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December 10, 2009

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Honorable Rich Gordon
Honorable Rose Jacobs Gibson
Honorable Adrienne Tissier
COUNTY OF SAN MATEO
BOARD OF SUPERVISORS
400 County Center, 1st Floor
Redwood City, CA 94063
VIA OVERNIGHT MAIL

Re: Opposition to Proposed Ordinance Regulating Firearm Dealers and Ammunition Vendors

Hon. Supervisors:

We write on behalf of our clients the National Rifle Association (NRA) and the California Rifle and Pistol Association (CRPA), as well as the hundreds of thousands of their members in California. Our clients oppose adoption of a the ordinances currently being considered by the San Mateo County Board of Supervisors ("BOS"). Various provisions of these proposals unlawfully burden business, are preempted by state law, and/or violate the constitutional right to keep and bear arms.

The BOS is considering an ordinance that would require anyone "engaged in the business of selling, leasing, or otherwise transferring any firearm, firearms component, or ammunition" (together "Dealers"[1]) to obtain a "law enforcement permit" (hereinafter "Permit") annually from the Sheriff when operating within any unincorporated areas of San Mateo County. Although we recognize that requiring a license to operate as a business for firearm dealers generally has been held to be legal, it is doubtful that all "dealers" of firearms *components* and/or ammunition can legally be subjected to such a requirement. We write in the hope of alerting you to some not so obvious legal issues in advance so the BOS may make an informed decision.

[1] 3.57.011(f) defines "engaged in the business" as: "conduct[ing] a business by the selling, leasing, or transferring of any firearm, firearm component, or ammunition, or to hold one's self out as engaged in the business of selling, leasing, or transferring of any firearm, firearm component, or ammunition, or to sell, lease, or transfer firearms, firearm components, or ammunition in quanity, in series, or in individual transactions, or in any other manner indicative of trade."

In addition, to satisfy any possible notice of claim requirement, please consider this correspondence notice of our intent to sue for injunctive and declaratory relief and damages in the event the BOS votes to adopt the proposed ordinances in its present form. If we prevail in such action, we will seek to recover any and all attorneys' fees as provided by federal and state law.

ANALYSIS

The proposed ordinance is wrought with a multitude of pre-conditions, failure to satisfy any of which could result in refusal to issue or the revocation of the Permit. Most of these conditions not only hamper legitimate business but are also unlawful.

For example, in order for a Dealer to conduct business in San Mateo County, the Dealer, among other things, must:

1) procure a Permit;
2) have all employees background checked (who have access to firearms, firearms components, or ammunition);
3) fortify security at the business location with security cameras, structural reinforcement, etc.;
4) purchase a minimum $1,000,000 liability insurance policy;
5) record all ammunition sales (including long-gun ammunition) with: the date of transaction, name, address, and date of birth of transferee; number on government-issued photo identification of transferee, the brand, type, caliber or gauge, and amount of ammunition transferred, the transferee's signature, the name of the transferor who processed the transaction, and the transferee's thumb print;
6) within 5 days of any ammunition transaction, electronically transfer all records thereof to the Sheriff;
7) store all records of ammunition sales on the premises of the business for 5 years;
8) if firearm sales represents 50% of business, prohibit persons under 18 years of age from entering store, and prohibit persons under 21 years of age if handguns are sold, *kept* or *displayed*;
9) check identification of persons entering the business to make sure they are of a legal age to enter;
10) provide a biannual inventory report to the Sheriff (in addition to the inventories for ATF and DOJ); and
11) find a location for the business that is not in a residential zone or within 1,500 feet of any school, pre-school, day-care facility, park, community center, place of worship, liquor store, bar, youth center, video arcade, amusement park, or other Dealer.

This extensive list of conditions, which is not exhaustive, is itself testimony to the substantial burden that would be placed on legitimate businesses by the proposed ordinance, as well as to the practical deficiencies with the proposed ordinance.

Promoters of this ordinance claim it is legally sound in its entirety. They are wrong. As discussed

in more detail below, several provisions are either flatly unlawful or present unresolved, novel legal issues which can only be resolved with litigation.

I. The Ammunition Sales Records Provision Is Preempted by State Law

Proposed section 3.57.019 requires registration of all ammunition sold. It contains a sunset provision for handgun ammunition sold after February 1, 2011 in an attempt to avoid conflict with state law that will go into effect at that time. Nonetheless, this provision still runs afoul of California's preemption doctrine insofar as it requires Dealers to collect and maintain records of ammunition purchases. A local firearms regulation will be struck down where state law either *expressly* or *impliedly* preempts the local law. Under California's implied preemption doctrine, a local regulation will be struck down where it conflicts with state law, i.e., duplicates state law, contradicts a state law, or enters into a field fully occupied by the state[2] to the exclusion of local regulation.(*Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895 [70 Cal.Rptr.3d 324].)

A. The Ammunition Sales Records Provision Enters A Field Fully Occupied by State Law

The State Legislature recently passed, and Governor Schwarzenegger signed, Assembly Bill 962 ("AB 962"). AB 962 is a comprehensive regulation of ammunition vendors. AB 962 provides for virtually identical record-keeping requirements for handgun ammunition as the proposed provision has for all other ammunition.[3] AB 962 further mandates: the secure display of handgun ammunition on the premises,[4] face-to-face transactions of handgun ammunition,[5] presentation of bona fide evidence of identity from all transferees of handgun ammunition,[6] prohibitions on certain employees handling handgun ammunition,[7] and prohibitions on transferring *any* ammunition to certain prohibited persons.[8]

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[2] A local ordinance "enters a field fully occupied" by state law either expressly or impliedly. (*Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.App.4th 893, 898*). A law impliedly occupies a field when: 1) the subject matter has been so fully and completely covered by general law as to clearly indicate that is has become exclusively a matter of state concern; 2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or 3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. (*Id.*)

[3] See AB 962 at *Penal Code section 12061(a)(3).*

[4] See AB 962 at *Penal Code section 12061(c)(2).*

[5] See AB 962 at *Penal Code section 12318(a).*

[6] *Id.*

[7] See AB 962 at *Penal Code section 12061(a)(1).*

[8] See AB 962 at *Penal Code section 12316(a)(C).*

Even before AB 962 passed, state law already extensively regulates ammunition transactions in general. Specifically, provisions in Penal Code section 12316 prohibit the transfer of any ammunition to a person under 18 years of age and handgun ammunition to any person under 21 years of age. Penal Code section 12071.4(d) provides how ammunition being sold at a gun show can be displayed to and handled by potential buyers. Based on the content of AB 962 "so fully and completely" covering handgun ammunition transactions, transacting in handgun ammunition "has become exclusively a matter of state concern."

The legal issue that the drafters of these proposals have neglected to highlight is whether the transacting in long-gun ammunition is a separate field from that of handgun ammunition, or if ammunition regulation is one single legal "field." We maintain the latter is true, as supported by the pre-AB 962 Penal Code provisions mentioned above. The proposed provision enters into an area (i.e., a legal field) occupied by state law and is thus preempted. Of course, this is a case of first impression, as AB 962 was just recently passed. This issue will need to be litigated in order to be answered definitely. And our clients are prepared to do so.

B. The Ammunition Sales Records Provision Contradicts State Law

A local ordinance 'contradicts' state law when it is inimical to or cannot be reconciled with state law.[9] Since a provision of the ordinance requires record-keeping of long-gun ammunition transactions, the BOS would be passing a law that conflicts with the Legislature's intentions regarding ammunition transactions. While the State chose to mandate ammunition records be kept for transactions involving *handgun ammunition*, it deliberately chose to exclude long-gun ammunition transactions from that requirement. The *expressio unius* maxim requires that legislative omissions be considered intentional.[10] Under this maxim, the intent of the Legislature was to exclude long-gun ammunition from record-keeping requirements.

Thus, regardless of whether State law fully occupies the field of ammunition transactions as we maintain in section 1, proposed section 3.57.019 is preempted by state law because it is inimical thereto.

C. The Ammunition Sales Records Provision Frustrates State Law

"If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (*Fiscal v. San Francisco, 158 Cal.App.4th 895, 911*). As mentioned, the Legislature has enacted a comprehensive statutory regime regarding ammunition transactions. AB 962 was primarily intended to prevent prohibited persons from obtaining handgun ammunition by providing law

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[9] (*Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.App.4th 893, 898*), citing *Ex Parte Daniels (1920) 183 Cal. 636, 641-648.*

[10] Expressio unius est exclusio alterius: the expression of one thing signifies the exclusion of others. (See e.g. Lukhard v. Reed (1987) 481 U.S. 368 [95 L.Ed.2d 328], Omni Capital Int'l v. Rudolf Wolff & Co. Ltd., (1987) 484 U.S. 97, 106 [108 S.Ct. 404, 98 L.Ed.2d 415].); see also People v. Jose A. (1992) 5 Cal.App.4th 697 noting People v. Norwood (1972) 26 Cal.App.3d 148, 156; People v. Rowland (1999) 75 Cal.App.4th 61 [88 Cal.Rptr.2d 900].)

enforcement with detailed records of those transactions. The proposed provision would necessarily result in ammunition vendors retaining vastly more records than envisioned by the Legislature under AB 962. This would not only cause confusion for ammunition vendors as to their obligations under AB 962, but would also cause more work for law enforcement officers in the process of searching for records of an illicit *handgun* ammunition purchase. Thus, the proposed provision "stands as an obstruction to the accomplishment and execution of the full purposes and objectives of the legislative scheme regulating ammunition transactions." (*Id.*)

II. Restricting the Admittance of Persons Under 21 Years of Age Is Unlawful

Section 3.57.020(a)(1) of the proposed ordinance prohibits entry of any person under 21 years of age into a store where firearms transactions represent at least 50% of business and where handguns are sold, kept or displayed. This provision is not only practically unsound in that it puts a significant and unnecessary burden of liability on firearm dealers, it is also illegal and unconstitutional.

A. The Age Provision Violates the Equal Protection Clause of the U.S. Constitution

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Proponents of the ordinance point out that California case law in *Suter v. City of Lafayette, 57 Cal.App.4th 1109* clearly says that an ordinance prohibiting unaccompanied minors from entering premises where the sale of firearms is the primary business is legal under Equal Protection. But those proponents failed to point out that the ordinance in *Suter* only prohibited *minors*, i.e., those under *18 years of age*. The proposed ordinance before the BOS includes those under *21 years of age*. This distinction is relevant for two reasons.

First, those over 18 but under 21 years of age have a right to purchase long guns and long-gun ammunition under California law[11]. This is a fundamental right under the Second Amendment to the U.S. Constitution. (See *District of Columbia v. Heller*,128 S.Ct. 2783). Because it is a fundamental right, any law that makes a classification involving that right is now subject to strict scrutiny (See *Maher v. Roe, 432 U.S. 464, 470*). In *Suter*, the court applied rational basis review because: 1) the case was decided pre-*Heller*; and 2) because it involved a class of people (minors) who are not permitted under law to purchase any firearm.

Thus to justify the prohibition of those between 18 and 21 years of age, the county would be required to show a court that the provision is narrowly tailored to serve, and actually does serve, a compelling governmental interest. No such showing can be made.[12] There are already state and federal laws that are both more narrow and far more effective. Those laws prohibit gun stores from selling a firearm to minors and require background checks before a purchase is approved. Further, the unconstitutionally wide breadth of this provision becomes apparent when you consider that those between 18 and 21 years of age would be prohibited from entering a store that only sold long guns if the owner (or an employee) carried or kept under the counter a handgun in the store; or if there was a handgun hanging

[11] CA Penal Code section 12072(b)

[12] As a policy consideration, minors illegally purchasing firearms, those purchases are virtually never from gun stores anyways.

on the wall as a decoration.[13]

Second, even if the court were to apply a rational basis review with guidance from *Suter*, this provision would not withstand that scrutiny as to those between 18 and 21 years of age. In upholding the ordinance at issue in that case in the face of an Equal Protection challenge, the *Suter* court reasoned that "because minors have a *legitimate reason* for entering sports or department stores that sell merchandise other than weapons or weapons-related goods, a rational basis exists for distinguishing between such businesses and those that primarily sell weapons."[14] (Emphasis added.) Unlike minors, those between 18 and 21 years of age do have a "legitimate reason" to be in a store that primarily sells firearms. In fact, they have a reason so legitimate that it is protected by both the Second Amendment to the U.S. Constitution and California law: to purchase firearms and ammunition for self defense or hunting.

B. The Age Provision Violates the Second Amendment of the U.S. Constitution

As the United States Supreme Court held in its recent landmark decision, *District of Columbia v. Heller* 128 S.Ct. 2783, the Second Amendment to the United States Constitution guarantees the right of individuals to keep and bear arms. The State Legislature has made it clear that the Constitutional right to self-defense includes the right of all law-abiding Californians over the age of *18 years* to own, possess, and use firearms within the sanctity of their own homes and businesses for lawful self-defense – without interference from local government entities. (Cal. Pen. Code § 12026). Additionally, *McDonald v. Chicago* is currently pending before the United States Supreme Court. That case will resolve the issue of whether the Second Amendment is "incorporated," thereby restraining local governments from infringing on the individual right to keep and bear arms.

In the coming months following the Supreme Court's decision in *McDonald*, there will likely be numerous "test case" lawsuits filed throughout the nation, many in California. The validity of local restrictions on the access to firearms by non-prohibited persons will be among the issues litigated. And the right to keep and bear arms "necessarily includes the right to purchase them..." (*Andrews v. State, 50 Tenn. 165, 178*, a case cited repeatedly by the Supreme Court in *Heller*).

Thus, the imposition of a provision by a local government that restricts access to persons otherwise legally able to purchase firearms will amount to an unconstitutional restraint on the right to keep and bear arms after the *McDonald* decision is issued.

C. The Age Provision Violates the First Amendment of the U.S. Constitution

Firearm retailers sell not only firearms, but books, pamphlets, and magazines on a wide variety of generally associated topics including gun control, gun safety, the history of firearms, firearms technology, and military history. There is nothing corrupting about a person between 18 and 21 years of age viewing the firearms themselves in this context. The proposed provision will therefore face constitutional challenge under the First Amendment's guarantees of freedom of the press and of expression generally.

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[13] See proposed ordinance section 3.57.020(a)(1): prohibits entrance of anyone under 21 years of age if the business "sells, *keeps or displays*" handguns. (Emphasis added.)

[14] *Suter*, 57 Cal.App.4th 1109, 1133

Again, to justify such a prohibition under strict scrutiny, the county would be required to show a court that the provision is narrowly tailored to serve, and actually does serve, a compelling public interest. No such showing can be made. There are already in place state and federal laws that are both narrower and far more effective. Those laws bar gun stores from selling a firearm to minors and require background checks before a purchase is approved.

D. The Age Provision Violates State and Federal Preemption Principles

Not only does state law specifically allow those over 18 but under 21 years of age to purchase firearms (Penal Code section 12072(b)) and long gun ammunition (Penal Code section 12316(b)), but federal law does as well (18 USCS section 922(b)(1)). With these laws, both the federal and sate Legislatures have expressed their intention to occupy the field of which age groups should have access to firearms and ammunition. Otherwise, local governments could easily violate their residents' civil rights by setting arbitrary age limits to enter a gun store, which in effect prohibits their access to a constitutionally protected right. Furthermore, the proposed ordinance directly contradicts the same state and federal laws for the same reasons.

III. The Dealer Inventory Provision is Expressly Preempted by State Law

Proposed section 3.57.021 requires licensed firearms dealers to take a physical inventory of their firearms and submit a list of "each firearm held by the licensee by make, model, and serial number,"as well as every lost or stolen firearm, to the Sheriff twice each year. Despite assertions to the contrary by proponents of the ordinance, this is a "registration" law, as that term has been defined by California's Supreme Court after a careful review of the language and legislative history of California's firearms laws. As such, the proposed provision contravenes Government Code section 53071 ("Section 53071") which expressly prohibits local governments from enacting any regulation *"relating to"* firearms licensing or registration.

The scope and preemptive effect of Section 53071 was analyzed less than two years ago, when California's Court of Appeal (First District, Division Four; the same district in which San Mateo County lies) affirmed an extensively briefed June 2006 trial court decision invalidating a San Francisco ordinance that sought to ban handgun possession and firearm or ammunition sales within the City and County of San Francisco. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal. App. 4th 895 [70 Cal. Rptr. 3d 324].) Among other holdings, the trial court had declared San Francisco's handgun ban expressly preempted under Section 53071 because it constituted or "related to" firearms *licensing* – something Section 53071 expressly forbids. The appellate court panel, after considering a myriad of *amicus* briefs from local and nation-wide organizations, unanimously agreed with the trial court's determination. Tellingly, this decision is downplayed or ignored by the proponents of these ordinances.

Under *Fiscal,* if this provision is deemed merely to be "relating to" firearms licensing or registration, it will be struck down. Proponents of this provision insist, without citing any legal authority, that this is not a "registration" law because it does not record the *identity* of the purchasers or owners of firearms. But the case law supports our position on this. We would be willing to brief this issue in detail upon your request, as the legal discussion is too lengthy for the purposes of this correspondence.

IV. The Zoning Provision is Unlawful

Proponents of the proposed ordinance rely on a 2006 case out of Minnesota as authority for the

legality of proposed section 3.57.018 – the zoning provision.[15] In that case, a firearm dealer challenged a zoning ordinance on Equal Protection grounds that required him to locate away from churches and schools. Although the court upheld the ordinance in that case, the precedent is almost worthless, for two reasons: 1) it is not binding authority from our Circuit (Ninth); and more importantly, 2) it was decided prior to the U.S. Supreme Court's ruling in *Heller*.

The fact that it was a pre-*Heller* decision is relevant as to the level of scrutiny the court applied. In the Minnesota case, the court applied rational basis scrutiny, finding the dealer's claim involved neither a suspect class *nor a fundamental right*. While firearm dealers may not be a suspect class in the eyes of the law, the law remains uncertain as to whether a fundamental right is involved when regulating the accessibility of firearms, through firearms dealers, to the general public. As mentioned, some courts have already determined the right to keep and bear arms "necessarily includes the right to purchase them..." (*Andrews v. State, 50 Tenn. 165, 178*).

Thus, if a fundamental right is involved, the analysis under the Minnesota case is not applicable to the proposed provision. Since the individual right aspect of Second Amendment jurisprudence remains in its infancy, there is little guidance on what analysis applies. But there is another fundamental right which has been analyzed thoroughly, and which shares similar accessibility issues with the right to keep and bear arms that may provide insight into courts' possible analysis: the right to abortion. Just as the ability of a woman to secure a safe abortion is "inextricably bound up with" the freedom of physicians to perform the abortions, so is the ability of people to secure a constitutionally protected firearm "inextricably bound up with" the freedom of firearm dealers to supply the firearms and buyers to purchase them.

A court in Ohio was faced with the question wether a zoning ordinance relegating abortion providers to controlled use property was legal.[16] After finding that the zoning ordinance was more than a *de minimis* "obstacle in the path of a woman's freedom of choice," the court ruled to overturn the ordinance. It reasoned that abortion is a fundamental right and thus subject to strict scrutiny: "in finding the standard of review, the important fact is that this lawsuit concerns women's abortion rights, not that the resolution is a zoning law."[17]

Similarly, the proposed ordinance before the BOS places a more than *de minimis* obstacle in the path of residents of San Mateo County wanting to purchase a firearm, also a constitutionally protected fundamental right. And although public safety is generally a legitimate government interest, continuing the abortion analogy, that interest must be weighed against the nature and degree of the burden on the right to bear arms. Further, because a fundamental right is involved, the BOS must be able to show *facts* that support the concerns about the dangers of having Dealers in a certain area, not simple

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[15] *Koscielski v. Minneapolis*, 435 F.3d 898 (8th Cir. 2006)

[16] *Haskell v. Washington Township*, 635 F.Supp 550

[17] *Id.* at 557

pronouncements of *possible* dangers.[18] Although the BOS, and proponents of the ordinance, cite a litany of statistics in the Purpose section of the proposed ordinance about gun crime in general, not a single one shows any link between the location of Dealers and the dangers associated with firearms.

Even if the proposed zoning provision were otherwise valid, regulations involving fundamental rights must employ the least restrictive means necessary to achieve the interest. There already exist myriad laws prohibiting firearms from being: carried in public while loaded, discharged in public, brandished, possessed within 1,000 feet of a school zone, etc. Enforcement of these laws are a less restrictive and more efficient means of achieving the County's interest.

Furthermore, the BOS has not shown that there exists any land available in the unincorporated parts of San Mateo where a Dealer can operate in compliance with the proposed ordinance. The county may need to produce a survey showing the available lands for Dealers. Even if there does exist such land, relegating Dealers to undesirable, inaccessible locations will still constitute an unconstitutional burden.

There are also Equal Protection issues here. As mentioned, the Minnesota case cited by proponents of the ordinance as authority that there is no Equal Protection violation where a zoning ordinance singles out a firearm dealer was pre-*Heller* and thus applied an obsolete analysis. A proper analysis, under strict scrutiny, would require consideration of the zoning requirements for similarly situated businesses. Pharmacies, jewelry stores, banks, check-cashing operations are regularly robbed for prescription drugs, money and valuables, thereby causing a potentially dangerous situation for neighboring areas. Yet there is no such requirement that they be zoned away from churches, schools, parks, etc.

V. Firearm Components Vendors Cannot be Forced to Purchase Liability Insurance

Proposed section 3.57.017 requires any Dealer to purchase a *minimum* liability insurance policy of $1,000,000. Proponents of the ordinance point out that the *Suter* case upheld an ordinance requiring firearm dealers (who sell functional firearms) to purchase liability insurance, in the face of an Equal Protection challenge, for the proposition that businesses merely selling firearm *components* can also be forced to buy such policies. Firearm dealers argued that they were being unlawfully discriminated against because other businesses did not have to purchase such insurance policies. The court disagreed. It based its holding, at least in part, by comparing the magnitude of harm that can potentially be caused by the negligent transfer of a firearm from a dealer with that of other businesses. But there is no comparable harm that can be caused by selling mere firearm *components*.

Furthermore, we believe that the *Suter* court's analysis as to firearm dealers was flawed and could be challenged in good faith post-*Heller*. The court went into a lengthy discussion of why firearms dealers are different from car vendors. However, it failed to make more apt comparisons, such as: 1) a grocery or

[18] See *City of Renton v. Playtime Theatres, Inc. 475 U.S. 41*, holding that cities/counties may zone adult businesses if there is a reason unrelated to the content of the "speech" to do so, such as "to preserve the quality of urban life;" but that the cities/counties must support their reasons for doing so with facts. Although *Renton* held that a city or county need not conduct its own original study regarding the facts, they must still provide some factual showing from another city/county's study or other source. This means the BOS must show facts that Dealers make an area more dangerous, which it has failed to do.

liquor store, bar, or restaurant could negligently sell alcohol to a minor who dies or kills someone while drinking and driving; 2) pharmacies could negligently dispense pills that could seriously harm or kill a person or end up in the wrong hands; 3) a restaurant could fail to warn a person who has allergies to certain foods; etc.

VI. Local Law Enforcement Licenses are Unlawful as Applied to Firearm Component and Ammunition Vendors

Proponents of the ordinance point out that the *Suter* case interprets Penal Code section 12071 as permitting local regulation of firearm dealer licensing. However, those proponents cite no law for the proposition that local governments can require firearm *component* or ammunition vendors to obtain a law enforcement license. This is likely because proponents know such a requirement is unlawful.

First, as mentioned, the Legislature has expressed its intention to occupy fully the field of ammunition transactions. Early drafts of AB 962 considered licensing requirements for handgun ammunition vendors but the Legislature ultimately opted to omit it. This is evidence of the Legislature's intent for mere ammunition dealers to not be subject to such licensing schemes.

Second, there is no rational basis for requiring a law enforcement license from a vendor of mere firearm *components*.

VII. The Employee Background Check Provisions Are Illegal

A. Certificate of Eligibility from DOJ

Proposed section 3.57.013 lists the information required to be divulged by applicants for a License. Proposed section 3.57.013(5) requires the applicant to provide:

> *A certificate of eligibility form the state Department of Justice under Penal Code Section 12071* for *each individual identified in Sec. 3.57.013*, demonstrating that the person is not prohibited by state or federal law from possessing firearms or ammunition." (Emphasis added.)

Proposed section 3.57.013 includes not only the License applicant himself, but:

> "all persons who will have access to or control of workplace firearms, *firearm components*, or *ammunition*, including but not limited to, the applicant's employees, agents and/or supervisors, if any."

However, state law only authorizes certificates of eligibility for employees of *firearm* retailers. Section 12071(b)(20) of the California Penal Code provides:

> *Firearms dealers may* require any agent *who handles sells, or delivers firearms* to obtain and provide to the dealer a certificate of eligibility from the [DOJ]..." (Emphasis Added.)

The language of 12071(b)(20) indicates that the Legislature intended to limit the persons subject

to a certificate of eligibility to those who handle *firearms* (not mere firearm components or ammunition) as an agent for a *firearms dealer* (not a firearm components or ammunition vendor). Thus, Section 3.57.013(5)'s requirement that all persons with "access to or control of" firearm components or ammunition is invalid because it conflicts with an area of law fully occupied by the state and is thus preempted. It also contradicts state law by imposing an impossible condition on ammunition vendors; specifically: forcing employees of ammunition vendors to obtain certificates of eligibility when state law expressly says they cannot.

B. Information Provided to Sheriff

Proposed section 3.57.014 requires any employee or agent of a Dealer with access to firearms, *firearm components*, or *ammunition* to provide to the Sheriff: "fingerprints, a recent photograph, a signed authorization for the release of pertinent records, and any additional information which the Sheriff considers necessary to complete the investigation." This requirement is also preempted by state law on three distinct grounds.

First, the classes of employees that may be subjected to background checks is a field occupied fully by the state. This is indicated by the various provisions in California law that so thoroughly regulate what an employer can require and in what instances.[19] Further evidence of the Legislature's intent in this area is the aforementioned Penal Code section 12071. Because the Legislature details when a firearm dealer *may* conduct certain background checks and *expressly* allows local jurisdictions to conduct additional background checks on employees of *firearm* dealers, seems to suggest the Legislature must expressly provide for when background checks can be conducted. The lack of a similar provision for ammunition and firearm components vendors evinces the Legislature's intent not to require or allow background checks on them.

Second, as mentioned, the field of ammunition transactions has been fully occupied by the state. AB 962 already lays out the requirements of employers when employing people, i.e., they must not employ a person they know or should know is prohibited from possessing ammunition under state or federal law.[20] If the Legislature intended to allow local regulation in this area, it would have expressly stated such, in light of the comprehensive nature of AB 962.

Finally, as written, proposed section 3.57.014 is unlawful as to firearm dealers as well, because it duplicates state law requirements and is thus preempted thereby. (See *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895). California Penal Code section 12071(a)(1)(D) already requires that any firearm dealer must have a Certificate of Eligibility issued from the DOJ. Proposed section 3.57.014

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[19] See Penal Code sections 12077.5(g) (No person or agency may require or request another person to obtain a firearms eligibility check or notification of a firearms eligibility check pursuant to this section. A violation of this subdivision is a misdemeanor); 12071(b)(20)(a) discussed above; and 11105 (b)(11) the Attorney General can only furnish state summary criminal history information to a county or city for employment purposes when: BOS/city council approves and it is for determining specific criminal conduct committed by a specific person. See also section 8104 of Welfare & Institutions Code limiting the release of a person's mental health records by DOJ to specific situations. This list are only some examples, it is not exhaustive.

[20] See Penal Code section 12061(a)(1).

reiterates the same requirement. Such a duplication of legal obligations is therefore preempted by state law.

C. The Required Background Checks for Employees Handling Firearm *Components* Violates Equal Protection

As with most provisions in the proposed ordinance, there is no rational basis for requiring a background check from an employee of a vendor of mere firearm *components*, especially when it is not known what qualifies as a "firearm component" in the first place. (See next paragraph).

VIII. Miscellaneous Issues with Ordinance

A. Lack of Definition for "Firearm Components" Makes Ordinance Unlawfully Vague

Such a comprehensive legal scheme should make it obvious to whom it applies. Is someone who sells a scope, firearm sighting systems, a gunsmith considered a dealer of "firearm components?" What about a person who sells paintball equipment that could be used on a firearm? The principle that laws must not be excessively vague is deeply rooted in the constitutional guarantee of due process of law[21]. The lack of a definition for "firearm components" makes the proposed ordinance vague as to whom the law applies, thereby creating due process issues.

B. The Ordinance Violates Due Process Because It Is Motivated by a Political Animus

The amount of obligations imposed on Dealers by the proposed ordinance shocks the conscience, particularly when you consider that as far as we could discover *there currently are no Dealers in the unincorporated parts of San Mateo.* Despite that fact, this extremely dense ordinance was suddenly introduced at a special meeting. What was so pressing that a regular meeting could not be held on the matter?

This is not an issue for San Mateo, but rather the result of gun control groups pushing their agenda in the Bay Area. The proposed ordinance is being "shopped" to various local governments, including ABAG, by the Legal Community Against Violence ("LCAV"). In fact, on September 9, 2009, a memorandum was distributed to ABAG, encouraging its members to adopt the very ordinance currently being considered by the BOS. However, thus far no other member of ABAG, out of its 101 city and 8 other county members, has acted to adopt this ordinance. There is a reason these cities and counties find this ordinance unpalatable.

LCAV's involvement casts a suspicious cloud over this proposal and its hasty consideration. Why was a *special meeting* called to consider the ordinance if there currently are no dealers in unincorporated San Mateo County? Why has no other county or city in ABAG adopted this ordinance?

We respectfully submit these questions to the BOS for its consideration of the motivation behind this ordinance.

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[21] See *Grayned v. City of Rockford, 408 U.S. 104, 108-109 .*

CONCLUSION

Besides the legal issues, there are significant practical problems presented by these types of ordinances which we believe should be addressed immediately. We suggest that the BOS consult with Dealers and their representatives, in order to understand the ramifications of implementing the proposed ordinance.

In light of these potential liabilities imposed on Dealers by this ill-conceived ordinance, the NRA, CRPA and their many members must oppose it. It is not the intention of the NRA, CRPA or individual gun owners to frustrate legitimate regulations. But as the *Fiscal* court warned: "the goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law. . .Therefore, when it comes to regulating firearms, local governments are well advised to tread lightly."[22]

If you have any questions or concerns, please feel free to contact us.

Sincerely,
MICHEL & ASSOCIATES, P.C.

C.D. Michel

CDM/sb

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[22] See *Fiscal v. City and County of San Francisco*, (2008) 158 Cal. App. 4th 895, 919

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