Finding of Emergency

March 10, 2020

Pursuant to the requirements of Government Code section 11346.1, subdivision (a)(1), the Department of Justice (Department) is providing notice of proposed emergency readoption of regulations regarding Identification Requirements for Firearms and Ammunition Eligibility Checks.

Submission of Comments

Government Code section 11346.1, subdivision (a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency.

The text of the proposed emergency regulations and the "Finding of Emergency" are posted on the Department's website at https://oag.ca.gov/firearms/regs/id-fa-ammo.

The Department plans to file the emergency rulemaking package with OAL at least five working days from the date at the top of this notice. After submission of the proposed emergency to the OAL, the OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

If you would like to comment on the proposed emergency regulation amendments or the Finding of Emergency, your comments must conform to the following:

- Be in writing only;
- Contain a notation that the comment is for OAL consideration in connection with proposed emergency regulations;
- Identify the topic of the emergency regulation, Identification Requirements for Firearms and Ammunition Eligibility Checks; and,
- Be received by both the Department and the OAL within five days of the Department's filing with OAL.

Responding to comments is strictly at the Department's discretion.

Send comments simultaneously to:

Department of Justice
Bureau of Firearms
Attn: Kamran Ali
P.O. Box 160487
Sacramento, CA 95816

Or Emergencyregs@doj.ca.gov

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Or staff@oal.ca.gov

Statement Regarding Compliance with Government Code Section 11346.1(e)

As explained herein, the Department of Justice (Department) has made substantial progress and proceeded with diligence toward compliance with Government Code section 11346.1, subdivision (e). Specifically, since the emergency readoption of the initial emergency regulations, the Department identified changes that are reflected in the regulations that the Department intends to adopt by regular rulemaking (Certificate of Compliance). These changes include adjusting fee provisions, amending forms incorporated by reference in the regulations, improving the overall clarity of the regulations based on feedback from the public and stakeholders, and creating and incorporating several additional forms into the regulations.

The Department has completed the 45-day comment period and is currently drafting the Final Statement of Reasons. A readoption of the emergency regulations is necessary because the Department will not be able to complete its review before the emergency regulations expire on March 31, 2020.

Statement Regarding Emergency Circumstances Since the Adoption of Emergency Regulations

The Department finds it necessary to readopt these emergency regulations because the circumstances demonstrating the existence of an emergency are unchanged since the initial adoption of the emergency regulations.

Subject Matter of Proposed Regulation Amendments

Identification Requirements for Firearms and Ammunition Purchases and Eligibility Checks.

Regulation to Be Adopted

Title 11, section 4045.1.

Regulations to Be Amended

Title 11, sections 4002, 4142, 5478.

Specific Facts Demonstrating the Need for Immediate Action

The Department is statutorily required to perform an eligibility check under state and federal law for all firearms purchases in California. The Department is also statutorily required to perform an eligibility check to determine eligibility to possess a firearm or ammunition under state and federal law in numerous other contexts. Eligibility checks are also required for certificates of eligibility, firearm ownership reports, law enforcement gun release applications, dangerous weapons license/permit applications, entertainment firearms permit applications, as well as for peace officer applicants, custodial officers, transportation officers, applicants to a basic course of training certified by the Commission on Peace Officer Standards and Training that includes the carrying and use of firearms, applicants for an explosives permit, and applicants for a permit to carry a concealed weapon. Eligibility checks are required for ammunition sales (as of July 1, 2019). Federal law prohibits certain categories of non-citizens from purchasing or possessing a firearm or

ammunition, including any alien who is "illegally or unlawfully in the United States." (18 U.S.C. § 922 (d)(5)(A), (g)(5)(A).)

California law requires a prospective firearms purchaser to present "clear evidence of [the purchaser's] identity and age." (Pen. Code, §§ 26815, subd. (c), 27540, subd. (c), 28215, subd. (a)(1).) A valid California driver license or identification card satisfies this requirement. (*Id.*, § 16400.) California law also requires a prospective ammunition purchaser to provide a driver license or identification card. (Pen. Code, § 30352, subd. (a)(2).) Before recent changes in the law, an applicant for a California driver license or identification card had to show to the Department of Motor Vehicles proof of lawful presence in the United States during the application process. (Cal. Code Regs., tit. 13, § 15.00.)

In 2013, California passed Assembly Bill (AB) 60, the Safe and Responsible Driver's Act, creating a driver license program for individuals who could not provide proof of lawful presence in the United States. (Stats. 2013, Ch. 524.) AB 60 became effective in 2015 and allows individuals to apply for a driver license or identification card in California regardless of their immigration status and without providing proof of lawful presence in the United States. AB 60 driver licenses and identification cards were distinguishable from regular California driver licenses and identification cards, by the notation "FEDERAL LIMITS APPLY" imprinted on the front. After the AB 60 licenses and identification cards became available, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued guidance to firearm dealers stating that because the AB 60 driver license or identification card "is only issued to a person who cannot provide proof of lawful presence in the United States," there is "reasonable cause to believe a potential transferee in possession of an AB [60] driver license is illegally or unlawfully in the United States and prohibited from receiving or possessing firearms or ammunition. As such, you may not transfer firearms or ammunition to the person. . . ." ("Open Letter to All California Federal Firearm Licensees," June 30, 2016.)

At the beginning of 2018, California began issuing driver licenses and identification cards in accordance with the federal REAL ID Act. Passed by Congress in 2005, the REAL ID Act enacted the 9/11 Commission's recommendation that federal government set standards for the issuance of sources of identification. Obtaining a REAL ID version of a driver license or identification card is optional. However, after October 1, 2020, California residents will need to have a REAL ID-compliant driver license or identification card (or another REAL ID-compliant identification, such as a passport), rather than a regular California driver license or identification card, to board a domestic flight or enter secure federal facilities. In 2018, the Department of Motor Vehicles began offering two types of identification—a federal compliant REAL ID driver license/identification card, and a federal non-compliant California driver license/identification card. The federal non-compliant California driver licenses and identification cards with the words "FEDERAL LIMITS APPLY" on the front are issued to <u>both</u>: (1) individuals applying under AB 60; and (2) individuals who are able to submit satisfactory proof that their presence in the United States is authorized under federal law, but choose not to apply for a "REAL ID" driver license or identification card. The AB 60 driver license/identification card is no longer distinguishable from a regular California driver license/identification card. It is thus unclear whether a person with a federal non-compliant California driver license or identification card is eligible to purchase a firearm under federal law, because that person was not necessarily required to submit satisfactory proof of lawful presence in the United States. Because of this change, ATF rescinded the June 30, 2016 open letter, by removing the letter from its website.

At the end of 2018, California passed another law, Senate Bill (SB) 244, affecting AB 60 driver licenses and identification cards, which went into effect on January 1, 2019. (Stats. 2018, Ch. 885.) That law prohibits AB 60 driver licenses and identification cards—those issued to persons who were not required to submit satisfactory proof of lawful presence in the United States—from being used as evidence of an individual's citizenship or immigration status for any purpose. (Veh. Code § 12801.9, subd. (l).) Because AB 60 driver licenses and identification cards are indistinguishable from other federal non-compliant California driver licenses and identification cards issued to individuals who have provided satisfactory proof of lawful presence in the United States, neither form of identification may be used to determine an individual's eligibility to purchase a firearm.

As set forth above, there have been significant changes recently to California driver licenses and identification cards, as well as to California law governing their use as evidence of citizenship or immigration status. These changes have affected the eligibility check process and have left firearm dealers and ammunition vendors, as well as law enforcement agencies, unable to rely on federal non-compliant licenses when determining whether a prospective purchaser or applicant is permitted to possess a firearm or ammunition, consistent with state and federal law.

Failure to act may result in significant public harm. The Department is concerned that firearm dealers and ammunition vendors may inadvertently sell firearms or ammunition to individuals who are not eligible under federal law because they are not lawfully present in the United States.

The result is widespread confusion for firearm dealers, law enforcement agencies, and the public. Current regulations do not address the recent changes to California law regarding California driver licenses and identification cards. Some firearm dealers have declined to sell firearms to persons who only have a federal non-compliant license or identification card without proof of lawful presence in the United States. But the Department has no way of knowing whether all firearm dealers follow the same protocol. Before the passage of SB 244, the National Rifle Association had advised firearm dealers to ask for additional information at their discretion if the dealer had "cause to believe the individual using one of these licenses may be prohibited from possessing firearms." (National Rifle Association Institute for Legislative Action, "California Special Alert: Update Regarding Use of Non-REAL IDs for Firearm Purchases," March 22, 2018.)

This confusion has had a negative financial impact on 1800 firearm dealers and their employees throughout the state, and will negatively impact 250 ammunition vendors (as of July 1, 2019). Also, firearm dealers that require additional documentation may lose business to those that do not require any additional documentation. This confusion also increases the risk that firearms or ammunition will be inadvertently sold to persons who are not eligible to make such purchases under federal law.

This emergency regulation is necessary to secure the eligibility check process, and to assist firearm dealers and ammunition vendors, as well as law enforcement agencies, to obtain sufficient information that will allow for an accurate determination of whether a prospective purchaser or applicant is permitted to possess firearms or ammunition, consistent with federal law.

Explanation of Failure to Adopt Nonemergency Regulations

The change to California driver licenses and identification cards that created confusion over identification requirements for firearms purchases took effect on January 22, 2018. The Department did not have advance notice of this change, and the issue came to the Department's attention through inquiries from firearm dealers and the public in the spring of 2018. Through the spring and summer of 2018, the Department was consulting with the California Department of Motor Vehicles and the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives, regarding the changes to California driver licenses and identification cards, and their effect on eligibility checks. The Department was also analyzing, preparing guidance, and drafting potential regulations regarding the driver license and identification card changes and their impact on the eligibility check process and firearms dealers' ability to comply with their obligations under federal law.

Senate Bill (SB) 244 had been introduced in the Legislature in 2017, but was substantively amended and ultimately passed by the Legislature on August 31, 2018. It was signed into law by the Governor on September 28, 2018. As described in the Finding of Emergency, the Department determined that SB 244, which was scheduled to take effect on January 1, 2019, would further impact the eligibility check process and firearms dealers' and ammunition vendors' ability to comply with their obligations under federal law.

On November 20, 2018, the Department issued guidance to firearm dealers suggesting that they consider asking prospective purchasers with federal non-compliant driver licenses or identification cards for additional documentation establishing lawful presence in the United States, as well as a consumer alert to California residents with a federal non-compliant license or identification that a firearm dealer may require additional documentation for firearm purchases.

Because the guidance issued by the Department is voluntary and not all firearm dealers follow the guidance, the Department has determined after six months that the guidance is not sufficient to address the threat of public harm resulting from changes in California law relating to California driver licenses and identification cards. The Department has also determined that the additional procedures required to secure the eligibility check process for firearm purchases should be implemented for all other eligibility check processes through which the Department determines whether an applicant is permitted to possess a firearm or ammunition. The Department thus needed to develop procedures and revise documentation for various types of eligibility checks, as part of this emergency rulemaking. The Department filed these proposed emergency regulations with the Office of Administrative Law on June 17, 2019.

Technical, Theoretical, and Empirical Study, Report, or Similar Document, Upon Which the Department Relied

National Rifle Association Institute for Legislative Action, "California Special Alert: Update Regarding Use of Non-REAL IDs for Firearm Purchases," March 22, 2018.

U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Open Letter to All California Federal Firearms Licensees," June 30, 2016.

Authority and Reference Citations

Authority: Sections 28060, 28100, 28155, 28215, and 28220, Penal Code.

Reference: Sections 832.15, 832.16, 13511.5, 16400, 18900, 18905, 23000, 26150, 26155, 26170, 26710, 26815, 27540, 27560, 27565, 27875, 27920, 27966, 28000, 28160, 28215, 28220, 28250, 29182, 29500, 30105, 30370, 31000, 31005, 32650, 32655, 32700, 32705, 32710, 32715, 33300, 33305, and 33850, Penal Code; Section 12101, Health & Safety Code; 18 U.S.C. § 922(d) and (g

Informative Digest/Policy Statement Overview

Penal Code section 28060 authorizes the Department to adopt regulations to allow the seller or transferor of a firearm or the person loaning the firearm, and the purchaser or transferee of a firearm or the person being loaned the firearm, to complete a sale, loan, or transfer through a firearm dealer. Penal Code section 28220 requires the Department to examine its records to determine if a purchaser or transferee is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm. Penal Code section 30370 requires the Department to approve the purchase or transfer of ammunition through a vendor to individuals who are not prohibited, and authorizes the Department to write regulations regarding this process. Further, the United States Code, Title 18, section 922, subdivisions (d) and (g), and the Code of Federal Regulations, Title 27, section 478.99, subdivision (c)(5) provide that an alien illegally or unlawfully in the United States is prohibited from owning or possessing firearms or ammunition.

The only way for the Department to fulfill its statutory obligation to determine that an individual is not prohibited from purchasing or possessing firearms or ammunition is through this emergency rulemaking. This regulation is also imperative for firearm dealers and ammunition vendors to determine that an individual is not prohibited. If this emergency regulation is not readopted, there will be continued uncertainty regarding firearms and ammunition sales in California for which the purchaser presents a federal non-compliant driver license or identification card, as well as continued uncertainty regarding eligibility checks involving federal non-compliant driver licenses and identification cards. This uncertainty increases the risk that firearms and ammunition will fall into the hands of individuals who are prohibited by either state or federal law, creating an imminent threat to the public safety and general welfare of California residents.

The Department has determined that this proposed regulation is not inconsistent or incompatible with existing state regulations which do not address the possibility that persons without lawful presence in the United States could hold a validly issued California driver license or identification card. In determining that the proposed regulations are not inconsistent or incompatible with existing state regulations, the Department performed a search of existing state regulations on this subject.

§ 4002. Miscellaneous Report Fees.

This section has been amended to update the revision dates of BOF forms 4542A, 4544A, 4010A, 4100A and 961 from 07/2017 to 12/2019. It also been amended to rename form 4542A from

"Firearm Ownership Record" to "Firearm Ownership Report" in order to be consistent with other firearm regulations sections.

§ 4045.1. Additional Documentation Requirements for Eligibility Checks.

This section describes "eligibility checks" as background checks based on any application or report for which an applicant is required to submit a driver license or identification card, or the number of a driver license or identification card, so that the Department may determine whether the applicant is eligible to possess a firearm or ammunition. California law requires eligibility checks in multiple contexts. This section is necessary to capture all eligibility checks required under California law. Furthermore, this section establishes guidelines regarding how copies of the driver licenses or identification cards and proof of lawful presence in the United States shall be retained by law enforcement agencies, firearm dealers, ammunition vendors, or submitted by the applicant.

Subdivision (a) states the basic requirement that when submitting any application or report for which an applicant is required to submit a driver license or identification card, or the number from a driver license or identification card, a copy of the applicant's driver license or identification card shall also be submitted. This subdivision is necessary to inform applicants that a copy of the applicant's driver license or identification card is required as part of the application or report.

Subdivision (b) establishes that if the applicant presents a federal non-compliant California driver license or identification card with the notation "FEDERAL LIMITS APPLY" on the front, instead of a REAL ID, the applicant shall also submit proof of lawful presence in the United States. In addition, this subdivision establishes and lists the forms of acceptable proof of lawful presence in the United States. This list of accepted documentation is drawn from the list the California Department of Motor Vehicles accepts as proof of lawful presence. (Cal. Code Regs., tit.13, § 15.00). This subdivision is necessary so that individuals with a federal non-compliant California driver license or identification card will know what additional document(s) they need to provide the Department when undergoing an eligibility check to purchase a firearm or ammunition.

Subdivision (c) addresses name mismatches. If the name on the driver license or identification card does not match the name on the document submitted in accordance with subdivision (b), the applicant must provide additional documentation as to the name change. The acceptable types of documentation are listed. This subdivision is necessary because it is common, whether due to marriage, divorce, or some other circumstance, that an individual's name may not match their birth certificate, passport, or other document listed in subdivision (b).

Subdivision (d) describes eligibility checks initiated by applications or reports submitted to the Department in a paper format and establishes how an individual shall prove lawful presence in the United States when using a paper form. These forms have been updated and are incorporated by reference, as it would be cumbersome, unduly expensive, or otherwise impractical to publish all of the forms listed in their entirety in the California Code of Regulations. This section is necessary to identify all the paper applications and reports that will be affected by the regulation.

Under Penal Code section 27560, subdivision (a), the "New Resident Report of Firearm Ownership," form BOF 4010A is used by individuals who are moving into California and wish to bring all of their California-legal firearms with them. These individuals must report the firearm(s)

to the Department. The Department has revised this form by adding language regarding the document(s) that should be included if the applicant has a "FEDERAL LIMITS APPLY" driver license or identification card and not a REAL ID. This was necessary so an individual will know what document(s) to include preventing the form from being returned without processing.

Under Penal Code section 28000, the "Firearm Ownership Report," form BOF 4542A is used by individuals who wish to report firearm ownership to the Department. The Department has revised this form by adding instructions that pertain to the requirements being adopted in section 4045.1. The Department has revised this form by adding language regarding the document(s) that should be included if the applicant has a "FEDERAL LIMITS APPLY" driver license or identification card and not a REAL ID. This was necessary so an individual will know what document(s) to include preventing the form from being returned without processing.

Under Penal Code section 27565, the "Curio or Relic Firearm Report," form BOF 4100A, is used by individuals who must report their out-of-state purchase of a curio or relic firearm. The Department has revised this form by adding language regarding the document(s) that should be included if the applicant has a "FEDERAL LIMITS APPLY" driver license or identification card and not a REAL ID. This was necessary so an individual will know what document(s) to include preventing the form from being returned without processing.

Under Penal Code section 27966, the "Collector In-State Acquisition of Curio or Relic Long Gun Report," form BOF 961 is used by individuals who must report their in-state acquisition of a curio or relic firearm. The Department has revised this form by adding language regarding the document(s) that should be included if the applicant has a "FEDERAL LIMITS APPLY" driver license or identification card and not a REAL ID. This was necessary so an individual will know what document(s) to include preventing the form from being returned without processing.

Under Penal Code sections 27875 and 27920, the "Report of Operation of Law or Intra-Familial Transaction," form BOF 4544A is used by individuals who must report the possession of a firearm by operation of law, or the transfer of a firearm to a family member (Intra-Familial transfer). The Department has revised this form by adding language regarding the document(s) that should be included if the applicant has a "FEDERAL LIMITS APPLY" driver license or identification card and not a REAL ID. This was necessary so an individual will know what document(s) to include preventing the form from being returned without processing.

Under various Penal Code statutes, the "Dangerous Weapons License/Permit(s) Application," form BOF 030, and the "Dangerous Weapons License/Permit(s) Renewal Application," form BOF 031, are used by individuals who wish to apply for or renew a dangerous weapons license or permit. The Department has revised these forms by adding language regarding the document(s) that should be included if the applicant has a "FEDERAL LIMITS APPLY" driver license or identification card and not a REAL ID. This was necessary so an individual will know what document(s) to include preventing the form from being returned without processing.

Subdivision (e) describes the eligibility checks initiated by applications and reports submitted electronically through the Department's California Firearms Application Reporting System (CFARS). This subdivision also indicates what forms to upload in CFARS to prove lawful presence in the United States. This subdivision is necessary to identify the forms that may be submitted electronically through CFARS.

Subdivision (f) describes the eligibility checks initiated by applications or reports submitted electronically through the Department's Dealer Record of Sale (DROS) Entry System. This subdivision also indicates what documentation an individual shall provide through the DROS Entry System to prove lawful presence in the United States. This subdivision is necessary to identify the forms that may be submitted electronically through the DROS Entry System.

Subdivision (g) addresses eligibility checks initiated by applications or reports submitted to other agencies that include fingerprint data to be used by the Department in order to determine whether an individual is eligible to possess a firearm or ammunition under state or federal law. This subdivision is necessary to inform other government agencies of what the Department has determined is acceptable documentation to prove lawful presence in the United States.

§ 4142. Application Forms.

This section has been amended to update the revision dates of BOF forms 030 and 031 from 01/2012 to 05/2019.

§ 5478. Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Voluntary Deregistration.

This section has been amended to update the revision dates of BOF form 4542A from 07/2017 to 12/2019.

Forms Incorporated by Reference

The only changes being made to these forms pertain to adding instructions that correspond to the requirements being adopted in section 4045.1.

Form BOF 030 (Rev. 05/2019), Dangerous Weapons License/Permit(s) Application

Form BOF 031 (Rev. 05/2019), Dangerous Weapons License/Permit(s) Renewal Application

Form BOF 961 (Rev. 12/2019), Collector In-State Acquisition of Curio or Relic Long Gun Report

Form BOF 4010A (Rev. 12/2019), New Resident Report of Firearm Ownership

Form BOF 4100A (Rev. 12/2019), Curio or Relic Firearm Report

Form BOF 4542A (Rev. 12/2019), Firearm Ownership Report

Form BOF 4544A (Rev. 12/2019), Report of Operation of Law or Intra-Familial Firearm Transaction

Mandate on Local Agencies or School Districts

The Department has determined the proposed emergency regulation does not impose a mandate or a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. It will not require local agencies or school districts to incur additional costs in order to comply with the proposed emergency regulations.

Duplication of State Statutes as Necessary to Satisfy Government Code Section 11349.1(a)(3)

To satisfy the requirements of Government Code section 11349.1(a)(6), the text of the proposed regulations are non-duplicative.

Other Matters Prescribed by Statute Applicable to the Agency or to Any Specific Regulation or Class of Regulations

None.

Fiscal Impacts

The Department has assessed the potential for significant adverse impact that might result from the proposed emergency action and has determined:

- There will be no non-discretionary costs or savings to local agencies
- There will be no costs to school districts
- There will be no costs or savings in federal funding to the State
- There will not be any cost or savings to any state agency