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

RE: OAL Reference No. CTU2012-0207-01: Petition by Jason Davis re: alleged underground regulation by the Department of Justice

Dear Director Cornez:

The California Department of Justice (the Department) respectfully submits the following response to the petition by Jason Davis alleging that the Department has issued, used, enforced or attempted to enforce an underground regulation.

The Department admits that it only issues permits for the manufacture of dangerous weapons to individuals, and does not issue such permits in the sole name of a corporation or other business entity. However, the Department contends that this policy is the "only legally tenable interpretation" of the applicable Penal Code provisions, and therefore the Department is not using nor enforcing an underground regulation. (Govt. Code, § 11340.9, subd. (f).)

FACTUAL BACKGROUND

I. THE HISTORY OF LEGISLATIVE BANS ON ASSAULT WEAPONS AND .50 CALIBER BMG RIFLES.

The Roberti-Roos Assault Weapons Control Act of 1989 (Roberti-Roos AWCA) was California's first assault weapons act. The California Legislature, in passing the Roberti-Roos AWCA, found and declared that "the proliferation and use of assault weapons pose[d] a threat to the health, safety, and security of all citizens of this state" because an assault weapon "has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." (Pen. Code, § 30505, subd. (a) [former Pen. Code, § 12275.5¹].) The Roberti-Roos

¹ The California Penal Code sections addressing dangerous weapons laws were renumbered and reorganized effective 2012. For ease of reference, both the new and prior code sections are cited in this letter brief.

AWCA controlled AK and AR-15 series assault weapons. (Pen. Code, § 30510 [former Pen. Code, § 12276].) These types of assault weapons are known as “Category 1” firearms.

The California Supreme Court upheld the constitutionality of the Roberti-Roos AWCA in *Kasler v. Lockyer* (2000) 23 Cal.4th 472. The *Kasler* decision also allowed certain firearm models that were variations of the AK or AR-15, with only minor differences from those two models, to be classified as assault weapons under the original Roberti-Roos AWCA. These types of assault weapons are known as “Category 2” firearms.

After the passage of the Roberti-Roos AWCA in 1989, many manufacturers created new firearm models that had very similar characteristics to controlled assault weapons. In response, the Legislature passed and the governor signed Senate Bill 23 (Chapter 129, Statutes of 1999), which allowed assault weapons to be defined by their general characteristics, such as a semiautomatic, center-fire rifle having the capacity to accept a detachable magazine and a pistol grip, thumbhole stock, folding or telescoping stock, grenade launcher or flare launcher, flash suppressor, or forward pistol grip. (Pen. Code, § 30515 [former Pen. Code, § 12276.1].)

Fifteen years after the passage of Roberti-Roos AWCA, the Legislature passed the .50 Caliber BMG Regulation Act of 2004, which bans the sale, possession and manufacture of .50 caliber BMG rifles. In passing the Act, the Legislature found and declared “the proliferation and use of .50 BMG rifles pose[d] a clear and present terrorist threat to the health, safety, and security of all residents” because “those firearms have such a high capacity for long distance and highly destructive firepower that they pose an unacceptable risk to the death and serious injury of human beings, destruction or serious damage of vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure.” (Pen. Code, § 30505, subd. (b) [former Pen. Code, § 12275.5].)

II. THE MANUFACTURING OF ASSAULT WEAPONS AND .50 CALIBER BMG RIFLES IS ALLOWED WITH A PERMIT ISSUED BY THE DEPARTMENT.

When the Roberti-Roos AWCA was first enacted in 1989, it completely prohibited the manufacture of assault weapons in California; there was no provision that allowed manufacture of assault weapons even if a permit was issued by the Department. (See Stats. 1989, ch. 19 §§ 1-7 (Assem. Bill No. 357).) In 1990, a provision was added to allow the manufacture of assault weapons if the Department issued a permit. (See Stats. 1990, ch. 129 § 8 (Sen. Bill No. 23).)

As the law currently stands, the manufacture of assault weapons and .50 BMG rifles in California is prohibited unless the Department has issued a manufacturing permit. (Pen. Code, §§ 30600 [former Pen. Code, § 12280, subd. (a)], 30645, subd. (b) [former Pen. Code, § 12280, subd. (h)].) The same application process (including recordkeeping, inspection and revocation) used for the issuance of permits for the manufacture of machine guns is used for the issuance of permits allowing the manufacture of assault weapons and .50 BMG rifles. (Pen. Code, § 31005 [formerly Pen. Code, § 12287].) If “good cause exists for the issuance of the permit to the

applicant,” the Department may issue the permit for the manufacture of machine guns, as well as assault weapons and .50 caliber BMG rifles. (Pen. Code, § 32650 [formerly Pen. Code, § 12230].) However, under no circumstances can a permit “be issued to a person who is under 18 years of age.” (*Ibid.*)

A license to manufacture firearms (which includes assault weapons and .50 caliber BMG rifles) in California can only be issued to an applicant that has the following: (1) a valid federal license to manufacture firearms; (2) any regulatory or business license required by local government; (3) a valid seller’s permit or resale certificate issued by the State Board of Equalization, if applicable; and (4) a certificate of eligibility issued by the Department. (Pen. Code, § 29050.) Certificates of eligibility (COEs) may only be issued to a person if the Department determines, after examining its records and records available through “the National Instant Criminal Background Check System,” that the applicant is not prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm. (Pen. Code, § 26710.) Only individuals—not corporations or any other type of business entity—can be issued COEs because the Department can only run criminal background checks on individuals. There is no mechanism by which the Department can conduct a criminal background check on a corporation or other business entity.

III. THE DEFINITION OF “PERSON” IN THE PENAL CODE.

In 1989, as part of the Roberti-Roos AWCA, the definition of “person” was added to the Penal Code:

As used in this chapter, “person” means an individual, partnership, corporation, association, or any other group or entity, regardless of how it was created.

(Pen. Code, § 16970 [formerly Pen. Code, § 12277].) The Legislative Counsel’s summary of Assembly Bill No. 357 (1989-1990 Reg. Sess.)—which was a part of the Roberti-Roos AWCA—indicates that this section was added solely to prohibit individuals, partnerships, corporations, associations, and any other group or entity, from advertising the sale of assault weapons.² (See Stats. 1989, ch. 19 (Assem. Bill No. 357).) There is no indication that this section was added to allow the issuance of permits for the manufacture of assault weapons and, in fact, could not have been added for such a purpose since the manufacture of assault weapons—with or without a permit—was prohibited by the Roberti-Roos AWCA.

The above-mentioned definition of “person” is only applicable to the following Penal Code sections: (1) section 16790—definition of “licensed gun dealer;” (2) section 17505—

² Former Penal Code section 12020.5 (now current Penal Code section 17505) was amended by Assembly Bill No. 357 to prohibit any person, as defined by then newly created (but now former) Penal Code section 12277, from advertising the sale of any assault weapon in a newspaper or other publication.

advertising of unlawful weapons; and (3) sections 30500 through 31100—assault weapons and .50 caliber BMG rifles. It does not apply, however, to the issuance of machine gun permits pursuant to Penal Code section 32650 (formerly Penal Code section 12230) or the issuance of COEs pursuant to Penal Code section 26710 (formerly Penal Code section 12071, subdivision (a)(4)).

IV. THE DEPARTMENT ISSUES PERMITS FOR THE MANUFACTURE OF ASSAULT WEAPONS AND .50 CALIBER BMG RIFLES TO INDIVIDUALS AUTHORIZED TO ACT ON BEHALF OF CORPORATIONS OR OTHER BUSINESS ENTITIES.

It is the Department's policy to only issue assault weapons permits for the manufacture of assault weapons in California to individuals who are authorized to act on behalf of corporations or other business entities. As the application attached to the petition evidences,³ an individual is required to provide his or her personal information so that the Department is able to conduct a criminal background check to ensure that the applicant is not prohibited under state or federal law from possessing or owning firearms. As noted above, the Department cannot conduct a criminal background check on a corporation or other business entity, as required by the applicable statutes.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR EVALUATING AN "UNDERGROUND REGULATION" CHALLENGE

Every regulation must be adopted consistent with the procedural requirements of the Administrative Procedure Act (APA), unless it is subject to one of the enumerated exceptions. (Gov. Code, § 11340 et seq.) The APA requires, in part, public notice and an opportunity for public comment before the regulation takes effect. (*Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 333.) A regulation that is adopted inconsistent with the APA is known as an "underground regulation." (Cal. Code Regs., tit. 1, § 250). "Underground regulations" may be declared invalid by a court. (*Morning Star, supra*, 38 Cal.4th at p. 333; see also Gov. Code, § 11350.)

The APA defines a "regulation" as a rule or standard of general application. (Gov. Code, § 11342.600.) The state agency rule or standard is a regulation subject to the APA if (1) it applies generally rather than to a specific case and (2) it implements, interprets, or makes specific the law enforced or administered by the state agency imposing the rule or standard. (*Ibid.*)

Several exceptions exempt regulations from the requirements of the APA. These exceptions allow the state agency to enforce or impose the rule or standard without promulgating

³ Since the filing of the petition, the Department issued a revised application of the dangerous weapons permit, a copy of which is attached hereto as Exhibit 1.

it pursuant to the APA, even though the rule or standard fits the definition of a “regulation.” One exemption is known as “the only legally tenable interpretation of a provision of law.” (Gov. Code, § 11340.9, subd. (f).) Under the “only legally tenable interpretation” exception, the state agency need not promulgate it pursuant to the APA if the regulation essentially reiterates the law. If the regulation departs from or embellishes upon the law, the state agency must comply with the APA. (*Morning Star, supra*, 38 Cal.4th at p. 336.)

If an interested person believes that a state agency has adopted an underground regulation, that person may file a petition with the Office of Administrative Law for a determination of whether the state agency complied with applicable provisions of the APA. (Cal. Code Regs., tit. 1, § 260(a).)

II. THE DEPARTMENT’S POLICY OF ONLY ISSUING PERMITS FOR THE MANUFACTURE OF ASSAULT WEAPONS AND .50 CALIBER BMG RIFLES TO INDIVIDUALS IS NOT AN UNDERGROUND REGULATION.

The Department’s policy of only issuing assault weapon permits for the manufacture of assault weapons and .50 caliber BMG rifles to individuals and not corporations is not an underground regulation because it is the “only legally tenable interpretation” of the applicable Penal Code sections.⁴ Specifically, the Department relies on the following Penal Code provisions as a basis for requiring that individuals, not corporations or other business entities, receive permits for the manufacture of assault weapons:

- Penal Code section 29050 (formerly Penal Code section 12086, subdivision (b)): A license to manufacture firearms (which includes assault weapons and .50 caliber BMG rifles) can only be issued to a non-prohibited applicant that has obtained a COE.
 - NOTE: The definition of “person” as referenced in Penal Code section 16970 (formerly Penal Code section 12277) does not apply to section 29050.
- Penal Code section 26710 (formerly Penal Code section 12071, subdivision (a)(4)): The Department is only able to conduct criminal background checks for COEs on individuals. The Department is unable to conduct a criminal background investigation of a corporation or other business entity, and thus persons prohibited by adverse criminal history from obtaining a COE could sidestep the legal restrictions simply by forming a corporation and applying under that guise.
 - NOTE: The definition of “person” as referenced in Penal Code section 16970 (formerly Penal Code section 12277) does not apply to section 26710.

⁴ The Department does not dispute that its policy applies generally to all applicants for dangerous weapons permits, and that the policy interprets the Penal Code as it applies to the issuance of dangerous weapons permits. (*Tidewater Marine Western Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571.)

- Penal Code section 31105 (formerly Penal Code section 12287): The Department may only issue permits for the manufacture of assault weapons in accordance with Penal Code section 32650 (formerly Penal Code section 12230).
- Penal Code section 32650 (formerly Penal Code section 12230): The Department may only issue permits upon the satisfactory showing that good cause exists for the issuance of a permit to a non-prohibited applicant, who has obtained a COE and that under no circumstances can a person under the age of 18 receive a permit.
 - NOTE: The definition of “person” as referenced in Penal Code section 16970 (formerly Penal Code section 12277) does not apply to section 32650.

Based on the foregoing provisions, the Department’s policy of only issuing permits for the manufacture of assault weapons to individuals is the “only legally tenable interpretation” of the applicable Penal Code sections. Thus, it falls under the exception to the APA allowing a state agency to enforce or impose the rule or standard without promulgating it pursuant to the APA. (Gov. Code, § 11340.9, subd. (f).)

III. THE DEPARTMENT’S POLICY DOES NOT HARM “BUSINESS” BUT INSTEAD FURTHERS THE LEGISLATURE’S INTENT THAT ASSAULT WEAPONS BE REGULATED.

In the petition and the supporting public comments, the argument is made that the Department’s policy of limiting the issuance of permits for the manufacture of assault weapons only to individuals is harmful to businesses that seek to manufacture firearms in California. However, these contentions are without merit and fail to acknowledge that the Department’s policy furthers the Legislature’s intent in the Roberti-Roos AWCA that assault weapons be regulated. (See Pen. Code, § 30505, subd. (a) [former Pen. Code, § 12275.5].)

For example, in the petition, Mr. Davis contends that the Department’s policy is unfair because “a corporation that loses its sole employee with the permit that is obtained under the corporations [sic] ‘good cause’ is unable to continue business until it finds a replacement employee who then obtains a replacement permit.” However, the Department recommends—and has always recommended—that multiple employees of a corporation obtain the necessary permits so that production of firearms is not halted or delayed if a permitted employee leaves the corporation. Having multiple employees “permitted” also solves the other problem that Mr. Davis and others often raise—specifically, what happens if the only permitted employee has to leave the premises to use the restroom or decides to take a vacation. Having multiple employees “permitted” is no different than issuing multiple sets of work keys to employees, setting up multiple work stations for each employee, or providing training to multiple employees—it is an acceptable cost and responsibility for doing business. The cost for an initial assault weapons permit is \$372.00 and the annual renewal fee is \$126.00—neither of which

renders the permitting of multiple employees "cost prohibitive" for firearm manufacturers, who often sell their manufactured assault weapons for hundreds, if not thousands, of dollars each.⁵

By passing multiple acts regarding assault weapons and .50 caliber BMG rifles, it is clear that the Legislature intended that no person shall possess or sell any dangerous weapon unless he or she has been granted a license or permit pursuant to the Department's regulations. (See Pen. Code, §§ 30900-30945, 31050, 31055, & 31100; see also Cal. Code Regs., tit. 11, § 4128.) This intent is not furthered by the scheme advanced in the petition; specifically, the issuance of permits to corporations (on which the Department is unable to conduct criminal background checks), thereby allowing any prohibited person from forming a corporation through which to manufacture, possess, and sell dangerous weapons.

CONCLUSION

For the reasons set forth above, the Department respectfully requests that the Office of Administrative Law deny the petition's request that the Department's policy be declared an underground regulation.

Sincerely,



KIMBERLY GRANGER
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

CC: Jason Davis, Esq. (via email)

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⁵ The rules for licensing construction contractors contain similar restrictions. Corporations qualify for contractors' licenses by designating a responsible managing officer or employee (RMO/RME) who is individually qualified for a particular license. (Bus. & Prof. Code, § 7068(b)(3).) The qualifier must be a bona fide officer or employee of the corporation and actively engaged in work encompassed by the license. (*Id.*, § 7068(c).) The qualifier "shall be responsible for exercising that direct supervision and control of construction operations as is necessary to secure full compliance with the provisions of" the Contractors' State License Law. (*Id.*, § 7068.1.) If the RMO/RME disassociates from the licensed entity, the licensee must notify the Contractors State License Board in writing and replace the qualifier within ninety days from the date of disassociation. (*Id.*, § 7068.2.) Where the corporation fails to do so, the license is automatically suspended and is unable to perform contracting activities until the suspension is lifted. (*Id.*; *Wright v. Issak* (2007) 149 Cal.App.4th 1116, 1123.)