

CALIFORNIA DEPARTMENT OF JUSTICE

FINDING OF EMERGENCY

October 9, 2020

Pursuant to the requirements of Government Code section 11346.1, subdivision (a)(1), the Department of Justice (Department) is providing notice of the proposed emergency readoption of the regulation regarding the Dealer Record of Sale (DROS) Fee. The Department finds that an emergency continues to exist, and that the readoption of Title 11, Division 1, Chapter 20.5, Section 999.400 is necessary to avoid serious harm to the public peace, health and safety, and general welfare.

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to the submission of the proposed emergency action to the Office of Administrative Law (OAL), the Department provide a notice of this proposed action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency regulation to the OAL, the OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulation as set forth in Government Code section 11349.6.

The text of the proposed emergency regulation and the “Finding of Emergency” are posted on the Department’s website at: <https://oag.ca.gov/firearms/regs/>.

The Department plans to file the emergency rulemaking package with the OAL at least five working days from the date provided at the top of this notice, October 16, 2020. If you would like to comment on the Finding of Emergency or the proposed emergency regulation, those comments must be in writing, with a notation that identifies the emergency regulation to which they relate, and must be received by both the Department and the OAL within five days of the Department’s filing with the OAL. The Department may respond to comments at its discretion.

Send comments simultaneously to:

Department of Justice
Bureau of Firearms
Attn: Kelan Lowney
P.O. Box 160487
Sacramento, CA 95816

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Or BOFemergencyregs@doj.ca.gov

Or staff@oal.ca.gov

Statement Regarding Compliance with Government Code section 11346.1(e)

The Department has made substantial progress and proceeded with diligence toward compliance with Government Code section 11346.1, subdivision (e). The Department has been working on economic impact analysis of the increase in the Dealer Record of Sale (DROS) Fee from \$19 to

\$31.19. In the last few months, the Department has experienced a higher than normal DROS volume and is endeavoring to include the most up-to-date economic and fiscal information in its rulemaking documents.

Additionally, the Department has been working to identify necessary changes to the regulatory text that will be reflected in the regulations that the Department intends to adopt by regular rulemaking (Certificate of Compliance). These changes include clarifying the procedure for remission of the DROS Fee to the Department and removing extraneous information, to increase the clarity of the regulation.

The Department is currently drafting the final text of the regulations, and is also preparing the Economic and Fiscal Impact Statement (STD 399) and other necessary documentation to initiate the 45-day comment period.

A re-adoption of the emergency regulations is necessary because the Department will not be able to complete the rulemaking process before the emergency regulations expire on October 28, 2020.

Statement Regarding Emergency Circumstances Since the Adoption of Emergency Regulations

The Department finds it necessary to readopt these emergency regulations because the circumstances demonstrating the existence of an emergency are unchanged since the initial adoption of the emergency regulations.

On January 1, 2020, the regulatory \$19 DROS fee authorized by Penal Code section 28225 became invalid and, without the emergency regulation, the Department will not have authority to charge a fee to conduct background checks for firearm transactions. Without the ability to charge a valid DROS fee, the Department anticipates a loss in revenue, which will make the DROS Fund insolvent. If the DROS Fund becomes insolvent, the Department will have two options: (1) discontinue background checks and other Bureau activities, or (2) redirect General Fund resources from other potentially mandated Departmental programs, risking public safety and lack of compliance in other areas. Beginning January 1, 2020, Penal Code section 28233 authorizes the Department to charge a DROS fee of exactly \$31.19. This action to readopt the emergency regulation implementing Penal Code section 28233 will permit the Department to continue imposing the new \$31.19 fee in place of the old \$19 fee, and to avoid serious harm resulting from an insolvency in the DROS fund.

Subject Matter of Proposed Regulation Amendments

Dealer Record of Sale (DROS) Fee.

Regulation to Be Amended

CCR Title 11, section 4001

Specific Facts Demonstrating the Existence of an Emergency and the Need for Immediate Action

Before January 1, 2020, existing law allowed the Department to require a firearms dealer to charge each firearm purchaser a \$19 fee, called the “DROS Fee,” at the time of a transfer of firearms (a “DROS transaction”).

The DROS Fee is deposited in the Dealers’ Record of Sale Special Account of the General Fund (the “DROS Fund”), and is appropriated by the Legislature to offset certain costs incurred by the Department’s Bureau of Firearms (the Bureau), as specified by Penal Code section 28225, subdivision (b) and Penal Code section 28230, subdivision (a). The bulk of the DROS Fee revenue pays for activities referenced in Penal Code section 16580, which authorize or mandate most of the activities of the Bureau. As explained below, the emergency regulation is in response to a recent legislative change in the funding of critical firearms-related Departmental activities.

Change in Legislation

Assembly Bill (AB) 1669, effective January 1, 2020, decreased the fee authorized by Penal Code section 28225 to \$1, and removed the reference to Penal Code section 16580 from section 28225, subdivision (b)(11). The remaining references in section 28225 specify various programs that may be funded by a fee that, as of January 1, 2020, may not exceed \$1. The Department anticipates promulgating regulations to set this fee in a separate rulemaking package.

AB 1669 also added a new section to the Penal Code, section 28233. Subdivision (b) of that section authorizes a new \$31.19 fee for regulatory and enforcement activities related to the sale, purchase, manufacturing, lawful or unlawful possession, loan, or transfer of firearms pursuant to any provision listed in Penal Code section 16580. This is the statutory reference that had been deleted from section 28225, which previously provided the basis for the \$19 DROS Fee. Because the new fee in section 28233 funds the activities specified by section 16580, and because this fee is the principal fee charged at the time of each DROS transaction, the Department is naming the new fee authorized by section 28233 the “DROS Fee.”

Although Penal Code section 28233 grants authority to the Department to require a firearms dealer to charge a \$31.19 fee, the statute is not self-executing. The Department may promulgate regulations to implement the fee. This action readopts an emergency regulation amending Title 11, Section 4001 of the California Code of Regulations, to set the fee at \$31.19. Penal Code section 28233 does not grant the Department the discretion to set the initial fee at any other amount. But the amount of the fee must not exceed the cost of the regulatory program. (*California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 939.)

If the Department does not implement the fee authorized by Penal Code section 28233, the Department estimates that in fiscal year 2020-21 the decrease in revenue would result in insolvency and a deficit of over \$17,000,000. See the Economic and Fiscal Impact Statement (STD 399) and Addendum, hereby incorporated by reference, for a detailed explanation of the Department's revenue and expenditure calculations.

Immediate, Serious Harm

Unless regulations are promulgated to implement the new DROS Fee, the Department will lose future DROS Fee revenue. Historically, the DROS Fee accounts for approximately 70 percent of the revenue collected by the Bureau. The remaining revenue comes from loans and dedicated fees, such as permits for firearms used on movie sets. The loss of the DROS Fee would result in the insolvency of the Bureau and the discontinuance of most of the Department's firearms-related regulatory and enforcement activities.

Serious harm would result from discontinuing the Bureau's activities, especially those directly related to checking the background of potential firearm purchasers or transferees. Each of the activities described above is necessary to ensure that a person prohibited by state or federal law does not purchase or maintain possession of a firearm. The ownership or possession of a firearm by convicted felons, persons found to be a danger to self or others because of a mental illness, persons addicted to the use of narcotics, and other prohibited persons pose a risk of immediate, serious harm to the people of the state of California.

Meeting this threat requires a consistent revenue stream that is directly related to the number of firearms sold and possessed in the state. Penal Code section 28233 structures the DROS Fee in exactly this manner. The Bureau cannot rely on funding from other sources (e.g., directly from the General Fund) that are unable to account for fluctuations in the number of firearms sold and thus the number of required background checks and related activities.

Explanation of Failure to Adopt Nonemergency Regulations

In December 2019, the Department adopted an emergency regulation because of the timeline presented by the passage of AB 1669. Governor Newsom signed AB 1669 into law on October 11, 2019. The changes made by that bill become operative on January 1, 2020, only 82 days after the bill was chaptered.

Efforts to adopt permanent regulations have been further impeded by Executive Order N-33-20, which directs non-essential personnel to stay at home or at their place of residence. Additionally, the Department has been experiencing a higher than normal DROS volume and is endeavoring to include the most up to date economic and fiscal information in its rulemaking documents.

Authority and Reference Citations

Authority: Sections 28233 and 28240, Penal Code.

Reference: Sections 28225, 28230, 28233, 28235, and 28240, Penal Code.

Informative Digest/Policy Statement

Existing law allows the Department to require a firearms dealer to charge each firearm purchaser a fee, called the “DROS Fee,” for the transfer of one or more firearms at the same time to the same transferee. Until January 1, 2020, the fee was \$19. As of January 1, 2020, the DROS Fee is \$31.19.

Fiscal Impact Disclosures Regarding the Proposed Action

The Department has made the following initial determinations:

Mandate on local agencies or school districts: None.

Cost to any local agency or school district which shall be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Cost of savings to the state: The new fee will generate revenue for the Bureau to offset the costs of its regulatory and enforcement activities. The Department anticipates that for fiscal year 2020-21, its regulatory and enforcement costs will be approximately \$30 million and its revenue from the DROS Fee will be approximately \$30 million.