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VIA CERTIFIED U.S. MAIL & EMAIL

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**Re: Current Ongoing Unlawful DOJ Regulation & Enforcement Practice
Pre-Litigation Demand**

Attorney General Becerra,

We write on behalf of our clients the California Rifle & Pistol Association, FFLGuard, and hundreds of firearm retailers about recent unlawful actions by the Department of Justice (DOJ) and its Bureau of Firearms (BOF) that are preventing legally eligible firearm and ammunition purchasers and transferees from taking possession of their lawfully purchased property as they are entitled to under California state law and preventing licensed dealers from delivering said property.

In a recent publication to the Dealer's Record of Sale (DROS) DES system, the BOF is ignoring state law mandates regarding firearm and ammunition release procedures by posting a notice (the Notice), that is incorrect and contains a new regulation and enforcement practice. The Notice states:

Under Penal Code section 28220(f)(4), the Department of Justice (DOJ) has up to 30 days to complete background checks on purchasers of firearms and ammunition. Prior to the COVID-19 pandemic, DOJ typically completed these checks within Penal Code Section 26815(a)'s 10-day waiting period. COVID-19 protective measures have impacted the ability to increase the personnel resources in the DROS unit to address the recent sustained increase in firearms and ammunitions transactions without compromising the health and safety of our employees and the community. As a result, firearms and ammunition dealers and purchasers should know that

as DOJ employees continue to perform the statutorily required background checks throughout the COVID-19 pandemic, circumstances may compel that background checks are completed after the expiration of the 10-day waiting period. DOJ will continue to strive to provide the best service and complete these checks in the shortest time possible.

I. The Notice is Incorrect, and the DOJ's Action in Delaying Deliveries is Unlawful

The Notice and the corresponding actions taken by the DOJ in delaying the delivery of firearms pursuant to this notice is incorrect as a matter of law and constitutes an unlawful underground regulation and enforcement practice. (*See, e.g., Doe v. Becerra* (2018) 20 Cal.App.5th 330.) The notice confuses two separate and distinct duties and responsibilities placed upon two different entities.

The DOJ is obligated to process information relating to firearm transfers from licensed dealers that collect this information and submit it to the DOJ. Dealers may release firearms only after 10 days have lapsed, except under specific statutorily authorized circumstances. The DOJ has no authority to delay *all* transactions. Rather, the DOJ is statutorily empowered to delay the release of a firearm *only* “*if* the records of the department, or the records available to the department in the National Instant Criminal Background Check System, *indicate*” that the purchaser is likely prohibited. (Pen. Code, § 12280, subd. (f)(1)(A).) Only then may the DOJ take additional actions (and time) to further investigate that purchaser’s questionable record, and thus attempt to deny the release of a purchased firearm. (Pen. Code, § 12280, subd. (f).) And the release can be denied only if it is “prohibited by state or federal law.” (Pen. Code, § 12280, subd. (f)(1)(B).)

II. What State Law Requires: Waiting Period Versus Delay and the Correlated Duties

In order to understand the interplay and distinctions between waiting periods versus firearm delivery delays, and the DOJ’s duty to process applications and release firearms for delivery versus the Dealer’s restriction on releasing firearms before 10 days, consider the provisions that mandate the duties and restrictions.

A. Waiting Period – A Dealer’s Duty

California’s waiting period is dynamic under certain circumstances, but in General, when a person purchases a firearm in California, the individual must wait 10 days before the seller can deliver it. (Pen. Code, §§ 26815, 27540.) This general 10-day waiting period applies to all types of firearms. But there are exceptions for certain purchasers, including peace officers and special permit holders. (Pen. Code, §§ 26950, 26965.)

California’s general waiting period is the second longest in the country. Besides California, only eight States and the District of Columbia have any kind of waiting period. Four of those

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jurisdictions have waiting periods for all firearms.¹ The other five have waiting periods for only certain types of firearms.²

California's waiting period imposes a prohibition on the *delivery* of firearms by *California licensed firearm dealers*. Specifically, subdivision (a) of Penal Code section 27540 states that a **dealer** shall not deliver a firearm to a person:

Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.

Similarly, subdivision (a) of Penal Code section 26815 states that no firearm shall be **delivered**:

Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission to the department of any fee required pursuant to Section 28225, whichever is later.³

It is important to note that these Penal Codes do not state a firearm may only be delivered “after notice by the department.” If they did, this would give the DOJ carte blanche authority to delay the delivery of a firearm by a dealer. Rather, it permits the DOJ to delay the delivery of a firearm **only** upon notice pursuant to Penal Code section 28220. As described in detail below, Penal Code section 28220 also does not authorize the DOJ to delay any transaction, but rather mandates that the DOJ may delay those persons with specified indicators of prohibited status within the records examined and sets the **default delay for persons with specified indicators of prohibited status whose examination is inconclusive or incomplete at 30-days.**

¹ See Haw. Rev. Stat. Ann. § 134-2(e) (2016 Cum. Supp.) (14 days); Ill. Comp. Stat., ch. 720, §5/24-3(A)(g) (3 days for handguns, 1 day for long guns); R. I. Gen. Laws §§11-47-35(a)(1) (2016 Supp.), 11-47-35.1 (2012), 11-47-35.2 (7 days); D. C. Code Ann. §22-4508 (Cum. Supp. 2017) (10 days).

² See Fla. Stat. §790.0655 (2017) (3 days for handguns); Iowa Code Ann. §724.20 (3 days for handguns); Md. Pub. Saf. Code Ann. §§5-123 (2011), 5-124, 5-101(r) (Supp. 2017) (7 days for handguns and “assault weapons”); Minn. Stat. §624.7132 (2016) (5 business days for handguns and “semiautomatic military-style assault weapon[s]”); N. J. Stat. Ann. §2C:58-2(a)(5)(a) (7 days for handguns).

³ Emphasis added.

Importantly, the California legislature presumed a non-prohibition when it comes to the default status of the purchaser by permitting the dealer to deliver the firearm if the dealer has not been notified by the DOJ to deny or delay the transaction. This is true regardless of whether the DOJ has completed its background check. **Thus, for purchasers who have no indicators of a prohibited status, the default delay is 10-days.** But, as a safeguard, Penal Code section 28255 contains the following mandate:

[I]f after the conclusion of the waiting period described in Sections 26815 and 27540, the individual named in the application as the purchaser of the firearm takes possession of the firearm set forth in the application to purchase, the dealer shall notify the Department of Justice of that fact in a manner and within a time period specified by the department, and with sufficient information to identify the purchaser and the firearm that the purchaser took possession of.

This provides the DOJ notice and opportunity to recover any firearms from persons later determined to be prohibited from possessing firearms or ammunition: “If disqualifying information arises about an individual who has already taken possession of a newly purchased firearm, California has in place the APPS system, which is designed to retrieve such firearms from prohibited persons. The APPS system acts as a safety net for individuals who have been previously approved to possess a firearm, but who later become prohibited.” (*Silvester v. Harris* (E.D.Cal. 2014) 41 F. Supp. 3d 927, 965.)

B. Processing Delays – A DOJ Duty

A step-by-step analysis of Penal Code section 28220 details the statutory actions that the DOJ may or must perform upon the receipt of firearm purchaser’s information. Subdivision (a) provides the duty placed upon the DOJ by the legislature to process the information upon submission, and states as follows:

(a) Upon submission of firearm purchaser information, the **Department of Justice shall examine** its records, as well as those records that it is authorized to request from the State Department of State Hospitals pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser is a person described in subdivision (a) of Section 27535, or is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

The Legislature, having placed a time frame on the delivery of firearms by the dealer, has clearly mandated that the DOJ does not have the discretion to delay its examination, but rather placed a duty upon the DOJ to examine the specified records “upon submission of the firearm purchaser information.” The purpose, clearly stated, is to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning or purchasing a firearm.

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And, as part of its Penal Code section 28220 duties, the DOJ was provided 9 duties with notification components: 2 discretionary duties and 7 mandatory duties.

The first notice provision addressing delays, Penal Code section 28220 subdivision (f)(1), mandates that the DOJ *immediately* notify the dealer to delay the transfer of firearms under very limited circumstances. Specifically, the DOJ may notify the dealer to delay the transfer *if* the DOJ specified records *indicate* that the purchaser falls within a very specific category of individuals who are likely to be prohibited and only where the DOJ is unable ascertain whether the purchaser is prohibited from possessing, receiving, owning, or purchasing firearms:

(f)(1)(A) The department *shall immediately* notify the *dealer* to *delay* the transfer of the firearm to the purchaser *if* the records of the department, or the records available to the department in the National Instant Criminal Background Check System, *indicate one of the following*:

(i) The purchaser has been taken into custody and placed in a facility for mental health treatment or evaluation and may be a person described in Section 8100 or 8103 of the Welfare and Institutions Code and the department is unable to ascertain whether the purchaser is a person who is prohibited from possessing, receiving, owning, or purchasing a firearm, pursuant to Section 8100 or 8103 of the Welfare and Institutions Code, *prior to the conclusion of the waiting period described in Sections 26815 and 27540.*

(ii) The purchaser has been arrested for, or charged with, a crime that would make him or her, if convicted, a person who is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm, and the department is unable to ascertain whether the purchaser was convicted of that offense *prior to the conclusion of the waiting period described in Sections 26815 and 27540.*

(iii) The purchaser may be a person described in subdivision (a) of Section 27535, and the department is unable to ascertain whether the purchaser, in fact, is a person described in subdivision (a) of Section 27535, *prior to the conclusion of the waiting period described in Sections 26815 and 27540.*

(B) The dealer shall provide the purchaser with information about the manner in which he or she may contact the department regarding the delay described in subparagraph (A).⁴

Significantly, each of the three reasons not only require that the DOJ have identified specific information within its records before instituting a delay, but that the identification of the information within its records have occurred “prior to the conclusion of the waiting period...” And, the requirement that the DOJ be “unable to ascertain” whether the applicant is prohibited from possessing, receiving, owning, or purchasing a firearm implies that the DOJ actually examine the records as obligated by Penal Code section 28220 subdivision (a). This section does not grant the DOJ discretion in its ability to delay the delivery of firearms pursuant to Penal Code sections 26815 and 27540.

In sum, Penal Code section 28220 provides a mandate upon the DOJ to examine its records and make determinations regarding the eligibility of applicants to purchase, acquire, and possess firearms. And, it provides certain notice requirements relating to actual determinations made in the examination process. It does not, however, provide any discretionary provision or mechanism by which the DOJ can delay firearms on its own accord. And, Penal Code section 28820(f)(4), being applicable to only those individuals who have specified indicators, provides a

III. The DOJ DROS System Entry Log-In Notice and Application

At least as early as April 3, 2020 and thereafter, licensed California firearm dealers began contacting our office and our clients regarding their inability to deliver firearms after the 10-day waiting period. On Monday April 6, 2020, the DOJ DROS System Entry Log-In Notice provided a notice to its dealers, which stated in part:

Under Penal Code section 28220(f)(4), the Department of Justice (DOJ) has up to 30 days to complete background checks on purchasers of firearms and ammunition.

On the contrary, Penal Code section 28220(f)(4) does not grant the DOJ the 30 days to complete background checks on purchasers of firearms and ammunition. Rather, it mandates that the DOJ delay the delivery of firearms to purchasers who have specific indicators within the records examined by the DOJ. Penal Code section 28220(f)(4) implicitly mandates that the DOJ must actually examine its records prior to the expiration of the applicable 10-day waiting period and prior to any delay being initiated.

In fact, Section 28220(f)(4) was enacted after the Department of Justice was sued over rampant delays in processing firearm purchase applications. (Assembly Bill 500, 2013 - 2014 Reg. Sess.) Indeed, DOJ and BOF staff have encouraged and facilitated the State in its design, development, implementation, maintenance, and enforcement of California’s increasingly complex regulatory scheme—including the implementation Penal Code section 28220(f)(4) after

⁴ Emphasis added.

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the being sued for systematically violating the rights of California residents and failing in its duty to timely process firearm applications. And the State authorized only limited powers of delay to the DOJ pursuant to Penal Code section 28220(f)(4), *none* of which are discretionary.

The Notice and delays in accordance with this Notice confuse the duties of the DOJ to process applications with the 10-day waiting period, stating:

Prior to the COVID-19 pandemic, DOJ typically completed these checks within Penal Code Section 26815(a)'s 10-day waiting period. COVID-19 protective measures have impacted the ability to increase the personnel resources in the DROS unit to address the recent sustained increase in firearms and ammunitions transactions without compromising the health and safety of our employees and the community. As a result, firearms and ammunition dealers and purchasers should know that as DOJ employees continue to perform the statutorily required background checks throughout the COVID-19 pandemic, **circumstances may compel that background checks are completed after the expiration of the 10-day waiting period.** DOJ will continue to strive to provide the best service and complete these checks in the shortest time possible.

On its face, this statement provides an explanation for the delayed background checks. But the Notice is being promulgated as an explanation to the DOJ's refusal, via the Dealer Record of Sale Entry System, to permit licensed California firearms to deliver firearms after the 10-day waiting period has lapsed. While we understand the serious nature of the current Pandemic and the burdens it has placed upon not only the DOJ, but the entire world, the actions of applying a blanket delay on the delivery of firearms creates an additional burden for the DOJ.

Even if the delays were lawful, every delay increases the DOJ's burden. Penal Code section 28220(f)(1) mandates the additional step of notifying the dealer of the delay. Penal Code section 28220(f)(2) mandates the additional step that the DOJ notify the purchasers *by mail* of the delay. And, Penal Code section 28220(f)(3) requires that the DOJ immediately notify the dealer upon the purchaser being deemed eligible to possess firearms. The addition of these burdens, at a time of "sustained increase in firearm and ammunition transactions," do not reduce the burden placed upon the DOJ, but rather they amplifies the burden on the DOJ. And, as described above, it does not negate the duty to continue the examination.

If DOJ and BOF simply *complied with the State's law* it would likely significantly reduce their backlog and corresponding labor required to perform statutorily mandated duties. Moreover, "[n]ot all DROS applications go to the processing queue for an analyst to review . . . If a DROS application has been checked by all of the databases, and there are no hits or matches found in any of the databases, then that DROS application is considered 'auto-approved' and is not put into any queue for a CIS Analyst to review." (*Silvester v. Harris*, FINDINGS OF FACT AND CONCLUSIONS OF LAW, 41 F. Supp. 3d 927, 952 (E.D. Cal. 2014).) "Approximately 20% of all DROS applications

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are auto-approved and do not go into the DROS application queue for review by a CIS Analyst.” (*Id.* at 953.)

IV. Conclusion

The DOJ does not have 30 days to process applications for firearms and ammunition, as stated in its Notice. For purchasers who have no indicators of a prohibited status, the default delay is 10-days. This shall be extended for persons whom, after the DOJ has examined their records and determine that specified indicators of prohibited status exist, in order to permit the DOJ to continue their examination of records and determine their status. For that limited set of individuals, the DOJ must continue its examination and if the DOJ determines that the individual is not prohibited, the DOJ shall immediately inform the dealer that they shall release the firearm. For those individuals whose examination is inconclusive or incomplete, a default maximum delay of 30-days protects their rights, and the DOJ shall inform the dealer that they may deliver the firearm.

In addition to direct costs and impacts to our organizations, our members and similarly situated members of the public are being harmed by the Notice and enforcement of it. We respectfully demand that you direct DOJ and BOF to immediately cease and desist enforcement of their unlawful actions of delaying the delivery of firearms and ammunition for those applicants whose determination can be made on the basis of the statutorily identified records within your and their custody and control.

We look forward to hearing from you promptly.

Sincerely,

A handwritten signature in black ink, appearing to read "C.D. Michel", written in a cursive style.

C.D. Michel

cc: Robert Wilson, Deputy Attorney General (BOF), robert.wilson@doj.ca.gov
John Echeverria, Deputy Attorney General, john.echeverria@doj.ca.gov