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Bureau of Firearms

*Exempt From Filing Fees Pursuant
to Gov't Code § 103*
Superior Court Of California,
Sacramento
10/01/2012
awb:ward
By , Deputy
Case Number:
34-2012-80001279

DEPARTMENT 33

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO

14 CALIFORNIA DEPARTMENT OF
JUSTICE - BUREAU OF FIREARMS,

16 Petitioner,

15 v.

17 OFFICE OF ADMINISTRATIVE LAW,

18 Respondent,

20 CALIFORNIA BUSINESS
21 ENVIRONMENTS INC. DBA FRANKLIN
ARMORY,

22 Real Party in Interest,

Case No.

PETITION FOR WRIT OF MANDATE
OR OTHER APPROPRIATE RELIEF

1 **PETITION FOR WRIT OF MANDATE**

2 Petitioner California Department of Justice through its Bureau of Firearms ("the Bureau")
3 alleges:

4 **INTRODUCTION**

5 1. The Department of Justice, through its Bureau of Firearms, is tasked with regulating
6 the manufacture and sales of firearms under a number of interrelated provisions of the Penal Code
7 and the California Code of Regulations.

8 2. Those laws, read together, mandate that the Bureau may only issue permits to acquire
9 or manufacture assault weapons and .50 BMG rifles (together, "assault weapons") in California to
10 persons who can pass a background check. Because only individuals can be subjected to a
11 background check, the Bureau may only issue assault weapon permits to individuals.

12 3. In order to afford corporations and other business entities that manufacture assault
13 weapons the benefit of such permits, the Bureau adheres to a policy that is the only legally
14 tenable interpretation of the law: it issues permits to individuals authorized to act on behalf of
15 corporations or other business entities. The authorization is not transferable to other persons, or
16 to activities that are not undertaken on behalf of the corporation.

17 4. Firearm manufacturer Franklin Armory petitioned the Office of Administrative Law
18 ("OAL") on November 17, 2011 to declare the Bureau's interpretation of the law an
19 impermissible "underground regulation," arguing that several Penal Code provisions, read
20 together, require that the permits be issued directly to corporations, and not their individual
21 representatives.

22 5. Notwithstanding the fact that the Bureau's policy is exempt from the Administrative
23 Procedures Act under Government Code section 11340.9, subdivision (f), because it is the only
24 legally tenable interpretation of California's assault weapon permit scheme, on August 15, 2012,
25 OAL issued a nonbinding determination finding that the policy was an invalid "underground
26 regulation" because it was not adopted as a regulation as required by Government Code section
27 11340.5, subdivision (a). The OAL determination was published in the California Regulatory
28 Notice Register on August 31, 2012.

6. The Bureau comes before this Court to challenge OAL's determination under Government Code section 11340.5, subdivision (d), which provides: "Any interested person may obtain judicial review of [a determination that an agency action is an underground regulation] by filing a written petition requesting that the determination of the [OAL] be modified or set aside" within thirty days of the date the determination is published in California Regulatory Notice Register. Given that the Bureau has interpreted the assault weapon permitting scheme in the only legally tenable way, the OAL's determination should be set aside.

PARTIES

7. Petitioner is the California Department of Justice's Bureau of Firearms, which is part of the Department of Justice's Division of Law Enforcement. The Bureau promotes legitimate and responsible firearms possession and use by California residents through education, regulation, and enforcement actions regarding the manufacture, sales, ownership, safety training, and transfer of firearms.

8. Respondent Office of Administrative Law is an agency of the government of the State of California charged with ensuring the state's regulations are clear, necessary, legally valid, and available to the public. Among other responsibilities, OAL exercises discretion in responding to petitions challenging agency actions as alleged underground regulations, and in issuing determinations regarding those petitions.

9. Petitioner is informed and believes that real party in interest California Business Environments, Inc., doing business as Franklin Armory, is a California corporation which manufactures firearms.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the matters alleged in this Petition pursuant to Government Code section 11340.5, subdivision (d).

11. Venue is proper in this County in accordance with California Code of Civil Procedure sections 395 and 1109.

ISSUES PRESENTED

I. THE LAW GOVERNING UNDERGROUND REGULATIONS

12. Government Code section 11342.600 of the Administrative Procedures Act (APA) defines "regulation" 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." Any regulation adopted by a state agency through the exercise of quasi-legislative power delegated to the agency by statute to implement, interpret, or make specific the law enforced or administered by the agency, or to govern the agency's procedures, is subject to the APA unless a statute expressly exempts the regulation from APA review. (Gov. Code, §§ 11340.5, 11346.)

13. Government Code section 11340.5, subdivision (a), provides:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

14. When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5, it adopts an underground regulation as defined in California Code of Regulations, title 1, section 250, subdivision (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA *and is not subject to an express statutory exemption from adoptions pursuant to the APA.* (Emphasis added.)

15. There are a number of exemptions to section 11340.5, which allow an agency to impose a policy without adopting a regulation. For one, Government Code section 11340.9, subdivision (f) provides that the state agency need not adopt a regulation if the regulation "embodies the only legally tenable interpretation of a provision of law." Under this exemption,

1 the agency must comply with the APA only if the policy departs from or embellishes upon the
2 law. (*Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 336.)

3 16. OAL may issue a determination as to whether or not an agency has issued, utilized,
4 enforced, or attempted to enforce a rule that meets the definition of a regulation that should have
5 been adopted pursuant to the APA. (Gov. Code, § 11340.5, subd. (b).) An OAL determination
6 that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is
7 not binding on the agency or a court, but it may be entitled to deference in any subsequent
8 litigation of the issue. (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 428.)

9 II. THE LAW GOVERNING ASSAULT WEAPON PERMITS

10 17. The Roberti-Roos Assault Weapons Control Act of 1989 and the .50 California BMG
11 Regulation Act of 2004 ("Roberti-Roos Act") prohibits the possession and manufacture of assault
12 weapons and .50 BMG rifles (together, "assault weapons") in California without a permit issued
13 by the Department of Justice's Bureau of Firearms. (Pen. Code, §§ 30600, subd. (a); 30605,
14 subd. (a); 30645, subd. (b); 31000, subd. (c); 31005, subd. (a)(2).)¹

15 18. In order to issue permits for both the possession and manufacture of assault weapons,
16 the Act requires the Bureau to use the application process provided in section 32650 for permits
17 for the possession and manufacture of machine guns. (§§ 31000, subd. (c); 31005, subd. (b).)
18 Under section 32650, the Bureau may issue a permit for the possession or manufacture of these
19 categories of weapons if "good cause exists for the issuance of the permit to the applicant."
20 (§ 32650.)

21 19. One of the means of determining "good cause" is found in title 11, section 4128,
22 subdivision (c) of the California Code of Regulations, which requires applicants for permits for
23 the possession, transportation, or sale of dangerous weapons (which include assault weapons) to
24 provide the Bureau with "clear and convincing evidence that there is a bona fide market or public
25 necessity for the issuance of a dangerous weapons license or permit and that the applicant can
26 satisfy that need without endangering public safety." Another regulation governing dangerous

27 ¹ All statutory cites are to the California Penal Code, unless otherwise noted.
28

1 weapons permits sets forth general areas of investigation that the Bureau may conduct regarding
2 applicants. (Cal. Code Regs., tit. 11, § 4138.)

3 20. Section 29050, which details the permitting requirements for the manufacture all
4 firearms, including assault weapons, more specifically addresses the question of whether an
5 applicant will endanger public safety. (§ 29050; *see* § 16520, subd. (a) [for purposes of § 29050,
6 “‘firearm’ means any device, designed to be used as a weapon, from which is expelled through a
7 barrel, a projectile by the force of any explosion or other form of combustion,” including the
8 frame or receiver of the weapon] and subd. (b)(12) applying the definition to § 29050].) Under
9 section 29050, a license permitting the manufacture of firearms in California may be issued only
10 to an applicant who possesses all of the following: (1) a valid federal license to manufacture
11 firearms; (2) any regulatory or business license required by local government; (3) a valid seller’s
12 permit or resale certificate issued by the State Board of Equalization, if applicable; and (4) a
13 certificate of eligibility (“COE”) issued by the Bureau pursuant to section 26710. (§ 29050.)

14 21. According to section 26710, the Bureau may issue a COE only if the Bureau
15 determines, after examining its records and records available through the National Instant
16 Criminal Background Check System, that the applicant is not prohibited by state or federal law
17 from possessing, receiving, owning, or purchasing a firearm. (§ 26710, subd. (b).)

18 22. Because the Bureau can only run such criminal background checks on individuals, it
19 can only issue COEs to individuals. There is no mechanism by which the Bureau can conduct a
20 criminal background check on a corporation or other business entity, in order to issue a COE to a
21 corporation. There is thus no means under California law by which the Bureau may issue a
22 permit to manufacture firearms, including assault weapon firearms, directly to a corporation.

23 23. There is a Penal Code provision defining “person” to mean “individual, partnership,
24 corporation, limited liability company, association, or any other group or entity, regardless of how
25 it was created” for purposes of a limited number of provisions: (1) section 16790 (the definition
26 of “licensed gun dealer”); (2) section 17505 (prohibiting the advertising of the sale of unlawful
27 weapons); and (3) sections 30500 through 31100 (the Roberti-Roos Act). (§ 16970.)
28

1 24. On its face, this definition does not apply to section 26710, which sets forth the
2 process by which a person may request an COE that meets the requirements of section 32650,
3 upon which the Roberti-Roos Act relies for the issuance of assault weapon permits. (§§ 26710,
4 subd. (a); 29050; 31000, subd. (c); 31005, subd. (b).) The fact that other parts of the Roberti-
5 Roos Act may rely upon section 16970's definition of "person" does not mean the definition can
6 be applied to section 32650, merely because it is referenced in the Act.

7 25. Further, the Legislative Counsel's summary of the Roberti-Roos Act indicates that
8 the definition of "person" now found in section 16970 was initially added solely to define the
9 "persons" prohibited from advertising the sale of assault weapons in a newspaper or other
10 publication in former section 12020.5 (current section 17505), which was added to the Penal
11 Code in the same bill as the Roberti-Roos Act. (*Compare* Stats. 1989, ch. 19, § 1.5 [amending
12 former Penal Code section 12020.5 (current section 17505), making it unlawful for any person, as
13 defined in former section 12277 (current section 16970) to advertise the sale of assault weapons]
14 *with* Stats. 1989, ch. 19, § 3 [enacting Roberti-Roos Act].) Properly interpreted, that definition
15 should not apply to the Roberti-Roos Act, much less section 32650, which is not part of the Act.

16 **III. THE BUREAU'S INTERPRETATION OF THE LAW GOVERNING ASSAULT WEAPON**
17 **PERMITS**

18 26. The Bureau has harmonized sections 26710, 29050, 31000, 31005, and 32650 in the
19 only legally tenable way: it has determined that the statutory scheme requires that assault weapon
20 permits may be issued only to individuals who are authorized to act on behalf of corporations or
21 other business entities. An explanation of the Bureau's interpretation was submitted to OAL by
22 Franklin Armory, in a letter sent by the Bureau to Franklin Armory on May 5, 2006:

23 The Department issues assault weapon permits to corporations and other
24 business entities. However, such permits are issued to individuals authorized
25 to act on behalf of corporations or other business entities. The authorization
26 is not transferable to other persons, or to activities that are not undertaken on
27 behalf of the corporation.

28 27. The Bureau may, under its interpretation, run a background check on the individual
authorized to act on behalf of the corporation, issue an COE to the individual if he or she clears

1 the background check, and then issue the assault weapon permit to the individual, who acts as the
2 corporation's representative with respect to the permit.

3 28. The Bureau's reading of the applicable statutes is the only legally tenable
4 interpretation of the laws governing the permits in conjunction with the laws governing assault
5 weapons. (Gov. Code, § 11340.9, subd. (f).) It merely harmonizes all of the statutes referred to
6 in the permitting scheme to arrive at the only reasonable understanding of the scheme. (*See*
7 *Morning Star Co. v. State Board of Equalization, supra*, 38 Cal.4th at p. 336.)

8 29. Moreover, the Legislature's clear intent to strictly limit the possession and
9 manufacture of assault weapons in California would not be furthered by a scheme in which
10 permits could be issued to a corporation without any background check. This would allow any
11 individual or group of individuals who would otherwise be prohibited under the law from
12 obtaining a permit to form a shell corporation in order to possess, manufacture, and sell
13 dangerous weapons, thus skirting the clear intent of the laws at issue here.

14 **IV. OAL'S DETERMINATION**

15 30. On November 17, 2011, real party in interest Franklin Armory filed a petition with
16 the OAL ("OAL Petition") seeking a determination that the Bureau's interpretation of the Penal
17 Code with respect to the issuance of assault weapon permits constituted an "underground
18 regulation" under the APA.

19 31. OAL received the OAL Petition on February 7, 2012.

20 32. OAL received public comment in the form of letters dated May 21, 2012 from
21 California Association of Federal Firearms Licensees, Inc. and FFL Guard.

22 33. On June 1, 2012, the Bureau filed a response to the OAL Petition.

23 34. On June 12, 2012, Franklin Armory submitted its reply.

24 35. OAL issued a determination regarding this matter on August 15, 2012, in 2012 OAL
25 Determination No. 8 ("Determination"). A copy of the Determination is attached to this petition
26 as Exhibit A, and incorporated herewith. The OAL published the determination in the August 31,
27 2012 issue of the California Regulatory Notice Register.

36. In its Determination, OAL found that the Bureau's policy falls within the definition of "regulation" and should have been adopted pursuant to the APA.

37. OAL acknowledged that the Bureau had admitted that its policy is a rule that generally applies to a certain class. OAL then determined that the policy “further implements, interprets and makes specific Penal Code sections 31005 and 32655 and California Code of Regulations, title 11, sections 4128 and 4138.”

38. Despite having the benefit of the Bureau's explanation above, OAL refused to apply the "legally tenable interpretation of the law" exemption of Government section 11340.9, subdivision (f) to the Bureau's interpretation of the relevant laws, by finding that "the issuance of the Certificate of Eligibility is not part of the Roberti-Roos Act." This finding is erroneous, however, because a narrow and exclusive reading of the Act without taking into account the overarching firearms permitting scheme in sections 26710 and 29050, which requires a Certificate of Eligibility in order to issue a permit, is not a proper interpretation of the Act.

CAUSE OF ACTION

OAL's Determination Was Incorrect

(Writ of Mandate – Government Code § 11340.5; Code of Civil Procedure § 1085)

39. Under Government Code section 11340.5, subdivision (d), “[a]ny interested person may obtain judicial review of a given determination [by the OAL] by filing a written petition requesting that the determination of the office be modified or set aside” within thirty days of the publication of the determination in the California Regulatory Notice Register.

40. Mandamus may issue to compel an official both to exercise his or her discretion, as required by law, and to exercise it under a proper interpretation of the applicable law. (Code Civ. Proc., § 1085.)

41. The Bureau is beneficially interested in the writ and has no other plain, speedy, or adequate remedy at law. (Code Civ. Proc., § 1086.)

42. OAL abused its discretion when it determined that the Bureau's interpretation of the law was an underground regulation.

1 43. While the Bureau's interpretation does "implement, interpret, or make specific" the
2 Penal Code provisions and regulations governing assault weapon permits, that interpretation is the
3 only legally tenable interpretation of that statutory scheme.

4 44. The Bureau's interpretation is thus exempted from the APA under Government
5 section 11340.9, subdivision (f).

6 45. OAL therefore failed to correctly determine that the Bureau's policy is not an
7 underground regulation because it falls under the "only legally tenable interpretation" exemption.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Petitioner Department of Justice - Bureau of Firearms prays that this Court
10 issue a peremptory writ of mandate, under Government Code section 11340.5 and Code of Civil
11 Procedure section 1085, commanding:

12 1. That respondent OAL set aside 2012 OAL Determination No. 8, and determine that
13 the Bureau's interpretation of the applicable assault weapon permit laws does not constitute an
14 underground regulation;

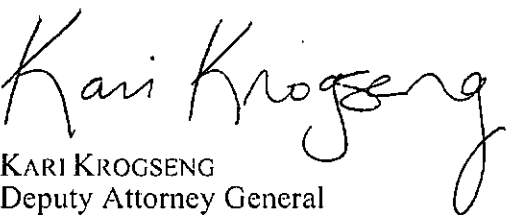
15 2. That petitioner Bureau recovers its costs in this case; and

16 3. That such other and further relief be granted as the Court considers just and proper.
17

18 Dated: October 1, 2012

Respectfully Submitted,

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 Supervising Deputy Attorney General

22 
23 KARI KROGSENG
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26 California Department of Justice -
 Bureau of Firearms

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EXHIBIT A



California Regulatory Notice Register

REGISTER 2012, NO. 35-Z

PUBLISHED WEEKLY BY THE OFFICE OF ADMINISTRATIVE LAW

AUGUST 31, 2012

PROPOSED ACTION ON REGULATIONS

TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

Conflict-of-Interest Code — Notice File No. Z2012-0821-23 1233

Amendment

State: Office of the State Treasurer

Multi-County:

Southern California Regional Rail Authority
California Transit Systems Joint Powers Insurance
Authority
Hanford Joint Union High School District
Napa Vallejo Waste Management Authority

TITLE 8. OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

*Elevated Locations, Guardrail Exception for Portable Amusement Rides —
Notice File No. Z2012-0821-20* 1234

TITLE 13. DEPARTMENT OF MOTOR VEHICLES

2013 Annual Fee Adjustment — Notice File No. Z2012-0820-01 1237

TITLE 16. BOARD OF BEHAVIORAL SCIENCES

Disciplinary Guidelines — Notice File No. Z2012-0821-24 1240

TITLE 16. MEDICAL BOARD OF CALIFORNIA

Physician Availability: Elective Cosmetic Procedures — Notice File No. Z2012-0821-03 1244

TITLE 16. MEDICAL BOARD OF CALIFORNIA

Polysonnography Program Basic Life Support — Notice File No. Z2012-0821-02 1247

TITLE 17. AIR RESOURCES BOARD

Consumer Products 2012 — Notice File No. Z2012-0821-22 1248

(Continued on next page)

***Time-
Dated
Material***

TITLE 21. DEPARTMENT OF GENERAL SERVICES

Amend Regulations for Agricultural and Engineering Contract Procedures —

Notice File No. Z2012-0821-25 1253

TITLE 24. BUILDING STANDARDS COMMISSION

Adoption of 2012 IRC with Amendments into 2013 CRC — Notice File No. Z2012-0821-04 1256

TITLE 24. BUILDING STANDARDS COMMISSION

Adoption of 2012 IBC with Amendments into 2013 CBC — Notice File No. Z2012-0821-05 1260

TITLE 24. BUILDING STANDARDS COMMISSION

Adoption of 2013 California Green Building Standards Code (CALGreen) —

Notice File No. Z2012-0821-06 1264

TITLE 24. BUILDING STANDARDS COMMISSION

CA Building Standards Administrative Code (Part 1, Title 24) — Notice File No. Z2012-0821-07 1268

TITLE 24. BUILDING STANDARDS COMMISSION

2013 California Green Building Standards Code (CAL Green Code — Part 11, Title 24) —

Notice File No. Z2012-0821-08 1271

TITLE 24. BUILDING STANDARDS COMMISSION

2012 Triennial Rulemaking Cycle — CCR, Title 24, Part 9 — Notice File No. Z2012-0821-09 1274

TITLE 24. BUILDING STANDARDS COMMISSION

California Building Code (Part 2, Title 24) — Notice File No. Z2012-0821-10 1279

TITLE 24. BUILDING STANDARDS COMMISSION

2012 Triennial Rulemaking Cycle — CCR, Title 24, Part 2.5 — Notice File No. Z2012-0821-11 1282

TITLE 24. BUILDING STANDARDS COMMISSION

2012 Triennial Rulemaking Cycle — CCR, Title 24, Part 2.5 — Notice File No. Z2012-0821-12 1286

TITLE 24. BUILDING STANDARDS COMMISSION

New Triennial Edition of the California Building Code (CBC), CCR, Title 24, Part 2 —

Notice File No. Z2012-0821-13 1291

TITLE 24. BUILDING STANDARDS COMMISSION

2012 Triennial Rulemaking Cycle — CCR, Title 24, Part 2 — Notice File No. Z2012-0821-14 1294

TITLE 24. BUILDING STANDARDS COMMISSION

New Triennial Edition of the California Building Code (CBC), CCR, Title 24, Part 2 —

Notice File No. Z2012-0821-15 1298

(Continued on next page)

TITLE 24. BUILDING STANDARDS COMMISSION	
<i>Title 24, Part 1, California Administrative Code, Chapter 6 — Seismic Evaluation Procedure 2012 Triennial Code Adoption Cycle — Title 24, Part 2, California Building Code — Structural Requirements — Notice File No. Z2012-0821-16</i>	1301
TITLE 24. BUILDING STANDARDS COMMISSION	
<i>Adopt Appendix Chapter A1, 2009 International Existing Building Code — Notice File No. Z2012-0821-17</i>	1305
TITLE 24. BUILDING STANDARDS COMMISSION	
<i>2013 California Green Building Standards Code, CCR, Title 24, Part 11 — Notice File No. Z2012-0821-18</i>	1308
TITLE 24. BUILDING STANDARDS COMMISSION	
<i>Public Swimming Pools — Notice File No. Z2012-0821-19</i>	1311
TITLE 24. BUILDING STANDARDS COMMISSION	
<i>Adoption of 2012 IEBC, Appendix A, Chapters A1 and A3 with Amendments into 2013 CBC — Notice File No. Z2012-0821-21</i>	1314
TITLE 27. OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT	
<i>Proposition 65 — Bromoethane No Significant Risk Level — Notice File No. Z2012-0821-01</i>	1318
GENERAL PUBLIC INTEREST	
DEPARTMENT OF FOOD AND AGRICULTURE	
<i>Notice of 15-day Comment Period re: Proposed Regulations concerning Shell Egg Food Safety</i>	1321
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD	
<i>Notice of Additional Location for Public Hearing on Regulations Concerning Board Rules of Practice and Procedure</i>	1322
PROPOSITION 65	
<i>Please see Title 27 entry under "PROPOSED ACTION ON REGULATIONS" above</i>	
DECISION NOT TO PROCEED	
SUPERINTENDENT OF PUBLIC INSTRUCTION	
<i>Concerning Federal-Based Migrant Education Program</i>	1322

(Continued on next page)

OAL REGULATORY DETERMINATION

2012 OAL DETERMINATION NO. 8 — DEPARTMENT OF JUSTICE

Concerning Permits for Assault Weapons 1322

SUMMARY OF REGULATORY ACTIONS

Regulations filed with the Secretary of State 1328

Sections Filed, March 28, 2012 to August 22, 2012 1329

The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

CALIFORNIA REGULATORY NOTICE REGISTER (USPS 002-931). (ISSN 1041-2654) is published weekly by the Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814-4339. The Register is printed by Barclays, a subsidiary of West, a Thomson Reuters Business, and is offered by subscription for \$205.00 (annual price). To order or make changes to current subscriptions, please call (800) 888-3600. "Periodicals Postage Paid in Saint Paul, MN." **POSTMASTER:** Send address changes to the: CALIFORNIA REGULATORY NOTICE REGISTER, Barclays, a subsidiary of West, a Thomson Reuters Business, P.O. Box 2006, San Francisco, CA 94126. The Register can also be accessed at <http://www.oal.ca.gov>.

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Website Access: Materials regarding this proposal can be found by accessing the following Internet address: <http://www.cdfa.ca.gov/ahfss/regulations.html>.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Notice of Additional Location for Public Hearing

Notice is hereby given by the Occupational Safety and Health Appeals Board that an additional location has been added via live video teleconference for the public to attend the previously scheduled Public Hearing on September 17, 2012 regarding proposed changes to Board Rules of Practice and Procedure Noticed in the California Regulatory Notice Register on August 3, 2012, Register 2012, No. 31-Z.

Location for participation in Public Hearing via live video teleconference:

100 N. Barranca Street, Suite 410, West Covina, CA 91791

For additional information, please contact:

Michael Wimberly, Executive Officer or
J. Jeffery Mojcher, Chief Counsel
Cal/OSHA Appeals Board
2520 Gateway Oaks Drive, Suite 300
Sacramento, CA 95833
(916) 275-5751.

DECISION NOT TO PROCEED

SUPERINTENDENT OF PUBLIC INSTRUCTION

Federal-Based Migrant Education Program

Pursuant to Government Code section 11347, the State Superintendent of Public Instruction (SSPI) has decided not to proceed with title 5, division 1, chapter 19, subchapter 3, sections 18093, 18110; and subchapter 7, sections 18180, 18181, 18182, 18183, 18184 (Notice File No. Z2012-0521-04), published June 1, 2012, in the California Regulatory Notice Register 2012, No. 22-Z, page 704), and withdraws this proposed action from further consideration.

The SSPI will also publish this Notice of Decision Not to Proceed on the California Department of Education's Web site at <http://www.cde.ca.gov/re/lr/rr>.

OAL REGULATORY DETERMINATION

OFFICE OF ADMINISTRATIVE LAW DETERMINATION OF ALLEGED UNDERGROUND REGULATIONS

(Pursuant to Government Code Section 11340.5 and Title 1, section 270, of the California Code of Regulations)

The attachments are not being printed for practical reasons or space considerations. However, if you would like to view the attachments please contact Margaret Molina at (916) 324-6044 or mmolina@oal.ca.gov.

DEPARTMENT OF JUSTICE

STATE OF CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

2012 OAL DETERMINATION NO. 8
(OAL FILE NO. CTU2012-0207-01)

REQUESTED BY: JASON DAVIS,
REPRESENTING
CALIFORNIA BUSINESS
ENVIRONMENTS INC. dba
FRANKLIN ARMORY

**CONCERNING: PERMITS FOR ASSAULT
WEAPONS
DETERMINATION ISSUED
PURSUANT TO
GOVERNMENT CODE
SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The specific rule challenged by the Petitioner is stated in a variety of correspondence between the Firearms Bureau of the Department of Justice (Department) and the Petitioner. The most succinct iteration of the rule is in a letter from the Department to the Petitioner dated May 5, 2006:

The Department issues assault weapon permits to corporations and other business entities. However, such permits are issued to individuals authorized to act on behalf of corporations or other business entities. The authorization is not transferable to other persons, or to activities that are not undertaken on behalf of the corporation. . . .

DETERMINATION

¹As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

OAL determines that the Department rule as stated in the letter from the Department to the Petitioner dated May 5, 2006, as quoted above meets the definition of "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On February 7, 2012, OAL received a petition from Jason Davis, the Petitioner, alleging that the Department has issued, used, enforced or attempted to enforce an underground regulation. The Petitioner represents California Business Environments Inc. doing business as Franklin Armory. The petition alleges that the Roberti-Roos Assault Weapons Control Act of 1989 and the .50 Caliber BMG Regulation Act of 2004 (Roberti-Roos Act) (Pen. C. section 30500 et seq.) permit "persons" to be issued a permit to possess or to sell or offer or expose for sale assault weapons. "Person," as defined in Penal Code section 16970 includes corporations, limited liability companies, associations and other groups and entities:

As used in Sections 16790 and 17505 and in Chapter 2 (commencing with Section 30500) of Division 10 of Title 4, "person" means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created.

The petition alleges that rather than issuing a permit for an assault weapon to a business entity that submitted the permit application, the Department issues the permit to a person authorized to act on behalf of the business entity, as stated in a letter from the Department to the Petitioner, dated May 5, 2006:

The Department issues assault weapon permits to corporations and other business entities. However, such permits are issued to individuals authorized to act on behalf of corporations or other business entities. The authorization is not transferable to other persons, or to activities that are not undertaken on behalf of the corporation. . . .

In its response to the petition, the Department agrees that this is an accurate statement of its policy.

POSSESSION OF ASSAULT WEAPONS

The Roberti-Roos Act sets out the statutory requirements for possession and control of assault weapons.

Penal Code section 30605 makes it generally illegal to possess assault weapons in California; however, Penal Code section 30675(a)(2) states that section 30605 does not apply to a person who has a permit to possess an assault weapon or a .50 BMG rifle issued pursuant to Penal Code section 31005:

31005. (a) The Department of Justice may, upon a finding of good cause, issue permits for the manufacture or sale of assault weapons or .50 BMG rifles for the sale to, purchase by, or possession of assault weapons or .50 BMG rifles by, any of the following:

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

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

As stated in Penal Code section 31005, subdivision (b), the application for permits shall be undertaken in the same manner as specified in Article 3 of Chapter 6 of the Penal Code, commencing with section 32650. In Article 3, Penal Code section 32655 sets out the requirements for a permit:

- (a) An application for a permit under this article shall satisfy all of the following conditions:
 - (1) It shall be filed in writing.
 - (2) It shall be signed by the applicant if an individual, **or by a member or officer qualified to sign if the applicant is a firm or corporation.**
 - (3) It shall state the applicant's name.
 - (4) It shall state the business in which the applicant is engaged.
 - (5) It shall state the applicant's business address.
 - (6) It shall include a full description of the use to which the firearms are to be put.

(b) Applications and permits shall be uniform throughout the state on forms prescribed by the Department of Justice.

- (c) Each applicant for a permit shall pay at the time of filing the application a fee determined by the Department of Justice. The fee shall not exceed the application processing costs of the Department of Justice.
- (d) A permit granted pursuant to this article may be renewed one year from the date of issuance, and annually thereafter, upon the filing of a renewal application and the payment of a permit renewal fee, which shall not exceed the application processing costs of the Department of Justice.
- (e) After the department establishes fees sufficient to reimburse the department for processing costs, fees charged shall increase at a rate not to exceed the legislatively approved annual cost-of-living-adjustments for the department's budget. [Emphasis added.]

Additionally, Penal Code section 30600 makes illegal, among other things, keeping for sale or offering or exposing for sale an assault weapon; however, pursuant to Penal Code section 30650, section 30600 does not apply to persons who are issued a permit pursuant to Penal Code section 31005.

Pursuant to the authority granted by the Legislature to the Department in Penal Code section 30520(c), the Department has adopted regulations setting out the requirements for issuance of a permit to possess an assault weapon.²

California Code of Regulations, title 11, section 4128 states that no person shall possess, transport, or sell any dangerous weapon³ unless he/she has been granted a license and/or a permit.

California Code of Regulations, title 11, section 4138 requires that the Department investigate an applicant for a dangerous weapon permit:

The DOJ shall conduct investigations of applicants for dangerous weapon licenses/permits to establish grounds for the issuance or denial of the application as follows:

- (a) Related Persons. Additional persons who may be investigated are:
 - (1) Persons with 10 percent or more interest in the licensee/permittee's business.

²Penal Code section 30520(c) states:

The Attorney General shall adopt those rules and regulations that may be necessary or proper to carry out the purposes and intent of this chapter.

³The definition of "dangerous weapon" includes assault weapons, pursuant to California Code of Regulations, title 11, section 4127(f).

(2) Persons with authority to make management decisions for the licensee/permittee.

(3) Persons who have access to the dangerous weapon(s).⁴

(b) Applicant's Business Role and/or Control of the Business. The following areas may be investigated concerning the applicant's business role and/or control of the business:

(1) Primary function of the business.

(2) Law enforcement's comments on the business.

(3) Applicant's financial interest in the business and source of funds.

(4) Applicant's role in and/or control of the business.

(5) Spouse's association with the business.

(c) Applicant's Personal Qualifications. The following areas may be investigated concerning the applicant's personal background:

(1) Character assessment by personal and/or business acquaintances and appropriate law enforcement and government agencies.

(2) Criminal history and driving record.

(3) Military record.

(4) Past employment or expertise related to the weapon to be covered by the requested license/permit.

(5) Medical history.

And lastly, as noted in the Factual Background above, "person" is defined in Penal Code section 16970:

As used in Sections 16790 and 17505 and in Chapter 2 (commencing with Section 30500) of Division 10 of Title 4, "person" means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion,

bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code, sec. 11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a "regulation" subject to the APA. This analysis will determine (1) whether the challenged rule is a "regulation" within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law

⁴ We note that this regulation requires the Department of Justice to conduct an investigation of any person who has access to dangerous weapons. However, it does not require that those persons be named as persons authorized to act on behalf of the business entity.

enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).⁵

As stated in *Tidewater*, the first element used to identify a "regulation" is whether the rule applies generally. A rule need not apply to all persons in the state of California; it is sufficient if the rule applies to a clearly defined class of persons⁶ or situations.⁷

In this case, the Department, in the challenged rule, states that it issues assault weapon permits to corporations and other business entities. The permits, however, are issued to individuals authorized to act on behalf of the corporation or other business entity. The rule applies to any corporation or other business entity that applies for a permit to possess or sell an assault weapon. Corporations and other business entities that apply for a permit to possess or sell assault weapons are a clearly defined class of persons or situations.

The first element of the *Tidewater* case is, therefore, met.

The second element used to identify a "regulation" as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure.

Penal Code sections 31005(b) and 32655 provide that the Department may issue permits for the possession and/or sale of assault weapons if specified conditions are met. In particular, Penal Code section 32655 specifically includes the procedure for an application for a permit by a business entity. In addition, the Department has adopted California Code of Regulations, title 11, section 4128 prohibiting the possession, transportation, or sale of any dangerous weapon without a permit. California Code of Regulations, title 11, section 4138 sets out the investigation the Department will conduct in evaluating an application for a permit.

The challenged rule further implements, interprets and makes specific Penal Code sections 31005 and 32655 and California Code of Regulations, title 11, sections 4128 and 4138, the law enforced or administered by the Department. The second element of *Tidewater* is, therefore, met.

The challenged rule, therefore, meets the definition of "regulation" in Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from

the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation **except to the extent that the legislation shall do so expressly.**" (Emphasis added.)

In its response to the petition, the Department stated that the exemption known as the "only legally tenable interpretation" applies to the challenged rule.

Government Code section 11340.9 establishes several exemptions from the APA. Subdivision (f) exempts a regulation that "embodies the only legally tenable interpretation of a provision of law."

In its response, the Department argues that the Penal Code sections addressing the issuance of a Certificate of Eligibility require the Department to conduct criminal background checks which can only be done for natural persons.

Penal Code section 26700 et seq. establishes the procedure for the issuance, forfeiture, and condition of license to sell, lease, or transfer firearms at retail. Penal Code section 26705 states that the duly constituted licensing authority of a city, county, or a city and county shall accept applications for, and may grant licenses permitting the sale of firearms at retail within the city, county, or city and county. The applicant must comply with several requirements, including the requirement in Penal Code section 26710 that the applicant have a Certificate of Eligibility issued by the Department. The Certificate of Eligibility is issued only to applicants who are not prohibited by state or federal law from possessing firearms.

The Department notes that to determine if an applicant is prohibited from possessing firearms by state or federal law, it must conduct a background check on the applicant. It cannot conduct a background check on a corporation or other business entity, therefore, the challenged rule is the only legally tenable interpretation of law.

The rule challenged by the Petitioner and addressed in this determination concerns the permit issued pursuant to the Roberti-Roos Act. The issuance of the Certificate of Eligibility is not part of the Roberti-Roos Act. Our determination is limited to the terms of the rule challenged by the Petitioner, i.e., the issuance of a permit or license pursuant to the Roberti-Roos Act. The Certificate of Eligibility, issued pursuant to Penal Code section 26700 et seq., is not part of the rule challenged by the Petitioner; therefore, the only legally tenable interpretation of Penal Code section 26700 et seq. does not apply in this matter.

⁵ Government Code section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

⁶ Pursuant to Government Code section 17 "person" means: "Person" includes any person, firm, association, organization, partnership, limited liability company, business trust, corporation, or company.

⁷ See also *Roth v. Department of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

We find, therefore, that the “only legally tenable interpretation” exemption does not apply to the rule challenged by the Petitioner. OAL did not identify any other relevant exemptions.

AGENCY RESPONSE

In addition to the argument that the “only legally tenable interpretation” exemption applies in this matter, the Department also argues that the definition of “person” in Penal Code section 16970 does not apply to the permit issued pursuant to the Roberti–Roos Act. The Department argues that the legislative intent behind the adoption of Penal Code section 16970 was to prohibit individuals, partnerships, corporations, association, and any other group or entity, from advertising the sale of assault weapons.

Penal Code section 16970 states:

As used in Sections 16790 and 17505 and in **Chapter 2 (commencing with Section 30500) of Division 10 of Title 4**, “person” means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created. [Emphasis added.]

It is settled law that the legislative intent behind a statutory enactment can be examined only if there is ambiguity in the language of the statute. In *People v. Superior Court of San Joaquin County Respondent; Jose Francisco Zamudio, Real Party in Interest* (2000) 23 Cal.4th 183, 192–193 [96 Cal.Rptr. 2d 463] (referred to hereafter as *Zamudio*), the California Supreme Court set forth the following analytical framework:

... Initially, “[a]s in any case of statutory interpretation, our task is to determine afresh the intent of the Legislature by construing in context the language of the statute.” (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal.Rptr. 614, 805 P.2d 873) In determining such intent, we begin with the language of the statute itself. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 73, 276 Cal. Rptr. 130, 801 P.2d 373.) That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 90, 260 Cal.Rptr. 520, 776 P.2d 222.) ‘If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what is said, and the plain meaning of the language governs.’ *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268, 36 Cal.Rptr.2d 563, 885 P.2d 976.) But when the statutory language is ambiguous, ‘the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute

internally and with related statutes.’ (*Calvillo–Silva v. Home Grocery* (1998) 19 Cal.4th 714, 724, 80 Cal.Rptr.2d 506, 968 P.2d 65.)

Giving the words of Penal Code section 16970 their “usual and ordinary meaning,” there is no ambiguity. Penal Code section 16970 clearly states that the definition of “person” applies to Chapter 2 of Division 10 of Title 4 of the Penal Code, the Roberti–Roos Act.

Chapter 2 includes sections 30500 to 31115, inclusive, including the provisions for the issuance of the permits for assault weapons that give rise to the challenged rule in this determination. We do not find any ambiguity in the language of Penal Code section 16970; therefore, it is not necessary to refer to the legislative intent behind the enactment of the section.

Finally, the Department responds to an allegation by the Petitioner that the challenged rule harms businesses. The allegation of harm to business in California is not relevant to the question of whether the rule meets the definition of “regulation” in Government Code section 11342.600; therefore, this allegation is outside the scope of this determination and will not be addressed here.

PUBLIC COMMENTS

OAL received comments from Clifton B. Monfort of Michel and Associates, P.C., Attorneys at Law, and Brandon Combs of California Association of Federal Firearms Licensees, Inc. Their comments included additional information about the challenged rule and its effect on their businesses. We thank them for their comments.

CONCLUSION

The rule challenged by the Petitioner is stated in a letter from the Department to the Petitioner, dated May 5, 2006:

The Department issues assault weapon permits to corporations and other business entities. However, such permits are issued to individuals authorized to act on behalf of corporations or other business entities. The authorization is not transferable to other persons, or to activities that are not undertaken on behalf of the corporation. . . .

In accordance with the above analysis, OAL determines that this rule meets the definition of “regulation” that should have been adopted pursuant to the APA.

/s/

Debra M. Cornez
Assistant Chief Counsel/
Acting Director

/s/

Kathleen Eddy
Senior Counsel