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June 8, 2012

Debra M. Comez
Director, Office of Administrative Law
300 Capital Mall, Suite 1250
Sacramento, CA 95814

**Re: CTU2011-1121-02
Department of Justice – Bureau of Firearms’ Policy and Forms Regarding Applicatio
for Dangerous Weapons Permits By Corporations and Other Entities**

Ms. Comez,

I write in reply to the Department of Justice – Bureau of Firearms’ (“BOF”) partial response to the above referenced petition. In their letter, the BOF “admits that it only issues permits for the manufacture of dangerous weapons to individuals, and does not issue such permits in the sole name of a corporation or other business entity.” Further, the BOF “contends that this policy is the only legally tenable interpretation of the applicable Penal Code provisions, and therefore the BOF is not using nor enforcing an underground regulation. (Govt. Code §11340.9, subd. (f).)

In an attempt to draw the attention away from the multiple permitted uses for which the BOF refuses to issue permits to Corporations, the BOF’s response addresses *only* the manufacture of “assault weapons” and “.50 BMG Rifles” under the Assault Weapons Control Act (“AWCA”) Further, the BOF’s sole legal proposition is that the law does not permit Certificates’ of Eligibility for corporations, and therefore corporations and other non-natural persons cannot be issued permits. That position is wholly inaccurate and contrary to the express language and obligations placed upon them by the Legislature. Significantly, the BOF’s response is rife with unsupported false statements about the law that are contradicted by a simple review of the Penal Code.

**1: AWCA PERMITS ARE AUTHROIZED BY LAW FOR CORPORATE AND OTHER ENTITY
ACTIVITIES THAT DO NOT REQUIRE CERTIFICATES OF ELIGIBILITY – YET SUCH
PERMITS ARE STILL PROHIBITED BY BOF POLICY AGAINST CORPORATE
PERMITTEES**

There are two sections of the Penal Code providing for two different types of AWCA permits – with different requirements. Penal Code section 31005 provides legal authority for those who desire to *manufacture* or *sell* “assault weapons” or “.50 BMG rifles” and who have “good cause” to do so:

(a) The Department of Justice may, upon a finding of good cause, issue permits for the manufacture or sale of assault weapons or .50 BMG rifles for the sale to,

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purchase by, or possession of assault weapons or .50 BMG rifles by, any of the following:

- (1) The agencies listed in Section 30625, and the officers described in Section 30630.
- (2) Entities and persons who have been issued permits pursuant to this section or Section 31000.
- (3) Federal law enforcement and military agencies.
- (4) Law enforcement and military agencies of other states.
- (5) Foreign governments and agencies approved by the United States State Department.
- (6) Entities outside the state who have, in effect, a federal firearms dealer's license solely for the purpose of distribution to an entity listed in paragraphs (3) to (5), inclusive.

(b) Application for the permits, the keeping and inspection thereof, and the revocation of permits shall be undertaken in the same manner as specified in Article 3 (commencing with Section 32650) of Chapter 6.

If however, the “person” desires to obtain an “assault weapon” or “.50 BMG rifle” for purposes other than “manufacturing” or “sales,” then the Penal Code section 31000 subd. (c) expressly provides legal authority for such a permit:

Any person who wishes to acquire an assault weapon after January 1, 1990, or a .50 BMG rifle after January 1, 2005, shall first obtain a permit from the Department of Justice in the same manner as specified in Article 3 (commencing with Section 32650) of Chapter 6.

The BOF has expressly recognized the following non-manufacturing and non-sales activities as “good cause”¹ for such a permit:

- Training - (11 C.C.R. 4133);
- Research - (11 C.C.R. 4133);
- Development - (11 C.C.R. 4133);
- Commercial Motion Pictures - (11 C.C.R. 4134);
- Television Production - (11 C.C.R. 4134);
- Other Commercial Entertainment Events - (11 C.C.R. 4134);
- Repair - (11 C.C.R. 4136);
- Maintenance - (11 C.C.R. 4136);
- Activities Sanctioned by Military - (11 C.C.R. 4137);

¹ It is important to note that there is no express “good cause” requirement for obtaining a non-manufacturing/non-sales AWCA permit under Penal Code section 31000. The Department of Justice does, however, require “good cause” for a permit to be issued for such activities. That regulatory requirement for “good cause” is not, however, challenged in this petition. That will be addressed in another matter.

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None of these activities require a Certificate of Eligibility to perform. As such, the BOF's entire argument fails to address their policy of refusing permits for corporations and other entities that engage in these activities.

2. THE BOF'S POLICY OF ONLY ISSUING AWCA PERMITS TO NATURAL PERSONS IS NOT THE ONLY TENABLE INTERPRETATION – AS THEY CLAIM

The BOF argues that their position is “only legally tenable interpretation” of the applicable Penal Code sections. Specifically, they provide three reasons for their position.

First, they argue that Penal Code section 29050 states that “a license to manufacture firearms (which includes assault weapons and .50 caliber BMG rifles) can only be issued to a non-prohibited applicant that has obtained a Certificate of Eligibility.” Second, the BOF argues that because machinegun permits are unavailable to corporations, the AWCA permits should be too. Finally, the BOF argues that if Corporations and other entities are able to obtain permits to manufacture .50 “BMG rifles and “assault weapons,” then prohibited persons would be able to obtain permits and manufacturer such firearms.

The BOF's arguments are, each and every one, fallacious, incorrect, and far outside the bounds of a plain reading of the authority cited.

a. Penal Code 26710 Permits Corporations to Obtain Certificates of Eligibility

To support their position that the legislature excluded non-natural persons from obtaining permits, the BOF reaches outside of the AWCA to the general firearms manufacturing requirements. The general manufacturing requirements are provided in Penal Code section 29010, which provides as follows:

. . . [N]o person, firm, or corporation . . . may manufacture firearms within this state unless that person, firm, or corporation is licensed pursuant to Chapter 2 (commencing with Section 29030.)²

Thus, the general provision regulating the manufacture of firearm expressly mandates licenses for corporations and firms – not just individuals. Reinforcing this position, Penal Code section 29030 defines a “licensee:”

. . . [Licensee means a person, firm, or corporation that satisfies both of the following: (a) Has a license issued pursuant to subdivision (b) of Section 29050 [and] (b) is among those recorded in the centralized list specified in Section 29060.

Thus, it is clear that “firms” and “corporations” are included within those who are permitted to have a license pursuant to Penal Code section 29050 subd. (b).

Subdivision (b) (4) requires that the applicant have a “certificate of eligibility issued by the Department of Justice pursuant to 26710.” Thus, there are two readings of these sections: Either this provision requires that “certificates of eligibility” be available for firms and corporations, as well as natural persons – which is a plain

² The requirement for a license does not apply to manufacturers who manufacturer fewer than 100 firearms per calendar year. (Penal Code § 29010 subd. (b).)

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reading. Or, as the BOF contends, the “certificate of eligibility” is not available for firms or corporations – which ignores, nullifies, and contradicts the mandate that “firms” and “corporations” express licensing mandate of Penal Code section 29030. More importantly, there is no legal authority supporting that position. Thus, the cumulative effect of the general manufacturing license requirements expressly include firms and corporations within those that are to be issued licenses, which necessitate that firms and corporations are authorized by law to obtain “certificates of eligibility.”

The BOF states that “The Department is only able to conduct criminal background checks for COEs on individuals.” Not only is this incorrect by the express language above (conveniently omitted from the BOF’s analysis), it is incorrect when one examines the clear text of the “certificate of eligibility” provision. Examination of Penal Code section 26710 reveals that the BOF is expressly permitted to provide Certificates of Eligibility to Corporations. It states:

- (a) A person may request a certificate of eligibility from the Department of Justice.
- (b) The Department of Justice shall examine its records and records available to the department in the National Instant Criminal Background Check System in order to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

The BOF implies that the term “person” as used here, does not include Corporations because “the definition of ‘person’ as referenced in Penal Code section 16970 (formerly Penal Code section 12277) does not apply to section 26710.” It is true that the definition of “person” as used referenced in Penal Code section 16970 does not apply to Penal Code section 26710.

Penal Code section 7, however, does apply. Penal Code section 7, defining words used in the Penal Code generally, clearly, unambiguously, and expressly states that “the word ‘person’ includes a corporation as well as a natural person.” Thus, read properly, and contrary to the BOF’s position, Section 26710 expressly permits a corporation to request a Certificate of Eligibility from the BOF. And, the BOF cites’ nothing to the contrary.

Thus, firms and corporations are legally entitled to licenses to manufacture firearms and the prerequisite certificates of eligibility.

b. Contrary to The BOF’s Argument, Corporations May Obtain Machine Gun Permits

The BOF implies that corporations cannot obtain machinegun permits, therefore they are prohibited from obtaining AWCA permits. This is, however, wholly inaccurate as well – as Corporations are expressly permitted to obtain machinegun permits.

The BOF correctly states that Penal Code section 31105 provides that the BOF may only issue permits for the *manufacture* of “assault weapons” in accordance with Penal Code section 32650. And, the BOF correctly states that the BOF may issue permits for the *manufacture* of “machineguns” And, the BOF correctly states that “the definition of ‘person’ as referenced in Penal Code section 16970 . . . does not apply to section 32650 [regulating machineguns].

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However, the BOF incorrectly states that the BOF may only issue permits to an applicant “who has obtained a COE.” Nothing within the Penal Code section 32650 requires a Certificate of Eligibility. As discussed above, only those “persons, firms, or corporations” manufacturing more than 100 firearms per year are required to obtain a “certificate of eligibility.” (Penal Code 29010 subd. (b).)

Even where a Certificate of Eligibility is required, corporations and firms are permitted to obtain such certificates –as discussed above. Thus, nothing cited by the BOF relating to section 32650 prohibit a firm or corporation from obtaining a “machinegun permit.”

Emphasizing the point that corporations are permitted to obtain machinegun permits is Penal Code section 32655 subd. (a)(2), which expressly provides for firm and corporate applicants:

An application for a permit under this article shall satisfy all of the following conditions: . . . It shall be signed by the applicant if an individual, or by a member or officer qualified to sign if the applicant is a firm or corporation.

Thus, the BOF’s argument that “assault weapon” permits cannot be provided to firms or corporations because such permits are not allowed for “machinegun” permits is wholly inaccurate and fallacious.

In sum, the BOF has failed to provide a single legal basis for their position that corporations and firms cannot be provided permits under the AWCA.

c. **The BOF Incorrectly States That Manufacturers Can Avoid COE’s By Obtaining Permits Through Corporate and Other Non-Natural Person Entities.**

Turning to public policy, the BOF argues that issuing permits to corporations would permit a prohibited person the ability to manufacture “dangerous weapons.” This is incorrect. Penal Code section 29120 mandates that all employees handling firearms (this includes “assault weapons” and “.50 BMG rifles”) also obtain a “certificate of eligibility” – just like the corporate licensee:

(a) A licensee shall require that each employee obtain a certificate of eligibility pursuant to Section 26710, which shall be renewed annually, before being allowed to come into contact with any firearm.

(b) A licensee shall prohibit any employee who the licensee knows or reasonably should know is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm from coming into contact with any firearm.

Thus, the BOF again fails to provide any valid or accurate legal or public policy basis in support of their underground regulation prohibiting corporations and other entities from obtaining permits.

3. **THE BOF’S POLICY OF ONLY ISSUING AWCA PERMITS TO NATURAL PERSONS IS THE LEAST TENABLE INTERPRETATION AND HURT’S BUSINESS**

Not only is the BOF’s baseless analysis that law external to the AWCA prevents permits from being issued to corporations, firms, and other non-natural persons incorrect, but it is the least tenable position in light of the

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AWCA's express language – and it harms lawful businesses that are otherwise entitled to such permits for lawful activities under the AWCA.

a. The Penal Code Clearly Provides Corporations The Opportunity To Obtain Permits

In what can only be described as devastating to the BOF's entire argument, Penal Code section 31110 provides clear and express statutory authority for corporations and other entities to have "assault weapons" and ".50 BMG permits."

(a) Except as provided in subdivision (b), the Department of Justice shall, *for every* person, *firm, or corporation to whom a permit is issued pursuant to this article*, annually conduct an inspection for security and safe storage purposes, and to reconcile the inventory of assault weapons.

(b) *A* person, *firm, or corporation with an inventory of fewer than five devices that require any Department of Justice permit shall* be subject to an inspection for security and safe storage purposes, and to reconcile inventory, once every five years, or more frequently if determined by the department.

The BOF has claimed that the Corporations are not entitled permits, but the above provision makes all such claims incredulous and renders the BOF's the least tenable interpretation. This authority is in addition to the authority provided in Petitioner's Initial Petition – which is incorporated in its entirety herein by reference and provides express authority for corporations and other entities to obtain permits.

It is clear, unambiguous, and without any reasonable argument that the Legislature and the AWCA can only be interpreted to include corporations, firms and other non-natural persons within the statutorily mandated permit scheme of Penal Code sections 31000 & 31005.

b. The BOF'S Interpretation Creates Liability, Ignores Corporate Protections, and otherwise harms businesses

The BOF argues that their policy furthers the intent of the law, specifically citing Penal Code section 30505, which states in part: "It is the intent of the Legislature in enacting this chapter to place restrictions³ on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession." Nowhere in Penal Code section 30505 does it state that corporations are prohibited from obtaining permits. Thus, the only implication from this provision is that the permit scheme, as written and inclusive of corporations and other entities, effectuated the intent to permit corporations and other entities to obtain permits. Yet, the BOF policy places many burdens upon entities, including:

- The BOF policy is contrary to statutory law as described above. This alone raises an issue of considerable public importance requiring prompt resolution.
- The BOF policy creates a fictitious relationship between a corporation's dealings in firearms and those of the employee/permittee. i.e. If an employee is permitted to sell "assault weapons" and ".50 BMG

³ Significantly, this provision does not state that it is the intent to ban "assault weapons" as the BOF claims. Rather, it states that is the Legislature's intent to place "restrictions" and "establish a "permit procedure for their lawful sale and possession."

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Rifles” and is not otherwise licensed to sell firearms generally, but the individual’s employer is permitted to sell firearms generally but not permitted to sell “assault weapons” and “.50 BMG Rifles,” how can an employee sell firearms under the corporations state and federal firearms licenses?⁴

- The BOF policy places unintended significance upon the importance of an employee relationship with the Corporation. For example, under the Bureau of Firearms interpretation, in order for a corporation to engage in sales of “assault weapons” and “.50 BMG rifles” to law enforcement or to other permittees such as movie prop houses, the corporation must ensure that it has employees with said permits employed at all times. A corporation that loses its sole employee with the permit that is obtained under the corporations “good cause” is unable to continue business until it finds a replacement employee who then obtains a replacement permit – which can take nearly a year in some instances.
- The BOF policy causes undue delay upon a corporation with high turnover or limited employee resources due to the fact that the Bureau’s processing time for such permits can take months to over a year to process – leaving corporations with satisfactory “good cause” to sell such firearms without the ability to do so lawfully during periods after their “permitted” employee leaves the corporations employment – thereby holding the corporations hostage and reliant upon its employees.
- The BOF policy causes duplicity and increased costs upon corporations by requiring corporations to require *multiple* employees to obtain *annual* permits as redundant security against employee turnover.

The BOF’s only response to these burdens is their allegation that having multiple employees ‘permitted’ is no different than issuing multiple sets of work keys to employees – and it is an acceptable cost for doing business – approximating the costs at \$372 for the initial application for the secondary employee. This ignores the fact that additional employees cost money in salaries, insurance benefits, and other expenses requisite to hiring an individual in the State of California – which can increase expenses by tens of thousands of dollars annually – These expenses that are only required because of the BOF’s policy that runs contrary to existing law.

Of most concern, and unaddressed by the BOF, is that the method by which the BOF grants such permits to individuals and not to corporations creates a potential and real liability situation for corporations and other business entities within California. A corporation or other business entity operating under federal law as a Federal Firearms Licensee (18 U.S.C. 921 *et seq.*) and under California laws regulating firearm sales is required to operate under an individual’s permit – thereby creating entity confusion and criminal and civil liability.⁵

⁴ See Penal Code section 12070 *et seq.* regarding the general requirements for California Firearms dealers (separate and apart from those relating to “assault weapons” and “.50 BMG Rifles.” See also, 18 U.S.C. section 921 *et seq.* for federal regulations relating to the same.

⁵ The BOF attempts to address this by comparing the AWCA permittees to the requirements for construction contractors. This comparison is like comparing apples and oranges, as the licensing requirements cited by Ms. Kimberly Granger expressly provides a mechanism for a corporation and other non-natural persons to be qualified by its officers and other representatives. Whereas the AWCA expressly provides a mechanism for the corporations and non-natural persons to be licensed themselves – as well as natural persons. Further, unlike the AWCA, if a “qualifier” leaves the business, the business has 90 days to replace the “qualifier. Under the AWCA and the BOF’s interpretation, if a permitted employee leaves the business, the business is immediately in felonious possession of “assault weapons” and “.50 BMG rifles” in its inventory. And, unlike general contractors which are abundant and plentiful, AWCA permittees are few and far between due to the discretion taken by the BOF in issuing such permits. The application process takes over a year to complete. And, even assuming that a replacement permittees is found and hired, all the inventory within the possession of the business without a permittees is contraband – unassumable by the new permitted employee. As such, by their express terms, AWCA permittees and general contractors are worlds apart as licensing schemes.

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For example, only “licensed gun dealers” may engage in sales, service, or repair of “assault weapons” and “.50 BMG Rifles.”⁶ Penal Code section 16790 defines “licensed gun dealer” as “[a] person who is licensed pursuant to Sections 26700 to 26915, inclusive, and who has a permit to sell assault weapons or .50 BMG rifles pursuant to Section 31005.”

Corporations and other business entities licensed pursuant to Section 26700 to 26915 are not issued permits due to BOF policies, but rather individuals under their employment are issued permits. Thus, the BOF’s interpretation creates the fictitious situation in which they permit Corporations without “assault weapon” or “.50 BMG Rifle” permits to sell, repair, and/or service such firearms because they employ a permitted individual. Simultaneously, the BOF interpretation permits individuals not licensed pursuant to Penal Code sections 26700 to 26915 to sell “assault weapons” and “.50 BMG Rifles” on behalf of their corporate employer who is licensed pursuant to Penal Code Sections 26700 to 26915. In other words, the BOF policy is a departmental sanctioning of unlawful conduct that would be, but for estoppel defenses⁷, subject to criminal prosecutions.

Doing so has the possibility of placing liability upon the individual permittees by taking the individual out of the protection provided by Corporate or other entity status since they are acting as “individuals.” Additionally, it subjects both the Corporation and the individual to criminal prosecution for unlawful sales of “assault weapons” and “.50 BMG Rifles” because neither of the two entities possesses both the requisite licenses and permits solely due to the BOF’s misguided application of these laws.

⁶ 31050. (a) Any ***licensed gun dealer*** may take possession of any assault weapon or .50 BMG rifle for the purposes of servicing or repair from any person to whom it is legally registered or who has been issued a permit to possess it pursuant to this chapter. (b) Any ***licensed gun dealer*** may transfer possession of any assault weapon or .50 BMG rifle received pursuant to subdivision (a), to a gunsmith for purposes of accomplishing service or repair of that weapon. A transfer is permissible only to the following persons:

- (1) A gunsmith who is in the dealer's employ.
 - (2) A gunsmith with whom the dealer has contracted for gunsmithing services.
- (c) In order for paragraph (2) of subdivision (b) to apply, the gunsmith receiving the assault weapon or .50 BMG rifle shall hold all of the following:
- (1) A dealer's license issued pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto.
 - (2) Any business license required by a state or local governmental entity.

31055. In addition to the uses allowed in Article 5 (commencing with Section 30900), any ***licensed gun dealer*** who lawfully possesses an assault weapon or .50 BMG rifle pursuant to Article 5 (commencing with Section 30900) may do any of the following:

- (a) Transport the firearm between dealers or out of the state if that person is permitted pursuant to the National Firearms Act. Any transporting allowed by this section or Section 31050 shall be done as required by Sections 16850 and 25610.
- (b) Display the firearm at any gun show licensed by a state or local governmental entity.
- (c) Sell the firearm to a resident outside the state.
- (d) Sell the firearm to a person who has been issued a permit pursuant to Section 31000.

⁷ See, for example, United States v. Tallmadge (9th Cir. 1987) 829 F.2d 767.

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CONCLUSION

The BOF's claims that corporations and other unnatural persons are not legally permitted to obtain COE's and therefore cannot obtain permits are clearly contrary to the express language of the Penal Code. Further, the BOF's claims that the AWCA's cross-referencing the permit requirements with the machinegun provisions bars AWCA permits for corporations is equally incorrect and contrary to express law.

Moreover, it is clear, unambiguous, and without argument that the Legislature and the AWCA can only be interpreted to include corporations, firms and other non-natural persons within the statutorily mandated permit scheme of Penal Code sections 31000 & 31005. As such, the BOF has failed to provide a single credible argument in support of their underground regulation.

For the reasons set forth above, and on behalf of California Business Environments Inc. DBA Franklin Armory, we respectfully request that the Office of Administrative law grant the petitioner's request that the Department of Justice – Bureau of Firearms' policy be declared an "underground regulation."

Again, thank you for your time and consideration.

Sincerely,
DAVIS & ASSOCIATES

s/ Jason Davis

.. .. .
JASON DAVIS