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June 15, 2018

OFFICE OF ADMINISTRATIVE LAW
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staff@oal.ca.gov
VIA U.S. Mail and E-Mail

RE: OAL File # 2018-0525-06 ("Assault Weapon Definitions")

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 the proposed regulation titled "Assault Weapon Definitions" (OAL File Number 2018-0525-06) that the California Department of Justice ("DOJ") submitted to the Office of Administrative Law ("OAL").

The proposal seeks to add section 5460 to Title 11, Division 5 of the California Code of Regulations ("C.C.R."), which would extend all forty-four definitions found in 11 C.C.R. section 5471 to "apply to the identification of assault weapons pursuant to Penal Code section 30515." While recognizing the 45-day public comment period has ended, we strongly believe the proposed regulation directly conflicts with a prior OAL decision that should be brought to the attention of OAL's Reference Attorney. We hope this letter and its contents assist OAL in its decision, and we greatly appreciate any consideration on the matter.

I. THE PROPOSED REGULATION SEEKS TO BYPASS THE REQUIREMENTS OF THE APA AND OTHERWISE SIDESTEPS OAL'S PRIOR DISAPPROVAL OF DOJ'S REGULATORY ACTIONS

In 2016, California enacted Senate Bill No. 880 ("SB 880") and Assembly Bill No. 1135 ("AB 1135"), both of which redefined California's definition of an "assault weapon" as applied to certain semiautomatic rifles and pistols listed in Penal Code section 30515. Both bills also provided a means for individuals who currently possess firearms now classified as "assault weapons" to register them

with DOJ, thereby allowing their continued lawful possession in the state of California.[1] To facilitate this registration process, DOJ was required to adopt regulations implementing registration procedures. Such regulations would be exempt from California's Administrative Procedure Act ("APA").[2]

DOJ first submitted proposed regulations regarding the registration of "bullet-button assault weapons" on December 30, 2016, with a request that OAL "file and print" the regulations "ASAP."[3] Proposed section 5471, which included over 44 definitions, would have applied "to terms used in the identification of assault weapons pursuant to Penal Code section 30515, and for purposes of Articles 2 and 3 of this Chapter." In other words, the proposed definitions would apply to both the *registration* of newly classified "assault weapons" and general *enforcement* of California law. Our office submitted a letter of opposition to both OAL and DOJ regarding the proposed regulations on January 9, 2017. (Exhibits 1 and 2.) Shortly before OAL was scheduled to issue a decision, however, DOJ formally withdrew the proposal on February 13, 2017.

Three months later, DOJ resubmitted its proposed regulations on May 15, 2017, once again requesting OAL to "file and print."[4] No substantive changes to the original proposal were made. Instead, DOJ provided OAL with a cover letter responding to the opposition letter our office submitted on January 9, 2017. In response, our office submitted another comprehensive letter addressing the arguments raised by DOJ in their cover letter. (Exhibit 3.) OAL officially denied DOJ's proposal on June 26, 2017, but no specific reason for the denial was provided. (Exhibit 4.)

DOJ then submitted a third proposal to OAL on July 21, 2017, once again requesting OAL to "file and print" the proposed regulations.[5] The only substantive changes to the original proposal was the date for the deadline to register and a clarification that the proposed definitions no longer applied for the purposes of "identification of assault weapons" pursuant to Penal Code section 30515.[6] As a result, the definitions would only apply for the purposes of registration. OAL officially approved the proposed regulations on August 2, 2017.

When viewed in context with DOJ's limited APA exemption, the changes made are indicative of the reason for OAL's prior disapproval. The APA exception only applied to regulations regarding *registration*—not the *enforcement* of California law in other respects. But should OAL approve DOJ's most recent proposal, those same definitions which were only approved after conforming to DOJ's APA exception will once again apply for general enforcement purposes. In other words, DOJ is sidestepping OAL's prior disapproval and is otherwise seeking to adopt definitions in a manner that bypasses the requirements of the APA.

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[1] See Penal Code § 30900(b).

[2] Penal Code § 30900(b)(5).

[3] A copy of this proposal is available online at https://d3uwh8jpzww49g.cloudfront.net/sharedmedia/1509343/12-30-doj-proposed-assault-weapons-regulations.pdf.

[4] A copy of this second proposal is available online at http://michellawyers.com/wp-content/uploads/2017/05/DOJ-Submission-of-Regulation-.pdf

[5] A copy of this third proposal is available online at http://michellawyers.com/wp-content/uploads/2017/07/OAL-File-Number-2017-0719-04FP.pdf.

[6] Assembly Bill No. 103 modified the underlying statute by extending the deadline to register from January 1, 2018, to July 1, 2018.

II. DOJ'S "RESPONSES" TO PUBLIC COMMENTS REGARDING THE PROPOSED REGULATION FURTHER DEMONSTRATES DOJ'S DISREGARD FOR THE APA'S RULEMAKING PROCESS

Over 2,277 individuals submitted over 114 different public comments during the mandatory 45-day public comment period. Included among those was a comprehensive 20-page comment letter submitted by our office. (Exhibit 5.) DOJ rejected every single proposed alternative, stating that none proposed are potentially more effective or less burdensome—largely because proposed section 5460 does not itself contain any of the definitions for which it applies.[7]

None of the related documents submitted to OAL illustrate any of the above issues regarding DOJ's prior regulatory attempts on the issue. DOJ also fails to mention the reason for the lack of existing regulations is because they were repealed as part of DOJ's "bullet button assault weapon" regulations. In any event, DOJ's proposal denies members of the public a meaningful opportunity to participate in the rulemaking process by preventing them from commenting on the definitions themselves—all of which were adopted pursuant to an APA exception without any public comment.

III. CONCLUSION

The APA is not a requirement in name only. DOJ's actions have denied the public a meaningful opportunity to participate in the regulatory process. What's more, DOJ's attempt to extend the application of regulations adopted pursuant to an APA exception clearly demonstrates DOJ's disregard for the APA, OAL's role, and the importance of public participation in the rulemaking process. For these reasons, we respectfully request OAL disapprove DOJ's proposal.

Should you have any questions concerning the contents of this letter or its attachments, please do not hesitate to contact our office at your convenience.

Sincerely,
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Matthew D. Cubeiro

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[7] Included with this letter, we have separated DOJ's responses to the comments our office submitted. (Exhibit 6.) Of note, DOJ has failed to respond to a significant portion of our comments, so we have highlighted those responses in hopes of drawing attention to the lack of response to other comments raised in our letter.

EXHIBIT 1

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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."[1] 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,"[2] or to possess such a firearm,[3] 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;"[4] or (2) it has certain features.[5] 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.

---

[1] *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).
[2] Pen. Code, § 30600.
[3] Pen. Code, § 30605.
[4] *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.
[5] *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.[6]

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."[7] DOJ did not make any other definitions implementing the "assault weapon" law in 2000.

[6] Pen. Code, § 30515(a) (2016).
[7] 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."[8] 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.[9] 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.

---

[8] *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."

[9] *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.***[10]

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.

[10] 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."[11] "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."[12] Any regulation that substantially fails to comply with these requirements can be judicially declared invalid.[13] And, even if there is some debate on whether the proposed provisions relate to implementing the new

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[11] *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236.
[12] *California School Boards Ass'n, supra,* 186 Cal.App.4th at 1328, internal citations and quotation marks omitted).
[13] *Id.*

registration scheme, "*any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*"[14]

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.[15] 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.[16] Nothing in the Code changed for

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[14] *Id.* (emphasis added).
[15] Cal. Code Regs. tit. 11, § 5470 (proposed).
[16] 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.[17]

Yet, Section 5471, subdivision (a) of the new regulations[18] 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."[19] 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.[20]

Nevertheless, DOJ's proposed new Section 5471, subdivision (d) purports to define "barrel length" and seeks publication without going through the APA.[21]

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[17] *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).

[18] Entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Explanation of Terms Related to Assault Weapon Designation,"

[19] Cal. Code Regs. tit. 11, § 5471(a) (proposed) (emphasis added).

[20] *See* Pen. Code, § 30515.

[21] 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.[22] Rifles with barrels of 16 inches in length or shorter[23] and shotguns with barrels of 18 inches in length or shorter[24] 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."[25] 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.[26] 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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[22] *See* Pen. Code, § 33210.
[23] Pen. Code, § 17170.
[24] Pen. Code, § 17180.
[25] S*ee* Pen. Code, §§ 30600-30680 (governing "assault weapons"); *see also* Pen. Code, §§ 16590, 17700-17800 (governing "short-barreled" rifles and shotguns).
[26] *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.***"[27] 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*.[28] In addition, the Legislature has, via statute, authorized DOJ to constantly update who may lawfully possess firearms through the Armed and Prohibited Persons System.[29] 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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[27] Cal. Code Regs., tit. 11, § 5477(a) (proposed) (emphasis added).
[28] See, e.g., Cal. Penal Code §§ 26710, 28220, 30105, 33865.
[29] *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, 39025, 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"[30] 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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[30] AB 857, 2015-2016, Leg. Counsel's Digest (Cal. 2016) *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB857 (last visited Jan. 5, 2017).

enlarge or impair its scope."[31] "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."[32] 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."[33]

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." [34] 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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[31] *Interinsurance Exchange of Automobile Club, supra,* 148 Cal.App.4th at 1236.
[32] *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 (internal quotation marks and citations omitted).
[33] *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).
[34] *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[35]

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."[36]

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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[35] Cal. Code. Regs, tit. 11, § 5474.1(a), (b) (proposed).
[36] 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.[37]

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."[38] 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 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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[37] Cal. Code Regs., tit. 11 § 5474.1(c) (proposed).
[38] *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.[39] 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.[40] 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.[41] 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.[42] 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.[43]

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.[44]

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 engravement, 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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[39] Pen. Code, § 23910.
[40] Pen. Code, §§ 29180-29184.
[41] Pen. Code, § 29180(c).
[42] Pen. Code, § 29180(b).
[43] 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).)
[44] 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.[45]

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.[46] 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."[47]

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.*[48] 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.[49] Thus, section 5474 conspicuously and improperly enlarges the requirements of 30900, subdivision (b)(3).

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[45] *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.")
[46] *See* ATF Rul. 2009-1
[47] Pen. Code, § 30900(b)(3).
[48] Cal. Code Regs., tit. 11, § 5474(a) (proposed) (emphasis added).
[49] *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.[50]

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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[50] 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 . . ."[51] Accordingly, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.[52] 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."[53]

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[51] Gov. Code, § 11346.2, subd. (a)(1).)
[52] *See* Gov. Code, § 11349.1, subd. (a)(3).
[53] 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.[54]

"An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void."[55] 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.[56]

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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).)

[54] Cal. Code Regs., tit. 1, § 16(a).

[55] *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.

[56] *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.*[57]

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[.]'"[58]

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.[59]

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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[57] Cal. Code Regs. tit. 11, § 5470(b) (proposed) (emphasis added).
[58] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[59] *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[.]'"[60] 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).[61] 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[62], a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.[63]

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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[60] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[61] *See* Cal. Code Regs., tit. 11, § 5471 (proposed) ("For purposes of Penal Code section 30515 and this Chapter the following definitions shall apply . . .").
[62] 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).)
[63] 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[.]"[64] 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[.]"[65] 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.[66]

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"[67] 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[.]"[68] 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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[64] Cal. Code Regs., tit. 1, § 16(a)(1).
[65] Cal. Code Regs., tit. 1, § 16(a)(3).
[66] Cal. Code Regs., tit. 11, § 5471(r) (proposed) (emphasis added).
[67] Cal. Code Regs., tit. 1, § 16(a)(1).
[68] 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.[69] 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[.]"[70] 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/manufacturer, the date the firearm was

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[69] 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).)

[70] Cal. Code Regs., tit. 1, § 16(a)(1).

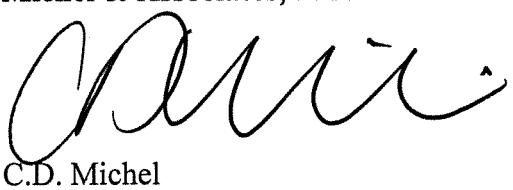
acquired, the name and address of the individual from whom, or business from which, the firearm was acquired.[71]

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.



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[71] Cal. Code Regs., tit. 11, § 5474(b).

EXHIBIT 2

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RE: Request to Reject Publication of 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."[1] As a result, OAL should reject the publication of these problematic, improperly-adopted regulations.

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,"[2] or to possess such a firearm,[3] 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;"[4] or (2) it has certain features.[5] 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.
- (F) A forward pistol grip.

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[1] *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).
[2] Pen. Code, § 30600.
[3] Pen. Code, § 30605.
[4] *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.
[5] *See* Pen. Code, § 30515.

(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.[6]

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."[7] DOJ did not make any other definitions implementing the "assault weapon" law in 2000.

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.

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[6] Pen. Code, § 30515(a) (2016).
[7] Cal. Code Regs. tit. 11, § 5469.

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."[8] 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.[9] 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.
- (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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[8] *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."

[9] *See* Pen. Code, § 30515(a)(1), (a)(4) (2016).

(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.***[10]

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.

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

[10] Pen. Code, § 30515.

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."[11] "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."[12] Any regulation that substantially fails to comply with these requirements can be judicially declared invalid.[13] And, even if there is some debate on whether the proposed provisions relate to implementing the new registration scheme, "*any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*"[14]

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[11] *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236.
[12] *California School Boards Ass'n, supra,* 186 Cal.App.4th at 1328, internal citations and quotation marks omitted).
[13] *Id.*
[14] *Id.* (emphasis added).

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.[15] 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.[16] Nothing in the Code changed for 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.[17]

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[15] Cal. Code Regs. tit. 11, § 5470 (proposed).
[16] Pen. Code, § 30510, subdivisions (a)(1), (a)(4), and (b).
[17] *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1113 ("As a general rule, when a

Yet, Section 5471, subdivision (a) of the new regulations[18] 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."[19] 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.[20]

Nevertheless, DOJ's proposed new Section 5471, subdivision (d) purports to define "barrel length" and seeks publication without going through the APA.[21]

California law, like federal law, restricts the possession, sale, manufacture, importation, etc. of "short-barreled" rifles and shotguns.[22] Rifles with barrels of 16 inches in length or shorter[23] and

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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).

[18] Entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Explanation of Terms Related to Assault Weapon Designation,"

[19] Cal. Code Regs. tit. 11, § 5471(a) (proposed) (emphasis added).

[20] *See* Pen. Code, § 30515.

[21] 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."

[22] *See* Pen. Code, § 33210.

[23] Pen. Code, § 17170.

shotguns with barrels of 18 inches in length or shorter[24] 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."[25] 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.[26] 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.

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

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[24] Pen. Code, § 17180.
[25] *See* Pen. Code, §§ 30600-30680 (governing "assault weapons"); *see also* Pen. Code, §§ 16590, 17700-17800 (governing "short-barreled" rifles and shotguns).
[26] *See* Pen. Code, § 30515(a)(3).

ammunition feeding device on an assault weapon pursuant to Penal Code section 30900, subdivision (b)(1) . . . ***after the assault weapon" is registered.***"[27] 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*.[28] In addition, the Legislature has, via statute, authorized DOJ to constantly update who may lawfully possess firearms through the Armed and Prohibited Persons System.[29] 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.

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)

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[27] Cal. Code Regs., tit. 11, § 5477(a) (proposed) (emphasis added).
[28] See, e.g., Cal. Penal Code §§ 26710, 28220, 30105, 33865.
[29] *See generally* Pen. Code, §§ 3000-30005.

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, 39025, 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"[30] 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 enlarge or impair its scope."[31] "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

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

[31] *Interinsurance Exchange of Automobile Club, supra,* 148 Cal.App.4th at 1236.

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."[32] 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."[33]

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." [34] 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,

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

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

[33] *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).

[34] *See Bearden, supra,* 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).

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[35]

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."[36]

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

(l) 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

(9) DMV Vehicle Registration

(10) Certificate of Eligibility, as defined in section 4031, subdivision (g) of Chapter 3.[37]

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[35] Cal. Code. Regs, tit. 11, § 5474.1(a), (b) (proposed).
[36] Cal. Code. Regs, tit. 11, § 5474.1(c) (proposed).
[37] Cal. Code Regs., tit. 11 § 5474.1(c) (proposed).

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."[38] 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 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.

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);

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[38] *Bearden, supra,* 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).

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.[39] 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.[40] 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.[41] 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.[42] 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.[43]

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.[44]

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 engravement, 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 information beyond the serial number. This means that DOJ's proposed regulations improperly enlarge or impair the statutory scope intended by the legislature.[45]

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[39] Pen. Code, § 23910.
[40] Pen. Code, §§ 29180-29184.
[41] Pen. Code, § 29180(c).
[42] Pen. Code, § 29180(b).
[43] 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).)
[44] 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).
[45] *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.")

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.[46] 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."[47]

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.*[48] 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.[49] Thus, section 5474 conspicuously and improperly enlarges the requirements of 30900, subdivision (b)(3).

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

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[46] *See* ATF Rul. 2009-1
[47] Pen. Code, § 30900(b)(3).
[48] Cal. Code Regs., tit. 11, § 5474(a) (proposed) (emphasis added).
[49] *See* Cal. Code Regs., tit. 11, § 978.30(a) (2000).

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.[50]

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."

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

[50] Cal. Code Regs., tit. 11, § 5477(c) (proposed) (emphasis added).

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 . . ."[51] Accordingly, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.[52] 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."[53]

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[51] Gov. Code, § 11346.2, subd. (a)(1).)

[52] *See* Gov. Code, § 11349.1, subd. (a)(3).

[53] Gov. Code, § 11349, subd. (c). Persons presumed to be "directly affected" by a regulation are those who:

(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

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.[54]

"An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void."[55] 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.[56]

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

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public in general.
(Cal. Code Regs., tit. 1, § 16(b).)

[54] Cal. Code Regs., tit. 1, § 16(a).

[55] *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.

[56] *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).

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.*[57]

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[.]'"[58]

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.[59]

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 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

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[57] Cal. Code Regs. tit. 11, § 5470(b) (proposed) (emphasis added).
[58] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[59] *See* generally Pen. Code, §§ 30515(a)(7).

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[.]'"[60] 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).[61] 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[62], a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.[63]

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 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[.]"[64] 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

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[60] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[61] *See* Cal. Code Regs., tit. 11, § 5471 (proposed) ("For purposes of Penal Code section 30515 and this Chapter the following definitions shall apply . . .").
[62] 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).)
[63] Pen. Code, § 30515, subd. (b) (emphasis added).
[64] Cal. Code Regs., tit. 1, § 16(a)(1).

governing statute[.]"[65] 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.[66]

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"[67] 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[.]"[68] 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 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.

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[65] Cal. Code Regs., tit. 1, § 16(a)(3).
[66] Cal. Code Regs., tit. 11, § 5471(r) (proposed) (emphasis added).
[67] Cal. Code Regs., tit. 1, § 16(a)(1).
[68] Cal. Code Regs., tit. 1, § 16(a)(3).

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.[69] 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[.]"[70] 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/manufacturer, the date the firearm was acquired, the name and address of the individual from whom, or business from which, the firearm was acquired.[71]

If the description at issue is "not limited to" the parameters described in the regulation, then it

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[69] 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).)

[70] Cal. Code Regs., tit. 1, § 16(a)(1).

[71] Cal. Code Regs., tit. 11, § 5474(b).

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 urge the OAL to refuse to publish DOJs regulations for "Bullet-Button Assault Weapons" and require DOJ to abide by the APA's procedural and substantive requirements.

Sincerely,
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RE: OPPOSITION to Department of Justice's Proposed Regulations Regarding "Bullet-Button Assault Weapons" on the Grounds that They Do Not Qualify for the Exemption to the Administrative Procedure Act Provided by Penal Code Section 30900(b)(5), Unlawfully Conflict with Statutes, or Are Unlawfully 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 2017-0512-02FP). 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, making them void and unenforceable.

DOJ submitted these proposed regulations on May 12, 2017, requesting expedited review from the OAL and refusing to disclose copies of these proposed regulations to members of the public who requested them. Emphasizing this point, the following information may be found on DOJ's website:

> On May 12, 2017, the Department of Justice filed proposed draft regulations with the Office of Administrative Law (OAL) for a File and Print rulemaking action. The draft regulations are not open for public comment due to the exemption set forth in Penal Code section 30900. Per the stated exemption, the Department is not required to provide further clarification.[1]

DOJ ultimately did post the proposed regulations on its website[2] on or about May 22, 2017, days after they were obtained from the OAL and widely distributed by the NRA/CRPA and other pro-Second Amendment groups.

These proposed regulations are virtually identical to those that DOJ previously submitted to the OAL on December 30, 2016, and subsequently withdrew on February 10, 2017 (OAL Regulatory Action Number 2016-1229-01FP). And, like the previous ones, DOJ improperly seeks to shoehorn these proposed regulations into the exemption provided by section 30900, subdivision (b)(5). Instead of spending the time since February 10, 2017 to formally adopt regulations through the Administrative Procedure Act's ("APA") rulemaking process, DOJ apparently spent that time writing a cover letter attempting to justify its desire to avoid the APA process. The result is DOJ's May 4, 2017 letter addressed to OAL Director Debra M. Cornez ("DOJ's May 4th Letter" or "May 4th Letter").

As it did in December 2016, DOJ now claims again that each of its proposed regulations is entirely exempt from the APA rulemaking process by way of Penal Code section 30900, subdivision (b)(5). That section, however, only provides DOJ a limited exemption from the APA rulemaking process for regulations relating solely to the *registration* of *newly defined* "assault weapons." There can be little doubt that various provisions of DOJ's proposed regulations are unrelated to registration. Even if there is an argument they relate to registration, DOJ cannot be given the benefit of the doubt that its proposed regulations are exempt from the APA because "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA" and against DOJ.[3]

DOJ is aware of the limited scope of the applicable APA 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. Through its improper proposed regulations, DOJ clearly seeks to expand its authority and extend the definition of "assault weapon" to cover a wider range of firearms than those contemplated by the Penal Code. This obvious, and at times ham-fisted, attempt to circumvent the APA is only made more egregious given DOJ's recent track record with its proposed regulations concerning "large-capacity" magazines (*i.e.*,

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[1] State of California Department of Justice, Bureau of *Firearms*, https://oag.ca.gov/firearms (last visited June 5, 2017).

[2] State of California Department of Justice, *Firearm Regulations/Rulemaking Activities*, https://oag.ca.gov/firearms/regs (last visited June 5, 2017).

[3] *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).

withdrawing its "large-capacity" magazine regulations like it did with its "assault weapon" regulations) and its shenanigans implementing timely regulations for "Firearm Safety Certificates."[4]

Moreover, many of the proposed provisions unlawfully conflict with current California law or are ambiguous and confusing. As a result, DOJ should rescind its problematic and improper regulations—or otherwise be prevented from implementing them.

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,"[5] or to possess such a firearm,[6] unless it is properly registered. A firearm can meet the definition of an "assault weapon" two ways: (1) it is expressly listed in the Penal Code or C.C.R. as an "assault weapon,"[7] and/or (2) it has certain features.[8] 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 based on its features 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.
- (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.

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[4] *See* Motion for Attorney Fees, *Belemjian v. Harris*, No. 15CECG00029, 2015 WL 11029973 (Cal.Super. Aug. 25, 2015). The Belemjian plaintiffs' lawsuit charged that DOJ's failure to comply with the requirements of the APA in announcing rules for the Firearm Safety Certificate Program administration, and to adopt the legislatively mandated regulations for the safety demonstrations, denied the public their statutory right to notice and an opportunity to be heard. Sometime after the plaintiffs brought suit, DOJ voluntarily initiated APA compliance, giving the plaintiffs the relief they sought.

[5] Pen. Code, § 30600.

[6] Pen. Code, § 30605.

[7] *See* Pen. Code, § 30510; Cal. Code Regs. title 11, § 5499.

[8] *See* Pen. Code, § 30515.

(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.[9]

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. DOJ's Original "Assault Weapon" Regulations Implemented in 2000 and the 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."[10] DOJ did not make any other definitions implementing the "assault weapon" law in 2000.

These regulations also provided for the registration of "assault weapons" based on those features, established fees, and set 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, dealers, and manufacturers made their firearms "California compliant" by removing the "detachable magazine" feature from their firearms so that their firearms no

[9] Pen. Code, § 30515(a) (2016).
[10] Cal. Code Regs. tit. 11, § 5469.

longer met the legal definition of "assault weapon." In making the firearms' magazine "non-detachable," 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: thus the common term "bullet button." Because a tool is needed to release the magazine, and because current California regulations consider 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."[11]

For years, firearm owners, dealers, manufacturers, and lawyers made countless attempts to obtain DOJ's official opinion on the legality of attaching a "bullet button" to these "assault weapons." However, DOJ had stopped its previous practice of providing Californians with guidance on firearms law. So firearm owners, dealers, and manufacturers were left entirely on their own to ascertain whether the attachment of a "bullet button" effectively excluded a firearm from the pre-2017 "assault weapon" definition. Based on DOJ's silence and lack of enforcement on the matter, Californians assumed (and assumed correctly) that such a practice was legal and, thus, continued it for years. It was not until 2011, in the context of a lawsuit,[12] that DOJ opined on the record that "bullet buttons" rendered the firearm's magazine "non-detachable."

Therefore, based much on DOJ's actions, the practice of 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") came into being and was officially recognized to remove one of the key features necessary to cause a firearm to meet the "assault weapon" definition.[13] This means that, prior to 2017, a "bullet button" could be used to remove a majority of firearms from the "assault weapon" definition, thereby making them legal, "California compliant" firearms.

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" definitions for rifles and pistols (but not shotguns) so that they no longer include 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."

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[11] *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."

[12] *See* Motion to Dismiss for Defendants at 1-2, 7-8, *Haynie v. Harris* (N.D. Cal., Mar. 4, 2014, No. C 10-01255 SI) 2014 WL 899189, *available at* http://ia600300.us.archive.org/32/items/gov.uscourts.cand.225676/gov.uscourts.cand.225676.26.1.pdf.

[13] *See* Pen. Code, § 30515(a)(1), (a)(4) (2016).

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.
- (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.***[14]

[14] Pen. Code, § 30515.

Again, we emphasize subdivisions (a)(1) and (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 or make additions to any of the section's other terms or phrases. *All* of the other features or characteristics that cause a firearm to meet the definition of an "assault weapon" are unchanged.

The Legislature's amendments to Penal Code section 30515 converted hundreds of thousands of rifles and pistols owned by California residents into newly-defined "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 newly defined "assault weapons" after January 1, 2017 (and prior to registration). Thus, the Legislature created Penal Code section 30680 stating:

> Section 30605 [the code section restriction possession of assault weapons] 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,[15] 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) of section 30900 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

[15] Assembly Bill 103 proposes to extend the registration deadline from January 1, 2018 to July 1, 2018. Assembly Bill 103, 2017-2018 Leg., Reg. Sess. (Cal. 2017), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB103 (last visited June 9, 2017). However, because Assembly Bill 103 is pending and has not been passed into law yet, January 1, 2018 will still be treated as the applicable registration deadline for the purposes of this Letter.

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 that 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. LEGAL BACKGROUND RE: PERMISSIVE SCOPE OF A GOVERNMENT AGENCY'S RULEMAKING POWER

On the first and last pages of its May 4th Letter, DOJ misleadingly cites to the *PaintCare* and *Association of California Insurance Companies* cases to imply that it can largely ignore the "exact provisions" of Penal Code section 30900, subdivision (b) (*i.e.*, the authorizing statute delineating the nature and scope of DOJ's APA exemption) and, thus, enact regulations that have virtually nothing to do with the provisions of section 30900, subdivision (b) without going through the APA process. According to DOJ, this is because it is authorized to "fill up the details" of the statutory scheme due to the fact that "[t]here is no requirement that the authorizing statute set forth every component of an agency's implementing regulations."[16] For many reasons, DOJ is wrong.

For one, the *PaintCare* and *Association of California Insurance Companies* cases only deal with a government agency's authority to enact regulations *under the APA rulemaking process*. They do not deal with an agency's authority to exaggerate the scope of an APA exemption by enacting regulations *outside of the APA rulemaking process*. DOJ's reading of those cases would nullify the rule that "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."[17] So if there is any doubt as to whether one of DOJ's proposed regulations is outside the scope of DOJ's APA exemption (section 30900(b)(5)), we must *necessarily* conclude that the APA's requirements *do* apply to that regulation, that DOJ cannot shoehorn that regulation under its APA exemption, and that DOJ must enact that regulation through the regular APA rulemaking process.

Second, DOJ's cites to those cases erroneously imply that the groups opposing its regulations would not even accept regulations that are reasonably related or necessary to the registration process, unless they were expressly listed in Penal Code section 30900. This couldn't be further from the truth. Rather, CRPA and NRA contend that a number of DOJ's proposed regulations are neither reasonably, nor in any way, related to the registration process as outlined in Penal Code section 30900, subdivision (b)(5). *Obviously*, nobody expects Penal Code section 30900 to list in detail every single regulation that DOJ is allowed to implement under its APA exemption. And nobody has ever disputed the fact that DOJ can (and must) adopt a variety of regulations "for the purpose of implementing [subdivision (b) of section 30900]."[18]

Both *PaintCare* and *Association of California Insurance Companies* confirm that a government agency can only adopt regulations that are reasonably related to the authorizing statute and that do not conflict with existing statutory law.

Importantly,

> **An administrative agency "has only as much rulemaking power as is invested in it by statute."** (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299, 105 Cal.Rptr.2d 636, 20 P.3d 533; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391, 211 Cal.Rptr. 758,

[16] DOJ's May 4th Letter, page 1.
[17] *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).
[18] Pen. Code, § 30900(b)(5).

> 696 P.2d 150.) **Regulations that are inconsistent with a statute, alter or amend it, or enlarge or impair its scope are void.** (*Carmel Valley Fire Protection Dist., supra*, at p. 300, 105 Cal.Rptr.2d 636, 20 P.3d 533; *Association for Retarded Citizens, supra*, at p. 391, 211 Cal.Rptr. 758, 696 P.2d 150.) . . . In determining whether the Legislature has authorized [a government agency] to exercise its rulemaking power to implement [a regulation], "we first ' "scrutinize the actual words of the statute, giving them a plain and commonsense meaning." ' [Citation.]"[19]

Therefore, contrary to its suggestion, DOJ does not have nearly unfettered authority to bypass the APA in proposing regulations under the exemption provided by Penal Code section 30900, subdivision (b)(5). DOJ is still limited to adopting regulations *only* "for the purpose of implementing [subdivision (b) of section 30900]."[20] Further, even assuming it qualified for the APA exemption, any proposed regulation still cannot be "inconsistent with a statute, alter or amend it, or enlarge or impair its scope."[21] DOJ does not—and cannot—cite to anything that contradicts these important rules.

The series of citations regarding statutory interpretation on page 6 of DOJ's May 4th Letter do nothing to advance DOJ's arguments. DOJ cites to these cases, one after the other, without showing exactly how they apply to the scope of the APA exemption found in Penal Code section 30900, subdivision (b)(5). DOJ simply concludes, without any analysis or explanation, that "Our approach comports with past judicial decisions."[22]

In the end, despite DOJ's misguided efforts, the following rules still stand, and they cannot be ignored:

1) Generally, "[i]f a rule constitutes a 'regulation' within the meaning of the APA ... it may not be adopted [or] amended . . . except in conformity with 'basic minimum procedural requirements' [of the APA] that are exacting."[23] Any regulation that substantially fails to comply with these requirements can be judicially declared invalid.[24]

2) Even if there is some debate on whether a proposed regulation relates to an exemption to the APA, "*any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*" and against applicability of the APA exemption.[25]

3) An administrative agency "has only as much rulemaking power as is invested in it by statute."[26]

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[19] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015)* (emphasis added); *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 390–91.
[20] Pen. Code, § 30900(b)(5).
[21] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015).*
[22] DOJ's May 4th Letter, page 6.
[23] *California School Boards Ass'n, supra,* 186 Cal.App.4th at 1328, internal citations and quotation marks omitted).
[24] *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).
[25] *Id. (*emphasis added).

4) Regardless of whether an exemption to the APA applies, "***an agency does not have the authority to alter or amend a statute or enlarge or impair its scope***."[27]

III. A NUMBER OF THE REGULATIONS PROPOSED BY DOJ EXCEED THE SCOPE OF PENAL CODE § 30900(b) AND MUST, THEREFORE, BE ADOPTED UNDER THE APA TO BE VALID

A number of DOJ's proposed regulations are neither relevant to, nor reasonably necessary for, the implementation of the registration scheme delineated in Penal Code section 30900, subdivision (b), *i.e.*, the registration scheme applicable *only* to firearms that are newly-designated as "assault weapons" by AB 1135 and SB 880. Some 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, thus, cannot be implemented without adhering to the formal APA rulemaking process. Because DOJ seeks to implement them without substantially complying with the requirements of the APA rulemaking process, these proposed regulations are invalid.[28]

A. The APA Exemption Stated in Penal Code Section 30900(b)(5) Does Not Extend to the 44 Definitions DOJ Proposes or to DOJ's Corresponding Attempt to Require the Registration of "Bullet-Button" Shotguns

DOJ's May 4th Letter misleadingly suggests that DOJ can provide definitions for any term used in the identification of *any* type of "assault weapon" (*i.e.*, even those "assault weapons" that were in no way affected by AB 1135 and SB 880) without satisfying the APA. But, Penal Code section 30900, subdivision (b) does not give DOJ such carte blanche authority.

Penal Code section 30900, subdivision (b)(1) expressly states that the APA exemption stated in subdivision (b)(5) only applies to the registration of "an assault weapon that does not have a fixed magazine, *as defined in Section 30515*[.]"[29] So Penal Code section 30515 *already* provides the definitions needed for the registration at issue. And the *only* "assault weapons" within section 30515 that do "not have a fixed magazine" are the *rifles* and *pistols* referenced in Penal Code section 30515, subdivisions (a)(1) and (a)(4). These firearms comprise the newly defined category of "assault weapons" implemented by AB 1135 and SB 880. DOJ can only propose regulations pertaining to *these* "assault weapons" for purposes of registration by using the definitions provided by Penal Code section 30515; DOJ cannot propose regulations for any other type of "assault weapon" (or any other firearm for that matter) if it refuses to go through the APA rulemaking process, much less change the definitions for those firearms.

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[26] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015).*
[27] *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236 (emphasis added).
[28] *See 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).
[29] Pen. Code, § 30900(b)(1) (emphasis added).

So, DOJ's APA exemption applies only to regulations that solely concern:

1. The *registration procedures*
2. for the *newly defined* category of "assault weapons" implemented by AB 1135 and SB 880.

Significantly, both of these criteria must be satisfied for a proposed regulation to be exempt from the APA requirements. For instance, DOJ cannot bypass the APA when implementing a regulation that pertains to the registration process for a firearm that was not affected by AB 1135 and 880 (but attempts to do just that, as discussed below). And DOJ cannot bypass the APA when implementing a regulation that has absolutely nothing to do with the registration process, even if the regulation might pertain to a firearm that was affected by AB 1135 and 880 (which DOJ also attempts to do, as discussed below).

Also, there is no indication that currently-existing definitions are in any way insufficient to identify the "assault weapons" that can be registered pursuant to Penal Code section 30900, subdivision (b). After all, not much has changed since DOJ registered thousands of firearms in 2000. It bears repeating that ***the Legislature did not change any terms relating to the definition of "assault weapon" aside from changing the phrase "capacity to accept a detachable magazine" to "does not have a fixed magazine***. And there is nothing in the text of Penal Code sections 30515, 30680, or 30900, or the text of AB 1135 and SB 880, suggesting that DOJ needs to make the additional definitions that are being objected to by this letter. DOJ did not need to make most of these additional definitions in 2000 to identify the group of "assault weapons" that could be registered back then (and the definitions that DOJ did make were made after extensive public comment via the APA process), and it does not need to make such definitions now.

Accordingly, if DOJ just uses the valid, currently-existing definitions, then it will not have to worry about the concerns it mentioned in its May 4th Letter:

- having "the same definitions used to determine whether a weapon must be registered under the AWCA to also be used to determine whether a weapon constitutes an assault weapon for other purposes under the AWCA"[30]

- having "uniform definitions across the statutory scheme" that "would eliminate any gap between the weapons that are registered and the weapons that are exempt from the prohibition on possession."[31]

- "[t]he consequence of limiting the registration definitions to the registration process[, which] would be the application of different definitions to different portions of the AWCA"[32]

Furthermore, the very fact that DOJ has concerns that definition changes will impact other provisions of the *AWCA* is telling. It *proves* that DOJ's proposed definitions are not just limited to registration of the

[30] DOJ's May 4th Letter, page 4.
[31] DOJ's May 4th Letter, page 5.
[32] DOJ's May 4th Letter, page 6.

firearms affected by AB 1135 and SB 880. For instance, how exactly do DOJ's proposed definitions (purportedly) applying to:

(1) "the weapons [that are not registered] that are exempt from the prohibition on possession[,]"[33]
(2) unrelated, "different portions of the AWCA"[34] that have nothing to do with registration, and
(3) "whether a weapon constitutes and assault weapon for *other* purposes [besides registration purposes] under the AWCA[,]"[35]

have *anything* to do with the definitions needed to register firearms under Penal Code section 30900, subdivision (b)?

And, even though DOJ emphatically alludes to the inconsistency of having two separate systems of definitions, these allusions are meaningless because DOJ never shows why there would be any inconsistencies or dual systems if it simply left the current definitions unchanged, or, assuming it can, if it simply limited its changes to definitions that *only* have to do with the registration of the newly-designated "assault weapons."

When the currently-existing definitions *already* establish what needs to be registered under Penal Code section 30900, subdivision (b)—as they do here—there is no need to define what does *not* need to be registered, *i.e.,* the weapons "that are exempt from the prohibition on possession," the weapons governed by "different portions of the AWCA," and the weapons that meet the "assault weapon" definition but cannot be registered under section 30900, subdivision (b).

These are all arguments that the CRPA and NRA made in their January 9, 2017 letter (and restated below) that DOJ fails to address. Why is DOJ going through all the unnecessary work of conjuring new definitions that have nothing to do with the registration scheme described by Penal Code section 30900, subdivision (b)? And if these terms are so necessary, why didn't DOJ take the time from December (when the original regulations were proposed) to the present to properly seek public comment through the standard APA procedures? Most of the issues highlighted by the CRPA and NRA back in January could have been addressed by now. Inexplicably, DOJ is proposing the same list of 44 new definitions for "assault weapon" terms that it proposed in December 2016, and it still insists that it wants all of them implemented without going through the APA.[36]

In addition, DOJ's unnecessary definitions are making previously legal firearms now illegal and changing the rules (*e.g.*, as to what can be registered) without any notice to Californians. Therefore, the provisions of the AWCA would, in effect, be applied retroactively and prevent people from registering firearms that they should be able to register. In other words, by changing these definitions now, after the new "assault weapon" law has already gone into effect, DOJ is causing the provisions of "the AWCA [not to be] applie[d] prospectively[,]" in contrast to what the AWCA allows and is preventing

[33] DOJ's May 4th Letter, page 5.
[34] DOJ's May 4th Letter, page 6.
[35] DOJ's May 4th Letter, page 4 (emphasis added)
[36] Cal. Code Regs. tit. 11, § 5470 (proposed).

the "grandfathering in [of] the possession of previously-owned weapons."[37] This is improper in its own right.

If the Legislature intended to allow DOJ free reign to amend every single existing definition possibly relating to "assault weapons," especially those for "assault weapon" terms completely unaffected by AB 1135 and SB 880, it would have clearly said so. It did not. There is no discussion of definition changes in the legislative history, other than the Legislature's decision to define "assault weapon" in Penal Code section 30515 pursuant to AB 1135 and SB 880 and to expressly state in subdivision (b)(1) that this is the definition at issue when it comes to the new registration process. Accordingly, the Legislature gave DOJ a limited APA exemption for registration procedures for the firearms that AB 1135 and SB 880 transformed into "assault weapons" on January 1, 2017. So, at most, DOJ's APA exemption only extends to proposed definitions relating to the newly-designated "assault weapons" (*i.e.*, those without a fixed magazine), if those definitions are needed for registration. And DOJ cannot exploit its APA exemption to redefine terms for purposes of illegally altering, amending, enlarging, and impairing portions of the Penal Code in ways that the Legislature never contemplated when it adopted AB 1135 and SB 880. As such, the following proposed regulations, which have zero to do with firearms meeting the new definition of "assault weapon," are especially improper must go through the APA process or be rejected as void.

1. Many of DOJ's Proposed Definitions, Including, but Not Limited to, Those for "Flash Suppressor," "Pistol Grip," "Threaded Barrels," and "Shotguns," Cannot be Implemented Because They Are Not Exempt from APA Review

Due to all the reasons stated above, DOJ cannot shoehorn these proposed definitions under its APA exemption. Most notably, these terms have nothing to do with the magazine release, the only aspect of the definition of "assault weapon" definition that has been changed by AB 1135 and SB 880. Again, the Legislature did not change any terms relating to the definition of "assault weapon" aside from changing the phrase "capacity to accept a detachable magazine" to "does not have a fixed magazine." So why change, expand, and/or redefine any of the other terms used to define "assault weapon," which have been in effect for almost 20 years and which *were* adopted under the APA? There is no justification.

Further, DOJ's May 4th Letter fails to address why or how an amendment, clarification, or revision of existing terms and definitions is needed in order to facilitate the so-called identification of "assault weapons," much less the identification of the newly-designated "assault weapons" for registration purposes.

Therefore, there is no need for DOJ to now expand or clarify the definitions of terms like "flash suppressor," "pistol grip," "threaded barrels," "shotguns," etc. The proposed definitions that DOJ submitted for these and other terms should be rejected, and DOJ should, at the very least, be required to abide by the APA rulemaking process if it wants to implement these definitions.

[37] *See* DOJ's May 4th Letter, pages 2 and 4 (stating "The AWCA is not a strict prohibition on assault weapons, because its provisions have only applied prospectively, to prohibit the new entry of assault weapons on the market" and that "the AWCA applies prospectively")

2. Proposed Sections 5470(d) and 5471(a) Cannot be Implemented Because They Are Not Exempt from APA Review and Because They Conflict with Existing Law, Which Does Not Contemplate Shotguns as Part of the New "Assault Weapon" Definition

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.[38] Nothing in the Code changed for shotguns, including for "[a] semiautomatic shotgun that has the ability to accept a detachable magazine."[39] The Legislature left shotguns untouched when adopting AB 1135 and SB 880. Specifically, AB 1135 and SB 880 were meant to:

> revise th[e] definition of "assault weapon" to mean a semiautomatic centerfire *rifle*, or a semiautomatic *pistol* that does not have a fixed magazine but has any one of those specified attributes. The bill[s] [were also meant to] define "fixed magazine" to mean 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.[40]

The Legislature is presumed to have *intentionally* revised the definition of "assault weapon" for pistols and rifles while leaving the definition of "assault weapon" for shotguns unchanged: "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.'" [41]

Yet, proposed section 5471, subdivision (a)[42] 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."[43] DOJ seeks to re-write Penal Code section 30515 against the Legislature's intentions, essentially replacing the phrase "that has the capacity to accept a detachable magazine" with the phrase "that does not have a fixed magazine" for *shotguns*. In other words, shotguns with "bullet buttons" are now "assault weapons" not by legislative change, but by DOJ's action alone.

This is improper because shotguns with "bullet buttons" are not "assault weapons" under the new, or any, law. Under the relevant parts of current California law, only a shotgun that has the ability

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[38] Pen. Code, § 30510(a)(1), (a)(4), and (b).
[39] Pen. Code, § 30515(a)(7).
[40] AB 1135, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1135 (last visited June 13, 2017) (emphasis added); SB 880, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB880 (last visited June 13, 2017) (emphasis added).
[41] *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1113 (citing *Russello v. United States* (1983) 464 U.S. 16, 23).
[42] Entitled "Registration of Assault Weapons Pursuant to Penal Code Section 30900(b)(1); Explanation of Terms Related to Assault Weapon Designation."
[43] Cal. Code Regs. tit. 11, § 5471(a) (proposed) (emphasis added).

to accept a detachable magazine is an "assault weapon."[44] Under current California regulations, a shotgun with a "bullet button" does not have the capacity to accept a detachable magazine because a tool is required to remove the magazine.[45] Therefore, as of the writing of this letter, shotguns with "bullet buttons," by definition, are not "assault weapons."

And DOJ's justification for finding otherwise is nonsensical. On page 6 of DOJ's May 4th Letter, it writes that AB 1135 and SB 880 require the registration of "bullet-button" shotguns because of the following language in Penal Code section 30900, subdivision (b)(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 [assault] 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).[46]

DOJ claims that the phrase "weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool" encompasses shotguns. But it fails to point out that first those firearms must be considered "assault weapons." And shotguns with "bullet buttons" are not now and have never been "assault weapons."

DOJ, not the California Legislature, is making a whole class of firearms "assault weapons." *For that reason alone, proposed sections 5470(d) and 5471(a) are void*. Regardless of whether an exemption to the APA applies or not, "an agency does not have the authority to alter or amend a statute or enlarge or impair its scope."[47] DOJ appears to be blind to this fact, stating in its May 4th Letter that it "does not anticipate or intend that the proposed definitions will bring any new weapons within the statutory definition of 'assault weapon,' other than the bullet-button weapons the Legislature intended to be covered."[48] But DOJ does not explain why we are wrong that shotguns should not be included.

3. Proposed Section 5471(d) Should Not Be Allowed to Bypass the APA Rulemaking Process Because DOJ's New Definition for "Barrel Length" Is Irrelevant for the New "Assault Weapon" Definition

A simple reading of Penal Code section 30515 shows that barrel length is irrelevant to the newly-established category of "assault weapons" that needs to be registered under section 30900, subdivision (b). The new category of "assault weapon" is based on magazine function only and has nothing to do with barrel length. For example, a semiautomatic, centerfire rifle that does not have a fixed magazine and a "pistol grip" is still an "assault weapon" under the new law, regardless of whether

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[44] Pen. Code, § 30515(a)(7).
[45] *See* Cal. Code Regs. tit. 11, § 5469(a).
[46] Pen. Code, § 30900(b)(1) (emphasis added).
[47] *Interinsurance Exchange of Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236 (emphasis added).
[48] DOJ May 4th Letter, page 5.

it has a 20-inch barrel or a 25-inch barrel. Thus, there is no need for DOJ to define "barrel length" for the registration of the newly-defined "assault weapons."

Nevertheless, DOJ's proposed Section 5471, subdivision (d) purports to define "barrel length" without going through the APA.[49] So why is DOJ including a definition of "barrel length" in its proposed regulations for the registration of "Bullet-Button Assault Weapons?"

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. California law, like federal law, restricts the possession, sale, manufacture, importation, etc. of "short-barreled" rifles and shotguns.[50] Rifles with barrels of 16 inches in length or shorter[51] and shotguns with barrels of 18 inches in length or shorter[52] are considered "short-barreled" and illegal. Currently, however, California has no statute or regulation specifying how to measure a barrel's length for purposes of these restrictions. Recognizing the need to specify how to measure barrel length, DOJ is now attempting to fast-track regulations making such clarification by hiding them among "assault weapon" registration regulations and "borrowing" the latter's APA exemption provided by Penal Code section 30900, subdivision (b)(5).

It is rather disingenuous for DOJ to hide this motive in its May 4th Letter, saying that "[a] weapon's barrel length is a basic piece of identifying information collected for every weapon . . . much like information about a weapon's manufacturer or model."[53] DOJ did not need to define "barrel length" in this way during its previous registration periods for "assault weapons." It has registered hundreds of thousands of other firearms without having a definition for barrel length. Why does it need to define "barrel length" now, especially when the new "assault weapon" law has nothing to do with barrel length?

Likewise, it is disingenuous of DOJ to claim in its May 4th Letter that its proposed definition of "barrel length" is proper due to Penal Code section 11106, subdivision (b). Penal Code section 11106, subdivision (b) just states that

> [t]he Attorney General shall permanently keep and properly file and maintain all information reported to the Department of Justice pursuant to . . . [firearms law] and maintain a registry thereof . . . The registry shall consist of . . . caliber, type of firearm, if the firearm is new or used, barrel length, and color of the firearm[.]

Again, DOJ is essentially claiming that its proposed definition of "barrel length" is merely a basic piece of identifying information collected for every weapon. This couldn't be further from the truth. DOJ seems to forget that nothing under current California or federal law, or even the proposed regulations,

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[49] 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."
[50] *See* Pen. Code, § 33210.
[51] Pen. Code, § 17170.
[52] Pen. Code, § 17180.
[53] DOJ May 4th Letter, p. 10.

prevents the owner of a firearm (even one that meets the definition of an "assault weapon") from changing the firearm's barrel length—unless doing so causes the firearm to become too short for purposes of the restrictions on "short-barreled" rifles or shotguns, or causes a semiautomatic centerfire rifle's overall length to fall under 30 inches. A firearm owner may modify the barrel length the day following registration of the firearm, thus rendering the information provided to DOJ out-of-date. Finally, section 11106 predates the new "assault weapon" definitions, so to suggest that subdivision (b)(5)'s APA exemption extends to it is a stretch.

In the end, it is wholly improper of DOJ to sneak in a regulation for "short-barreled" rifles and shotguns here. It seems like DOJ is hoping that the OAL will simply miss the fact that the Code sections defining, restricting, and regulating "short-barreled" rifles and shotguns are located in different sections unrelated to "assault weapons."[54] DOJ's 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. And any doubt as to whether APA requirements apply must be resolved in favor of excluding proposed Section 5471, subdivision (d) from DOJ's limited exemption to the APA.

4. Proposed Section 5471(m) Should Not Be Allowed to Bypass the APA Rulemaking Process Because DOJ's Statements About Magnets Left on the "Bullet-Button" Are Irrelevant for the New "Assault Weapon" Definition Implemented by AB 1135 and SB 880

In the second paragraph of subdivision (m), wherein DOJ defines "detachable magazine," DOJ states:

> An AR-15 style firearm that has a bullet-button style magazine release with a magnet left on the bullet-button constitutes a detachable magazine. An AR-15 style firearm lacking a magazine catch assembly (magazine catch, magazine catch siring and magazine release button) constitutes a detachable magazine. An AK-47 style firearm lacking a magazine catch assembly (magazine catch, spring and rivet/pin) constitutes a detachable magazine.

This second paragraph is of note because it states that leaving a magnet within a "bullet button" constitutes a "*detachable magazine*" and that firearms without magazine catches are also "d*etachable magazines*." But, leaving the magnet within the "bullet button" has nothing to do with the registration requirements or the new definition of "assault weapons" without "*fixed magazines*." This definition is purely for law enforcement purposes. Prior to January 1, 2017, some firearm owners made a claim that the magnet left in the "bullet button" was a "tool," which means that the magazines were not "detachable" and that the firearm did not fall under the "assault weapon" definition. But that argument is moot after 2016 because, with or without the magnet, a rifle or pistol with a "bullet button" and with the other prohibited features is still considered an "assault weapon." This definition has nothing to do with the registration process but is yet another attempt by DOJ to extend the APA exemption to include definitions not necessary for registration. Thus, it should not be allowed to bypass the APA.

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[54] S*ee* Pen. Code, §§ 30600-30680 (governing "assault weapons"); *see also* Pen. Code, §§ 16590, 17700-17800 (governing "short-barreled" rifles and shotguns).

5. Proposed Section 5471(x) Should Not Be Allowed to Bypass the APA Process Because DOJ's Proposed Definition for "Overall Length of Less than 30 Inches" Is Irrelevant for the New "Assault Weapon" Definition

DOJ's May 4th Letter states that a "semiautomatic, centerfire rifle that has an overall length of less than 30 inches" is an "assault weapon."[55] Just like the definition of "assault weapon" for shotguns, this one was also unchanged by AB 1135 and SB 880. For semiautomatic, centerfire rifles with an overall length of less than 30 inches, whether the firearm has a "fixed" magazine has no effect on its classification as an "assault weapon." This means that the characteristic of having an overall length of less than 30 inches is not contemplated by Penal Code section 30900, subdivision (b) because there can be no lawful registering of any such firearms in the new registration period. Thus, whether (or how) a firearm has an "overall length of less than 30 inches" is completely irrelevant to the new "assault weapon" definition, much less to the registration of the new "assault weapons."

What DOJ also fails to mention is that a "semiautomatic, centerfire rifle that has an overall length of less than 30 inches" has been an "assault weapon" *since 2001*.[56] People were able to register such 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. So there is no need to define "overall length of less than 30 inches" now for the registration of the *newly-defined* "assault weapons."

It appears that DOJ recognizes this fact because its sole justification on page 11 of its May 4th Letter is that the definition of "overall length of less than 30 inches" is needed because it will help DOJ recognize what is *not* a newly-defined "assault weapon" that is subject to registration. That is not the case. This is DOJ redefining, in 2017, a definition of a term used to describe a firearm that was banned in 2001.

DOJ is (again) stretching the APA exemption beyond the realm of "assault weapon" registration for purposes of expanding the scope of firearm restrictions. Such misuse of an APA exemption to further an agenda is improper. And if there is any doubt as to whether this proposed regulation is outside the scope of DOJ's APA exemption, we must *necessarily* conclude that it is and that DOJ must enact that regulation through the regular APA rulemaking process.[57]

B. DOJ's Prohibition on Removal of the Release Mechanism (Proposed Section 5477) Is Invalid Because (1) Penal Code Section 30900(b)(5)'s Exemption to the APA Does Not Extend to Activity Post-Registration and (2) It Contradicts and Enlarges Statutes Governing Restrictions on Registered "Assault Weapons"

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

[55] DOJ May 4th Letter, page 11.
[56] *See* Pen. Code, § 30515(a)(3).
[57] *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).

(b)(1) . . . ***after the assault weapon" is registered***."[58] 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, ironically, are not defined in DOJ's extensive definition section. Regardless, there is simply nothing in Penal Code section 30900, subdivision (b) that could be construed as exempting DOJ from the APA when regulating what happens *after* the registration process has already been implemented. And the removal of the "bullet button" 10 days or 30 years down the line after registration in no way affects the registration process.

Practically speaking, almost anything could happen to a firearm after it is registered (*e.g.*, modifying the barrel length as discussed above). 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. If DOJ is so worried about one of those circumstances being unlawful, DOJ needs to either take it up with the Legislature or propose additional regulations through the APA process. As such, DOJ's APA exemption does not apply to Section 5477. And Section 5477 is invalid.

DOJ's attempts to connect Section 5477 to the registration process ring hollow. On page 8 of its May 4th Letter, DOJ states that "[r]emoval of the bullet-button undermines law enforcement officials' ability to identify the weapon" and "undermines the registration requirement" because it would allow "a firearm owner . . . to substantially alter a weapon or transform it into another type of weapon after it has been registered." DOJ knows how small and inconspicuous a "bullet button" is. Even a trained law enforcement officer would have to physically manipulate the firearm or scrutinize it closely to notice the presence or absence of most "bullet buttons." Contrary to DOJ's assertions, removing the "bullet button" does not alter the appearance of the overall firearm, nor does it alter the other more obvious indicia of a specific firearm like its make, model, and, mostly, its serial number.

Correspondingly, DOJ also fails to consider what law enforcement officers actually do when they check for properly registered "assault weapons." Law enforcement knows that next year, a firearm meeting the definition of an "assault weapon," with or without a "bullet button," must be registered to the possessor or it is a crime. If law enforcement must identify the firearm to see if it is lawfully registered, they enter the make, model, and serial number into the Automated Firearm System ("AFS"). If the firearm is registered to the individual, there is no crime. If it is not registered to the individual, possession of the "assault weapon" is a violation of California law. Whether it has a "bullet button" is not considered. Thus, DOJ's claim that removing the "bullet button" affects law enforcement's ability to identify the firearm is tenuous at best.

Section 5477 is void *on the additional ground* that it stands in direct contradiction to what the Legislature intended for the treatment of "assault weapons" post-registration. As shown by the exceptions the Legislature carved out for registered owners of "assault weapons," it is improper for DOJ to prohibit the removal of the "bullet button" from a firearm after it has already been registered as an "assault weapon." 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, pursuant to Penal Code section 30900, subdivision (b), a firearm meeting the current definition of an "assault weapon" possesses a *registered* "assault weapon." That firearm is now in the system as an "assault weapon"

[58] Cal. Code Regs., tit. 11, § 5477(a) (proposed) (emphasis added).

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 sum, DOJ does not have authority to adopt its proposed Section 5477 even if it went through the APA process, let alone if it just relied on subdivision (b)'s APA exemption.

C. The Eligibility Check Required by Proposed 11 C.C.R. Sections 5476(d) & (e), and the Citizenship Information Required by DOJ as Stated in Proposed Section 5474(a), Are Unrelated to Registration and Have No Statutory Support

1. The Eligibility Check Requirement

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 "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.

But, whenever background checks are required for firearms in California, the Legislature has adopted *statutes* to expressly authorize DOJ to conduct them.[59] 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 addition, the Legislature has, via statute, authorized DOJ to constantly update who may lawfully possess firearms through the Armed and Prohibited Persons System.[60] If DOJ were now deemed to have authority to require background checks absent statutory authority, these other statutes would be meaningless.

DOJ fails to address any of these points in its May 4th Letter. So if DOJ has greater concerns than the Legislature had (when it drafted and passed AB 1135 and SB 880) about "ensur[ing] that [DOJ] does not accept registrations from persons who have been disqualified or prohibited from possessing or registering [firearms]," DOJ needs to take it up with the Legislature.

In sum, proposed Section 5476, subdivisions (d) and (e) improperly go beyond what is stated by statute and are, therefore, void.

2. The Citizenship Information Required by Proposed Section 5474(a)

As a preliminary matter, DOJ claims that the citizenship information required by proposed Section 5474, subdivision (a) "is reasonably necessary to complete the eligibility check process" because "[c]itizenship information is required to confirm eligibility to possess a firearm under federal law[.]"[61] But, as shown in the preceding section, the proposed eligibility check itself is improper.

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[59] *See, e.g.*, Cal. Penal Code §§ 26710, 28220, 30105, 33865.
[60] *See generally* Pen. Code, §§ 3000-30005.
[61] DOJ May 4th Letter, page 10.

Additionally, asking for citizenship information probably means that DOJ will have to run the background check through the National Instant Criminal Background Check System (NICS).[62] But, it is dubious whether DOJ can legally conduct a full background check under NICS for the mere registration of "assault weapons," as NICS is reserved only for firearm *transactions*.[63]

Regardless, Penal Code section 30900, subdivision (b)(3) 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."[64] Section 5474 conspicuously and improperly enlarges the requirements of 30900, subdivision (b)(3) and is, thus, void.

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

When making regulations, "an agency does not have the authority to alter or amend a statute or enlarge or impair its scope."[65] "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."[66] 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***."[67]

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[62] Otherwise, there is no need for the person's immigration status and country of citizenship information. In addition, a background check (through NICS) for "assault weapon" registration is referenced on the CRIS screenshots on page 16 of DOJ'S proposed CFARS Form.

[63] 28 C.F.R. § 25.6 states that:

> (j) Access to the NICS Index for purposes unrelated to NICS background checks required by the Brady Act. Access to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of:
> (1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;
> (2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,
> (3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

[64] Pen. Code, § 30900(b)(3).

[65] *Interinsurance Exchange of Automobile Club, supra,* 148 Cal.App.4th at 1236.

[66] *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 (internal quotation marks and citations omitted).

[67] *See In re: Medical Board of California*, OAL Determination Decision of Disapproval of Regulatory

A. DOJ's Refusal to Register Firearms Based on Their Lack of Serial Numbers and Other Information, Even Though They Meet the New Definition of "Assault Weapon," Is in Conflict with Existing Statutory Law

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 (subsections (c), (d), and (e)). Those provisions are not problematic. But, subdivisions (f) and (g) of section 5472 are, stating:

> (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 FMBUS [*i.e.*, a Firearm Manufactured by Unlicensed Subject][68] 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, which already exist under California law and which are independent of the registration requirements for "assault weapons."

1. Proposed Section 5472(f) Would Prohibit Registration of Firearms Made Without Serial Numbers by Licensed Manufacturers and Those Firearms That Already Had Markings and Were Registered Under Existing California Law.

There was a time when firearm manufacturers were not required to put serial numbers on firearms. Historically, federal law did not require serial numbers on firearms. The Federal Firearms Act of 1938, 152 Stat. 1250, the first federal law to regulate commerce in firearms, imposed no duty to mark firearms with serial numbers. Serial numbers by manufacturers and importers were required for the first time in 1958, except that they were not required for shotguns and .22 caliber rifles.[69] Serial numbers on all firearms were not required until enactment of the Gun Control Act of 1968.[70] Federal law has never required serial numbers on firearms made by persons other than manufacturers and importers. *It is not unlawful under federal or California law to possess a firearm without a serial number*. Yet, DOJ outright refuses to accept the registration of these firearms, in contrast to what Penal Code sections 30515, 30680, and 30900 say about registration being allowed for any firearm lawfully-possessed before January 1, 2017. DOJ's proposed action contradicts existing law requiring registration

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Action, OAL File No. 2014-0827-02 S (October 15, 2014) (emphasis added).

[68] DOJ defines "FMBUS" in proposed Section 5471(s) as "a Firearm Manufactured by Unlicensed Subject."

[69] 26 C.F.R. § 177.50 (1958).

[70] P.L. 90-618, 82 Stat. 1213, 1223.

of "assault weapons," and it exceeds the registration requirements of the Penal Code. DOJ does not have such regulatory authority.

Furthermore, DOJ's concerns about the identification of the firearm appear insincere because DOJ had heretofore, for purposes of previous and current firearm registrations, fully accepted markings on firearms based on a lower standard than what Proposed Section(f) requires. DOJ had processed those registrations with no questions asked. For instance, Penal Code section 28000, in part, allows for the registration of a firearm when a person (1) obtains it through an exemption from section 27545 (requiring firearms to be transferred through a licensed firearm dealer); or (2) is otherwise not required by law to report acquisition, ownership, destruction, or disposal of a firearm.[71] And California law currently allows for, and DOJ accordingly accepts, the application to register a firearm that an individual personally makes. This is done through the use of the "Firearm Ownership Report" form.[72] Firearm owners currently, and have in the past, used the "Firearm Ownership Report" form to register their homemade firearms with the state. Included in these registrations are firearms that meet the new definition of "assault weapon." DOJ had no problem in the past accepting registration of firearms through this method and neither California, nor DOJ, at that time imposed any of the rigorous marking requirements set forth in the proposed regulations. Firearm owners were able to provide identification marks engraved or installed on their firearms and submit them to DOJ under this standard. We know of no instances where DOJ in the past refused to accept the registrations for these firearms. Not only do DOJ's regulations contradict California law by asking for markings of firearms which exceed current California law, but they also exceed what DOJ has accepted for years.

2. DOJ's Creation of a Serial Number Scheme Exceeds the APA Exemption for Registering "Assault Weapons"

Pursuant to section 5472, subdivision (g), DOJ will refuse to register an "assault weapon" manufactured by a "FMBUS" (i.e., an unlicensed individual) unless he or she complies with the serial number application requirements of section 5474.2. This proposed regulation is void because it conflicts with both existing statutes and statutes that have not taken effect. The proposed regulation exceeds the requirements of the recently-enacted sections from AB 857 (2016) and other sections of the Penal Code (as described below) pertaining to the application for a DOJ-provided serial number pursuant to Penal Code section 23910.

To reiterate, under California law, Californians can lawfully make their own firearms, and they are 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.[73] Under this law, there is no specific requirement as to how a serial number must be engraved/attached to the firearm. But, with section 5472, subdivision (g), DOJ prescribes the specific requirements for doing so, making definitive determinations above the scope of the statute governing serial numbers. While DOJ may arguably have the authority to make such a rule after going through the formal APA process, it

[71] Pen. Code, § 28000.
[72] A copy of this form may be found at https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/volreg.pdf (Last visited June 7, 2017). Note the website address uses the term "volreg." This is an abbreviation for "voluntary registration" and is often how people, including DOJ, refer to this form.
[73] Pen. Code, § 23910.

certainly does not have the authority to bypass the APA when altering a statute that applies beyond just "assault weapon" registration.

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.[74] For firearms falling under this requirement, serial numbers provided by DOJ would need to be added to the firearm before January 1, 2019.[75] 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.[76] Thus, under AB 857, both individuals with existing firearms and those 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 *after* July 1, 2018.[77]

Not only does DOJ add nothing new, but its proposed regulations also affirmatively cause problems by being inconsistent with existing law. Specifically, Proposed Section 5474.2, subdivision (a)(3)(B)—in contrast to AB 857 and other areas of California law—requires "*certain additional information*" (*i.e.*, information in addition to the serial number) to be stamped on the firearm.[78]

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; the engravement, stamping, or placement of the *serial number* alone suffices. Presumably, DOJ borrowed this heightened engraving/stamping standard from federal law (for licensed firearm manufacturers and importers who have the machinery and capability to comply with these requirements). Regardless, the fact remains that California's Legislature knowingly chose *not* to require the engraving/placing of additional information beyond the serial number. This means that DOJ's proposed regulations improperly enlarge or impair the statutory scope intended by the Legislature.[79]

Ultimately, all that Section 5474.2 does is cause more, unnecessary problems for Californians who wish to comply with the law. Those individuals who sought and applied serial numbers under the existing standard would have to *re-apply and re-engrave* their serial number and additional markings 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

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[74] Pen. Code, §§ 29180-29184.
[75] Pen. Code, § 29180(c).
[76] Pen. Code, § 29180(b).
[77] 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).)
[78] 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).
[79] *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.")

incorrect. A federally licensed gunsmith/dealer (commonly referred to as an "01") may do the engraving.[80] But, DOJ creates further problems because current California law requires either the 07 or 01 to have a "Dangerous Weapon" Permit to do this work because the firearms in question are "assault weapons." Without such a permit, the firearms could not be lawfully taken to or left with a firearm manufacturer/dealer/gunsmith. Doing so would cause the firearm owner and licensee to violate the restrictions on transferring and possessing "assault weapons." That there are very few "Dangerous Weapon" Permit holders in California underscores why the Legislature did not make this a requirement.

DOJ should not be allowed to change that with proposed 11 C.C.R. Sections 5472, subdivision (g) and 5471.2, subdivision (a)(3)(B).

B. Proposed Section 5477(c) (Requirement for Clear Digital Photos) Requires Access to Photography Equipment that Is Not Required Under the Penal Code

Section 5477, subdivision (c) is inconsistent with the Penal Code in that it makes as a prerequisite to "assault weapon" registration, access to fairly expensive digital equipment (not just computer and internet access, as DOJ claims in its May 4th Letter). 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.[81]

This exceeds the requirements of the Penal Code. The Legislature, as mentioned above, laid out the information required for registration of an "assault weapon." Included in that information is a "*description*" of the firearm, not a *depiction*. There is nothing in the Penal Code or elsewhere in the regulations that require a registrant to provide pictures of a firearm. It is also unnecessary for the registration of the firearm. This was never a requirement when firearms were required to be registered as "assault weapons" in 2000.

Moreover, under the requirements of Section 5477, subdivision (c), an individual who wants to register her firearm as an "assault weapon" needs to purchase, borrow, and/or find the digital camera 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 may know how to operate it. The members of the Legislature clearly did not intend to have the ownership and operation of digital devices be a barrier to firearm registration and ownership or they would have added it to the requirements for registration.

[80] *See* ATF Rul. 2009-1
[81] Cal. Code Regs., tit. 11, § 5477(c) (proposed) (emphasis added).

C. Proposed 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."[82] Existing California law does not limit that broad phrase, so DOJ's proposed scope, definitively limiting who qualifies, 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 who should be considered a "family member," absent any intention by the Legislature to so limit that term.

DOJ, in proposed 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,

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[83]

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, which allows "family members residing in the same household" to register "assault weapons."

[82] *See Bearden, supra,* 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).
[83] Cal. Code. Regs, tit. 11, § 5474.1(a), (b) (proposed).

DOJ does not stop there. It also requires "proof of address" for *each* joint registrant in order to register "assault weapons."[84]

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

(l) 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

(9) DMV Vehicle Registration

(10) Certificate of Eligibility, as defined in section 4031, subdivision (g) of Chapter 3.[85]

Nothing in the Code so limits the scope of acceptable proof of address in the manner that DOJ seeks to do. Also of note, this information is not required from a person who is *not* jointly registering an "assault weapon." The "proof of residence" requirement acts as an additional bar to joint registration that the Legislature never intended.

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."[86] Therefore, Section 5474.1 is invalid.

[84] Cal. Code. Regs, tit. 11, § 5474.1(c) (proposed).
[85] Cal. Code Regs., tit. 11 § 5474.1(c) (proposed).
[86] *Bearden, supra,* 138 Cal.App.4th at 436 (internal quotation marks and citations omitted).

IV. A NUMBER OF DOJ'S PROPOSED REGULATIONS RE: "BULLET-BUTTON ASSAULT WEAPONS" ARE ALSO INVALID ON THE BASIS THAT THEY ARE UNCLEAR

As further explained below, the following proposed provisions cannot be approved for publication because they are not sufficiently clear as the law demands:

- The definition of "contained in," as stated in proposed Section 5471, subdivision (k);
- The amendment to the definition of "flash suppressor," as stated in proposed Section 5471, subdivision (r);
- The requirement for a description of the firearm that uniquely identifies it, as stated in proposed Section 5474, subdivision (b); and
- DOJ's photography requirements, as stated in proposed Section 5474, subdivision (c)

These provisions suffer from more than one clarity deficiency listed in Title 1, C.C.R. section 16, subdivision (a), which means that the OAL cannot approve them for publication. They also violate the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution, which require "a reasonable degree of certainty in . . . criminal law . . . ."[87]

Undoubtedly, these regulations are confusing to persons of ordinary intelligence who are directly affected by them. And they will likely invite arbitrary and capricious action by DOJ and law enforcement 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 be clear.[88] On both legal and practical grounds, therefore, DOJ's regulations should not be moved forward for official adoption.

A. Legal Standard re: the "Clarity" Standard for Regulations

Agencies must draft regulations "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style . . . ."[89] Accordingly, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.[90] 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."[91]

In examining a proposed regulation for compliance with the "clarity" requirement, the OAL

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[87] *People v. Heitzman* (1994) 9 Cal.4th 189, 199 (quoting *In re Newbern* (1960) 53 Cal.2d 786, 792).)
[88] *In re: re: Air Resources Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-0202-05 SR (March 27, 2001); *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.
[89] Gov. Code, § 11346.2(a)(1).)
[90] *See* Gov. Code, § 11349.1(a)(3).
[91] Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be "directly affected" by a regulation.

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; or

(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.[92]

"An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void."[93] 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.[94]

B. Legal Standard re: the Void for Vagueness Doctrine Based on Due Process Concerns

> [T]he underlying concern [of the void for vagueness doctrine] is the core due process requirement of adequate notice. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.) That the terms . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a [law that] either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its

[92] Cal. Code Regs., tit. 1, § 16(a).
[93] *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.
[94] *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).

> meaning and differ as to its application, violates the first essential of due process of law.[95]

To pass constitutional muster when facing a vagueness challenge, a law must pass two separate and distinct tests: (1) it must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" and (2) it must do so "in a manner that does not encourage arbitrary and discriminatory enforcement." [96]

Accordingly, DOJ's proposed regulations must clearly define the behavior that is being regulated so that persons of ordinary intelligence can understand them, and they must provide sufficient standards to prevent arbitrary and discriminatory enforcement by authorities.

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[.]'"[97] 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" purporting to "clarify" what that term means within the definition of "fixed magazine" stated by Penal Code section 30515, subdivision (b).[98] Instead, DOJ causes more confusion. 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[99], a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.[100]

To any person, DOJ's definition of "contained in" is nonsensical in its intended context of clarifying the statutory definition of "fixed magazine." 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 assuming this is DOJ's

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[95] *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.
[96] *Kolender v. Lawson* (1983) 461 U.S. 352, 357.
[97] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[98] *See* Cal. Code Regs., tit. 11, § 5471 (proposed) ("For purposes of Penal Code section 30515 and this Chapter the following definitions shall apply . . .").
[99] 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).)
[100] Pen. Code, § 30515, subd. (b) (emphasis added).

intention, it is confusing and nonsensical 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 rejected 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 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[.]"[101] 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[.]"[102] 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.[103]

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 that term with any purposeful meaning. As is, one might think that a device reducing the muzzle flash by 20% suffices while another 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. This means, among other things, that a person of ordinary intelligence cannot understand its meaning and that it encourages arbitrary and discriminatory enforcement. Thus, it is unconstitutionally vague.

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 is 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(mm) Is Unclear as to What Type of Modifications Must be Made to a Folding or Telescoping Stock for It to be Considered "Fixed"

[101] Cal. Code Regs., tit. 1, § 16(a)(1).
[102] Cal. Code Regs., tit. 1, § 16(a)(3).
[103] Cal. Code Regs., tit. 11, § 5471(r) (proposed) (emphasis added).

In subdivision (mm), DOJ states that "'[s]tock, fixed' means a stock that does not move, fold, or telescope." However, it is unclear based on this definition what type of modification must be made to a folding or telescoping stock for it to be considered "fixed." For example, it cannot be ascertained from DOJ's language whether the modification can be temporary or whether it must be "permanent." And, if the latter, it is unclear what would suffice (*i.e.* riveted, welded, or glued). Thus, subdivision (mm) necessarily must be revised before it can be implemented.

F. 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"[104] 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[.]"[105] 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 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, it is missing contextual information and definitions that are critically needed to allow a person to understand its 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 on the basis that it deems pictures inadequately clear or incorrectly positioned.

Further, DOJ asks for two additional pictures, one from the left side of the receiver/frame and one from the right side. However, "[a]t the discretion of the Department 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. 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

[104] Cal. Code Regs., tit. 1, § 16(a)(1).
[105] Cal. Code Regs., tit. 1, § 16(a)(3).

accept (as substitution) photos of identification markings at some other location on the firearm beside the receiver/frame. Again, what that means and what other photos DOJ shall "substitute" allows DOJ to abuse its wide discretion. Because proposed Section 5474, subdivision (c) is so vague that it confuses persons of common intelligence, invites arbitrary and discriminatory enforcement, and violates ordinary notions of fair play and the settled rules of law, it must be rejected.

V. DOJ'S PROPOSED FORMS ENTITLED "CALIFORNIA FIREARMS APPLICATION REPORTING SYSTEM (CFARS)" AND "NEW SERIAL NUMBER APPLICATION (BOF 1008)" CANNOT BE ISSUED BECAUSE THEY HAVE ELEMENTS THAT EXCEED THE SCOPE OF PENAL CODE § 30900, ARE IN DIRECT CONFLICT WITH EXISTING LAW, AND ARE DETRIMENTALLY UNCLEAR

All of the arguments made in Sections I through IV, *supra*, against DOJ's proposed regulations also apply to DOJ's translation and application of them for its proposed forms (*i.e.*, the regulation's functional counterpart or re-statement on the forms). Some additional problems plague the proposed forms, as discussed below.

A. The "New Serial Number Application (BOF 1008)" Form

This Form conflicts with Fifth Amendment protections because it compels the applicant to testify as to whom he or she acquired the firearm from. "The Fifth Amendment states that '[n]o person ... shall be compelled . . . to be a witness against himself. To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.'"[106]

By requiring a registrant to disclose, under penalty of perjury, where he or she obtained a firearm, if it was transferred to the registrant without going through a licensed firearm dealer (and without an exception to that requirement), the form is essentially forcing the applicant to admit failure to comply with the applicable provisions of the Penal Code requiring that private party transfers be conducted through a licensed dealer. Because this non-compliance is a crime, this means that the "New Serial Number Application (BOF 1008)" Form would be compelling the applicant to be a witness against himself, contrary to the provision of the Fifth Amendment.[107] This is improper, and the "New Serial Number Application (BOF 1008)" Form should be revised so that it no longer violates Fifth Amendment rights.

B. The CFARS Form

For the same reasons, the CFARS Form likewise conflicts with the Fifth Amendment because it compels the applicant to testify under penalty of perjury as to whom he or she acquired the firearm from, and from where the firearm was acquired (see Page 10 of DOJ's CFARS Form).

Secondly, page 8 of the CFARS Form contradicts Penal Code sections 30680 and 30900 when it states that "[s]hotguns should be semi automatic or have a revolving cylinder" in order to be registered under Penal Code section 30900. As mentioned in Section III.A.1, *supra*, regulation of shotguns by DOJ exceeds DOJ's APA exemption because the new "assault weapon" definition does not contemplate

[106] *People v. Kurtenbach*, 204 Cal.App.4th 1264, 1283-84 (2012) (internal citation and quotation marks omitted).

[107] *See* U.S.C.A.Const. Amend. 5; *see, e.g., Russell v. United States*, 306 F.2d 402 (9th Cir. 1962).

shotguns at all. No shotguns—regardless of whether or how they meet the "assault weapon" definition under Penal Code section 30515—must be registered as an "assault weapon" at this time. As such, the CFARS Form states the law erroneously and must be fixed.

Even more inexplicable is that none of DOJ's proposed regulations even hint that a shotgun with a revolving cylinder can be registered, likely because DOJ knows they cannot legally be registered. It is unclear why DOJ is now saying on the CFARS Form that such a shotgun can be registered. This invites people to unwittingly admit to DOJ that they possess an illegal firearm while believing that it is not a problem. As a result, the phrase "[s]hotguns should be semi automatic or have a revolving cylinder" should be stricken from page 8 of the CFARS Form. Similarly, DOJ should take out any option for "revolving cylinder" in the "Magazine" pull-down menu located on page 10 of the Form.

Thirdly, DOJ expands "assault weapon" law when it states on page 8 of the CFARS Form that it "will not process registrations for firearms that are currently in law enforcement custody. You must be in lawful possession of the firearm." This is in direct contrast to the provisions of Penal Code section 30680, which indicate that the only factor of "lawful possession" that can be considered when determining registrability is whether "[t]he person lawfully possessed that assault weapon prior to January 1, 2017."[108] Thus, DOJ is statutorily obligated to register all firearms meeting the other two requirements of Penal Code section 30680,[109] if those firearms were lawfully possessed prior to January 1, 2017. Whether those firearms are currently in the possession of law enforcement is completely irrelevant to registration. The sole test for "lawful possession" is whether they were in lawful possession *before* January 1, 2017, not whether they are in lawful possession after January 1, 2017. Thus, DOJ needs to strike the phrase "[t]he Department will not process registrations for firearms that are currently in law enforcement custody. You must be in lawful possession of the firearm."

Fourthly, as explained in Section III.A, *supra*, DOJ's refusal to register firearms due to their lack of serial numbers is in conflict with existing law. Consequently, DOJ should remove from page 8 of the CFARS Form the entire bulleted paragraph about serial numbers, including the assertion that "[t]he Assault Weapon Registration cannot be submitted until such time the Department issued serial number has been engraved and permanently affixed to the firearm."

Fifthly, DOJ's requirements on the CFARS Form for joint registration go against both existing law and common sense. Based on the way that DOJ drafted the CFARS Form and the example it constructed (see page 9 where both registrants register the firearm), it appears that both parties to a joint registration must fill out and complete the registration form for the joint registration to work. This runs counter to the fact that "joint" means "common to two or more" and "sharing with another[.]"[110] Based on the ordinary and contemporary meaning of "joint" and how it is used in other legal applications, most people will assume that only one registration form needs to be filled out for both people. And there appears to be no reason why DOJ is requiring two completed forms. The fact that DOJ is

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[108] Pen. Code, § 30680(b).

[109] The other two requirements are that "[p]rior to January 1, 2017, the person was eligible to register that assault weapon pursuant to subdivision (b) of Section 30900" and that "[t]he person registers the assault weapon by January 1, 2018, in accordance with subdivision (b) of Section 30900." Pen. Code, § 30680(a), (c).

[110] MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/joint (last visited June 1, 2017).

misconstruing the term "joint" and requiring two registration forms will unnecessarily cause many joint registrants to get denied based on a needless procedural hindrance.

DOJ should only require one completed registration form for both parties to a joint registration. In addition, it is unknown why DOJ is requiring joint registrants to provide residency information when DOJ does not require this from single registrants. Certainly, there is no existing law authorizing DOJ to do this. And, it is also unclear by DOJ's language on the CFARS Form how many times the registration fee should be paid if there are joint registrants. If it is truly "joint" registration of a single firearm, then they should only pay once. It seems like this is the direction DOJ is leaning toward as well, but it is currently unclear. Therefore, DOJ should promptly remedy these critical defects pertaining to joint registration, and the CFARS Form should not be allowed to be published in its current state.

Furthermore, DOJ should amend the CFARS Form on page 10 so that the "Category" pull-down menu does not allow any option but "semiautomatic." Otherwise, the CFARS Form would conflict with Penal Code sections 30680 and 30515, subdivisions (a)(1) and (a)(4), which collectively state that only semiautomatic rifles and pistols can be registered now as "assault weapons."

Also on page 10, DOJ should either ensure that it has every "make" and "model" listed in the corresponding pull-down menus or include an option for "other." Otherwise, DOJ would be effectively barring individuals from registering firearms that they have a right to register simply because they cannot find an appropriate option in the pull-down menus.

Moreover, page 10 on the CFARS Form seems to show that DOJ forgot entirely that certain pistols can be registered as "assault weapons." For example, the "Additional Firearm Characteristics" boxes that the DOJ allows registrants to check only apply to rifles, as delineated in Penal Code section 30515, subdivision (a)(1). But the "additional firearm characteristics" for pistols as delineated in Penal Code section 30515, subdivision (a)(4) appear to be missing.

Lastly, DOJ should allow registrants to provide the date *to the best of their recollection* for the fields on the CFARS Form requiring them to provide information about the exact date (to the day) that they acquired the firearm, the source from whom they acquired the firearm, and the location from where they acquired the firearm. The majority of firearm owners honestly do not know these data points for their firearms because they are not required to know them or keep track of them. It would be inequitable and impractical to force them to provide a definitive answer under "penalty of perjury" (see page 16). By requiring this information, DOJ is either forcing individuals to commit perjury or effectively preventing the registration of newly-defined "assault weapons" by owners who forgot all the small details of their firearm's acquisition (and which California law does not require them to remember). Because the Penal Code does not make "memory of firearm acquisition details" a prerequisite to "assault weapon" registration under Penal Code section 30900, the DOJ's requirements are legally improper. Therefore, DOJ should revise the CFARS Form so that it allows registrants to provide information to the best of their recollection. This would also alleviate the perjury concerns currently plaguing the CFARS Form.

VI. CONCLUSION

DOJ's proposed regulations and forms for "Bullet-Button Assault Weapons" (*i.e.*, OAL Regulatory Action Number 2017-0512-02FP) are unlawful. And they are riddled with other flaws that

make their administration, interpretation, and enforcement highly problematic. Allowing these regulations to be implemented would cause irreparable harm to countless thousands of Californians and subvert the basic minimum procedural requirements that the APA was enacted to protect. Thus, DOJ should not be allowed to implement its proposed regulations for "Bullet-Button Assault Weapons" as they are currently constructed. We look forward to the OAL and DOJ's cooperation and hope litigation will not be necessary to address our clients' concerns. If you have any questions, please do not hesitate to contact us.

Sincerely,
Michel & Associates, P.C.

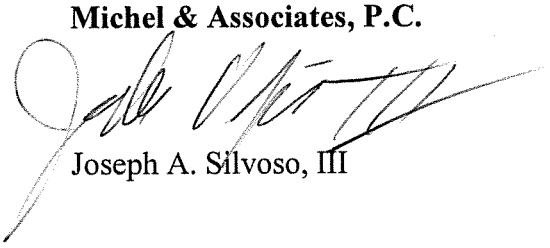

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EXHIBIT 4

State of California
Office of Administrative Law

In re:
Department of Justice

Regulatory Action:

Title 11, California Code of Regulations

Adopt sections: **5470, 5471, 5472, 5474, 5474.1, 5474.2, 5475, 5476, 5477, 5478**
Amend sections: **5469, 5473**
Repeal sections:

DENIAL OF REQUEST TO FILE AND PUBLISH REGULATIONS

Government Code Section 11343.8

OAL Matter Number: 2017-0512-02

OAL Matter Type: File and Print Only (FP)

On May 12, 2017, pursuant to Government Code section 11343.8, the California Department of Justice (Department) submitted to the Office of Administrative Law (OAL) its request for OAL to file with the Secretary of State and for OAL to publish in the California Code of Regulations the regulations listed above, which concern requirements and procedures for the registration of certain assault weapons.

On June 26, 2017, OAL denied the Department's request for the filing and publishing of these regulations as described above.

Date: June 26, 2017

Dale P. Mentink
Senior Attorney

For: Debra M. Cornez
Director

Original: Xavier Becerra
Copy: Jacqueline Dosch

EXHIBIT 5

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January 8, 2018

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Division of Law Enforcement
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Sacramento, CA 95816-0487
awdefinitions@doj.ca.gov
VIA EMAIL

RE: Written Comment for the California Department of Justice's Proposed Regulation on "Assault Weapon" Definitions

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 the proposed regulation titled "Assault Weapon Definitions" (OAL Notice File Number Z-2017-111401) that the California Department of Justice ("DOJ") submitted to the Office of Administrative Law ("OAL").

The regulation at issue, which DOJ intends to add to Title 11, Division 5 of the California Code of Regulations ("C.C.R."), is proposed 11 C.C.R. section 5460. Proposed section 5460 seeks to apply all forty-four definitions from 11 C.C.R. section 5471 to Penal Code section 30515.

With proposed section 5460, DOJ attempts to do exactly what our *Villanueva v. Becerra* lawsuit[1] anticipated that it would do and tries to prevent it from doing—namely, renege on its assertion that the section 5471 definitions only apply for the narrow purpose of registering "assault weapons" affected by Assembly Bill ("AB") 1135 and Senate Bill ("SB") 880. As shown below, DOJ obtained

[1] *See Villanueva v. Becerra* (Fresno Sup. Ct. Sept. 7, 2017), Case No. 17CECG03093.

OAL approval of section 5471 by asserting that the definitions only applied to "assault weapon" registration and, thus, qualified for the exemption to the California Administrative Procedures Act ("APA") under Penal Code section 30900(b)(5). The plaintiffs in *Villanueva* saw through this facade, and their suspicions were confirmed by DOJ's filing of proposed 11 C.C.R. section 5460. If section 5460 is codified, the forty-four definitions from section 5471 would broadly apply to the identification of all "assault weapons" for purposes of enforcing every single California "assault weapon" restriction under the sun, not just for "assault weapon" registration as DOJ claimed.

Yet, these forty-four definitions were never previously adopted in compliance with the APA for such broad law enforcement purposes. Therefore, proposed section 5460, based on DOJ's past actions relating to "assault weapon" regulations, is a blatant effort to bypass the APA and extend the reach and effect of definitions previously submitted under an APA exemption. Because many of the definitions in section 5471 do not qualify for the APA exemption under Penal Code section 30900(b)(5), improperly expand or curtail statutes, or violate the APA standards for review under Government Code section 11349.1(a) (because they have never been scrutinized under these standards), they cannot be applied to Penal Code section 30515 by way of proposed section 5460. Setting all this aside, as shown below, there are many other problems that plague proposed section 5460 and prevent its adoption.

I. "ASSAULT WEAPON" LAW BACKGROUND

A. DOJ's Original "Assault Weapon" Regulations Implemented in 2000, Which Included Definitions of "Assault Weapon" Terms

SB 23 (1999) required DOJ to adopt regulations to carry out the purpose and intent of former Penal Code section 12276.1 (now section 30515) and to allow Californians to register the firearms affected by SB 23. In 2000, DOJ promulgated the original "assault weapon" regulations in accordance with the standard rulemaking process of the APA. DOJ defined these 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."[2] DOJ did not make any other definitions in response to the "assault weapon" law in 2000, and it is safe to say that thousands to tens of thousands of people registered "assault weapons" based on the definitions that DOJ implemented following APA procedure more than sixteen years ago. Whether these definitions were needed, though, is debatable, as even DOJ decided to eliminate them in 2017 when it implemented its "Bullet-Button Assault Weapon" registration regulations.

B. Current Definition of "Assault Weapon" and the New Registration Process

AB 1135 and SB 880 amended the definition of a features-based "assault weapon" stated in Penal Code section 30515 by removing the requirement that the firearm have the "capacity to accept a detachable magazine" and replacing that phrase with the bold and italicized phrase that follows:

> (a) Notwithstanding Section 30510, "assault weapon" also means any of the following:
> (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.

[2] Cal. Code Regs. tit. 11, § 5469 (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.***[3]

We emphasize subdivisions (a)(1) and (a)(4), and additionally highlight subdivision (b), to underscore the only changes made in the definition of "assault weapon" in 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" under Penal Code section 30515. The Legislature did not change or make additions to any of

[3] Pen. Code, § 30515 (emphasis added).

the section's other terms or phrases. *All* of the other features or characteristics that cause a firearm to meet the definition of an "assault weapon" are unchanged.

The Legislature also amended Penal Code section 30900 to create a registration process for the firearms meeting the new definition of "assault weapon" so that existing owners could lawfully continue to possess them. The Legislature added a new subdivision (b) for this purpose, and paragraph (5) of subdivision (b) states:

> ***[DOJ] shall adopt regulations for the purpose of implementing this subdivision [b]. 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).[4]

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. So, DOJ's APA exemption applied only to regulations that solely concern the *registration procedures*.

C. DOJ's "Bullet-Button Assault Weapon" Registration Regulations, Which Include the 44 Definitions at Issue, and the Lawsuit Filed in Response to These Regulations

On December 30, 2016, DOJ submitted proposed "Bullet-Button Assault Weapon" regulations to the OAL, claiming that the regulations were exempt from the APA pursuant to Penal Code section 30900(b)(5).[5] Many stakeholders, including our clients, promptly responded with written oppositions to these proposed regulations. The proposed regulations went far beyond what was needed to register the new "bullet button assault weapons" and redefined many key terms used to define firearms as "assault weapons."

The only authority that DOJ cited when proposing 11 C.C.R. section 5471 (*i.e.,* the regulation relating to "assault weapon" definitions) was Penal Code section 30900. In addition, DOJ prefaced the definitions in section 5471 with the statement "*[f]or purposes of Penal Code section 30515 and this Chapter*[6] the following definitions shall apply[.]"[7] Then, on February 10, 2017, DOJ withdrew the regulations. It is unknown at this time why DOJ withdrew the regulations. It could be due to an anticipated rejection, like what DOJ did with the emergency "large-capacity magazine" regulations from late December 2016.[8]

On May 12, 2017, DOJ tried again to submit proposed regulations for "Bullet Button Assault Weapons" to the OAL. These proposed regulations were virtually identical to those that DOJ previously submitted to the OAL on December 30, 2016, and DOJ again claimed that Penal Code section 30900(b)(5) applied to exempt all of its proposed regulations from the APA.

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[4] Pen. Code, § 30900(b)(5) (emphasis added).
[5] *See* OAL Regulatory Action Number 2016-1229-01FP (submitted to the OAL as "File and Print" only).
[6] *I.e.*, Chapter 39 of Title 11, Division 5 of the C.C.R., which contains *all* the regulations for "assault weapons" and "large-capacity magazines."
[7] OAL Regulatory Action Number 2016-1229-01FP (emphasis added).
[8] *See* OAL File Nos. 2016-1223-02E Parts 1a and 1b and 2016-1223-02 Part 2.

But, one difference between the December 2016 regulations and the May 2017 regulations is the preface to the definitions in proposed section 5471. While the preface for the December 2016 regulations stated that the section 5471 definitions shall apply "[f]or purposes of Penal Code section 30515 and this [entire] Chapter[,]" the preface for the May 2017 regulations stated: The following definitions apply to terms used in the identification of assault weapons pursuant to Penal Code section 30515 *and for purposes of Articles 2 and 3 of this Chapter* [*i.e.*, only the sections of the Chapter pertaining to "assault weapon" registration][.]"[9] Therefore, sometime between December 2016 and May 2017, DOJ realized that the APA prevented it from applying the forty-four definitions from section 5471 to all regulations restricting "assault weapons." Accordingly, DOJ scaled down the language of the preface.

In addition, DOJ also submitted a letter to the OAL on May 4, 2017 wherein DOJ advocated for the approval of its proposed regulations, stating, *inter alia*, that its definitions in 11 C.C.R. section 5471 "will be used for the identification of assault weapons as defined in Penal Code section 30515 for all purposes under the AWCA [the Assault Weapons Control Act, Penal Code sections 30500, et seq.]."[10] Several stakeholders saw the problem with DOJ's arguments, particularly the APA violation advocated by DOJ, and they sent in written oppositions once again. On June 26, 2017, the OAL rejected DOJ's proposed regulations, forcing DOJ to go back to the drawing board.

DOJ made a third attempt to submit its proposed "Bullet-Button Assault Weapon" regulations to the OAL on July 19, 2017.[11] The proposed regulations were substantively unchanged from the previous two versions, and DOJ again cited Penal Code section 30900(b)(5) as authority for its claim that the regulations were exempt from the APA.

And sometime between May 2017 and July 2017, DOJ realized that the APA prevented it from broadly applying the forty-four definitions from section 5471 to "*the identification of assault weapons pursuant to Penal Code section 30515*" (the exact language used for both the preface to the definitions in May 2017 and for proposed section 5460 now). Hence, for its July 2017 regulations, DOJ took out that language and changed the preface for the forty-four definitions so that it stated instead: "*[f]or purposes of Penal Code section 30900* and Articles 2 and 3 of this Chapter the following definitions shall apply[.]"[12] This change reflects DOJ's realization that the APA prevented it from broadly applying the forty-four definitions of terms in section 5471 to "the identification of assault weapons pursuant to Penal Code section 30515."[13] This change is the result of DOJ's attempt to narrow the scope of the application of the definitions.

The OAL approved DOJ's third attempt at "Bullet-Button Assault Weapon" regulations on July 31, 2017, and the regulations became effective immediately. Included in this set of "Bullet-Button Assault Weapon" regulations are the forty-four definitions found in 11 C.C.R. section 5471. In response, on September 7, 2017, our office filed a lawsuit, titled *Villanueva v. Becerra*, against DOJ on behalf of CRPA.[14] Among other reasons, this lawsuit was filed because the plaintiffs (1) saw through

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[9] OAL Regulatory Action Number 2017-0512-02FP (emphasis added).
[10] DOJ's May 4, 2017 letter addressed to OAL Director Debra M. Cornez, page 4.
[11] OAL Regulatory Action Number 2017-0719-04.
[12] OAL Regulatory Action Number 2017-0719-04 (emphasis added).
[13] Cal. Code Regs. tit. 11, § 5469 (proposed).
[14] *See Villanueva v. Becerra* (Fresno Sup. Ct. Sept. 7, 2017) Case No. 17CECG03093.

DOJ's claim to the OAL that the section 5471 definitions would only apply for the narrow purpose of "assault weapon" registration, (2) anticipated that DOJ would necessarily apply the section 5471 definitions to the identification of all "assault weapons" pursuant to Penal Code section 30515, and (3) sought to prevent DOJ from doing so on the basis that this violates the APA and is contrary to California law.

Proposed 11 C.C.R. section 5460 exemplifies DOJ's plan to flip-flop on the position it took previously to get its regulations approved, DOJ's effort to shoehorn its "Bullet-Button Assault Weapon" registration regulations into California's "assault weapon" law in general, and DOJ's exploitation of a loophole provided by its limited APA exemption in section 30900(b)(5) allowing for regulations solely for the purposes of registering "assault weapons."

On November 22, 2017, DOJ circulated its Notice Publication/Regulations Submission for the proposed "Assault Weapon Definitions" at issue (OAL Notice File Number Z-2017-111401). This proposed regulation seeks to apply the definitions from DOJ's regulations specific to "Bullet-Button Assault Weapon" registration to the identification of "assault weapons" under Penal Code section 30515 generally.

Now, in a seemingly nefarious attempt to circumvent the APA requirements, DOJ endeavors to expand the scope of the definitions it originally claimed were just for "registration." The definitions in question were not needed or required for the registration process, and if the definitions are to be used to define "assault weapons" in general, they must go through the APA process themselves and not simply be imported from a regulation that did not go through the APA.

II. THE PROCESS OF REVIEWING REGULATIONS AND HOW THE NECESSITY, AUTHORITY, CLARITY, CONSISTENCY, REFERENCE, AND NONDUPLICATION STANDARDS OF GOVERNMENT CODE § 11349.1(a) APPLY TO ALL 44 DEFINITIONS AT ISSUE IN 11 C.C.R. § 5471

A. Reviewing Regulations

Any regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage.[15] So, in general, the adoption of regulations by a state agency must satisfy requirements and procedures established by the APA. [16] Any regulation that fails to comply with APA requirements can be judicially declared invalid.[17]

B. Application of the Government Code § 11349.1(a) Standards to the 44 Definitions at Issue

"It is important to note that material proposed to be incorporated by reference into a regulation shall be reviewed *in accordance with the same procedures and standards for a regulation published in*

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[15] Gov. Code, § 11346.
[16] *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.
[17] *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).

the California Code of Regulations. (1 Cal. Code Regs., sec. 20, subd. (b).)"[18] Therefore, the forty-four definitions in 11 C.C.R. section 5471, which are incorporated by reference in DOJ's proposed section 5460, "must comply with all APA standards."[19]

This also makes practical sense because the forty-four definitions from section 5471 were never previously subjected to the APA standards in Government Code section 11349.1, due to DOJ's claim that they qualified for an APA exemption (see discussion in Section I(C) of this letter above). DOJ repeatedly attempts to classify the regulations as "promulgated" in its "Notice of Proposed Rulemaking."[20] But that phrasing is misleading, as the forty-four definitions were never subjected to APA review and public comment. Rather, they were ramrodded through the claimed APA exemption for "assault weapon" registration regulations provided by Penal Code section 30900(b). Correspondingly, they were never subjected to the public scrutiny that comes with adherence to the APA rulemaking process. And as discussed below (and in previous letters to DOJ and OAL), problems remain with the definitions. To allow DOJ to sidestep the APA again with these definitions would set a dangerous and unlawful precedent that would encourage state agencies to avoid APA scrutiny by first promulgating more regulations than is necessary under an APA exemption and then conclusorily applying those regulations to a whole other area of law untouched by the original APA exemption.

Proposed section 5460 states that all forty-four definitions in 11 C.C.R. section 5471 shall apply to Penal Code section 30515 separately. Consequently, every definition must be separately considered, even if proposed section 5460 does not expressly write out the wording for each definition within the text of proposed section 5460.

Any proposed "assault weapon" regulation unrelated to the registration of a newly-classified "assault weapon" is ***not*** exempt from the APA. And proposed section 5460, and its forty-four separate instances of applications, certainly is now not confined to the *registration* of a newly-classified "assault weapon." These definitions extend beyond the registration of "bullet-buttoned assault weapons." They apply to all of the firearms meeting the definition of "assault weapon" in Penal Code section 30515, not just the two subdivisions changed by the Legislature. Accordingly, those forty-four definitions, as applied to Penal Code section 30515, are not exempt from the APA, as the OAL recognized in rejecting these definitions when DOJ applied them to Penal Code section 30515.[21]

Allowing DOJ to yoke the exemption from Penal Code section 30900(b) for regulations relating to registration to proposed section 5460 would reward DOJ and other state agencies for disingenuous efforts to sidestep the APA and to strategically make regulations in response to lawsuits like *Villanueva v. Becerra*. Therefore, as shown below, this letter will analyze how the forty-four definitions from 11 C.C.R. section 5471 and/or their application to Penal Code section 30515 fail to satisfy the APA's Authority, Consistency, Necessity, Clarity, and Reference standards and should thus be rejected.

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[18] *In re: Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board,* OAL Determination Decision of Disapproval of Regulatory Action, OAL Matter No. 2017-0104-02 (Feb. 22, 2017) (emphasis added).
[19] *See In re: Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board,* OAL Determination Decision of Disapproval of Regulatory Action, OAL Matter No. 2017-0104-02 (Feb. 22, 2017).
[20] *See* OAL Notice File Number Z-2017-111401, Notice of Proposed Rulemaking, pages 2 and 3.
[21] *See generally* STATE OF CALIFORNIA OFFICE OF ADMINISTRATIVE LAW, *Denial of Request to File and Publish Regulations, OAL Matter Number 2017-0515-02* (June 26, 2017), available at https://shared.nrapvf.org/sharedmedia/1509706/2017-0512-02fp-denial.pdf (last visited Jan. 8, 2018).

C. Proposed Section 5460 Fails to Satisfy the APA's Authority Standard

1. The Law on the Authority Standard

"The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch."[22] To serve this purpose, courts "have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[23] 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.[24]

To ensure promulgation of legally valid regulations, and to ensure that agencies act within the scope of their rulemaking authority, Government Code section 11349.1 tasks the OAL with reviewing proposed regulations for compliance with the Authority standard of the APA. Government Code section 11349(b) defines "Authority" as meaning "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Section 14 of title 1 of the C.C.R. provides in pertinent part:

> (a) Sources of "Authority." "Authority" shall be presumed to exist only if an agency cites in its "authority" note proposed for printing in the California Code of Regulations:
> (1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or
> (2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.
> (b) [. . .]
> (c) Review of "Notes." In reviewing "notes," OAL shall use the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.
> (1) For purposes of this analysis, an agency's interpretation of its regulatory power, as indicated by the proposed citations to "authority" or "reference" or any supporting documents contained in the rulemaking record, shall be conclusive unless:
> (A) *the agency's interpretation alters, amends or enlarges the scope of the power conferred upon it*; or
> (B) *a public comment challenges the agency's "authority"* . . .[25]

As discussed immediately below, DOJ's proposed interpretation alters, amends and/or enlarges the scope of power conferred upon DOJ. Additionally, this public comment is submitted to challenge

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[22] *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297.
[23] *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 493 (internal quotation marks and citation omitted).
[24] *California Emp. Com. v. Kovacevich* (1946) 27 Cal.2d 546.
[25] Cal. Code Regs., tit. 1, § 14 (emphasis added).

DOJ's rulemaking authority. Therefore, DOJ's interpretation of its authority is not conclusive and proposed section 5460 cannot be approved for publication in the C.C.R.[26]

2. *Neither Penal Code § 30520(c), Nor Any Other Statute, Gives DOJ the Authority to Apply 11 C.C.R. § 5471(a) to Penal Code § 30515, as Stated in Proposed Section 5460, Because that Application Would Alter Penal Code § 30515 in a Way that Contradicts the Purpose and the Intent of the Legislature*

Section 5471(a) states that "'[a]bility to accept a detachable magazine' means with respect to a semiautomatic *shotgun*, it does not have a fixed magazine."[27] Applying this definition to Penal Code section 30515(a)(7)—which currently reads "[a] semiautomatic shotgun that has the ability to accept a detachable magazine—would result in the phrase "a semiautomatic shotgun that does not have a fixed magazine." Consequently, "a semiautomatic shotgun that does not have a fixed magazine" would now be considered an "assault weapon," whereas it wasn't previously, if DOJ were allowed to implement proposed section 5460. In other words, DOJ is attempting to singlehandedly shoehorn semiautomatic shotguns with "bullet buttons" into the definition of "assault weapons." Clearly, this is against the Legislature's intent and a usurpation of legislative power.

As discussed above, AB 1135 and SB 880 only changed the definitions of "assault weapon" for certain rifles and pistols in Penal Code section 30515, based on their magazine function, in order to close the "bullet-button" loophole for *rifles* and *pistols*.[28] Nothing in the Code changed for shotguns, including for "[a] semiautomatic shotgun that has the ability to accept a detachable magazine."[29] The Legislature intentionally left shotguns untouched when passing AB 1135 and SB 880 for its purpose of amending Penal Code section 30515. Specifically, AB 1135 and SB 880 were meant to:

> revise th[e] definition of "assault weapon" to mean a semiautomatic centerfire *rifle*, or a semiautomatic *pistol* that does not have a fixed magazine but has any one of those specified attributes. The bill[s] [were also meant to] define "fixed magazine" to mean 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.[30]

The Legislature is presumed to have *intentionally* revised the definition of "assault weapon" for pistols and rifles while leaving the definition of "assault weapon" for shotguns unchanged: "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.'"[31]

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[26] *See In re: Board of Equalization*, OAL Determination Decision of Disapproval of Regulatory Action, OAL Matter No. 2016-0104-01 (Feb. 24, 2016).
[27] Cal. Code Regs. tit. 11, § 5471(a) (emphasis added).
[28] Pen. Code, § 30510(a)(1), (a)(4), and (b).
[29] Pen. Code, § 30515(a)(7).
[30] AB 1135, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1135 (last visited June 13, 2017) (emphasis added); SB 880, 2015-2016 Leg., Reg. Sess. (Cal. 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB880 (last visited June 13, 2017) (emphasis added).
[31] *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1113 (citing *Russello v. United States* (1983) 464 U.S. 16, 23).

Hence, the Legislature intentionally and purposely chose *not* to replace the phrase "that has the capacity to accept a detachable magazine" with the phrase "that does not have a fixed magazine" for semiautomatic shotguns in Penal Code section 30515 (whereas it chose to make such a replacement for semiautomatic pistols and rifles in the same statute). Even if DOJ thinks that the Legislature acted in error in not applying such a replacement to semiautomatic shotguns, or that the Legislature committed an oversight,[32] DOJ "may not, under the guise of a regulation, substitute its judgment for that of the Legislature"[33] and compel that to be done that lies outside the scope of the statute.[34] Yet, with proposed section 5460, that is exactly what DOJ is seeking to do because section 5460 would effectively replace the phrase "that has the capacity to accept a detachable magazine" with the phrase "that does not have a fixed magazine" when it comes to semiautomatic shotguns. DOJ seeks to expand its authority and extend the definition of "assault weapon" to cover a wider range of firearms than those contemplated by the plain language of the Penal Code.

Proposed section 5460 conspicuously runs counter to the intent and purpose of the Legislature in drafting and amending Penal Code section 30515. Accordingly, it is absurd to even suggest that proposed section 5460 is "necessary or proper"[35] to carry out the legislative purposes and intent behind the drafting and amendment of Penal Code section 30515. As such, Penal Code section 30520(c) does *not* give DOJ the authority to promulgate proposed section 5460 (even though DOJ claims it does), and well-established case law shows that no other possible statute can give DOJ the authority it claims to have. This is because proposed section 5460 "alters, amends or enlarges the scope of the power conferred upon DOJ,"[36] and because it alters Penal Code section 30515 in a way that enlarges or impairs its scope and makes it contradict with what the Legislature had intended. [37] Hence, proposed section 5460 "must be declared void."[38]

D. Proposed Section 5460 Fails to Satisfy the APA's Consistency Standard

1. The Law on the Consistency Standard

Government Code section 11349.1(a)(4) requires the OAL to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the Consistency standard. Government Code section 11349(d) defines "consistency" to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." If an agency's proposed regulation "is not in harmony with, or in conflict with, existing law, ***the***

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[32] *Whitcomb Hotel v. California Employment Commission* (1944) 24 Cal.2d 753, 759 (holding that "[e]ven if the failure . . . were an oversight on the part of the Legislature, the [state agency] would have no power to remedy the omission. The power given it to adopt rules and regulations . . . is not a grant of legislative power[.]"

[33] *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 397 (internal citation and quotation marks omitted).

[34] *Knudsen Creamery Co. of Cal. v. Brock* (1951) 37 Cal.2d 485, 493.

[35] Pen. Code, § 30520(c).

[36] *See* Cal. Code Regs., tit. 1, § 14.

[37] *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305–06, *review denied (May 13, 2015)* (emphasis added); *Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 390–91.

[38] *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436 (internal quotation marks and citations omitted) (holding that "[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.")[38]

OAL will disapprove of the regulation and prevent it from being adopted."[39] And California courts hold that "no regulation adopted is valid or effective unless consistent and not in conflict with [existing] statute[.]"[40]

2. The Application of 11 C.C.R. § 5471(a) to Penal Code § 30515, as Stated in Proposed 11 C.C.R. § 5460, Is in Conflict with Existing Law

Proposed section 5460 cannot be adopted because it fails to comply with the consistency standard of the APA. As explained in Section II(C)(2) of this letter above, the application of 11 C.C.R. section 5471(a) to Penal Code section 30515 is in conflict with existing law.

Under existing law, a semiautomatic shotgun with an attached "bullet-button" is not considered an "assault weapon" because it does not have the ability to accept a detachable magazine (*i.e.*, the firearm in and of itself cannot accept a detachable magazine because an external tool needs to be inserted and manipulated before a person can remove the magazine). However, proposed section 5460, though the application of 11 C.C.R. section 5471(a), seeks to distort the language of Penal Code section 30515(a)(7) so that a semiautomatic shotgun with an attached "bullet-button" *will* be considered an "assault weapon." As discussed in Section II(C)(2) above, this is contrary to the intent of the Legislature.

Undoubtedly, proposed section 5460 is in conflict with or contradictory to, an existing statute. It is inconsistent with controlling law and compels that to be done that lies outside the scope of Penal Code section 30515. As a result, it violates the APA's Consistency standard and cannot be adopted into the C.C.R.

E. Proposed Section 5460 Fails to Satisfy the APA's Necessity Standard

1. The Law on the Necessity Standard

Government Code section 11349.1(a)(1) requires the OAL to review all regulations for compliance with the Necessity standard. Government Code section 11349(a) defines "necessity" as follows:

> "Necessity" means the record of the rulemaking proceeding demonstrates *by substantial evidence* the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, *evidence includes, but is not limited to, facts, studies, and expert opinion.*[41]

To further explain the meaning of "substantial evidence" in the context of the Necessity standard, 1 C.C.R. section 10(b) provides:

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[39] *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) (emphasis added).
[40] *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321.
[41] Gov. Code, § 11349(a) (emphasis added).

> (b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
>
> (1) A statement of the specific purpose of ***each*** adoption, amendment, or repeal[42]

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons.[43] The Initial Statement of Reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed; or, simply restated, the Initial Statement of Reasons must show "why" a regulation is needed and "how" this regulation fills that need.[44]

2. *DOJ Fails to Meet the Necessity Standard Because Its Initial Statement of Reasons Fails to Describe the Need for Proposed Section 5460, Much Less Demonstrate by "Substantial Evidence" Why Proposed Section 5460 Is Needed*

For one, DOJ needs to show how the currently-existing definitions within Penal Code section 30515 itself are insufficient to identify "assault weapons" and, thus, why the definitions from 11 C.C.R. section 5471 are necessary. DOJ currently makes no attempt to do so. In making this required Necessity showing, DOJ must also explain why the forty-four definitions are needed *now*. In other words, DOJ must factor in the consideration that the terms used to define "assault weapon" have hardly changed since 2000. It bears repeating that ***the Legislature in 2016 did not change any terms relating to the definition of "assault weapon" aside from changing the phrase "capacity to accept a detachable magazine" to "does not have a fixed magazine" for certain rifles and pistols***. So, DOJ must show what provisions in the texts of Penal Code sections 30515, 30680, or 30900—or the texts of AB 1135 and SB 880—suggest that DOJ needs to make the additional definitions that are being objected to by this letter.

At the very least, DOJ must show via substantial evidence how the new change in law generated by AB 1135 and SB 880 warrants the proposed definitions and why California needs them *now*. Or, if DOJ is claiming that the forty-four definitions are so necessary regardless of the new change in law in 2017, DOJ must show why it did not propose these new definitions in the last sixteen years and how this was detrimental to Californians.

Further, DOJ's Initial Statement of Reasons fails to demonstrate by "substantial evidence" (*i.e.*, facts, studies, and expert opinions) why or how DOJ needs to expand or clarify the definitions of specific terms like "flash suppressor," "pistol grip," "threaded barrels," "shotguns," etc. in order to facilitate the so-called identification of "assault weapons." Significantly, DOJ needs to make "[a] statement of the specific purpose of ***each*** adoption,"[45] which means that DOJ needs to specify why each of the forty-four applications of 11 C.C.R. section 5471 to Penal Code section 30515 is necessary (see also the discussion in Section II(B) of this letter). DOJ completely shirks this regulatory duty under

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[42] Cal. Code Regs., tit. 1, § 10(b) (emphasis added).
[43] Gov. Code, § 11346.2(b)
[44] Gov. Code, § 11346.2(b)(1).
[45] Cal. Code Regs., tit. 1, § 10(b) (emphasis added).

the APA. The evidentiary burden is on DOJ to show why *each* application of section 5471 to Penal Code section 30515 is necessary; it is not the burden of the public to point out why such applications are not necessary. Therefore, DOJ fails to meet the Necessity standard of the APA because its Initial Statement of Reasons does not "include an explanation of the need and the rationale for each proposed . . . change";[46] rather, it only "contains broad, general statements of necessity, providing the reader only with background information and an overview of the problem the action is intended to address" as opposed to information that allows the reader to comment knowledgably.[47]

Even though it is not the public's burden to point out why certain changes generated by proposed section 5460 are not necessary, this letter will still analyze a few examples (discussed immediately below) to illustrate the lack of necessity at issue.

a. The Application of 11 C.C.R. § 5471(d)—Which States DOJ's New Definition for "Barrel Length" —to Penal Code Section 30515 Is Not Necessary

A simple reading of Penal Code section 30515 shows that barrel length is irrelevant to the newly-established category of "assault weapons," and DOJ provides no indication, much less "substantial evidence," that the general public or law enforcement has been confused in the last few decades when it came to how barrel length is defined. The new category of "assault weapon" is based on magazine function only and has nothing to do with barrel length. For example, a semiautomatic, centerfire rifle that does not have a fixed magazine and a "pistol grip" is still an "assault weapon" under the new law, regardless of whether it has a 20-inch barrel or a 25-inch barrel. Thus, there is no need for DOJ to define "barrel length" now.

Nevertheless, DOJ's proposed section 5460, by way of 11 C.C.R. section 5471(d), purports to define "barrel length." So, what is DOJ's motivation for doing this now? 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 (*i.e.*, not "assault weapons"). California law, like federal law, restricts the possession, sale, manufacture, importation, etc. of "short-barreled" rifles and shotguns.[48] Rifles with barrels of 16 inches in length or shorter[49] and shotguns with barrels of 18 inches in length or shorter[50] are considered "short-barreled" and illegal. Currently, however, California has no statute or regulation specifying how to measure a barrel's length for purposes of these restrictions. Recognizing the need to specify how to measure barrel length, DOJ is now attempting to fast-track regulations making such clarification by hiding them among "assault weapon" regulations.

It is rather disingenuous for DOJ to hide this motive in its Initial Statement of Reasons. DOJ did not need to define "barrel length" in this way during its previous registration periods for "assault weapons." It has registered hundreds of thousands of other firearms without having a definition for barrel length. Why does it need to define "barrel length" now, especially when the new changes to "assault weapon" law have nothing to do with barrel length?

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[46] *In re: Board of Pharmacy,* OAL Determination Decision of Disapproval of Regulatory Action, OAL Matter No. 2016-1130-01 (Jan. 23, 2017).
[47] *In re: Department of Corrections and Rehabilitation,* OAL Determination Decision of Disapproval of Regulatory Action, OAL Matter No. 2016-0804-02 (Sept. 21, 2016).
[48] *See* Pen. Code, § 33210.
[49] Pen. Code, § 17170.
[50] Pen. Code, § 17180.

In the end, it is wholly improper of DOJ to sneak in a regulation for "short-barreled" rifles and shotguns here. It seems like DOJ is hoping that the OAL will simply miss the fact that the Code sections defining, restricting, and regulating "short-barreled" rifles and shotguns are in different Code sections unrelated to "assault weapons."[51] DOJ's proposal to apply the definition of "barrel length" found in section 5471(d) to Penal Code section 30515 therefore fails to satisfy the APA's Necessity standard.

b. The Application of 11 C.C.R. § 5471(m)—Which Reflects DOJ's Statements About Magnets Left on the "Bullet-Button"— to Penal Code Section 30515 Is Not Necessary

In the second paragraph of 11 C.C.R. section 5471(m), wherein DOJ defines "detachable magazine," DOJ states:

> An AR-15 style firearm that has a bullet-button style magazine release with a magnet left on the bullet-button constitutes a detachable magazine. An AR-15 style firearm lacking a magazine catch assembly (magazine catch, magazine catch siring and magazine release button) constitutes a detachable magazine. An AK-47 style firearm lacking a magazine catch assembly (magazine catch, spring and rivet/pin) constitutes a detachable magazine.

This second paragraph is noteworthy because it states that leaving a magnet within a "bullet button" constitutes a "*detachable magazine*" and that firearms without magazine catches are also "*detachable magazines*." But, leaving the magnet within the "bullet button" has nothing to do with the new definition of "assault weapons" without "*fixed magazines*."

And, importantly, the application of section 5471(m) to Penal Code section 30515 is unnecessary because it seeks to address a moot issue. Prior to January 1, 2017, some firearm owners made a claim that the magnet left in the "bullet button" was a "tool," which means that the magazines were not "detachable" and that the firearm did not fall under the "assault weapon" definition. But that argument is moot after 2016 because, with or without the magnet, a rifle or pistol with a "bullet button" and with the other prohibited features is still considered an "assault weapon." Hence, there is no need for DOJ to apply section 5471(m) to Penal Code section 30515.

F. Proposed Section 5460 Fails to Satisfy the APA's Clarity Standard

As further explained below, the application of the definitions in 11 C.C.R. section 5471 to Penal Code section 30515 cannot be approved for publication because the following definitions from section 5471 are not sufficiently clear as the law demands:

- The definition of "contained in," as stated in section 5471(k);
- The definition of "featureless," as stated in section 5471(o);

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[51] *See* Pen. Code, §§ 30600-30680 (governing "assault weapons"); *see also* Pen. Code, §§ 16590, 17700-17800 (governing "short-barreled" rifles and shotguns).

- The definition of "flash suppressor," as stated in section 5471(r); and

- The definition of "stock, fixed," as stated in section 5471(mm).

Also, the text of proposed section 5460 is unclear on the additional ground that it gives an incomplete citation to other sections of the C.C.R.

On the whole, these provisions suffer from more than one clarity deficiency listed in 1 C.C.R. section 16(a), which means that the OAL cannot approve them for publication. They also violate the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution, which require "a reasonable degree of certainty in . . . criminal law . . . ."[52]

Undoubtedly, provisions of proposed section 5460 are confusing to persons of ordinary intelligence who are directly affected by it. This confusion will likely invite arbitrary and capricious action by DOJ and law enforcement 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.[53] On both legal and practical grounds, DOJ's regulations should not be adopted.

1. The Law on the APA's Clarity Standard

Agencies must draft regulations "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style . . . ."[54] But the Legislature, in establishing the OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them.[55] For this reason, when the OAL reviews regulations submitted to it for publication, it must determine whether the regulations are sufficiently clear.[56] 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."[57]

"An ambiguous regulation that does not comply with the rulemaking procedures of the APA is void."[58] 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.[59]

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[52] *People v. Heitzman* (1994) 9 Cal.4th 189, 199 (quoting *In re Newbern* (1960) 53 Cal.2d 786, 792).)
[53] *In re: re: Air Resources Board*, OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 01-0202-05 SR (March 27, 2001); *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.
[54] Gov. Code, § 11346.2(a)(1).)
[55] Gov. Code, § 11340(b).
[56] *See* Gov. Code, § 11349.1(a)(3).
[57] Gov. Code, § 11349(c). Cal. Code Regs., tit. 1, § 16(b) defines what persons are presumed to be "directly affected" by a regulation.
[58] *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 383.
[59] *In 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).

2. *11 C.C.R. § 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(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[.]'"[60] Section 5471(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 purportedly defining the term "contained in" to "clarify" what that term means within the definition of "fixed magazine" stated by Penal Code section 30515(b).[61] But DOJ causes more confusion. Penal Code section 30515(b) defines "fixed magazine" as:

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

To any person, DOJ's definition of "contained in" is nonsensical in its intended context of clarifying the statutory definition of "fixed magazine." 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 giving DOJ the benefit of the doubt, such a definition is confusing and nonsensical 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(k) is woefully unclear and should be rejected as void.

3. *11 C.C.R. § 5471(o) Is Unclear as to What "Featureless" Means*

Section 5471(o) states that "'[f]eatureless' means a semiautomatic firearm (rifle, pistol, or shotgun) lacking the characteristics associated with that weapon, as listed in Penal Code section 30515."

This definition of "featureless" isn't clear and cannot be understood by the persons affected by it. DOJ references the characteristics listed in Penal Code section 30515, but it never states which

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[60] Cal. Code Regs., tit. 1, § 16, subds. (a)(4), (a)(5).
[61] *See* Cal. Code Regs., tit. 11, § 5471 (proposed) ("For purposes of Penal Code section 30515 and this Chapter the following definitions shall apply . . .").
[62] 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).)
[63] Pen. Code, § 30515(b) (emphasis added).

characteristics it means. For example, for rifles: "semiautomatic," "centerfire," "does not have a fixed magazine," "pistol grip," "flash suppressor," etc. can all be lumped together into "characteristics." Section 5471(o) does not clarify whether a rifle must lack some or all of these "characteristics" to be "featureless."

"Featureless" as that term is most commonly used by the public usually refers to a rifle that will have the following characteristics: semiautomatic, centerfire, and does not have a fixed magazine (or prior to 2017, may have had "the capacity to accept a detachable magazine") but doesn't have any of the additional, required features that would cause the rifle to meet the definition of an "assault weapon" under P.C. section 30515(a)(1). Or, it can mean a rifle that has those features but also has a fixed magazine. But it is currently unclear whether the definition of "featureless" in section 5471(o) mirrors the common public perception of "featureless."

Hence, with the definition in section 5471(o), it is unclear what DOJ means by "featureless." Section 5471(o), therefore, cannot be applied to Penal Code section 30515 for purposes of identifying "assault weapons."

4. Section 5471(r) Is Unclear as to What Devices Can Satisfy DOJ's Definition of "Flash Suppressor"

DOJ's definition of the term "flash suppressor" is too vague to be understood by persons directly affected by the regulation. Section 5471(r) should be presumed unclear because "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning[.]"[64] 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[.]"[65] 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.[66]

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 that term with any purposeful meaning. As is, one might think that a device reducing the muzzle flash by 20% suffices while another might think that it has to be 50% or more. So, section 5471(r), on its face, can be reasonably and logically interpreted to have more than one meaning. This means, among other things, that a person of ordinary intelligence cannot understand its meaning and that it encourages arbitrary and discriminatory enforcement. Therefore, it is unconstitutionally vague, and an OAL Decision of Disapproval is in order because DOJ "does not explain the process" for determining whether a device "perceptibly" reduces muzzle flash and does not

[64] Cal. Code Regs., tit. 1, § 16(a)(1).
[65] Cal. Code Regs., tit. 1, § 16(a)(3).
[66] Cal. Code Regs., tit. 11, § 5471(r) (proposed) (emphasis added).

state "[w]hat criteria will be used" for such determinations.[67]

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 is 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(r). Resultantly, an OAL Decision of Disapproval is in order on Clarity grounds because "standards or criteria need to be included in the regulation so that those affected by this regulation would know what the Department [*i.e.,* DOJ] will base its determination on. How does the Department intend to determine [what] is sufficient?"[68]

What more, the second and third sentences in section 5471(r) exacerbate the uncertainty and ambiguity because they create a gray zone where a device can be advertised as a "flash suppressor" even though it does not "perceptibly reduce or redirect muzzle flash." Would such a device still meet the definition of "flash suppressor"? It would seem contrary to common sense to allow a device to be deemed a "flash suppressor," regardless of whether it reduces muzzle flash, just because it is being advertised a certain way. Yet, the language of section 5471(r) invites some people to have this view. For instance, section 5471(r) invites the interpretation that a device would be a "flash suppressor" under California law, even if it actually *increased* the muzzle flash, so long as it was called a "flash hider" by its manufacturer. This would be analogous to prosecuting a person for possession of a bazooka just because he possessed a pack of "Bazooka Joe" bubble gum. So, at the very least, DOJ needs to clarify the interplay between the first sentence of 5471(r) and the second and third sentences, as well as which sentence(s) take precedence.

5. *Section 5471(mm) Is Unclear as to What Type of Modifications Must be Made to a Folding or Telescoping Stock for It to be Considered "Fixed"*

In subdivision (mm), DOJ states that "'[s]tock, fixed' means a stock that does not move, fold, or telescope." But, it is unclear based on this definition what type of modification must be made to a folding or telescoping stock for it to be considered "fixed." For example, it cannot be ascertained from DOJ's language whether the modification can be temporary or whether it must be "permanent." And, if the latter, it is unclear what would suffice (*i.e.* riveted, welded, or glued). Therefore, subdivision (mm) necessarily must be revised before it can be implemented.

G. Proposed Section 5460 Provides an Incomplete Citation to the C.C.R.

Proposed section 5460 states that "[t]he definitions of terms in section 5471 *of this chapter* shall apply to the identification of assault weapons pursuant to Penal Code section 30515."[69]

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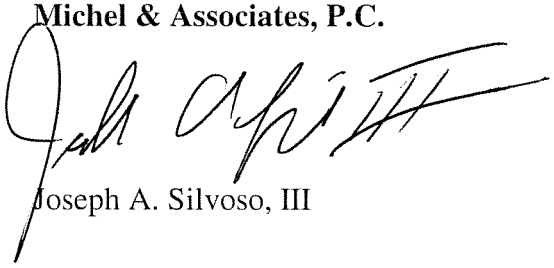
[67] *In re: Department of Corrections and Rehabilitation,* OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2016-0804-02 (Sept. 21, 2016).
[68] *In re: Department of Housing and Community Development,* OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 2017-0120-01 (March 13, 2017).
[69] Cal. Code. Regs., tit. 11, § 5460 (proposed) (emphasis added).

But the OAL has held that a proposed regulation's citations to other sections of the C.C.R. are only complete if they refer to the applicable title for the C.C.R. section: "The citations are not complete in that they do not refer to the specific title of the CCR . . . [ ] These examples of clarity problems . . . must be resolved before the regulations can be approved by OAL."[70] So DOJ must specifically state in the text of proposed section 5460 that the "section 5471" DOJ is referencing is located in Title 11 of the C.C.R..

III. CONCLUSION

Due to a myriad of reasons, DOJ's proposed regulation for "Assault Weapon Definitions" (*i.e.*, OAL Notice File Number Z-2017-1114-01) cannot be implemented. It violates the APA's Authority, Consistency, Reference, Necessity, and Clarity Standards. It is not only unlawful, but it is also plagued with other problems that make its administration, interpretation, and enforcement highly problematic. Allowing proposed section 5460 to be implemented would cause irreparable harm to countless thousands of Californians and subvert the basic minimum procedural requirements that the APA was enacted to protect. Therefore, DOJ cannot implement its proposed regulation for "Assault Weapon Definitions" as it is currently written. We look forward to the OAL and DOJ's cooperation and hope litigation will not once again be necessary to address our clients' concerns. If you have any questions, please do not hesitate to contact us.

Sincerely,
Michel & Associates, P.C.



Joseph A. Silvoso, III

[70] *In re: Department of Insurance,* OAL Determination Decision of Disapproval of Regulatory Action, OAL File No. 05-0624-01S (Aug. 12, 2005).

cc.:

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EXHIBIT 6

Silvoso III	Joseph	1, 70, 71, 72, 73, 74, 75, 76,	Email

#	Summarized Comment	DOJ Response
1.	General opposition to the Assault Weapon Definition regulations.	We received a number of non-specific, generalized comments in opposition to the assault weapon definition regulation. The Department is adopting the regulation for the reasons stated in the initial statement of reasons.

#	Summarized Comment	DOJ Response
70.	"Proposed section 5460 seeks to apply all forty-four definitions from 11 CCR section 5471 to Penal Code section 30515… these forty-four definitions were never previously adopted in compliance with the APA for such broad law enforcement purposes. Therefore, proposed section 5460,…is a blatant effort to bypass the APA and extend the reach and effect of definitions previously submitted under an APA exemption. Because many of the definitions in section 5471 do not qualify for the APA exemption under Penal Code section 30900(b)(5), improperly expand or curtail statutes, or violate the APA standards for review under Government Code section 11349.1(a) (because they have never been scrutinized under these standards), they cannot be applied to Penal Code section 30515 by way of proposed legislation."	No change has been made in response to these comments because they are generalized comments in opposition to the regulation. The Department is adopting the regulation for the reasons stated in the initial statement of reasons.

#	Summarized Comment	DOJ Response
71.	a. "Neither Penal Code section 30520(c), nor any other statute, gives DOJ the authority to apply 11 CCR section 5471(a) to Penal Code section 30515, as stated in proposed section 5460, because that application would alter section 30515 in a way that contradicts the purpose and the intent of the Legislature." Section 5471(a) states that '"[a]bility to accept a detachable magazine" means with respect to a semiautomatic shotgun, it does not have a fixed magazine.' Applying this definition to Penal Code section 30515(a)(7)-which currently reads '[a] semiautomatic shotgun that has the ability to accept a detachable magazine'-would result in the phrase 'a semiautomatic shotgun that does not have a fixed magazine.' Consequently, 'a semiautomatic shotgun that does not have a fixed magazine' would now be considered an 'assault weapon,' whereas it wasn't previously, if DOJ were allowed to implement proposed section 5460. In other words, DOJ is attempting to singlehandedly shoehorn semiautomatic shotguns with 'bullet buttons' into the definition of 'assault weapons.' Clearly, this is against the Legislature's intent and a usurpation of legislative power. AB 1135 and SB 880 only changed the definitions of 'assault weapon' for certain rifles and pistols in Penal Code section 30515, based on their magazine function, in order to close the 'bullet-button' loophole for *rifles* and *pistols.* Nothing in the Code changed for shotguns, including for '[a] semiautomatic shotgun that has the ability to accept a detachable magazine.'"	No change has been made to the regulation in response to this comment because the Department rejects this comment. The Department is authorized to administer the assault weapons law through implementing regulations, which includes the power to define statutory terms that are otherwise undefined. In promulgating such regulations, the Department may specify whether a particular weapon falls within the categories of assault weapons established by the Legislature. The Department has determined that application of section 5471(a) to the identification of assault weapons pursuant to Penal Code section 30515(a)(7) will support the administration of the assault weapons law in a manner that is most consistent with the Legislature's intent. Having recognized the dangers posed by bullet-buttons on rifles and pistols, the Department believes the Legislature also intended to prohibit bullet-button equipped shotguns.

#	Summarized Comment	DOJ Response
72.	a. "DOJ fails to meet the necessary standard because its Initial Statement of Reasons (ISOR) fails to describe the need for proposed section 5460, much less demonstrate by "substantial evidence" why proposed section 5460 is needed. b. DOJ needs to show how the currently existing definitions in Penal Code section 30515 itself are insufficient to identify "assault weapons" and, thus, why the definitions from 11 CCR section 5471 are necessary. DOJ currently makes no attempt to do so. c. Further, DOJ's ISOR fails to demonstrate by "substantial evidence" (i.e., facts, studies, and expert opinions) why or how DOJ needs to expand or clarify the definitions of specific terms like "flash suppressor," "pistol grip," "threaded barrels," "shotguns," etc. in order to facilitate the so-called identification of "assault weapons." Significantly, DOJ needs to make a statement of specific purpose of each adoption…"	No change has been made in response to these comments because they are generalized comments in opposition to the regulation. The Department is adopting the regulation for the reasons stated in the initial statement of reasons.
73.	"The application of 11 CCR. section 5471(d)—which states DOJ's new definition for "barrel length"—to Penal Code section 30515 is not necessary. A simple reading of Penal Code section 30515 shows that barrel length is irrelevant to the newly-established category of "assault weapons," and DOJ provides no indication, much less "substantial evidence," that the general public or law enforcement has been confused in the last few decades when it came to how barrel length is defined."	No change has been made to the regulation in response to the comment because the Department rejects this comment. The key provision in the definition of barrel length is that the measurement is to the furthermost end of the barrel or permanently attached muzzle device. The purpose of the definition is to make clear that unless a muzzle device is permanently attached, it cannot be used to satisfy the 30-inch requirement.
74.	"The application of 11 CCR section 5471(m)—which reflects DOJ's statements about magnets left on the "bullet-button"—to Penal Code section 30515 is not necessary…leaving the magnet within the "bullet-button" has nothing to do with the new definition of "assault weapons" without "fixed magazines."	No change has been made to the regulation in response to this comment because the Department rejects this comment. The reference to "magnet" in the definition of "detachable magazine" serves the purpose of providing a non-exclusive list of examples of a detachable magazine.

#	Summarized Comment	DOJ Response
75.	The following definitions are not clear, and fail to provide "a reasonable degree of certainty" as required by the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, section 7 of the California Constitution:	
	a. The definition of "contained in," as stated in section 5471(k); the definition is confusing and nonsensical because of the doubling of the concept "cannot be removed without disassembly of the firearm action."	a. No change has been made to the regulation in response to this comment because the Department rejects this comment. The definition of "contained in" serves the purpose of providing an example of a fixed magazine.
	b. The definition of "featureless," as stated in section 5471(o); it is currently unclear whether this definition mirrors the common public perception of "featureless."	b. No change has been made to the regulation in response to the comment because the Department rejects this comment. The definition of "featureless" means not having the features listed in Penal Code section 30515.
	c. The definition of "flash suppressor," as stated in section 5471(r); DOJ provides no guidance as to what extent the flash suppressor must "perceptibly reduce" muzzle flash; 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."	c. No change has been made to the regulation in response to the comment because the Department rejects this comment. If the device reduces or redirects muzzle flash to any perceptible degree, it qualifies as a "flash suppressor." Also, it is not necessary to specify the angle at which the muzzle flash must be redirected, because all that is required is that muzzle flash be redirected in any perceptible manner for a device to qualify as a "flash suppressor."
	d. The definition of "stock, fixed," as stated in section 5471(mm); it is unclear what type of modification must be made to a folding or telescoping stock for it to be considered "fixed."	d. No change has been made to the regulation in response to the comment because the Department rejects this comment. The purpose of the definition is not to provide instructions on how to modify a folding or telescoping stock such that the stock "does not move, fold, or telescope" as set forth in section 5471(mm).

#	Summarized Comment	DOJ Response
76.	Proposed section 5460 provides an incomplete citation to the CCR. DOJ must specifically state in the text of proposed section 5460 that the "section 5471" DOJ is referencing is located in Title 11 of the CCR.	No change has been made to the regulation in response to the comment because the Department rejects this comment. The phrase "this chapter" as used in the proposed regulation refers to the chapter in which the regulation will appear: Chapter 39 of Division 5 of Title 11 of the California Code of Regulations. The phrase cannot reasonably be interpreted to refer to any other chapter of the California Code of Regulations, and there is no requirement to provide full references to chapters, divisions, and titles in this instance.