

**SENIOR PARTNER**  
C. D. MICHEL\*

**MANAGING PARTNER**  
JOSHUA ROBERT DALE

**SPECIAL COUNSEL**  
W. LEE SMITH

**ASSOCIATES**  
ANNA M. BARVIR  
SEAN A. BRADY  
TIFFANY D. CHEUVRON  
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

May 8, 2019

**VIA EMAIL & FAX**

Kelan Lowney  
Department of Justice  
P.O. Box 160487  
Sacramento, CA 95816-0487  
**EMAIL:** [ammoregulations@doj.ca.gov](mailto:ammoregulations@doj.ca.gov); [ammoregs@doj.ca.gov](mailto:ammoregs@doj.ca.gov)  
**FAX:** (916) 731-3387

**Re: Proposed Regulations Regarding Ammunition Purchases or  
Transfers – Title 11, Division 5, Chapter 11 (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, as well as their respective members throughout California, in opposition to the proposed regulations regarding “Ammunition Purchases or Transfers” (the “proposed regulations”), which if adopted would add sections 4300-4309 to Title 11 of the California Code of Regulations (“C.C.R.”).

On January 31, 2019, our office submitted a letter of comment concerning the California Department of Justice’s (“DOJ”) original text of the proposed regulations.<sup>1</sup> That letter addressed the general requirements of California’s Administrative Procedure Act (“APA”) and several key deficiencies thereunder with DOJ’s proposal. For the sake of brevity, those concerns will not be repeated here. Although DOJ has addressed some of our clients’ concerns with this revised proposal, many substantial problems remain.

For these reasons and those discussed below, our clients still oppose the regulations as currently drafted.

---

<sup>1</sup> A copy of this comment letter can be viewed online at <http://michellawyers.com/wp-content/uploads/2019/01/Ltr-to-DOJ-re-Ammo-Background-Check-Regs.pdf>.

## **I. DOJ'S MARCH 14, 2019, STAKEHOLDERS MEETING**

As an initial matter, we were recently informed that DOJ held a stakeholder's meeting on March 14, 2019, with several licensed ammunition vendors regarding the upcoming background check requirements the proposed regulations purport to implement. Among statements made by DOJ officials during this meeting, stakeholders were informed that the ammunition background check system had already been developed and was currently undergoing testing.

It is of great concern that DOJ has already created the system for which ammunition transactions will be processed beginning July 1, when *the required regulations implementing that system have yet to be formally adopted*. In this and other firearm-related rulemaking activities, our clients have repeatedly informed DOJ of one of the core tenants of the APA, namely to provide members of the public a meaningful opportunity to comment on proposed regulations. By creating a system before members of the public have been provided a meaningful opportunity to comment on regulations required to implement that system, DOJ is once again displaying its utter disregard for the rulemaking process and the public itself.

Because of this, we have little doubt DOJ will ignore the comments it receives. What's more, DOJ has taken a wholly unnecessary gamble using taxpayer funds on a system that has yet to be formally approved. DOJ owes stakeholders, members of the public, and California's Office of Administrative Law ("OAL") an explanation for this action.

### **A. DOJ's Statements to Stakeholders Regarding Out-of-State Driver's Licenses**

DOJ also informed stakeholders during the March 14, 2019, meeting that the proposed system will not be able to accept out-of-state driver's licenses or IDs. If true, such a restriction would not only illegally constrain the scope of Penal Code section 28180, but would also amount to a violation of various constitutional provisions.

DOJ has stated in its Initial Statement of Reasons ("ISOR") Addendum that the information to be collected from a prospective purchaser "must be collected in the manner described in Penal Code section 28180." Penal Code section 28180 requires firearm dealers to collect a purchaser's name, date of birth, and driver's license or identification number "from the magnetic strip on the purchaser's driver's license or identification and shall not be supplied by any other means, except as authorized."<sup>2</sup> But Penal Code section 28180 also states that if the magnetic strip reader is unable to obtain the required information, the firearms dealer "shall obtain a photocopy of the identification as proof of compliance."<sup>3</sup> And while it may be true that California's new ammunition sales restrictions require ammunition vendors to collect a purchaser's information "as described in Section 28180," the law also makes clear that out-of-state identification may be used when purchasing ammunition. See Cal. Penal Code § 30370(b) (requiring information to be collected pursuant to Penal Code section 28180); Cal. Penal Code § 30352(a)(2) (requiring the purchaser's driver's license or other identification number "*and the state in which it was issued*" to be recorded upon delivery of the ammunition).

<sup>2</sup> Cal. Penal Code § 28180(a).

<sup>3</sup> Cal. Penal Code § 28180(b)(2).

Regardless, denying non-California-residents their right to acquire ammunition would run afoul of multiple constitutional guarantees. The Second Amendment “implies a corresponding right to obtain the bullets necessary to use them” and a “regulation eliminating a person’s ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose” thus violating that right. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014). The right to travel guarantees that “a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the ‘Privileges and Immunities of Citizens in the several States’ that he visits.” *Saenez v. Roe*, 502 U.S. 489, 501 (1999) (quoting U.S. Const. Art. IV, §2, cl. 1). Facially discriminatory regulations violate the Commerce Clause, regardless of whether they have a discriminatory purpose. *See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). And, finally, “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which invade or restrain them must be closely scrutinized” and be necessary to serve a compelling government interest. *City of Cleburne, Tex., v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). For these reasons, DOJ needs to clarify whether out-of-state identification can be used to purchase ammunition under the proposed regulation. Failure to do so would, at minimum, constitute a lack of the clarity required of a regulation under the APA.

## **B. Additional Statements Made By DOJ to Stakeholders**

Several other problematic statements made by DOJ to stakeholders during the March 14, 2019 meeting, include:

- Large retailers will have access to the system as of June 1, 2019, whereas others would only have access beginning July 1, 2019—the day the background check process is scheduled to begin.
- DOJ plans on creating training materials and a step-by-step webinar for licensed ammunition vendors regarding the ammunition background check process.
- A full-scale background check for a customer is anticipated to take anywhere from several hours to several days, whereas an AFS/COE check should take a few minutes.
- A purchaser’s Driver’s License must match their AFS/COE records in order to be approved for a purchase.
- A full-scale background check will only rely on a person’s state records—federal databases will not be included as part of the background check process.

As stated by Government Code section 11342.600 and OAL, a “regulation” is “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 agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”<sup>4</sup> Unless expressly exempted by statute, every regulation is subject to the APA’s rulemaking procedures.<sup>5</sup>

<sup>4</sup> Cal. Gov. Code § 11342.600; See also [https://www.oal.ca.gov/wp-content/uploads/sites/166/2017/05/What\\_Is\\_a\\_Regulation.pdf](https://www.oal.ca.gov/wp-content/uploads/sites/166/2017/05/What_Is_a_Regulation.pdf).

<sup>5</sup> Cal. Gov. Code § 11346.

Assuming the above statements are accurate, these amount to “regulations” within the meaning of the APA, thereby requiring DOJ to provide members of the public a meaningful opportunity to comment on them or else they are void as illegal underground regulations.<sup>6</sup> Yet, nowhere in the proposed regulations or their revised text does DOJ discuss access by large retailers, training materials and webinars, or the time DOJ estimates it will need to conduct the required background check.<sup>7</sup>

DOJ has also failed to provide any clarifying information as to what constitutes a “match” for purposes of the Standard Ammunition Eligibility Check, despite this issue being raised in our prior comment letter. It is also unclear why DOJ has simply stated that it has “exercised no discretion” as to this requirement when it has shown itself to be more than capable of adopting regulations that help clarify requirements elsewhere. In sum, to the extent DOJ intends to implement the actions described in the above statements it must at least amend the proposal to include them as part of the proposed regulations.

#### **i. Use of Federal Databases**

In the ISOR Addendum, DOJ states that a purchaser’s citizenship status and federal Alien Registration Number or I-94 (if applicable) are required to conduct the Basic Ammunition Eligibility Check. DOJ’s basis for this assertion is that Penal Code section 30370, subdivision (c), requires DOJ to develop a procedure in which “a person who is not prohibited from purchasing or possessing ammunition may be approved.” In reaching this conclusion, DOJ states that it “has determined that it would be counter to the legislative intent . . . to approve purchases of ammunition by individuals who may be prohibited from doing so under either state or federal law.” DOJ nevertheless recognizes it is not permitted to use federal databases to ensure a person is not prohibited (as discussed in our prior comment letter).

But DOJ is incorrect in its assumptions for several reasons. First, DOJ makes no mention in the ISOR Addendum regarding the prohibitions under existing state laws adopted pursuant to Senate Bill No. 54 (“SB 54”).<sup>8</sup> These provisions, clearly reflect the California legislature’s intent, which has also been recognized by Attorney General Becerra himself, prohibit state agencies—including DOJ—from inquiring into an individual’s immigration status.<sup>9</sup> What’s

---

<sup>6</sup> Cal. Gov. Code § 11340.5(a) (prohibiting DOJ from enforcing any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a “regulation” under the APA unless it has been adopted as such and filed with the Secretary of State pursuant to the APA).

<sup>7</sup> What’s more, as noted in our prior comment letter, DOJ is statutorily obligated to approve or deny the required background check “at the time of purchase or transfer.” Cal. Penal Code § 30370(a). In other words, DOJ is statutorily prohibited from delaying ammunition background checks for any amount of time.

<sup>8</sup> These restrictions were raised in our prior comment letter, but DOJ makes no mention of them in its ISOR Addendum or revised regulations.

<sup>9</sup> Cal. Govt. Code § 7284.6(a)(1)(A).

more, the California Legislature's "intent" is irrelevant as applied to a voter approved initiative, which is what created the controlling law here.<sup>10</sup>

DOJ also argues that both the Standard Ammunition Eligibility Check and the COE Verification methods involve a check of a person's immigration status. But that is irrelevant because neither is specifically required for the purposes of lawfully acquiring ammunition in California. Individuals need only to have submitted immigration information in connection with their original COE application or firearm purchase.<sup>11</sup> And DOJ already administers the Armed Prohibited Person System as a means to disarm individuals who later become prohibited and revoke any previously issued COE.

In any event, DOJ prohibited from accessing federal databases for purposes of conducting ammunition background checks. It cannot simply add a layer to the background check process (i.e. referencing its Prohibited Armed Persons File) and access federal databases through other means as a way of circumventing this restriction. For these reasons, DOJ's collection and use of a person's citizenship information in connection with an ammunition background check is strictly prohibited by federal and state law and lacks the necessity, authority, and consistency required by the APA.

## **II. DOJ'S REVISED ECONOMIC AND FISCAL IMPACT STATEMENT AND PROPOSED FEES**

In addition to the revised text of the proposed regulations and ISOR addendum, DOJ has also included a revised Economic and Fiscal Impact Statement that goes into additional detail concerning the expected cost and revenue of administering the required ammunition background check program. The information serves to justify DOJ's selected fees. But as discussed below, there are serious flaws with DOJ's estimations.

### **A. DOJ's Estimated Costs to Businesses Are Grossly Understated**

DOJ's cost estimate for vendor staff processing time is based on California's minimum wage (\$11/hour). This is an unreasonable assessment given that COEs are required for every vendor employee and the required training for such employees. Using minimum wage also ignores management level positions necessary to oversee employees and assumes a two-minute processing time for each transaction. Given the oversight necessary to ensure compliance with California law (which can result in license revocation and potential criminal penalties for any

---

<sup>10</sup> Although it is true that Senate Bill No. 1235 was adopted in connection with Proposition 63, Proposition 63 controls and is the actual source for these requirements. See also *In re Espinoza*, 192 Cal.App. 4th 97 (4th Dist. 2011) (prohibiting state agencies from offering an interpretation that cannot be "construed in context of the nature and obvious purpose . . . that does not harmoniz[e] [with] all [the] provisions relating to the subject matter").

<sup>11</sup> To further illustrate this point, the COE application does not even contemplate ammunition purchases as a reason for seeking a COE, as the application and COE requirements have long been in place well before the adoption of the ammunition sales restrictions. See *BOF 4008 (Rev. 10/2014): Certificate of Eligibility Application*, California Department of Justice, Bureau of Firearms, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/coeapp.pdf> (Oct. 2014).

violation), it is wholly unreasonable for DOJ to assume costs based on California's minimum wage and such a short time estimation for each transaction, not to mention the cost of legal counsel to guide vendors through compliance.

This gross understatement is further illustrated when compared to DOJ's salaries for the "59 new positions" that are responsible for processing ammunition transactions on DOJ's end. These salaries total \$5,839,347 in the first year (an average of \$98,971 per employee), and \$4,515,371 for every year thereafter (an average of \$76,531 per employee). Even assuming the national standard of 2,087 hours per year, this amounts to approximately \$36 per hour at least per DOJ employee tasked with processing ammunition transactions—excluding any additional costs such as training. For DOJ to assume a minimum wage employee will be responsible for administering a vendor's program, when DOJ's own employees earn more than double that, raises serious questions as to its projected costs to businesses.

For these reasons, DOJ needs to revise its Economic and Fiscal Impact Statement to better account for ammunition vendor wages and related costs.

#### **B. DOJ's Proposed Fees Exceed Its Reasonable Cost of Regulatory and Enforcement Activities**

DOJ states that the proposed fees of \$1 for Standard Ammunition Background Checks and COE Verifications are "necessary to recover the reasonable costs of regulatory and enforcement activities." Yet, DOJ also states that it intends to "build a reserve for economic uncertainties." Not only is such a reserve contrary to both the express limitations of the Penal Code and the California Constitution,<sup>12</sup> but DOJ provides no information as to how much of a reserve it intends to maintain.

For the first year the system is scheduled to launch, DOJ has estimated it will incur \$12,844,697 in expenses while taking in \$14,104,000 in revenue. And in fiscal years thereafter, DOJ estimates an average of \$9,886,506 in expenses while taking in the same amount of revenue. The reasons for the initial costs in the first year "include personal services, operating expenses and equipment, system enhancements, infrastructure, and other costs."

***Taking DOJ's estimates at face value, the proposed fees exceed 9% of its costs in the first fiscal year and nearly 30% of its overall costs in the years thereafter.***

As stated in Penal Code section 30370, DOJ is only authorized to "recover the reasonable cost of regulatory and enforcement activities," and is only authorized to charge a fee that **cannot exceed** those costs.<sup>13</sup> In other words, DOJ is not authorized to charge a fee that would allow it to

---

<sup>12</sup> See Cal. Const. art. XIII A, § 3(a)(1), (d) (when charging a fee, an agency must show "that the amount is no more than necessary to cover the reasonable costs of the governmental activity[.]")

<sup>13</sup> Cal. Penal Code § 30370(e); See also Cal. Penal Code § 30370(c) (allowing DOJ to "recover the cost of processing and regulatory and enforcement activities" related to the full-scale background check procedure which cannot "exceed the fee charged for [DOJ's] Dealers' Record of Sale (DROS) process").

“build a reserve” and then adjust the fee at a later date. But DOJ’s proposed fee does just that, and therefore violates the necessity, authority, and consistency requirements of the APA, as well as the California Constitution.

### III. REVISED SECTION 4306 – EXEMPTED INDIVIDUALS

DOJ has revised the list of individuals it considers exempt from DOJ approval to purchase or transfer ammunition. In the revised text, DOJ states that these individuals are exempt “pursuant to Penal Code section 30352, subdivision (e).” But there is a fundamental problem with this statement. Penal Code section 30352, subdivision (e) *only* exempts those listed individuals *as applied to subdivisions (a) and (d) of Penal Code section 30352*. It does not provide an exception to the requirements of Penal Code section 30370, a wholly separate Penal Code provision which ammunition vendors must abide by when processing ammunition transactions. While we recognize this as an oversight on the part of the author of the law, DOJ is nevertheless prohibited under the APA from expanding the exception to apply to both provisions absent further legislation.

### IV. CONCLUSION

DOJ states that it would be “unduly burdensome” and “unnecessarily expensive” to develop and use a system separate from California’s Dealer Record of Sale (“DROS”) Entry System (“DES”). Yet DOJ was given a loan of \$25 million from the California Legislature for this express purpose, which appears to have not even been utilized.<sup>14</sup> Coupled with the serious issues concerning the required authority, clarity, and consistency under the APA, and the fact that DOJ has prematurely developed the system which these regulations are purportedly designed to implement, our clients respectfully request DOJ revise the proposal accordingly. Should DOJ refuse to do so, our clients are prepared to take any action available under the law to compel DOJ’s compliance, including litigation.

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

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



Matthew D. Cubeiro

---

<sup>14</sup> As noted in DOJ’s Revised Economic and Fiscal Impact Statement, DOJ estimates it will incur \$12,844,697 in expenses for the first fiscal and \$9,886,506 in expenses every year thereafter. The larger first year expenses are due to initial program costs which, presumably, include the creation of the new system. In other words, DOJ has only spent \$2,958,191 of the initial \$25 million start-up loan it received from the California legislature. What’s more, these costs are being incurred during the first fiscal year in which DOJ expects to earn revenue from the new system, raising a question as to why the initial loan was even necessary.