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April 27, 2018

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Department of Justice
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Office of Administrative Law
300 Capitol Mall Suite 1250
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VIA U.S. MAIL AND EMAIL

Re: **PROPOSED REGULATIONS:
CERTIFICATE OF ELIGIBILITY**

Ms. Durfor,

On behalf of Firearms Policy Coalition, The Calguns Foundation, Firearms Policy Foundation, and California Association of Federal Firearms Licensees, I write you in opposition to the proposed Department of Justice (“DOJ”) regulations purportedly implementing administration of the Certificate of Eligibility pursuant to Penal Code section 26710.

CERTIFICATES OF ELIGIBILITY

Certificates of eligibility are permitted and governed by Penal Code section 26710, which states:

- (a) A person may request a certificate of eligibility from the Department of Justice.
- (b) The Department of Justice shall examine *its records and records available to the department in the National Instant Criminal Background Check System in order to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.*
- (c) The department shall issue a certificate to an applicant if the department’s records indicate that the applicant is not a person who is prohibited by state or federal law from possessing firearms.
- (d) The department shall adopt regulations to administer the certificate of eligibility program and shall recover the full costs of

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administering the program by imposing fees assessed to applicants who apply for those certificates.

STANDARD OF REVIEW

To withstand review by the Office of Administrative Law and comply with the Government Code, the proposed regulations must withstand scrutiny of the following factors: (1) Necessity, (2) Authority, (3) Clarity, (4) Consistency, (5) Reference, and (6) Non-duplication. (Gov't Code § 11349.1.)

A proposed regulation satisfies the requirement of “necessity” if 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.

(Gov't Code § 11349(a).)

A proposed regulation is consistent when it is “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov't Code, § 11349(d).)

A proposed regulation satisfies the “authority” requirement if a provision of law permits or obligates the agency to adopt, amend, or repeal a regulation. (Gov't Code § 11349(b).) An administrative regulation may not alter or amend a statute or enlarge or impair its scope and must be struck down by a court if it does so. In deciding whether a regulation alters, amends, enlarges, or restricts a statute, or merely implements, interprets, makes specific, or otherwise gives effect to a statute a court must interpret the meaning of the statute. In doing so, courts apply principles of statutory interpretation developed primarily in case law. It examines the language of the statute, and may consider appropriate legislative history materials to ascertain the will of the legislature so as to effectuate the purpose of the statute.

A proposed regulation satisfies the requirement of “clarity” if the record of the rulemaking proceeding demonstrates that the proposed regulations are “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” (Gov't Code § 11349(c).)

Finally, a proposed regulation satisfies the requirement of “consistency” if the record of the rulemaking proceeding demonstrates that the proposed regulations are in “harmony with, and not

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in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. (Gov't Code § 11349(d).)

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carryout those provisions of the statute, no regulation adopted is valid unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. (Gov't Code § 11342.2.) Here, the proposed regulations described below cannot stand as they are unnecessary, inconsistent, and beyond the authority of the Department of Justice to implement.

PROPOSED REGULATIONS

1. Proposed Regulation Section 4031(a) Is Not Necessary, Is Inconsistent With Statutory Law, And The Department Of Justice Lacks Authority To Implement This Provision.

Proposed section 4031 (a) defines "California Ammunition Vendor" or "CAV" as "an *individual* with a valid ammunition vendor license issued pursuant to Penal Code section 30342." (Emphasis added.) Penal Code section 30342, however, expressly states mandates that such licenses are mandated for "any person, firm, corporation, or other business enterprise."

The proposed definition is not necessary, as there is no justifiable reason to limit the definition solely to individuals. With regard to the Penal Code generally, private corporations stand on the same footing as individuals, since this statute provides that "person" includes corporation. *People v. Palermo Land & Water Co.* (Cal. App. Jan. 31, 1907), 4 Cal. App. 717. Moreover, the DOJ lacks the authority to implement the provision, since the regulation attempts to redefine the meaning of California Ammunition Vendors in such a manner that limits their applicability solely to a subset of those that the legislature included within the scope of Penal Code section 30342. Finally, the proposed regulation is inconsistent with the statutory scheme, which is demonstrated by the inclusion of firms, corporations, or other business enterprises in the set of entities that are entitled to California Ammunition Vendors within Penal Code section 30342.

2. Proposed Regulation Section 4031(a) Is Not Necessary, Is Inconsistent With Statutory Law, And The Department Of Justice Lacks Authority To Implement This Provision.

Proposed section 4031 (d) defines "Certificate of Eligibility" as meaning:

...that the Department has checked its records and the records available to the Department in the National Instant Criminal Background Check System and determined that the applicant is not prohibited from acquiring or processing firearms pursuant to Penal Code sections 29800, 29805, 29815, through 29825, and 29900, or Welfare and Institutions Code section 8100 and 8103, or Title 18,

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sections 921 and 922 of the United States Code, or Title 27, Part 478.32 of the Code of Federal Regulations at the time the check was performed *and which ensures that a person who handles, sells, delivers, or has under his or her custody or control any ammunition, is eligible to do so pursuant to Penal Code section 30347.*

(Emphasis added.)

This is inconsistent with the meaning of Certificate of Eligibility found in Penal Code section 26710(b), which void of any reference to the eligibility to possess ammunition and is limited to the eligibility of to possess, receive, own, or purchase *a firearm*, stating: “The Department of Justice shall examine its records and records available to the department in the National Instant Criminal Background Check System in order to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.” Moreover, subsection (c) mandates that the DOJ issue the Certificate if the person is not prohibited from possessing firearms. Thus, regardless of whether a person is prohibited from possessing ammunition, if they are permitted to possess firearms, the DOJ shall issue a Certificate of Eligibility.

Penal Code section 30347 does place a duty on the Department to notify vendors if the agent or employee with the Certificate of Eligibility becomes prohibited from possessing firearms or ammunition, but that duty to notify is a mandate separate and apart from the statutory mandate on issuing and administering certificates of eligibility, which is limited to firearm eligibility alone.

The DOJ lacks the authority the authority to change the meaning and scope of a Certificate of Eligibility, as the Legislature merely granted the DOJ the authority to administer the Certificate of Eligibility program – not redefine it.

Nothing has amended the meaning of Certificate of Eligibility in the decades since this term was originally established as part of Penal Code section 12071, and the fact that DOJ never sought fit to include the term ammunition when they promulgated the existing regulations demonstrates that this expansion is unnecessary. Furthermore, as a result of the overreach, this proposed definition which narrows the scope of permissible applicants, expands the scope of the DOJ duties, and is both inconsistent with Penal Code section 26710 and beyond the scope of the statutory authority granted to the DOJ, the definition is made even more unnecessary.

3. Proposed Regulation Section 4035(b)(2)(D) and 4037(b)(2) are Not Necessary, Are Inconsistent With Statutory Law, And The Department Of Justice Lacks Authority To Implement These Provisions.

Proposed section 4035(b)(2)(D) states that “we may need to share the information you provide us with any Bureau of Firearms representative or other persons designated by the Attorney General

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upon request.” Proposed Regulation 4037(b)(2) incorporates Section 4035(b)(2)(D) by reference. While the other disclosure provisions contained therein are limited to those authorized or mandated by federal or state law, this clause is open ended. Agreeing to this mandates that the applicant waive their privacy rights with regard to the information submitted during the process, which includes the applicant’s full name, residence street address, email address, telephone number, date of birth, gender, ATI number, country of citizenship, and alien registration number, their criminal history and mental health information, if any, their passwords for accessing their mandated electronic application system, and other private and personal information.

This waiver goes so far as permitting the disclosure of this information to any person designated by the Attorney General upon request. This is, essentially, a wholesale grant for the California Attorney General to use the personal information of firearms as they see fit, even for personal or political gain *and retribution*. The information contained in firearms databases are statutorily maintained in confidence. For example, Under the Public Records Act (PRA), government records are open and subject to inspection by and disclosure to the public, unless they are “exempt from disclosure by express provisions of law.” (Gov’t Code, § 6253, subd. (b).) The PRA specifically exempts certain types of documents from public disclosure, including those described in Government Code sections 6254 and 6255. In addition, Government Code section 6254, subdivision (k) incorporates confidentiality privileges set forth elsewhere in law, and makes those privileged documents exempt from the disclosure requirements of the PRA. The Department of Justice’s database containing information from Dealers’ Record of Sale information (including firearm ownership record) is specifically exempt from disclosure pursuant to Penal Code sections 11105 and 11106. Yet, the DOJ seeks to mandate that those seeking to comply with Chapter 3 waive their statutory rights to privacy.

And the Attorney General himself recognizes the existence and importance of privacy on his Web site about privacy laws, wherein he states, “The state Constitution gives each citizen an inalienable right to pursue and obtain privacy.” A.G. Xavier Becerra, “California Law - Constitutional Right to Privacy,” *Privacy Laws*, online at <https://oag.ca.gov/privacy/privacy-laws> (internal quotations omitted). Indeed, “All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy.” Cal. Const., Art. I, Sec. 1 (underline added).

There is no conceivable legal or rational basis to mandate that those seeking a Certificate of Eligibility to waive their rights to privacy relating to all the information submitted or obtained in the process. The inclusion of this mandatory waiver of privacy is in direct conflict with statutory and constitutional privacy rights and the DOJ lacks the legal authority to mandate that those seeking to comply with Chapter 3 give up their privacy rights.

4. Proposed Regulation Section 4039(b) Is Incomplete

Proposed Regulation 4039(b) provides a denied applicant the ability to challenge the denial by both seeking a copy of their criminal history record pursuant to Penal Code section 11121 and have those criminal history records corrected pursuant to 11126, if inaccurate. It does not,

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however, provide the same for applicants denied on the basis that they are incorrectly identified as prohibited from possessing firearms on non-criminal grounds, such as those prohibited by the Welfare and Institutions Code.

CONCLUSION

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carryout those provisions of the statute, no regulation adopted is valid unless consistent and not in conflict with the statute and is reasonably necessary to effectuate the purpose of the statute. (Gov't Code section 11342.2.)

Here, the proposed regulations discussed above cannot stand as they are unnecessary, inconsistent, beyond the authority of the Department of Justice to implement, and unclear. As such, we recommend that the department either delete or appropriately revise the above-referenced provisions.

Sincerely,
THE DAVIS LAW FIRM

s/ Jason Davis

JASON DAVIS

cc: Robert Wilson (Robert.Wilson@doj.ca.gov)