LAW OFFICES OF RAYMOND MARK DIGUISEPPE, PLLC*

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January 5, 2018

Via Email and U.S. Mail
Jacqueline Dosch
Bureau of Firearms
Division of Law Enforcement
Department of Justice
P.O. Box 160487
Sacramento, CA 95816-0487

Re: Written Comments Regarding Proposed 11 CCR § 5460

Dear Ms. Dosch:

I write on behalf of The Calguns Foundation (CGF), Firearms Policy Coalition (FPC), Firearms Policy Foundation (FPF), Second Amendment Foundation (SAF), and California Association of Federal Firearms Licensees (CAL-FFL), concerning the rulemaking proposal of the Department of Justice (DOJ) to adopt section 5460 as part of title 11, division 5, Chapter 39, of the California Code of Regulations (CCR), for the ostensible purpose of effectuating the "assault weapon" definitions that the DOJ previously promulgated under 11 CCR § 5471 *entirely outside* the Administrative Procedures Act (APA) as definitions that would apply "for all purposes under the assault weapons law," "without limitation to [the] context of the new ['assault weapons'] registration process."

The Attorney General and DOJ have been sued twice over the "bullet button assault weapons" regulations promulgated last July – see *Holt v. Becerra* and *Villanueva v. Becerra* – on the basis that the regulatory scheme the DOJ promulgated in connection with the new "assault weapons" registration requirement under Penal Code section 30900, subdivision (b)(1) – including (and especially) the slew of definitional terms under 11 CCR § 5471 – was issued in clear violation of the public notice, comment, and review process of the APA and vastly exceeds any rulemaking authority that the DOJ may have by materially expanding, altering, and otherwise contravening the substantive law governing

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"assault weapons" under the Assault Weapons Control Act (AWCA). The plaintiffs in *Holt* (who include CGF, FPC, FPF, and SAF) have also sued the Office of Administrative Law (OAL) because of the key role it played in bringing the DOJ's illegal regulatory agenda to fruition – specifically, by effectively endorsing the DOJ's claim that the entire regulatory scheme was eligible for "File and Print" publication as totally "exempt" from the APA and shuttling along the whole package to the Secretary of State for publication in the CCR.

This move by the DOJ to add 11 CCR § 5460 only after the litigation ensued is telling. It inevitably smacks of a *post hoc* attempt to save face and rescue its beleaguered regulatory scheme by taking advantage of the formal APA rulemaking process, midstream, to issue public proclamations in support of its case that the regulatory scheme is valid as it stands – under the guise of simply patching up a whole in the scheme with another regulation. Indeed, the text of this regulation that the DOJ portrays as "necessary" to the proper enforcement of the assault weapons law – "The definitions of section 5471 of this chapter shall apply to the identification of assault weapons pursuant to Penal Code section 30515" – is redundant given the effect of the existing regulatory scheme under the AWCA.

The section of the regulations immediately preceding this proposed regulation, 11 CCR § 5459, establishes the "title and scope" of the entire scheme, and it expressly states:

> This chapter shall be known as the 'Department of Justice Regulations for Assault Weapons and Large-Capacity Magazines,' may be cited as such and are referred to herein as "these regulations." *The provisions of these regulations shall apply to assault weapons as defined in Penal Code section 30515* and as specified pursuant to Penal Code section 30520, and large-capacity magazines as defined in Penal Code section 16740."

So by the very terms of 11 CCR § 5459, the definitions in section 5471 already have the effect of "apply[ing] to the identification of assault weapons pursuant to PC section 30515, without limitation to [the] context of the new registration process" – which is the purported purpose behind the DOJ's proposal to adopt 11 CCR § 5460 as a new regulation.

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In fact, 11 CCR § 5471 itself states the "assault weapon" definitions contained therein apply "[f]or purposes of section 30900" (11 CCR § 5471), and both section 30900 and 30515 are part of the same chapter of the Penal Code – Chapter 2, of Part 6, Title 4, Division 10. The DOJ even makes note of this in its Notice of Proposed Rulemaking, saying "[t]his chapter contains the statutory provisions restricting the possession, sale, and use of assault weapons." Well, the intent of that chapter is "to place restrictions on the use of assault weapons and *to establish a registration and permit procedure for their lawful sale and possession*." (§ 30505, subd. (a), emphasis added.) And, under the express terms of the AWCA's general prohibition against possession of "assault weapons," *any* violation of this chapter subjects one to criminal sanction. (§ 30605, subd. (a), italics added.) Thus, section 30900 is part and parcel of the AWCA's enforcement mechanisms, such that a failure to comply with the registration requirement necessarily subjects a person to the same sanctions applicable to any other form of unlawful possession under the AWCA.

This redundancy behind proposed 11 CCR § 5460 evinces an ulterior motive for the proposal, most naturally seen as a conveniently-timed effort to publicly defend its prior actions in promulgating the regulatory scheme currently being challenged as illegal. But whatever the true motive behind this proposal, in making it, the DOJ has actually backed itself into a corner concerning the challenged regulations. Because 11 CCR § 5460 would have essentially the same effect as the "assault weapon" definitional terms under 11 CCR § 5471 at the heart of the regulatory scheme, and because the DOJ has expressly acknowledged that proper promulgation of 11 CCR § 5460 requires compliance with the formal APA process, *it has effectively conceded* that those core definitional terms it forced through by regulatory fiat are subject to the APA. And therefore, the entire series of those regulations – all *44* in total – was subject to the very same process that the DOJ now attempts to invoke, belatedly, with its proposal to add 11 CCR § 5460; that is, public notice, public comment, appropriate consideration of and response to the public's concerns, and review by the OAL to ensure necessity, clarity, and consistency in the regulations. (Gov. Code, §§ 11346.2, subds. (a)-(b), 11347.3, subd. (b), 11346.36, subd. (b)(1), 11346.4, 11346.5, 11346.8, subd. (a), 11346.9, 11349.1, & 11349.3.) *All* of these regulations are invalid as a matter of law, because "no state agency 'shall issue, utilize, enforce, or attempt to enforce any . . . regulation . . .' unless it does so pursuant to the APA." (*County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 516; Gov. Code § 11340.5, subd. (a).)

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The same is true with the vast majority of the DOJ's other regulations in this scheme, as the litigation spotlights. They are invalid because the additional significant changes they purport to effect in the substantive law governing "assault weapons" not only violate the axiomatic rule that an agency's regulations must be consistent, not in conflict with the [law], and reasonably necessary to effectuate its purpose" (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 100), but also far exceed the narrow scope of any APA "exempt" regulatory power that the DOJ has under Penal Code section 30900, subdivision (b)(5). All the DOJ is authorized to do is issue regulations for the specific, limited purpose of establishing an Internet-based electronic registration system that collects identifying information about the firearms and their owners in exchange for a small fee. (*Ibid.*)

To whatever extent 11 CCR § 5460 may have any meaningful significance independent of the existing regulatory scheme's effect, it could not purge this illegality infecting the whole lot. In fact, the DOJ has simply further complicated matters by attempting to portray 11 CCR § 5460 as having a meaningfully independent effect "necessary" to the proper enforcement of the assault weapons law. If, as the DOJ insists, this regulation truly is *necessary* to ensure "concrete," "clear," and "uniform" guidance "to the public, the judiciary, district attorney's offices, and law enforcement" on the assault weapons law, then the scheme as it currently stands is unconstitutionally vague because it invites discriminatory or arbitrary enforcement of the law in violation of the citizens' state and federal constitutional rights (*In re Newbern* (1960) 53 Cal.2d 786, 792, and *Kolender v. Lawson* (1983) 461 U.S. 352, 35) – just as the plaintiffs in *Holt v. Becerra* contend.

Finally, as much as the DOJ may hope to harness the rulemaking process as a means to put up a defense or curry favor with the public concerning its previous regulatory actions that led to the current litigation, those efforts simply rely upon distortions of the true affairs. The DOJ claims in its Initial Statement of Reasons (pages 7-8) that its regulatory scheme "does not change the requirements of the statute," "does not alter the fundamental definitions of assault weapons provided by PC section 30515," and that its definitional terms in fact "most accurately reflect the legislative intent behind PC section 30515."

In reality, as already illustrated and as the plaintiffs in both pending lawsuits have further persuasively explained, this regulatory scheme directly contravenes the language and intent of the AWCA by significantly altering the substantive law in numerous ways so

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as to force upon law-abiding gun owners far more onerous restrictions or conditions on their use and possession of firearms than the Legislature has ever provided or intended.

Needless to say, CGF, FPC, FPF, SAF, and CAL-FFL do not support the DOJ's proposal to adopt 11 CCR § 5460 as some sort of patch ostensibly "necessary" to plug a whole in its scheme – a move that they see as merely a means to artificially buttress or perpetrate a procedurally and substantively invalid series of "assault weapons" regulations.

Rather, consistent with the righteous relief that the plaintiffs in *Holt* seek and are entitled to obtain through the courts, these organizations implore the DOJ, on behalf of their supporters and all law-abiding California gun owners whose rights hang in the balance, to abandon this and any other efforts to effectuate the illegal regulatory scheme and to instead properly invest its public funds and resources toward establishing a legitimate, straightforward, and non-expansive set of regulations. This would include immediately ceasing any further implementation or enforcement of the challenged regulations, taking all such steps as may be necessary to effect the deletion and/or depublication of the same, and pursuing in its place the proper installation of regulations which fully comply with the APA and are consistent in all respects with the substantive law under the AWCA. Concomitantly, the DOJ should seek another legislative amendment to further extend the "assault weapons" registration deadline by at least the amount of time that the DOJ has wasted in promulgating and enforcing its illegal regulatory scheme.

Similarly, the organizations implore the OAL to take all such steps as may be necessary on its end to effect the deletion and/or depublication of the invalid regulations and to exercise its important powers, and duties, to ensure any and all regulations that the DOJ proposes concerning the new "assault weapons" registration requirement fully comply with the APA and are consistent in all respects with the substantive law under the AWCA.

Respectfully submitted,
/s/ *Raymond M. DiGuiseppe*
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in *Holt v. Becerra*

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