISOR states this subdivision is necessary "to inform an individual how to use an ATN to obtain the status for the Basic Ammunition Eligibility Check from the Department."

This subdivision, however, directly conflicts with the Penal Code it purports to implement. Specifically, subdivision (a) of Penal Code section 30370 requires DOJ to "electronically approve the purchase or transfer of ammunition through a vendor" but that "[t]his approval *shall occur at the time of purchase or transfer*."²⁵ In other words, the decision on whether to approve or deny a particular transaction must be made at the time of transfer, thereby precluding DOJ from enacting any system that would delay a transaction beyond the time of purchase or transfer.²⁶

²² It is our understanding that DOJ is aware of this issue and has been expressly instructed by the Bureau of Alcohol, Tobacco, Firearms and Explosives and/or the Federal Bureau of Investigation that accessing the federal databases for purposes of conducting ammunition background checks is prohibited.

²³ Cal. Govt. Code § 7284.6(a)(1)(A) (emphasis added). Notably, Attorney General Xavier Becerra has publicly stated that DOJ is not in the business of deportation and should not be "doing the job of federal immigration agents." https://www.washingtonpost.com/world/national-security/california-tells-local-law-enforcement-to-follow-federal-law--but-dont-be-immigration-enforcers/2018/03/28/bee713f4-32b2-11e8-94fa-32d48460b955_story.html?utm_term=.076e8c8b4e71.

²⁴ See Cal. Govt. Code § 7284.6(b).

²⁵ Emphasis added.

²⁶ The legislative history of SB 1235 also makes this quite clear. For example, according to the Senate Appropriations Committee, the \$25 million start-up loan issued to DOJ was to, among other

As a result, DOJ's proposed regulation issuing an ATN to a prospective purchaser for no other purpose than to monitor the status of the Basic Ammunition Eligibility Check is in direct conflict with the Penal Code section it seeks to implement and otherwise exceeds DOJ's regulatory authority.

VI. PROPOSED SECTION 4304 – “FIREARMS ELIGIBILITY CHECK”

Proposed section 4304 concerns the purchase of ammunition in connection with the purchase of a firearm, which as noted is already subject to an eligibility check. Subdivision (b) of proposed section 4304, however, is poorly worded in that it assumes an individual with an AFS record or Certificate of Eligibility (“COE”) will automatically be approved upon paying a \$1 fee for the Standard Ammunition Eligibility Check. To that end, the proposed regulation should instead simply read that if a person wants to take possession of the ammunition before the Department completes the firearms eligibility check, a Standard Ammunition Eligibility Check, Basic Ammunition Eligibility Check, or COE Verification Process must be conducted prior to the transfer of the ammunition. But DOJ needs to clarify how licensed ammunition vendors are to determine which procedure to follow for a customer.

What's more, nothing in the proposed regulation specifies how a licensed ammunition vendor is supposed to collect the required information regarding the transfer of ammunition as called for under Penal Code section 30352. As a result, DOJ needs to amend this proposed regulation to ensure consistency and clarity with existing law as required by the APA.

VII. PROPOSED SECTION 4305 – “COE VERIFICATION PROCESS”

Proposed section 4305 addresses the procedure for verifying a purchaser's COE as an alternative to the Standard Ammunition Eligibility Check and Basic Ammunition Eligibility Check. DOJ has proposed a \$1 fee for this type of check, while also proposing ammunition vendors collect the following information about the purchaser in connection with the transfer:

- Name;
- Date of birth;
- Current address; and,
- Driver license or other government identification number.²⁷

As a threshold matter, the proposed regulation fails to include the required information as called for in the Penal Code. Specifically, subdivision (a) of Penal Code section 30352 requires licensed ammunition vendors to collect the following information in addition to what DOJ has proposed:

- The date of the sale or other transfer;
- The state in which the purchaser's driver's license or other identification was issued;

requirements, “develop the system *enabling real-time review and approval* of transactions at the point of sale/transfer.” *SB 1235, Third Reading*, Senate Rules Committee, Office of Senate Floor Analyses at 12 (emphasis added).

²⁷ 11 C.C.R. § 4305(a-b) (proposed). DOJ's proposed regulation

- The brand, type, and amount of ammunition sold or otherwise transferred;
- The purchaser's signature;
- The name of the salesperson who processed the sale or transaction; and,
- The purchaser's telephone number.²⁸

Because Penal Code section 30352 requires this information to be collected at the time of delivery "on a form to be prescribed the Department of Justice," DOJ needs to amend its regulation to clarify that the above information needs to be collected when transferring ammunition pursuant to the proposed COE Verification Process. Doing so will ensure consistency and clarity with existing law as required by the APA.

In addition to the above, DOJ has again chosen a fee amount of \$1, stating in their ISOR that this "will contribute toward start up costs and ongoing system maintenance, including employee salaries." But that is not the appropriate standard in which to select the fee. As clearly stated in subdivision (e) of Penal Code section 30370, the fee selected by DOJ must not "exceed the reasonable regulatory and enforcement costs." What's more, DOJ has demonstrated in other respects that it can verify a person's COE without cost.²⁹ As a result, DOJ needs to clarify how the proposed \$1 fee does not exceed the reasonable regulatory and enforcement costs in processing COE verifications as required under the Penal Code.

VIII. PROPOSED SECTION 4306 – "AMMUNITION PURCHASES OR TRANSFERS FOR EXEMPTED INDIVIDUALS"

Proposed section 4306 lists specific types of identification that will identify an individual as exempt from the requirement that licensed ammunition vendors must first obtain DOJ approval. Specifically, proposed subdivision (a) lists the following:

- A valid FFL;
- An authorized law enforcement representative's written authorization from the head of the agency authorizing the ammunition purchase or transfer;
- A centralized list of exempted FFLs DOJ-issued certificate indicating the individual is on the centralized list of exempted FFLs;
- A sworn state, or local peace officer's credential and verifiable written certification from the head of the agency; or,
- A sword federal law enforcement officer's credential and verifiable written certification from the head of the agency.³⁰

²⁸ Cal. Penal Code § 30352(a)(1-7).

²⁹ For example, employees of California licensed firearm dealers must generally possess a valid COE as a condition of employment. DOJ recently proposed regulations modifying the DROS Entry System ("DES") which includes a procedure for verifying a prospective employee's COE, yet there is no cost associated with this procedure. See <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/dros-text-of-regs-120718.pdf>.

³⁰ 11 C.C.R. § 4306(a)(1-5) (proposed).

DOJ cites Penal Code section 30352 as authority for this proposed regulation. But the proposed list fails to include both licensed ammunition vendors and persons who purchase or receive ammunition at a target facility as expressly listed in Penal Code section 30352.³¹

As a result, DOJ should amend its proposed regulation to include these individuals, and what procedures a licensed ammunition vendor should follow when transferring ammunition to them in order to satisfy the consistency and clarity requirements of the APA.

IX. PROPOSED SECTION 4307 – “TELEPHONIC ACCESS FOR AMMUNITION VENDORS”

Proposed section 4307 addresses the required telephonic access for ammunition vendors without accessibility to an internet connection due to their location not allowing for internet service. Our primary concern with the proposed regulation, however, is the hours of operation of DOJ’s telephonic system. Presumably, retail businesses such as ammunition vendors will be open outside of a typical 9-5 workday and otherwise open 7 days a week. DOJ’s proposed regulation does not specify if the telephonic access system will be available during such times. For this reason, DOJ needs to clarify when the system will be operational to ensure clarity for existing ammunition retail businesses.

X. DOJ’S ECONOMIC IMPACT ANALYSIS IN THEIR INITIAL STATEMENT OF REASONS IS SEVERELY FLAWED AND OTHERWISE FACTUALLY INACCURATE

In addition to the text of the proposed regulations, DOJ has made several inaccurate and/or misleading claims and statements in its ISOR warranting attention.

First, DOJ estimates there will be approximately 13 million ammunition purchases or transfers conducted each year pursuant to a Standard Ammunition Eligibility Check. This estimation appears to have been calculated based on 931,037 background checks conducted in California in 2014 for firearm transactions. But the basis for this estimation is fundamentally flawed, as DOJ is referencing background checks—not actual gun sales. A single background check could incorporate more than one firearm. And using background check numbers for a single year fails to account for firearms already owned by California residents.³² DOJ also fails to describe how it selected 40 rounds as the number of rounds in each box of ammunition. A simple web search of available ammunition yields wildly varying numbers of rounds per box, with the most common quantities either 50 or 20 rounds per box.

DOJ claims “there is no evidence that these regulations will deter ammunition sales or be a significant burden to ammunition purchases.” Yet DOJ’s own statements directly contradict this point. It states that “ammunition purchases are considered a leisurely activity, and oftentimes done while out shopping for other items or browsing for future purchases, which is beneficial to both parties.” What’s more, DOJ also states that costs are “minimal because although it takes time for the Department to process an ammunition eligibility check, ammunition purchasers will be shopping for other products in the store, allowing the ammunition vendor to sell more items to the public.” Notwithstanding the fact

³¹ See Cal. Penal Code §§ 30352(e)(1), 30352(e)(3).

³² Indeed, perhaps a better method of estimating the actual number of firearms currently owned by California residents would be to simply refer to the total number of records currently in DOJ’s AFS database, some of which go as far back as the early 1900’s.

that DOJ is obligated to process transactions in real-time and without any delay (contrary to DOJ's assertions), such statements make it clear that there is indeed a significant burden.

DOJ's analysis also ignores attempts by other states at implementing similar legislation. In 2013, New York enacted identical ammunition background check requirements. But before the law could be implemented, New York's Governor issued a memorandum of understanding suspending enforcement of the ammunition background check requirements. That memorandum cited "the lack of adequate technology" while also stating that the database "cannot be established and/or function in the manner originally intended at this time."³³ New York's Governor has also issued a statement that "the ammunition sales database *will not be prematurely introduced until the technology is ready and it does not create an undue burden for business owners*."³⁴ To date, New York has yet to implement the ammunition sales database.

XI. CONCLUSION

As currently drafted, the proposed regulations are incomplete and lack key substantive provisions that would allow members of the public to easily understand them and provide meaningful opportunity to comment. They also raise serious issues as to the required authority, clarity, and consistency required under the APA. For these reasons, we respectfully request DOJ revise the proposal accordingly and address the concerns identified above.

Should you have any questions regarding this letter, please do not hesitate to contact our office at your convenience.

Sincerely,
Michel & Associates, P.C.



Matthew D. Cubeiro

³³ See <https://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html>.

³⁴ See https://www.syracuse.com/state/index.ssf/2015/07/cuomo_agrees_to_changes_to_ny_safe_act_regarding_ammunition_sales.html (emphasis added).