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**RE: Pre-Litigation Demand to Withdraw Regulations Regarding "Bullet-Button Assault Weapons" Because They Do Not Qualify for the Exception to the Administrative Procedure Act Provided by Penal Code Section 30900(b)(5); Unlawfully Conflict with Statutes; and Are Vague and Confusing**

To Whom It May Concern:

We write on behalf of our clients, the National Rifle Association of America ("NRA") and the California Rifle & Pistol Association, Incorporated ("CRPA"), as well as their respective members throughout California, to oppose regulations submitted to the Office of Administrative Law ("OAL") by the California Department of Justice ("DOJ") relating to "Bullet-Button Assault Weapons" (OAL Regulatory Action Number 2016-1229-01FP). These regulations purport to amend sections 5469 and 5473 of Title 11, Division 5 of the California Code of Regulations ("C.C.R.") and add sections 5470-5472, 5474-5474.2, and 5475-5478. Many problems plague DOJ's proposed "Bullet-Button Assault Weapon" regulations. These problems are serious enough to void various provisions thereof.

DOJ submitted these proposed regulations on December 30, 2016, a Friday immediately preceding New Year's Eve, requesting that they be filed and printed by the OAL "ASAP" with an effective date of January 1, 2017. DOJ claims these proposed regulations are exempt from the Administrative Procedure Act's ("APA") rulemaking process by way of Penal Code section 30900,

subdivision (b)(5). That section, however, only provides DOJ a limited exemption from the rulemaking process for regulations relating to the *registration* of “assault weapons.” Instead of abiding by the APA’s requirements for regulations wholly unrelated to the registration requirements, DOJ improperly seeks to shoehorn them under the exemption provided by Penal Code section 30900, subdivision (b)(5).

DOJ is aware of the limited scope of this exemption. Its titling of every proposed section as “Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1)” – regardless of how tenuous the connection to registration is – makes that obvious. DOJ clearly seeks to extend the definition of “assault weapon” to cover a wider range of firearms than specified in the Penal Code and extend its authority. This obvious, and at times ham-fisted, attempt to circumvent the APA is only made more blatant given DOJ’s recent problems with its proposed regulations concerning “large-capacity magazines” and past problems implementing timely regulations for “Firearm Safety Certificates.”

Moreover, many of the proposed provisions unlawfully conflict with current California law and are ambiguous and confusing. DOJ cannot be given the benefit of the doubt that its proposed regulations are exempt from the APA here because “any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA.”<sup>1</sup> As a result, DOJ should rescind its problematic, improperly-adopted regulations before it is judicially or administratively ordered to do so.

## **I. “ASSAULT WEAPON” LAW BACKGROUND: DEFINITIONS, TERMS, & REGISTRATION**

Under California law, it is generally illegal to manufacture, import, transfer (whether sold, gifted, or lent), or offer for sale, any firearm defined as an “assault weapon,”<sup>2</sup> or to possess such a firearm,<sup>3</sup> unless it is properly registered. A firearm can meet the definition of an “assault weapon” one of two ways: (1) it is expressly listed in the Penal Code or C.C.R. as an “assault weapon;”<sup>4</sup> or (2) it has certain features.<sup>5</sup> Pertinent to this discussion is the latter definition.

### **A. Pre-2017 Definition of “Assault Weapon” Based on the Firearm’s Features**

Before 2017, a firearm met the “assault weapon” definition if it was any of the following:

- (1) A semiautomatic, centerfire rifle *that has the capacity to accept a detachable magazine and any one of the following*:
  - (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.
  - (B) A thumbhole stock.
  - (C) A folding or telescoping stock.
  - (D) A grenade launcher or flare launcher.
  - (E) A flash suppressor.

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<sup>1</sup> *California School Boards Ass’n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1328, *as modified on denial of reh’g* (Aug. 24, 2010) (internal citations and quotation marks omitted).

<sup>2</sup> Pen. Code, § 30600.

<sup>3</sup> Pen. Code, § 30605.

<sup>4</sup> *See* Pen. Code, § 30510; Cal. Code Regs. title 11, § 5499. Historically, the Penal Code outlined the definition of “assault weapon” and left it to DOJ to define the specific terms in that definition. But, that is no longer the case. *See Harrott v. Cnty. of Kings* (2001) 25 Cal. 4th 1138, 1153; 1155.

<sup>5</sup> *See* Pen. Code, § 30515.

- (F) A forward pistol grip.
- (2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.
- (3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.
- (4) A semiautomatic pistol ***that has the capacity to accept a detachable magazine and any one of the following:***
  - (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
  - (B) A second handgrip.
  - (C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer's hand, except a slide that encloses the barrel.
  - (D) The capacity to accept a detachable magazine at some location outside of the pistol grip.
- (5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.
- (6) A semiautomatic shotgun that has both of the following:
  - (A) A folding or telescoping stock.
  - (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.
- (7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
- (8) Any shotgun with a revolving cylinder.<sup>6</sup>

We emphasize subdivisions (a)(1) and (a)(4) to highlight the only two sections that are modified by the recent change in California law and that serve as the basis of the proposed regulations at issue.

***1. Definitions of Key “Assault Weapon” Terms Under Current California Code of Regulations***

In 2000, DOJ promulgated the original “assault weapon” regulations (which are currently still in effect) in accordance with the standard APA rulemaking process. It defined these key terms: (a) “Detachable magazine;” (b) “Flash suppressor;” (c) “Forward pistol grip;” (d) “Pistol grip that protrudes conspicuously beneath the action of the weapon;” and (e) “Thumbhole stock.”<sup>7</sup> DOJ did not make any other definitions implementing the “assault weapon” law in 2000.

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<sup>6</sup> Pen. Code, § 30515(a) (2016).

<sup>7</sup> Cal. Code Regs. tit. 11, § 5469.

These regulations also provided for the registration of “assault weapons” based on those features, established fees, and processing times. It is safe to say that thousands to tens of thousands of people registered “assault weapons” based on the DOJ’s definitions during 2001.

## **2. Detachable Magazine and "Bullet Button" Firearms**

Prior to 2017, some firearm owners and manufacturers made their firearms “California compliant” by removing the “detachable magazine” feature from their firearms so that the firearms no longer met the legal definition of “assault weapon.” In making the firearms unable to accept a “detachable magazine,” they typically retrofitted their firearms with an aftermarket product generally called a “magazine lock.” The most common kind is known as a “Bullet Button” (hence the title of the proposed regulations).

Whereas the standard magazine release for a “detachable magazine” can usually operate with the push of a finger, the typical “magazine lock” replaces the standard one-piece magazine release button with a two-piece assembly that cannot be operated with just the push of a finger; rather a tool is needed to reach the button to release the magazine so it can be removed. The most common “tool” used to remove the magazine is the tip of a bullet: hence the common term “Bullet Button.” Because a tool is needed to release the magazine, and because California considers a magazine not to be “detachable” if a “tool” is required to remove it from the firearm, a firearm with a magazine lock can no longer be said to have “the capacity to accept a detachable magazine.”<sup>8</sup> Therefore, prior to 2017, attaching a magazine lock like a “Bullet Button” to a firearm that would qualify as an “assault weapon” if it had “the capacity to accept a detachable magazine,” removes one of the key features necessary to stay within the “assault weapon” definition.<sup>9</sup> This means that, prior to 2017, a “Bullet Button” could be used to remove a firearm from the “assault weapon” category, making it a legal, “California compliant” firearm.

The Legislature viewed this practice, some fifteen years later, as a “loophole” to the “assault weapon” restrictions, and it became the impetus driving Assembly Bill (“AB”) 1135 and Senate Bill (“SB”) 880, which changed the “assault weapon” definition for rifles and pistols (but not shotguns) so that it no longer includes the feature affected by the “Bullet Button.” These bills’ purpose was to make it so that equipping a pistol or rifle with a “Bullet Button” alone is no longer sufficient to take that firearm outside the definition of an “assault weapon.”

### **B. 2017 Definition of “Assault Weapon” and the New Registration Process**

AB 1135 and SB 880 amended the definition of a features-based “assault weapon” as follows:

- (1) A semiautomatic, centerfire rifle *that does not have a fixed magazine but has any one of the following*:
  - (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

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<sup>8</sup> See Cal. Code Regs. tit. 11, § 5469(a). “Detachable magazine” means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool. Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine.”

<sup>9</sup> See Pen. Code, § 30515(a)(1), (a)(4) (2016).

- (B) A thumbhole stock.
  - (C) A folding or telescoping stock.
  - (D) A grenade launcher or flare launcher.
  - (E) A flash suppressor.
  - (F) A forward pistol grip.
- (2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.
- (3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.
- (4) A semiautomatic pistol *that does not have a fixed magazine but has any one of the following*:
- (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
  - (B) A second handgrip.
  - (C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer's hand, except a slide that encloses the barrel.
  - (D) The capacity to accept a detachable magazine at some location outside of the pistol grip.
- (5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.
- (6) A semiautomatic shotgun that has both of the following:
- (A) A folding or telescoping stock.
  - (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.
- (7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
- (8) Any shotgun with a revolving cylinder.
- (b) ***For purposes of this section, "fixed magazine" means an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.***<sup>10</sup>

Again, we emphasize subdivisions (a)(1), (a)(4), and additionally highlight subdivision (b), to underscore the only changes made in the definition of “assault weapon” from 2016 to 2017 under AB 1135 and SB 880. Aside from changing the language from “that has the capacity to accept a detachable magazine and any one of the following” to “that does not have a fixed magazine but has any one of the following” and then defining “fixed magazine,” the Legislature made no other change to the definition of “assault weapon.” It did not change, add, or redefine any of the section’s other key terms or phrases.

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<sup>10</sup> Pen. Code, § 30515.

Because the Legislature's amendments to Penal Code section 30515 potentially convert hundreds of thousands of rifles and pistols owned by California residents into "assault weapons," and with the registration period for "assault weapons" being closed under current law, the Legislature needed to allow for the continued possession of those firearms after January 1, 2017 (and prior to registration). The Legislature created Penal Code section 30680 stating:

Section 30605 does not apply to the possession of an assault weapon by a person who has possessed the assault weapon prior to January 1, 2017, if all of the following are applicable:

- (a) Prior to January 1, 2017, the person was eligible to register that assault weapon pursuant to subdivision (b) of Section 30900.
- (b) The person lawfully possessed that assault weapon prior to January 1, 2017.
- (c) The person registers the assault weapon by January 1, 2018, in accordance with subdivision (b) of Section 30900.

The Legislature also amended Penal Code section 30900 to create a registration process for these firearms meeting the new definition of "assault weapon" so that existing owners could lawfully continue to possess them. The Legislature renumbered the previous (and mostly defunct) registration section and added a new subdivision (b) for this purpose.

In pertinent part, the new subdivision (b) provides:

- (1) Any person who, from January 1, 2001, to December 31, 2016, inclusive, lawfully possessed an assault weapon that does not have a fixed magazine, as defined in Section 30515, including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool, shall register the firearm before January 1, 2018, but not before the effective date of the regulations adopted pursuant to paragraph (5), with the department pursuant to those procedures that the department may establish by regulation pursuant to paragraph (5).
- (2) Registrations shall be submitted electronically via the Internet utilizing a public-facing application made available by the department.
- (3) The registration shall contain a description of the firearm that identifies it uniquely, including all identification marks, the date the firearm was acquired, the name and address of the individual from whom, or business from which, the firearm was acquired, as well as the registrant's full name, address, telephone number, date of birth, sex, height, weight, eye color, hair color, and California driver's license number or California identification card number.
- (4) The department may charge a fee in an amount of up to fifteen dollars (\$15) per person but not to exceed the reasonable processing costs of the department. The fee shall be paid by debit or credit card at the time that the electronic registration is submitted to the department. The fee shall be deposited in the Dealers' Record of Sale Special Account to be used for purposes of this section.

- (5) ***The department shall adopt regulations for the purpose of implementing this subdivision. These regulations are exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).***

Paragraph (5) makes clear that only regulations whose purpose is implementing “this subdivision,” i.e., subdivision (b) of section 30900, are exempt from the APA. This means DOJ’s exemption from the APA is limited to only those regulations relating to:

- (1) “those procedures” as stated in (b)(1) to register “an assault weapon that does not have a fixed magazine, as defined in Section 30515, including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool,” i.e., the newly classified “assault weapons”;
- (2) the electronic submission of the registration of an “assault weapon” defined in (b)(1), in compliance with (b)(2);
- (3) the information to be contained in the registration as required (and limited) by (b)(3); and
- (4) the amount of the registration fee and how to pay it in compliance with (b)(4).

In sum, any regulations unrelated to Paragraphs (1)-(4) of subdivision (b) are ***not*** exempt from the APA.

**II. A NUMBER OF THE REGULATIONS PROPOSED BY DOJ EXCEED THE SCOPE OF PENAL CODE § 30900(B) AND MUST, THEREFORE, ADHERE TO THE APA OR BE DEEMED INVALID**

DOJ’s proposed regulations do more than just implement the registration scheme delineated in Penal Code section 30900, subdivision (b) for firearms newly-designated as “assault weapons” by AB 1135 and SB 880. They seek to create or amend a whole host of definitions for “assault weapon” features and other terms, as well as regulate activities after the registration process.

As a result, these proposed regulations exceed the scope of the APA exemption provided by Penal Code section 30900, subdivision (b)(5) and are invalid because “an agency does not have the authority to alter or amend a statute or enlarge or impair its scope.”<sup>11</sup> “If a rule constitutes a ‘regulation’ within the meaning of the APA ... it may not be adopted, amended, or repealed except in conformity with ‘basic minimum procedural requirements’ [citation] [of the APA] that are exacting.”<sup>12</sup> Any regulation that substantially fails to comply with these requirements can be judicially declared invalid.<sup>13</sup> And, even if there is some debate on whether the proposed provisions relate to implementing the new

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<sup>11</sup> *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236.

<sup>12</sup> *California School Boards Ass’n, supra*, 186 Cal.App.4th at 1328, internal citations and quotation marks omitted).

<sup>13</sup> *Id.*

registration scheme, “any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA.”<sup>14</sup>

**A. Penal Code section 30900(b)(5)’s Exemption to the APA Does Not Extend to Regulations Defining “Assault Weapon” Terms**

As explained above, Penal Code section 30900(b)(5)’s exemption from the APA applies only to regulations implementing subdivision (b), which solely concerns the *registration procedures* for the newly defined category of “assault weapons” by AB 1135 and SB 880. Subdivision (b) gives DOJ no authority to regulate definitions of “assault weapon” terms.

Nevertheless, DOJ is proposing a list of 44 new definitions for “assault weapon” terms that it wants implemented without going through the APA.<sup>15</sup> DOJ cannot do this.

First, the new statutory definitions for “assault weapons” appear in a completely different statute than Penal Code section 30900, subdivision (b) (see Penal Code section 30515). Many of the definitions DOJ proposes have nothing to do with registration of the newly defined “assault weapons.” There is, therefore, no need for DOJ to now expand or clarify the definitions of “flash suppressor,” “pistol grip,” “threaded barrels,” “shotguns,” etc.

More importantly, subdivision (b)(1) only permits the registration of firearms newly defined as “assault weapons” that were “lawfully possessed” “from January 1, 2001, to December 31, 2016 . . . .” Many of these definitions DOJ seeks to create or amend date back to terms from the original regulations for features-based “assault weapons” and have remained unchanged since 2000. This means that firearms lawfully possessed pre-2017 could be classified as “assault weapons” not by the Legislature’s adoption of AB 1135 and SB 880, but by DOJ’s unilateral redefinition of terms, thereby retroactively making them illegal.

If the Legislature intended to allow DOJ free reign to amend existing definitions, some of which could affect currently possessed (even some registered) “assault weapons,” including ones lawfully obtained before or after 2017, it would have clearly said so. It did not. Instead, it gave a limited exemption to the APA for registration procedures. Even if DOJ’s APA exemption extends to some definitions (which it does not), it would only be for those relating to the new definition of “assault weapon” (i.e., those without a fixed magazine). As such, the following proposed regulations, which have zero to do with firearms meeting the new definition of “assault weapon,” must go through the APA process, even if DOJ has authority to amend *some* definitions.

***1. Proposed Sections 5470(b) and 5471(a) Are Not Exempt from APA Review Because the New “Assault Weapon” Definition Does Not Contemplate Shotguns***

As discussed above, AB 1135 and SB 880 only changed the definitions of “assault weapon” for certain rifles and pistols, based on their magazine function.<sup>16</sup> Nothing in the Code changed for

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<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> Cal. Code Regs. tit. 11, § 5470 (proposed).

<sup>16</sup> Pen. Code, § 30510, subdivisions (a)(1), (a)(4), and (b).



shotguns, let alone for “[a] semiautomatic shotgun that has the ability to accept a detachable magazine” as delineated in Penal Code section 30515, subdivision (a)(7). The Legislature left shotguns untouched when adopting AB 1135 and SB 880 and is presumed to have done so intentionally.<sup>17</sup>

Yet, Section 5471, subdivision (a) of the new regulations<sup>18</sup> states that, for purposes of the definition of “assault weapon” given in Penal Code section 30515, “[a]bility to accept a detachable magazine” means with respect to a semiautomatic *shotgun*, it does not have a fixed magazine.”<sup>19</sup> In other words, shotguns with bullet buttons are now “assault weapons” not by legislative change, but by DOJ’s action alone.

Moreover, even if these proposed provisions were relevant to registration, they would unlawfully extend the definition of “assault weapon” to a new class of shotguns unanticipated by the Legislature. For that reason alone, they are void. These provisions have nothing to do with the registration of “an *assault weapon* that does not have a fixed magazine, as defined in Section 30515, including those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool,” (Paragraph 1 of subdivision (b)), because shotguns are not contemplated by that definition. Shotguns are not redefined as “assault weapons” under the new legislation. As such, no new registration of any shotguns as “*assault weapons*” will be necessary and neither will any regulations governing such.

**2. DOJ’s New Definition for “Barrel Length” Given in Subdivision (d) of Section 5471 Has No Relevance in Defining a Firearm as an “Assault Weapon” and, Thus, No Relevance to Registering One**

A simple reading of Penal Code section 30515 shows that barrel length is irrelevant to any “assault weapon” definition, let alone the newly established category of ones that need to be registered under subdivision (b) (which is based on magazine function only). As explained above, a firearm can meet the definition of an “assault weapon” either by being listed in the Penal Code or C.C.R. as one or by having certain features. Barrel length is not one of the features considered.<sup>20</sup>

Nevertheless, DOJ’s proposed new Section 5471, subdivision (d) purports to define “barrel length” and seeks publication without going through the APA.<sup>21</sup>

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<sup>17</sup> *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1113 (“As a general rule, when a legislature ‘includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion.’”) (citing *Russello v. United States* (1983) 464 U.S. 16, 23).

<sup>18</sup> Entitled “Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Explanation of Terms Related to Assault Weapon Designation,”

<sup>19</sup> Cal. Code Regs. tit. 11, § 5471(a) (proposed) (emphasis added).

<sup>20</sup> See Pen. Code, § 30515.

<sup>21</sup> This is actually a reprint of the federal definition for this term located in the *National Firearms Act Handbook* on pages 5 and 6 of Chapter 2 (“What Are ‘Firearms’ under the NFA?”). The National Firearms Act is comprised of the sections of the United States Code restricting devices like machineguns, “destructive devices,” silencers, and “short barreled” rifles and shotguns. Federal law no longer has an applicable definition of “assault weapon.”

California law, like federal law, restricts the possession, sale, manufacture, importation, etc. of “short-barreled” rifles and shotguns.<sup>22</sup> Rifles with barrels of 16 inches in length or shorter<sup>23</sup> and shotguns with barrels of 18 inches in length or shorter<sup>24</sup> are considered “short-barreled” pursuant to the Code sections defining those two terms. Currently, however, California has no statute or regulation specifying how to measure a barrel’s length for purposes of these restrictions.

The code sections defining, restricting, and regulating “short-barreled” rifles and shotguns are located in different sections unrelated to “assault weapons.”<sup>25</sup> It seems that DOJ now realizes that some clarification on barrel-length measurement is needed to enforce California law restricting “short-barreled” rifles and shotguns and is attempting to fast-track regulations making such clarification by hiding them among “assault weapon” registration regulations and “borrowing” the latter’s exemption to the APA provided by Penal Code section 30900, subdivision (b)(5).

This is improper and the proposed regulations for “barrel length” must go through the APA process, as they have nothing to do with registering a newly classified “assault weapon” under AB 1135 and SB 880.

### ***3. DOJ’s Proposed Definition for “Overall Length of Less than 30 Inches” Is Irrelevant for the New “Assault Weapon” Definition***

A “semiautomatic, centerfire rifle that has an overall length of less than 30 inches” is an “assault weapon” and has been since 2001.<sup>26</sup> Just like the definition of “assault weapons” for shotguns, this one was unchanged by AB 1135 and SB 880. People were able to register firearms with a length of under 30 inches as “assault weapons” during the year 2001 registration period and nothing has changed since then. Nobody could lawfully obtain a semiautomatic, centerfire rifle under 30 inches after December 31, 2000 or possess one that was not registered.

Yet, in proposed section 5471, subdivision (x), DOJ purports to define the term “overall length of less than 30 inches.” For this category of “assault weapon,” whether the firearm has a “fixed” magazine does not matter. Thus, this definition is wholly outside the new “assault weapon” definition and is thus not contemplated by subsection (b) because there can be no lawful registering of any such firearms in the new registration period.

Here, it appears DOJ is (again) stretching the APA exception beyond the realm of “assault weapon” registration for purposes of expanding the scope of the “assault weapon” restrictions. Such misuse of an APA exception to further an agenda is improper.

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<sup>22</sup> See Pen. Code, § 33210.

<sup>23</sup> Pen. Code, § 17170.

<sup>24</sup> Pen. Code, § 17180.

<sup>25</sup> See Pen. Code, §§ 30600-30680 (governing “assault weapons”); see also Pen. Code, §§ 16590, 17700-17800 (governing “short-barreled” rifles and shotguns).

<sup>26</sup> See Pen. Code, § 30515(a)(3).

**B. Proposed Section 5477 Is Invalid Because Penal Code section 30900(b)(5)'s Exemption to the APA Does Not Extend to Activity Post-Registration**

Proposed section 5477 would prohibit the removal of the “release mechanism for an ammunition feeding device on an assault weapon pursuant to Penal Code section 30900, subdivision (b)(1) . . . *after the assault weapon” is registered.*”<sup>27</sup> No doubt DOJ is referring to the removal of the “bullet button,” despite the somewhat confusing terms used, like “release mechanism” and “ammunition feeding device,” which are not defined in DOJ's extensive definition section. Regardless, there is simply nothing in Penal Code section 30900, subdivision (b) allowing DOJ to regulate what happens *after* the registration process has already been implemented.

Practically speaking, almost anything could happen to a firearm after it is registered. The exemption to the APA in section 30900 cannot be read as giving DOJ free reign to skip the APA requirements when it comes to the thousands of different circumstances potentially encountered by a firearm after registration. As such, the APA exemption does not apply to section 5477.

**C. The Eligibility Check Required by Proposed 11 C.C.R. Sections 5476(d) & (e) Is Unrelated to Registration and Has No Statutory Support**

Proposed Section 5476, titled “Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Processing of Applications,” addresses the submission and review of the “assault weapon” registration applications. Section 5476, subdivision (d) states:

Once the Department determines that all necessary information has been received and the firearm qualifies for registration, *the firearms eligibility check shall commence.* The Department will inform the applicant of the results of the check.

This sounds like a background check. But, the legislature does not require, or even refer to, an eligibility or “background check” in the new (or any other) Penal Code sections governing the registration of “assault weapons.” In fact, wherever background checks are required for firearms in California, the Legislature has expressly authorized DOJ to conduct it *via statute*.<sup>28</sup> In addition, the Legislature has, via statute, authorized DOJ to constantly update who may lawfully possess firearms through the Armed and Prohibited Persons System.<sup>29</sup> If DOJ had authority to require background checks absent statutory authority, these other statutes would be meaningless.

In sum, the Legislature has decided that a background check is, by law, *not* required for the registration of “assault weapons” and that DOJ has no authority to require one, as it unilaterally seeks to do. This provision improperly goes beyond the statute and is void.

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<sup>27</sup> Cal. Code Regs., tit. 11, § 5477(a) (proposed) (emphasis added).

<sup>28</sup> See, e.g., Cal. Penal Code §§ 26710, 28220, 30105, 33865.

<sup>29</sup> See generally Pen. Code, §§ 3000-30005.

**D. DOJ's References to Penal Code Sections Beyond the Registration of Newly Defined "Assault Weapons" Demonstrate Its Proposed Regulations Exceed the Limited APA Exemption in Penal Code section 30900(b)(5)**

One needs to look no further for the improper scope and breadth of the regulations than the "references" cited at the end of each proposed code section. For instance, section 5471 ("Registration of Assault Weapons Pursuant to Penal Code Section 30900(a)(1); Explanation of Terms Related to Assault Weapon Designation") references:

Sections 16200, 16350, 16460, 16890, 30515, 30600, 30605, 30615, 30620, 30625, 30630, 30635, 30640, 30645, 30650, 30655, 30660, 30665, 30670, 30675, 30900, 30905, 30910, 30915, 30920, 30925, 30930, 30935, 30940, 30945, 30950, 30955, 30960, and 30965, Penal Code.

Of note, sections numbering in the 16000s relate to the Penal Code's definition sections for deadly weapons, and section 16460 specifically defines "destructive device." Of course, the registration of "assault weapons" has nothing to do with other types of "deadly weapons" beyond "assault weapons." And sections 30600 through 30680 concern illegal activities with "assault weapons" and exceptions thereto (again, a subject whose connection to "assault weapon" registration is tenuous at best). But, the questionable references do not stop there. As discussed below, proposed regulations section 5474.2 (entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Firearm Manufactured By Unlicensed Subject (FMBUS)") cites as reference "Sections 23900, 23910, 23915, 23920, 30105, 30515, 30680, and 30900, [of the] Penal Code." Sections 23900 through 23920 lie completely outside of the "assault weapon" chapter in the Penal Code and address the recently passed legislation involving so-called "Ghost Guns"<sup>30</sup> and the requirements for individuals to obtain a serial number from DOJ prior to making their own firearms.

It appears that DOJ is abusing its narrow APA exemption intended for regulations implementing the registration of new "assault weapons" to adopt its wish-list to define or redefine a number of terms that have nothing to do with the new definitions for "assault weapons" or the registration thereof and to improperly exert its view on what it believes should be registered "assault weapons." Regardless of DOJ's motives, these proposed regulations are not contemplated by the exemption to the APA provided by Penal Code section 30900, subdivision (b)(5), and are invalid.

**III. DOJ'S PROPOSED REGULATIONS RE: "BULLET-BUTTON "ASSAULT WEAPONS" ARE INVALID BECAUSE THEY CONFLICT WITH EXISTING LAW**

In addition to improperly exceeding section 30900(b)(5)'s exemption from the APA, a number of DOJ's proposed regulations are inconsistent with existing California statutes on firearms law and are thus unlawful.

When making regulations, "an agency does not have the authority to alter or amend a statute or

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<sup>30</sup> AB 857, 2015-2016, Leg. Counsel's Digest (Cal. 2016) *available at* [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB857](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB857) (last visited Jan. 5, 2017).

enlarge or impair its scope.”<sup>31</sup> “It is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. A ministerial officer may not ... under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute. And, a regulation which impairs the scope of a statute must be declared void.”<sup>32</sup> If an agency’s proposed regulation “is not in harmony with, or in conflict with, existing law, the OAL will disapprove of the regulation and prevent it from being adopted.”<sup>33</sup>

In addition to the above examples of Section 5471, subdivision (a) and Section 5470, subdivision (b), directly conflicting with Penal Code statutes by extending the restriction of “having a fixed magazine” to shotguns and requiring shotguns with “bullet buttons” to be registered as “assault weapons” (see Section II.A above), the following proposed regulations also unlawfully conflict with statutes and ought to be rejected.

**A. 11 C.C.R. Section 5474.1 Improperly Narrows the Statutory Definitions of “Family” and “Acceptable Forms of Proof of Address”**

Section 5474.1 is void because it improperly limits the scope of permissible joint registrations of “assault weapons” under California law by narrowly defining who are “family members residing in the same household.”<sup>34</sup> Existing California law does not limit that broad phrase; correspondingly, DOJ’s limited scope is in conflict with California law. DOJ further narrows the scope of joint registration by limiting the acceptable forms of proof to show that the members indeed reside in the same household. This has severe consequences, as joint registration is of vital importance for “assault weapon” law.

Penal Code section 30955 provides:

The department's registration procedures shall provide the option of joint registration for any assault weapon or .50 BMG rifle owned by family members residing in the same household.

This law is unchanged by the recent “assault weapon” legislation. But DOJ, through section 5474.1, takes it upon itself to limit what should be considered a “family member,” absent any intention by the legislature to so limit it.

DOJ, in section 5474.1, entitled “Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Joint Registration of Assault Weapons,” requires all of the following in order for a firearm to be jointly registered:

- 1) One family member must be identified as the primary registrant,

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<sup>31</sup> *Interinsurance Exchange of Automobile Club, supra*, 148 Cal.App.4th at 1236.

<sup>32</sup> *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 (internal quotation marks and citations omitted).

<sup>33</sup> *See In re: Medical Board of California*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2014-0827-02 S (October 15, 2014).

<sup>34</sup> *See Bearden, supra*, 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).

- 2) The name and relationship of each joint registrant must be provided,
- 3) All joint registrants must have been 18 years old by December 31, 2017, and
- 4) Joint registration is only authorized for the following family relationship:
  - (a) Spouse
  - (b) Parent to Child
  - (c) Child to Parent
  - (d) Grandparent to Grandchild
  - (e) Grandchild to Grandparent
  - (f) Domestic Partner
  - (g) Siblings<sup>35</sup>

There are many different family dynamics that DOJ either does not consider or refuses to recognize. DOJ's narrow view of what constitutes a "family" clearly lays outside the scope of the Penal Code in allowing "family members residing in the same household" to register "assault weapons."

DOJ does not stop there. It also requires "proof of address" for each joint registrant in order to register "assault weapons."<sup>36</sup>

Acceptable forms of proof of address are (only) as follows:

- (1) Carry Concealed Weapon (CCW) Permit
- (2) Curio and Relic (C & R) Federal firearm license with name and address
- (3) Utility Bill: Cable, electricity garbage, gas, propane, alarm/security or water bill with purchaser's name on it and dated within three months of application for registration.
- (4) Military permanent duty station orders indicating assignment within California; (active duty military spouse ID is not acceptable).
- (5) Property Deed: Valid deed or trust for the individual's property or a certificate of title
- (6) Resident Hunting License
- (7) Signed and dated rental agreement/contract or residential lease
- (8) Trailer certification of title

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<sup>35</sup> Cal. Code. Regs, tit. 11, § 5474.1(a), (b) (proposed).

<sup>36</sup> Cal. Code. Regs, tit. 11, § 5474.1(c) (proposed).

(9) DMV Vehicle Registration

(10) Certificate of Eligibility, as defined in section 4031, subdivision (g) of Chapter 3.<sup>37</sup>

Nothing in the Code so limits the scope of acceptable proof of address in the manner that DOJ seeks to do.

In other words, DOJ unilaterally “compels that to be done which lies without the scope of [California’s joint registration laws] and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of [said law]. And, a regulation which impairs the scope of a statute must be declared void.”<sup>38</sup> Therefore, section 5474.1 is invalid.

**B. 11 C.C.R. Section 5477(a) Purports to Regulate What Modifications Can Be Made to a Registered “Assault Weapon” Beyond the Statute**

Section 5477 is void because it stands in direct contradiction to what the Legislature intended for the treatment of “assault weapons” post-registration.

As explained in section II. B above, section 5477, subdivision (a) prohibits the removal of the “bullet button” from a firearm after the firearm has already been registered as an “assault weapon.” This is improper, as shown by the exceptions the Legislature carved out for registered owners of “assault weapons.” These exceptions, such as Penal Code section 30675, subdivision (c) apply to the registered owner of an “assault weapon,” *regardless* of whether the owner added/removed features to/from the “assault weapon” after registration. A person who possesses and registers a firearm meeting the current definition of an “assault weapon” pursuant to Penal Code section 30900 subdivision (b) possesses a *registered* “assault weapon.” That firearm is now in the system as an “assault weapon” registered to that individual. As a result, the requirements, restrictions, and exceptions for possessing a registered “assault weapon” apply to that person and that firearm—irrespective of what he or she does with the “bullet button.”

In other words, the Penal Code does not distinguish between how and why a firearm is considered an “assault weapon” once it is a registered “assault weapon;” it is a registered “assault weapon.” Nothing prevents an individual who currently has a registered “assault weapon” from adding or removing features, provided the resulting firearm is not considered illegal for some other reason (i.e., a short-barreled rifle, machinegun, or destructive device). Likewise, aside from DOJ’s own, independent determination, there is nothing under existing law that prevents an individual, once the firearm is registered as an “assault weapon,” from adding and removing other features that would cause the firearm to meet the definition of an “assault weapon” (i.e. for rifles: pistol grips, forward pistol grips, flash suppressors folding/collapsible stocks, etc.), or modifying a rifle’s length to less than 30 inches (but not less than 26 inches for short-barreled rifles). Thus, by trying to distinguish how and why a firearm is considered an “assault weapon” once it is registered and imposing a post-registration restriction regarding changes to the “bullet button,” DOJ’s regulation is in direct conflict with California law. As such, the regulation is invalid.

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<sup>37</sup> Cal. Code Regs., tit. 11 § 5474.1(c) (proposed).

<sup>38</sup> *Bearden, supra*, 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).

**C. DOJ Claims It Can Refuse to Register Firearms Meeting the New Definition of “Assault Weapon”**

Proposed Section 5472, titled “Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Weapons That Will Not be Registered as Assault Weapons,” specifies which firearms DOJ will not register. This clarifies, in part, that Californians need not register firearms that were considered “assault weapons” under prior “assault weapon” registration laws in effect before January 1, 2017 (subsection (b)) and firearms that are not considered “assault weapons” or disassembled (subsection (c), (d), and (e)). But, in subdivisions (f) and (g) of section 5472, DOJ states:

(f) The Department will not register as an assault weapon a firearm manufactured by a Federally-licensed manufacturer if the firearm does not have a serial number applied pursuant to federal law.

(g) The Department will not register as an assault weapon a firearm manufactured by an unlicensed subject if the firearm does not have a serial number assigned by the Department and applied by the owner or agent pursuant to section 5474.2.

Subdivision (f) precludes from registration firearms manufactured before the requirement that manufacturers place serial numbers on firearms, and subdivision (g) expands the requirements for adding serial numbers that already exist under California law, and which are independent of the registration requirements for “assault weapons.”

**1. *Proposed Section 5472, Subdivision (f) Would Prohibit Registration of Firearms Manufactured by Licensed Manufacturers Without Serial Numbers.***

Not only does DOJ fail to provide a way for Californians to register their lawfully-possessed firearms that do not have serial numbers, thereby barring the possession of certain firearms just for not having serial numbers, but DOJ also fails to take into consideration that there was a time when firearm manufacturers were not required to put serial numbers on firearms. Prior to the Gun Control Act of 1968, firearm manufacturers were not required to put serial numbers on their firearms. While some manufacturers chose to do so on their own accord, the fact that a firearm manufacturer did not put a serial number on the firearm does not make the firearm illegal to possess under California or federal law. Yet, DOJ outright refuses to accept the registration of these firearms. Doing so exceeds the registration requirements of the Penal Code and DOJ’s regulatory authority.

**2. *DOJ’s Creation of a Serial Number Scheme Exceeds the APA Exception for Registering “Assault Weapons”***

Pursuant to section 5472, subdivision (g), DOJ will refuse to register an “assault weapon” manufactured by an unlicensed individual unless he or she complies with the serial number application requirements of section 5474.2. This proposed regulation actually conflicts with existing statutes, as the regulation exceeds the requirements of the recently-enacted sections from AB 857 (2016) and other sections of the Penal Code pertaining to the application for a DOJ-provided serial number pursuant to Penal Code section 23910. Thus, it conflicts with current laws and is void.



As a preliminary matter, nothing under California or federal law prevents individuals from making firearms for their own personal use, provided the firearm is one they can legally make and the individual is not prohibited from owning and possessing firearms. Consequently, Californians can make their own firearms, and pursuant to past California law, they were able to do this without having to put a serial number on their firearm. Also, California law (separate from registration of “assault weapons”) already allows for the application of a serial number.<sup>39</sup> Under this law, there is no specific requirement as to how a serial number must be engraved/attached to the firearm. But, DOJ prescribes the requirements with section 5472, subdivision (g).

Also, the Legislature passed AB 857 last year, requiring Californians to add a serial number to homemade firearms and certain other firearms lacking serial numbers.<sup>40</sup> For firearms possessed by Californians falling under this requirement, the serial numbers provided by DOJ would need to be added to the firearm before January 1, 2019.<sup>41</sup> Additionally, those who want to make their own firearm after July 1, 2018 must: (1) request a serial number before completing the firearm and (2) add the number soon after the completion of the firearm.<sup>42</sup> Thus, under AB 857, both individuals with existing firearms and individuals who wish to manufacture their own firearm must apply to DOJ for the unique serial number or other mark of identification” and engrave it according to the standards set forth in federal law.<sup>43</sup>

The gratuitousness of DOJ’s regulations is further accentuated when one sees how the regulations conflict with existing statutes; not only do they add nothing new, but they also affirmatively cause problems by being inconsistent with current law. In contrast to AB 857 and other areas of California law, section 5474.2, subdivision (a)(3)(B) of DOJ’s proposal requires “certain additional information” (i.e., information in addition to the serial number) to be stamped on the firearm.<sup>44</sup>

California statutory law—even with the strict provisions added by AB 857—does not require this much information to be engraved, casted, or otherwise placed on the firearm; just the engraving, stamping, or placement of the serial number suffices. Presumably, DOJ borrowed this heightened engraving/stamping standard (for licensed firearm manufacturers and importers who have the machinery and capability to comply with these requirements) from federal law. Regardless, the fact remains that California’s legislature knowingly chose *not* to require the engraving/placing of additional

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<sup>39</sup> Pen. Code, § 23910.

<sup>40</sup> Pen. Code, §§ 29180-29184.

<sup>41</sup> Pen. Code, § 29180(c).

<sup>42</sup> Pen. Code, § 29180(b).

<sup>43</sup> Pen. Code, § 29180(b)(2) and (c)(2). Federal law requires licensed manufacturers and importers to identify their firearms “[b]y engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame or receiver thereof an individual serial number. The serial number must be placed in a manner not susceptible of being readily obliterated, altered, or removed, and must not duplicate any serial number placed by you on any other firearm. For firearms manufactured or imported on and after January 30, 2002, the engraving, casting, or stamping (impressing) of the serial number must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch...” (27 C.F.R § 478.92(a)(1)(I).)

<sup>44</sup> Failure to abide by these marking requirements will cause DOJ to deny the registration of the “assault weapon.” (Cal. Code Regs., tit. 11 § 5474.2(a)(4) (proposed).

information beyond the serial number. This means that DOJ's proposed regulations improperly enlarge or impair the statutory scope intended by the legislature.<sup>45</sup>

In the end, all that section 5474.2 does is cause more, unnecessary problems for Californians. Those individuals who sought and applied serial numbers under the existing standard would have to re-apply and re-engrave their serial number pursuant to 5474.2's specifications. Also, the regulation specifies that a federally licensed firearm manufacturer (commonly referred to as an "07" licensee) is required to engrave the firearm. This is incorrect. A federally licensed gunsmith/dealer (commonly referred to as an "01") may do engraving.<sup>46</sup> But, DOJ creates further problems because current California law requires either the 07 or 01 to have a "Dangerous Weapon" Permit ("DWP") to do this work because the firearms in question are "assault weapons." Without a DWP, the firearms could not be taken to or left with a firearm manufacturer/dealer/gunsmith or the firearm owner and licensee would violate California laws restricting transfer and possession of an "assault weapon."

Hence, for many reasons, 11 C.C.R. sections 5472, subdivision (g) and 5471.2, subdivision (a)(3)(B) exceed the legislature's requirements for firearms made by Californians. These new regulations governing the marking of firearms provide yet another example of DOJ's improper promulgation of regulations.

**D. The Information Required by DOJ for "Assault Weapon" Registration, as Stated in Proposed Section 5474(a), Is Not Called for by Statute**

It is easy to see how section 5474, subdivision (a) is not needed for the registration of "assault weapons." The Penal Code is specific as to exactly what personal information is required for registration: "registrant's full name, address, telephone number, date of birth, sex, height, weight, eye color, hair color, and California driver's license number or California identification card number."<sup>47</sup>

But the requirements described in subdivision (a) of section 5474 entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Applicant and Firearms information," go beyond the requirements of the Penal Code for registration. This new regulation requires all of the information listed in the Penal Code *but also requires military ID number, U.S. citizenship status, place of birth, country of citizenship, and alien registration number.*<sup>48</sup> The extra information is necessary for the background check DOJ requires (mentioned in Section 5476 and discussed further below). But the Penal Code makes no mention of a background check or the necessity of all the extra information requested by 11 C.C.R. section 5474, subdivision (a). The California Legislature was rather specific as to what personal information is required for the registration of an "assault weapon" (and, by implication, what information is not required), and DOJ seems willing to ignore those requirements. DOJ's willful disregard is so pronounced that the new, proposed regulations also go beyond the requirements of previous "assault weapon" registration requirements issued by DOJ.<sup>49</sup> Thus, section 5474 conspicuously and improperly enlarges the requirements of 30900, subdivision (b)(3).

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<sup>45</sup> *Interinsurance Exchange of Automobile Club, supra*, 148 Cal.App.4th at 1236 ("an agency does not have the authority to alter or amend a statute or enlarge or impair its scope.")

<sup>46</sup> See ATF Rul. 2009-1

<sup>47</sup> Pen. Code, § 30900(b)(3).

<sup>48</sup> Cal. Code Regs., tit. 11, § 5474(a) (proposed) (emphasis added).

<sup>49</sup> See Cal. Code Regs., tit. 11, § 978.30(a) (2000).

**E. Proposed Section 5477(c) Requires the Ownership and Operation of Computer and Photography Equipment that Are Not Required Under the Penal Code**

Section 5477, subdivision (c) is inconsistent with the Penal Code in that it makes as prerequisites to “assault weapon” registration, the ownership and operation of fairly expensive digital equipment. Section 5477, subdivision (c) states:

*Clear digital photos of firearms listed on the application. One photo shall depict the bullet-button style magazine release installed on the firearm. One photo shall depict the firearm from the end of the barrel to the end of the stock if it is a long gun or the point furthest from the end of the barrel if it is a pistol. The other two photos shall show the left side of the receiver/frame and right side of the receiver/frame. These locations are typically where firearms are marked when manufacturing is complete. At the discretion of the Department the last two photos shall be substituted for photos of identification markings at some other locations on the firearm.<sup>50</sup>*

So an individual who wants to register her firearm as an “assault weapon” needs to purchase, borrow, and/or find the digital camera and computer that would allow her to take “clear digital photos” of the firearm and to send the photos to DOJ. This is highly problematic for many people, ranging from low-income individuals who cannot afford access to such equipment to elderly individuals who do not know how to operate such equipment. In contrast, no such requirement to own and/or operate cameras and computers exists under the Penal Code for *any* type of firearm ownership or registration, and especially not for “assault weapon” registration. The California legislature did not intend to have the ownership and operation of digital devices be a barrier to firearm registration and ownership. Nevertheless, DOJ ignores the letter and the spirit of existing law, and subverts the purposes of California firearm law, by seeking approval for section 5477, subdivision (c).

**F. DOJ’s “Non-Liability” Clause Lacks Any Statutory Authority and Is in Direct Conflict with The Information Practices Act of 1977**

Included in the regulations is a “non-liability” clause stating that DOJ “is not responsible for and will have no liability for any hardware, software, information, or other items” associated with the registration process. But DOJ has failed to provide any relevant authority for this provision other than Penal Code section 30900 and 30905. Neither explicitly exempts DOJ from any liability for any reason, and as a result DOJ has no authority to include such a provision as part of the regulations. What’s more, the regulation violates the right to privacy under the California Constitution and is contrary to DOJ’s statutory duties under the Information Practices Act of 1977.

Every individual is entitled to certain inalienable rights, including the right to privacy. Cal. Const., art. I, § 1. Following the enactment of the federal Privacy Act of 1974, and with growing concern over government’s increasing demand for personal information, California enacted a similar statute in 1977 titled the “Information Practices Act” (“IPA”). The IPA created safeguards for “the maintenance and dissemination of personal information,” and otherwise required the release of information to “be subject to strict limits.”

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<sup>50</sup> Cal. Code Regs., tit. 11, § 5477(c) (proposed) (emphasis added).

Under the IPA, the disclosure of “any personal information in a manner that would link the information disclosed to the individual to whom it pertains” is prohibited absent specific circumstances. *See* Cal. Civ. Code § 1798.24. Notably, there is no exception for agencies that enact “non-liability” clauses as DOJ is attempting to do here. As a result, DOJ cannot enact a regulation that so plainly violates Californian’s right to privacy and is otherwise in direct conflict with DOJ’s statutory duties under the IPA.

#### **IV. DOJ HAS ALSO DRAFTED REGULATIONS RE: BULLET-BUTTON “ASSAULT WEAPONS” THAT ARE INVALID ON THE BASIS THAT THEY ARE UNCLEAR**

As further explained below, the following provisions cannot be approved for publication because they are unclear:

- DOJ’s registration requirements for shotguns, as stated in section 5470, subdivision (b);
- DOJ’s definition of “contained in,” as stated in section 5471, subdivision (k);
- DOJ’s reworking of the definition of “flash suppressor,” as stated in section 5471, subdivision (r);
- DOJ’s requirement for a description of the firearm that uniquely identifies it, as stated in section 5474, subdivision (b); and
- DOJ’s photography requirements, as stated in section 5474, subdivision (c)

These regulations suffer from more than one clarity deficiency listed in Title 1 C.C.R. section 16, subdivision (a). Undoubtedly, these regulations cannot be easily understood by persons who are directly affected by them. And they will likely invite arbitrary and capricious action by DOJ because they are too vague to provide adequate notice of the conduct proscribed or prescribed, or to provide sufficiently definite guidelines for enforcement. The law deems as void such vague regulations that fail to comply with APA standards. Hence, on both legal and practical grounds, DOJ’s regulations should not be moved forward for official adoption.

##### **A. Legal Standard re: the “Clarity” Standard for Regulations**

The APA (Gov.Code, §§ 11340 *et seq.*) requires that agencies draft regulations “in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style . . .”<sup>51</sup> Accordingly, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.<sup>52</sup> A regulation is drafted with “clarity” when it is “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”<sup>53</sup>

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<sup>51</sup> Gov. Code, § 11346.2, subd. (a)(1).)

<sup>52</sup> *See* Gov. Code, § 11349.1, subd. (a)(3).

<sup>53</sup> Gov. Code, § 11349, subd. (c). Persons presumed to be “directly affected” by a regulation are those who:

In examining a regulation for compliance with the “clarity” requirement, the OAL must presume that the regulation does not comply with the required “clarity” standard if any of the following conditions exists:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute;
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons “directly affected”; or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.<sup>54</sup>

“An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void.”<sup>55</sup> Therefore, if the OAL finds that an agency’s proposed regulation “is vague and does not meet the clarity standard[,]” the regulation will be disapproved and the agency will be prevented from moving forward with the regulation.<sup>56</sup>

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- (1) are legally required to comply with the regulation; or
  - (2) are legally required to enforce the regulation; or
  - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
  - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

(Cal. Code Regs., tit. 1, § 16(b).)

<sup>54</sup> Cal. Code Regs., tit. 1, § 16(a).

<sup>55</sup> *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.

<sup>56</sup> *In re: re: Air Resources Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-0202-05 SR (March 27, 2001); *see In re: Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2012-0918-04 S (November 6, 2012); *see In re: Department of Social Services*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-1231-01 S (February 21, 2002).

**B. Proposed Section 5470(b) Is Unclear, as to Whether “A Semiautomatic Shotgun that Has the Ability to Accept a Detachable Magazine” *Must Have an Additional Feature Before It Needs to be Registered as an “Assault Weapon”***

As explained in the analysis for Section II.A above, section 5470, subdivision (b) is oddly written. Remember, this regulation states:

A semiautomatic, centerfire firearm (rifle, pistol, *shotgun*) with an ammunition feeding device that can be readily removed from the firearm with the use of a tool, commonly referred to as a bullet-button weapon, *that has one or more specified features identified in Penal Code section 30515 is included in the category of firearms that must be registered.*<sup>57</sup>

Therefore, section 5470, subdivision (b) appears to state that

A semiautomatic, centerfire . . . *shotgun* [that does not have a fixed magazine and], that has one or more specified features identified in Penal Code section 30515 is included in the category of firearms that must be registered.

As explained in Section II.A. above, this is extremely confusing. For starters, section 5470, subdivision (b) should be presumed unclear because “the regulation uses language incorrectly” and “presents information in a format that is not readily understandable by persons ‘directly affected[.]’”<sup>58</sup>

Legally, the final clause should *not* modify the word “shotgun” because such modification means that DOJ would not require registration for an “assault weapon”: “[a] semiautomatic shotgun does not have a fixed magazine” *but that does not also have* “one or more specified features identified in Penal Code section 30515.” As explained in Section II.A above, this would run counter to the Penal Code, and DOJ’s intent to classify shotguns without “fixed magazines” as “assault weapons.”

If DOJ is trying to expand the definition of Penal Code section 30515(a)(7) (“A semiautomatic shotgun that has the ability to accept a detachable magazine”) to include all semiautomatic shotguns that do not have “fixed magazines,” they appear to require one additional feature. The above regulation requires, for registration, the shotgun to have “*one or more specified features identified in Penal Code section 30515.*”<sup>59</sup>

Accordingly, because persons directly affected by section 5470 are well familiar with the Penal Code’s designation of “assault weapon” for shotguns, they will want to read section 5470 so that it is consistent with the Penal Code’s definition of “assault weapon.” This is difficult to do based on how DOJ worded and presented section 5470. Either DOJ wants individuals to register semiautomatic shotguns without fixed magazines, or it wants them to register semiautomatic shotguns without fixed magazines *and one or more feature*. But which is it? The result will be rampant confusion amongst persons directly affected by section 5470, subdivision (b), if this regulation is approved, as persons directly affected cannot easily understand whether the shotguns at issue must have an additional feature

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<sup>57</sup> Cal. Code Regs. tit. 11, § 5470(b) (proposed) (emphasis added).

<sup>58</sup> Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).

<sup>59</sup> See generally Pen. Code, §§ 30515(a)(7).

before they are required to be registered (even though the Penal Code does not require the *additional* feature for the shotgun to be deemed an “assault weapon” under 30515(a)(7)). Thus, section 5470, subdivision(b) fails to meet the Government Code’s “clarity” standard.

**C. Proposed Section 5471(k) Is Unclear as to What “Contained In” Means as that Term Is Used in the Penal Code’s Definition of “Fixed Magazine”**

Section 5471, subdivision (k) should be presumed unclear because “the regulation uses language incorrectly” and “presents information in a format that is not readily understandable by persons ‘directly affected[.]’”<sup>60</sup> Section 5471, subdivision (k) states:

“Contained in” means that the magazine cannot be released from the firearm while the action is assembled. For AR-15 style firearms this means the magazine cannot be released from the firearm while the upper receiver and lower receiver are joined together.

DOJ is defining the term “contained in” for the sole purpose of clarifying what that term means within the definition of “fixed magazine” stated by Penal Code section 30515, subdivision (b).<sup>61</sup> Penal Code section 30515, subdivision (b) defines “fixed magazine” as:

For purposes of this section, fixed magazine” means an ammunition feeding device *contained in*, or permanently attached to<sup>62</sup>, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.<sup>63</sup>

To any person, DOJ’s definition of “contained in” is nonsensical in its intended context of clarifying the statutory definition of “fixed magazine.” At best, if one were to help DOJ make sense of its definition of “contained in,” it appears as if DOJ is basically saying that a fixed magazine is “an ammunition feeding device [that the magazine cannot be released from the firearm while the action is assembled], or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.” Even this is confusing and nonsensical, though, because of the doubling of the concept “cannot be removed without disassembly of the firearm action.” DOJ’s garbled, grammatically-incorrect definition and regulation would befuddle anyone. Consequently, section 5471, subdivision (k) is woefully unclear and should be designated as void.

**D. Proposed Section 5471(r) Is Unclear as to What Devices Can Satisfy DOJ’s Definition of “Flash Suppressor”**

In addition to exceeding the scope of the exception to the APA given by Penal Code section 30900, DOJ’s definition of the term “flash suppressor” is too vague to be understood by persons

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<sup>60</sup> Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).

<sup>61</sup> See Cal. Code Regs., tit. 11, § 5471 (proposed) (“For purposes of Penal Code section 30515 and this Chapter the following definitions shall apply . . .”).

<sup>62</sup> In its proposed regulations, DOJ states that “‘permanently attached to’ means the magazine is welded, epoxied, or riveted into the magazine well.” (Cal. Code Regs., tit. 11, § 5471, subd. (w) (proposed).)

<sup>63</sup> Pen. Code, § 30515, subd. (b) (emphasis added).

directly affected by the regulation. Section 5471, subdivision (r) should be presumed unclear because “the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning[.]”<sup>64</sup> Also, the regulation “uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute[.]”<sup>65</sup> Currently, section 5471, subdivision (r) reads:

“Flash suppressor” means any device attached to the end of the barrel, that is designed, intended, or functions to *perceptibly reduce or redirect muzzle flash* from the shooter’s field of vision. A hybrid device that has either advertised flash suppressing properties or functionally has flash suppressing properties would be deemed a flash suppressor. A device labeled or identified by its manufacturer as a flash hider would be deemed a flash suppressor.<sup>66</sup>

DOJ provides no guidance as to what extent the flash suppressor must “perceptibly reduce” muzzle flash. The term “perceptibly reduce” is not a term of art within the firearm community, so DOJ needed to have defined it in order to imbue its regulation with any purposeful meaning. As is, one person directly affected by the regulation might think that a device reducing the muzzle flash by 20% suffices while another directly-affected person might think that it has to be 50% or more. So, section 5471, subdivision (r) on its face can be reasonably and logically interpreted to have more than one meaning.

Similarly, DOJ provides no guidance as to what angle a device must “redirect flash muzzle from the shooter’s field of vision” in order for it to be deemed a “flash suppressor.” Is an angle of 2 degrees sufficient, or does the angle have to be greater than 30 degrees? Nobody—not even DOJ apparently—knows. Because this information not established, it allows DOJ to arbitrarily or capriciously enforce “assault weapon law,” with different DOJ agents deeming different devices to be “flash suppressors” and surprising Californians who were denied DOJ’s views of the law due to the ambiguous language of 11 C.C.R. section 5471, subdivision (r).

#### **E. Proposed Section 5474(c) Is Unclear as to Exactly What Type of Photographs Must Be Submitted to Register “Assault Weapons”**

Section 5474, subdivision (c) should be presumed unclear because “the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning”<sup>67</sup> and it “uses terms [e.g., relating to photography] which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute[.]”<sup>68</sup> Section 5474, subdivision (c) reads:

*Clear digital photos* of firearms listed on the application. One photo shall depict the bullet-button style magazine release installed on the firearm. One photo shall depict the firearm from the end of the barrel to the end of the stock if it is a long gun or the point

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<sup>64</sup> Cal. Code Regs., tit. 1, § 16(a)(1).

<sup>65</sup> Cal. Code Regs., tit. 1, § 16(a)(3).

<sup>66</sup> Cal. Code Regs., tit. 11, § 5471(r) (proposed) (emphasis added).

<sup>67</sup> Cal. Code Regs., tit. 1, § 16(a)(1).

<sup>68</sup> Cal. Code Regs., tit. 1, § 16(a)(3).



furthest from the end of the barrel if it is a pistol. The other two photos shall show the left side of the receiver/frame and right side of the receiver/frame. These locations are typically where firearms are marked when manufacturing is complete. At the discretion of the Department the last two photos shall be substituted for photos of identification markings at some other locations on the firearm.

Subdivision (c) is horribly written. Aside from the fact that it requires the firearm owner to own and operate a digital camera and/or download pictures on a computer to send to DOJ, it is missing contextual information and definitions that are critically needed to allow a person to understand the regulation's requirements.

What constitutes a "clear digital phot[o]" appears to be up to DOJ's discretion. The size of the picture, distance from where these pictures are taken, location or background of the photo shoot, and contrast, focus, and resolution of the image are all not established. The regulation does not reference or provide exemplars of "clear" photos.

The requirement that the photo depict the firearm from barrel to stock for long guns, or from barrel to "the point furthest from the end of the barrel" for pistols, leaves open a multitude of angles, distances, and depictions from which DOJ can designate as satisfactory. It is unknown whether DOJ will reject registrations for pictures it deems inadequately clear or incorrectly positioned.

Further, DOJ asks for two last pictures, one the left side of the receiver/frame and one from the right. However, "[a]t the discretion of the Department [sic] the last two photos shall be substituted for photos of identification markings at some other locations on the firearm." The syntax and word choice of this last sentence make it hard to decipher.<sup>69</sup> It seems as if DOJ is saying that, at its own discretion, it may substitute these photos for identification from some other location, or that it can accept (as substitution) photos of identification markings at some other location on the firearm beside the receiver/frame. Again, what that means, what other photos DOJ shall "substitute," and when DOJ will use or abuse its discretion remains to be seen. In the meantime, the clearest thing about section 5474, subdivision (c) is that it is so hopelessly unclear that it should not be approved of for publication.

**F. Proposed Section 5474(b) Is Unclear as to Exactly What Type of "Unique" Description Needs to be Submitted for a Firearm in Order to Register that Firearm as an "Assault Weapons"**

Section 5474, subdivision (b) should be presumed unclear because "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning[.]"<sup>70</sup> Section 5474, subdivision (b) reads:

A description of the firearm that identifies it uniquely, *including but not limited to*: firearm type, make, model, caliber, firearm color, barrel length, serial number, all identification marks, firearm country of origin/manufacture, the date the firearm was

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<sup>69</sup> This also suggests that the regulation should be presumed unclear on the additional ground that it "uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation[.]" (Cal. Code Regs., tit. 1, § 16(a)(4).)

<sup>70</sup> Cal. Code Regs., tit. 1, § 16(a)(1).

acquired, the name and address of the individual from whom, or business from which, the firearm was acquired.<sup>71</sup>

If the description at issue is “not limited to” the parameters described in the regulation, then it can conceivably include every other unnamed parameter under the sun relating to a firearm, ranging from the age of the firearm to personal pet names for the firearm. Persons directly affected by the regulation should not have to guess at what else they need to include in a description that “identifies [a firearm] uniquely.” But that is what they are forced to do now because, due to the open-ended wording of DOJ’s regulation, different people will naturally have different opinions of what fully describes a firearm in a way that “identifies it uniquely.” This makes the regulation unworkably vague and subject to rejection by the OAL.

## V. CONCLUSION

DOJ’s proposed regulations for “Bullet-Button Assault Weapons” (i.e., OAL Regulatory Action Number 2016-1229-01FP), as they are currently written, are unlawful. And they are riddled with other flaws that make administration, interpretation, and enforcement highly problematic. Allowing these regulations to be implemented would cause irreparable harm to thousands of Californians and subvert the basic minimum procedural requirements that the APA was enacted to protect. Thus, we demand that DOJ immediately withdraw its proposed regulations for “Bullet-Button Assault Weapons.” Although our law firm has the authority to bring a lawsuit to compel the withdrawal of these regulations to the extent that DOJ refuses to comply with our demand, we hope that it will not come to that. We look forward to DOJ’s cooperation. If you have any questions, please do not hesitate to contact me.

Sincerely,  
Michel & Associates, P.C.



C.D. Michel

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<sup>71</sup> Cal. Code Regs., tit. 11, § 5474(b).