

## FINAL STATEMENT OF REASONS

### UPDATE OF INITIAL STATEMENT OF REASONS

All information provided in the Initial Statement of Reasons is accurate and current.

### NON-SUBSTANTIVE AMENDMENTS TO REGULATION

#### Section 4142

In Section 4142, subdivision (a)(2), the phrase, “which is hereby incorporated by reference,” is added.

As originally noticed to the public, Section 4142, subdivision (a)(3) indicated a change to the revision date of form BOF 045 to 01/2020. This form is not being amended as part of this rulemaking package. It was last revised in December 2019 in a separate Section 100 action, and the final text of the regulation has been modified to reflect the new revision date.

As originally noticed to the public, Section 4142, subdivision (a)(4) shows a revision date for form BOF 045 as 01/2012. The form was revised in December 2019 in a separate Section 100 action, and the final text of the regulation has been modified to reflect the new revision date.

#### Section 5478

As originally noticed to the public, Section 5478, subdivision (a) shows a revision date for form BOF 4546 as 07/2017. This form was revised in December 2019 in a separate Section 100 action, and the final text of the regulation has been modified to reflect the new revision date.

### SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE NOTICE PERIOD OF DECEMBER 20, 2019 THROUGH 5:00 PM, FEBRUARY 4, 2020.

The Department received fourteen comments from one individual. The summary of comments and responses to comments are as follows:

**COMMENT 1:** Matthew Cubeiro stated that neither firearm nor ammunition transactions require individuals to provide federally compliant IDs or any supplemental documentation demonstrating a person’s lawful presence in the United States under California law. A driver’s license or ID issued by DMV, regardless if issued pursuant to AB 60, is still a “valid” ID within the meaning of California law as applied to firearm transactions. Likewise, a federal non-compliant ID sufficiently provides a person’s name, date of birth, description, and picture as required for ammunition transactions [citing Cal. Penal Code § 16300]. What’s more, having been aware of the issues concerning federal non-compliant IDs for over a year, DOJ failed to include any changes requiring federally compliant IDs in regulations regarding “Ammunition Purchases or Transfers” which were approved by OAL in 2019 [citing OAL File No. 2019-0517-07.]

**RESPONSE 1:** No change has been made in response to this comment. California law requires a prospective firearm purchaser to present “clear evidence of [the purchaser’s] identity and age.” (Pen. Code, §§ 26815, subd. (c), 27540, subd. (c), 28215, subd. (a)(1).) “Clear evidence . . . of identity and age” is defined as a valid California driver license or identification card. (*Id.*, §16400.) California law also requires a prospective ammunition purchaser to provide a driver license or identification card. (*Id.*, § 30352, subd. (a)(2).) These Penal Code provisions establish a floor, not a ceiling, on what the Department may require in order to secure the background check process. The Department is statutorily required to perform an eligibility check to determine eligibility to possess a firearm or ammunition under state and federal law in numerous other contexts. Federal law prohibits certain categories of non-citizens from purchasing or possessing a firearm or ammunition, including any alien who is “illegally or unlawfully in the United States.” (18 U.S.C. § 922 (d)(5)(A), (g)(5)(A).) The Department may require, through regulations, that persons undergoing an eligibility check provide documentation establishing lawful presence in the United States, in furtherance of the Department’s statutory obligation to determine eligibility to possess a firearm or ammunition under state and federal law. The Department elected to promulgate a single set of regulations governing documentation requirements for establishing lawful presence in the United States, for all eligibility checks, including those associated with ammunition purchases or transfers.

**COMMENT 2:** Matthew Cubeiro stated that federal law specifically contemplates the use of federal non-compliant IDs for purposes of firearm transactions, including IDs issued by foreign governments [citing 27 C.F.R. § 478.11]. And for good reason. There are several exceptions to the federal restrictions against non-U.S. citizens acquiring or possessing firearms. Such exceptions include aliens who have been lawfully admitted to the United States under a nonimmigrant visa who have either: 1) Been admitted to the United States for lawful hunting or sporting purposes; or, 2) Are in possession of a hunting license or permit lawfully issued in the United States [citing 18 U.S.C. § 922(y)(2)(A)]. Such individuals are incapable of obtaining a federally compliant REAL ID by nature of their immigration status, yet are not also prohibited under federal law from acquiring or possessing firearms. DOJ’s proposed regulations would effectively prohibit such individuals from being able to lawfully acquire firearms and/or ammunition.

**RESPONSE 2:** No change has been made in response to this comment. Notwithstanding federal laws and regulations regarding documents that may be used to verify the identity of a prospective firearms purchaser, California law requires a prospective firearm or ammunition purchaser to present a valid California driver license or identification card. (Pen. Code, §§ 16400, 26815, subd. (c), 27540, subd. (c), 28215, subd. (a)(1), 30352, subd. (a)(2).) Some categories of non-U.S. citizens, who have lawful presence in the United States, are not prohibited from purchasing firearms or ammunition under federal law, and some of these persons are eligible to obtain a REAL ID (e.g., lawful permanent residents). Even if non-U.S. citizens with lawful presence in the United States cannot or do not wish to obtain a REAL ID, under the proposed regulations those persons can still satisfy the eligibility check requirements by presenting documentation establishing lawful presence in the United States. The proposed regulations do not require a REAL ID for all eligibility checks.

**COMMENT 3:** Matthew Cubeiro stated the Department failed to mention concerns regarding SB 244 to the California Legislature while SB 244 and other related bills were being considered. In fact, California’s Attorney General has often expressed support for California’s efforts in these regards. The Department could have raised its concerns at any point during the legislative process for the bills it mentions—yet it chose not to do so in favor of supporting its unrelated immigration agenda. What’s more, the Department issued a press release as early as 2014 concerning licenses issued pursuant to AB 60, illustrating just how long DOJ has been aware of such licenses.

**RESPONSE 3:** No change has been made in response to this comment. As explained in the Initial Statement of Reasons, the need for proof of lawful presence in the United States is a result of the physical appearance of federal non-compliant driver licenses and identification cards that have been issued in California since January 22, 2018. The physical appearance of these driver licenses and identification cards was determined by the Department of Motor Vehicles, a state agency that is wholly separate from the Department of Justice. As also explained in the Initial Statement of Reasons, new prohibitions on using certain types of driver licenses and identification cards as evidence of immigration status, enacted by SB 244, further highlighted the need for separate documentation showing proof of lawful presence.

**COMMENT 4:** Matthew Cubeiro stated the Department’s Initial Statement of Reasons lacks the proper necessity required under the APA because the Department did not describe a single instance where a prohibited person was able to obtain firearms or ammunition as a result of using a federally non-compliant driver license or identification card.

**RESPONSE 4:** No change has been made in response to this comment. The Initial Statement of Reasons provides a statement of the specific purpose of each provision of the proposed regulations, as well as information on why each provision is required to carry out the described purpose of the provision. As explained in the Initial Statement of Reasons, the proposed regulation is necessary to secure the eligibility check process, and to assist firearm dealers and ammunition vendors, as well as law enforcement agencies, to obtain sufficient information that will allow for an accurate determination of whether a prospective purchaser or applicant is permitted to possess firearms or ammunition, consistent with federal law.

Assuming that the reference in the comment to “prohibited persons” means persons who lack lawful presence in the United States, the Department is not required to cite an instance where such a person was able to obtain firearms or ammunition as a result of using a federal non-compliant driver license or identification card. If such instances have occurred, they would not necessarily be known to law enforcement officials or the Department. However, the risk that a person without lawful presence could use a federal non-compliant driver license or identification card to pass an eligibility check, absent any requirement for proof of lawful presence, is very real. There is no way to determine whether an applicant for an eligibility check is lawfully present in the United States, unless the person presents a REAL ID or the documentation required by the proposed regulation. As noted in the Initial Statement of Reasons, the recent

significant changes to California driver licenses and identification cards, as well as to California law governing their use as evidence of citizenship or immigration status, have resulted in widespread confusion for firearm dealers, law enforcement agencies, and the public. This is because firearm dealers and ammunition vendors, as well as law enforcement agencies, are unable to rely on federal non-compliant licenses when determining whether a prospective purchaser or applicant is lawfully present in the United States.

The decision to address the risk that a person without lawful presence could use a federal non-compliant driver license or identification card to pass an eligibility check is well within the Department's rulemaking authority. The proposed regulation provides a way for eligibility check applicants to demonstrate their lawful presence in the United States, even if they do not possess a REAL ID. As noted in the Initial Statement of Reasons, the proposed regulation is consistent with an advisory issued by the National Rifle Association, advising firearm dealers to ask for additional information at their discretion if the dealer had "cause to believe the individual using one of these licenses may be prohibited from possessing firearms." (National Rifle Association Institute for Legislative Action, "California Special Alert: Update Regarding Use of Non-REAL IDs for Firearm Purchases," March 22, 2018.), except firearm dealers no longer have to profile a prospective purchaser to determine whether to request additional information. All purchasers will now be subject to the same application requirements.

**COMMENT 5:** Matthew Cubeiro stated that the "Standard Ammunition Eligibility Check (AFS [Automated Firearms System] Match)," one of the four types of background checks used to determine if a purchaser is prohibited from purchasing ammunition, does not require knowledge of the purchaser's immigration status, because in order to obtain approval under this option, the individual must already have lawfully acquired a firearm. As a result, requiring federally compliant identification for purposes of this type of background check is wholly unnecessary.

**RESPONSE 5:** No change has been made in response to this comment. Persons who are not lawfully present in the United States are prohibited from purchasing or possessing firearms or ammunition. There is no way to determine whether an applicant for an eligibility check is lawfully present in the United States, unless the person presents a REAL ID or the documentation required by the proposed regulation. As with all of the other eligibility checks covered by the proposed regulation, requiring proof of lawful presence in the United States from federal non-compliant license holders seeking to pass a Standard Ammunition Eligibility Check is the only way to screen out persons who lack lawful presence in the United States. When performing a Standard Ammunition Eligibility Check, there is no way to reliably confirm in every instance that the underlying firearm purchase that could be used to satisfy the eligibility check did not involve a federal non-compliant driver license or identification card.

Persons who purchased a firearm after January 22, 2018, but before July 1, 2019 (when the Department's emergency regulations regarding identification requirements for eligibility checks took effect), may have used a federal non-compliant driver license or identification card when making that purchase. However, the type of driver license or identification card (REAL ID or federal non-compliant) used during that transaction is not reflected in the Department's records. Under the proposed regulation, ammunition vendors must examine the driver license or

identification card presented by the customer, and then require the customer to provide proof of lawful presence, if the driver license or identification card is federal non-compliant. However, ammunition vendors cannot view the underlying firearm purchase transaction record that would be the basis for approval of the Standard Ammunition Eligibility Check—and thus cannot determine whether the transaction occurred during a period when a federal non-compliant driver license or identification card might have been used to purchase the firearm—unless that firearm transaction was conducted by that ammunition vendor. Thus, a categorical exemption from the proposed regulation’s documentation requirements for Standard Ammunition Eligibility Checks may result in the sale of a firearm or ammunition to a prohibited person.

**COMMENT 6:** Matthew Cubeiro stated that the “COE Verification Process,” one of the four types of background checks used to determine if a purchaser is prohibited from purchasing ammunition, does not require knowledge of the purchaser’s immigration status, because a person issued a Certificate of Eligibility has already been verified eligible to own or possess firearms and ammunition by DOJ. Requiring federally compliant identification, therefore, is wholly unnecessary for such transactions.

**RESPONSE 6:** No change has been made in response to this comment. Persons who are not lawfully present in the United States are prohibited from purchasing or possessing firearms or ammunition. There is no way to determine whether an applicant for an eligibility check is lawfully present in the United States, unless the person presents a REAL ID or the documentation required by the proposed regulation. As with all of the other eligibility checks covered by the proposed regulation, requiring proof of lawful presence in the United States from federal non-compliant license holders seeking to obtain or renew their Certificate of Eligibility is the only way to screen out persons who lack lawful presence in the United States. When processing a Certificate of Eligibility renewal application, there is no way to reliably confirm in every instance that the original Certificate of Eligibility application was not based on a federal non-compliant driver license or identification card.

Persons who applied for a Certificate of Eligibility after January 22, 2018, but before July 1, 2019 (when the Department’s emergency regulations regarding identification requirements for eligibility checks took effect), may have used a federal non-compliant driver license or identification card when undergoing the associated eligibility check. However, the type of driver license or identification card (REAL ID or federal non-compliant) used during that eligibility check is not reflected in the Department’s records. Certificates of Eligibility are valid for one year. A categorical exemption from the proposed regulation’s documentation requirements for existing Certificate of Eligibility holders would leave the Department unable to verify that Certificates of Eligibility originally issued prior to July 2019 were not issued to persons who lack lawful presence in the United States.

**COMMENT 7:** Matthew Cubeiro stated that the “Estimated Private Sector Cost Impacts” mischaracterizes the impact the proposed regulations will have on private businesses. The Department makes no mention of the potential impacts on the thousands of business owners and employees who may have difficulty in renewing the required licenses as a result of the proposed regulations. In fact, many younger employees of firearms businesses could find themselves out

of work should they be unable to obtain the required documentation in time for the required annual renewal of their COE.

**RESPONSE 7:** No change has been made in response to this comment. As indicated in the Economic Impact Statement, the proposed regulations specify the identification documentation required when submitting a form or application that is already required by regulation. Even if the cost or time needed for obtaining the documents described in the proposed regulation were properly attributable to the proposed regulation, to the extent businesses and/or employees need to expend additional time or money to renew their Certificates of Eligibility, the economic impact of this is mitigated by the benefits of the proposed regulation, which enables firearm and ammunition dealers to sell to persons who do not have a REAL ID but have additional documentation verifying lawful presence in the United States. In addition, business owners and employees should not encounter significant difficulties in renewing their Certificates of Eligibility if they begin the renewal process in advance of when their certificates expire. Certificate of Eligibility holders are made aware when they apply or renew their certificate that it is valid for one year. The Department also automatically notifies individuals through email 60 days in advance of the Certificate of Eligibilities expiration, providing ample time to gather the required documentation for the renewal process.

**COMMENT 8:** Matthew Cubeiro stated the Department failed to mention any of the costs associated with obtaining the required documentation. There are significant time and monetary expenses involved in obtaining the required forms of identification and/or supplemental documentation. Nowhere in DOJ's Economic and Fiscal Impact Statement are these mentioned or even alluded to.

**RESPONSE 8:** No change has been made in response to this comment. As indicated in the Economic Impact Statement, the proposed regulations specify the documentation used to identify yourself when submitting a form or application that is already required by regulation. A driver license or identification card is already required when purchasing a firearm or ammunition in California. The documents needed when applying for a California driver license or identification card, for both the REAL ID and federal non-complaint versions, are the same documents that can be used to prove lawful presence in the United States under the proposed regulation. As the October 2020 deadline for presenting a REAL ID at security checkpoints for airports and federal buildings approaches, an increasing proportion of the population will have a REAL ID, thus obviating the need for proof of lawful presence when undergoing the eligibility checks covered by the proposed regulation.

Even if the cost or time needed for obtaining the documents described in the proposed regulation were properly attributable to the proposed regulation, the economic impact of this is mitigated by the benefits of the proposed regulation, which enables applicants to satisfy an eligibility check even if they do not have a REAL ID. Persons who are not lawfully present in the United States are prohibited from purchasing or possessing firearms or ammunition. There is no way to determine whether an applicant for an eligibility check is lawfully present in the United States, unless the person presents a REAL ID or the documentation required by the proposed regulation.

**COMMENT 9:** Matthew Cubeiro stated the Department makes no mention of the potential lost revenue to businesses should their customers not have the required documentation at hand when attempting to purchase a firearm or ammunition.

**RESPONSE 9:** No change has been made in response to this comment. Persons who are not lawfully present in the United States are prohibited from purchasing or possessing firearms or ammunition. There is no way to determine whether a prospective purchaser is lawfully present in the United States, unless the person presents a REAL ID or the documentation required by the proposed regulation. Attributing “potential lost revenue” from customers who do “not have the required documentation at hand when attempting to purchase a firearm or ammunition” to the proposed regulation assumes that it is possible to determine that any given customer has lawful presence in the United States without reference to the required documentation, but this is not correct.

**COMMENT 10:** Matthew Cubeiro stated the Department makes no mention of the potential lost revenue to businesses resulting from the additional time it may take to process a transaction.

**RESPONSE 10:** No change has been made in response to this comment. Persons who are not lawfully present in the United States are prohibited from purchasing or possessing firearms or ammunition. There is no way to determine whether a prospective purchaser is lawfully present in the United States, unless the person presents a REAL ID or the documentation required by the proposed regulation. Attributing “potential lost revenue to businesses resulting from the additional time it may take to process a transaction” to the proposed regulation assumes that it is possible to determine that any given customer has lawful presence in the United States without reference to the required documentation, but this is not correct.

**COMMENT 11:** Matthew Cubeiro stated while it is true some California gun owners have already obtained a REAL ID, many of those IDs are in fact federally non-compliant as a result of DMV’s failure to properly implement the REAL ID program. As stated on DMV’s website, DMV “followed the process” of Wisconsin, but several months later was informed by the federal government that those processes were inadequate [citing <https://www.dmv.ca.gov/portal/dmv/detail/realid/residencyfaqs> (last visited June 19, 2019)]. DOJ’s proposed regulations, however, make no mention of this issue—*let alone how a California licensed firearms dealer will be able to distinguish between a REAL ID that is federally compliant and a REAL ID that was issued prior to DMV amending its application process to be federally complaint.*

**RESPONSE 11:** No change has been made in response to this comment. Since April 2019, DMV has required REAL ID applicants to present two proofs of residence address. Previously, only one proof was required. This change does not impact whether a REAL ID applicant provided satisfactory proof of lawful presence in the United States, which has been a requirement for obtaining a REAL ID since DMV began issuing them on January 22, 2018. There is thus no need for firearm dealers to distinguish between REAL IDs issued before and after this April 2019 policy change. In addition, REAL IDs issued prior to the April 2019 change regarding proofs of residence address remain valid, although persons issued REAL IDs prior to

April 2019 must submit an additional proof of residence. See <https://realid.dmv.ca.gov/home/second-residency-faqs/>.

**COMMENT 12:** Matthew Cubeiro stated that obtaining a U.S. passport, certified copy of a U.S. birth certificate, or certified document required if the individual's name has been changed, such as adoption paperwork or a marriage certificate, can be costly and time consuming.

**RESPONSE 12:** No change has been made in response to this comment. Notwithstanding the cost or time needed for obtaining the documents described in the proposed regulation, the same documents are also needed when applying for a California driver license or identification card, for both the REAL ID and federal non-complaint versions. A California driver license or identification card is normally required when purchasing a firearm in California. As the October 2020 deadline for presenting a REAL ID at security checkpoints for airports and federal buildings approaches, an increasing proportion of the population will have a REAL ID, thus obviating the need for providing proof of lawful presence when undergoing the eligibility checks covered by the proposed regulation.

**COMMENT 13:** Matthew Cubeiro stated the Department failed to explain why the regulation requires that U.S. birth certificates used as proof of lawful presence be issued by a city, county, or state vital statistics office.

**RESPONSE 13:** No change has been made in response to this comment. The proposed regulation requires a certified copy of a U.S. birth certificate, issued by a city, county, or state vital statistics office. The birth certificate must be issued by one of these types of offices, because those are the only offices that can issue a certified copy of a birth certificate.

**COMMENT 14:** Matthew Cubeiro stated the Department failed to explain why abbreviated or abstract U.S. birth certificates are not acceptable as proof of lawful presence.

**RESPONSE 14:** No change has been made in response to this comment. An abbreviated or abstract birth certificate is a document indicating that an official birth certificate exists; it is not a copy of the official birth certificate, and does not necessarily contain all information available on the official birth certificate. Abbreviated or abstract birth certificates are not accepted by DMV or the federal government for purposes of a REAL ID or passport application.

#### LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

#### ALTERNATIVES DETERMINATIONS

The Department has determined that no alternative it considered, or that it otherwise identified, or was brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.



The alternative of not adopting the regulations is not a suitable alternative because it could allow people to possess firearms or ammunition when they are prohibited from doing so under state and federal law.

#### ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No alternatives were proposed to the Department that would lessen any adverse economic impact on small business.

#### DOCUMENTS INCORPORATED BY REFERENCE

The proposed regulations will incorporate the following forms:

Form BOF 030 (Rev. 01/2020), Dangerous Weapons License/Permit(s) Application

Form BOF 031 (Rev. 01/2020), Dangerous Weapons License/Permit(s) Renewal Application

Form BOF 051 (Rev. 01/2020), Entertainment Firearms Permit Application

Form BOF 116 (Rev. 01/2020), Personal Firearm Eligibility Check Application

Form BOF 961 (Rev. 01/2020), Collector In-State Acquisition of Curio or Relic Long Gun Report

Form BOF 4010A (Rev. 01/2020), New Resident Report of Firearm Ownership

Form BOF 4100A (Rev. 01/2020), Curio or Relic Firearm Report

Form BOF 4542A (Rev. 01/2020), Firearm Ownership Report

Form BOF 4544A (Rev. 01/2020), Report of Operation of Law or Intra-Familial Firearm Transaction

The above forms are incorporated by reference because it would be cumbersome, unduly expensive, or otherwise impractical to publish the forms in the California Code of Regulations. During the rulemaking proceeding, the forms were made available upon request, and were available for viewing on the Department's website.

#### NONDUPLICATION

Some of the regulations may repeat or rephrase in whole or in part a state or federal statute or regulation. This was necessary to satisfy the clarity standard set forth in Government Code section 11349.1(a)(3).