

**SENIOR COUNSEL:**  
C. D. MICHEL

**SPECIAL COUNSEL:**  
JOSHUA R. DALE  
W. LEE SMITH

**ASSOCIATE COUNSEL:**  
SEAN A. BRADY  
SCOTT M. FRANKLIN  
HILLARY J. GREEN  
THOMAS E. MACIEJEWSKI  
CLINT B. MONFORT  
JOSEPH A. SILVOSO, III  
TAMARA M. RIDER  
LOS ANGELES, CA



**OF COUNSEL:**  
DON B. KATES  
SAN FRANCISCO, CA

RUTH P. HARING  
LOS ANGELES, CA

GLENN S. MCROBERTS  
SAN DIEGO, CA

**AFFILIATE COUNSEL:**  
JEFFREY M. COHON  
LOS ANGELES, CA

DAVID T. HARDY  
TUCSON, AZ

MEMORANDUM FROM THE DESK OF  
C. D. MICHEL

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**Re: GUN AMMO GOOGLING:  
DOES INTERNET ACCESS TO RARE AMMUNITION CALIBERS LIMIT THE  
AVAILABILITY OF “REPLICAS” TO QUALIFY AS “ANTIQUE FIREARMS?”**

**Date: April 14, 2011**

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**I. Introduction:<sup>1</sup>**

Collectors of “replicas antique firearms” have been able to buy and sell these collectibles without going through the usual arduous federal and state law required process for acquiring modern firearms. This has generally been legal because a “replica” of an “antique firearm” is not considered a “firearm” under federal or (most) state laws, and so is not regulated as one.

But “replicas” have fallen legal under the legal definition of “antique firearms” in the past because the ammunition for these firearms was not readily available in the ordinary channels of commercial trade. As rare calibers of rimfire and centerfire ammunition have become more readily available on the internet however, the possibility that replicas of antique firearms will no longer be exempted from the definition of “firearms,” and consequently the likelihood of these replicas being regulated like modern firearms under federal law, is increasing.

This possible narrowing of the legal definition of “antique firearms” may also effect the amount of black powder a person/company may commercially manufacture under federal law.

Collectors should be aware of and keep an eye on these potential developments. Understanding the

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situation requires an understanding of the legal context in which antique firearms and replicas of antique firearms regulated and exempted from federal and state restrictions; as well as the requirements and exceptions for manufacturing black powder. These are discussed below:

## **II. Definitions:**

The Gun Control Act of 1968 (GCA) (18 United States Code (USC) section 921 *et seq*) and the federal regulations promulgated in compliance with the GCA cover the licensing, sales, possession, and transfer requirements for most firearms under federal law.<sup>2</sup>

### **A. Definition of Firearm**

A “firearm” under the Gun Control Act is defined as:

- (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- (B) the frame or receiver of any such weapon;
- (C) any firearm muffler or firearm silencer; or
- (D) any destructive device.

18 USC 921(a)(3).

But the law also provides that the term “firearm” “does not include an antique firearm.” (*Id.*)<sup>3</sup>

### **B. Definition of Antique Firearm**

A firearm is considered an “antique firearm” if it fits any of the following three definitions:

- (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
- (B) *any replica of any firearm described in subparagraph (A) if such replica--*
  - (i) *is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or*
  - (ii) *uses rimfire or conventional centerfire fixed ammunition which is no longer*

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<sup>2</sup> The National Firearms Act (NFA) ( 26 USC 5801) also regulates firearms, however these firearms are highly regulated devices (i.e. “machineguns,” short-barreled rifles and shotguns) which are generally prohibited from being possessed in most states in the absence of special permits or licenses.

<sup>3</sup> California law exempts “antique firearms,” as defined under Section 921(a)(16) of Title 18 of the United States Code (quoted above), for purposes of Penal Code sections 12070, 12071, and paragraph (8) of subdivision (a), and subdivisions (b), (c), (d), and (f) of section 12072. Cal Pen § 12001(e). These laws are generally the ones that require a person to have a license when selling firearms or for firearm sales to be processed by a firearms licensee when a sale is conducted between two non-licensees.

*manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or*

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term “antique firearm” shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

18 USC 921(a)(16) (emphasis added).

### **C. Definition of “Explosive Material” and “Black Powder”**

Federal law also limits the manufacture of “explosive material” without a license. 18 USC 842(a)(1). “Black Powder<sup>4</sup>” is defined as an “explosive material” under federal law. 27 CFR 555.23 and ATF Publication 5400.8.

The general restrictions on “explosive materials” does not apply to:

commercially manufactured *black powder* in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, intended to be used *solely for sporting, recreational, or cultural purposes in antique firearms* as defined in section 921(a)(16) of title 18 of the United States Code, or in antique devices as exempted from the term “destructive device” in section 921(a)(4) of Title 18 of the United States Code.

18 USC 945(a)(5)(emphasis added)

### **III. Analysis**

Firearm enthusiasts and collectors have been able to acquire replicas of pre-1899 firearms under 18 USC 921(a)(16) subsection (B) because typically the firearm is either:

1) “not designed or redesigned for using rimfire or conventional centerfire fixed ammunition,” or;

2) the replica firearm “uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.”

If a replica firearm “uses rimfire or conventional centerfire fixed ammunition *which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade...*” then it meets the definition of an “antique firearm” and is therefore exempt from state and federal

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<sup>4</sup> Antique firearms, firearms modeled after antique firearms, and muzzle loading firearms tend to use black powder (commonly referred to as gunpowder) as a propellant for bullets. Black powder burns more slowly than its modern equivalent, smokeless powder, putting less pressure on the barrel of the firearm while providing less muzzle velocity than an equivalent amount of smokeless powder.

firearm requirements. *Id.* But the terms “readily available” and “ordinary channels of commercial trade” are not defined in the statute. Historically, since the ammunition for replicas that fire rimfire or centerfire ammo wasn’t readily commercially available, to use the replica the owner would either load their own ammunition, or find someone, typically a hobbyist or fellow collector, who reloaded the specific ammunition for the replica. Before the internet, finding these hobbyists or ammunition loaders was difficult. But with the advent of the internet even the rarest calibers can be found, and might now be considered “readily available” because these days, rare calibers of “rimfire or conventional centerfire fixed ammunition” can be found through search engine results that show where and how to acquire previously hard to find ammunition over the internet.

The question then becomes: is the ammunition found on the internet “readily available” thorough the “ordinary channels of commercial trade?” The answer to that question may pose problems in the future for firearm enthusiasts accustomed to purchasing “replicas” of “antique firearms” without going through the typical state and federal hurdles (using firearm dealers, filling out 4473 forms, etc) in acquiring firearms.

This availability of ammunition and questions surrounding whether a “replica” meets the definition of an “antique firearm” also raises concerns for manufacturers previously exempt under federal law from needing a license to manufacture black powder.

As discussed above, manufactures of limited quantities of black powder are exempt from the federal licensing requirements if they produce less than fifty pounds of black powder *and* if they intended the powder to be used solely for sporting, recreational, or cultural purposes in “antique firearms.” 18 USC 845(a)(5).<sup>5</sup>

Manufacturers, well aware of the ambiguities within the definition of “antique firearms,” are finding it difficult to determine whether they fall under this exception, or must now possess a license to create black powder. If ATF determines that a manufacturer needed to possess a license and manufactured black powder without one, the lack of the appropriate federal license could be considered a violation of federal law which may result in a fine and/or up to 10 years in federal prison. 18 USC 844(a)(1).

#### **IV. Conclusion**

The availability of almost all types of unique calibers and sizes of ammunition on the internet may change the analysis of whether a replica of an antique firearm will be exempt under federal and state law transfer requirements. This new found availability may prove problematic for those who wish to continue to acquire replica “antique firearms” without having to purchase them through a firearm dealer, because one of the definitions that classify a replica as an “antique firearm” steadily losing its scope. This may also have an effect on manufacturers of black powder who had previously made limited amounts of the substance for sporting, recreational, or cultural purposes without a federal license.

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<sup>5</sup> Keep in mind that definition that remains in doubt is the one for replicas of “antique firearms.” If the manufacturer creates black powder for firearms manufactured prior to 1899 may be exempt. But then the question becomes for what kind of firearm is the manufacturer making the powder? The pre-1899 firearm or the replica?

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