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VIA U.S. Mail & E-Mail

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**Re: Written Comments Regarding the California Department of
Justice's Proposed Regulation Section 5460 Regarding "Assault
Weapon" Definitions – OAL File No. Z-2017-1114-01**

To Whom it May Concern:

We write on behalf of our clients, the National Rifle Association of America (“NRA”), the California Rifle & Pistol Association, Incorporated (“CRPA”), and their respective members who reside in California to oppose the addendum to the Initial Statement of Reasons and related documents for the California Department of Justice, Bureau of Firearms’ (“DOJ”) proposed regulation titled “Assault Weapon Definitions” (OAL File No. Z-2017-1114-01), with notice posted by DOJ on October 19, 2018.

The regulation at issue will add section 5460 to Title 11 of the California Code of Regulations (“C.C.R.”), which, if adopted, will expand the application of the definitions listed in 11 C.C.R. section 5471 to apply to the identification of “assault weapons” pursuant to Penal Code section 30515.

Because the amended Initial Statement of Reasons only adds documents for which DOJ allegedly relied upon in drafting its definitions, we are dismayed that DOJ has not addressed any of the concerns raised in prior public comments. What’s more, DOJ’s notice is set to expire on November 24, 2018—*less than three weeks after the close of this public comment period*. Considering it took DOJ nearly five months to respond to public comments and submit this proposed regulation to the Office of Administrative Law (“OAL”) when originally proposed, we are gravely concerned that DOJ will once again attempt to deny the public a meaningful opportunity to participate in the regulatory process by largely ignoring public comments in an attempt to rush the proposal through.

California’s Administrative Procedure Act (“APA”) is not a requirement in name only. Yet DOJ’s attempt to extend the application of regulatory definitions adopted pursuant to a limited APA

exception clearly demonstrate DOJ’s disregard for the APA, OAL’s role, and the importance of public participation in the rulemaking process. For these reasons and those stated below, DOJ should abandon its current path and instead propose substantive regulatory definitions that afford members of the public a meaningful opportunity to comment.

I. BACKGROUND

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. These 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 the 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. 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. OAL officially denied DOJ’s proposal on June 26, 2017, but no specific reason for the denial was provided.

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

¹ See Cal. Penal Code § 30900(b).

² Cal. 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>.

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. The proposed regulation, if adopted, will once again apply those same definitions to general enforcement purposes. In other words, DOJ is attempting to sidestep OAL’s prior disapproval and is otherwise seeking to adopt definitions in a manner that bypasses the requirements of the APA.

Our office submitted a comment letter on June 15, 2018, to OAL on the matter, highlighting the above information.⁷ Our letter also discussed the fact that DOJ received over 2,277 individual public comments to which DOJ rejected every single proposed alternative. Instead, DOJ stated none of those proposed alternatives were potentially more effective or less burdensome—largely because proposed section 5460 does not itself contain any of the definitions for which it applies. The following month, DOJ withdrew the proposed regulation from consideration by OAL.⁸

II. CALIFORNIA’S ADMINISTRATIVE PROCEDURES ACT

The APA is designed to provide the public with a meaningful opportunity to participate in the adoption of regulations by California state agencies such as DOJ, and to ensure the creation of an adequate record for OAL and judicial review.⁹ Every regulation is subject to the rulemaking procedures of the APA unless expressly exempted by statute.¹⁰

OAL is tasked with reviewing all regulations that have been submitted to it for publication in the California Code of Regulations Supplement and for transmittal to the Secretary of State.¹¹ Specifically, OAL will review any proposed regulation to ensure it satisfies the following criteria:

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

⁷ A copy of this letter and its attachments can be viewed online at <http://michellawyers.com/wp-content/uploads/2018/07/Ltr-to-OAL-re-DOJ-AW-Def-Expansion.pdf>.

⁸ A copy of the Notice of Withdrawal can be viewed online at <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/aw-withdrawal.pdf>.

⁹ Office of Administrative Law, *Guide to Public Participation in the Regulatory Process*, <https://www.oal.ca.gov/wp-content/uploads/sites/166/2017/05/How-2-Participate-102016.pdf> (Oct. 2016).

¹⁰ A “regulation” is defined as every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. Cal. Gov. Code § 11342.600.

¹¹ Cal. Gov. Code § 11349.1.

- **Necessity** – meaning 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 the law that the regulation implements, interprets, or makes specific, taking into account the totality of the record (where evidence includes, but is not limited to, facts, studies, and expert opinion);
- **Authority** – meaning the provision of law which permits or obligates the agency to adopt, amend, or repeat a regulation;
- **Clarity** – meaning written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them;
- **Consistency** – meaning being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law;
- **Reference** – meaning the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation; and,
- **Nonduplication** – meaning that a regulation does not serve the same purpose as a state or federal statute or another regulation.¹²

Should a regulation fail to comply with the above requirements, OAL may disapprove it within 30 working days after the regulation was submitted for review.¹³ And any person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief.¹⁴

III. DOJ'S AMENDED INITIAL STATEMENT OF REASONS DOES NOT ADDRESS ANY OF THE ABOVE APA REQUIREMENTS

DOJ's addendum to its Initial Statement of Reasons merely attempts to clarify how the definitions in the proposed regulation were composed by adding references to specific documents allegedly relied upon that "were inadvertently omitted" originally.

¹² Cal. Gov. Code §§ 11349, 11349.1(a)(1-6). OAL may also consider the clarity of the proposed regulation in the context of related regulations already in existence. Cal. Gov. Code § 11349.1(b).

It is also 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 the California Code of Regulations. *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). Therefore, the definitions contained in 11 C.C.R. section 5471, which are incorporated by reference in DOJ's proposed regulation, must comply with all APA standards. *Id.*

¹³ Cal. Gov. Code § 11349.3.

¹⁴ Cal. Gov. Code § 11350.

A. “Ability to Accept a Detachable Magazine”

DOJ has defined the term “ability to accept a detachable magazine” to mean “with respect to a semiautomatic shotgun, it does not have a fixed magazine.”¹⁵ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using California Penal Code sections 30515(a) and 30900(b)(1).

In addition to the objections raised in prior comment letters which DOJ has yet to adequately respond to, DOJ appears to have forgotten that the term “detachable magazine” had been previously negotiated and ultimately approved, and that prior attempts by DOJ to redefine this term have failed—and with good reason. DOJ’s amended Initial Statement of Reasons clarify that their definition for this term was composed using California Penal Code sections 30515(a) and 30900(b)(1). Law-abiding gun owners should also be able to rely upon those same Penal Code provisions in order to determine what is or is not legally permissible in California—which DOJ’s definition does not allow for.

What’s more, the registration period for firearms now classified as an “assault weapon” has ended. DOJ’s definition, which it now seeks to apply for purposes of enforcement, was not in effect during this registration period. As a result, gun owners who currently own firearms affected by this definition but did not register due to their mistaken belief could suffer unjust enforcement.

B. “Action”

The term “action” has been defined to mean “the working mechanism of a semiautomatic firearm, which is the combination of the receiver or frame and breech bolt together with the other parts of the mechanism by which a firearm is loaded, fired, and unloaded.”¹⁶ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using page 8 of Todd W. Woodard’s *Shooter’s Bible Guide to Cartridges* from 2011.

As stated in the referenced source, the term “action” is defined as “the combination of the receiver or frame and breech bolt together with the other parts of the mechanism by which a firearm is loaded, fired and unloaded.”¹⁷ DOJ’s chosen definition, however, expands upon this by limiting the definition to “semiautomatic” firearms. But as the referenced source makes clear, the term “action” is not limited in its application to “semiautomatic” firearms. DOJ is therefore pursuing a definition that is contrary to the meaning commonly understood by firearm experts and the general public.

C. “Barrel”

The term “barrel” has been defined to mean “the tube, usually metal and cylindrical, through which a projectile or shot charge is fired.”¹⁸ The definition also states that “[b]arrels may have a rifled

¹⁵ 11 C.C.R. § 5471(a).

¹⁶ 11 C.C.R. § 5471(b).

¹⁷ See Todd W. Woodard, *Shooter’s Bible Guide to Cartridges* at 8 (defining “action”), Sky Horse Publishing (2011).

¹⁸ 11 C.C.R. § 5471(c).

or smooth bore.”¹⁹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using page 1, paragraph 3 of ATF Ruling 2005-4, California Penal Code sections 17090 and 17190, pages 19-22 and 25 of ATF’s Guidebook regarding the Importation & Verification of Firearms, and the United States Marine Corps Technical Manual for the M16A2.

As a threshold matter, ATF Ruling 2005-4 concerns “Certain integral devices intended to diminish the report of paintball guns,” ultimately holding that such devices are not in fact “silencers” within the meaning of the Gun Control Act of 1968 or the National Firearms Act. It is therefore unclear why or how this ATF Ruling was used by DOJ in composing the definition for the term “barrel.” As the cited page and paragraph state:

To determine whether the ported barrel and outer sleeve would function as a silencer, it was removed by cutting with a hack saw. A threaded adaptor with tape wrapped around it was utilized so the device could be attached to a .22 caliber Ruger Mark II pistol. With the device attached, a sound meter test was performed, with five shots being fired with the device attached and five shots fired without the device attached. The testing indicated that the attachment of the device resulted in a 7.98-decibel sound reduction.²⁰

In addition to this ruling lacking any substantive value for the definition at issue, the subject of its discussion does not in any way concern “assault weapons.” Further clarification on how ATF Ruling 2005-4 was used in composing this definition is therefore needed.

DOJ also references California’s definitions for the terms “rifle” and “shotgun” as being used to compose the definition at issue.²¹ But as with the above ATF ruling, these definitions do not appear to provide anything of substance. They do not even mention the word “barrel,” instead referring to a “rifled bore” and “smooth bore” respectively. Further clarification, therefore, is needed to determine how this source was used in composing the definition at issue.

The amended Initial Statement of Reasons also states that DOJ relied upon specific pages found in ATF’s Guidebook regarding the Importation and Verification of Firearms. Specifically, DOJ references pages from the “Firearms Verification” section of this document. But the pages referenced do not define or describe the term “barrel” anywhere. Instead, these pages only refer to the term generally as it is used to identify rifles, shotguns, firearms, and any other weapon as defined under federal law. Further clarification, therefore, is needed to determine how this source was used in composing the definition at issue.

Lastly, DOJ references several pages of the U.S. Marine Corps Technical Manual for the m16A2 Rifle. This firearm, however, is a “weapon designed for either automatic fire (3-round bursts)

¹⁹ *Id.*

²⁰ See <https://www.atf.gov/firearms/docs/ruling/2005-4-ported-device-attached-barrel-paintball-gun/download>.

²¹ Cal. Penal Code §§ 17090, 17190.

or semiautomatic fire (single shot) through the use of a selector lever.”²² Such a firearm is therefore defined as a “machinegun” that cannot be classified as an “assault weapon” under California law.²³ Referencing the instruction manual for such a firearm is inappropriate for the purposes of identifying the features and characteristics of an “assault weapon” without further clarification.

D. “Barrel Length”

The term “barrel length” has been defined by DOJ in the following way:

Without consideration of any extensions or protrusions rearward of the closed bolt or breech-face the approved procedure for measuring barrel length is to measure from the closed bolt (or breech-face) to the furthermost end of the barrel or permanently attached muzzle device. Permanent methods of attachment include full-fusion gas or electric steel-seam welding, high-temperature (1100°F) silver soldering, or blind pinning with the pin head welded over. Barrels are measured by inserting a dowel rod into the barrel until the rod stops against the closed bolt or breech-face. The rod is then marked at the furthermost end of the barrel or permanently attached muzzle device, withdrawn from the barrel, and measured.²⁴

In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using 27 C.F.R. section 479.11’s definition of the term “firearm,” ATF’s Guidebook regarding the Importation & Verification of Firearms, and the ATF’s National Firearms Act Handbook.

27 C.F.R. section 479.11 states that “the length of the barrel having an integral chamber(s) on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breech block when closed and when the shotgun or rifle is cocked.”²⁵ This definition has been expanded upon in ATF’s National Firearms Handbook, also referenced by DOJ. Specifically, ATF has stated that the procedure for measuring a barrel is as follows:

[M]easure from the closed bolt (or breech-face) to the furthermost end of the barrel or permanently attached muzzle device. Permanent methods of attachment include full-fusion gas or electric steel-seam welding, high-temperature (1100°F) silver soldering, or blind pinning with the pin head welded over. Barrels are measured by inserting a dowel rod into the barrel until the rod stops against the bolt or breech-face. The rod is then marked at the furthermost end of the barrel or permanently attached muzzle device, withdrawn from the barrel, and measured.²⁶

²² M16A2 5.56 Rifle, Military.com, <https://www.military.com/equipment/m16a2-556-rifle> (last visited Nov. 5, 2018).

²³ See Cal. Penal Code § 16880 (definition of “machinegun”).

²⁴ 11 C.C.R. § 5471(d).

²⁵ 27 C.F.R. § 479.11 (definition of term “firearm”).

²⁶ National Firearms Act Handbook, ATF, <https://www.atf.gov/file/58251/download> (April 2009).

DOJ's references contain nearly identical language to that chosen for the definition at issue. Thus, the primary question is whether such a definition and the references to federal sources are even necessary under California law. We are unaware of a single Penal Code provision that will be impacted should this definition be adopted, as the procedures for measuring a firearm's barrel have been exclusively a matter of federal concern. Indeed, all of California's "assault weapon" restrictions do not in any way concern the length of a firearm's barrel. Adopting a state specific definition, despite relying on federal sources, will only cause more confusion among California gun owners.

E. "Bullet"

The term "bullet" has been defined by DOJ to mean "the projectile expelled from a gun."²⁷ But the definition also states that the term is not synonymous with a cartridge, and that it "can be of many materials, shapes, weights, and constructions such as solid lead, lead with a jacket of harder metal, round-nosed, flat-nosed, hollow-point, et cetera."²⁸ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the NRA Institute for Legislative Action Glossary and ATF's Guidebook regarding the Importation & Verification of Firearms.

The current version of NRA's Glossary defines the term to mean "the projectile expelled from a gun."²⁹ NRA's Glossary also states that this definition is not synonymous with the term cartridge, and bullets can be of many materials, shapes, weights and constructions such as solid lead, lead with a jacket of harder metal, round-nosed, flat-nosed, hollow-pointed, etc.³⁰ This definition, therefore, is nearly identical to that which DOJ has adopted. But NRA's Glossary was designed and intended for press inquiries. Nor were they intended to be used for the purposes of drafting laws and regulations.³¹

NRA's Glossary was instead designed and written in such a way to better help a layman's understanding (specifically members of the media) when authoring or reporting on firearm related issues. What's more, at no point did DOJ attempt to communicate with our clients to determine if a more suitable and appropriate definition for use in a criminal law context could be or had been crafted. This therefore serves as a primary example of how DOJ has denied members of the public, including our clients, a meaningful opportunity to participate in rulemaking process. What's more, DOJ has not provided any reason or justification as to why this definition is necessary for the purpose of defining terms used to identify "assault weapons," let alone how it also satisfies any of the other APA requirements.

Regarding the reference to ATF's Guidebook regarding the Importation & Verification of Firearms, pages 15 and 17 are specifically mentioned. Page 15 concerns the general definition for the term "ammunition" under federal law. But the only discussion of projectiles concern "armor piercing ammunition," whose projectiles encompass only a subclass of those available. Page 17, however, only

²⁷ 11 C.C.R. § 5471(e).

²⁸ *Id.*

²⁹ <https://www.nraila.org/for-the-press/glossary/>.

³⁰ *Id.*

³¹ Indeed, the Glossary is found under the "Press Inquiries" menu option on the NRA-ILA website.

discusses the definition of a “pistol” under federal law. Because it is unclear exactly how these ATF sources are relevant, further clarification is needed to determine how these sources were used in composing the definition at issue.

F. “Bullet-Button”

The term “bullet-button” has been defined by DOJ to mean “a product requiring a tool to remove an ammunition feeding device or magazine by depressing a recessed button or lever shielded by a magazine lock.”³² DOJ’s definition also states that a “bullet-button” equipped fully functional semiautomatic firearm does not meet the “fixed magazine” definition under Penal Code section 30515(b).³³ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using both the California Penal Code (sections 30515(b) and 30900(b)(1)) and the “knowledge and experience of the Department’s Bureau of Firearms staff.”

It is unclear what is meant by “knowledge and experience of the Department’s Bureau of Firearms staff.” For the purposes of the APA’s “necessity” standard, evidence of necessity “includes, but is not limited to, facts, studies, and *expert opinion*.³⁴ The problem with DOJ’s general statement is the regulation at issue concerns highly technical definitions for terms used in firearm nomenclature. Experts are therefore necessary to define such terms to ensure their accuracy.

While we do not object to DOJ relying on expert opinions and analysis for the purposes of adopting a proposed regulation, those experts and any materials they relied upon should be disclosed to the public. DOJ should therefore identify the individuals, state their qualifications and experience, and provide any relevant materials relied upon by those individuals in composing the definition at issue. To do otherwise unnecessarily and improperly limits the ability of members of the public to provide meaningful comments on the amended Initial Statement of Reasons as applied to this definition.

G. “Bore”

The term “bore” has been defined by DOJ to mean “the interior of a firearm’s barrel excluding the chamber.”³⁵ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the NRA Institute for Legislative Action Glossary and the ATF Guidebook regarding the Importation & Verification of Firearms.

The definition found in NRA’s Glossary for the term “bore” generally mirrors that of DOJ’s definition.³⁶ But as stated above, this definition was never intended to be adopted in a criminal law context. Rather, it was only intended to provide a layman with a general understanding of its meaning.

³² 11 C.C.R. § 5471(f).

³³ *Id.*

³⁴ Cal. Gov. Code § 11349(a) (emphasis added).

³⁵ 11 C.C.R. § 5471(g).

³⁶ See <https://www.nraila.org/for-the-press/glossary/>.

The term “bore” is technically the British word for the term “gauge,” which is how the British measure the size of a round or cartridge (usually for a shotgun). As NRA’s Glossary notes, the term “gauge” is defined as “the **bore** size of a shotgun determined by the number of round lead balls of **bore** diameter that equals a pound.”³⁷ This is unlike U.S. measurement techniques, which typically refer to the diameter of the grooves of a firearm’s barrel. DOJ’s chosen definition, therefore, is a **gross** oversimplification. NRA’s Glossary was again written for the purposes of helping members of the media generally understand firearm terminology—not adopting regulations with potential criminal implications. And as with other definitions for which DOJ allegedly relied upon NRA’s Glossary for, at no point did DOJ attempt communicating with our clients on the matter.

What’s more, the reference to ATF’s Guidebook regarding the Importation and Verification of Firearms further illustrates DOJ’s misunderstanding of the term. Specific references to pages 17, 19, 25, and 27 are given, all of which include discussions on pistols, rifles, “AOWs,” and destructive devices. Notably absent is a reference to the page discussing shotguns (firearms for which the term is usually associated with). Even so, none of the pages referenced in the ATF Guidebook provide any information defining the term—let alone that which somehow assisted DOJ in composing its own definition.

H. “Caliber”

The term “caliber” has been defined by DOJ to mean “the nominal diameter of a projectile of a rifled firearm or the diameter between the lands in a rifled barrel.”³⁸ DOJ’s definition also states that in the U.S., calibre is usually expressed in hundreds of an inch, whereas in Great Britain it is expressed in thousandths of an inch, and in millimetres elsewhere (including Europe).³⁹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the NRA Institute for Legislative Action Glossary and page 11 of Todd Woodard’s 2011 book *Shooter’s Bible Guide to Cartridges*.

Mr. Woodard defines the term “caliber” to mean “[t]he approximate diameter of the circle formed by the tops of the lands of a rifled barrel, often expressed in hundredths of an inch or millimetres.”⁴⁰ NRA’s Glossary similarly defines the term to mean the “nominal diameter of a projectile of a rifled firearm or the diameter between the lands in a rifled barrel.”⁴¹ But NRA’s Glossary goes further to state that “[i]n this country, usually expressed in hundreds of an inch; in Great Britain in thousandths; in Europe and elsewhere in millimeters.”⁴²

For similar reasons stated above, DOJ’s “copy and paste” approach to NRA’s Glossary and Mr. Woodard’s book is inappropriate. DOJ’s definition, for example, fails to define the term “lands,” nor is

³⁷ <https://www.nraila.org/for-the-press/glossary/> (emphasis added).

³⁸ 11 C.C.R. § 5471(h).

³⁹ *Id.*

⁴⁰ Woodard, *Shooter’s Bible Guide to Cartridges*, *supra*.

⁴¹ <https://www.nraila.org/for-the-press/glossary/>.

⁴² *Id.*

the term defined elsewhere either in the Penal Code or DOJ’s regulations. This makes it difficult for someone lacking the necessary knowledge of what is meant by that term to understand exactly how such a measurement is taken. DOJ’s chosen definition will thus only cause further confusion. What’s more, it is unclear what purpose adopting such a definition serves, raising serious questions as to its necessity.

I. “Cartridge”

The term “cartridge” has been defined by DOJ to mean “a complete round of ammunition that consists of a primer, a case, propellant powder, and one or more projectiles.”⁴³ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the NRA Institute for Legislative Action Glossary, page 15 of ATF’s Guidebook regarding the Importation & Verification of Firearms, and page 11 of Todd Woodard’s 2011 book *Shooter’s Bible Guide to Cartridges*.

Mr. Woodard generally defines the term “cartridge” to mean a “single round of ammunition consisting of the case, primer and propellant, with or without one or more projectiles.”⁴⁴ NRA’s Glossary defines the term as a “single, complete round of ammunition.”⁴⁵ And the cited ATF reference discusses the federal definition of “ammunition.”

In addition to those issues raised above, a primary concern with these referenced materials is that DOJ appears to have wholly ignored the definition for the term “ammunition” found in the California Penal Code—which itself contains the definition DOJ is seeking to adopt.⁴⁶ It is therefore unclear what purpose adopting this definition has. What’s more, adopting the definition without the additional clarifying language found in the Penal Code’s definition for the term “ammunition” appears to contradict its express language and will only serve to cause further confusion among gun owners.

J. “Centerfire”

The term “centrefire” has been defined by DOJ to mean “a cartridge with its primer located in the center of the base of the case.”⁴⁷ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using Frank Barnes 2009 book *Cartridges of the World* and NRA’s Glossary.

Interestingly, DOJ chose to ignore Mr. Woodard’s book for this definition despite it being labelled the “bible” to understanding cartridges, a discussion of which necessarily includes defining the term “centrefire.” Instead, DOJ only chose to rely on NRA’s Glossary and Mr. Barnes book. DOJ should clarify this inconsistency as to why Mr. Woodard’s information was ignored when DOJ was composing its definition for this term.

⁴³ 11 C.C.R. § 5471(i).

⁴⁴ Woodard, *Shooter’s Bible Guide to Cartridges*, supra.

⁴⁵ <https://www.nraila.org/for-the-press/glossary/>.

⁴⁶ See Cal. Penal Code § 16150 (defining the term “ammunition” to generally mean “one or more loaded cartridges consisting of a primed case, propellant, and with one or more projectiles.”).

⁴⁷ 11 C.C.R. § 5471(j).

Regarding the materials referenced, Mr. Barnes' book notes that "there are two major classifications of cartridges—centerfire and rimfire. The former is fired by a primer located in the center of the case head; the latter by the priming compound distributed around the entire inside of the rim's outer diameter."⁴⁸ Mr. Barnes goes further to note that there is a third type of case commonly known as "caseless," meaning the case itself is made from combustible material that is consumed when fired. Yet DOJ failed to include a definition for this type of case despite including a definition for rimfire (even though "rimfire" is not mentioned anywhere in the Penal Code as applied to "assault weapons"). For this and other reasons stated above, clarification is needed from DOJ in order to afford the public a meaningful opportunity to provide comment.

K. "Contained In"

The term "contained in" has been defined by DOJ to mean "that the magazine cannot be released from the firearm while the action is assembled."⁴⁹ DOJ's definition also states that 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.⁵⁰ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using both California Penal Code section 30515(b) and the "knowledge and experience of the Department's Bureau of Firearms staff."

As stated above, it is unclear what is meant by "knowledge and experience of the Department's Bureau of Firearms staff." DOJ should identify which staff, state their experience and training, and provide any information relied upon by staff to provide members of the public a meaningful opportunity to comment on the references to the amended Initial Statement of Reasons.

With the only other reference for this definition being Penal Code section 30515(b), DOJ is providing a circular reference to the language in the Penal Code for a term which it is simultaneously trying to define. This is reflected in DOJ's chosen language for the definition, which itself is a restatement of Penal Code section 30515(b). As stated in the APA, regulations must generally not serve the same purpose as a state or federal statute.⁵¹ Although it is true that this standard does not necessarily prohibit state agencies from printing relevant portions of the enabling legislation in a regulation, doing so must be necessary to satisfy the clarity requirement of the APA. Here, the definition most certainly fails that standard. Nor can it be said to be necessary under the APA.

Lastly, DOJ's chosen definition limits the examples given to AR-15 style firearms. By doing so, DOJ is ignoring numerous firearms owned by California gun owners that do not fit that classification, leaving those gun owners in the dark as to what exactly DOJ's chosen language for this definition means to them. Further clarification from DOJ is needed on this issue.

⁴⁸ Frank C. Barnes, *Cartridges of the World*, Gun Digest Books (12th Edition).

⁴⁹ 11 C.C.R. § 5471(k).

⁵⁰ *Id.*

⁵¹ Cal. Gov. Code § 11349(f).

L. “Department”

The term “Department” has been defined by DOJ to mean the California Department of Justice.⁵² In the amended Initial Statement of Reasons, DOJ notes that this is “a standard definition throughout the California Code of Regulations.

While we do not object to the chosen language for this definition, the issue is again one of necessity and non-duplication. As DOJ’s own definition states, this is a “standard definition” that commonly understood. DOJ has not provided any additional references as to why enacting such a definition is necessary given the registration period for newly-classified “assault weapons” has ended. What’s more, DOJ has not provided any reason as to why this definition is necessary to define the terms used in Penal Code section 30515, as was stated in DOJ’s “Problem Statement” for the Initial Statement of Reasons associated with this proposed regulation.

M. “Detachable Magazine”

The term “detachable magazine” has been defined by DOJ to mean “any ammunition feeding device that can be removed readily from the firearm without disassembly of the firearm action or use of a tool.”⁵³ DOJ’s definition further states that a bullet or ammunition cartridge is considered a tool, and that an 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.⁵⁴ DOJ’s definition further addresses specific types of firearms and devices, stating that AR-15 style firearms with bullet-button style magazine releases with a magnet left on the bullet-button, or those lacking a magazine catch assembly (a magazine catch, spring, and release button) constitute a detachable magazine within the meaning of this definition.⁵⁵ DOJ also states that an AK-47 style firearm lacking a magazine catch assembly also constitutes a detachable magazine.

In the amended Initial Statement of Reasons, DOJ notes that this definition previously existed in the California Code of Regulations but that it has expanded on it “due to advancements of firearms technology available to the public. DOJ also notes that it relied upon California Penal Code section 30515 in composing the definition (presumably for the expanding language).

The references provided in the amended Initial Statement of Reasons, however, do not add anything of substance to this definition. As with prior comments, DOJ should specify who drafted the additional language, state their credentials, and provide any information relied upon by those individuals in order to provide members of the public a meaningful opportunity to comment. What’s more, if DOJ has now decided this definition is somehow necessary, it should specify why the definition was recently repealed.

⁵² 11 C.C.R. § 5471(l).

⁵³ 11 C.C.R. § 5471(m).

⁵⁴ *Id.*

⁵⁵ *Id.*

N. “Disassembly of the Firearm Action”

The term “disassembly of the firearm action” has been defined by DOJ to mean “the fire control assembly is detached from the action in such a way that the action has been interrupted and will not function.”⁵⁶ DOJ’s definition also specifically addresses the AR-15 style firearm, noting that this would require the rear take down pin to be removed, the upper receiver lifted upwards and away from the lower receiver using the front pivot pin as the fulcrum before the magazine could be released.⁵⁷ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the “knowledge and experience” of the Department’s Bureau of Firearms staff, pages 10 and 11 of Colt’s Operator’s Manual for the M16A2 Carbine, Commando SMG, and M4 Carbine, and several ATF publications.⁵⁸

As stated above, it is unclear what is meant by “knowledge and experience of the Department’s Bureau of Firearms staff.” DOJ should identify which staff, state their experience and training, and provide any information relied upon by staff to provide members of the public a meaningful opportunity to comment on the references to the amended Initial Statement of Reasons.

It is also unclear why, let alone to what extent, DOJ relied upon the “Field Stripping” section of Colt’s Operator’s Manual. This reference involves the cleaning and maintenance of just one type of firearm. What’s more, the firearm in question is “capable of automatic or semiautomatic fire, with the M4 Carbine featuring 3 round Burst control,” meaning such firearms are classified as “machineguns” within the meaning of California law. It is therefore inappropriate of DOJ to rely on such materials in drafting regulations for *semiautomatic* firearms.

DOJ has also referenced several ATF publications that do not appear to provide any substantive justification for the composed definition. Specifically, DOJ references “unserviceable firearms” as discussed in ATF’s National Firearms Act Handbook. But these references primarily concern those firearms incapable of being readily restored to a firing condition—not how to disassemble a firearm’s action. As ATF notes in this reference, the most common method for rendering a firearm to be unserviceable is “to weld the chamber of the barrel closed and weld the barrel to the receiver.”⁵⁹ Therefore, further clarification from DOJ is necessary in order to afford members of the public a meaningful opportunity to comment on the chosen reference.

Lastly, as stated above, DOJ has for unknown reasons chosen to focus on a style of firearm in crafting its definition as opposed to all “assault weapons.” By doing so, DOJ is ignoring numerous firearms owned by California gun owners that do not fit that classification, leaving those gun owners in

⁵⁶ 11 C.C.R. § 5471(n).

⁵⁷ *Id.*

⁵⁸ Specifically, DOJ references “‘ATF National Firearms Act Handbook,’ ATF E-publication 5320.8, Revised: April 2009, page 5, ‘Section 2.1 Types of NFA firearms,’ page 19, section ‘2.1.9 Unserviceable firearm,’ page 67, section ‘10.1.5 DEWATS,’ page 160, section ‘2. The Gun Control Act.’”

⁵⁹ *National Firearms Act Handbook* at 19, supra.

the dark as to what exactly DOJ's chosen language for this definition means to them. Further clarification from DOJ is needed on this issue.

O. "Featureless"

The term "featureless" has been defined by DOJ to mean "a semiautomatic firearm (rifle, pistol, or shotgun) lacking the characteristics associated with that weapon, as listed in Penal Code section 30515."⁶⁰ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using California Penal Code section 30515 and ATF's August 1997 "FFL Newsletter."

It is again unclear why DOJ is relying upon ATF materials in crafting definitions applicable to California law, especially considering the chosen newsletter is now over 20 years old and no longer applicable following the sunsetting of the Federal "Assault Weapon" Ban in 2004. That said, the chosen reference only concerns the frame or receiver of a firearm.

It is equally unclear why such a definition is in fact necessary. By its nature, a firearm is either an "assault weapon" or it is not. Considering DOJ has refused to provide members of the public with guidance as to how to make a so-called "featureless" firearm, the need to define the term is questionable and doing so will only serve to cause confusion among California gun owners.

P. "Fixed Magazine"

The term "fixed magazine" has been defined by DOJ 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."⁶¹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using only California Penal Code section 30515(b).

As stated above, DOJ is providing a circular reference as it is merely referring to the language in the Penal Code for a term which it is simultaneously trying to define. Such a circular reference and definition is neither necessary nor does it provide additional clarity as required by the APA. What's more, the chosen language of the definition will only serve to cause confusion should the proposed regulation be enacted. This is because the definition fails to reference DOJ's definition for the term "ability to accept a detachable magazine," which directly contradicts this definition when viewed in context of Penal Code section 30515.

Q. "Flare Launcher"

The term "flare launcher" has been defined by DOJ to mean "a device used to launch signal flares."⁶² In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using ATF's National Firearms Act Handbook, pages 149-150 of ATF's E-Publication 5320.8, and ATF Rule 95-3.

⁶⁰ 11 C.C.R. § 5471(o).

⁶¹ 11 C.C.R. § 5471(p).

⁶² 11 C.C.R. § 5471(q).

DOJ's definition for this term provides nothing of substance. It is for that reason that DOJ's reference to ATF Ruling 95-3 is entirely unnecessary. If DOJ sought to provide additional guidance and clarity for the public, it would have instead chosen to use relevant language from ATF Ruling 95-3 and not merely restate the obvious definition of the term. For this reason, further clarification from DOJ is warranted.

R. "Flash Suppressor"

The term "flash suppressor" has been defined by DOJ as "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."⁶³ DOJ has also noted that a hybrid device that has either advertised flash suppressing properties or functionally has flash suppressing properties, or a device labelled or identified by its manufacturer as a flash hider, would also be deemed a flash suppressor.⁶⁴ In the amended Initial Statement of Reasons, DOJ notes that this term previously existed in the California Code of Regulations, but that DOJ has "expanded on it." DOJ also notes that to expand this term, it used the NRA Institute for Legislative Action Glossary.

In addition to the above comments regarding the use of NRA's Glossary, it is disingenuous for DOJ to suggest that this definition was merely expanded upon. As previously worded, the definition reads "any device designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision."⁶⁵ The added language, however, doesn't just attempt to clarify, but instead serves to encompass other types of devices that were not previously classified as "flash suppressors." What's more, DOJ has still failed to adequately address any of the concerns raised in our previous opposition letters, including how if this definition is necessary, why was it repealed in the first place?

S. "FMBUS"

The term "FMBUS" has been defined by DOJ to mean "a firearm manufactured by an unlicensed subject."⁶⁶ In the amended Initial Statement of Reasons, DOJ notes that this term was created entirely by the Department's Bureau of Firearms staff.

As stated above, it is unclear what is meant by "knowledge and experience of the Department's Bureau of Firearms staff." DOJ should identify which staff, state their experience and training, and provide any information relied upon by those staff to provide members of the public a meaningful opportunity to comment on the references to the amended Initial Statement of Reasons.

DOJ also appears to be contradicting its own regulations that were recently adopted pursuant to Assembly Bill No. 857. Instead of adopting the term and definition as applied in other respects, DOJ

⁶³ 11 C.C.R. § 5471(r).

⁶⁴ *Id.*

⁶⁵ 11 C.C.R. § 5469(b) (repealed).

⁶⁶ 11 C.C.R. § 5471(s).

instead chose to adopt the term “self-assembled” and “self-manufactured” firearm.⁶⁷ While these definitions concern the same issue, they are wholly different from one another. And it is in that difference that enforcement of this definition will cause further public confusion. In fact, NRA and CRPA have been contacted on multiple occasions by members and gun owners who have already suffered this confusion.

What’s more, the registration period for newly classified “assault weapons” has now ended. And because this definition will not serve any purpose in helping members of the public identify firearms classified as an “assault weapon” (as is DOJ’s stated purpose for this proposed regulation), it does not satisfy the necessity requirements of the APA.

T. “Forward Pistol Grip”

The term “forward pistol grip” has been defined by DOJ to mean “a grip that allows for a pistol style grasp forward of the trigger.”⁶⁸ In the amended Initial Statement of Reasons, DOJ notes that this term previously existed in the California Code of Regulations and “has not changed.”

Nothing in the amended Initial Statement of Reasons provides any substantive materials for members of the public to comment on. But as stated above with other regulatory definitions that previously existed, if it is somehow necessary to enact, why was the definition repealed to begin with?

U. “Frame”

The term “frame” has been defined by DOJ to mean “the receiver of a pistol.”⁶⁹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using section 479.11 of the Code of Federal Regulations, as well as several ATF publications.⁷⁰

What DOJ fails to mention is that this term has also been defined by DOJ in a separate regulation to mean “the basic unit of a firearm that is a handgun.”⁷¹ Yet DOJ makes no mention of this definition in the referenced materials for the amended Initial Statement of Reasons. As a result, the regulation is already causing confusion by referring to the term “handgun” in one definition and

⁶⁷ 11 C.C.R. § 5507(s) (defining the term to mean, generally, “a firearm fabricated or constructed, including firearm constructed using a 3D printer or any other technology, by a person, or a firearm the component parts which were fit together by a person to construct a firearm”).

⁶⁸ 11 C.C.R. § 5471(t).

⁶⁹ 11 C.C.R. § 5471(u).

⁷⁰ Specifically, DOJ references “U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, ‘ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War, Firearms Verification’, page 17, ‘Pistol.’ ” And “U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, ‘ATF National Firearms Act Handbook,’ ATF E-publication 5320.8, Revised: April 2009, page 160, section ‘2. The Gun Control Act,’ page 166, ‘ATF Rul. 2004-5.’ ”

⁷¹ 11 C.C.R. § 5507(l).

“pistol” in the other. What’s more, the term has been commonly understood by gun owners and members of the public without DOJ’s definition for decades, raising serious questions as to the necessity of the definition.

DOJ’s references to ATF publications also raise additional questions. Most notably, the referenced ATF materials indicate that the term “frame” is not limited to handguns but applies to firearms, generally.⁷² It is also unclear why DOJ is referencing ATF Ruling 2004-5 regarding the “7.62mm Aircraft Machine Gun” of the United States Military for purposes of this definition. Therefore, DOJ should clarify why and how it relied upon these sources in composing the definition at issue.

Lastly, DOJ’s definition directly conflicts with the definition of the term “firearm” as found in California Penal Code section 16520. Pursuant to this section, the term “firearm” only “includes the frame or receiver of the weapon” as applied to specifically listed Penal Code sections.⁷³ Notably absent from this list, however, is Penal Code section 30515. *Expressio unius est exclusio alterius* is a canon of statutory construction holding that, when a legal document includes a list, anything not in that list is assumed to be purposely excluded. Because California’s “assault weapon” restrictions are specifically excluded from this list, a frame or receiver of a firearm alone can never constitute a “firearm” for the purposes of Penal Code section 30515. DOJ’s chosen definition thereby is in direct conflict with this provision as it defines the term to mean “the basic unit of a *firearm*.⁷⁴”

V. “Grenade Launcher”

The term “grenade launcher” has been defined by DOJ to mean “a device capable of launching a grenade.”⁷⁴ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using page 173 of Oxford’s Essential Dictionary of the U.S. Military and page 27 of the ATF Guidebook regarding the Importation and Verification of Firearms.

As with the definition of “flare launcher,” DOJ’s references and definition for this term provides nothing of substance. Such items are already classified as “destructive devices” and have been for decades. DOJ adopting this definition adds nothing of substance and is otherwise circular in nature. For this reason, further clarification from DOJ as to the purpose of these references is warranted.

W. “Permanently Attached To”

The term “permanently attached to” has been defined by DOJ to mean “the magazine is welded, epoxied, or riveted into the magazine well.”⁷⁵ DOJ’s definition also states that a firearm with a magazine housed in a sealed magazine well and then welded, epoxied, or riveted into the sealed

⁷² See *National Firearms Act Handbook* at 160, supra. (noting the definition of the term “firearm” includes “the *frame* or receiver of any such weapon” (emphasis added)).

⁷³ Cal. Penal Code § 16520(b)(1-20).

⁷⁴ 11 C.C.R. § 5471(v).

⁷⁵ 11 C.C.R. § 5471(w).

magazine well meets this definition.⁷⁶ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using several ATF publications.⁷⁷

As noted above, ATF Ruling 2005-4 concerns certain integral devices intended to diminish the report of paintball guns. Likewise, the other referenced ATF publications concern permanently attached **muzzle devices**, not **magazines** as is the subject of this definition. What use any of these publications have for the purpose of composing this definition warrants further clarification from DOJ in order to allow the public a meaningful opportunity to provide comment.

X. “Overall Length of Less Than 30 Inches”

DOJ defined the term “overall length of less than 30 inches” to mean:

[W]ith respect to a centerfire rifle means the rifle has been measured in the shortest possible configuration that the weapon will function/fire and the measurement is less than 30 inches. Folding and telescoping stocks shall be collapsed prior to measurement. The approved method for measuring the length of the rifle is to measure the firearm from the end of the barrel, or permanently attached muzzle device, if so equipped, to that part of the stock that is furthest from the end of the barrel, or permanently attached muzzle device. (Prior to taking a measurement the owner must also check any muzzle devices for how they are attached to the barrel.)⁷⁸

In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the case of *People v. Rooney*, 17 Cal.App.4th 1207 (1993), and various pages of ATF’s Guidebook regarding the Importation & Verification of Firearms.⁷⁹

As a threshold matter, the referenced case by DOJ concerned a defendant charged with possession of a “short-barreled firearm” and not an “assault weapon” as these regulations purport to concern. What’s more, the decision was issued well before the Legislature adopted California’s restrictions against certain firearms with an overall length of less than 30 inches. It is for this reason that DOJ should have sought meaningful input from members of the public instead of referring to now outdated and potentially distinguishable legal opinions.

⁷⁶ *Id.*

⁷⁷ Specifically, DOJ references “‘ATF Rul. 2005-4.’ Carl J. Truscott, Director, October 12, 2005. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, ‘ATF National Firearms Act Handbook,’ ATF E-publication 5320.8, Revised: April 2009, page 5, ‘2.1.1 Shotgun,’ page 6, ‘2.1.3 Rifle,’ page 21, ‘Section 2.5 Removal of firearms from the scope of the NFA by modification/elimination of components.’ ”

⁷⁸ 11 C.C.R. § 5471(x).

⁷⁹ Specifically, DOJ references “U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, ‘ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War, Firearms Verification’, page 21, sections 5845(a)(1) 5845(a)(2); page 22, section 5845(a)(3) and 5845(a)(4); page 25; pages 29-30, sections 1 and 2; page 31, section 5; page 32, section 6.

The cited references to ATF's guidebook are equally confusing and lack substantive value for members of the public to comment on. Pages 21-22 merely concerns the definition of the term "firearm" under federal law, noting that firearms with a certain overall lengths or barrel lengths are "[s]ubject to NFA regulations."⁸⁰ Whereas pages 25, 29-30, and 32 only concern "Any Other Weapons" and "Antique" firearms. Further clarification from DOJ as to how such references assisted in composing the substantive definition is warranted to provide members of the public a meaningful opportunity to comment.

Y. "Pistol"

The term "pistol" has been defined by DOJ to mean "any device designed to be used as a weapon, from which a projectile is expelled by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length."⁸¹ DOJ's definition also states that this includes AR-15 style pistols with pistol buffer tubes attached, noting that pistol buffer tubes typically have smooth metal with no guide on the bottom for rifle stocks to be attached and sometimes have a foam pad on the end of the tube farthest from the receiver.⁸² In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using California Penal Code section 16530 as well as several ATF publications.⁸³

A primary concern with DOJ adopting this definition is the fact that California Penal Code section 16530 already defines the term, raising issues of necessity and nonduplication. But DOJ's definition differs from the Penal Code definition, which also raises issues of consistency and clarity. For these reasons, further clarification from DOJ is necessary in order to afford members of the public a meaningful opportunity to comment.

Z. "Pistol Grip That Protrudes Conspicuously Beneath the Action of the Weapon"

The term "pistol grip that protrudes conspicuously beneath the action of the weapon" has been defined by DOJ to mean "a grip that allows for a pistol style grasp in which the web of the trigger hand

⁸⁰ See *ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War: Firearms Verification* at 21-22, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, <https://www.atf.gov/firearms/docs/guide/atf-guidebook-importation-verification-firearms-ammunition-and-implements-war/download> (last visited Nov. 6, 2008) (emphasis added).

⁸¹ 11 C.C.R. § 5471(y).

⁸² *Id.*

⁸³ Specifically, DOJ references "U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, All FFLs Jan 2015 Open Letter on the Redesign of 'Stabilizing Braces,' entire letter. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, 'ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War, Firearms Verification,' pages 17, page 18, and 25. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives Letter to Mr. Michael Faucette of Mark Barnes & Associates regarding 'Adjustable Pistol Stabilizing Braces,' December 22, 2015, entire letter."

(between the thumb and index finger) can be placed beneath or below the top of the exposed portion of the trigger while firing.”⁸⁴ DOJ’s definition also notes that this definition includes pistol grips on bullpup firearm designs.⁸⁵ In the amended Initial Statement of Reasons, DOJ notes that this definition previously existed in the California Code of Regulations but that DOJ has “expanded on it.” DOJ also states that to expand this definition, it used pages 166 and 227 of Graham Smith and Ian Hogg’s book *Military Small Arms 300 Years of Soldiers* and NRA’s Glossary.

As a threshold matter, the only change from the previously enforced definition for this term is the addition of the language regarding bullpup firearm designs. That said, the current version of NRA’s Glossary defines the term to mean “[t]he handle of a handgun or protrusion on the buttstock or fore-end of a shoulder-operated gun that resembles the grip or handle of a handgun.”⁸⁶ This definition also notes that a “‘semi-pistol grip’ is one less pronounced than normal” whereas “a ‘vertical pistol grip’ is more pronounced than normal.”⁸⁷

Setting aside the issues raised above regarding the use of NRA’s Glossary, it is entirely unclear how DOJ relied upon this information in expanding upon the previously adopted definition. The same is true for Mr. Smith and Mr. Hogg’s book. As a result, further clarification from DOJ is necessary to afford members of the public a meaningful opportunity to comment on the amended Initial Statement of Reasons.

AA. “Receiver,” “Receiver, Lower,” “Receiver, Upper”

The term “receiver” has been defined by DOJ to mean “the basic unit of a firearm which houses the firing and breech mechanisms and to which the barrel and stock are assembled.”⁸⁸ And the terms “receiver, lower” and “receiver, upper” have been defined by DOJ to mean “the lower part” and “top portion” of a “two part receiver,” respectively.⁸⁹ In the amended Initial Statement of Reasons, DOJ notes that it composed these definitions using NRA-ILA’s Glossary, pages 11 and 12 of ATF’s Guidebook regarding the Importation & Verification of Firearms, and various pages of the U.S. Marine Corps Technical Manual for the M16A2 Rifle.

As a threshold matter, this term is defined differently by DOJ elsewhere for no apparent reason. DOJ has defined the term in 11 C.C.R. section 5507(p) to mean “the basic unit of a firearm that is a long gun.” In other words, DOJ specifically limits the application of this definition in certain respects. And as explained above, California Penal Code section 16520 prohibits a receiver from being classified as an “assault weapon,” thereby raising serious questions about the definition’s necessity, clarity, and consistency.

⁸⁴ 11 C.C.R. § 5471(z).

⁸⁵ *Id.*

⁸⁶ <https://www.nraila.org/for-the-press/glossary/>.

⁸⁷ *Id.*

⁸⁸ 11 C.C.R. § 5471(aa).

⁸⁹ 11 C.C.R. § 5471(bb), 5471(dd).

NRA's Glossary defines the term "receiver" to mean "[t]he housing for a firearm's breech (portion of the barrel with chamber into which a cartridge or projectile is loaded) and firing mechanism."⁹⁰ Setting aside the above issues raised regarding DOJ's use of NRA's Glossary, the definitions differ in that DOJ's definition classifies the term as a firearm, whereas NRA's definition does not. A good reason for this is because an upper receiver or lower receiver, in and of itself, does not necessarily constitute the serialized part which is treated as a "firearm" for the purposes of state or federal law. DOJ's definition, on the other hand, does not make this distinction, which can result in confusion among gun owners.

Lastly, the reference to ATF's Guidebook regarding the Importation & Verification of Firearms appears to add nothing of substance for members of the public to provide meaningful comment on. For these reasons, further clarification and/or explanation from DOJ is necessary.

BB. "Receiver, Unfinished"

The term "receiver, unfinished" has been defined by DOJ to mean "a precursor part to a firearm that is not yet legally a firearm."⁹¹ DOJ has also stated that unfinished receivers may be found in various levels of completion, and that as more finishing work is completed, it gradually becomes a firearm.⁹² DOJ also states that some just have the shape of an AR-15 lower receiver and are solid metal, whereas some have been worked on and the magazine well has been machined open.⁹³ DOJ's definition also states that an FMBUS began as unfinished receivers.⁹⁴ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using several ATF publications.⁹⁵

DOJ's chosen definition serves as a prime example of DOJ's own inconsistency. In a separate regulation, DOJ defines the term "Receiver or *frame*, unfinished" using an identical description.⁹⁶ Choosing to expand the definition to include frames in this context will only result in confusion among gun owners.

⁹⁰ <https://www.nraila.org/for-the-press/glossary/>.

⁹¹ 11 C.C.R. § 5471(cc).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Specifically, DOJ references "U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, 'Are '80%' or 'unfinished' receivers illegal?' <https://www.atf.gov/qa-category/receiver-blanks>, last reviewed April 27, 2018. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, 'Are some items being marketed as non-firearm unfinished or '80%' receivers actually considered firearms?' <https://www.atf.gov/qa-category/receiver-blanks>, last reviewed May 2, 2016. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, 'ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War, Firearms Verification,' page 4 section (2), page 7 section (e). U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, 'What is an '80%' or 'unfinished' receiver?' <https://www.atf.gov/qa-category/receiver-blanks>, last reviewed May 14, 2015."

⁹⁶ See 11 C.C.R. § 5507(q) (emphasis added).

The referenced ATF materials also provide little or no substance for members of the public to provide meaningful comment on. The primary concern for each of these publications is to determine whether an object is considered a firearm for purposes of federal law. They do not attempt to specifically define objects that are not yet considered firearms as DOJ is attempting to do here. What purpose DOJ has in adopting this definition remains unclear and requires further clarification.

CC. “Rifle”

The term “rifle” has been defined by DOJ to mean “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.”⁹⁷ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using California Penal Code section 17090 and several ATF publications.⁹⁸

As a threshold matter, the term “rifle” is already defined by the California Penal Code.⁹⁹ DOJ has also defined the term in the context of another regulation for purposes of registration.¹⁰⁰ While the language among these definitions are identical, the issue is again one of necessity, especially for a term that is already commonly understood among gun owners. Further clarification from DOJ on this issue is therefore warranted.

DD. “Rimfire”

The term “rimfire” has been defined by DOJ to mean “a rimmed or flanged cartridge with the priming mixture located in the rim of the case.”¹⁰¹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using pages 7 and 8 of Frank Barnes book *Cartridges of the World* and NRA’s Glossary.

DOJ’s chosen language mirrors that found in NRA’s Glossary and is largely consistent with Mr. Barnes’ book. Setting aside the issues raised above regarding the use of NRA’s Glossary, it is unclear why DOJ needs to define this term. The term is not mentioned anywhere in California’s “assault weapon” restrictions, let alone Penal Code section 30515. Enacting a definition applicable to this code section, therefore, will only serve to cause confusion and is otherwise not necessary.

⁹⁷ 11 C.C.R. § 5471(ee).

⁹⁸ Specifically, DOJ references “U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, ‘ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War, Firearms Verification,’ pages 19, 21, 22 and 25. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, ‘ATF National Firearms Act Handbook,’ ATF E-publication 5320.8, Revised: April 2009, page 95, section ‘(c) Rifle.’ ”

⁹⁹ See Cal. Penal Code § 17090.

¹⁰⁰ See 11 C.C.R. § 5507(r).

¹⁰¹ 11 C.C.R. § 5471(ff).

EE. “Second Handgrip”

The term “second handgrip” has been defined by DOJ as “a grip that allows the shooter to grip the pistol with their non-trigger hand.”¹⁰² DOJ’s definition also states that the second hand grip often has a grip texture to assist the shooter in weapon control.¹⁰³ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using page 9 of ATF’s National Firearms Act Handbook.

The cited reference to ATF’s National Firearms Act handbook merely states that “certain alterations to a pistol or revolver, such as the addition of a second vertical handgrip, create a weapon that no longer meets the definition of pistol or revolver.”¹⁰⁴ If such firearms are no longer capable of meeting the definition of a *pistol* or *revolver*, clarification is needed on how this reference was appropriate for DOJ to rely upon in composing a definition applicable to a *pistol*.

FF. “Semiautomatic”

The term “semiautomatic” has been defined by DOJ to mean the following:

[A] firearm functionally able to fire a single cartridge, eject the empty case, and reload the chamber each time the trigger is pulled and released. Further, certain necessary mechanical parts that will allow a firearm to function in a semiautomatic nature must be present for a weapon to be deemed semiautomatic. A weapon clearly designed to be semiautomatic but lacking a firing pin, bolt carrier, gas tube, or some other crucial part of the firearm is not semiautomatic for purposes of Penal Code section 30515, 30600, 30605(a), and 30900.

- (1) *A mechanically whole semiautomatic firearm merely lacking ammunition and a proper magazine is a semiautomatic firearm.*
- (2) *A mechanically whole semiautomatic firearm disabled by a gun lock or other firearm safety device is a semiautomatic firearm. (All necessary parts are present, once the gun lock or firearm safety device is removed, and weapon can be loaded with a magazine and proper ammunition.)*
- (3) *With regards to an AR-15 style firearm, if a complete upper receiver and a complete lower receiver are completely detached from one another, but still in the possession or under the custody or control of the same person, the firearm is not a semiautomatic firearm.*

- (4) *A stripped AR-15 lower receiver, when sold at a California gun store, is not a semiautomatic firearm. (The action type, among other things, is undetermined.)¹⁰⁵*

¹⁰² 11 C.C.R. § 5471(gg).

¹⁰³ *Id.*

¹⁰⁴ See *National Firearms Act Handbook* at 9, supra.

¹⁰⁵ 11 C.C.R. § 5471(hh).

In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using the knowledge and experience of DOJ’s staff, specific California Penal Code sections, and the NRA Institute for Legislative Action Glossary.¹⁰⁶

As stated above, it is unclear what is meant by “knowledge and experience of the Department’s Bureau of Firearms staff.” DOJ should identify which staff, state their experience and training, and provide any information relied upon by staff to provide members of the public a meaningful opportunity to comment on the references to the amended Initial Statement of Reasons.

Setting aside the above comments regarding the use of NRA’s Glossary, DOJ’s chosen language wildly expands upon the NRA’s definition. As defined in the NRA’s Glossary, the term “semiautomatic” simply means “[a] firearm designed to fire a single cartridge, eject the empty case and reload the chamber each time the trigger is pulled.”¹⁰⁷ Whether and how this definition was used by DOJ in adopting any of the additional language should be clarified to afford members of the public a meaningful opportunity to comment.

Lastly, it is unclear how DOJ relied upon the cited Penal Code sections in composing this definition. The referenced sections are all in relation to California’s “assault weapon” restrictions and do not provide any guidance regarding what constitutes a “semiautomatic” firearm for the purposes of these restrictions. Further clarification on how these sections assisted DOJ in composing the substantive definition is therefore needed to provide members of the public a meaningful opportunity to comment.

GG. “Shotgun with a Revolving Cylinder”

The term “shotgun with a revolving cylinder” has been defined by DOJ to mean “a shotgun that holds its ammunition in a cylinder that acts as a chamber much like a revolver.”¹⁰⁸ DOJ’s definition also states that to meet this definition, the shotgun’s cylinder must mechanically revolve or rotate each time the weapon is fired, whereas a cylinder that must be manually rotated by the shooter does not qualify as a revolving cylinder.¹⁰⁹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using page 13 of Ian Hogg and John Weeks’ book *Military Small Arms of the 20th Century* and the SRM Arms Model 1216 Operating Instructions.

The reference to the book *Military Small Arms of the 20th Century*, as with other references to military firearms, does not appear to be an appropriate comparison. For example, much of the discussion in the cited reference focuses on multi-barreled machine guns including the Vulcan, Minigun, and other aircraft cannons and machineguns. To say that this discussion is somehow useful in composing the definition is therefore questionable. The same is true for the manual of the SRM Arms

¹⁰⁶ Specifically, DOJ references California Penal Code sections 30315, 30600, 30605(a), and 30900.

¹⁰⁷ <https://www.nraila.org/for-the-press/glossary/>.

¹⁰⁸ 11 C.C.R. § 5471(ii).

¹⁰⁹ *Id.*

Model 1216, a shotgun that does not incorporate a revolving cylinder design. Further clarification from DOJ is therefore warranted as to why or how these references assisted DOJ in composing the definition at issue.

Lastly, this term has not been defined since the enactment of Senate Bill No. 23 (“SB 23”) in 1999, nor was it changed or modified following the enactment of SB 880 and AB 1135. Further clarification from DOJ as to why this definition is only now necessary is warranted.

HH. “Shroud”

The term “shroud” has been defined by DOJ to mean “a heat shield that is attached to, or partially or completely encircles the barrel, allowing the shooter to fire the weapon with one hand and grasp the firearm over the barrel with the other hand without burning the shooter’s hand.”¹¹⁰ But DOJ also states that a slide encircling the barrel is not a shroud.¹¹¹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using California Penal Code section 30515(a)(4)(C).

The cited reference here provides nothing of substance for members of the public to provide meaningful comment on. As with other definitions containing circular references in the amended Initial Statement of Reasons, this reference and substantive definition raises concerns of necessity and nonduplication. Further clarification from DOJ is therefore needed.

II. “Spigot”

The term “spigot” has been defined by DOJ to mean “a muzzle device on some firearms that are intended to fire grenades.”¹¹² DOJ has also stated that the spigot is what the grenade is attached to prior to it being launched.¹¹³ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using page 5 of Century Arms’ Manual for the Yugo Model 59/66 Rifle.

The cited reference does not provide any substantive information for members of the public to provide comment on. Instead, the cited reference merely notes that the Yugo Model 59/66 was distinguished from other SKS variants by nature of its “spigot-style grenade launcher permanently attached to the muzzle and a folding grenade launcher sight.”¹¹⁴ Such a device is therefore a grenade launcher under federal and state law. The question, then, is why such a definition is necessary when such devices have been prohibited as “destructive devices” for decades and the term “grenade launcher” is already listed as a prohibited feature.

¹¹⁰ 11 C.C.R. § 5471(jj).

¹¹¹ *Id.*

¹¹² 11 C.C.R. § 5471(kk).

¹¹³ *Id.*

¹¹⁴ See *Owner’s Manual: Yugo Model 59/66 Rifle*, Cal. 7.62x39mm at 5, Century International Arms, <https://www.centuryarms.com/media/Rhet/Resources/Post/Attachment/43028537736787.pdf> (last visited Nov. 6, 2018).

JJ. “Stock,” “Stock, Fixed,” “Stock, Folding,” “Stock, Telescoping”

The term “stock” has been defined by DOJ to mean “the part of a rifle, carbine, or shotgun to which the receiver is attached and which provides a means for holding the weapon to the shoulder.”¹¹⁵ DOJ’s definition also states that a stock may be fixed, folding, or telescoping.¹¹⁶ These have been defined by DOJ in the following ways:

- **Fixed** – “a stock that does not move, fold, or telescope.”¹¹⁷
- **Folding** – “a stock which is hinged in some fashion to the receiver to allow the stock to be folded next to the receiver to reduce the overall length of the firearm.”¹¹⁸
- **Telescoping** – “a stock which is shortened or lengthened by allowing one section to telescope into another portion.”¹¹⁹

In the amended Initial Statement of Reasons, DOJ notes that it composed these definitions using California Penal Code sections 17090 and 17190, ATF’s Open Letter to FFLs Regarding “Stabilizing Braces,” pages 2-7 and 2-34 of the United States Marine Corps Technical Manual for the M16A2 Rifle, pages 164-165 of Graham Smith and Ian Hogg’s book *Military Small Arms 300 Years of Soldiers’ Firearms*, and pages 14 and 34 of Colt’s Operator’s Manual for the M16A2 Carbine, Commando SMG, and M4 Carbine.

Penal Code sections 17090 and 17190 provide California’s definitions for “rifle” and “shotgun.” But these definitions do not otherwise appear to provide anything of substance other than noting such firearms are “designed or redesigned, made or remade, and intended to be fired from the shoulder.”¹²⁰ Likewise, the reference to ATF’s Open Letter to FFLs on the Redesign of “Stabilizing Braces” appears to provide nothing of substance because this letter concerns certain products applicable to *pistols* and not rifles, carbines, or shotguns as DOJ’s definition notes.

As for the other cited references, DOJ is once again referring only to manuals for firearms generally classified as machineguns under state and federal law. Further clarification from DOJ is therefore warranted.

Lastly, DOJ has already demonstrated it is incapable of applying its own definition in a uniform manner, raising serious questions as to the APA’s clarity requirement for regulations. NRA and CRPA

¹¹⁵ 11 C.C.R. § 5471(l).

¹¹⁶ *Id.*

¹¹⁷ 11 C.C.R. § 5471(mm).

¹¹⁸ 11 C.C.R. § 5471(nn) (DOJ’s definition also notes that this definition includes under folding and over folding stocks).

¹¹⁹ 11 C.C.R. § 5471(oo) (DOJ’s definition notes that on AR-15 style firearms, the buffer tube or receiver extension acts as the fixed part of the stock on which the telescoping butt stock slides or telescopes).

¹²⁰ See Cal. Penal Code §§ 17090, 17190.

have received several questions from members and gun owners regarding certain adjustable stocks that, while incapable of meeting the definition for a “telescoping” stock, DOJ has nonetheless arbitrarily deemed them to be. These stocks typically have adjustable fit features that can move but do not telescope off the buffer tube or receiver extension. Yet when processing SB 880 and AB 1135 registrations, DOJ has nonetheless required gun owners to mark such products as telescoping stocks. Further clarification from DOJ is therefore warranted.

KK. “Those Weapons with an Ammunition Feeding Device that Can be Readily Removed from the Firearm with the Use of a Tool”

Here, DOJ has also adopted a definition for a “term” when in fact the definition is designed to identify certain types of firearms. Specifically, DOJ has defined “those weapons with an ammunition feeding device that can be readily removed from the firearm with the use of a tool” includes “functional semiautomatic rifles, pistols, and shotguns with bullet-button style magazine releases.”¹²¹ In the amended Initial Statement of Reasons, DOJ notes that it composed this definition using California Penal Code section 30900(b)(1).

The cited reference provides nothing of substance for members of the public to provide meaningful comment on. As with other definitions containing circular references in the amended Initial Statement of Reasons, this reference and substantive definition raises concerns of necessity and nonduplication. Further clarification from DOJ is therefore warranted.

LL. “Thumbhole Stock”

The term “thumbhole stock” has been defined by DOJ to mean “a stock with a hole that allows the thumb of the trigger hand to penetrate into or through the stock while firing.” In the amended Initial Statement of Reasons, DOJ notes that this term previously existed under 11 C.C.R. section 5469 and has not changed.

The cited reference provides nothing of substance for members of the public to provide meaningful comments on. Outside of our prior comments to which DOJ has yet to adequately respond to, DOJ has still failed to answer why this regulation is now necessary if this definition was previously repealed.

MM. “Threaded Barrel, Capable of Accepting a Flash Suppressor”

The term “threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer” has been defined by DOJ to mean “a threaded barrel able to accept a flash suppressor, forward handgrip, or silencer, and includes a threaded barrel with any one of those features already mounted on it.”¹²² DOJ’s definition also states that some firearms have “lugs” in lieu of threads which are used to attach some version of silencers, and that for the purpose of this definition a barrel with such lugs is construed as a threaded barrel.¹²³ In the amended Initial Statement of Reasons, DOJ notes

¹²¹ 11 C.C.R. § 5471(pp).

¹²² 11 C.C.R. § 5471(rr).

¹²³ *Id.*

that it composed this definition using page 15 of Heckler & Koch's MP5 Submachinegun Operators Manual and pages 11-12 of ATF's Guidebook regarding the Importation & Verification of Firearms.

The reference to Heckler & Koch's MP5 Submachinegun Operators Manual does not provide anything of substance for members of the public to provide meaningful comment on. The cited page merely contains a list of nomenclature terms for the MP5. What's more, the firearm is a "submachinegun, with it's detachable large capacity magazine and select-fire operation."¹²⁴ DOJ is therefore once again referring to an instruction manual for a firearm that is strictly prohibited in California by nature of it being classified as a machinegun.

DOJ's reference to ATF's Guidebook also serves as a prime example of DOJ's fundamental misunderstanding of firearm terminology that could have been avoided if it sought meaningful input from the public. The specific reference notes that a frame or receiver of a destructive device is "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion **to receive** the barrel."¹²⁵ This definition, therefore, has zero relation to a threaded barrel capable of accepting a flash suppressor, and instead is only in reference to the frame of a destructive device that has threading for purposes of accepting some type of barrel.

Further clarification how either of these references assisted DOJ in composing the definition is warranted. DOJ should also state why such a definition is necessary given the term was first adopted following the enactment of SB 23 in 1999, was not changed with the enactment of SB 880 and AB 1135, and during that time was never specifically defined by DOJ. What's more, adopting this definition now will only cause confusion among gun owners as DOJ is attempting to specify that barrels with features already mounted are still considered threaded barrels by DOJ. Otherwise, DOJ should clarify if barrels that have permanently attached devices also constitute threaded barrels.

IV. THE ADDITIONAL "TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS" LIKEWISE DO NOT ADDRESS ANY OF THE ABOVE APA REQUIREMENTS

Outside of those comments raised above and in our previous correspondence, we believe it improper for DOJ to only reference technical and/or operator manuals for machineguns when composing definitions used to identify semiautomatic firearms. There are far more appropriate sources available for DOJ to rely upon.

DOJ has not once contacted our clients (or any stakeholder to our knowledge) to seek their input in composing the definitions at issue in this proposed regulation. Instead, DOJ appears to be relying upon that information which it has on hand—likely from its own equipment purchases for purposes of equipping its agents. It is for this reason that DOJ should reconsider its current approach

¹²⁴ Heckler & Koch MP5 Submachinegun Family Operator's Manual, Heckler & Koch, Inc. (May 1993).

¹²⁵ See *ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War: Firearms Verification* at 12, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, <https://www.atf.gov/firearms/docs/guide/atf-guidebook-importation-verification-firearms-ammunition-and-implements-war/download> (last visited Nov. 6, 2008) (emphasis added).

and instead seek the meaningful input of stakeholders and the gun-owning public before composing definitions from its limited and narrow perspective.

V. DOJ'S AMENDED INITIAL STATEMENT OF REASONS DO NOT ADDRESS ITEMS IDENTIFIED BY OAL AS REQUIRING ATTENTION PRIOR TO RESUBMISSION OF THIS MATTER

In connection with the withdrawal of the proposed regulation as originally submitted for review, a senior attorney with OAL emailed DOJ with a list of items “that should be addressed prior to resubmission of this matter.”¹²⁶ None of these items have been addressed in DOJ’s amended Initial Statement of Reasons and related documents. Below, we have highlighted and summarized each of these items to ensure they are addressed and responded to by DOJ before the proposal is resubmitted to OAL for review.

A. Box B.4 on Form 399

On the Fiscal Impact Statement Form submitted with this proposed regulation, box B.4 (which addresses the fiscal effect the proposed regulation will have on state government) was checked. The note from DOJ regarding this selection indicates that “[t]he proposed regulation action will clarify ambiguities in the identification of assault weapons and will not have any negative fiscal impacts.” But as stated by OAL, California’s State Administrative Manual (“SAM”) requires California’s Department of Finance to approve DOJ’s selection and statement.¹²⁷ No such approval appears to have been presented in connection with DOJ’s amended Initial Statement of Reasons and related documents.

B. Comment Binder 2 – Final Statement of Reasons

OAL’s attorney identified 3 items contained in “Binder 2” that should be addressed, all of which appear to relate to comments 1 and 2 as summarized and responded to by DOJ in their Final Statement of Reasons submitted to OAL.¹²⁸ OAL noted that some of these comments were marked as irrelevant when in fact they were directed at the action, concern pending legal challenges, and highlight how the proposed regulation is not clear and/or easily understood by California residents. OAL notes these comments as relevant and thereby warranting a specific response from DOJ.

¹²⁶ A redacted copy of this email is attached to this letter for reference.

¹²⁷ See SAM – Budgeting, *Estimates Which Require Department of Finance Action: 6615*, https://www.documents.dgs.ca.gov/sam/SamPrint/new/sam_master/sam_master_file/chap6000/6615.pdf (revised and renumbered from 6660 in March 2009).

¹²⁸ Specifically, these include comments by individuals (names omitted) with references to Tabs K and L.

C. Comment Binder 3 – Final Statement of Reasons

“Binder 3” was also identified to contain comments warranting more specific and/or appropriate responses than what was provided in DOJ’s Final Statement of Reasons.¹²⁹ Regarding the summarized comments and DOJ’s responses, DOJ failed to address how the proposed regulation does not infringe on the Second Amendment and/or other Constitutional rights. DOJ also responded using a “general opposition response” to questions on how the proposed regulation is not arbitrary and therefore necessary or to what extent these regulations will take away law enforcement resources from enforcing existing laws. What’s more, DOJ also failed to appropriately respond to a comment asking about why the hearing on the proposed regulation was happening at this time, thereby directed at the procedures followed by DOJ in submitting the proposed regulation to OAL.

D. Comment Binder 4 – Final Statement of Reasons

Several comments associated with “Binder 4” were also identified by OAL as warranting more specific and/or appropriate responses from DOJ.¹³⁰ Individual comments were improperly marked as irrelevant, including comments regarding a lack of adequate notice and funds being wasted on this program which would be better served for other law enforcement purposes. And several of the responses to summarized comments did not appear to address the issue raised.

Among the summarized comments and responses identified were several comments raised by in a previous opposition letter submitted by our office on behalf of NRA and CRPA. These include the following:

#	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.

Comment #71, with DOJ’s response identified by OAL as not addressing the assertions raised.

¹²⁹ Specifically, these include DOJ’s response to summarized comments #2, #3a, #29. These also include DOJ’s responses to individual comments by individuals (names omitted) with references to Tabs R, S, and Y.

¹³⁰ Specifically, these include DOJ’s responses to summarized comments #52, #62, #85, #70, #71, #72, #102, and #103. These also include individual comments by individuals (names omitted) with a reference to comment #49.

#	Summarized Comment	DOJ Response
71.	<p>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 <i>rifles</i> and <i>pistols</i>. Nothing in the Code changed for shotguns, including for '[a] semiautomatic shotgun that has the ability to accept a detachable magazine.'"</p>	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.

Comment #71, with DOJ's response identified by OAL as not addressing the specific interpretation issue being raised (i.e., why the legislature used the phrase "ability to accept a detachable magazine" instead of "does not have a fixed magazine") with respect to specific shotguns.

#	Summarized Comment	DOJ Response
72.	<p>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.</p> <p>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.</p> <p>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..."</p>	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.

Comment #72, with DOJ's response identified by OAL as not addressing the objection raised.

E. Comments Listed by DOJ as “Irrelevant” Which Are in Fact Relevant

Lastly, OAL identified several summarized labeled by DOJ as irrelevant that are, in fact, relevant thereby warranting an appropriate response from DOJ.¹³¹

VI. DOJ’S OWN ATTORNEYS HAVE PROVIDED CONFLICTING ACCOUNTS REGARDING THE EFFECT OF ENACTING 11 C.C.R. SECTION 5471

In several lawsuits challenging the underlying definitions and Penal Code provisions associated with the proposed regulation, DOJ’s own attorneys have provided conflicting accounts as to their exact nature and effect. For example, DOJ noted in one filing that all the previous definitions used to identify “assault weapons” were not in fact repealed, and instead “consolidated” in section 5471 along with other definitions that apply to the registration of newly-classified “assault weapons.”¹³² If true, there should be no need to adopt these definitions now.

In another example, DOJ’s own experts have testified that it is already impossible for a layman, including law enforcement officers, to accurately classify a firearm as an “assault weapon” under California law. Specifically, Detective Mersereau of the LAPD recently stated that “LAPD does not keep statistics on the number of assault weapons . . . recovered citywide *due to the expertise needed to determine whether a weapon is actually an assault weapon.*”¹³³ If, through its own expert, DOJ truly believes this to be the case, no amount of definitions or otherwise will help members of the public accurately identify a firearm as an “assault weapon” under California law without expert assistance.

VII. CONCLUSION

All of DOJ’s listed references in the amended Initial Statement of Reasons appear to be limited to that which DOJ had on hand as a result of prior equipment purchases for the Department or otherwise. Nor has DOJ made a reasonable effort to afford members of the public an opportunity to comment on any of the substantive definitions. Instead, the amended Initial Statement of Reasons appears to be nothing more than a rushed attempt to provide legal support for definitions that were illegally adopted and now the subject of litigation.

¹³¹ Specifically, these include summarized comments #17, #29a-c, #49, #65, #66, #104, and #109.

¹³² See Opposition to Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at 10-11, *Villanueva v. Becerra*, Case No. 17-03093 (stating that “[p]etitioners incorrectly contend that DOJ improperly repealed five definitions originally promulgated in 2000” and that “[t]hese definitions now appear in section 5471.”) April 6, 2018, <http://michellawyers.com/wp-content/uploads/2018/05/Villanueva-Opp-to-Writ-of-Mandate.pdf>.

¹³³ Expert Report and Declaration of Det. Michael Mersereau at 4:10-12 (Oct. 25, 2018), *Rupp v. Becerra*, Case No. 17-00746 (compl. filed 2017).

For these reasons, DOJ should abandon its current path and instead propose substantive regulatory definitions that afford members of the public a meaningful opportunity to comment.

Sincerely,
Michel & Associates, P.C.



Matthew D. Cubeiro

From: [REDACTED]
Sent: Monday, July 9, 2018 3:59 PM
To: 'Jacqueline Dosch'; [REDACTED]
Subject: OAL Matter No. 2018-0525-04S Assault Weapon Definitions

Hi Jacqueline,

Below are some items I have identified that should be addressed prior to resubmission of this matter. If you have any questions, please feel free to contact me.

Form 399:

1. Box B.4. is checked, which, pursuant to SAM 6615 requires DOF signoff.

Final Statement of Reasons:

2. Comments- Binder 3:
 - a. #2: These comments suggest that DOJ is punishing gun owners. DOJ using general opposition response, however, these are a bit more specific.
 - i. Comment from [REDACTED] (Tab R) alleges definitions are arbitrary. This is essentially a necessity challenge. Response does not address this issue.
 - ii. Tab S, Comment from [REDACTED] – “How about enforcing existing laws?” does not appear to be addressed in summary.
 - b. #3(a): Raises second amendment violation. DOJ’s response does not appear to address the objection raised by commenter.
 - c. #29 – Tab Y, Comment from [REDACTED] – asks about why the hearing is happening now. This appears relevant because it is directed at the procedures followed.
3. Comments Binder 2:
 - d. Tab K, comment from [REDACTED] – Second issue marked as irrelevant, however, it is directed at the action.
 - e. Tab L – comment by [REDACTED] part 2, issue about standing up to legal challenges appears to be relevant.
 - f. Tab L – Comment from [REDACTED] re imposing confusing regulations on citizens. This appears to be a claim that the regulations are not clear and should be addressed more specifically than the responses in #2.
4. Comments Binder 4:
 - g. Comment from [REDACTED] #49: This comment is identified as irrelevant however, it appears directed at the procedures in that the commenter states that DOJ adoption of these regulations is being done without adequate notice to the public.
 - h. Comment from [REDACTED] – Use money wasting on this program to support law enforcement etc. This comment appears to be relevant and should be responded to.
 - i. Comment #52- DOJ’s response does not appear to address the objection raised by commenter.
 - j. Comment 62 – Re vagueness of regulations. DOJ’s response does not appear to address the issue raised.
 - k. Comment 85 – DOJ’s response does not appear to address the issue raised by commenter.

- I. Comment 52 – DOJ's response does not appear to address the issues raised.
- m. Comment #70 – DOJ's response appears to not address the assertions raised.
- n. #71 – DOJ's response does not really address the specific interpretation issue being raised i.e. why did the legislature use "ability to accept detachable magazine" instead of "does not have a fixed magazine."
- o. #72- challenges DOJ's necessity. DOJ's response does not appear to address the objection raised by commenter.
- p. # 85 - DOJ's response does not appear to address the issues raised.
- q. #102 - DOJ's response does not appear to address the issues raised.
- r. #103 - DOJ's response does not appear to address the issues raised.

Comments Identified as Irrelevant that appear to be relevant:

- 5. #17
- 6. #29a-c
- 7. #49
- 8. #65
- 9. #66
- 10.#104
- 11.#109

Once again, please feel free to contact me if you have any questions.

[REDACTED]
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