

CALIFORNIA DEPARTMENT OF JUSTICE

TITLE 11. LAW

**DIVISION 5. FIREARMS REGULATIONS CHAPTER 1. BUREAU OF FIREARMS
FEES**

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

Existing law allows the Department of Justice (Department) to require a firearms dealer to charge each firearm purchaser or transferee a fee, called the Dealer Record of Sale, or “DROS” Fee, at the initiation of a purchase or transfer of one or more firearms. This fee is then remitted to the Department pursuant to the CCR Title 11, Section 4240. Until January 1, 2020, the DROS Fee was \$19 per DROS transaction, as set by the CCR, Title 11, Section 4001, and authorized by Penal Code sections 28225 and 28230.

Assembly Bill (AB) 1669, effective January 1, 2020, decreased the fee authorized by Penal Code section 28225, to a maximum of \$1. Additionally, AB 1669 removed the authority to use the \$1 fee to fund regulatory and enforcement activities related to the sale, purchase, possession, loan or transfer of firearms pursuant to any provision listed in Penal Code section 16580. Subdivision (a)(43) of section 16580 references Penal Code sections 23500 to 30290, inclusive, which authorize or mandate most of the activities of the Department’s Bureau of Firearms (Bureau).

AB 1669 added a new section to the Penal Code, section 28233. Subdivision (b) of that section authorizes a new \$31.19 fee to fund 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 section 16580. That section is the reference that was deleted from Penal Code section 28225, which authorized the previous DROS Fee.

The Department implemented this new \$31.19 fee in an emergency rulemaking that went into effect on January 1, 2020.

The Department’s emergency regulations named the new fee authorized by Penal Code section 28233 the “DROS Fee,” because this fee is the principal fee charged at the time of each DROS transaction, and because the new fee would fund the activities previously funded by the prior DROS Fee.

This rulemaking proposes to make permanent, with changes, that emergency regulation.

BENEFITS ANTICIPATED FROM REGULATORY ACTION

This rulemaking protects public safety by providing a consistent revenue stream for the Bureau’s activities. The Department anticipates that this rulemaking would result in revenue of \$27,678,006 for Fiscal Year 2021-22 and then \$24,535,738 for Fiscal Year 2022-23 and each

year thereafter. This revenue would pay for those activities related to checking the background of potential firearm purchasers, activities which serve to protect public safety by ensuring 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.

Other activities funded by the DROS Fee, such as the maintenance of the Automated Firearm System (AFS) and certain aspects of the Armed and Prohibited Persons Section (APPS) are directed toward the investigation and prosecution of firearms-related crimes. Addressing these important public safety issues requires a consistent revenue stream that is directly related to the number of firearms sold and possessed in the state. Penal Code section 28233, which this rulemaking implements, structures the DROS Fee in exactly this manner.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION

§ 4001. Bureau of Firearms Fees.

Subdivision (a) has been amended in six ways.

First, the Department has added a subdivision letter, (a), to the existing text, as amended. Because the Department proposes to add a second subdivision, the addition of a subdivision letter to the existing text, as amended, allows for each subdivision to be easily referenced. This is a non-substantial change because it does not materially alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.

Second, the Department has deleted the explicit citations, within the regulation text, of the statutory authority for the regulation. Prior to January 1, 2020, the regulation cited Penal Code sections 28225, 28230, and subdivisions (a) and (b) of section 28240 as the authority for the regulation. The Department deleted the reference to Penal Code sections 28225 and 28230, because the referenced statutes no longer provide the authority for the DROS Fee. The emergency rulemaking that went into effect January 1, 2020, replaced those citations with a citation to section 28233, which provides the authority for the new DROS Fee. For the purposes of the emergency rulemaking, updating the citation was sufficient to quickly and effectively implement the statute.

However, the Department has now chosen to delete all explicit citations, within the regulation text, of the statutory authority for the regulation. It is unnecessary to include the statutory authority in the regulation text, because the statutory authority for the regulation is already provided in the Authority section at the end of the regulation. Duplicating the statutory authority in the regulation text results in an extraneous prefatory clause that obscures the pertinent regulatory text. Consequently, deleting the citations would result in greater clarity.

Third, the Department is adding a clause to subdivision (a) to explain when the fee shall be charged. The current regulation text does not specify when the DROS Fee is to be collected.

This lack of clarity could result in a firearm dealer inappropriately waiting to charge the fee until the time of the physical transfer of the firearm. However, the process of purchasing a firearm begins prior to that point, and involves significant Departmental expenditure. The programs that are authorized to be funded by the DROS Fee are largely concerned with background checks on potential firearms purchasers or transferees. A firearm dealer must submit to the Department certain identifying information for every potential firearm purchaser or transferee. (Pen. Code, §§ 28100-28490.) As required by Penal Code section 28220, the Department then examines available records to determine whether the potential purchaser or transferee is prohibited by state or federal law from possessing, receiving, owning or purchasing a firearm. The Department then notifies the dealer of its determination, and the pending sale is either completed or the sale is denied.

Because the DROS Fee funds the various programs, systems and activities that make this determination possible, the fee must be collected upon submission of firearm purchaser information to the Department, which initiates the determination process. (Pen. Code, § 28220, subd. (a)). If, instead, the dealer waited until the physical transfer of a firearm, the DROS Fee would not be collected in instances when the determination resulted in a rejection or denial. In such a case, the intensive process that resulted in the rejection or denial would not be funded. Because the submission of the DROS to the Department initiates the process by which the Department determines the legality of a particular firearm transfer, it is the most reasonable time to collect the DROS Fee. The fee-collection timeline specified in these proposed regulations is how the fee is currently collected, though it is not explicitly stated in statute or regulation. The Department proposes to add it, here, to specifically establish pertinent aspects of the DROS Fee collection process.

Fourth, the Department is adding a clause to subdivision (a) to explain who is charging the fee, and who is paying the fee. Penal Code section 28233 grants the Department the authority to require a dealer to charge each firearm purchaser a fee. The added clause clarifies that the Department has chosen to so require the collection of the fee in such a manner. The current regulation sets the fee, but it does not provide explicit direction, in the regulation, as to how that fee is collected. This addition would provide greater clarity to the public as to the specifics of fee payment and collection.

Fifth, the Department is setting the DROS Fee at \$31.19. 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, and is exercising its discretion to do so, in this rulemaking. The purpose of this amendment is to set the DROS Fee at \$31.19, and to delete the previous fee amount of \$19.

It is necessary to set the fee at \$31.19 to adequately fund the Department's 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 section 16580. Penal Code section 28233 does not grant the Department the discretion to set the initial fee at any other amount. Still, 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.)

The Department has determined that by setting the DROS Fee at the authorized amount of \$31.19, revenue generated by the fee would, generally, fund the specified regulatory programs without exceeding the cost of those regulatory programs (see Standardized Regulatory Impact Analysis, Table 3).

Since the authority for the previous DROS Fee has been repealed, if the Department does not implement the fee authorized by Penal Code section 28233, the Department estimates that in Fiscal Year 2021-22 the decrease in revenue would result in a deficit of \$11,367,074; in Fiscal Year 2022-23 and thereafter, the deficit would be \$26,736,279. Setting the DROS Fee at the statutorily authorized amount is necessary to prevent such a deficit, which would lead to the fiscal insolvency of the Bureau.

With the DROS Fee set at \$31.19, the Department estimates that in the first 12 months following full implementation, and each year thereafter, DROS Fee revenue would not exceed expenditures. (See the STD 399 Economic Impact Statement and the Standardized Regulatory Impact Analysis, for a detailed explanation of the Department's revenue and expenditure calculations.)

Sixth, the Department is deleting the parenthetical that follows, and explains, the term "firearms." The meaning of the term "firearm" is established in Penal Code section 16520, and does not need to be summarized in, or clarified by, this regulation. The regulated public reading this regulation, located as it is within Division 5, "Firearms Regulations," will already know what a firearm is. Inclusion of the parenthetical list of types of firearms is therefore substantively unnecessary. Further, the unnecessary parenthetical results in an overly-verbose sentence that obscures, rather than clarifies, the central topic. Consequently, deleting the parenthetical will result in greater clarity.

The addition of a new subdivision, (b), stipulates the method by which the fee, charged by the firearm dealer to the firearm purchaser, per subdivision (a), must be remitted to the Department. Section 4240 currently stipulates the method for remission of fees by firearms dealers to the Department. However, section 4001 does not currently make reference to section 4240 as stipulating that method, and the allusion in section 4240 to "the previous month's DROS activity" does not explicitly reference the fees associated with that DROS activity. The proposed addition of subdivision (b) to section 4001 directly links the firearm dealer's collection of DROS Fee monies from each firearm purchaser, pursuant to subdivision (a), with the remission of fee monies for "DROS activity" to the Department, pursuant to section 4240. Without this addition, subdivision (a) would mandate firearm dealers to collect the DROS fee, pursuant to Penal Code section 28233, for DROS activity, but there would not be consistent communication to firearms dealers as to the fact that the DROS Fee monies collected throughout the month will result in the "DROS activity" monthly billing statements in section 4240. By providing this direct reference, the proposed regulation results in greater clarity without prescribing any new requirement on the regulated public.

Authority was amended to delete references that are no longer pertinent to the regulation. Penal Code section 28220 did not provide authority for the DROS Fee, and reference to that section is being deleted. Penal Code sections 28225 and 28230 had previously provided authority for the DROS Fee, but no longer do so, and so reference to those sections are also being deleted. Penal Code section 28233 newly provides authority for the DROS Fee, so that section reference is being added.

These changes increase the clarity of the regulation by providing accurate references to the statutory authority for the regulation.

Reference was amended to delete references that are no longer pertinent to the regulation. Penal Code sections 27540, 28240 and 31115 are not pertinent to the regulation.

Removing these references will lead to greater clarity.

STANDARDIZED REGULATORY IMPACT ANALYSIS

Attached to this Initial Statement of Reasons are the following documents:

- Standardized Regulatory Impact Analysis: New Dealer Record of Sale (DROS) Fee
- Department of Finance comment letter regarding the DROS Fee SRIA
- Department of Justice response to the Department of Finance
- Standard Regulatory Impact Analysis: New Dealer Record of Sale (DROS) Fee (Revised)

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR SIMILAR DOCUMENTS RELIED UPON

Department staff relied upon their experience and expertise when writing these proposed regulations, and the following documents:

Aught, Rob, *The True Cost of Buying Your First Handgun* (2020, July 13) The Truth About Guns. Retrieved from <<http://www.thetruthaboutguns.com>> As of May 18, 2021.

Bice, Douglas C. and David D. Hemley, *The Market for New Handguns: An Empirical Investigation* (2002) Journal of Law and Economics, Vol. 45, 251-265.

Bourjaily, Phil. *The 10 Best Budget Shotguns* (2021, February 11) Field and Stream. Retrieved from <<https://www.fieldandstream.com/best-10-bargain-shotguns/>> As of July 8, 2021.

Bureau of Firearms of the California Department of Justice, Dealer Record of Sale Transactions, 1972-2018 (2018) retrieved from <<https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/dros-chart-2018.pdf>>

Cabanatuan, Michael, *Gun Sales Have Surged During the Pandemic, Up 500% for One Bay Area Store* (2020, October 23) San Francisco Chronicle.

- Goo, Sara Kehaulani, *Why Own a Gun? Protection Is Now Top Reason* (2013, May 9) PEW Research Center. Retrieved from <<https://www.pewresearch.org/fact-tank/2013/05/09/why-own-a-gun-protection-is-now-top-reason/>>
- Haar, Dan, *America's Rifle: Rise of the AR-15* (2013, March 9) Hartford Courant.
- Hung, Eric and Jacki Billings, eds. *Editor's Picks: Guns & Gear – Complete AR-15s*. Pew Pew Tactical. Retrieved from <https://www.pewpewtactical.com/editors-picks/#tag=complete-ar-15s> As of July 19, 2021.
- Kleck, Gary and Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun* (1995) *Journal of Criminal Law and Criminology*, Vol. 86, No. 1. 150-187.
- Kravitz-Wirtz, Nicole, Amanda Aubel, Julia Schleimer, Rocco Pallin and Garen Wintemute, *Violence, Firearms, and the Coronavirus Pandemic: Findings from the 2020 California Safety and Wellbeing Survey* (2020, October 6) medRxiv The Preprint Server for Health Sciences (unpublished) retrieved from <<https://www.medrxiv.org/content/10.1101/2020.10.03.20206367v1.full.pdf>>
- Linthicum, Kate, *Gun Sales Are Soaring. And It's Not Just Conservatives Stocking Up* (2020, October 30) Los Angeles Times retrieved from <<https://www.latimes.com/world-nation/story/2020-10-30/gun-sales-are-soaring-and-its-not-just-conservatives-stocking-up>>.
- National Shooting Sports Foundation, *Firearm and Ammunition Industry Economic Impact Report 2021* (2021) retrieved from <<https://www.nssf.org/government-relations/impact/>> As of May 7, 2021.
- Robertson, Matt. *Novice Marksman's Field Guide to Your First AR-15* (2021, May 25) retrieved from <<https://www.everydaymarksman.co/equipment/buying-your-first-ar-15/>> As of July 8, 2021.
- Smart, Rosanna, *Firearm and Ammunition Taxes* (2021, April 15) RAND Corporation retrieved from <<https://www.rand.org/research/gun-policy/analysis/essays/firearm-and-ammunition-taxes.html>>
- Sportsman's Outdoor Superstore, *Best Sellers in California Compliant Firearms*, (2020, March 2) retrieved from <<https://www.sportsmansoutdoorsuperstore.com/best-sellers-california-compliant-firearms.cfm>> As of March 2, 2020.
- Violence Policy Center, *The Militarization of the U.S. Civilian Firearms Market* (2011, June) retrieved from <<https://www.vpc.org/studies/militarization.pdf>>.
- Willis, Jay, *Owning a Gun in America is a Luxury* (2018, April 30) GQ Magazine retrieved from <<https://www.gq.com/story/gun-ownership-cost>>.

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the proposed action would not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

These regulations would require licensed firearms dealers to collect a DROS fee of \$31.19 from a firearm purchaser or transferee, and remit those monies to the Department. Collection of statutorily-authorized fees, and remission of such monies to the Department, is current practice for licensed firearms dealers. Only the dollar amount of the DROS fee would change due to the proposed action. This dollar amount change would be made automatically within the Dealer Record of Sale (DROS) Entry System (DES), and would have no direct impact on the activity of licensed firearms dealers.

By law, a firearm may not lawfully be sold to a person who resides in a state other than the state in which the seller's licensed premises is located (Pen. Code, § 27585, see also 18 U.S.C. § 922(b)(3); 27 CFR § 478.99(a)). It would be unlawful for a resident of California to purchase a firearm in another state so as to avoid payment of the increased DROS Fee, and to then bring the firearm back to California. Conversely, it is also generally unlawful for a resident of another state to purchase a firearm in California. Due to these restrictions, there is no reason to believe that the cost increase would lead California businesses to compete with businesses in other states.

The proposed action may have an economic impact that *indirectly* affects business, in a potential decrease in demand, which could lead to a loss in firearms sales of up to \$55,850,900 statewide in the 12 months following full implementation of the regulation.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department finds that no reasonable alternatives were presented to, or considered by, the Department that would lessen any adverse impact on small business.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASON FOR REJECTING THOSE ALTERNATIVES

The Department finds that no alternatives were presented to, or considered by, the Department that would be more effective in carrying out the purpose of the proposed regulation or would be as effective and less burdensome to affected private persons than the proposed regulation. 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. At its discretion, the Department may promulgate regulations to implement the fee. However, Penal Code section 28233 does not grant the Department the discretion to set the initial fee at any other amount.

Three alternatives were considered by the Department, as presented in the Standardized Regulatory Impact Analysis. However, these alternatives were not found to be reasonable alternatives, as they would be ineffective at funding the Department's firearms related regulatory and enforcement activities; ineffective at collecting the proposed DROS Fee; or are prohibited due to statutory constraints.

Performance Standard as Alternative:

The Department is prescribing a fee as authorized by statute to maintain the fiscal solvency of the Bureau of Firearms. The only alternative to implementing the fee is not to implement a fee at all, which is not a reasonable alternative.