



## **INFORMATION BULLETIN:**

### ***LAWFUL INTERSTATE INTRA-FAMILIAL TRANSFERS OF FIREARMS*** **What California Gun Owners and Licensed Dealers Need to Know**

**MARCH 13, 2020**

Seeking to enforce existing federal firearm laws across the country, Attorney General William Barr launched “Project Guardian”<sup>1</sup> in late 2019. Intended as “a nationwide strategic plan to reduce gun violence,” Project Guardian will focus on investigating, prosecuting, and preventing firearm-related crimes. It will do so by enforcing the existing background check system for firearm purchases and coordinating prosecution with state and local officials, among other steps to be taken by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”).

On March 4, 2020, ATF held an information session for licensed firearm dealers to discuss the goals of Project Guardian. While it appears to target criminals using firearms in crimes and those who try to buy firearms illegally, there are some important takeaways for California gun owners and licensed firearm dealers alike. The following information has been prepared to discuss those takeaways, particularly in the context of what are known as “interstate intra-familial transfers” of firearms, and the impact of federal law on transfers between family members who reside in different states.

#### **I. FEDERAL FIREARM TRANSFER LAWS – IN GENERAL**

Federal law generally requires any person “engaged in the business” of selling or transferring firearms to possess a valid federal firearms license.<sup>2</sup> During the March 4, 2020, information session, ATF expressed its concern regarding some California law enforcement officers engaging in repeated transactions of handguns.<sup>3</sup>

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<sup>1</sup> See *Attorney General William P. Barr Announces Launch of Project Guardian – A Nationwide Strategic Plan to Reduce Gun Violence*, United States Department of Justice, <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-project-guardian-nationwide-strategic-plan> (Nov. 13, 2019).

<sup>2</sup> 18 U.S.C. § 922(a) (making it unlawful for any person “except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of . . . dealing in firearms”); See also 27 C.F.R. § 478.11 (defining “engaged in the business” as a “person who devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms”).

<sup>3</sup> This is not the first time ATF has expressed such a concern. In March 2017, ATF’s Los Angeles Field Division sent a memo to Southern California police chiefs and sheriffs warning them of the issue. See Greg

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Usually, the handguns in question were not listed on California’s roster of handguns certified for sale.<sup>4</sup> In these cases, the seller was found to be engaging in repeated transactions for the express purpose of making a profit. And because the seller did not themselves have a federal firearms license, they faced criminal liability for being “engaged in the business” of selling firearms without a federal firearms license.<sup>5</sup>

ATF also expressed concern regarding improper “straw purchases” of firearms, reminding those in attendance that the transferee/buyer must be the *actual* transferee/buyer of the firearm.<sup>6</sup> As stated on ATF form 4473, a “person is the actual transferee/buyer if he/she is purchasing the firearm for him/herself or otherwise acquiring the firearm for him/herself.”<sup>7</sup> The form gives the following as examples:

Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith (*who may or may not be prohibited*). Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer “**NO**” to question 11.a. The licensee may not transfer the firearm to Mr. Jones.

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Mr. Brown buys the firearm with his own money to give to Mr. Black as a gift (*with no service or tangible thing of value provided by Mr. Black*), Mr. Brown is the actual transferee/buyer of the firearm and should answer “**YES**” to question 11.a.<sup>8</sup>

In the above example of Mr. Smith and Mr. Jones, should Mr. Jones improperly answer “YES” to question 11.a. and do so knowingly and/or willfully, he would be violating federal law.<sup>9</sup> And if the licensed firearm dealer processing the transaction is somehow aware that Mr. Jones is not the actual transferee/buyer but nevertheless processes the transaction, the licensed firearm dealer would be equally culpable.<sup>10</sup>

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Moran, Lyndsay Winkley, *ATF Warns Southern California Law Enforcement Officers May Be Illegally Selling Guns*, The San Diego Union-Tribune, <https://www.sandiegouniontribune.com/news/public-safety/sd-me-atf-memo-20170412-story.html> (April 12, 2017).

<sup>4</sup> See Cal. Pen. Code §§ 31910, 32000, 32015. In general, these restrictions prohibit dealers from selling or transferring handguns unless the handgun is listed on the California Department of Justice’s roster of handguns certified for sale and are discussed in more detail below. See *Handguns Certified for Sale*, California Department of Justice, <https://oag.ca.gov/firearms/certified-handguns/search> (last visited March 6, 2020).

<sup>5</sup> In one example, a federal grand jury indicted two Gardena Police Department officers after selling approximately 100 firearms collectively. See *2 California Police Officers Accused of Illegal Gun Sales*, KCRA3, <https://www.kcra.com/article/2-california-police-officers-accused-of-illegal-gun-sales/19602138> (March 26, 2018).

<sup>6</sup> See U.S. Department of Justice, Bureau of Alcohol, Tobacco, *ATF E-Form 4473: Firearms and Explosives, Firearms Transaction Record*, <https://www.atf.gov/file/61446/download> (Revised October 2016).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (emphasis in original).

<sup>9</sup> See 18 U.S.C. § 924.

<sup>10</sup> For decades, ATF has partnered with the National Shooting Sports Foundation to prevent illegal “straw purchases” through the “Don’t Lie for the Other Guy” campaign. See <http://www.dontlie.org/>. Since doing so, firearm retailers have learned how to better identify potential straw purchasers.

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## II. CALIFORNIA LICENSING AND TRANSFER REQUIREMENTS

Absent certain exceptions, California law requires a license to sell, lease, or transfer any firearm.<sup>11</sup> But even if an exception to the license requirement applies, California law generally requires all transactions between unlicensed individuals to be processed through a California licensed firearms dealer.<sup>12</sup> Such transactions are typically referred to as “private party transactions” or “PPTs” for short.

One exception to California’s licensing requirement is for the “infrequent” transfer of firearms.<sup>13</sup> Prior to January 1, 2020, California law defined the term “infrequent” to mean less than six transactions per calendar year for handguns, and in the case of other firearms “occasional and without regularity.” But this changed with the adoption of Senate Bill No. 376 (“SB 376”) in 2019. As of January 1, 2020, the term “infrequent” now means both of the following are true:

- The person conducts less than six transactions per calendar year; and,
- The person sells, leases, or transfers no more than 50 total firearms per calendar year.<sup>14</sup>

In other words, unlicensed individuals are prohibited under from selling or transferring any number of firearms in more than five PPTs per calendar year, and under most circumstances can those transactions involve more than 50 firearms in total.<sup>15</sup>

### A. California’s Roster of Handguns Certified for Sale

As mentioned above, California generally prohibits the manufacture, importation for sale, keeping for sale, offering or exposing for sale, giving, or lending of any “unsafe handgun.”<sup>16</sup> While the definition of “unsafe handgun” is complex and changes depending on the type of handgun, gun owners and licensed firearm dealers need to know that all semiautomatic pistols designed and manufactured after May 17, 2013, are likely considered “unsafe handguns” because of California’s “microstamping” requirement.

Specifically, California law generally requires all semiautomatic pistols be “equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that

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<sup>11</sup> Pen. Code § 26500.

<sup>12</sup> Pen. Code § 27545.

<sup>13</sup> Pen. Code § 26520.

<sup>14</sup> Pen. Code § 16730. For purposes of this definition, the term “transaction” is defined as “a single sale, lease, or transfer of any number of firearms.” *Id.* What’s more, the restriction only applies to the seller/transferor, meaning a person acting as the buyer/transferee is not limited by this restriction.

<sup>15</sup> Besides the exception for “infrequent” transactions, there are additional exceptions to California’s licensing requirements for situations such as estate transfers and transfers to nonprofit public benefit or mutual benefit corporations for purposes of an auction, raffle, or other similar event. See, generally, Pen. Code §§ 26505-26590. Consult an attorney experienced in California firearm laws for more information about these exceptions and their applications to your situation.

<sup>16</sup> Pen. Code § 32000(a).

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are transferred by imprinting on each cartridge case when the firearm is fired.”<sup>17</sup> Although the law was written to take effect on January 1, 2010, it also required DOJ to certify the technology to be “available to more than one manufacturer unencumbered by any patent restrictions.”<sup>18</sup> DOJ issued this certification on May 17, 2013, thereby requiring any semiautomatic pistols designed and manufactured on or after that date to be equipped with microstamping technology.<sup>19</sup>

Microstamping has effectively prohibited the sale of any newly designed handgun because, even though DOJ has certified the technology as available and unencumbered by patents, it has been proven to be unworkable and otherwise wholly ineffective as no firearm with microstamping technology has been added to the list since the mandate took effect.<sup>20</sup> But there are also exceptions. Any semiautomatic pistol already listed on DOJ’s roster of tested handguns determined not to be unsafe need not be equipped with microstamping.<sup>21</sup> This requirement only applies to semiautomatic pistols, meaning revolvers and single-shot pistols do not need to be equipped with microstamping (but may still need to be listed on DOJ’s roster otherwise).<sup>22</sup> What’s more, handguns that are “curios or relics” as defined under federal law are also exempt.<sup>23</sup>

Certain types of transfers are also exempt from California’s roster restriction. These include PPTs as well as those exempt from the requirement that the transaction be processed by a California licensed firearms dealer.<sup>24</sup> Among those types of transactions are “intra-familial” transfers of a firearm by gift, bequest, intestate succession, or other means.<sup>25</sup> As is the sale of any “unsafe handgun” to “sworn members” of certain state and federal agencies such as the Department of Justice, a police department, a sheriff’s official, any federal law enforcement agency, and the military or naval forces of the United States.<sup>26</sup>

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<sup>17</sup> Pen. Code § 31910(b)(7)(A).

<sup>18</sup> *Id.*

<sup>19</sup> 2013-BOF-03: *Certification of Microstamping Technology Pursuant to Penal Code Section 31910, Subdivision (b)(7)(A)*, California Department of Justice, Division of Law Enforcement, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/infobuls/2013-BOF-03.pdf> (May 17, 2013).

<sup>20</sup> See C. Rodney James, *Why Microstamping and Bullet Serialization Won’t Work*, NRA-ILA, <https://www.nraila.org/articles/20080801/why-microstamping-and-bullet-serializat> (Aug. 1, 2008); *Mission Impossible: California Court Upholds Microstamping Law*, NRA-ILA, <https://www.nraila.org/articles/20180703/mission-impossible-california-court-upholds-microstamping-law> (July 3, 2018).

<sup>21</sup> Pen. Code § 31910(b)(7)(A).

<sup>22</sup> Specifically, all revolvers and pistols must generally satisfy California’s drop safety and firing requirements. See Pen. Code §§ 31900-31910.

<sup>23</sup> Pen. Code § 32000(b)(3).

<sup>24</sup> Pen. Code § 32100(a-b).

<sup>25</sup> Pen. Code § 27875(a). Nor do California’s “unsafe handgun” restrictions prohibit individuals moving into California with such handguns provided they are not doing so with the intent of selling them. See Pen. Code § 32000(a) (prohibiting importation into California *for sale*); See also Pen. Code § 27875(b) (exception to California’s importation restrictions for intra-familial transactions).

<sup>26</sup> Pen. Code § 32000(b)(4-6).

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As applied to some law enforcement agencies and their sworn members, however, the law expressly forbids California licensed firearm dealers from transferring an “unsafe handgun” acquired pursuant to the exception to another person who is not also somehow exempt.<sup>27</sup> This means “sworn members” of state agencies such as the Department of Parks and Recreation, Department of Alcoholic Beverage Control, and other agencies expressly listed in subdivision (b)(6) of Penal Code section 32000 cannot engage in PPTs.<sup>28</sup> California licensed firearm dealers knowingly and willfully processing such transactions face liability under both state and federal law.<sup>29</sup>

### III. INTRA-FAMILIAR TRANSACTIONS OF HANDGUNS NOT ON CALIFORNIA’S ROSTER

As noted above, “intra-familial” transactions need not be processed by a California licensed firearms dealer and are therefore exempt from California’s “unsafe handgun” restrictions. But to qualify for the exception, certain requirements must still be satisfied. Specifically:

- Transfers must be “infrequent” pursuant to Penal Code section 16730;
- Transfers must be between members of the same immediate family<sup>30</sup>;
- Within 30 days of taking possession, the person receiving the firearm must submit a report to DOJ regarding the transfer<sup>31</sup>;
- The person taking possession must have a valid firearm safety certificate<sup>32</sup>; and,
- The person must be at least 18 years of age or older.<sup>33</sup>

Even if the exception applies, nothing would prevent the transaction from being processed through a California licensed firearms dealer. Indeed, many intra-familial transactions are processed through California licensed

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<sup>27</sup> Pen. Code § 32000(c)(1).

<sup>28</sup> It should be noted that from a practical standpoint, the California licensed firearms dealer will likely be unaware of how the “unsafe handgun” was originally acquired unless the seller/transferor expresses this fact to the dealer at the time of the transaction. In such cases, the dealer cannot and should not process the transaction.

<sup>29</sup> See Pen. Code § 32000(c)(1); See also 18 U.S.C. 922(b)(2) (stating it is a violation of federal law for a licensed dealer to sell or deliver a firearm in violation of any state law or any published ordinance “unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation” of state or local laws).

<sup>30</sup> As used here, the term “immediate family” means either a parent/child or grandparent/grandchild relationship. Pen. Code § 16720.

<sup>31</sup> DOJ currently uses the “Report of Operation of Law or Intra-Familial Firearm Transaction” form for this purpose. *BOF 45441 (Rev. 05/2019): Report of Operation of Law or Intra-Familial Firearm Transaction*, California Department of Justice, Bureau of Firearms, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/oplaw.pdf> (May 2019). It is also possible to submit this form electronically by using the California Firearms Application Reporting System (“CFARS”). See <https://cfars.doj.ca.gov/login!displayLogin.do>. Historically, DOJ has encouraged those who failed to timely file these reports to still do so by declining to prosecute. This internal DOJ policy appears to still be in effect.

<sup>32</sup> See, generally, <https://oag.ca.gov/firearms/fscinfo>.

<sup>33</sup> Pen. Code § 27875(a)(1-5).

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firearm dealers simply because the parties to the transaction are unaware of the exception or not certain in its application. What's more, the intra-familial transaction form contains substantially similar information used in a Dealer Record of Sale ("DROS") transaction, which contains nearly identical fields for purchaser and firearm information.<sup>34</sup> Should a California licensed firearms dealer be presented with an intra-familial handgun transaction, it will generally process the transaction in DOJ's DROS Entry System ("DES") as a PPT.<sup>35</sup>

### A. Interstate Intra-Familial Transactions of Handguns Not on California's Roster

When an intra-familial transaction is conducted between family members who reside in different states, federal laws must also be considered. In general, federal law prohibits selling or transferring a firearm to a resident of a different state without first transferring the firearm to a dealer in the recipient's home state.<sup>36</sup> The only exception to this restriction is for firearms acquired through an estate of a recently deceased individual.<sup>37</sup> As a result, intra-familial interstate transfers of firearms to California residents must first be delivered to a California licensed firearms dealer to process the transfer as required under federal law.

California law does not expressly prohibit PPTs between residents of different states. That said, DES appears unable to process a PPT when the seller is a non-California resident who lacks a California Driver's License or ID. To resolve this issue, California licensed firearm dealers can still process the transaction as a "Dealer Handgun Sale" or "Dealer Long Gun Sale."<sup>38</sup> And in the case of a handgun that is not on DOJ's roster of handguns certified for sale, as an "Exempt Handgun Sale."<sup>39</sup>

DOJ's DES User Guide states California licensed firearm dealers should select "Exempt Handgun Sale" as the transaction type "when the handgun being purchased meets the Exempt Handgun definition; i.e. peace officer purchasing non-roster firearms without a waiting period exemption letter, *returning a firearm to its owner*, single shot / single action sale (per Penal Code section 32100), *etc.*"<sup>40</sup> While not expressly listed, this presumably includes PPTs and intra-familial transactions, as these exceptions to California's "unsafe handgun"

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<sup>34</sup> See *BOF 929 (Rev. 01/2014): Dealer's Record of Sale (DROS) Worksheet*, California Department of Justice, Bureau of Firearms, [https://des.doj.ca.gov/forms/DROS\\_Worksheet\\_BOF-929.pdf](https://des.doj.ca.gov/forms/DROS_Worksheet_BOF-929.pdf) (Jan. 2014); *cf. BOF 45441 (Rev. 05/2019): Report of Operation of Law or Intra-Familial Firearm Transaction*, California Department of Justice, Bureau of Firearms, <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/oplaw.pdf> (May 2019).

<sup>35</sup> According to DOJ's DES User Guide, the dealer would select "Private Party Handgun Transfer" as the transaction type in DES "when the individual selling or transferring a handgun is not a firearms dealer." *DROS Entry System (DES) Firearms Dealership User Guide* p. 41, California Department of Justice, Bureau of Firearms, [https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/dros\\_entry\\_guide.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/dros_entry_guide.pdf) (Dec. 29, 2017, Rev. 3).

<sup>36</sup> 18 U.S.C. § 922(a)(5). Similarly, it is also generally unlawful for a person to acquire a firearm outside of their state of residence without first having the firearm delivered to a licensed dealer in the purchaser's home state. 18 U.S.C. § 922(a)(3).

<sup>37</sup> *Id.*

<sup>38</sup> See *DROS Entry System (DES) Firearms Dealership User Guide* pp. 40, 52, California Department of Justice, Bureau of Firearms, [https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/dros\\_entry\\_guide.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/dros_entry_guide.pdf) (Dec. 29, 2017, Rev. 3).

<sup>39</sup> *Id.* at 44.

<sup>40</sup> *Id.* (emphasis added).

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restrictions are found in the same Penal Code as the exception for returning a firearm to its owner (which is expressly contemplated).<sup>41</sup>

#### IV. CONCLUSION

California licensed firearm dealers can accommodate interstate intra-familial transactions of handguns not on California's roster by processing the transfer as an "Exempt Handgun Sale" through DES. That said, individuals must not engage in unlawful "straw purchases" or make any false statements on the required 4473 form when acquiring the firearm from a licensed dealer. Should you have questions regarding a transfer, consult with an attorney experienced in state and federal firearm laws.

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<sup>41</sup> See Pen. Code § 32110. California license firearm dealers should also note in the "Comments" field for the transaction that the transfer is exempt pursuant to subdivision (b) of Penal Code section 32110 as an intra-familial transfer.

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