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March 2, 2015

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RE: Proposed "Emergency" Regulations Regarding Firearm Safety Certificates and Safe Handling Demonstrations Currently Under OAL Review —OPPOSITION

To Whom It May Concern:

We write on behalf of our clients, the National Rifle Association ("NRA"), the California Rifle and Pistol Association ("CRPA"), and *FFLGuard*, as well as their respective members and clients throughout California, among them firearm dealers, distributors, instructors, and owners. We also represent the plaintiffs in *Belemjian v. Harris*, Case No. 15-00029, an ongoing lawsuit against the Department of Justice for its failure to properly adopt regulations regarding the Firearm Safety Certificate Program and the long-gun safe-handling demonstrations prior to January 1, 2015.

On February 17, 2015, the Department issued a notice of proposed emergency action to adopt regulations regarding the FSC Program. It submitted its proposed regulations to the Office of Administrative Law ("OAL") on February 25, 2015, seeking an emergency exception to the requirements of the California Administrative Procedures Act ("APA").

We write to express our clients' concerns regarding the Department's proposed regulations currently under review by the OAL and to dispute the Department's designation of them as "emergencies" that should bypass the formal procedures of the APA.

I. BACKGROUND

A. The Firearm Safety Certificate Program

On October 11, 2013, Governor Jerry Brown signed Senate Bill 683 into law. The bill created the Firearm Safety Certificate ("FSC") Program, an expansion and replacement of the now-defunct

Handgun Safety Certificate (“HSC”) Program. The new FSC Program took effect on January 1, 2015, over a year after being signed into law. In pertinent part, the bill prohibits any nonexempt person from purchasing or receiving any firearm, except an antique firearm, without a valid FSC and prohibits any person from selling, delivering, loaning, or transferring any firearm to any nonexempt person who does not have a valid FSC. (Pen. Code, §§ 27540, subd. (e), 31615, subds. (a)-(b).)¹ Violation is a misdemeanor. (Pen. Code, § 31615, subd. (b).) To be clear, an FSC is only necessary to *receive* a firearm, not to *possess* one.

If a person does not possess an FSC when attempting to purchase or receive a firearm, he or she may acquire one by paying up to \$25 (Pen. Code, § 31650, subd. (a)) and successfully completing a written test administered by a Department-certified instructor (Pen. Code, §§ 31640, 31645, subd. (a)). After passing the test administered by a certified instructor, the applicant is to be immediately issued an FSC that is valid for five years. (Pen. Code, § 31645, subd. (a).) If an FSC is lost or completely destroyed, one can obtain a duplicate certificate by asking the issuing instructor for one, proving one’s identity, and paying up to \$15. (Pen. Code, § 31660.)

Only Department-certified instructors may administer the firearm safety test and issue FSCs. To become a certified instructor, a person must meet the prerequisite skill, knowledge, and competency. (Pen. Code, § 31635, subd. (a).) Specifically, applicants must obtain a certification to provide training from an organization specified by Penal Code section 31635, subdivision (b), or any entity found by the Department to give comparable instruction in firearm safety. Alternatively, the applicant must have training similar or equivalent to that provided by an organization specified by Penal Code section 31635, subdivision (b).

Prior to January 1, 2015, to become a certified instructor under the former HSC Program, one was required to: (1) file a completed application with the Department; (2) specify which authorized organization he or she received training from; (3) attach a copy of the certification (initial applicants only); and (4) *either* provide a copy of their COE *or* enclose \$14.00 for a background check. There was no requirement that certified instructors acquire a valid COE or reapply for one annually.

On January 1, 2015, the Department released its Firearm Safety Certificate Program DOJ Certified Instructor Application. The new form requires applicants to: (1) file a completed application with the Department; (2) specify which authorized organization he or she received training from, attach a copy of the certification (initial applicants only); and (3) provide a copy of their valid COE. Under the proposed regulations, certified instructors must reapply for a COE each year.

B. The Safe-Handling Demonstrations

Subject to certain exemptions, Senate Bill 683 also created the requirement that most people purchasing a long gun from a licensed firearm dealer perform a long-gun safe-handling demonstration with the firearm to be transferred. (Pen. Code, § 26860, subds. (a), (d).) The law further requires the firearm dealer to “sign and date an affidavit stating that the requirements of subdivision (a) [i.e.,

¹ In the case of a handgun transfer, however, “an unexpired handgun safety certificate may be used.” (Pen. Code, 31615, subd. (a)(1).) Other exceptions to the FSC requirement can be found at sections 31700-31835.

completion of long-gun safe-handling demonstration] and the regulations adopted [by the Department] pursuant to subdivision (b) have been met.” (Pen. Code, § 26860, subd. (c).) Failure on the part of the firearm dealer to require a safe-handling demonstration before transfer of the firearm can result in the forfeiture of the dealer’s California Firearm Dealer’s license. (Pen. Code, § 26800.)

Prior to January 1, 2015, only transfers of handguns required the completion of a safe-handling demonstration. (Former Pen. Code, § 26860, subd. (a) (2014).) The criteria for handgun demonstrations are *expressly* codified in the Penal Code. (Pen. Code, §§ 26853, 26856, 26859.) The criteria for long-gun demonstrations are not so codified. Instead, section 26860, subdivision (b), requires the Department to “adopt regulations establishing a long gun safe handling demonstration that shall include, at a minimum, loading and unloading the long gun” *not later than January 1, 2015*. The Department, however, did not formally promulgate regulations regarding the long-gun safe-handling demonstration as it was statutorily mandated to do during the full year between adoption of the law and its taking effect.

C. The Department’s Current Requirements Governing the FSC Program

On October 2, 2014, the Department sent letters to all “California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities” expressly outlining “the new FSC program, *requirements* for DOJ Certified Instructors; *requirements* for Comparable Entities; and existing Handgun Safety Certificate program updates.” (A copy of that letter is attached hereto as Exhibit A.)

According to the Department’s October 2, 2014 letter, “the Department plan[ned] to utilize a web-based application to make FSC materials available, including the Firearm Safety Certificates, test materials, the FSC study guide and the FSC manual to all DOJ Certified Instructors.” (Ex. A, p. 1.) The letter also set forth, in pertinent part, several new “requirements” not previously required under the HSC Program that are generally applicable to all those engaging in the FSC Program and govern the manner in which the Department is to implement the FSC Program. (Ex. A, pp. 1-3.) Those rules, which the Department considers effective as of January 1, 2015, to the present, require that:

- (1) All certified FSC instructors have access to a personal computer, printer, and email;
- (2) All certified FSC instructors obtain a COE that must be renewed annually;
- (3) All FSC Program payments be made by major credit card; and
- (4) All certified FSC instructors include the “steps in long gun safety” procedures in the “FSC Manual” in all long-gun safe-handling demonstrations.

The requirements set forth in the Department’s October 2, 2014 letter are found nowhere in the California Code, and they are not mere restatements of statutory law. They were not formally noticed by the Department or any other state agency as required by the APA. There was *no* period for oral or written public comment. And the Department provided no reasons for the proposed regulations, any alternatives considered, or the effect the regulations would have on individuals.

C. The Pending OAL Petition and Lawsuit Challenging the Current FSC Regulations

On December 29, 2014, our office filed a petition with the OAL seeking a determination that the rules outlined in the Department's October 2 letter regarding the FSC Program are improper underground regulations as defined in the APA. (See Gov. Code, § 11346.) Notice of this petition was properly given to the Department on the same day the petition was filed. The OAL's determination on that petition is currently pending and can be expected in the next few weeks. (A copy of that petition is attached as Exhibit B.)

On January 6, 2015, our office filed a lawsuit in Fresno County Superior Court challenging the Department's current rules regarding the FSC Program on behalf of individuals Kim Belemjian, Jonathan Fairfield, T.J. Johnston, Matthew Pimentel, and Stanley Roy, and organizations CRPA and *FFLGuard*. The lawsuit, *Belemjian v. Harris*, alleges that each rule is in fact a "regulation" under the APA, and because the rules were adopted by the Department without following the required APA procedures, the Department has denied both the plaintiffs' and the public's statutory right to be heard and to provide input regarding regulations governing a program that significantly affects them. (A copy of the operative complaint is attached as Exhibit C.)

In response to the *Belemjian* complaint and a January 8, 2015 communication from our office offering to engage in alternative dispute resolution, Deputy Attorney General Jeffrey Rich, counsel for the Department, sent a letter to our office on January 9, 2015, indicating the Department's intention to bypass the regular rule-making procedures of the APA and, instead, proceed with the adoption of "emergency" regulations in connection with the FSC Program. (A copy of that letter is attached as Exhibit D.) The Department did not submit its proposed "emergency" regulations to the OAL until February 25, 2015—over six weeks later.

Given the pending lawsuit, and the current petition pending before the OAL, the proposed "emergency" regulations by the Department should be carefully scrutinized before further action is taken on them. Such scrutiny will reveal that the Department acted improperly when it initially unveiled regulations regarding the FSC Program and safe-handling demonstration, and that it continues to act improperly by seeking emergency status of those same regulations. Its efforts should be rejected.

II. THE DEPARTMENT'S PROPOSED "EMERGENCY" REGULATIONS ARE IMPROPER BECAUSE NO EMERGENCY EXISTS

Emergency regulations are not subject to the regular notice and comment procedures set forth in the APA. The emergency rule-making process, rather, has specific requirements outlined in section 11346.1 of the Government Code. The state agency must mail and post a notice of emergency action to every person who has filed a request for notice of regulatory action with the agency at least five working days before filing an emergency regulation with OAL. (Govt. Code, § 11346.1, subd. (a)(2).) That notice must include the specific language of the regulation to be adopted and a "finding of emergency." (*Id.*, § 11346.1, subds. (a)(2)(A)-(B).)

According to state law, "[e]mergency" means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Govt. Code, § 11342.545.) To establish a sufficient "emergency" to justify bypassing the important notice and comment requirements of the APA, the Department "must make a finding of emergency by *describing specific*

facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation,” unless the situation is expressly deemed an emergency by statute. (*Emergency Regulations Adoption Process*, Office of Administrative Law, http://www.oal.ca.gov/Emergency_Regulation_Process.htm (last visited Feb. 27, 2015), citing Govt. Code, § 11346.1, subd. (b)(2), double emphasis added.)

In addition, if the emergency existed and was known by the agency in sufficient time to have been addressed through non-emergency regulations, the finding of emergency shall include facts explaining the failure to address the situation through non-emergency regulations. ***A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, is not adequate to demonstrate the existence of an emergency.***

(*Ibid.*, double emphasis added.)

A. The Department’s “Finding of Emergency” Does Not Sufficiently Demonstrate that the Proposed Regulations Are Necessary to Avoid Serious Harm to the Public

The Department’s “Finding of Emergency” relies heavily on overstated claims that the regulations are necessary for the management of the FSC Program and that, without them, retail firearm sales will essentially stop, bankrupting firearms dealers in a matter of weeks and exposing the State to costly litigation. Notably, however, the Department provides absolutely *no* evidence that this would be the case, as it is required to do. (*Emergency Regulations Adoption Process*, Office of Administrative Law, http://www.oal.ca.gov/Emergency_Regulation_Process.htm (last visited Feb. 27, 2015), citing Govt. Code, § 11346.1, subd. (b)(2) [the Department “must make a finding of emergency by ***describing specific facts supported by substantial evidence*** that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation”].) Indeed, it relies wholly on rank speculation, which is never sufficient to demonstrate the existence of an emergency. (Govt. Code, § 11346.1, subd. (b)(2).)

Of course, it should be unsurprising that the Department provided no evidence demonstrating that its parade of horrors would come to pass. For the FSC Program has been in effect for over two months without the implementation of these regulations. Firearm sales have not come to a halt and no FFLs have declared bankruptcy over the Program. The Department might credit the rules it has improperly enforced since January 1 with saving the California firearms industry, but that doesn’t tell the whole story. In fact, the Department has for years administered the longstanding HSC Program, FSC’s predecessor, without any of the regulations it seeks to implement here. The FSC Program can continue without them as well.

Indeed, nearly every proposed FSC regulation deals with the management and administration of the Program. For instance, the proposals require that all FSC instructors obtain and maintain a valid COE, use a computer, printer, and email address to access the Department’s automated, web-based FSC system, make all fee payments by major credit card, and release the Department of liability associated with administering the Program. None of these matters can reasonably be said to be necessary to “avoid serious harm to the public peace, health, safety, or general welfare.” (Govt. Code, § 11342.545.) While the absence of implementing regulations might make administration of the FSC Program by the Department more difficult, it is not enough to say that such is necessary to avoid

serious harm to the public—especially considering it is a problem the Department brought upon itself when it failed to initiate rule-making procedures during the 14 months it was given before the Program launched on January 1.

With regard to the adoption of regulations establishing the long-gun safe-handling demonstrations, firearm purchasers, retailers, and instructors can continue to comply with the law, as they have done since January 1, 2015, by signing the affidavit establishing that a demonstration was done in compliance with any implementing regulation the Department has adopted. Or enforcement of the law might be halted, *temporarily*, until such time as the Department *properly* adopts the necessary regulations. For it cannot be seriously argued that imminent, grievous harm will be invited upon the public if the Department does not adopt these regulations as an emergency measure. Consider that long guns have been sold in California for over 100 years without either the safe-handling demonstration requirement or the proposed regulations. The Legislature, recognizing the *non-emergency* nature of the program, explicitly gave the Department 14 months to get the regulations in place *before* the law took effect. The failure of the Department to act in a timely manner does not create the sort of “emergency” that justifies working around the strict requirements of the APA.

Adopting regulations regarding the safe-handling demonstrations of handguns not currently covered by the Penal Code likewise cannot be said to be an “emergency.” The Department was not required (or even authorized) to adopt implementing regulations by January 1. To the contrary, the handgun demonstration requirements were adopted in October 2001, and have been required by law since January 2003. While the absence of regulations regarding certain, specific handgun types has led to some confusion over the years, it has caused neither the end of handgun sales nor widespread lawsuits challenging the statutory requirement. At no time in last 13 ½ years has the Department sought to adopt such regulations by non-emergency means. And it should not be permitted to tack them onto a package of regulations regarding a *new* program and adopt them as “emergency” measures now.

B. The Situation Identified in the Department’s “Finding of Emergency” Was Known to Exist in Sufficient Time to Have Addressed It Through Non-Emergency Regulations

“The term ‘emergency’ has been given a practical, commonsense meaning in the California case law: ‘[E]mergency has long been accepted in California as an *unforeseen situation calling for immediate action*. [Citations.] This is the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman.’ ” (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306, quoting *Sonoma Cnty. Org. of Public/Private Employees, Local 707, SEIU, AFL-CIO v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276-277, double emphasis added.) The Department’s need to create regulations for the management and administration of the FSC Program and safe-handling demonstrations cannot be said to be an “unforeseen situation calling for immediate action.” (*Id.*) To the contrary, the Department had *14 months* from the adoption of the law until it took effect, but it failed to act. Any “emergency” the Department speaks of is one of its own making. It was not “unforeseen.” And it does not call for the sort of “immediate action” that would limit the important input of stakeholders in the FSC Program.

Explaining its failure to adopt non-emergency regulations, the Department states that it had originally intended to develop a manual, pre-paid process for the issuance of FSCs. According to the Department, however, it scrapped this idea because it believed doing so would create an unreasonable financial burden for certified instructors. As a result, and in response to input received from a select

few stakeholders, the Department sought to develop an automated, web-based application by which certified instructors may submit payment for and issue FSCs on demand. The Department claims that the development of this system resulted in an 8- to 10-month delay in drafting the accompanying FSC regulations, as well as the Department's failure to adopt non-emergency regulations.

Such a claim, however, is hard to believe. The Department gives *no* reason it could not draft regulations for FSC *while* the automated, web-based system was being designed, developed, and implemented. Certainly, taking public comment during that time would have assisted the Department in developing a web portal suitable to the needs of the Program's various stakeholders, including licensed retailers and certified instructors. More importantly, however, Senate Bill 683 was signed into law in October 2013, *some 14 months before the FSC Program was set to take effect*. And the Department drafted and announced generally applicable rules for the Program on October 2, 2014—*three months before the Program was to take effect and five months before the Department finally submitted its "emergency" proposal to OAL*. All of those rules are part of the Department's regulation package and remain largely unchanged. It is quite clear that the Department was not only *capable* of working on the design of its web-based system and the proposed regulations simultaneously, that is exactly what it did.

The OAL should not allow the Department to move forward with this regulatory package on an emergency basis. For it would send a dangerous message to the Department and to all regulatory agencies that it is acceptable to wait until the last minute, *create* an urgent situation, and claim an emergency exists such that the public should be denied its statutory right to notice and comment. That is not the sort of situation the Legislature had in mind when it carved out an exception to the APA.

C. The Department's "Finding of Emergency" Is Based Solely on Expediency and Convenience to the Department

As established above, the Department has failed to identify any real harm that will come to the general public should the Department be required to follow the non-emergency rule-making procedures of the APA in adopting its FSC and safe-handling demonstration regulations. Instead, the Department's finding of emergency is based solely on its own bare desire for expediency and convenience.

Again, it is clear that the regulations the Department has put forth are not necessary to protect the public welfare, but to facilitate the Department's administration of the FSC Program. The Program can still run without them for no regulations are statutorily required for the enforcement of the FSC Program, though it might be more difficult to administer. Though it might create chaos for the Department, such is not the sort of "emergency" that justifies stripping stakeholders in the Program of their statutory right to notice and a sufficient period for public comment.

III. THE DEPARTMENT'S PROPOSED "EMERGENCY" REGULATIONS PRESENT SIGNIFICANT PROBLEMS FOR LICENSED FIREARM RETAILERS, CERTIFIED FSC INSTRUCTORS, AND INDIVIDUAL GUN OWNERS

A. California Licensed Firearm Retailers

Perhaps most greatly affected by the currently enforced rules, as well as the proposed "emergency" regulations, are licensed California firearm retailers ("FFLs"). In order to conduct

business efficiently, an FFL must employ FSC instructors to administer the program for customers who do not already possess an FSC when making a firearm purchase. It is typical of many FFLs to have several employees who are FSC instructors, allowing the FFL to have on staff at least one FSC instructor at all times during business hours. Because proposed “emergency” regulations require FSC instructors to acquire and maintain a valid COE, some FFLs are being forced to spend *tens of thousands of dollars annually* to obtain and maintain COEs for each of their certified instructors. Additional costs are also necessary for the required training, in addition to the time it takes for each employee to conduct a Livescan as required for the COE. This cost is particularly burdensome for retail chain FFLs with multiple locations throughout the State.

Many FFLs believe that imposing these costs on FFLs serves no purpose or goal, especially in light of the requirements under the former *HSC* Program. Under that program, an instructor was required simply to pay \$14 for a background check *or* provide proof of a valid COE at the time of his or her application. There was no requirement to maintain or renew the COE each year to continue administering the Program. As a result, for the many years the HSC program was in effect, the Department had served its goal of ensuring instructors were not prohibited from possessing or handling firearms without incurring and passing along the exorbitant costs of acquiring and maintaining COEs to FFLs and individual instructors.

Further, under the proposed regulations, FSC instructors may pre-pay for certificates as opposed to paying for each certificate individually at the time it is issued. The problem, however, is that the Department’s new web-based system requires each instructor to use an individual email address to login to the system and to pay for the certificates through his or her unique account. Presumably, an FFL would pay the necessary costs for acquiring multiple certificates, but these certificates would be linked to the individual instructor, not to the FFL. If an individual instructor quits or is fired, any prepaid certificates will travel with the instructor, costing the FFL untold amounts.

The proposed regulations also involve firearm safe-handling demonstrations, which must be completed by any customer wishing to purchase a firearm. By law, potential firearm purchasers must demonstrate the safe manner in which to load and unload the firearm using dummy rounds, often referred to as “snap caps,” in place of live ammunition. The Legislature expressly directed the Department to promulgate regulations establishing the long-gun safe-handling demonstration by the time the FSC Program launched on January 1, 2015. But it failed to do so.

Instead, the Department merely included in the FSC Study Guide a number of steps for conducting the demonstration as to a limited number of long-gun action types. It *did not* adopt those rules pursuant to the APA. Because the Study Guide procedures were drastically under-inclusive, FFLs were unsure for weeks how to properly administer the safe-handling demonstration requirements for long-guns with action types not included. Although the proposed “emergency” regulations include additional long-gun action types not previously covered, many are still missing and it seems likely the same problems will continue to arise.

Finally, the proposed “emergency” regulations include safe-handling demonstration requirements for pistols, for which the California Penal Code does not grant the authority to the

Department to draft regulations.²

B. Individual FSC Instructors

Also seriously affected by the Program are individual firearm instructors, not associated with an FFL, who are also certified FSC instructors. Many individual instructors have been teaching for decades and have been involved in the FSC Program since its first iteration, the Basic Firearm Safety Certificate Program, was in effect over a decade ago. These individuals are critical to the success of the FSC Program, providing training in countless venues, including shooting ranges, classrooms, gun shows, and individual's homes, and relieving FFLs of some of the burden of administering the Program.

Although the costs associated with obtaining a COE for one individual (\$78 application fee plus fees for Livescan service) may seem minor, consider that it means the FSC instructor must issue over a dozen certificates a year simply to pay for his or her COE. For California law only allows an instructor to charge up to \$25 to administer the Program, \$15 of which must be sent to the Department as a processing fee. The remaining \$10 may be kept by the instructor.

But the currently enforced rules, as well as the proposed "emergency" regulations, also require each instructor to utilize the Department's automated, web-based system when issuing certificates. The \$15 fee must be paid using only a major credit card, and the system requires the instructor to enter the FSC recipient's personal information into the System, preview the entered information, making changes as needed, and electronically submit the completed form to the Department. Once submitted, the instructor must immediately print, sign, and issue the automatically generated certificate. This process requires each instructor to possess a computer, a printer, a credit card reader, and a stable internet connection. Individual instructors must thus obtain these items prior to administering the Program, adding further costs and making it economically infeasible for many individual instructors to continue to provide the service to those seeking to acquire firearms.

What's more, many firearm instructors are required to travel to various locations throughout California to gun ranges, usually located well outside of urban areas with little or no cell phone reception, power, or internet connection that could be utilized by the instructor. As such, the proposed regulations effectively prohibit instructors from administering the Program unless and until they acquire the necessary equipment, if that is even possible. Although there is a potential benefit to having an automated system, the Department must have a manual, pre-paid alternative in place for instructors whose business takes them to areas with intermittent or non-existent internet service and those unable to accept credit card payments.

C. Members of the Public

Of the different stakeholders in the Program, perhaps most important of all are individual members of the public themselves, who are required to obtain an FSC in order to purchase a firearm.

² The steps for handgun demonstrations were set forth by statute under the former HSC Program and remain in effect. (Former Pen. Code, § 26860, subd. (a) (2014); Pen. Code, §§ 26853, 26856, 26859.)

March 2, 2015

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On multiple occasions, especially in the first few weeks of the Program's launch, the Department's entire automated, web-based system was offline, unable to process firearm transactions or generate any FSCs. As a result, many customers were turned away during those times they sought to exercise their Second Amendment rights to purchase a firearm. To this day, the Program continues to experience failures that result in the system being offline or otherwise inaccessible.

Finally, because of the astronomical costs of obtaining and maintaining COEs, coupled with the costs for the equipment necessary to administer the FSC Program, we are aware of some FFLs that have stopped offering the service to their customers and countless individual instructors have ceased administering the Program altogether. If the proposed regulations are adopted, the situation will only get worse, and those interested in purchasing a firearm will find themselves unable to do so in many instances or with very limited options for doing so.

IV. CONCLUSION

The very purpose of the APA is to ensure that the public has the opportunity to participate in the promulgation of regulatory measures, to promote open government, and to keep regulatory bodies accountable. Only in the most urgent circumstances should a government agency be permitted to circumvent the strict procedural requirements of the APA. The adoption of the Department's proposed regulations regarding the Firearm Safety Certificate and safe-handling demonstrations is simply not such an emergency. For the proposal is not necessary to avoid serious harm to the public peace, health, safety, or general welfare. Quite frankly, it seems the Department's claims of emergency are the result of a pending lawsuit and a petition to the OAL challenging the improper rules the Department is already enforcing and seeks to preserve. The Department should not be permitted to thwart the important goals of the APA in this instance.

Further, the proposed "emergency" regulations are wrought with practical problems that invite significant harm upon licensed firearm retailers, certified instructors, and firearm purchasers. If the Department had sought input from the Program's stakeholders through proper rule-making channels, many of these problems could have been avoided or mitigated. Instead, the Department seeks to adopt the regulations as an "emergency" measure, significantly reducing the time for public comment on these issues and shutting down the ability of stakeholders to work *with* the Department to create a workable program.

For the foregoing reasons, we respectfully request that the OAL reject the Department's proposed emergency regulations regarding Firearm Safety Certificates and Safe Handling Demonstrations. Should you have any questions or concerns regarding the content of this letter, please contact my office.

Sincerely,
Michel & Associates, P.C.



Anna M. Barvir

Attachments

EXHIBIT A



BUREAU OF FIREARMS
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October 2, 2014

California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities

Re: Firearm Safety Certificate Program

Dear California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities:

Pursuant to Senate Bill 683 (Stats 2013, ch. 761), effective January 1, 2015, the existing Handgun Safety Certificate (HSC) program will be expanded and renamed the Firearm Safety Certificate (FSC) program. Under the FSC program, requirements that currently apply to handguns only, will apply to all firearms (handguns and long guns).

The following information outlines the new FSC program, requirements for DOJ Certified Instructors; requirements for Comparable Entities; and existing Handgun Safety Certificate program updates.

The Department plans to utilize a web-based application to make FSC materials available, including the Firearm Safety Certificates, test materials, the FSC study guide, and the FSC manual to all DOJ Certified Instructors. The FSC study guide will also be available for printing and audio/visual materials will be available for streaming/downloading from the public website at <http://www.oag.ca.gov/firearms/fsc>. **Please be advised, this link will not be available until January 1, 2015.** Any materials that require a fee will be billed through the online system. Payment options will be limited to major credit/debit cards (e.g. MasterCard, Visa, American Express, and Discover cards). **Payment by cash or check will not be accepted.**

With the new FSC program web-based application, DOJ Certified Instructors will be able to issue an FSC electronically, search for an FSC that was originally issued by them for replacement, maintain FSC records, generate reports of FSC issuances, and review/obtain FSC materials. Each existing DOJ Certified Instructor will receive login information to the new system and should keep the login information readily available.

With the new FSC program web-based application, DOJ Certified Instructors will need access to a personal computer and printer. DOJ Certified Instructors will be able to use multiple web-browsers to access the web-based application, including but not limited to: Mozilla Firefox, Internet Explorer, Safari, and Google Chrome.

- Existing DOJ Certified Instructors will not be required to be recertified in long gun safety prior to January 1, 2015. DOJ Certified Instructors will be sent login information to be able to access the new FSC program online system. A userid and temporary password will be sent separately. Upon successful

login, existing DOJ Certified Instructors will be required to acknowledge they have read the revised Firearm Safety Certificate Manual, which includes steps in long gun safety and that they will include both handgun and long gun safety as part of the safe handling demonstrations. Upon acknowledgement, a new Firearm Safety Certificate Instructor card will be generated for the DOJ Certified Instructor to print and keep for their use. If the DOJ Certified Instructor does not acknowledge the handgun and long gun safety requirement, a new DOJ Certified Instructor card will not be generated and the individual will not be in compliance as a DOJ Certified Instructor.

- All DOJ Certified Instructors will be required to have a valid Certificate of Eligibility (COE). As of January 1, 2015, new applicants will be required to obtain a COE prior to submitting an application as a DOJ Certified Instructor. Existing DOJ Certified Instructors as of December 31, 2014, will be required to have a valid COE upon renewal or by June 30, 2015, whichever comes first. Any existing DOJ Certified Instructor who has not provided proof of a valid COE by June 30, 2015, will not have access to the FSC online system. Mere submission of the application will not be considered proof of a COE; therefore, please allow 4-6 weeks for the Department to process the COE application. The Certificate of Eligibility application (form BOF 4008) is available on the Attorney General's website at <http://www.oag.ca.gov/firearms/forms>. A Request for Live Scan Service (form BCIA 8016) is attached to the COE application. COEs must be renewed annually.
- Valid HSCs can still be used to purchase **handguns only** after December 31, 2014. However, effective January 1, 2015, an FSC will be required to purchase long guns. An FSC can be used to purchase/acquire handguns and long guns.
- A Declaration will be sent out to all existing entities, recognized by the Department as a comparable entity to those entities in Penal Code section 31635, for acknowledgement of existing training courses to include long gun safety beginning January 1, 2015. The Declaration must be completed, signed and returned to the Department by January 1, 2015. Failure to do so could result in the entity being removed as giving comparable training. New applicants to be considered as a comparable entity will need to include long gun training in the course outline effective January 1, 2015.
- Firearms dealers will still be required to tag firearms with the DOJ firearms warning labels, which will not be available through the new system and must be ordered through BOF. Orders for warning tags must be made via email at boffscprogram@doj.ca.gov. **Please be advised, this email address will not be in use until January 1, 2015.** Email requests must include the following: dealer name, CFD number, mailing address, and number of tags requested.

- Any unused¹ HSCs in possession of a DOJ Certified Instructor after January 1, 2015 can be returned to the Department for refund. Unused HSCs must be returned by March 1, 2015, in order to receive a refund. To receive a refund, send a written request to the Department at: Department of Justice, Bureau of Firearms – FSC, P.O. Box 160367, Sacramento, CA 95816-0367. Your written request must include the following:
 - DOJ Certified Instructor name
 - Address
 - How many HSCs are being returned

Unused HSCs received by the Department after March 1, 2015, will be destroyed and no refund will be issued.

- HSCs that have been damaged or filled out incorrectly and need to be voided can be returned to the Department prior to January 1, 2015, for a replacement HSC. Damaged or voided HSCs returned to the Department after December 31, 2014, will be destroyed. No refund will be issued for these returned HSCs.

All future correspondence between the Department and the DOJ Certified Instructors will be conducted primarily through email. DOJ Certified Instructors that currently do not have an email address will need to obtain one, otherwise, important information pertaining to the FSC program could be missed. In addition, an email address will be required to maintain access to the new web-based application (i.e., login information that is reset will be sent to an email address). If you have not been contacted recently by Department staff to confirm an email address, please send an email to bofhscprogram@doj.ca.gov with the information to be updated in the Department's records. Be sure to include your name and DOJ Certified Instructor number in your email notification.

Please be sure to check your email or mail in the near future for your login information to the new FSC system. If you have any questions, please contact the Bureau of Firearms at (916) 227-3750 or via email at bofhscprogram@doj.ca.gov.

Sincerely,



STEPHEN LINDLEY, Chief
Bureau of Firearms

For KAMALA D. HARRIS
Attorney General

¹Unused HSC cards for refund are cards that were not filled out previously and would not be considered voided.

EXHIBIT B

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December 29, 2014

Attention: Chapter 2 Compliance Unit
OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

SENT VIA USPS, EMAIL AND FAX

Re: **California Department of Justice - Firearm Safety Certificate Program
Underground Regulation**

To Whom It May Concern:

We write you on behalf of our clients the National Rifle Association (NRA) and FFLGuard, as well as their respective members and clients who reside in California. These members include firearm dealers, distributors, manufacturers, Handgun Safety Certificate (HSC) Instructors, as well as the firearm owning public.

Pursuant to Senate Bill 683(SB 683) (Stats 2013, ch. 761), effective January 1, 2015, the HSC program¹ will be replaced by the Firearm Safety Certificate (FSC) program. SB 683 mandates that DOJ implement regulations creating a new safe firearm handling demonstration, in addition to administering the FSC program pursuant to its enumerated provisions in the Penal Code.

On October 2, 2014 the DOJ issued a letter to "California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities." (Attached as **Exhibit 1**).² This letter addressed and established

¹ As described in Cal. Penal Code §§ 31610-31670. (2014). All section references are to the California Penal Code unless otherwise indicated.

² This letter was sent in advance of the pending FSC program scheduled to take effect January 1, 2015. DOJ has also published an "FAQ" concerning the FSC program. <http://oag.ca.gov/firearms/fscpfaqs> (Last visited December, 26, 2014) (**Exhibit 2**). The FAQ provides answers to general questions the public may have concerning the FSC. However, it provides no in-depth guidance outside what can be found in the California Penal Code.

policies for implementing the new FSC program, and established the requirements for instructors operating under the new program.

As explained below, DOJ's letter sets forth new rules of general application for the implementation of the FSC program that were not adopted pursuant to Administrative Procedure Act (APA). Accordingly, because DOJ's actions are not exempt from the APA, the agency's failure to properly promulgate regulations for the safe handling demonstration, and DOJ's new rules concerning the implementation of the FSC program, constitute unlawful underground regulations.

We seek assistance in having these improper underground regulations struck down.

I. The HSC Program Under Current California Law

Under current California law, most people purchasing a handgun from a licensed firearm dealer must perform a safe handling demonstration with the firearm,³ and must present an HSC to the California firearms dealer⁴ from whom they are purchasing the firearm showing they have successfully passed a written "Handgun Safety" test.

A. Certified HSC Instructors

The HSC may be obtained by passing a test administered by a DOJ Certified Instructor.

A person is not required to be a federal firearms licensee in order to administer the HSC test. Some Federal Firearm Licensees (FFLs) are also certified HSC instructors, who administer the written test in their store. Some instructors are employees of FFLs. There are also a number of instructors who, in addition to teaching firearm safety and/or other firearm related classes, administer the tests in their classrooms or on ranges with students. Provided a person meets the prerequisite skill, knowledge, and competency required to be a HSC instructor, any person may become an instructor.⁵ Department Certified Instructors shall have a certification that they received training from specific organizations (specified by the Penal Code), any entity found by DOJ to give comparable instruction in firearm safety, or the applicant shall have similar or equivalent training to that provided by a specific organization.⁶ When applying to be an HSC instructor a person must file an application with DOJ,

³ Cal. Penal Code § 26850 (2014).

⁴ §§ 26840(a), 27540(e), and 31615 (2014).

⁵ § 31635(a) (2014).

⁶ § 31635(b) (2014). Below is the list of specified organizations:

- (1) Department of Consumer Affairs, State of California-Firearm Training Instructor.
- (2) Director of Civilian Marksmanship, Instructor or Rangemaster.
- (3) Federal Government, Certified Rangemaster or Firearm Instructor.
- (4) Federal Law Enforcement Training Center, Firearm Instructor Training Program or Rangemaster.
- (5) United States Military, Military Occupational Specialty (MOS) as marksmanship or firearms

specify which organization he or she received training from, attach a copy of the certification, and *either* provide a copy of their Certificate of Eligibility (COE) *or* enclose \$14.00 for a background check.⁷ According to DOJ's application form a person is certified for five years.⁸

1. Certificate of Eligibility

A Certificate of Eligibility (COE) is a certificate provided by the DOJ confirming the holder of the certificate is eligible to possess firearms.⁹ A COE is only required in certain circumstances. The Penal Code does not require a COE in order to become an HSC instructor. Persons applying to be licensed firearm dealers in California must obtain a COE,¹⁰ so to must employees of firearm manufacturers,¹¹ amongst other individual.¹² Employees of licensed firearm dealers are not required to obtain a COE unless required to by their employer or required by local jurisdiction requires a background check of agents or employees of firearm dealers.¹³ A person applying for a COE must submit fingerprints to DOJ and renew the COE yearly.¹⁴

B. Handgun Safe Handling and HSC Test Criteria

instructor. Assignment as Range Officer or Safety Officer is not sufficient.

(6) National Rifle Association-Certified Instructor, Law Enforcement Instructor, Rangemaster, or Training Counselor.

(7) Commission on Peace Officer Standards and Training (POST), State of California-Firearm Instructor or Rangemaster.

(8) Authorization from a State of California accredited school to teach a firearm training course.

⁷ See attached DOJ Handgun Safety Certificate Program Certified Instructor Application (**Exhibit 3**).

⁸ There is no basis for this limitation under California law or regulation.

⁹ Cal. Penal Code § 26710 (2014); pursuant to this section DOJ was required to adopt regulations relating to the administration of the COE program.

¹⁰ § 26700.

¹¹ § 29120.

¹² One must have a COE: in order to be a "consultant-evaluator" as defined in Penal Code section 16410; in order to produce, promote, sponsor, operate, or otherwise organize a gun show or sell used firearms at a gun show pursuant to sections 27200 and 26525 respectively; and to be exempt from certain firearm transfer requirements as a curio or relic collector pursuant to sections 26585, 26970, and 27966.

¹³ § 31660

¹⁴ See attached "Certificate of Eligibility Application" **Exhibit 4** and 11 CCR §§ 4037 and 4039.

The criteria for the handgun safe handling demonstration are codified in the Penal Code.¹⁵ These criteria are broken up in the Penal Code by handgun action types (i.e. semiautomatic pistol, double-action revolver, and single-action revolver¹⁶). Certain people and certain transfers are exempt from this requirement.¹⁷ Once the demonstration is complete, firearm dealer¹⁸ and the firearm purchaser shall sign an affidavit stating that the safe handling requirements were met.¹⁹

As for the HSC requirements, unless one of these few exemptions apply, it is a misdemeanor to transfer a handgun to any non-exempt person who does not have a valid HSC and for that person to receive a handgun.²⁰

If a person does not possess an HSC when attempting to purchase or receive a handgun, that person must take a 30 question test (administered by an HSC instructor) which includes questions about California laws applicable to carrying and handling firearms, responsibilities of firearm ownership, current laws relating to private sales/transfers of firearms, etc.²¹ Certain individuals are exempt from the HSC requirement.²²

The test includes 30 multiple choice questions and costs up to \$25 (\$15 goes to the DOJ, and the rest goes to the certified instructor).²³ The applicant must correctly answer at least 75% of the questions to get the HSC.²⁴

¹⁵ § 26853-26859 (2014).

¹⁶ §§ 26853, 26856, and 26859 (2014), respectively.

¹⁷ Persons exempt from the HSC requirement are also exempt from the safe handling requirement. (Cal. Penal Code § 26850(h) (2014) referencing the requirements for possession of an HSC in Penal Code section 31615, and the exceptions to that requirement in section 31700.)

¹⁸ Despite the Code requiring the firearm *dealer* to sign the affidavit the demonstration is required to be preformed before a “department-certified *instructor*.” Cal. Penal Code § 26850(e).

¹⁹ § 26850(d). See attached “Safe Handling Demonstration Affidavit,” **Exhibit 5**.

²⁰ § 31615(a)(2)-(b).

²¹ Cal. Penal Code§ 31645(a) (2014).

²² §§ 31700-31835 (2014).

²³ § 31650(b) (2014).

²⁴ § 31645(a) (2014).

After passing the test, the HSC is valid for five years.²⁵ If an HSC is lost or completely destroyed, one can get a duplicate certificate by asking the issuing instructor for one, proving your identity, and paying up to \$15.²⁶

To be clear, an HSC is only necessary to *receive* a handgun, not to *possess* one.

II. The New FSC Program

On October 11, 2013, Governor Brown signed SB 683 into law. The bill completely replaces the HSC program with the new FSC program. All of the forgoing applies but instead of being applicable only to handguns the requirements now applies to all firearms. The FSC program will, in pertinent part, prohibit any person from purchasing or receiving *any* firearm (handgun or longarm) without a valid FSC, as well as prohibit any person from selling, delivering, loaning, or transferring *any* firearm to any person who does not have a valid FSC (barring limited exceptions).²⁷

The HSC instructor program officially becomes repealed and replaced by the FSC program on January 1, 2015. The HSC requirements that currently apply only to handguns (discussed above) will be revised and expanded to cover *all firearms*. This means that anyone purchasing any firearm must present an FSC to a dealer showing that they have successfully passed a written "Firearm Safety" test.²⁸ Also beginning January 1, 2015, anyone acquiring a long gun must perform a safe handling demonstration before receiving that firearm from a licensed firearms dealer.²⁹

A. The DOJ Has Failed to Adopt Mandated Regulations for the Long Gun Safe Handling Demonstrations

Penal Code section 26860 provides, in pertinent part:

- (a) Except as authorized by the department, commencing January 1, 2015, a firearms dealer shall not deliver a long gun unless the recipient performs a safe handling

²⁵ *Frequently Asked Questions*, Cal. Dept. of Justice, Office of the Attorney General, <http://oag.ca.gov/firearms/hscfaqs#a10> (last visited Dec. 18, 2014).

²⁶ Cal. Penal Code § 31660 (2014).

²⁷ SB 683 amended Cal. Penal Code §§ 27540, 27875, 27880, 27920, 27925, 28160, 31620, and 31810 and amends, repeals and replaces Cal. Penal Code §§ 26840, 31610, 31615, 31625, 31630, 31635, 31640, 31645, 31650, 31655, 31660, and 31700 (effective January 1, 2015) and adds Cal. Penal Code §§ 16535, 16865, and 26860. *See* California Legislative Information, SB-683 Firearms: firearm safety certificate.

²⁸ One of the exceptions to the FSC requirement is that if a person purchases a handgun that person may present a valid HSC. Cal. Penal Code § 26840(a) (2015). As discussed above, HSCs are only valid for 5 years after they are issued. Eventually, no members of the California public will have a valid HSC.

²⁹ Cal. Penal Code § 26860 (2014).

- demonstration with that long gun.
- (b) *The department shall, not later than January 1, 2015, adopt regulations establishing a long gun safe handling demonstration that shall include, at a minimum, loading and unloading the long gun.*
 - (c) The firearms dealer shall sign and date an affidavit stating that the requirements of subdivision (a) and the *regulations adopted*...have been met....
 - (d) The recipient shall perform the safe handling demonstration for a *department-certified instructor*....
 - (f) *Department-certified instructors* who may administer the safe handling demonstration shall meet the requirements set forth in subdivision (b) of Section 31635 [effective January 1, 2015].³⁰

In contrast to self-executing statutes, a non-self-executing statute (also known as a “wholly enabling” statute) cannot be enforced in the absence of valid implementing regulations - i.e., it “has no legal effect without the enactment of a regulation.”³¹ Such statutes are not functional until the agency charged with implementing them adopts regulations for that implementation.³²

By the long gun safe handling statute’s own language, it is “wholly enabling.” Although the FSC program is to become effective January 1, 2015, no regulations regarding the long gun safe handling demonstration have been proposed or adopted by DOJ.³³

Additionally, DOJ has not made any FSC materials, test materials, study guides or manuals available to DOJ Certified Instructors on their website. Nevertheless, DOJ has sent letters to “California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities” on October 2, 2014, indicating these materials will be available no earlier than January 1, 2015, via DOJ’s website.³⁴ However, DOJ’s letter also sets forth various new requirements for the FSC program that did not exist under the previous HSC program, and that were never subjected to the notice of “rule-making” requirements of the APA.

III. DOJ’s Letter to California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities Sets Forth Illegal Underground Regulations.

³⁰ Cal. Penal Code § 26860(a)-(d), (f) (2014) (emphasis added).

³¹ Office of Administrative Law, *What Must Be Adopted Pursuant to the APA?*, (Apr. 6, 2006), at 1, available at www.oal.ca.gov/res/docs/pdf/what_is_a_regulation.pdf

³² See *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1150 (2001) (noting that amendments to the Assault Weapons Control Act of 1989 were not self-executing and thus regulations were required to define weapons covered by the statute); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 502 (“Some statutory schemes, by their nature, cannot be implemented without administrative regulations”).

³³ By contrast the safe handling requirements for semiautomatic pistols, double and single action revolvers are located in the California Penal Code. Cal. Penal Code §§ 26853-26859.

³⁴ See DOJ Letter, **Exhibit 1**.

Cal. Gov't Code section 11342.600 defines a "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

"A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.'"³⁵

On October 2, 2014, DOJ sent letters to all California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities expressly outlining "the new FSC program, *requirements* for DOJ Certified Instructors; *requirements* for Comparable Entities; and existing Handgun Safety Certificate program updates."³⁶ The letter sets forth, in pertinent part, the following "requirements" that are generally applicable to all those engaging in the FSC program and govern the manner in which DOJ is to implement the FSC program:

The Department plans to utilize a web-based application to make FSC materials available, including the Firearm Safety Certificates, test materials, the FSC study guide and the FSC manual to all DOJ Certified Instructors. The FSC study guide will also be available for printing and audio/visual materials will be available for streaming/downloading from the public website at <http://www.oag.ca.gov/firearms/fsc>. **Please be advised, this link will not be available until January 1, 2015.** Any materials that require a fee will be billed through the online system. *Payment options will be limited to major credit/debit cards (e.g. MasterCard, Visa, American Express, and Discover cards). Payment by cash or check will not be accepted....DOJ Certified Instructors will need access to a personal computer and printer....DOJ Certified Instructors will be sent login information to be able to access the new FSC program online system....* Upon successful login, existing DOJ Certified Instructors will be required to acknowledge they have read the revised Firearm Safety Certificate Manual, *which includes steps in long gun safety and that they will include both and handgun and long gun safety as part of the safe handling demonstrations.*³⁷

The DOJ's letter further states:

³⁵ *Sherwin-Williams Co. v. S. Coast Air Quality Mgmt. Dist.*, 86 Cal. App. 4th 1258, 1283 (2001), as modified (Feb. 15, 2001) (citing *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996)).

³⁶ **Exhibit 1** (emphasis added).

³⁷ *Id.* (emphasis original) (italics added).

All DOJ Certified Instructors will be required to have a valid Certificate of Eligibility (COE). As of January 1, 2015, new applicants will be required to obtain a COE prior to submitting an application as a DOJ Certified Instructor. Existing DOJ Certified Instructors as of December 31, 2014, will be required to have a valid COE upon renewal or by June 30, 2015, whichever comes first. *Any existing DOJ Certified Instructor who has not provided proof of a valid COE by June 30, 2015, will not have access to the FSC online system.* Mere submission of the application will not be considered proof of a COE; therefore, please allow 4-6 weeks for the Department to process the COE application....COEs must be renewed annually.³⁸

The letter sets forth new rules of general applicability for DOJ's implementation of the FSC program that did not exist under the HSC program. These new rules are not authorized by any existing statute or regulation.

Specifically, the letter *requires* all DOJ Certified Instructors to have access to a *personal computer, printer, and email*. This "requirement" applies to all DOJ Certified Instructors and is thus a rule of general applicability. Furthermore, this "requirement" was created by DOJ for the purpose of implementing the FSC program and its enumerated provisions in the Penal Code. Therefore, the "requirement" that all DOJ Certified Instructors have access to a personal computer, printer, and email is a regulation subject to the requirements of the APA.

The letter also mandates that all FSC payments will be limited to *only major credit cards*. This "requirement" applies to all FSC purchasers and mandates its enforcement by DOJ Certified Instructors. Thus, this is a rule of general applicability and was created by DOJ for the purpose of implementing the FSC program. Therefore, the "requirement" that only major credit cards may be used as payment for an FSC is a regulation subject to the requirements of the APA.

The letter further mandates that the "steps in long guns safety" procedures contained in the forthcoming "revised Firearm Safety Certificate Manual" be included in the "safe handling demonstrations." But *DOJ still has not adopted any regulations regarding long gun safety demonstrations* as it is required to do so by Cal. Penal Code § 26860(b). DOJ has informed our clients that these regulations will not be available until **June, 2015**, despite the fact that Section 26860, subdivision (d) clearly requires DOJ to promulgate and adopt regulations *no later than January 1, 2015, "establishing a long gun safe handling demonstration that shall include, at a minimum, loading and unloading the long gun."*

DOJ is essentially shirking its statutory obligation to adopt regulations regarding long gun safety demonstrations by mandating instructors to use the procedures set forth in the "Firearm Safety Certificate Manual." DOJ's requirement that all DOJ Certified Instructors use the "steps in long guns safety" procedures contained in the forthcoming Firearm Safety Certificate Manual is a rule of general applicability and was created by DOJ for the purpose of implementing the FSC program. Therefore, this requirement is a regulation and subject to the requirements of the APA.

³⁸ *Id.* (emphasis added).

Lastly, DOJ's letter mandates that *all* DOJ Certified Instructors obtain a Certificate of Eligibility, *which must be renewed each year*. Previously, prospective HSC Certified Instructor applicants were given *the option* to either to provide a current COE or enclose \$14.00 with their application to accomplish a background check.³⁹ The sole purpose of providing a COE or conducting a background check is to verify whether the applicant is eligible to lawfully possess firearms. Under the HSC program, there was no reoccurring obligation for HSC Instructors to provide a renewed COE or undergo an additional background check.

DOJ's reoccurring COE requirement for all Certified FSC Instructor's lacks any regulatory or statutory basis. DOJ's COE requirement is generally applicable to all DOJ Certified Instructors and was created pursuant to implementing the FSC program. DOJ's COE requirement for all DOJ Certified Instructors is an underground regulation and subject to the requirements APA.

In sum, DOJ's letter clearly sets forth several "regulations" because these rules are generally applicable to all DOJ Certified Instructors and those seeking an FSC.⁴⁰ Additionally, the rules set forth in DOJ's letter were created for the purpose of the FSC program's implementation. "If an agency rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation whether or not the issuing agency so labeled it."⁴¹ The rules DOJ sets forth in its letter are "regulations" and subject to the requirements of the APA

IV. DOJ's Regulations Are Not Exempted From the APA's Requirements.

The regulations set forth in DOJ's letter for the implementation of the FSC program are not expressly exempted by statute from the requirements of the APA. "When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language."⁴² Nothing in SB 683 or the Penal Code regarding the FSC program exempts DOJ from the regulation adoption requirements of the APA.⁴³ In the case of the long gun safe handling demonstration the Penal Code requires DOJ to implement regulations.

"The APA specifically prohibits any state agency from making any use of a state agency rule which is a 'regulation' as defined in Government Code section 11342.600, that should have, but has

³⁹ See BOF form 037 (attached as **Exhibit 3**).

⁴⁰ See *Faulkner v. California Toll Bridge Authority*, 40 Cal. 2d 317 (standard of general application applies to all members of any open class).

⁴¹ *What Must Be Adopted Pursuant to the APA?* *supra* note 10, at 7 (citing *State Water Resources Control Board v. OAL*, 12 Cal. App. 4th 697 (1993)).

⁴² *United Systems of Arkansas v. Stamhon*, 63 Cal. App. 4th 1001 (1998).

⁴³ See *Winzler & Kelly v. Department of Industrial Relations*, 121 Cal. App. 3d 120, 174 (1981) (unless "expressly" or specifically exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities).

not been adopted pursuant to the APA (unless expressly exempted by statute).”⁴⁴

California Government Code section 11340.5(a) provides:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Therefore, the letter DOJ sent to all California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities on October 2, 2014, establish “regulations” that are not exempt from the APA. In establishing the aforementioned regulations, DOJ did not follow the procedures outlined in the APA. Thus, the regulations DOJ sets forth in its October 2, 2015, letter constitute unlawful underground regulations.

V. This Petition Raises Issues of Considerable Public Importance Because DOJ’s Underground Regulations Unduly Infringe Upon the Fundamental Right to Keep and Bear Arms.

The Second Amendment of the United States Constitution guarantees the right of law-abiding adults to keep and bear arms for lawful purposes. Our clients, the National Rifle Association and FFLGuard, represent countless California Firearm Dealers, employees of firearm dealers, firearm owners, DOJ Certified HSC Instructors, and, soon to be, DOJ Certified FSC Instructors throughout the State of California. DOJ’s underground regulations, with regard to the FSC program, unduly affect the entire process of lawfully acquiring a firearm. The safe handling demonstration and FSC test are required to be conducted through a FSC certified instructor. The requirements that FSC instructors possess computer access, e-mail, and a COE limits current HSC instructors and prevents individuals from becoming FSC instructors. The implementation of these underground regulations on January 1, 2015, will effectively “bottleneck” the public’s ability to purchase firearms within the State of California until DOJ certifies instructors qualified to issue FSC’s. Such a restriction is unconstitutional as it unduly infringes on the Second Amendment right to keep and bear arms.

V. Conclusion

DOJ was statutorily entrusted to promulgate and adopt regulations regarding the safe handling of long guns by January 1, 2015. DOJ’s letter requires **all** DOJ Certified Instructors to use the “steps of long gun safety” procedures contained in the forthcoming “revised Firearm Safety Certificate Manual” be included in the “safe handling demonstrations,” however, **DOJ still has not adopted any regulations regarding long gun safety demonstrations** as it was required to do so by Cal. Penal Code § 26860(b). DOJ has failed to act on the authority granted to it and has now attempted to circumvent its responsibility by creating underground regulations outside the requirements outlined by the APA.

⁴⁴ *What Must Be Adopted Pursuant to the APA?* *supra* note10, at 2.

Without any statutory or regulatory authority, DOJ's October 2, 2014 letter requires **all** DOJ Certified Instructors to have COE's.

Without any statutory or regulatory authority, DOJ's October 2, 2014 letter requires **all** DOJ Certified Instructors to have access to computer, printer, and email.

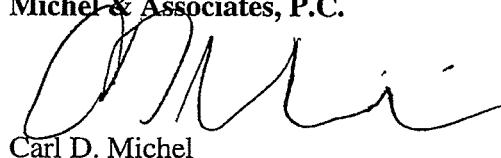
Without any statutory or regulatory authority, DOJ's October 2, 2014 letter requires **all** FSC payment be done using only major credit cards.

These requirements are "regulations" and thus subject to the requirements of the APA. Neither the Penal Code nor SB 683 exempt DOJ from the requirements of the APA, thus the requirements set forth in DOJ's October 2, 2015, letter constitute unlawful underground regulations.

I certify that I have submitted a copy of this petition and all attachments to the state agency which has issued, used, enforced, or attempted to enforce the purported underground regulations.

Sincerely,

Michel & Associates, P.C.

A handwritten signature in black ink, appearing to read 'C. Michel', is written over the printed name.

Carl D. Michel

CDM/llq

cc: Kamala Harris
Stephen Lindley

EXHIBIT 1

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



BUREAU OF FIREARMS
P.O. BOX 160367
SACRAMENTO, CA 95816-0367
Telephone: (916) 227-3750
Fax: (916) 227-7480

October 2, 2014

California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities

Re: Firearm Safety Certificate Program

Dear California Firearms Dealers, DOJ Certified Instructors, and Comparable Entities:

Pursuant to Senate Bill 683 (Stats 2013, ch. 761), effective January 1, 2015, the existing Handgun Safety Certificate (HSC) program will be expanded and renamed the Firearm Safety Certificate (FSC) program. Under the FSC program, requirements that currently apply to handguns only, will apply to all firearms (handguns and long guns).

The following information outlines the new FSC program, requirements for DOJ Certified Instructors; requirements for Comparable Entities; and existing Handgun Safety Certificate program updates.

The Department plans to utilize a web-based application to make FSC materials available, including the Firearm Safety Certificates, test materials, the FSC study guide, and the FSC manual to all DOJ Certified Instructors. The FSC study guide will also be available for printing and audio/visual materials will be available for streaming/downloading from the public website at <http://www.oag.ca.gov/firearms/fsc>. **Please be advised, this link will not be available until January 1, 2015.** Any materials that require a fee will be billed through the online system. Payment options will be limited to major credit/debit cards (e.g. MasterCard, Visa, American Express, and Discover cards). **Payment by cash or check will not be accepted.**

With the new FSC program web-based application, DOJ Certified Instructors will be able to issue an FSC electronically, search for an FSC that was originally issued by them for replacement, maintain FSC records, generate reports of FSC issuances, and review/obtain FSC materials. Each existing DOJ Certified Instructor will receive login information to the new system and should keep the login information readily available.

With the new FSC program web-based application, DOJ Certified Instructors will need access to a personal computer and printer. DOJ Certified Instructors will be able to use multiple web-browsers to access the web-based application, including but not limited to: Mozilla Firefox, Internet Explorer, Safari, and Google Chrome.

- Existing DOJ Certified Instructors will not be required to be recertified in long gun safety prior to January 1, 2015. DOJ Certified Instructors will be sent login information to be able to access the new FSC program online system. A userid and temporary password will be sent separately. Upon successful

login, existing DOJ Certified Instructors will be required to acknowledge they have read the revised Firearm Safety Certificate Manual, which includes steps in long gun safety and that they will include both handgun and long gun safety as part of the safe handling demonstrations. Upon acknowledgement, a new Firearm Safety Certificate Instructor card will be generated for the DOJ Certified Instructor to print and keep for their use. If the DOJ Certified Instructor does not acknowledge the handgun and long gun safety requirement, a new DOJ Certified Instructor card will not be generated and the individual will not be in compliance as a DOJ Certified Instructor.

- All DOJ Certified Instructors will be required to have a valid Certificate of Eligibility (COE). As of January 1, 2015, new applicants will be required to obtain a COE prior to submitting an application as a DOJ Certified Instructor. Existing DOJ Certified Instructors as of December 31, 2014, will be required to have a valid COE upon renewal or by June 30, 2015, whichever comes first. Any existing DOJ Certified Instructor who has not provided proof of a valid COE by June 30, 2015, will not have access to the FSC online system. Mere submission of the application will not be considered proof of a COE; therefore, please allow 4-6 weeks for the Department to process the COE application. The Certificate of Eligibility application (form BOF 4008) is available on the Attorney General's website at <http://www.oag.ca.gov/firearms/forms>. A Request for Live Scan Service (form BCIA 8016) is attached to the COE application. COEs must be renewed annually.
- Valid HSCs can still be used to purchase **handguns only** after December 31, 2014. However, effective January 1, 2015, an FSC will be required to purchase long guns. An FSC can be used to purchase/acquire handguns and long guns.
- A Declaration will be sent out to all existing entities, recognized by the Department as a comparable entity to those entities in Penal Code section 31635, for acknowledgement of existing training courses to include long gun safety beginning January 1, 2015. The Declaration must be completed, signed and returned to the Department by January 1, 2015. Failure to do so could result in the entity being removed as giving comparable training. New applicants to be considered as a comparable entity will need to include long gun training in the course outline effective January 1, 2015.
- Firearms dealers will still be required to tag firearms with the DOJ firearms warning labels, which will not be available through the new system and must be ordered through BOF. Orders for warning tags must be made via email at boffscprogram@doj.ca.gov. **Please be advised, this email address will not be in use until January 1, 2015.** Email requests must include the following: dealer name, CFD number, mailing address, and number of tags requested.

- Any unused¹ HSCs in possession of a DOJ Certified Instructor after January 1, 2015 can be returned to the Department for refund. Unused HSCs must be returned by March 1, 2015, in order to receive a refund. To receive a refund, send a written request to the Department at: Department of Justice, Bureau of Firearms – FSC, P.O. Box 160367, Sacramento, CA 95816-0367. Your written request must include the following:
 - DOJ Certified Instructor name
 - Address
 - How many HSCs are being returned

Unused HSCs received by the Department after March 1, 2015, will be destroyed and no refund will be issued.

- HSCs that have been damaged or filled out incorrectly and need to be voided can be returned to the Department prior to January 1, 2015, for a replacement HSC. Damaged or voided HSCs returned to the Department after December 31, 2014, will be destroyed. No refund will be issued for these returned HSCs.

All future correspondence between the Department and the DOJ Certified Instructors will be conducted primarily through email. DOJ Certified Instructors that currently do not have an email address will need to obtain one, otherwise, important information pertaining to the FSC program could be missed. In addition, an email address will be required to maintain access to the new web-based application (i.e., login information that is reset will be sent to an email address). If you have not been contacted recently by Department staff to confirm an email address, please send an email to bofhscprogram@doj.ca.gov with the information to be updated in the Department's records. Be sure to include your name and DOJ Certified Instructor number in your email notification.

Please be sure to check your email or mail in the near future for your login information to the new FSC system. If you have any questions, please contact the Bureau of Firearms at (916) 227-3750 or via email at bofhscprogram@doj.ca.gov.

Sincerely,



STEPHEN LINDLEY, Chief
Bureau of Firearms

For KAMALA D. HARRIS
Attorney General

¹Unused HSC cards for refund are cards that were not filled out previously and would not be considered voided.

EXHIBIT 2

State of California ~ Department of Justice

OFFICE of the ATTORNEY GENERAL

KAMALA D. HARRIS

FIREARM SAFETY CERTIFICATE PROGRAM FAQs

FAQs

1. What is the Firearm Safety Certificate Program?
2. What are the exemptions from the Firearm Safety Certificate requirement?
3. If I already have a Handgun Safety Certificate, will I still need a Firearm Safety Certificate?
4. Will I need a Firearm Safety Certificate if I begin a long gun transaction prior to January 1, 2015, but don't take possession of the long gun until after December 31, 2014?
5. Can I get a Firearm Safety Certificate prior to January 1, 2015?
6. How will I be able to obtain a Firearm Safety Certificate?
7. How much will the Firearm Safety Certificate cost?
8. Are there any minimum qualifications/requirements for a person who wants to take the Firearm Safety Certificate Test?
9. If I don't pass the test, can I take it again?
10. How long will a Firearm Safety Certificate be valid?
11. Will I need a Firearm Safety Certificate if I receive a firearm from my mother or father?
12. Will a Firearm Safety Certificate be required when a firearm is being loaned?
13. I am moving into California and intend to bring my firearm(s) with me. Will I need a Firearm Safety Certificate?

1. What is the Firearm Safety Certificate Program?

Pursuant to Senate Bill 683 (Stats 2013, ch. 761), effective January 1, 2015, the existing Handgun Safety Certificate (HSC) program will be expanded and renamed the Firearm Safety Certificate (FSC) program. Under the FSC program, requirements that currently apply to handguns only, will apply to all firearms (handguns and long guns).

2. What are the exemptions from the Firearm Safety Certificate requirement?

There are a variety of FSC requirement exemptions. In addition to the previous HSC exemptions, a person issued a valid hunting license is exempt from the FSC requirement for long guns only [Penal Code 31700(c)].

3. If I already have a Handgun Safety Certificate, will I still need a Firearm Safety Certificate?

A valid HSC can still be used to purchase/acquire handguns until it expires. For long gun purchases/acquisitions made January 1, 2015, and thereafter, an FSC will be required. An FSC can be used for both handgun and long gun purchases/acquisitions.

4. Will I need a Firearm Safety Certificate if I begin a long gun transaction prior to January 1, 2015, but don't take possession of the long gun until after December 31, 2014?

Yes. Effective January 1, 2015, an FSC must be obtained prior to taking possession of a long gun, regardless of when the DROS transaction was initiated

5. Can I get a Firearm Safety Certificate prior to January 1, 2015?

No. DOJ Certified Instructors are not authorized to issue FSCs until the statutory provisions establishing the FSC program go into effect on January 1, 2015.

6. How will I be able to obtain a Firearm Safety Certificate?

To obtain an FSC you must score at least 75% (23 correct answers out of 30 questions) on the FSC Test covering firearm safety and basic firearms laws. The true/false and multiple choice test is given by DOJ Certified Instructors who are generally located at firearms dealerships.

7. How much will the Firearm Safety Certificate cost?

The fee for taking the FSC Test and obtaining an FSC is twenty-five dollars (\$25). The \$25 fee entitles you to take the test twice (from the same DOJ Certified Instructor) if necessary.

8. Are there any minimum qualifications/requirements for a person who wants to take the Firearm Safety Certificate Test?

Yes. The FSC applicant must be at least 18 years of age and must present clear evidence of identity and age by presenting a California Driver License or California Department of Motor Vehicles Identification Card.

9. If I don't pass the test, can I take it again?

Yes. The \$25 fee entitles you to take the test twice if necessary. If you fail the test the first time, after 24 hours have elapsed you may retake another version of the test from the same DOJ Certified Instructor without any additional fee. The DOJ Certified Instructor is required to offer or make available to you the FSC Study Guide or refer you to view the webinar.

10. How long will a Firearm Safety Certificate be valid?

An FSC will be valid for five (5) years from the date of issuance.

11. Will I need a Firearm Safety Certificate if I receive a firearm from my mother or father?

Yes. Prior to taking possession of the firearm, you must have a valid FSC. Pursuant to Penal Code section 27875, subdivision (c), within 30 days of the transfer you must also report the acquisition to DOJ on Form BOF 4544, pdf.

12. Will a Firearm Safety Certificate be required when a firearm is being loaned?

It depends on the specific circumstances. Generally, a person being loaned a firearm must have a current FSC. However, an FSC is not required if the loan does not exceed three days in duration and the person loaning the firearm is at all times within the presence of the person being loaned the firearm.

13. I am moving into California and intend to bring my firearm(s) with me. Will I need a Firearm Safety Certificate?

No, you do not need an FSC to move into California with your firearm(s). However, pursuant to Penal Code section 17000, there are important personal firearm importation responsibilities that are explained on this website.

EXHIBIT 3



CALIFORNIA DEPARTMENT OF JUSTICE BUREAU OF FIREARMS Handgun Safety Certificate Program Certified Instructor Application



☐ Initial Application

☐ Renewal Application-

Certified Instructor Number _____

A. Applicant Information

Last Name:		First Name:		Middle Name:	
Residence Street Address:			City:	State:	Zip Code:
Mailing Address (if different):			City:	State:	Zip Code:
Date of Birth (mm/dd/yyyy):	CA Driver License or Identification Card Number:		Sex:	Phone No. (include area code):	
Email Address: _____					

Pursuant to Penal Code section 31635 subdivision (b), Department Instructor Certification requires training and certification from one of the following (select one training entity and attach a copy of the certification):

- ☐ Department of Consumer Affairs, State of California - Firearm Training Instructor.
- ☐ Director of Civilian Marksmanship, Instructor or Rangemaster.
- ☐ Federal Government, Certified Rangemaster or Firearm Instructor.
- ☐ Federal Law Enforcement Training Center, Firearm Instructor Training Program or Rangemaster.
- ☐ United States Military, Occupational Speciality (MOS) as marksmanship or firearms instructor.
- ☐ National Rifle Association-Certified Instructor, Law Enforcement, Rangemaster, or Training Counselor.
- ☐ Commission on Peace Officer Standards and Training, State of California- Firearm.
- ☐ Authorization from a State of California accredited school to teach a firearms training.
- ☐ Training deemed equivalent by the Department.

Please select one of the following:

- ☐ I currently possess a valid Certificate of Eligibility (COE)
(Attach copy of certificate).
- ☐ Enclosed is a \$14.00 non-refundable fee payable to the
Department of Justice.

B. Declaration

I understand that the Department of Justice (the Department) has no responsibility for insurance coverage for myself, my students, my classes, my courses, or my oversight of handgun safety demonstrations. If I do not have a valid or pending COE, I understand that a firearms eligibility check may be conducted on me during this application process and I expressly authorize the Department to make this check. I understand that information submitted by me for approval as a Department Certified Instructor is a matter of public record. I understand that I must renew my application to be a Department Certified Instructor every five years. I agree to comply with the Handgun Safety Certificate (HSC) Program guidelines, procedures, and legal requirements as specified in the applicable statutes and the HSC Certified Instructor Manual. I declare that I am not addicted to the use of any narcotic drug and that I am familiar with the list of prohibiting offenses and nothing would preclude me from possessing a firearm. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signature _____

Date _____

NOTE: Only Department Certified Instructors may order HSC tests and Handgun Safety Certificates, and oversee the handgun safe handling demonstration. (Pen. Code, §§ 26850, subd. (a) & (b), 26853, 26856, & 26859.)

If you have any questions regarding the HSC Program, please contact the Firearms Safety and Regulatory Section at (916) 227-3750.

Mail completed form and all required attachments to:

California Department of Justice

Bureau of Firearms - HSC

P.O. Box 160367

SACRAMENTO, CA 95816-0367

DOJ USE ONLY

Received Date: _____

Processed By BOF: _____

Certified Instructor Number: _____

EXHIBIT 4



CALIFORNIA DEPARTMENT OF JUSTICE
BUREAU OF FIREARMS
CERTIFICATE OF ELIGIBILITY APPLICATION



Please complete this application by typing or printing in black ink.
See reverse for instructions and fees.

Application Type

☐ New Permit

Applicant Tracking Identifier (ATI) Number _____

☐ Annual Renewal

Certificate of Eligibility (COE) Number _____

Expiration Date _____

NOTE: One application per person.

Applicant Information

☐ Male
☐ Female

Last Name _____

Suffix _____

First Name _____

Middle Name _____

Alias/Maiden Name _____

California Driver License or ID No. _____

Date of Birth _____

Social Security Number _____

United States Citizen: ☐ Yes ☐ No IF NO: _____

Country of Citizenship _____

Alien Registration or I-94 Number _____

Physical Residential Address _____

City _____

County _____

State _____

Zip Code _____

Mailing Address (if different) _____

City _____

County _____

State _____

Zip Code _____

☐ Check if new mailing address

Home Telephone Number _____

Daytime Telephone Number _____

Business Type (check appropriate box(es))

☐ Importer

☐ Wholesaler / Distributor

☐ Store Manager

☐ Collector

☐ Pawnbroker

☐ Gunsmith

☐ Firearms Dealer

☐ Manufacturer

☐ Explosive Permit

☐ Gun Show Promoter

☐ Shooting Range

☐ Certified Instructor

☐ Employee*

☐ Prop Master

☐ Other

Record dealership information below

*California Firearms Dealership (CFD) No: _____

(Indicate type)

*Name of Dealership: _____

Certification

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I expressly authorize the Department of Justice (DOJ) to perform firearms eligibility checks of all relevant state and federal databases. I further understand that if I knowingly furnish a fictitious name or address or knowingly furnish any incorrect information or omit any information required to be provided on this application, I am guilty of a misdemeanor.

Signature _____

Date _____

FOR DOJ USE ONLY

Date Received: _____

COE #: _____

Issue/Denial Date: _____

NTN #: _____

Initials: _____

Certificate of Eligibility Application Instructions

New Applicants

Fingerprint Submission Requirements:

You must submit your fingerprint impressions before submitting this application form to the Department of Justice (DOJ). To submit fingerprint impressions, you must take a completed Request for Live Scan Service form (BCIA 8016) to a Live Scan station. Please refer to www.oag.ca.gov/fingerprints for Live Scan station location information. There, you need to have your fingerprint impressions submitted to DOJ and the Federal Bureau of Investigation (FBI). You must pay the Live Scan operator a \$54 DOJ fingerprint processing fee and Bureau of Firearms (BOF) eligibility processing fee, a \$17 FBI fingerprint processing fee, as well as the Live Scan operator's fee (Note: the Live Scan operator fee varies by Live Scan site, and the BOF does not regulate or set this price).

The Live Scan operator will provide an Applicant Tracking Identifier (ATI) number on your copy of the Request for Live Scan Service form (BCIA 8016). The ATI number documents your fingerprint submissions. You must enter your ATI number on the designated space of your Certificate of Eligibility (COE) Application form.

New Application Form Submission Requirements:

Complete the COE Application form. Be sure to include your Live Scan ATI number. Only one applicant per form. For more than one applicant per firearms dealership, each individual must complete a separate application form and submit fingerprint impressions via Live Scan to DOJ and the FBI. Check the appropriate business type box(es). If your business type is not listed, check the "Other" box and indicate the type of business on the line below. If you are applying for a COE as an employee of a California Firearms Dealer (CFD), you must provide the name of the dealership and the dealership's CFD number. You must date and sign the certification.

Mail your completed COE Application to:

DEPARTMENT OF JUSTICE
BUREAU OF FIREARMS
FIREARMS LICENSING AND PERMITS SECTION - COE
P.O. BOX 160367
SACRAMENTO, CA 95816-0367

It is recommended that you retain a copy of your completed COE Application form and your Request for Live Scan Service form for your records.

Renewal Applicants

Fingerprint submissions are not required for annual renewal applications. Complete the COE application, being sure to include your COE number and expiration date. Check the appropriate business type box(es). If your business type is not listed, check the "Other" box and indicate the type of business on the line below. If you are applying for a COE as an employee of a CFD, you must provide the name of the dealership and the dealership's CFD number. You must date and sign the certification.

Mail your completed COE Application along with the \$22.00 COE annual renewal fee to the address listed below.

DEPARTMENT OF JUSTICE
BUREAU OF FIREARMS
FIREARMS LICENSING AND PERMITS SECTION - COE
P.O. BOX 160367
SACRAMENTO, CA 95816-0367

It is recommended that you retain a copy of your completed COE Application form and your Request for Live Scan Service form for your records.

If you have any questions, please contact the Bureau of Firearms at (916) 227-3751.

PRIVACY NOTICE

The information requested on this form is being requested by the State of California, Department of Justice, Bureau of Firearms, to establish grounds for the issuance of the license or permit indicated on this application. The maintenance of the information collected on this form is authorized by Penal Code section 26710. All information requested on this form is mandatory. Failure to provide the requested information will result in the denial of this application. Information provided on this form may be disclosed to any peace officer or other person designated by the Attorney General upon request.

Pursuant to Civil Code section 1798.30 et seq., individuals have the right [with some exceptions] to access records containing the personal information about themselves that are maintained by the agency. The Bureau of Firearms is the agency officially responsible for the system of records that maintains the information provided on this form. For more information regarding the location of your records and the categories of any persons who use the information in those records, you may contact the Department of Justice, Bureau of Firearms at the above listed address.



REQUEST FOR LIVE SCAN SERVICE

Applicant Submission

CA0349400

ORI (Code assigned by DOJ)

FIREARMS ELIGIBILITY CERT

Authorized Applicant Type

Certificate of Eligibility

Type of License/Certification/Permit OR Working Title (Maximum 30 characters - if assigned by DOJ, use exact title assigned)

Contributing Agency Information:

Department of Justice, Bureau of Firearms

Agency Authorized to Receive Criminal Record Information

02879

Mail Code (five-digit code assigned by DOJ)

P.O. Box 160367

Street Address or P.O. Box

Firearms Licensing and Permits Section

Contact Name (mandatory for all school submissions)

Sacramento

CA

95816-0367

City

State

ZIP Code

(916) 227-3751

Contact Telephone Number

Applicant Information:

Last Name

First Name

Middle Initial

Suffix

Other Name

(AKA or Alias) Last

First

Suffix

Date of Birth

Sex

☐

Male

☐

Female

Driver's License Number

Height

Weight

Eye Color

Hair Color

Billing

Number

(Agency Billing Number)

Place of Birth (State or Country)

Social Security Number

Misc.

Number

(Other Identification Number)

Home

Address Street Address or P.O. Box

City

State

ZIP Code

Your Number: N/A

OCA Number (Agency Identifying Number)

Level of Service: ☒ DOJ ☒ FBI

If re-submission, list original ATI number:
(Must provide proof of rejection)

Original ATI Number

Employer (Additional response for agencies specified by statute):

N/A

Employer Name

N/A

Mail Code (five digit code assigned by DOJ)

N/A

Street Address or P.O. Box

N/A

Telephone Number (optional)

N/A

City

State

ZIP Code

Live Scan Transaction Completed By:

Name of Operator

Date

Transmitting Agency

LSID

ATI Number

Amount Collected/Billed

EXHIBIT 5



CALIFORNIA DEPARTMENT OF JUSTICE
BUREAU OF FIREARMS
**Safe Handling Demonstration
Affidavit**



Declaration

On _____, _____
Date (mm/dd/yyyy) *Printed Name of Handgun Purchaser/Recipient*
performed the safe handling demonstration as required in California Penal Code sections 26850,
subdivisions (a) and (b), and 26853, and 26856, and 26859, with the handgun (or one of the
same make and model) referenced on Dealer Record of Sale (DROS) No. _____
DROS Number
under the supervision of _____
Printed Name of Certified Instructor *Certified Instructor Number*

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct.

Certified Instructor Signature

Date

Handgun Purchaser/Recipient Signature

Date

Dealer/Employee Signature

Date

Printed Name of Dealer/Employee

EXHIBIT C

1 C. D. Michel - SBN 144258
Joseph A. Silvos, III - SBN 248502
2 Sean A. Brady - SBN 262007
Anna M. Barvir - SBN 268728
3 MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
4 Long Beach, CA 90802
Telephone: (562) 216-4444
5 Fax: (562) 216-4445
cmichel@michellawyers.com

6 Attorneys for Plaintiffs

7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF FRESNO

9 KIM BELEMJIAN; JONATHAN
10 FAIRFIELD; T.J. JOHNSTON;
MATTHEW PIMENTEL; STANLEY ROY;
11 FFLGUARD, INC.; CALIFORNIA RIFLE
AND PISTOL ASSOCIATION;

12 Plaintiffs,

13 vs.

14 KAMALA D. HARRIS, in her official
15 capacity as Attorney General for the State
of California; STEPHEN LINDLEY, in his
16 official capacity as CHIEF OF THE
CALIFORNIA DEPARTMENT OF
17 JUSTICE BUREAU OF FIREARMS;
CALIFORNIA DEPARTMENT OF
18 JUSTICE; and DOES 1-10,

19 Defendants.
20
21
22
23
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25
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27
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FILED
FEB - 2 2015
SUPERIOR COURT OF CALIFORNIA
COUNTY OF FRESNO
BY _____ DEPUTY

CASE NO. 15-CE-CG-00029

**FIRST AMENDED VERIFIED
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND PETITION
FOR WRIT OF MANDATE**

Gov. Code, § 11340 et seq.; Gov. Code, § 1060;
U.S. Const., 2d Amend

Complaint Filed: January 6, 2015
Trial Date: Not Yet Set

1 Plaintiffs Kim Belemjian, Jonathan Fairfield, T.J. Johnston, Matthew Pimentel, Stanley
2 Roy, FFLGuard, Inc., and the California Rifle and Pistol Association (collectively, “Plaintiffs”),
3 by and through their counsel, bring this Complaint for Declaratory and Injunctive Relief against
4 the above-named Defendants, their employees, agents, and successors in office, and in support
5 thereof allege the following upon information and belief:

6 INTRODUCTION

7 1. Pursuant to Senate Bill 683 (“SB 683”), effective January 1, 2015, California’s
8 *Handgun* Safety Certificate Program¹ will be replaced by the *Firearm* Safety Certificate Program.
9 SB 683 requires Defendant California Department of Justice (“Department” or “DOJ”) to
10 administer the Firearm Safety Certificate Program pursuant to the California Penal Code and to
11 adopt regulations creating a safe-handling demonstration to be required for purchasers of firearms
12 other than handguns, mostly rifles and shotguns.

13 2. Plaintiffs bring this action pursuant to the California Administrative Procedure Act
14 (Gov. Code, § 11340 et seq.) (“APA”) to challenge the validity of and to enjoin several rules
15 improperly promulgated and enforced by Defendants the Attorney General for the State of
16 California, Kamala D. Harris, the Chief of the California Department of Justice Bureau of
17 Firearms, Stephen Lindley, and the California Department of Justice (collectively, “Defendants”),
18 in connection with the Firearm Safety Certificate Program. The challenged rules took effect
19 January 1, 2015.

20 3. Specifically, Plaintiffs challenge the Department’s four new rules of general
21 application for the implementation of the Firearm Safety Certificate Program announced by way
22 of a letter sent by the Department to all “California Firearms Dealers, DOJ Certified Instructors,
23 and Comparable Entities” on October 2, 2014. The challenged rules require that:

- 24 (1) All California DOJ Certified Instructors have access to a personal computer,
25 printer, and email;
26 (2) All DOJ Certified Instructors obtain Certificates of Eligibility that must be
27

28 ¹ As described in Penal Code sections 31610-31617. Unless otherwise indicated, all
section references are to the California Penal Code.

1 renewed annually;

2 (3) All Firearm Safety Certificate payments be limited to only major credit cards; and

3 (4) All DOJ Certified Instructors include the “steps in long gun safety” procedures
4 contained in the “Firearm Safety Certificate Manual” in all long-gun safe-handling
5 demonstrations.

6 4. The challenged rules implement, interpret, and make specific requirements for
7 compliance with statutory law enforced by Defendants. They include policy decisions by
8 Defendants that are subject to the open government and deliberative process requirements under
9 the APA. But the challenged rules do not comply with the rulemaking provisions of the APA.
10 They were adopted without prior public notice or opportunity for oral or written public comment.
11 (See Gov. Code, §§ 11346.2, 11346.4, 11346.5, 11346.8.)

12 5. The APA does allow for adoption of regulations without any advance public
13 notice and the opportunity for comment *only* in emergency circumstances where “the emergency
14 situation clearly poses such an immediate, serious harm that delaying action to allow public
15 comment would be inconsistent with the public interest.” (Gov. Code, §§ 11346.1, subds. (a)-(b).)
16 No “emergency” exists that would justify bypassing the formal process for the adoption of the
17 challenged rules here. And no other section of the California Code exempts the adoption of rules
18 concerning the Firearm Safety Certificate Program from the requirements of the APA.

19 6. Accordingly, Plaintiffs seek declaratory and injunctive relief to invalidate and
20 enjoin Defendants’ enforcement of the challenged rules as unlawful underground regulations.

21 7. Pursuant to Government Code section 1060, Plaintiffs also seek a declaration of
22 Defendants’ rights and obligations to Plaintiffs pursuant to Penal Code section 26860,
23 subdivisions (a), (c), and (d), which together require that recipients of long guns perform a long-
24 gun safe-handling demonstration in the presence of a certified instructor before taking possession,
25 and require a firearm dealer to certify that the regulations adopted pursuant to subdivision (b)
26 have been met. Because Defendants have yet to formally propose or adopt any regulations
27 establishing the long-gun safe-handling demonstration, firearm dealers and recipients, including
28 Plaintiffs, their members, and supporters, *cannot* comply with these provisions. And so a

1 controversy regarding whether the statute may be enforced absent any formal implementing
2 regulations exists.

3 8. Further, because firearm dealers and recipients, including Plaintiffs, their
4 members, and supporters, *cannot* comply with the long-gun safe-handling demonstration
5 provisions, unless and until the Department has fulfilled its statutory duty to formally adopt
6 regulations regarding the demonstration, Plaintiffs seek a declaration that Defendants'
7 enforcement of section 26860, subdivisions (a), (c), and (d) infringes on the Second Amendment
8 rights of Plaintiffs and others like them.

9 9. Firearm dealers and recipients, including Plaintiffs, their members, and supporters,
10 are thus irreparably harmed because they are precluded from engaging in constitutionally
11 protected conduct, i.e., transacting in lawful firearms

12 10. Accordingly, Plaintiffs seek to enjoin Defendants' enforcement of Penal Code
13 section 26860, subdivisions (a), (c), and (d) unless and until Defendants formally promulgate and
14 adopt regulations establishing the long-gun safe-handling demonstration as they were statutorily
15 mandated to do by January 1, 2015. (Pen. Code, § 26860, subd. (b).)

16 11. And because the Department was required to adopt such regulations pursuant to
17 the APA prior to January 1, 2015, but did not do so, a writ should issue from this Court mandating
18 that the Department immediately begin the official rulemaking process for those regulations.

19 PARTIES

20 I. PLAINTIFFS

21 12. Kim Belemjian is a resident of Fresno County, California. She intends to purchase
22 a firearm in California this year. Plaintiff Belemjian does not currently possess a Handgun Safety
23 Certificate or a Firearm Safety Certificate, and is not exempt from the Firearm Safety Certificate
24 and long-gun safe-handling demonstration requirements of Penal Code sections 31615 and 26860.
25 In order to purchase a firearm in California, Plaintiff Belemjian will be subject to the changes
26 made by SB 683 and the subsequent regulations imposed by Defendants.

27 13. Plaintiff Jonathan Fairfield has been certified by the Department to issue Handgun
28 Safety Certificates since December 8, 2008. He is also an NRA Certified Pistol Instructor and

1 NRA Certified Rifle and Shotgun instructor. Plaintiff Fairfield issues Handgun Safety Certificates
2 (now referred to as Firearm Safety Certificates) as part of his business as a firearm instructor at
3 various gun shows, at other firearm-related events, and in his role as a Firearm Safety Certificate
4 instructor at the Apple Valley Gun Club located in Victorville, California. In order to continue to
5 issue Firearm Safety Certificates, which are required to transfer or purchase any firearm in
6 California as of January 1, 2015, Plaintiff Fairfield will be subject to the changes made by SB 683
7 and the subsequent regulations imposed by Defendants.

8 14. Plaintiff T. J. Johnston is the owner and proprietor of AllSafe Defense Systems
9 (“AllSafe”), located in Orange, California, which offers both armed and unarmed self-defense
10 classes and specializes in providing safe, fun, and effective training in the use of firearms to
11 members of the public. Over the past three decades, Plaintiff Johnston has offered armed
12 self-defense training to thousands of students. As a certified Training Counselor of the NRA, he
13 has presented NRA Instructor Certification courses to over a thousand highly experienced
14 shooters and members of the law enforcement community aspiring to become NRA Certified
15 Instructors. In this capacity, Plaintiff Johnston offered training for individuals to become NRA
16 Certified Pistol Instructors, which satisfied the requirement to administer the Handgun Safety
17 Certificate program (now referred to as the Firearm Safety Certificate program). In November
18 2000, the Department issued Certificate #222, approving the AllSafe Basic Handgun class as
19 satisfying the training requirements for individuals to be issued a Handgun Safety Certificate.
20 Plaintiff Johnston was then approved as a certified instructor, authorized to issue Handgun Safety
21 Certificates, in 2003. He has since issued over 1,700 certificates. In order to continue to issue
22 Firearm Safety Certificates, which are required to purchase any firearm in California as of January
23 1, 2015, Plaintiff Johnston will be subject to the changes made by SB 683 and the subsequent
24 regulations imposed by Defendants.

25 15. Plaintiff Matthew Pimentel is a Fresno, California, based Peace Officer Standards
26 and Training (“POST”) Instructor, a California Department of Justice Firearms Instructor, and a
27 National Rifle Association (“NRA”) Certified Instructor who has provided firearm-related
28 instruction throughout California since early 2000. The Department has recognized Plaintiff

1 Pimentel's courses as meeting the requirements to certify individuals to become Handgun Safety
2 Certificate instructors under Penal Code section 31635, subdivision (b). Since 2007, Mr. Pimentel
3 has certified approximately 300 individuals to administer the Handgun Safety Certificate test, and
4 has himself issued approximately 400 Handgun Safety Certificates to individuals seeking to
5 purchase a handgun. In order to continue to issue *Firearm* Safety Certificates, which are required
6 to transfer or purchase any firearm in California as of January 1, 2015, Plaintiff Pimentel will be
7 subject to the changes made by SB 683 and the subsequent regulations imposed by Defendants.

8 16. Plaintiff Stanley Roy has been certified by the NRA as a Pistol Instructor since
9 December 2013 and as a Rifle Instructor since July 2014. He is also the Education Committee
10 Chairman of the Antelope Valley NRA Member's Council, which provides classes to the local
11 community on firearm safety and education. Plaintiff Roy wishes to provide Firearm Safety
12 Certificates to his group as well as other individuals as a Department certified instructor. Plaintiff
13 Roy has yet to apply to become a certified instructor, but intends to apply this year. In order to
14 become certified by the Department, Mr. Roy will be subject to the changes made by SB 683 and
15 the subsequent regulations imposed by Defendants. Plaintiff Roy also intends to purchase long
16 guns in California over the next few years.

17 17. Plaintiff FFLGuard LLC, is a Delaware corporation located at 244 Fifth Ave.,
18 Suite 1960, New York, New York 10001. FFLGuard offers a cooperative compliance and legal
19 defense program for Federal Firearms Licensees ("FFLs") by providing clients with lawyers,
20 subject-matter experts, professionals, and para-professionals who are specialists in the area of
21 firearms law and compliance. FFLGuard's legal defense program delivers FFLs with access to
22 these legal and firearms compliance specialists—providing educational training and rapid
23 response service—to safeguard the viability of the client's license. Clients participating in
24 FFLGuard's legal defense program subscribe voluntarily to FFLGuard's heightened compliance
25 standards and best practices. FFLGuard represents countless California Firearm Dealers and their
26 employees, including certified Handgun Safety Certificate Instructors and soon-to-be certified
27 Firearm Safety Certificate Instructors throughout California. This case falls squarely within the
28 interests of FFLGuard and its clients who are licensed dealers, the latter being subject to criminal

1 penalties for unintentional violation of the law and who cannot comply with the long-gun safe-
2 handling demonstration requirements placed on FFLs unless and until Defendants adopt
3 regulations pursuant to Penal Code section 26860, subdivision (b).

4 18. Plaintiff California Rifle and Pistol Association (“CRPA”) is a nonprofit
5 organization that seeks to defend the Second Amendment and advance laws that protect the rights
6 of individual California residents. The organization works to preserve constitutional and statutory
7 rights of gun ownership, including the right to self-defense, right to hunt and the right to keep and
8 bear arms. And it is dedicated to promoting the shooting sports by conducting state championship
9 matches for adults and young shooters, teaching firearms safety, and supporting state teams that
10 attend the national championships each year. CRPA represents the interests of the tens of
11 thousands of its members who reside in the State of California, including those in Fresno County,
12 who are too numerous to conveniently bring this action individually and whose interests include
13 their desire to transact in or acquire firearms and otherwise engage in conduct protected by the
14 Second Amendment. CRPA also represents a number of California Firearm Dealers and their
15 employees, certified Handgun Safety Certificate Instructors and soon-to-be certified Firearm
16 Safety Certificate Instructors throughout California who are subject to the changes made by SB
17 683 and the subsequent regulations imposed by Defendants.

18 **II. DEFENDANTS**

19 19. Defendant Kamala D. Harris is the Attorney General of California, the state’s chief
20 law officer. Pursuant to article V, section 13, of the California Constitution and Government Code
21 sections 12524, 12550, and 12560, Defendant Harris has supervisory powers over the district
22 attorneys, sheriffs, and other law enforcement officials to ensure the “uniform and adequate”
23 enforcement of the laws of the state of California. She is also charged with the duty to instruct
24 local prosecutors and law enforcement agencies regarding the meaning of the laws of the state,
25 including the implementation of the Firearm Safety Certificate Program. Defendant Harris is sued
26 in her official capacity.

27 20. Defendant Stephen Lindley is the Chief of the DOJ Bureau of Firearms. As such,
28 he is authorized to execute, interpret, and enforce the laws of the State of California pertaining to,

1 among other things, the administration of the Firearm Safety Certificate Program, including the
2 regulations, practices, and policies at issue in this action. Defendant Lindley is sued in his official
3 capacity.

4 21. Defendant California Department of Justice (“Department”) is a lawfully
5 constituted executive agency charged by SB 683 (Stats. 2013, ch. 761), to implement and
6 promulgate regulations establishing a new long-gun safe-handling demonstration and to
7 administer the Firearm Safety Certificate Program. It is the sole California agency responsible for
8 doing so.

9 22. Plaintiffs do not know the true names and capacities of Defendants Doe 1 through
10 Doe 10, inclusive, who are therefore sued by such fictitious names. Plaintiffs allege on
11 information and belief that each person or entity designated as Doe 1 through Doe 10, is
12 responsible in some manner for the unlawful acts alleged in this complaint. Plaintiffs pray for
13 leave to amend this Complaint and Petition to show the true names, capacities, and/or liabilities of
14 Doe Defendants if and when they are determined.

15 JURISDICTION AND VENUE

16 23. This Court has jurisdiction under article VI, section 10, of the California
17 Constitution and California Code of Civil Procedure section 410.10.

18 24. Venue in this Court is proper because this is an action against public officers of the
19 State of California, in their official capacities, for acts performed as part of their public duties that
20 have caused and will continue to cause legal injuries and deprivation of rights to persons,
21 including Plaintiffs, in Fresno County. (Code Civ. Proc., §§ 393, subd. (b), 395, subd. (a).)

22 25. Venue in this Court is also proper because this is an action against the Attorney
23 General, a public officer of the state of California, and because this Attorney General has an office
24 in Fresno, California. (Code Civ. Proc., § 401, subd. (1).)

25 AUTHENTICITY OF EXHIBITS

26 26. All exhibits accompanying this Complaint are true and correct copies of the
27 original documents. The exhibits are incorporated herein by reference as though fully set forth in
28 this Complaint.

1 **STATEMENT OF FACTS**

2 **I. THE STATUTORY AND REGULATORY FRAMEWORK**

3 **A. The Firearm Safety Certificate Program**

4 27. On October 11, 2013, Governor Jerry Brown signed SB 683 into law. The bill
5 created the Firearm Safety Certificate Program which, in pertinent part, prohibits any non-exempt
6 person from purchasing or receiving any firearm, except an antique firearm, without a valid
7 Firearm Safety Certificate and prohibits any person from selling, delivering, loaning, or
8 transferring any firearm to any person who does not have a valid Firearm Safety Certificate on or
9 after January 1, 2015.²

10 28. Prior to January 1, 2015, the predecessor to the *Firearm* Safety Certificate
11 Program was known as the *Handgun* Safety Certificate Program. As its name suggests, the
12 Handgun Safety Certificate Program was limited to the transfer of handguns. That Program was
13 officially expanded and replaced by the Firearm Safety Certificate Program on January 1, 2015.
14 Aside from a few exemptions not relevant here, the statutory requirements of the Firearm Safety
15 Certificate Program are materially the same, though they apply with equal force to the transfer of
16 firearms other than handguns, including mostly rifles and shotguns.

17 29. Under current law, it is a misdemeanor to purchase or receive any firearm, except
18 an antique firearm, without a valid Firearms Safety Certificate establishing that the transferee has
19 successfully passed the required firearm safety test. (Pen. Code, § 31615, subds. (a)(1) & (b).) In
20 the case of a handgun, however, “an unexpired handgun safety certificate may be used.” (Pen.
21 Code, 31615, subd. (a)(1).)

22 30. Subject to certain exemptions, it is a misdemeanor to transfer a firearm to any
23 non-exempt person who does not have a valid Firearm Safety Certificate and for that person to
24
25
26

27 ² SB 683 amended Penal Code sections 27540, 27875, 27880, 27920, 27925, 28160,
28 31620, and 31810 and amends, repeals, and replaces sections 26840, 31610, 31615, 31625,
31630, 31635, 31640, 31645, 31650, 31655, 31660, and 31700 (effective January 1, 2015). It also
adds sections 16535, 16865, and 26860.

1 receive a firearm. (Pen. Code, §§ 27540, subd. (e), 31615, subds. (a)(2) &(b).)³

2 31. A Firearm Safety Certificate is only necessary to purchase or receive a firearm, not
3 to possess one. (Pen. Code, § 31615, subds. (a).)

4 32. If a person does not possess a Firearm Safety Certificate when attempting to
5 purchase or receive a firearm, he or she may acquire one by paying up to \$25, Pen. Code, §
6 31650, subd. (a), and successfully completing a written test administered by a Department-
7 certified instructor, Pen. Code, § 31645, subd. (a).

8 33. Pursuant to Penal Code section 31640, subdivision (c), the written test includes
9 objective questions about, inter alia, California laws applicable to carrying and handling firearms,
10 responsibilities of firearm ownership, and current laws relating to private sales/transfers of
11 firearms. An applicant for a Firearm Safety Certificate must successfully complete the written test
12 with a passing grade of at least 75%. (Pen. Code, § 31645, subd. (a).)

13 34. Upon receiving a passing grade on the written test, the applicant is to be
14 immediately issued a Firearm Safety Certificate. (Pen. Code, § 31645, subd. (a).)

15 35. Only Department-certified instructors may administer the firearm safety test and
16 issue Firearm Safety Certificates.

17 36. Many Federal Firearm Licensees (“FFLs”) in California are also certified
18 instructors who administer the safety test in their stores. Some instructors are employees, agents,
19 or independent contractors of FFLs. There are also a number of instructors, like Plaintiffs
20 Pimentel and Johnston who, in addition to teaching firearm-related classes, administer the test in
21 their classrooms or on ranges with students, or at gun shows.

22 37. To become a certified Firearm Safety Certificate instructor and administer the
23 Firearm Safety Certificate test, a person must meet the prerequisite skill, knowledge, and
24 competency. (Pen. Code, § 31635, subd. (a).)

25 38. Firearm Safety Certificate instructor applicants must obtain a certification to
26 provide training from an organization specified by Penal Code section 31635, subdivision (b), or
27

28 ³ See Pen. Code, §§ 31700-31835 (listing individuals and transfers exempt from the
Firearms Safety Certificate requirement).

1 any entity found by the Department to give comparable instruction in firearm safety.

2 Alternatively, the applicant must have training similar or equivalent to that provided by an
3 organization specified by Penal Code section 31635, subdivision (b).

4 39. Prior to January 1, 2015, under the *Handgun* Safety Certificate Program, to
5 become a certified instructor, one was required to file a completed application with the
6 Department, specify which authorized organization he or she received training from, attach a copy
7 of the certification (initial applicants only), and *either* provide a copy of their Certificate of
8 Eligibility *or* enclose \$14.00 for a background check. (DOJ Handgun Safety Certificate Program
9 Certified Instructor Application (attached as Exh. A).) According to the Department's Handgun
10 Safety Certificate Program Certified Instructor Application, an approved applicant is certified as
11 an instructor for five years. (*Ibid.*)

12 40. On January 1, 2015, the Department released its *Firearm* Safety Certificate
13 Program DOJ Certified Instructor Application. The new form requires applicants to file a
14 completed application with the Department, specify which authorized organization he or she
15 received training from, attach a copy of the certification (initial applicants only), and provide a
16 copy of their Certificate of Eligibility. (Firearm Safety Certificate Program DOJ Certified
17 Instructor Application (attached as Exh. B).) According to the new application, an approved
18 applicant is certified as an instructor for five years. (*Ibid.*)

19 **B. The Long-Gun Safe-Handling Demonstration**

20 41. Subject to certain exemptions, SB 683 also requires most people purchasing a long
21 gun from a licensed firearm dealer to perform a long-gun safe-handling demonstration with the
22 firearm to be transferred. (Pen. Code, § 26860, subd. (a).)⁴

23 42. Prior to January 1, 2015, only transfers of handguns required the completion of a
24 safe-handling demonstration. (Pen. Code, § 26860, subd. (a) (2014).) The criteria for handgun
25 safe-handling demonstrations are expressly codified at Penal Code sections 26853 through 26859.

26
27 ⁴ Persons exempt from the Firearm Safety Certificate requirement are also exempt from
28 the safe-handling requirement. (Pen. Code, § 26860, subd. (g) [referencing the requirements for
possession of a Firearm Safety Certificate in Penal Code section 31615, subdivision (a), and the
exception to that requirement in section 31700].)

1 These criteria are broken up by handgun action types, i.e., semiautomatic pistol, double-action
2 revolver, and single-action revolver. (Pen. Code, §§ 26853, 26856, 26859.)

3 43. Pursuant to Penal Code Section 26860, subdivision (b), “the [D]epartment *shall*,
4 *not later than January 1, 2015, adopt regulations* establishing a long gun safe handling
5 demonstration that shall include, at a minimum, loading and unloading the long gun.” (Italics
6 added.)

7 44. Pursuant to Penal Code section 26860, subdivision (c), the FFL must “sign and
8 date an affidavit stating that the requirements of subdivision (a) [completion of long-gun safe-
9 handling demonstration] *and the regulations adopted [by the Department] pursuant to subdivision*
10 *(b) have been met.*” (Italics added.)⁵

11 45. Pursuant to Penal Code section 26860, subdivision (d), “[t]he recipient shall
12 perform the safe handling demonstration for a *department-certified instructor.*” (Italics added.)

13 46. Failure on the part of the FFL to require a safe-handling demonstration before
14 transfer of the firearm can result in the forfeiture of the dealer’s California Firearm Dealer’s
15 license. (Pen. Code, § 26800.)

16 **C. Certificates of Eligibility**

17 47. A Certificate of Eligibility (“COE”) is a certificate provided by the Department
18 confirming its holder is eligible to possess firearms. (Pen. Code, § 26710 (2014).)

19 48. A COE is only required by California law in certain circumstances. Persons
20 applying to be licensed firearm dealers in California must obtain one, so too must employees of
21 firearm manufacturers, amongst other individuals.⁶ (Pen. Code, §§ 26700, 29120.)

22 49. California law does *not* require employees and agents of FFLs to obtain a COE,
23 unless required by their employer or the local jurisdiction. (Pen. Code, § 31660.)

24
25 ⁵ The California Department of Justice Bureau of Firearms Safe Handling Demonstration
26 Affidavit is attached as Exhibit C.

27 ⁶ One must have a COE in order to: (1) be a “consultant-evaluator” as defined in section
28 16410; (2) produce, promote, sponsor, operate, or otherwise organize a gun show or sell used
firearms at a gun show pursuant to sections 27200 and 26525; and (3) be exempt from certain
firearm transfer requirements as a curio or relic collector pursuant to sections 26585, 26970, and
27966.

1 50. California statutory law does not require certified FSC instructors to obtain a COE.

2 **D. Adoption of Regulations Pursuant to the Administrative Procedure Act**

3 51. The California Administrative Procedure Act (“APA”) provides a detailed
4 statutory scheme for public notice and comment on regulations proposed by state agencies. (Gov.
5 Code, §§ 11340 et seq.)

6 52. Mandatory procedures include providing adequate notice to the public of
7 proposed regulations and an opportunity for public comment. (Gov. Code, §§ 11346.2, 11346.4,
8 11346.5, 11346.8.)

9 53. The agency must provide reports of detailed reasons for a proposed regulation, the
10 alternatives considered, and the effect the proposed regulation is projected to have on individuals.
11 (Gov. Code, §§ 11346.2, 11346.9.)

12 54. The APA specifically prohibits any state agency from making use of a rule which
13 is a “regulation” as defined in Government Code section 11342.600, that should have, but has not
14 been adopted pursuant to the detailed procedures set forth in the APA. (Gov. Code, § 11340.5,
15 subd. (a).)

16 55. If a rule constitutes a “regulation,” and there is no express statutory exemption
17 excusing the agency from complying with the APA, any regulation enacted without compliance
18 with the APA is an invalid “underground regulation” and cannot be enforced. (*Tidewater Marine*
19 *Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576; see also Gov. Code, § 11346.)

20 56. There is a narrow exception to the stringent requirements of the APA for
21 “emergency” regulations if an “emergency situation clearly poses such an immediate, serious
22 harm that delaying action to allow public comment would be inconsistent with the public
23 interest.” (Gov. Code, § 11346.1, subd. (a)(3).)

24 57. The purpose of the APA’s comprehensive scheme is to ensure that “those persons
25 or entities whom a regulation will affect have a voice in its creation,” *Armistead v. State*
26 *Personnel Board* (1978) 22 Cal.3d 198, 204-205, to allow the public to inform the agency about
27 possible unintended consequences of a proposed regulation, and to protect against “bureaucratic
28 tyranny,” *Cal. Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 507-

1 508.

2 **E. The Second Amendment Right to Keep and Bear Arms**

3 58. The Second Amendment to the United States Constitution provides: “A well
4 regulated militia, being necessary to the security of a free State, the right of the people to keep
5 and bear arms, shall not be infringed.” (U.S. Const., 2d Amend.)

6 59. The United States Supreme Court held in *District of Columbia v. Heller* (2008)
7 554 U.S. 570 that the Second Amendment protects an individual civil right to possess firearms
8 for self-defense.

9 60. The Supreme Court subsequently held in *McDonald v. City of Chicago* (2010)
10 561 U.S. 742, 778, that the Second Amendment right to possess arms for self-defense is a
11 “fundamental” right, incorporated through the due process clause of the Fourteenth Amendment
12 to restrict state and local governments from infringing on that individual right.

13 61. The right to keep and bear arms for self-defense necessarily implies a
14 corresponding right to acquire firearms. (*Jackson v. City and Cnty. of San Francisco* (9th Cir.
15 2014) 746 F.3d 953, 967; *see also Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 704;
16 *Andrews v. State* (Tenn. 1871) 50 Tenn. 165, 178, 8 A. Rep. 8, 13, *cited with approval* in *Heller*,
17 554 U.S. at p. 614.)

18 **II. THE NEW REQUIREMENTS GOVERNING THE FIREARM SAFETY CERTIFICATE**
19 **PROGRAM**

20 62. On October 2, 2014, Defendants sent letters to all “California Firearms Dealers,
21 DOJ Certified Instructors, and Comparable Entities” expressly outlining “the new [Firearm
22 Safety Certificate] program, *requirements* for DOJ Certified Instructors; *requirements* for
23 Comparable Entities; and existing Handgun Safety Certificate program updates.” (Stephen
24 Lindley, Chief, Bureau of Firearms, letter to California Firearms Dealers, DOJ Certified
25 Instructors, and Comparable Entities re: Firearm Safety Certificate Program, Oct. 2, 2014, p. 1
26 (attached as Exh. D), italics added.)

27 63. According to the October 2, 2014 letter, “the Department plans to utilize a
28 web-based application to make [Firearm Safety Certificate] materials available, including the

1 Firearm Safety Certificates, test materials, the [Firearm Safety Certificate] study guide and the
2 [Firearm Safety Certificate] manual to all DOJ Certified Instructors. The [Firearm Safety
3 Certificate] study guide will also be available for printing and audio/visual materials will be
4 available for streaming/downloading from the public website at
5 <http://www.oag.ca.gov/firearms/fsc>.” According to the Department’s letter, that link was not
6 made publicly available until January 1, 2015. (Exh. D, p. 1.)

7 64. The letter sets forth, in pertinent part, several new “requirements” not previously
8 required under the Handgun Safety Certificate Program that are generally applicable to all those
9 engaging in the Firearm Safety Certificate Program and govern the manner in which the
10 Department is to implement the Firearm Safety Certificate Program. (Exh. D, pp. 1-3.)

11 65. The requirements were intended by Defendants and are, on their face, intended to
12 apply generally rather than to a specific case.

13 66. According to the October 2, 2014 letter, “[a]ny materials that require a fee
14 will be billed through the online system. *Payment options will be limited to major*
15 *credit/debit cards* (e.g. MasterCard, Visa, American Express, and Discover cards).
16 **Payment by cash or check will not be accepted . . .**” (Exh. D, pp. 1-3, emphasis
17 original, italics added.)

18 67. According to the October 2, 2014 letter, “*DOJ Certified Instructors will*
19 *need access to a personal computer and printer*. DOJ Certified Instructors will be sent
20 login information to be able to access the new [Firearm Safety Certificate] program online
21 system.” (Exh. D, p.1, italics added.) The letter also informed certified instructors that “*an*
22 *email address will be required to maintain access to the new web-based application*.”
23 (Exh. D, p. 3, italics added.)

24 68. According to the October 2, 2014 letter, “[u]pon successful login [to the
25 Firearm Safety Certificate Program online system], existing DOJ Certified Instructors will
26 be required to acknowledge they have read the revised Firearm Safety Certificate Manual,
27 *which includes steps in long gun safety and that they will include both handgun and long*
28 *gun safety as part of the safe handling demonstrations*.” (Exh. D, pp. 1-2, italics added.)

1 69. According to the October 2, 2014 letter, “ *[a]ll DOJ Certified Instructors*
2 *will be required to have a valid Certificate of Eligibility (COE)*. As of January 1, 2015,
3 new applicants will be required to obtain a COE prior to submitting an application as a
4 DOJ Certified Instructor. Existing DOJ Certified Instructors as of December 31, 2014,
5 will be required to have a valid COE upon renewal or by June 30, 2015, whichever comes
6 first. *Any existing DOJ Certified Instructor who has not provided proof of a valid COE*
7 *by June 30, 2015, will not have access to the FSC online system*. Mere submission of the
8 application will not be considered proof of a COE; therefore, please allow 4-6 weeks for
9 the Department to process the COE application. . . . COEs must be renewed annually.”
10 (Ex. D, p. 2, emphasis added.)

11 70. The requirements set forth in Defendants’ October 2, 2014 letter constitute
12 “regulations” and are thus subject to the stringent requirements of the APA.

13 71. The requirements set forth in Defendants’ October 2, 2014 letter are found
14 nowhere in the California Code, and they are not mere restatements of statutory law.

15 72. The requirements set forth in Defendants’ October 2, 2014 letter were not
16 formally noticed by the Department or any other state agency as required by the APA.

17 73. Defendants provided no period for oral or written public comment
18 regarding the requirements set forth in Defendants’ October 2, 2014 letter was provided
19 as required by the APA.

20 74. Defendants provided no reasons for the proposed regulations, any
21 alternatives considered, and the effect the proposed regulations are projected to have on
22 the affected public.

23 75. Neither SB 683 nor any other section of the California Code expressly
24 exempts the adoption of rules concerning the Firearm Safety Certificate Program and
25 long-gun safe-handling demonstration from the procedural requirements of the APA.

26 76. There was no “emergency” sufficient to meet the narrow statutory
27 exception to the APA for emergency regulations. Indeed, Defendants had since October
28 2013, when SB 683 was signed into law, to promulgate any regulations regarding the

1 Firearm Safety Certificate Program before it took effect on January 1, 2015.

2 77. On December 18, 2014, Ms. Stacy Heinsen, on behalf of Defendants, sent
3 letters to identified certified instructors, providing them with their personal identifying
4 information to access the online system. (Stacy Heinsen, Mgr., Bureau of Firearms, letter
5 to DOJ Certified Instructors re: Firearm Safety Certificate Program - Online Access, Dec.
6 18, 2014, p. 1 (attached as Exh. E).)

7 78. Defendants' December 18, 2014 letter also explained to certified
8 instructors how the new web-based system would operate and reminded them that
9 instructors required access to a personal computer, printer, and email address to access the
10 system. (Exh. E, pp. 1-2.)

11 79. Plaintiffs have filed a petition with the Office of Administrative Law
12 ("OAL") seeking an opinion on the issues raised in this complaint. (C.D. Michel, letter to
13 Ch. 2 Compliance Unit, Office of Admin. L., Dec. 29, 2014 (attached as Exh. F).) The
14 OAL has yet to respond, but that is of no consequence here, because an OAL opinion on
15 an alleged underground regulation is not a prerequisite to "obtain[ing] a judicial
16 declaration as to the validity of any regulation" (Gov. Code, § 11350, subd. (a).) This
17 Court therefore has the authority to grant Plaintiffs the relief they seek.

18 **III. THE DEPARTMENT'S FAILURE TO PROMULGATE ANY REGULATIONS**
19 **ESTABLISHING A LONG-GUN SAFE-HANDLING DEMONSTRATION AS REQUIRED**
20 **BY STATUTE**

21 80. Defendant Department has adopted no regulations regarding the long-gun
22 safe-handling demonstration as it was required to do by Penal Code section 26860,
23 subdivision (b).

24 81. According to the Department's October 2, 2014 letter, the "steps in long
25 guns safety" procedures contained in the "Firearm Safety Certificate Manual" *must* be
26 included in the long-gun safe-handling demonstrations." (Exh. D, p. 2.) That rule,
27 however, was not adopted pursuant to the procedural requirements set forth in the APA.

28 **FIRST CAUSE OF ACTION**
FOR DECLARATORY AND INJUNCTIVE RELIEF

Validity of Rule that Certified Instructors Have Access to a Personal Computer, Printer, & Email
(Violation of California Administrative Procedure Act, Gov. Code, § 11340 et seq.)

(By All Plaintiffs Against All Defendants)

82. Plaintiffs incorporate by reference the allegations in the above paragraphs as though fully set forth herein.

83. The rule that all certified instructors have access to a personal computer, printer, and email applies to all certified instructors participating in the Firearm Safety Certificate Program. It is thus a rule of general applicability.

84. The rule was created by the Department for the purpose of implementing, interpreting, or making specific the Firearm Safety Certificate Program, a program administered by the Department pursuant to the Penal Code. It is thus a “regulation” under the APA.

85. There is no express exemption from the APA in the California Code regarding the promulgation of regulations regarding the Firearm Safety Certificate Program, there was no emergency sufficient to justify bypassing the APA, and the regulation is not a mere restatement of statutory law. It is thus subject to the procedural requirements set forth in the APA.

86. By implementing, administering, and enforcing the regulation that all certified instructors have access to a personal computer, printer, and email without providing formal notice or opportunity for public comment, Defendants have violated and continue to violate the APA.

87. An actual controversy exists. Plaintiffs contend that Defendants are violating the APA and that Defendants intend to continue to do so. Plaintiffs allege on information and belief that the Defendants and each of them contend the regulation is in full compliance with the requirements of the APA or was not subject to them.

88. A judicial declaration of the legality of Defendants’ conduct, and whether the regulation requiring that all certified instructors have access to a personal computer, printer, and email constitutes an invalid underground regulation in violation of the APA, is necessary and appropriate at this time, as the regulation took effect on January 1, 2015.

89. Defendants’ unlawful conduct has caused and, unless enjoined by this Court, will continue to cause irreparable injury to Plaintiffs, their members, and supporters.

90. Plaintiffs, their supporters, and members, as stakeholders in the Firearm Safety

1 Certificate Program, have been specifically harmed because Defendants' unlawful conduct has
2 denied them their statutory right to be heard and to provide input regarding regulations governing
3 a program that significantly affects them.

4 91. Further, harm from this underground regulation lies in the subversion of the
5 democratic values the APA was intended to serve. The notice, comment, and review procedures
6 of the APA were enacted to secure the public benefits of openness, accessibility, and
7 accountability in the formulation of rules that implement legislative enactments. Irreparable harm
8 to these important public benefits occurs whenever a state agency unlawfully adopts a regulation
9 and each time the agency acts pursuant to its underground regulation.

10 92. The public in general and Plaintiffs specifically have an interest in preventing
11 Defendants from enforcing the underground regulation that all certified instructors have access to
12 a personal computer, printer, and email, as it undermines the democratic values the APA was
13 designed to serve and prevents Plaintiffs from engaging in constitutionally protected conduct.

14 **SECOND CAUSE OF ACTION**
15 **FOR DECLARATORY AND INJUNCTIVE RELIEF**

16 Validity of Rule that Certified Instructors Obtain Certificates of Eligibility Annually
(Violation of California Administrative Procedure Act, Gov. Code, § 11340 et seq.)
(By All Plaintiffs Against All Defendants)

17 93. Plaintiffs incorporate by reference the allegations in the above paragraphs as
18 though fully set forth herein.

19 94. The rule that all certified instructors obtain Certificates of Eligibility annually
20 applies to all certified instructors participating in the Firearm Safety Certificate Program. Prior to
21 January 1, 2015, Handgun Safety Certificate certified instructor applicants were given the option
22 to *either* provide a current COE *or* enclose \$14.00 with their application to accomplish a
23 background check. (Exh. A.) And there was no reoccurring obligation for HSC instructors to
24 renew their COE or undergo another background check. The COE requirement is thus a new rule
25 of general applicability.

26 95. The rule was created by the Department for the purpose of implementing,
27 interpreting, or making specific the Firearm Safety Certificate Program, a program administered
28 by the Department pursuant to the Penal Code. It is thus a "regulation" under the APA.

96. There is no express exemption from the APA in the California Code regarding the

1 promulgation of regulations regarding the Firearm Safety Certificate Program, there was no
2 emergency sufficient to justify bypassing the APA, and the regulation is not a mere restatement
3 of statutory law. It is thus subject to the procedural requirements set forth in the APA.

4 97. By implementing, administering, and enforcing the regulation that all certified
5 instructors obtain Certificates of Eligibility annually without providing formal notice or
6 opportunity for public comment, Defendants have violated and continue to violate the APA.

7 98. An actual controversy exists. Plaintiffs contend that Defendants are violating the
8 APA and that Defendants intend to continue to do so. Plaintiffs allege on information and belief
9 that the Defendants and each of them contend the regulation is in full compliance with the
10 requirements of the APA or was not subject to them.

11 99. A judicial declaration of the legality of Defendants' conduct, and whether the
12 regulation all certified instructors obtain Certificates of Eligibility annually constitutes an invalid
13 underground regulation in violation of the APA, is necessary and appropriate at this time, as the
14 regulation took effect on January 1, 2015.

15 100. Defendants' unlawful conduct has caused and, unless enjoined by this Court, will
16 continue to cause irreparable injury to Plaintiffs, their members, and supporters.

17 101. Plaintiffs, their supporters, and members, as stakeholders in the Firearm Safety
18 Certificate Program, have been specifically harmed because Defendants' unlawful conduct has
19 denied them their statutory right to be heard and to provide input regarding regulations governing
20 a program that significantly affects them.

21 102. Further, harm from this underground regulation lies in the subversion of the
22 democratic values the APA was intended to serve. The notice, comment, and review procedures
23 of the APA were enacted to secure the public benefits of openness, accessibility, and
24 accountability in the formulation of rules that implement legislative enactments. Irreparable harm
25 occurs when a state agency unlawfully adopts a regulation and each time the agency acts
26 pursuant to its underground regulation.

27 103. The public in general and Plaintiffs specifically have an interest in preventing
28 Defendants from enforcing the underground regulation that all certified instructors obtain

1 Certificates of Eligibility annually, as it undermines the democratic values the APA was designed
2 to serve and prevents Plaintiffs from engaging in constitutionally protected conduct.

3 **THIRD CAUSE OF ACTION**
4 **FOR DECLARATORY AND INJUNCTIVE RELIEF**

4 Validity of Rule that All Firearm Safety Certificate Program Fees Be Paid By Major Credit Card
5 (Violation of California Administrative Procedure Act, Gov. Code, § 11340 et seq.)
6 (By All Plaintiffs Against All Defendants)

6 104. Plaintiffs incorporate by reference the allegations in the above paragraphs as
7 though fully set forth herein.

8 105. The rule that all Firearm Safety Certificate Program fees be paid by major credit
9 card applies to all Firearm Safety Certificate purchases and mandates its enforcement by
10 all certified instructors. It is thus a rule of general applicability.

11 106. The rule was created by the Department for the purpose of implementing,
12 interpreting, or making specific the Firearm Safety Certificate Program, a program administered
13 by the Department pursuant to the Penal Code. It is thus a “regulation” under the APA.

14 107. There is no express exemption from the APA in the California Code regarding the
15 promulgation of regulations regarding the Firearm Safety Certificate Program, there was no
16 emergency sufficient to justify bypassing the APA, and the regulation is not a mere restatement
17 of statutory law. It is thus subject to the procedural requirements set forth in the APA.

18 108. By implementing, administering, and enforcing the regulation that all Firearm
19 Safety Certificate Program fees be paid by major credit card without providing formal notice or
20 opportunity for public comment, Defendants have violated and continue to violate the APA.

21 109. An actual controversy exists. Plaintiffs contend that Defendants are violating the
22 APA and that Defendants intend to continue to do so. Plaintiffs allege on information and belief
23 that the Defendants and each of them contend the regulation is in full compliance with the
24 requirements of the APA or was not subject to them.

25 110. A judicial declaration of the legality of Defendants’ conduct, and whether the
26 regulation requiring all Firearm Safety Certificate payments be made using only major credit
27 cards constitutes an invalid underground regulation in violation of the APA, is necessary and
28 appropriate at this time, as the regulation took effect on January 1, 2015.

1 111. Defendants' unlawful conduct has caused and, unless enjoined by this Court, will
2 continue to cause irreparable injury to Plaintiffs, their members, and supporters.

3 112. Plaintiffs, their supporters, and members, as stakeholders in the Firearm Safety
4 Certificate Program, have been specifically harmed because Defendants' unlawful conduct has
5 denied them their statutory right to be heard and to provide input regarding regulations governing
6 a program that significantly affects them.

7 113. Further, harm from this underground regulation lies in the subversion of the
8 democratic values the APA was intended to serve. The notice, comment, and review procedures
9 of the APA were enacted to secure the public benefits of openness, accessibility, and
10 accountability in the formulation of rules that implement legislative enactments. Irreparable harm
11 to these important public benefits occurs whenever a state agency unlawfully adopts a regulation
12 and each time the agency acts pursuant to its underground regulation.

13 114. The public in general and Plaintiffs specifically have an interest in preventing
14 Defendants from enforcing the underground regulation that all Firearm Safety Certificate fees be
15 paid by major credit card, as it undermines the democratic values the APA was designed to serve
16 and prevents Plaintiffs from engaging in constitutionally protected conduct.

17 **FOURTH CAUSE OF ACTION**
18 **FOR DECLARATORY AND INJUNCTIVE RELIEF**

19 Validity of Rule that Certified Instructors Include Procedures Contained in the Firearm Safety
20 Certificate Manual in All Long-Gun Safe-Handling Demonstrations
(Violation of California Administrative Procedure Act, Gov. Code, § 11340 et seq.)
(By All Plaintiffs Against All Defendants)

21 115. Plaintiffs incorporate by reference the allegations in the above paragraphs as
22 though fully set forth herein.

23 116. The rule that all certified instructors include procedures contained in the Firearm
24 Safety Certificate manual in all long-gun safe-handling demonstrations applies to all certified
25 instructors participating in the Firearm Safety Certificate Program. It is thus a rule of general
26 applicability.

27 117. The rule was created by the Department for the purpose of implementing and
28 interpreting Penal Code section 26860 administered by the Department. It is thus a "regulation"
under the APA.

1 118. There is no express exemption in the California Code regarding the promulgation
2 of regulations regarding the Firearm Safety Certificate Program, there was no emergency
3 sufficient to justify bypassing the APA, and the regulation is not a mere restatement of statutory
4 law. It is thus subject to the procedural requirements set forth in the APA.

5 119. By implementing, administering, and enforcing the regulation that all certified
6 instructors include procedures contained in the Firearm Safety Certificate manual in all long-gun
7 safe-handling demonstrations without providing formal notice or opportunity for public
8 comment, Defendants have violated and continue to violate the APA.

9 120. An actual controversy exists. Plaintiffs contend that Defendants are violating the
10 APA, and that Defendants intend to continue to do so. Plaintiffs allege on information and belief
11 that the Defendants and each of them contend the regulation is in full compliance with the
12 requirements of the APA or was not subject to them.

13 121. A judicial declaration of the legality of Defendants' conduct, and whether the
14 regulation all certified instructors include procedures contained in the Firearm Safety Certificate
15 manual in all long-gun safe-handling demonstrations is an invalid underground regulation in
16 violation of the APA, is necessary and appropriate at this time, as the regulation took effect on
17 January 1, 2015.

18 122. Defendants' unlawful conduct has caused and, unless enjoined by this Court, will
19 continue to cause irreparable injury to Plaintiffs, their members, and supporters.

20 123. Plaintiffs, their supporters, and members, as stakeholders in the Firearm Safety
21 Certificate Program, have been specifically harmed because Defendants' unlawful conduct has
22 denied them their statutory right to be heard and to provide input regarding regulations governing
23 the program.

24 124. Further, harm from the underground regulation lies in the subversion of the
25 democratic values the APA was intended to serve. The notice, comment, and review procedures
26 of the APA were enacted to secure the public benefits of openness, accessibility, and
27 accountability in the formulation of rules that implement legislative enactments. Irreparable harm
28 occurs when a state agency unlawfully adopts a regulation and each time the agency acts

1 pursuant to its underground regulation.

2 125. The public has an interest in preventing Defendants from enforcing the
3 underground regulation that all certified instructors include procedures contained in the Firearm
4 Safety Certificate manual in all long-gun safe-handling demonstrations, as it undermines the
5 democratic values the APA was designed to serve.

6 **FIFTH CAUSE OF ACTION**
7 **FOR DECLARATORY RELIEF**

8 Long-Gun Safe-Handling Demonstration, Pen. Code, § 26860, subs. (a), (c), & (d)
(Code of Civil Procedure, § 1060)
(By All Plaintiffs Against All Defendants)

9 126. Plaintiffs incorporate by reference the allegations in the above paragraphs as
10 though fully set forth herein.

11 127. Penal Code section 26860, subdivision (b) requires Defendant Department to
12 promulgate and adopt regulations no later than January 1, 2015, “establishing a long gun safe
13 handling demonstration that shall include, at a minimum, loading and unloading the long gun.”

14 128. The Department has not formally adopted any regulations establishing a long-gun
15 safe-handling demonstration pursuant to the procedural requirements set forth in the APA.

16 129. Individuals, including Plaintiffs, who seek to acquire long guns thus *cannot*
17 perform the long-gun safe-handling demonstration mandated by Penal Code section 26860,
18 subdivisions (a) and (d). And firearm dealers, cannot comply with the requirements of
19 subdivisions (a) and (c). As such, Plaintiffs and the clients, members, and supporters of Plaintiffs
20 FFLGuard and CRPA, cannot lawfully transfer or acquire long guns in California unless and until
21 the Department enacts regulations as they were required to do by subdivision (b).

22 130. As a result, a controversy regarding the validity of the enforcement of Penal Code
23 section 26860, subdivisions (a), (c), and (d), absent any implementing regulations exists. And a
24 judicial declaration by this Court pursuant to Code of Civil Procedure section 1060 is necessary.

25 **SIXTH CAUSE OF ACTION**
26 **FOR DECLARATORY AND INJUNCTIVE RELIEF**

27 Long-Gun Safe-Handling Demonstration, Pen. Code, § 26860, subs. (a), (c), & (d)
(Violation of the Second Amendment, U.S. Const., 2d Amend.)
(By All Plaintiffs Against All Defendants)

28 131. Plaintiffs incorporate by reference the allegations in the above paragraphs as

1 though fully set forth herein.

2 132. Penal Code section 26860, subdivision (b) requires Defendant Department to
3 promulgate and adopt regulations no later than January 1, 2015, “establishing a long gun safe
4 handling demonstration that shall include, at a minimum, loading and unloading the long gun.”

5 133. The Department has not formally adopted any regulations establishing a long-gun
6 safe-handling demonstration pursuant to the procedural requirements set forth in the APA.

7 134. Individuals, including Plaintiffs, who seek to acquire long guns thus *cannot*
8 perform the long-gun safe-handling demonstration mandated by Penal Code section 26860,
9 subdivisions (a) and (d). And firearm dealers, cannot comply with the requirements of
10 subdivisions (a) and (c). As such, Plaintiffs and the clients, members, and supporters of Plaintiffs
11 FFLGuard and CRPA, cannot lawfully transfer or acquire long guns in California unless and until
12 the Department enacts regulations as they were required to do by subdivision (b).

13 135. The Second Amendment protects the right to acquire lawful firearms, including
14 long guns.

15 136. Because Defendants’ enforcement of Penal Code section 26860, subdivisions (a),
16 (c), and (d), absent any implementing regulations, makes it impossible to lawfully transfer long
17 guns in California, the enforcement of Penal Code section 26860, subdivisions (a), (c), and (d)
18 violates the Second Amendment.

19 137. Pursuant to Code of Civil Procedure sections 525 and 526, Plaintiffs seek to
20 enjoin enforcement of Penal Code section 26860, subdivisions (a), (c), and (d), unless and until
21 Defendants formally promulgate the required regulations. Unless enjoined by order of this Court,
22 Plaintiffs will continue to suffer great and irreparable harm because there exists no manner for
23 them to lawfully engage in the Second Amendment protected conduct of transferring or acquiring
24 long guns in California.

25 **SEVENTH CAUSE OF ACTION**
26 **FOR WRIT OF MANDATE**

26 Failure to Promulgate Regulations Establishing Long-Gun Safe-Handling Demonstration
27 (Violation of Penal Code, § 26860, subd. (b))
27 (By All Plaintiffs Against All Defendants)

28 138. Plaintiffs incorporate by reference the allegations in the above paragraphs as

1 though fully set forth herein.

2 139. Defendants have a clear, present, and ministerial duty to enact regulations
3 establishing a long-gun safe-handling demonstration under Penal Code section 26860,
4 subdivision (b). They also have a clear, present, ministerial duty to comply with the procedures
5 set forth in the California Administrative Procedure Act, Government Code, section 11340 et
6 seq., in promulgating those regulations.

7 140. Plaintiffs, their members, and supporters, are each beneficially interested in seeing
8 that Defendant Department performs its legal duties pursuant to section 26860, subdivision (b),
9 for they cannot comply with section 26860, subdivisions (a), (c), or (d) or lawfully transfer or
10 take possession of any long gun unless and until Defendant Department performs.

11 141. Defendants' unlawful failure to act has caused and, unless compelled by this
12 Court, will continue to cause irreparable injury to Plaintiffs, their clients, members, and
13 supporters because they are unable to engage in constitutionally protected conduct, i.e.,
14 transferring or acquiring long guns.

15 142. Plaintiffs lack a plain, speedy, and adequate remedy at law for the harms they
16 have suffered and will continue to suffer as a result of Defendants' unlawful conduct and failure
17 to act.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs pray for relief and judgment as follows:

20 1. For a declaration that Defendants' requirement that all DOJ Certified Instructors
21 have access to a personal computer, printer, and email address constitutes an invalid underground
22 regulation in violation of the California Administrative Procedure Act.

23 2. For a preliminary and permanent prohibitory injunction forbidding Defendants,
24 their employees, agents, and successors in office, from enforcing the invalid underground
25 regulation requiring that all DOJ Certified Instructors have access to a personal computer,
26 printer, and email.

27 3. For a declaration that Defendants' requirement that all DOJ Certified Instructors
28 obtain COEs annually constitutes an invalid underground regulation in violation of the California

1 Administrative Procedure Act.

2 4. For a preliminary and permanent prohibitory injunction forbidding Defendants,
3 their employees, agents, and successors in office, from enforcing the invalid underground
4 regulation that all DOJ Certified Instructors obtain COEs annually.

5 5. For a declaration that Defendants' requirement that all Firearm Safety Certificate
6 program payments be made using only major credit cards constitutes an invalid underground
7 regulation in violation of California's Administrative Procedure Act.

8 6. For a preliminary and permanent prohibitory injunction forbidding Defendants,
9 their employees, agents, and successors in office, from enforcing the invalid underground
10 regulation requiring that all Firearm Safety Certificate program payments be made using only
11 major credit cards.

12 7. For a declaration that Defendants' requirement that all DOJ Certified Instructors
13 include the "steps of long gun safety" procedures contained in the "Firearm Safety Certificate
14 Manual" in the "safe handling demonstrations," constitutes an invalid underground regulation in
15 violation of the California Administrative Procedure Act.

16 8. For a preliminary and permanent prohibitory injunction forbidding Defendants,
17 their employees, agents, and successors in office, from enforcing the invalid underground
18 regulation that all DOJ Certified Instructors use the "steps of long gun safety" procedures
19 contained in the "Firearm Safety Certificate Manual" in the "safe handling demonstrations."

20 9. For a declaration of the rights and obligations of Defendants to Plaintiffs,
21 including an order enjoining Defendants, their employees, agents, and successors in office, from
22 continuing to enforce Penal Code section 26860, subdivisions (a), (c), and (d), unless and until
23 Defendant Department formally adopts regulations establishing the long-gun safe-handling
24 demonstration as required by Penal Code section 26860, subdivision (b).

25 10. For a declaration that Defendants' enforcement of Penal Code section 26860,
26 subdivisions (a), (c), and (d), absent the adoption of formal implementing regulations, infringes
27 the Second Amendment right to acquire lawful firearms.

28 11. For a preliminary and permanent prohibitory injunction forbidding Defendants,

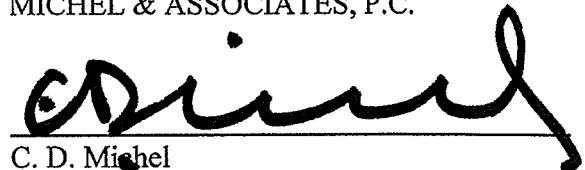
1 establishing the long-gun safe-handling demonstration as required by Penal Code section 26860,
2 subdivision (b).

3 12. For a peremptory writ of mandate compelling the Department to promulgate
4 regulations establishing the long-gun safe-handling demonstrations as required by Penal Code
5 section 26860, subdivision (b).

6 13. For an award of Plaintiffs' reasonable costs and attorneys' fees pursuant to Code
7 of Civil Procedure section 1021.5. and any other relevant provision of state or federal law.

8 Dated: February 2, 2015

MICHEL & ASSOCIATES, P.C.

9
10 

11 C. D. Michel
12 Joseph A. Silvoso, III
13 Sean A. Brady
14 Anna M. Barvir
15 *Counsel for Plaintiffs*

VERIFICATION

I, Steven H. Dember, am the Treasurer of the California Rifle & Pistol Association, a Plaintiff in the above-entitled action. I certify under penalty of perjury that I have read the foregoing FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR MANDATE and have authorized it for filing. Based upon my and my counsel's investigation, the contents of the foregoing Complaint and Petition are true to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of January 2015 at Lathrop, California.

By: Steven H. Dember
Steven H. Dember, Treasurer
California Rifle and Pistol Association

EXHIBIT D

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



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January 9, 2015

VIA E-MAIL (SBrady@michellawyers.com)

Sean A. Brady
Michel & Associates, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802

RE: Belemjian v. Harris
Fresno County Superior Court, Case No. 15-CE-CG-020029

Dear Mr. Brady:

I write to respond to your January 8 e-mails.

Defendants are presently in the process of preparing emergency regulations and final regulations, pursuant to the Administrative Procedures Act, for the Firearm Safety Certificate Program. Accordingly, there is no need for discussions or mediation as you have suggested. In fact, when the emergency regulations are adopted (to be followed by the adoption of final regulations), plaintiffs' action will be rendered entirely moot.

If plaintiffs do decide to seek a temporary restraining order on Wednesday, such action would be outside the scope of the Court's January 7 ruling, denying plaintiffs' ex parte application in its entirety "without prejudice." More precisely, "without prejudice" must be construed in the context of the Court's and counsel's statements made during the hearing. In context, "without prejudice" reasonably means that plaintiffs may bring a noticed motion for preliminary injunction if and when plaintiffs have evidence showing imminent irreparable harm. The context I refer to is the following excerpt from the rough draft hearing transcript:

[THE COURT:] Here's my suggestion: I could do a couple of different things. One I could just deny the T.R.O. Two, I could deny the T.R.O. without prejudice for you to refile now having the benefit of this conversation and knowing the evidence that you would need to muster, if you are able. *And then it also gives Mr. Rich more*

time -RBG because he was -- not to use bad stale PUPBZ, but he was under the gun somewhat to get this in; right? So that's probably the better of the two options.

MR. RICH: May I offer what defendants think is an appropriate disposition, and that is deny the application in it's entirety. *And then if plaintiffs' want to bring on a noticed motion for preliminary injunction, maybe that is what your Honor is saying, then they can go ahead and do that. But we would ask that the O.S.C. also be denied along with the T.R.O.*

THE COURT: *Okay.*

MS. BARVIR: Plaintiffs would like to -- like to see the court deny without prejudice has it suggested in its second option.

THE COURT: Okay. 50EU78 going to deny the application as before the court without O.S.C. without prejudice although -- he and that's the courts ruling. This is just now a friendly conversation. It doesn't sounds like, you know, in many instances in litigation the parties are pole arrestly opposed; right? Very very different positions looking at the same thing. So it sounds like we have the tunnel as litigants both on the *states side and plaintiffs' side here to maybe get things worked out. If you give Mr. Rich a little bit of time, these are very difficult, these short cause matters.* I mean for you, also, you did a great job, by the weigh, in your drafting it of it. *You work with him and give him a little more time I think maybe things can work out well for everyone.*

MR. BRADY: We did submit.

THE COURT: -- for -- what's that.

MR. BRADY: We did submit on O.R. L. we let them know a week.

THE COURT: I know I saw your letter. I'm not faulting you guys I think you did a great job. Okay?

MS. BARVIR: Thank you, your Honor.

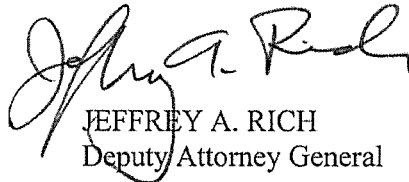
THE COURT: You bet.

(Rough draft of January 7, 2015 hearing transcript at 12:6-13:22, emphasis added.)

Based upon the above hearing transcript excerpt, it is manifest that the Court did not intend for “without prejudice” to mean that plaintiffs may, one week after the ex parte hearing, make another ex parte application for a TRO/OSC as a litigation tactic.

Further, if plaintiffs were to seek a temporary restraining order on Wednesday, such action would arguably result in a violation of Code of Civil Procedure section 128.7, subdivision (b), paragraphs (1) (“[The ex parte application] is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”) and (3) (“The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”).

Sincerely,



JEFFREY A. RICH
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General