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**VIA U.S. Mail & EMAIL**

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**Re: Proposed Rulemaking Regarding “Self-Manufactured or Self-Assembled Firearms” – Written Comments**

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, to submit written comments on the California Department of Justice’s (“DOJ”) proposed regulations regarding “Self-Manufactured or Self-Assembled Firearms” (the “proposed regulations”), which if adopted would amend sections 5505, 5507, 5509, 5510, 5511, 5513, 5514, 5516, 5517, 5518, and 5521 of Title 11, Division 5, Chapter 41, of the California Code of Regulations.

Existing California regulations require individuals who own a self-manufactured or self-assembled firearm that is not recorded with DOJ, and individuals who intend to manufacture or assemble a firearm on or after July 1, 2018, to obtain and engrave a DOJ-approved serial number on their firearm.<sup>1</sup> The proposed regulations amend existing regulations as a result of Senate Bill No. 746 (“SB 746”), which requires new California residents to also apply for a DOJ-approved serial number for any self-manufactured or self-assembled firearm they own and wish to possess in California.

<sup>1</sup> See Cal. Code Regs. tit. 11, §§ 5505-5522.

As currently drafted and for the reasons discussed below, DOJ's proposed regulations conflict with existing federal regulations and otherwise fail to meet the required necessity, authority, consistency, and clarity requirements of California's Administrative Procedures Act ("APA").

**I. THE PROPOSED REGULATIONS CONSTITUTE AN UNAUTHORIZED USE OF THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM**

Contrary to DOJ's Initial Statement of Reasons ("ISOR"), the proposed regulations conflict with existing federal regulations regarding the use of the National Instant Criminal Background Check System ("NICS").<sup>2</sup> Specifically, DOJ's proposed regulations conflict with subdivision (j) of section 25.6 of Title 28 of the Code of Federal Regulations, which reads:

*Access to the NICS index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of:*

- (1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;*
- (2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,*
- (3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.*

Subdivision (t) of section 922 of Title 18 of the United States Code, as referenced by section 25.6, generally prohibits a licensed importer, licensed manufacturer, or licensed dealer from transferring a firearm to another person who is not licensed before a background check can be completed. As a result, any use of NICS for purposes other than the transfer of a firearm from a licensed firearms dealer to an unlicensed individual must satisfy one of the above exceptions listed in subdivision (j) of section 25.6 of Title 28. Use of NICS is restricted for all other purposes, including general law enforcement activities.<sup>3</sup>

DOJ's proposed regulations include an amendment to the definition for the term "Firearms Eligibility Check" to mean "a state and federal background check pursuant to Penal Code section 28220 that is used to determine an individual's eligibility to possess, receive, own,

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<sup>2</sup> NICS was initially established following the adoption of the Brady Handgun Violence Prevention Act in 1993, allowing federal firearm licensees ("FFL") to conduct background checks on prospective firearm purchasers. While the majority of

<sup>3</sup> See, e.g., Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 81 FR 382-01.

or purchase a firearm.”<sup>4</sup> DOJ’s ISOR states that the current method of conducting the background check is pursuant to Penal Code section 30105, commonly referred to as a “Personal Firearms Eligibility Check.” But with the adoption of Senate Bill No. 746, California law has been amended to now state that this background check must be conducted pursuant to Penal Code section 28220, commonly referred to as a “Basic Firearms Eligibility Check.” The key difference between the two is that a Basic Firearms Eligibility Check determines a person’s firearms eligibility using both state and federal databases—including NICS—whereas a Personal Firearms Eligibility Check only references state databases.

DOJ’s proposed regulations, as well as the existing regulations, concern the issuance of a DOJ-approved serial number for self-manufactured or self-assembled firearms. They are in no way related to the transfer of a firearm by an FFL to an unlicensed individual. Therefore, using NICS in connection with the issuance of a DOJ-approved serial number is a purpose unrelated to subdivision (t) of section 922 of Title 18 of the United States Code, requiring the use to fall within one of the above listed exceptions found in subdivision (j) of section 25.6 of Title 28 of the Code of Federal regulations.

But DOJ’s proposed and existing regulations do not concern the issuance of a firearm-related or explosives-related permit or license. Rather, they describe the process by which a California resident may lawfully build a firearm for personal use (or in the case of a new California resident, reporting the ownership of a home-built firearm to DOJ). Nor are the regulations for purposes of responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), or disposing of firearms, as also contemplated under subdivision (j) of section 25.6 of Title 28 of the Code of Federal regulations.

For these reasons, DOJ’s regulations, as it relates to the use of NICS, conflict with existing federal regulations and are therefore prohibited.<sup>5</sup>

## **II. THE PROPOSED DEFINITION FOR “RECEIVER OR FRAME, UNFINISHED” LACKS THE CLARITY REQUIRED UNDER CALIFORNIA’S APA**

The APA is designed to provide the public with a meaningful opportunity to participate in the adoption of regulations by California state agencies such as DOJ, and to ensure the creation of an adequate record for the Office of Administrative Law (“OAL”) and judicial review.<sup>6</sup> In reviewing any proposed regulation, OAL will consider the regulations clarity. Specifically, OAL will consider how the regulation is written or displayed so that the meaning of

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<sup>4</sup> Cal. Code Regs. tit. 11, § 5507(m) (proposed). The proposed regulations will also amend section 5516 accordingly.

<sup>5</sup> While it is also true that California law has been amended to require DOJ to process background checks for the unique serial number application process using NICS, DOJ is nevertheless prohibited under federal law from doing so.

<sup>6</sup> 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).

the regulations will be easily understood by those persons directly affected by them.<sup>7</sup> Should a regulation fail to comply with the APA's clarity requirement (or any of its other requirements), OAL may disapprove the proposed regulation.<sup>8</sup>

In a prior comment letter submitted by our office on November 6, 2018, regarding the application of definitions used in connection with the identification of "assault weapons," we noted that DOJ adopted a definition for the term "Receiver, unfinished" that differed from the definition DOJ now seeks to amend. DOJ responded that other regulations "are not directly relevant" and that DOJ "is not required to adopt the same definitions for the same terms."<sup>9</sup> Now, however, DOJ's ISOR claims that the proposed amendment "is necessary in order to be consistent with other Department regulations," and that it "would be confusing for the public if the Department used separate definitions."<sup>10</sup>

Regardless of the contradiction, both the existing definition and DOJ's proposed amendment fail to adequately define the term so that it can be easily understood by California residents affected by the regulations. All that is stated is that an unfinished frame or receiver is a precursor part to a firearm that is not yet legally a firearm, and that "some have the shape of an AR-15" and others "have been worked on and the magazine well has been machined open."<sup>11</sup>

By that definition, *anything* that is not legally considered a firearm could arguably be construed as an unfinished frame or receiver. Conversely, DOJ's chosen phrase "receiver or frame, unfinished" could lead individuals to mistakenly believe the term includes actual receivers or frames that are legally considered firearms but are simply *non-functional* firearms. What's more, the phrase "precursor part" is not expressly defined and could imply that other parts of a firearm (such as springs, pins, triggers, etc.) are in fact firearm precursor parts within the meaning of the definition.<sup>12</sup>

The recent adoption of Assembly Bill No. 879 ("AB 879"), which regulates the sale or transfer of "unfinished receivers" and "unfinished handgun frames," raises the importance of

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<sup>7</sup> Cal. Gov. Code §§ 11349, 11349.1(a)(3). 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).

<sup>8</sup> Cal. Gov. Code § 11349.3.

<sup>9</sup> See <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/awd-fsor-010819.pdf>? (DOJ response to comment #47a).

<sup>10</sup> *Id.*

<sup>11</sup> Cal. Code Regs. tit. 11, § 5507(u) (proposed).

<sup>12</sup> Similar language was recently ruled unconstitutionally vague in *United States v. Roh*, Case No. SACR 14-167 JVS. In *Roh*, the government's theory rested on ATF having "classified" finished receivers as firearms, despite this classification contradicting published ATF regulations. Nevertheless, the court ultimately found that "when applied to include finished lower receivers" ATF's regulations were unconstitutionally vague. DOJ's proposed definition, therefore, will likely face similar scrutiny.

adequately defining the term. Providing an inadequate definition will only serve to cause further confusion should DOJ adopt a different definition in any future regulatory proposal associated with AB 879.<sup>13</sup>

For these reasons, DOJ's proposed definition fails to meet the clarity requirement of the APA and must be revised to expressly and adequately define an unfinished frame or receiver.

### **III. PROHIBITING INDIVIDUALS WHOSE BACKGROUND CHECK RESULTS IN AN "UNDETERMINED" STATUS FROM OBTAINING UNIQUE SERIAL NUMBERS LACKS NECESSITY, AUTHORITY, AND CONSISTENCY AS REQUIRED UNDER THE APA**

In addition to clarity, proposed regulations must also satisfy the necessity, authority, and consistency requirements of the APA, which are defined as follows:

- **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; and,
- **Consistency** – meaning being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.<sup>14</sup>

In a prior comment letter submitted by our office on March 19, 2018, regarding DOJ's original regulatory proposal for the unique serial number application process, we stated that DOJ's regulations were unclear as applied to persons whose background check resulted in an "undetermined" status.<sup>15</sup> In response, DOJ rejected the comment and stated that it "will deny the unique serial number application if no disposition can be generated for the applicant's criminal history."<sup>16</sup> DOJ's proposed amendments to section 5516, if adopted, would expressly state that an undetermined status will result in a denial.<sup>17</sup>

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<sup>13</sup> Indeed, DOJ's unique serial number application process and the provisions of AB 879 are uniquely intertwined as both concern the steps an individual must take when building a firearm in California.

<sup>14</sup> Cal. Gov. Code §§ 11349, 11349.1(a).

<sup>15</sup> See <http://michellawyers.com/wp-content/uploads/2018/03/Comment-Ltr-to-DOJ-re-Serial-Nos.pdf>.

<sup>16</sup> See <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/usna-fsor-a-b.pdf>? (DOJ response to comment #42).

<sup>17</sup> See Cal. Code Regs. tit. 11, §§ 5516(c), 5516(d)(1).

As noted above and in DOJ's regulatory proposal, the required firearms eligibility check must now be completed pursuant to Penal Code section 28220.<sup>18</sup> But Penal Code section 28220 does not provide any authority for DOJ to deny an individual based on an "undetermined" status. Rather, Penal Code section 28220 appears to expressly forbid DOJ from denying an individual simply because the background check resulted in an undetermined status.

Penal Code section 28220 states that whenever DOJ is "unable to ascertain the final disposition of . . . the purchaser's eligibility to purchase a firearm," the licensed firearms dealer processing the transaction is authorized to "immediately transfer the firearm to the purchaser."<sup>19</sup> Because no provision of the Penal Code authorizes DOJ to deny an individual who's background check resulted in an "undetermined" status, and rather expressly forbids such a denial, DOJ's proposed regulation directly contradicts California law. What's more, the burden of justifying a denial should, as a matter of policy, fall on DOJ—*not the individual*.

Moreover, prior DOJ rulemaking activity regarding recent changes to California's "assault weapon" laws also demonstrates how DOJ's proposed regulation is wholly unnecessary.<sup>20</sup> In connection with those regulations, DOJ implemented a firearms eligibility check system that was directly incorporated with CFARS as is the unique serial number application process. But this process did not deny an individual's "assault weapon" registration simply because the background check resulted in an undetermined status.

As a result, DOJ's proposed regulations regarding the denial of a unique serial number application to individuals based on an "undetermined" status fails to meet the required necessity, authority, and consistency standards of the APA.

#### IV. CONCLUSION

For the above reasons, DOJ's proposed regulations cannot be implemented as currently written because they violate the APA's necessity, authority, consistency, and clarity requirements, and otherwise conflict with existing federal law and regulations.

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



Matthew D. Cubeiro

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<sup>18</sup> Cal. Code Regs. tit. 11, § 5507(m) (proposed).

<sup>19</sup> Cal. Penal Code § 28220(f)(4).

<sup>20</sup> See Cal. Code Regs. tit. 11, §§ 5459-5478; See also OAL Matter Number 2017-0719-04.