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**SUSAN LAPSLEY**  
 Director

ENDORSED FILED  
 IN THE OFFICE OF  
 2009 NOV 30 PM 3:30



*Debra Bowen*  
 DEBRA BOWEN  
 SECRETARY OF STATE

Date: November 30, 2009

To: Jesse Galindo

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 28(S)**  
**(CTU 2009-0727-01)**  
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging two forms, CDC 812-A: Notice of Critical Information—Prison Gang Identification and CDC 812-B: Notice of Critical Information—Disruptive Group Affiliation, and California Code of Regulations, title 15, subsection 3341.5(c)(2)(A)2 as underground regulations.

On July 27, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether two forms are underground regulations. The forms you challenge are CDC 812-A: Notice of Critical Information—Prison Gang Identification and CDC 812-B: Notice of Critical Information—Disruptive Group Affiliation. These forms include descriptions and classifications of an inmate's status regarding gang affiliation. Neither of these forms were included with your petition. On September 21, 2009, OAL sent you a letter describing this oversight and informing you that your petition was incomplete.

In order to comply with the petition filing requirements<sup>1</sup>, on October 1, 2009, you submitted a revised petition which included a copy of CDC 812-A (9/92). However, no version of CDC 812-B was included with the petition. The current version date for both of these forms is 9/92. The 9/92 version of the forms are attached hereto as Exhibit A. In the revised petition you also challenged California Code of Regulations, title 15, subsection 3341.5(c)(2)(A)2 as an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600<sup>2</sup>, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither

<sup>1</sup> California Code of Regulations, title 1, section 260(b)(3).

<sup>2</sup> A regulation is defined in 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.

the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

(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 adoption pursuant to the APA. (Emphasis added)

The two forms you challenge as underground regulations are printed in the California Code of Regulations, title 15, as part of section 3378. Form CDC 812-A: Notice of Critical Information—Prison Gang Identification was adopted as a regulation in compliance with the APA and filed with the Secretary of State on October 26, 1988. It was amended in compliance with the APA and the amended form (version 9/92) was filed with the Secretary of State on June 17, 1994. Because you did not provide a copy of CDC 812-B: Notice of Critical Information—Disruptive Group Affiliation, OAL is unable to determine the version that you are challenging for this form. If the version is CDC 812-B (9/92), this version of the form was adopted as a regulation in compliance with the APA and filed with the Secretary of State on June 17, 1994. No further amendments to the forms have been made since that date.

In addition to the two forms, you also challenge California Code of Regulations, title 15, subsection 3341.5(c)(2)(A)2 as an underground regulation. California Code of Regulations, title 15, subsection 3341.5(c)(2)(A)2 was adopted as a regulation in compliance with the APA and filed with the Secretary of State on January 21, 1999. It was amended in compliance with the APA and filed with the Secretary of State on August 30, 1999.

Government Code section 11344.6 states:

The publication of a regulation in the California Code of Regulations or California Code of Regulations Supplement raises a rebuttable presumption that the text of the regulation as so published is the text of the regulation adopted.

No evidence had been presented to rebut this presumption. Since section 3378, which includes both challenged forms, and subsection 3341.5(c)(2)(A)2 were adopted in compliance with the APA, the challenged rules are not underground regulations.<sup>3</sup>

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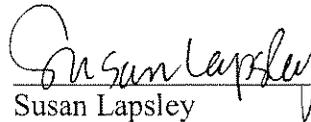
<sup>3</sup>A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

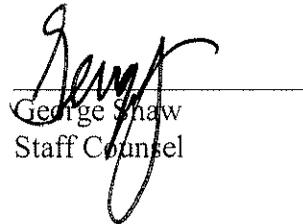
(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

The issuance of this summary disposition letter does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code or to seek declaratory relief pursuant to section 11350 of the Government Code.

  
Susan Lapsley  
Director

  
George Shaw  
Staff Counsel

Copy: Matthew Cate  
John McClure  
Tim Lockwood

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- (B) The challenged rule is contained in a California statute.  
(C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*  
(D) The challenged rule has expired by its own terms. [Emphasis added.]

# EXHIBIT

A

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

**NOTICE OF CRITICAL INFORMATION—PRISON GANG IDENTIFICATION**  
 CDC 812-A (9/92)

This nonConfidential form is used to identify primary source documents in the central file which establish an inmate/parolee's current status relative to prison gang activity/association. The identification process is initiated by completing a form CDC 812 and forwarding it to the Gang Coordinator/Investigator. The Gang Coordinator/Investigator will then complete or supervise the completion of form CDC 812-A and signify to its accuracy by printing name and signing. A CDC 128-B which delineates gang activity/association shall be completed per the CDC Operations Manual.

SUPPORTING INFORMATION

Documents shall be identified by date and type such as memorandum, probation report, parole report, incident report, police report, chrono.

A. SELF ADMISSION	B. TATTOOS AND SYMBOLS
C. WRITTEN MATERIAL	D. PHOTOGRAPHS
E. STAFF INFORMATION	F. OTHER AGENCIES
G. ASSOCIATION	H. INFORMANTS (REASON FOR RELIABILITY MUST BE SPECIFIED)
I. OFFENSES (GANG RELATED)	
J. LEGAL DOCUMENTS	
K. VISITORS	
L. COMMUNICATIONS (MAIL/NOTES)	
M. DEBRIEFING REPORTS	
ADDITIONAL DOCUMENTATION OR COMMENTS	

GANG COORDINATOR/INVESTIGATOR

PRINT NAME OF PRISON GANG AND CURRENT STATUS: MEMBER/ ASSOCIATE/DROPOUT/NONE OR SAFETY CONCERNS	PRINT NAME AND SIGN	TITLE	INSTITUTION/ REGION	DATE
CDC NUMBER	INMATE/PAROLEE'S NAME		PAGE _____ OF _____	

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

NOTICE OF CRITICAL INFORMATION—DISRUPTIVE GROUP IDENTIFICATION  
CDC 812-B (9/92)

This nonconfidential form is used to identify primary source documents in the central file which establish an inmate/parolee's membership in a disruptive group other than a recognized prison gang. The identification process is initiated by completing a form CDC 812 and forwarding it to the Gang Coordinator/Investigator. The Gang Coordinator/Investigator will then complete or supervise the completion of form CDC 812-B and signify to its accuracy by printing name and signing.

SUPPORTING INFORMATION

Documents shall be identified by date and type such as memorandum, probation, report, parole report, incident report, police report, chrono.

A. SELF ADMISSION	B. TATTOOS AND SYMBOLS
C. WRITTEN MATERIAL	D. PHOTOGRAPHS
E. STAFF INFORMATION	F. OTHER AGENCIES
G. ASSOCIATION	H. INFORMANTS (REASON FOR RELIABILITY MUST BE SPECIFIED)
I. OFFENSES (GANG RELATED)	
J. LEGAL DOCUMENTS	
K. VISITORS	
L. COMMUNICATIONS (MAIL/NOTES)	
M. DEBRIEFING REPORTS	
ADDITIONAL DOCUMENTATION OR COMMENTS	

GANG COORDINATOR/INVESTIGATOR

PRINT NAME OF DISRUPTIVE GROUP AND CURRENT STATUS: MEMBER/ASSOCIATE/DROPOUT/NONE OR SAFETY CONCERNS	PRINT NAME AND SIGN	TITLE	INSTITUTION/REGION	DATE
CDC NUMBER	INMATE/PAROLEE'S NAME		PAGE _____ OF _____	