

1 Donald E. J. Kilmer, Jr. [SBN: 179986]  
LAW OFFICES OF DONALD KILMER  
2 1645 Willow Street, Suite 150  
San Jose, California 95125  
3 Voice: (408) 264-8489  
Fax: (408) 264-8487  
4 E-Mail: Don@DKLawOffice.com

5 Jason A. Davis [SBN: 224250]  
Davis & Associates  
6 30021 Tomas Street, Suite 300  
Rancho Santa Margarita, CA 92688  
7 Voice: (949) 310-0817  
Fax: (949) 288-6894  
8 E-Mail: Jason@CalGunLawyers.com

9 Attorneys for Plaintiffs

10 UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO VENUE

13 MARK AARON HAYNIE, BRENDAN  
14 JOHN RICHARDS, THE CALGUNS  
15 FOUNDATION, INC., and THE  
16 SECOND AMENDMENT  
FOUNDATION, INC.,

17 Plaintiffs,

18 vs.

19 KAMALA HARRIS, Attorney General  
20 of California, CALIFORNIA  
21 DEPARTMENT OF JUSTICE, CITY  
22 OF ROHNERT PARK, and OFFICER  
DEAN BECKER (RP134),

23 Defendants.

Case No.: 3:10-CV-01255 SI

SECOND AMENDED  
CONSOLIDATED COMPLAINT

DEMAND FOR JURY TRIAL

42 U.S.C. §§ 1983, 1988

SECOND AMENDMENT

FOURTH AMENDMENT

FOURTEENTH AMENDMENT

24  
25 **PROCEDURAL INTRODUCTION**

26 1. *Haynie v. Harris*, Case No.: 3:10-CV-01255 SI was ordered consolidated with  
27 *Richards v. Harris (I)*, Case No.: 3:11-CV-02493 SI, in an ordered filed on  
28 October 22, 2011. (See Documents # 42 and #15 respectively.)

- 1 2. The second *Richards v. Harris (II)*, Case No.: 3:11-CV-05580 SI was ordered  
2 to be related with the first two cases in an order filed on December 21, 2011.  
3 (See documents #47 and # 20 respectively.)
- 4 3. The final (4<sup>th</sup>) case, *Plog-Horowitz, et al., v. Harris, et al*, Case No.: CV-12-  
5 0452 SI was ordered to be related to the first three (3) cases in an order filed  
6 on March 1, 2012 (See Documents # 53, #17 and #5 respectively.)
- 7 4. In a stipulation and order filed with the Court, all four cases were  
8 consolidated under *Haynie v. Harris*, Case No.: 3:10-CV-01255 SI, with the  
9 remaining case numbers dismissed and the Defendants reserving the right to  
10 separate trials.
- 11 5. The Defendants who have been dismissed from these consolidated actions:  
12 a. City of Pleasanton and Pleasanton Police Department in *Haynie v.*  
13 *Harris*, Case No.: 3:10-CV-01255 SI. See documents #6 and #7, filed on  
14 June 8, 2012 and June 15, 2010, respectively.  
15 b. Sonoma County Sheriff's Department and Sheriff's Deputy Greg  
16 Myers. Document #23, filed on June 19, 2012.
- 17 6. Pursuant to a stipulation of the parties filed on or after October 24, 2012, this  
18 Second Amended Consolidated Complaint dismisses the entire action  
19 entitled: *Plog-Horowitz, et al., v. Harris, et al*, Case No.: CV-12-0452 SI.

20 **SUBSTANTIVE INTRODUCTION**

- 21 7. Plaintiff MARK AARON HAYNIE was wrongfully arrested for possession of  
22 an Assault Weapon and required to make bail in a state criminal case in  
23 which he was found factually innocent. He is associated with and exercises  
24 membership rights in both the THE CALGUNS FOUNDATION, INC., and  
25 THE SECOND AMENDMENT FOUNDATION, INC.
- 26 8. Plaintiff BRENDAN RICHARDS is an honorably discharged United States  
27 Marine who saw combat duty in Iraq. He is associated with and exercises  
28 membership rights in both the THE CALGUNS FOUNDATION, INC., and

1 THE SECOND AMENDMENT FOUNDATION, INC.

2 a. On May 20, 2010, RICHARDS was wrongfully arrested for possession  
3 of an Assault Weapon and spent six (6) days in the Sonoma County jail  
4 while his family tried to raise the funds for him to make bail in a state  
5 criminal case which was dismissed. He was factually innocent of the  
6 charges brought.

7 b. On August 14, 2011, RICHARDS was wrongfully arrested a second  
8 time for possession of an Assault Weapon and spent four (4) days in  
9 the Sonoma County jail awaiting bail. Again the charges against him  
10 were dismissed. He was factually innocent of the charges brought.

11 9. Plaintiffs HAYNIE, and RICHARDS along with the Institutional Plaintiffs  
12 CALGUNS FOUNDATION, INC., and SECOND AMENDMENT  
13 FOUNDATION, INC., seek injunctive and declaratory relief against  
14 Defendants HARRIS and the CALIFORNIA DEPARTMENT OF JUSTICE  
15 that the California Penal Codes and Regulations defining Assault Weapons  
16 are unconstitutionally vague and ambiguous and therefore result in wrongful  
17 arrests and seizures of lawfully possessed/owned arms. The  
18 unconstitutionally vague and ambiguous definitions of assault weapons and  
19 the ongoing risk of arrest and seizure have a chilling on the fundamental  
20 right to “keep and bear” arms of ordinary and common design as protected by  
21 the Second Amendment to the United States Constitution.

22 10. Plaintiff BRENDAN RICHARDS also seeks monetary damages against the  
23 CITY OF ROHNERT PARK and OFFICER BECKER for unlawful seizure of  
24 his person and his firearms.

25 **PARTIES**

26 11. Plaintiff MARK AARON HAYNIE is a natural person and citizen of the  
27 United States and of the State of California and was at all material times a  
28 resident of Alameda County.

1 a. In a prior iteration of this action, HAYNIE had sued the City of  
2 Pleasanton and the Pleasanton Police Department. Those defendants  
3 were dismissed after reaching a cash settlement with Plaintiff  
4 HAYNIE.

5 b. Plaintiff HAYNIE does not seek any remedies against Defendants  
6 CITY OF ROHNERT PARK, or OFFICER BECKER.

7 12. Plaintiff BRENDAN RICHARDS is a natural person and citizen of the  
8 United States and of the State of California. He is an honorably discharged  
9 United States Marine with six months of combat duty in Iraq.

10 a. RICHARDS seek monetary remedies and injunctive relief against  
11 Defendants CITY OF ROHNERT PARK and OFFICER BECKER.

12 b. In a prior iteration of this action, RICHARDS had sued the County of  
13 Sonoma Sheriff's Department and Sheriff's Deputy Myers. Those  
14 defendants were dismissed after reaching a non-cash settlement with  
15 Plaintiff RICHARDS.

16 c. RICHARDS seeks only injunctive relieve against all the other  
17 remaining defendants.

18 13. Plaintiff THE CALGUNS FOUNDATION, INC., (CGF) is a non-profit  
19 organization incorporated under the laws of California with its principal  
20 place of business in San Carlos, California. The purposes of CGF include  
21 supporting the California firearms community by promoting education for all  
22 stakeholders about California and federal firearms laws, rights and  
23 privileges, and defending and protecting the civil rights of California gun  
24 owners. As part of CGF's mission to educate the public – and gun-owners in  
25 particular – about developments in California's firearm laws, CGF assists in  
26 the maintenance and contributes content to an internet site called  
27 Calguns.net. [<http://www.calguns.net/calgunforum/index.php>] On that  
28 website CGF informs its members and the public at large about pending civil

1 and criminal cases, including but not limited to: arrests, convictions and  
2 appeals relating to California gun law. The website itself contains messages,  
3 forums and various posts that document the concerns that California gun  
4 owners have about possible arrest, prosecution and conviction for running  
5 afoul of California's vague and ambiguous laws relating to so-called Assault  
6 Weapons. CGF represents its members and supporters, which include  
7 California gun owners and Plaintiffs HAYNIE, and RICHARDS. CGF brings  
8 this action on behalf of itself and its supporters, who possess all the indicia of  
9 membership.

10 14. Plaintiff SECOND AMENDMENT FOUNDATION, INC., (SAF) is a non-  
11 profit membership organization incorporated under the laws of Washington  
12 with its principal place of business in Bellvue, Washtington. SAF has over  
13 650,000 members and supporters nationwide, including California. The  
14 purposes of SAF include education, research, publishing and legal action  
15 focusing on the Constitutional right to privately owned and possess firearms,  
16 and the consequences of gun control. SAF brings this action on behalf of  
17 itself and its members.

18 15. Defendant KAMALA HARRIS is the Attorney General of the State of  
19 California and she is obligated to supervise her agency and comply with all  
20 statutory duties under California Law. She is charged with enforcing,  
21 interpreting and promulgating regulations regarding California's Assault  
22 Weapons Statutes. Furthermore, California Penal Code §§ 13500 *et seq.*,  
23 establishes a commission on Peace Officer Standards and Training that  
24 requires the DEPARTMENT OF JUSTICE, with the Attorney General as an  
25 *ex officio* member of the commission, which is to provide personnel, training  
26 and training material to cities and counties to insure an effective and  
27 professional level of law enforcement within the State of California.

28 Furthermore, California Attorney General KAMALA HARRIS has concurrent

1 prosecutorial jurisdiction with the state's 58 District Attorneys, and she is  
 2 bound by a duty to seek substantial justice and avoid the filing of criminal  
 3 charges in which she knows (or should know) are not supported by probable  
 4 cause. HARRIS also has an independent duty to disclose information  
 5 beneficial to the accused and by extension she has a duty to prevent wrongful  
 6 arrests in the first place when she has the power to do so.

7 16. Defendant CALIFORNIA DEPARTMENT OF JUSTICE is an agency of the  
 8 State of California, headed by the Attorney General of the State, with a  
 9 statutory duty to enforce, administer and interpret the law and promulgate  
 10 regulations regarding weapons identified by the California Legislature as  
 11 "Assault Weapons." This agency also has the power to issue memorandums,  
 12 bulletins and opinion letters to law enforcement agencies throughout the  
 13 State regarding reasonable interpretations of what constitutes an "Assault  
 14 Weapon" under California Law.

15 17. Defendant CITY OF ROHNERT PARK a municipal subdivision of the State  
 16 of California located in Sonoma County. Defendant CITY OF ROHNERT  
 17 PARK maintains a Department of Public Safety and is responsible for setting  
 18 the policies and procedures of that Department, including but not limited to  
 19 the training and discipline of peace officers employed by Defendant.

20 18. Defendant OFFICER DEAN BECKER was a peace officer employed by the  
 21 CITY OF ROHNERT PARK for all relevant time periods for this complaint.

22 19. Plaintiffs allege on information and belief that municipal police departments  
 23 and sheriffs' offices in California conduct peace officer training on the  
 24 identification and regulation of deadly weapons as defined by California law  
 25 and that any failure by the Defendants CITY OF ROHNERT PARK to  
 26 conduct adequate training is based on intentional or deliberate indifference  
 27 to the rights of gun-owners.

28 20. Plaintiffs further allege on information and belief the following alternative

1 theories of liability against the Defendants:

- 2 a. Defendants CITY OF ROHNERT PARK, intentionally or through
- 3 deliberate indifference to the rights of law-abiding gun-owners, have
- 4 failed to conduct training as to the identification and regulation of
- 5 Assault Weapons as defined by California Law; and/or
- 6 b. Defendants HARRIS and/or CALIFORNIA DEPARTMENT OF
- 7 JUSTICE, intentionally or through deliberate indifference to the rights
- 8 of law-abiding gun-owners, have failed to promulgate appropriate
- 9 memoranda, industry bulletins and/or regulations to assist local law
- 10 enforcement agencies in properly identifying Assault Weapons as
- 11 defined by California Law; and/or
- 12 c. California Law purporting to define and regulate Assault Weapons is
- 13 so unconstitutionally vague and ambiguous that no reasonable person
- 14 (i.e., the general public, local police, etc.) can identify and/or comply
- 15 with California’s laws regulating this class of weapons.

16 **JURISDICTION AND VENUE**

- 17 21. This Court has subject matter jurisdiction over this action pursuant to 28
- 18 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. §§ 1983, 1988.
- 19 22. This Court has supplemental jurisdiction over any state law causes of action
- 20 arising from the same operative facts under 28 U.S.C. § 1367.
- 21 23. Venue for this action is proper under 28 U.S.C. §§ 1391 and/or the Civil Local
- 22 Rules for bringing an action in this district.

23 **CONDITIONS PRECEDENT**

- 24 24. All conditions precedent have been performed, and/or have occurred, and/or
- 25 have been excused, and/or would be futile.

26 **FACTS - Plaintiff HAYNIE**

- 27 25. On or about February 7, 2009, officers of the PLEASANTON POLICE
- 28 DEPARTMENT arrested and detained MARK HAYNIE thus depriving him



1 of his liberty. The agency case numbers for the incident are: CEN: 09-6635  
2 and PFN: BHD164. The docket number was: 09318856.

3 26. MARK HAYNIE was cited for possession of an Assault Weapon under  
4 California Penal Code § 30600 et seq. Bail was set at \$60,000.00. This  
5 caused MARK HAYNIE to have to pay a \$6,000 fee to a bail bondsman.

6 27. MARK HAYNIE's rifle was not an Assault Weapon because it was not listed  
7 in California Penal Code § 30510 et seq.

8 28. MARK HAYNIE's rifle was not an Assault Weapons because it could not be  
9 identified under Penal Code § 30510 et seq. with the characteristics of an  
10 assault weapon in that:

11 a. It did not have a "detachable magazine" as that term is defined by  
12 California statutory law and regulations promulgated by the  
13 Defendant CALIFORNIA DEPARTMENT OF JUSTICE.

14 b. MARK HAYNIE's rifle did have a "bullet button" which requires the  
15 use of a tool (a bullet being defined as a tool by the California Code of  
16 Regulations) to remove the magazine from the gun, thus making the  
17 magazine non-detachable.

18 29. MARK HAYNIE's rifle is based on the popular and common Colt AR-15 rifle.  
19 It is functionally identical to an AR-15 except that the magazine (as noted  
20 above) is non-detachable and the non-detachable magazine capacity does not  
21 exceed ten (10) rounds.

22 30. Several manufacturers offer several models of semi-automatic, center-fire  
23 rifles that are not "assault weapons" as defined by California law. Examples:

24 a. Ruger Mini-14 Ranch Rifle. (Caliber 5.56mm NATO/.223 Rem.)

25 b. Ruger Mini Thirty Rifle. (Caliber 7.62 x 39mm)Ruger 99/44 Deerfield  
26 Carbine. (Caliber .44 Remington Magnum)

27 c. Remington Model 750 Woodmaster. (Available in several calibers.)

28 d. Browning BAR. (Available in several calibers.)



- 1 e. Benelli R1 Rifle. (Available in several calibers.)
- 2 31. MARK HAYNIE made all required court appearances. The Alameda County  
3 District Attorney's office declined to file an information against MARK  
4 HAYNIE and the matter was formally dropped from the Alameda County  
5 Superior Court Criminal Docket on March 27, 2009.
- 6 32. MARK HAYNIE was deprived of his liberty until March 27, 2009 when bail  
7 was exonerated in Department 701 by Superior Court Judge Walker.
- 8 33. MARK HAYNIE lost time off from work to make court appearances and  
9 incurred other losses associated with said criminal charges.
- 10 34. MARK HAYNIE was deprived of the possession and use of valuable personal  
11 property (a rifle) from the date of his arrest until mid-June of 2009 when he  
12 reacquired the firearm from the PLEASANTON POLICE DEPARTMENT.
- 13 35. On or about October 21, 2009, MARK HAYNIE obtained a finding of factual  
14 innocence under California Penal Code 851.8 from the PLEASANTON  
15 POLICE DEPARTMENT.
- 16 36. After termination of his criminal case and while this case was pending,  
17 MARK HAYNIE wrestled with whether or not he should "keep and bear"  
18 such a controversial weapon. He eventually sold his firearms for a number of  
19 reasons, including but not limited to a reasonable fear that he would face  
20 future additional arrests. This reasonable fear is based on:
- 21 a. As part of MARK HAYNIE's enjoyment of his Second Amendment  
22 rights, he regularly goes to the range to shoot his rifles. These ranges  
23 are public places. Because the rifle he wants to reacquire looks like a  
24 contraband weapon, he draws attention to himself by possessing this  
25 legal version of the rifle in these public settings. This makes it more  
26 likely that HAYNIE will have future law enforcement contact and  
27 possible arrest, based on possession of this particular rifle.
- 28 b. MARK HAYNIE's knowledge about the dangers of owning these

1 weapons was gained from his own experiences as set forth in this law  
2 suit.

3 c. MARK HAYNIE's knowledge about the risks of exercising his rights is  
4 also gained from Calguns.net, where he has learned about multiple  
5 wrongful arrests of law-abiding gun owners charged under California's  
6 vague and ambiguous Assault Weapon Statutes.

7 37. Based on his knowledge of these other cases – including co-plaintiff  
8 RICHARDS – and his own personal experience, Plaintiff HAYNIE has a  
9 reasonable fear that he may suffer repeated wrongful arrests in the future if  
10 he reacquires a firearm that local law enforcement agencies continue to  
11 confuse with firearms defined by California as Assault Weapons. This  
12 reasonable fear results in a chilling of his fundamental right to “keep and  
13 bear” arms of common use and ordinary design.

14 38. CALGUNS FOUNDATION, INC., paid for Plaintiff MARK HAYNIE'S  
15 representation in the criminal matter in the amount of: \$3,713.43.

16 39. CALGUNS FOUNDATION, INC., has also paid for the defense of other  
17 California residents similarly situated. (e.g., charged with possession of  
18 Assault Weapons and dismissal of charges.)

19 40. On or about May 10, 2010, the Defendants CITY OF PLEASANTON and  
20 CITY OF PLEASANTON POLICE DEPARTMENT were dismissed from this  
21 case after payment to MARK HAYNIE of \$6,000 and a release of all claims.

22 41. Because Defendant CALIFORNIA DEPARTMENT OF JUSTICE has taken  
23 the position that HAYNIE's arrest was indeed wrongful and that there is  
24 nothing they can do to further clarify the detachable magazine feature and  
25 bullet-button technology, they (DOJ) have adopted an admission that the  
26 California Assault Weapon regulatory regime (statutes and regulations)  
27 cannot be improved upon by any means at their disposal to prevent future  
28 wrongful arrests.

1 42. Plaintiffs herein allege that if no further clarifications of California's Assault  
2 Weapons statutes and regulations are desirable or (legally?) possible, yet  
3 innocent gun-owners continue to be arrested by local law enforcement  
4 agencies and charged with violating Penal Code § 30600 *et seq.*, then only one  
5 conclusion can follow – the entire set of laws and regulations defining  
6 California Assault Weapons is unconstitutionally vague and ambiguous.

7 **FACTS – Plaintiff RICHARDS (First Arrest)**

8 43. On or about May 20, 2010, Defendant BECKER arrested Plaintiff  
9 RICHARDS thus depriving him of his liberty.

10 44. On or about May 20, 2010, Defendant BECKER seized firearms (2 pistols and  
11 1 rifle) from Plaintiff RICHARDS, thus depriving him of the means of  
12 exercising his Second Amendment rights.

13 45. The arresting agency case number for the incident is: 10-0001930. The  
14 docket number for the Sonoma Superior Court Case was: SCR 583167.

15 46. Defendant BECKER investigated a disturbance at a Motel 6 located at 6145  
16 Commerce Blvd., which was within his operational jurisdiction.

17 47. While both men were on the sidewalk at the motel, Defendant BECKER  
18 questioned Plaintiff RICHARDS about his involvement in the disturbance,  
19 and during the conversation, RICHARDS revealed that he had unloaded  
20 firearms in the trunk of his vehicle.

21 48. Defendant BECKER indicated that he planned to search the trunk of  
22 RICHARDS' vehicle and began to walk toward RICHARDS' car. After  
23 BECKER asked a second time if Plaintiffs' firearms were loaded and  
24 responding "no", RICHARDS inquired whether OFFICER BECKER needed a  
25 warrant to search the trunk of his car.

26 49. Apparently relying on Penal Code § 25850, OFFICER BECKER replied that  
27 since RICHARDS had admitted that firearms were in the trunk, no warrant  
28 was necessary.

1 50. Only after this statement, and in obedience to BECKER'S demand, did  
2 RICHARDS turn over the keys to the trunk of his vehicle.

3 51. OFFICER BECKER found two pistols and one rifle, along with other firearm-  
4 related equipment in the trunk. None of the firearms were loaded.

5 52. OFFICER BECKER inquired about the registration of Plaintiff's firearms  
6 and RICHARDS replied that those firearms that required registration were  
7 in fact registered to him.

8 53. OFFICER BECKER placed RICHARDS under arrest for a violation of CA  
9 Penal Code § 30600 *et seq.* – Possession of an unregistered Assault Weapon.

10 54. On the strength of an incident report prepared by OFFICER BECKER, who  
11 claimed to be a firearm instructor and an expert witness having previously  
12 testified about the identification of Assault Weapons, Plaintiff RICHARDS  
13 was charged by the Sonoma County District Attorney with the following  
14 crimes by way of felony complaint:

15 a. Two counts of possession of an Assault Weapon under California Penal  
16 Code § 30600 *et seq.*

17 b. Four counts of possession of large capacity magazines. CA Penal Code  
18 § 16590 *et seq.*

19 55. Bail was set at \$20,000.00. RICHARDS spent 6 days in jail while his family  
20 tried to raise the funds for bail. Finally, a \$1,400 non-refundable fee was paid  
21 to a bondsman and RICHARDS was released on bail.

22 56. On September 9, 2010, prior to a scheduled Preliminary Hearing, the Sonoma  
23 County District Attorney's Office dismissed all charges against Plaintiff  
24 BRENDAN RICHARDS.

25 57. The dismissal was based on an August 16, 2010, report prepared by Senior  
26 Criminalist John Yount of the California Department of Justice Bureau of  
27 Forensic Services. Criminalist Yount had found that none of RICHARDS  
28 firearms were Assault Weapons as defined by the California Penal Code or

1 any of its regulations.

- 2 a. One firearm (a semi-automatic pistol) had a properly installed bullet  
3 button, thus rendering the firearm incapable of accepting a detachable  
4 magazine that could only be removed from the gun by the use of a tool.
- 5 b. The other firearm (a semi-automatic rifle) had none of the features or  
6 characteristics that make a firearm subject to registration under CA's  
7 Assault Weapon regime.
- 8 c. There was never an issue with the third firearm (another semi-  
9 automatic pistol that is actually on the California safe handgun list)  
10 being classified as an assault weapon and it was registered to Plaintiff.

11 58. All of RICHARDS' firearms were semi-automatic guns. California certifies  
12 scores of semi-automatic pistols (including models based on the venerable .45  
13 Cal. M1911 of World War II vintage) for retail sale in California.  
14 Additionally, several manufacturers offer several models of semi-automatic,  
15 center-fire rifles that are not "assault weapons" under California law.

16 Examples include:

- 17 a. Ruger Mini-14 Ranch Rifle. (Caliber 5.56mm NATO/.223 Rem.)
- 18 b. Ruger Mini Thirty Rifle. (Caliber 7.62 x 39mm)Ruger 99/44 Deerfield  
19 Carbine. (Caliber .44 Remington Magnum)
- 20 c. Remington Model 750 Woodmaster. (Available in several calibers.)
- 21 d. Browning BAR. (Available in several calibers.)
- 22 e. Benelli R1 Rifle. (Available in several calibers.)
- 23 f. Springfield Armory M1A with California legal muzzle break and 10-  
24 round magazines.
- 25 g. World War II Era M1 Garand, available for mail order sales from the  
26 United States Government through the Civilian Marksmanship  
27 program. <http://www.thecmp.org/Sales/rifles.htm>
- 28 h. World War II Era M1 Carbines, also available for mail order sales from

1 the United States Government through the Civilian Marksmanship  
2 program. <http://www.thecmp.org/Sales/rifles.htm>

3 Thus, Plaintiffs herein aver that semi-automatic firearms are common and  
4 ordinary weapons, suitable for exercising Second Amendment rights.

5 59. After the government's release of the expert's report, the Prosecution had  
6 further discussions with RICHARDS' Counsel, wherein it was pointed out  
7 that California law does not criminalize mere possession of large capacity  
8 magazines. Upon The People's concession that this is the state of the law in  
9 California, all charges against RICHARDS were dismissed.

10 60. RICHARDS, through counsel, made several inquiries over the next several  
11 months to the Sonoma County District Attorney about a stipulation of factual  
12 innocence under Penal Code § 851.8. These negotiations reached an impasse  
13 when the District Attorney insisted on a finding that there was probable  
14 cause for the police to arrest RICHARDS as a *quid pro quo* for their  
15 stipulation for a finding of factual innocence. In other words, it can be  
16 inferred that the Sonoma County District Attorney still believed, after  
17 dismissing the case against RICHARDS, that there is enough ambiguity in  
18 the California Assault Weapon statutes and regulations that reasonable  
19 minds can differ and that experts are required to interpret the law. Of course  
20 this set of circumstances will still result in gun-owners continuing to be  
21 arrested, having to post bail, and having to hire attorneys and experts to  
22 clear their names.

23 61. BRENDAN RICHARDS made all required court appearances until the  
24 matter was dismissed on September 9, 2010.

25 62. BRENDAN RICHARD was thus deprived of his liberty while he was  
26 incarcerated pending the posting of bail and then through to September 9,  
27 2010, when the case was dismissed and bail was exonerated.

28 63. BRENDAN RICHARDS lost time off from work and incurred travel expenses

1 to make court appearances. He also incurred other losses associated with the  
2 criminal case against him.

3 64. BRENDAN RICHARDS was deprived of the possession and use of valuable  
4 personal property (two pistols and a rifle), necessary for exercising his Second  
5 Amendment “right to keep and bear arms.” This deprivation of  
6 constitutionally protected property occurred from the date of his arrest until  
7 the property was returned to him following the dismissal.

8 65. THE CALGUNS FOUNDATION, INC., paid \$11,224.86 for Plaintiff  
9 BRENDAN RICHARDS’ legal representation in the first criminal matter.

10 66. THE CALGUNS FOUNDATION, INC., has also paid for the defense and  
11 expert consultations for many other California residents similarly situated.  
12 (e.g., possession of a “bullet button” semi-automatic rifle, arrest and  
13 dismissal of charges.)

14 **FACTS – Plaintiff RICHARDS (Second Arrest)**

15 67. On or about August 14, 2011, the Sonoma County Sheriff’s Office acting  
16 through Sheriff’s Deputy Greg Myers, arrested Plaintiff RICHARDS thus  
17 depriving him of his liberty.

18 68. On or about August 14, 2011, the Sonoma County Sheriff’s Office acting  
19 through Sheriff’s Deputy Greg Myers, made contact with RICHARDS,  
20 wherein RICHARDS informed the arresting officer that there were firearms  
21 located in the trunk of his vehicle. RICHARDS declined to consent to a  
22 search of the trunk. The arresting officer then hand-cuffed RICHARDS and  
23 proceeded to conduct a warrantless search of the vehicle in apparent reliance  
24 on Penal Code § 25850. The arresting officer seized a Springfield Armory  
25 M1A from the trunk of Plaintiff RICHARDS car.

26 69. The arresting officer apparently believed that the muzzle break installed on  
27 RICHARDS’ rifle was a flash suppressor. RICHARDS was charged with a  
28 single felony count of violating California Penal Code § 30600 *et seq.*, –



1 possession of an assault weapon. Bail was initially set at \$100,000.

2 70. A motion to reduce bail was made on or about August 18, 2011, and bail was  
3 reduced to \$20,000. RICHARDS was released on bail that day after posting a  
4 non-refundable fee to a bail bondman of approximately \$2,000.

5 71. Prior to the next court appearance, the weapon in question was examined by  
6 the California Department of Justice Bureau of Forensic Services. Senior  
7 Criminalist John Yount issued a report on or about August 29, 2011, that the  
8 firearm was not an Assault Weapon under California law.

9 72. The arresting officer either lacked the training to properly distinguish a  
10 muzzle break from a flash suppressor and/or the definition of a flash  
11 suppressor is so vague and ambiguous that a well trained peace officer can  
12 easily confuse a flash suppressor with a muzzle break.

13 73. The California Department of Justice has never promulgated objective  
14 standards for identifying flash suppressors. Plaintiffs allege on information  
15 and belief that the CALIFORNIA DEPARTMENT OF JUSTICE in fact relies  
16 upon manufacturer catalogs and marketing materials, rather than objective  
17 scientific tests to determine whether a device is a flash suppressor, flash-  
18 hider, muzzle break and/or recoil compensator.

19 74. On or about September 19, 2011, the charges against RICHARDS were  
20 dismissed. Although he was cleared by the government's own expert, the  
21 Sonoma County D.A. declined to stipulate to a finding of factual innocence.

22 75. The weapon in question – Springfield Armory model M1A is a common and  
23 ordinary firearm suitable for exercising the “right to keep and bear arms”  
24 under the Second Amendment to the United States Constitution.

25 76. RICHARDS lost time off of work. He was required to post bail. CALGUNS  
26 FOUNDATION, INC., again paid RICHARDS' criminal defense lawyer.

27 77. Following this second arrest on charges of violating California Penal Code §  
28 30600 – possession of an Assault Weapon – Plaintiff RICHARDS has a

1 reasonable fear, that by exercising a fundamental right protected by the U.S.  
 2 Constitution, he is realistically threatened by a repetition of wrongful  
 3 arrests. He further contends that the claim of future injury cannot be  
 4 written off as mere speculation. RICHARDS also bases his fear of repeated  
 5 arrests on the information he obtains from the Calguns.net website.

6 78. During the course of this litigation, Plaintiffs reached an agreement to  
 7 dismiss the Sonoma County Defendants (the Sheriff's Office and Deputy  
 8 Myer) from the case in consideration of Sonoma Sheriff-Coroner Steve  
 9 Freitas' declaration that California Law defining "flash suppressor" is vague  
 10 and ambiguous. [See Exhibit O attached hereto. The exhibit is pages 8 and  
 11 9 of a 9-page settlement agreement.]

12 **FACTS – Relating to Vague and Ambiguous Laws Impacting**  
 13 **the Second Amendment**

14 79. The CALIFORNIA DEPARTMENT OF JUSTICE is the State agency  
 15 responsible for the training and education of law enforcement agencies with  
 16 respect to Assault Weapons under Penal Code §§ 30520 and 31115.

17 a. Penal Code § 30520 states: "The Attorney General **shall** adopt those  
 18 rules and regulations that **may** be necessary **or** proper to carry out the  
 19 purposes and intent of this chapter." [emphasis added]

20 b. Penal Code § 31115 states [in part]: "The Department of Justice **shall**  
 21 conduct a public education and notification program regarding the  
 22 registration of assault weapons and the definition of the weapons set  
 23 forth in Section 30515." [emphasis added]

24 80. California's definitions of Assault Weapons are set forth at Penal Code §§  
 25 16170(a), 16250, 16790, 16970, and 30500-31115.

26 81. The California Code of Regulations interpreting the statutory definition of  
 27 assault weapons are found at Title 11, Division 5, Chapters 39 & 40.

28 82. The Orange County Sheriff's Department has issued a training bulletin about

1 the “bullet button” to prevent wrongful arrests in that county. A true and  
2 correct copy is attached as **Exhibit A**.

3 83. The City of Sacramento has issued a training bulletin about the “bullet  
4 button” to prevent wrongful arrests in that jurisdiction. A true and correct  
5 copy is attached as **Exhibit B**.

6 84. The Calguns Foundation Inc., has published a flow-chart to identify weapons  
7 that are designated as assault weapons under California law. A true and  
8 correct copy is attached as **Exhibit C**.

9 85. Defendant CALIFORNIA DEPARTMENT OF JUSTICE has promulgated an  
10 “Assault Weapons Identification Guide,” an 84-page publication which  
11 describes the Assault Weapons regulated in Penal Code (former) sections  
12 12276, 12276.1, and 12276.5. In the Guide, the Department acknowledges  
13 that a magazine is considered detachable when it “can be removed readily  
14 from the firearm with neither disassembly of the firearm action nor use of a  
15 tool being required. A bullet or ammunition cartridge is considered a tool.”

16 86. Defendant CALIFORNIA DEPARTMENT OF JUSTICE has declined to issue  
17 a statewide bulletin or other directive regarding the “bullet button.”

18 87. Though it would not be unduly burdensome for Defendant CALIFORNIA  
19 DEPARTMENT OF JUSTICE to issue a bulletin regarding the technology of  
20 the bullet button and to develop a field test to insure state-wide compliance  
21 with the law, the CALIFORNIA DEPARTMENT OF JUSTICE insists:

- 22 a. That this Court does not have the power to compel issuance of such a  
23 bulletin, and/or  
24 b. That the California Assault Weapon Statutes and Regulations are  
25 sufficiently clear that the risk of arrest and prosecution should be  
26 borne by the citizens of California and/or that the risks of paying  
27 damages for false arrest should be borne by local law enforcement  
28 agencies.

1 At this stage of the litigation, Plaintiffs are prepared to accept Defendants'  
2 (DOJ) characterization that the Assault Weapon Statutes and Regulations  
3 that they are charged with interpreting, educating the public about and  
4 enforcing are not subject to any further clarification by their agency.

5 88. Instead, Plaintiffs will aver that the entire California Assault Weapon  
6 Statutes and the Regulations derived therefrom are vague and ambiguous on  
7 their face and as applied to HAYNIE and RICHARDS.

8 89. Furthermore, Plaintiffs allege that Defendant CALIFORNIA DEPARTMENT  
9 OF JUSTICE has contributed – through its policies, procedures and customs  
10 – to a state of general confusion of California's Assault Weapons laws thus  
11 rendering them hopelessly vague and ambiguous as applied; and thus an  
12 infringement of the Second Amendment to the United States Constitution.

13 **FACTS – Department of Justice Creates Confusion**

14 90. The formation of CGF was partially inspired by a desire to counteract a  
15 disinformation campaign orchestrated by the California Department of  
16 Justice (DOJ) in response to gun owners realizing the implications of the  
17 California Supreme Court Decision in *Harrot v. County of Kings* and the  
18 expiration of the Federal Assault Weapons laws.

19 91. In late 2005, various individuals and licensed gun stores began importing  
20 into California AR pattern rifles and the receivers for them.

21 92. In response to inquiries about the legality of importing and possessing  
22 certain AR and AK pattern rifles and receivers, DOJ began replying in their  
23 official letters that while THEY were of the opinion that these rifles were  
24 legal, local District Attorneys might disagree and prosecute anyway. True  
25 and correct copies of these letter are attached as **Exhibit D** and they all  
26 follow a similar pattern of declaring a certain gun part (receiver) legal to  
27 import into California and then warning the recipient that California's 58  
28 District Attorneys may have a different opinion that could result in

1 prosecution. See:

- 2 i. December 12, 2005 letter from DOJ to Ms. Amanda Star  
 3 rendering an opinion about the legality of a Stag-15 Lower  
 4 receiver but warning that local prosecutors may disagree and  
 5 prosecute accordingly.
- 6 ii. January 18, 2006 letter from DOJ to BST Guns also opining out  
 7 the legality of firearms, but giving the same warning the 58  
 8 county prosecutors could potentially prosecute anyway.
- 9 iii. December 28, 2005 letter from DOJ to Matthew Masuda.
- 10 iv. December 27, 2005 letter from DOJ to Christopher Kjellberg.
- 11 v. December 27, 2005 letter from DOJ to Kirk Haley.
- 12 vi. December 28, 2005 letter from DOJ to Mark Mitzel.
- 13 vii. December 28, 2005 letter from DOJ to Jason Paige.

14 93. From February to May 2006, the California Department of Justice issued a  
 15 series of memorandums that were obtained as part of a California Public  
 16 Records Request. A true and correct copy of that disclosure is Attached as  
 17 **Exhibit E**. The memorandums are remarkable because:

- 18 a. The Department of Justice made changes to the various versions of  
 19 this memorandum due to Jason Davis, then an attorney for the  
 20 National Rifle Association, pointing out legal flaws in the various  
 21 iterations.
- 22 b. In all versions of the memorandum, the Department of Justice directly  
 23 conflicted the previously published Assault Weapons Information  
 24 Guide by stating that owners of a firearm with features had to,  
 25 “permanently alter the firearm so that it cannot accept a detachable  
 26 magazine.” “Permanent alteration” is not required in the Penal Code,  
 27 the Assault Weapons Information Guide, or the then existing  
 28 California Code of Regulations 11 C.C.R. 5469.

1 94. On or about May 10, 2006, DOJ counsel Alison Merrilees informed a member  
2 of the public that the DOJ wished to create a test case, “[w]e are eagerly  
3 awaiting a test case on this, because we think we’ll win.” A true and correct  
4 copy of the email that was obtained as part of a Public Records Act request is  
5 attached as **Exhibit F**.

6 95. In May 2006, DOJ issued an internal memo to phone staff that stated, “It is  
7 DOJ’s opinion that under current law, a semiautomatic centerfire rifle that is  
8 modified to be temporarily incapable of accepting a detachable magazine, but  
9 can be restored to accommodate a detachable magazines, is an assault  
10 weapons if it has any of the features listed in §12276.1(a)(1),” and  
11 “Individuals who alter a firearm designed and intended to accept a  
12 detachable magazine in an attempt to make it incapable of accepting a  
13 detachable magazine do so at their legal peril,” stating further, “[w]hether or  
14 not such a firearm remains capable of accepting a detachable magazine is a  
15 question for law enforcement agencies, district attorneys, and ultimately  
16 juries of twelve persons, not the California Department of Justice.” A copy of  
17 this memorandum was obtained as part of a Public Records Act Request and  
18 is attached as **Exhibit G**.

19 96. On or about June 6, 2006, DOJ issued a Notice of Proposed Rulemaking. The  
20 proposed amendment would have “define[d] a sixth term, “capacity to accept  
21 a detachable magazine”, as meaning “capable of accommodating a detachable  
22 magazine, but shall not be construed to include a firearm that has been  
23 permanently altered so that it cannot accommodate a detachable magazine.”  
24 A true and correct copy of the notice is attached as **Exhibit H**.

25 97. On or about November 1, 2006, DOJ issued a “Text of Modified Regulations”  
26 The updated text attempted to define “detachable magazine” as “currently  
27 able to receive a detachable magazine or readily modifiable to receive a  
28 detachable magazine” and had other “permanency” requirements. A true and

1 correct copy of the notice is attached as **Exhibit I**.

2 98. Plaintiff CGF alleges on information and belief, DOJ did not submit the  
3 Modified Regulations to the Office of Administrative Law (“OAL”) and thus  
4 the 2006 Rulemaking did not take effect.

5 99. On or about July 11, 2007, CGF (through Gene Hoffman, the Chairman of  
6 CGF) petitioned the OAL to have them find that the continued publication of  
7 the “Important Notice” Memorandum after the 2006 Rulemaking that was  
8 not submitted to OAL was an “Underground Regulation.” See **Exhibit J**.

9 100. On or about September 11, 2007, OAL accepted Hoffman’s petition. See  
10 **Exhibit K**.

11 101. On or about September 21, 2007, OAL suspended it’s review as DOJ issued a  
12 certification on or about September 20, 2007, that stated, “[DOJ] reserves the  
13 right to interpret the law in any case-specific adjudication, as authorized in  
14 *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557,572.” A  
15 true and correct copy of the letter from the OAL along with DOJ’s  
16 certification is attached as **Exhibit L**.

17 102. The reservation in the certification of September 20, 2007, leads to  
18 uncertainty over whether the DOJ would take the position that permanence  
19 was required for modifications to a firearm so that the firearm would not  
20 have “the capacity to accept a detachable magazine.”

21 103. On or about September 29, 2008, DOJ responded to a letter inquiry about the  
22 legality of selling a semiautomatic center fire rifle with an alternate version  
23 of the bullet button colloquially known as the Prince-50 kit. DOJ stated:

24 “Since there are no statutes, case law, or regulations concerning  
25 whether a rifle that is loaded with a fixed, removeable magazine can  
26 also be considered to have the ‘capacity to accept a detachable  
27 magazine,’ we are unable to declare rifles configured with the ‘Prince  
28 50 Kit’ or ‘bullet button’ to be legal or illegal.”

See **Exhibit M**, with special attention to Attachment A, which is the letter



1 dated September 29, 2008.

2 104. On or about November 3, 2008, DOJ replied to Kern County DA Edward  
3 Jagels:

4 “Since there are no statutes, case law, or regulations concerning  
5 whether a rifle that is loaded with a fixed, removeable magazine  
6 can also be considered to have the ‘capacity to accept a  
7 detachable magazine,’ we are unable to declare rifles configured  
8 with the ‘Prince 50 Kit’ or ‘bullet button’ to be legal or illegal.”

9 A true and correct copy of this letter is attached as **Exhibit N**. The letter is  
10 hard to read due to multiple copies. If discovery proceeds in this matter,  
11 Plaintiff would expect to obtain a cleaner copy.

12 105. Not only is the CALIFORNIA DEPARTMENT OF JUSTICE claiming it has  
13 no duty to issue a clarifying bulletin to the State’s District Attorneys and  
14 Law Enforcement Community, on this issue; they have apparently engaged  
15 in a pattern of disinformation and confusion on the issue of whether a rifle  
16 fitted with a device that makes it incapable of accepting a detachable  
17 magazine is legal to own in California. It could be argued that CALIFORNIA  
18 DEPARTMENT OF JUSTICE ’s firearms division has created such a state of  
19 confusion that the entire statutory and regulatory scheme for defining  
20 California Assault Weapons is hopelessly, and unconstitutionally vague and  
21 ambiguous.

22 **FACTS – Calguns Foundation, Inc., Ongoing Efforts to**  
23 **Assist Law Abiding Gun Owners**

24 106. The CALGUNS FOUNDATION, INC., has defended many incidents of law  
25 abiding gun owners and retailers whose firearms were either seized, the  
26 individual was arrested and/or charged with violating Assault Weapons  
27 Control Act.

28 a. In approximately April 2007, Matthew Corwin was arrested and  
charged with multiple violations of the AWCA. See *People v. Matthew  
Corwin*, Case No. GA069547, Los Angeles Superior Court.

- 1           b.     In June 2008, John Contos was arrested and charged in Solano County  
2                     with a violation of (then) Penal Code § 12280 - possession and/or  
3                     manufacturing of Assault Weapons based on the allegation that his  
4                     rifle had an illegal thumb-hole stock. The case number was  
5                     VCR198514-VF. CGF funded the defense of Mr. Contos. The case was  
6                     dismissed and the D.A. stipulated to a finding of factual innocence.
- 7           c.     In November 2008, John Crivello had a semiautomatic centerfire rifle  
8                     with a bullet button magazine release seized from his home in Santa  
9                     Cruz, California by the Santa Cruz Police Department. Counsel  
10                    provided by CGF educated the Santa Cruz District Attorney's office.  
11                    Counsel to CGF was advised that DOJ stated that it was unclear  
12                    whether the bullet button was legal but that the District Attorney  
13                    should file anyway. The District Attorney (ADA Dave Genochio and/or  
14                    Charlie Baum) dropped charges and the firearm was returned to Mr.  
15                    Crivello. CGF spent \$645.00 defending Mr. Crivello.
- 16          d.     On or about November 3, 2009, Deputy J. Finley of Orange County  
17                     Sheriff's Department seized a bullet button equipped Stag Arms AR-15  
18                     style firearm from Stan Sanders. CGF counsel was engaged to explain  
19                     the legality of the firearm to the Orange County Sheriff's Department  
20                     and the firearm was subsequently returned to Mr. Sanders. The  
21                     Orange County Training Bulletin was issued partially in response to  
22                     this incident. CGF spent \$650.00 defending Mr. Sanders.
- 23          e.     On or about March 30, 2010, Robert Wolf was arrested by the  
24                     Riverside County Sheriff's Department for possession of a  
25                     semiautomatic centerfire rifle with a "Prince 50 Kit." CGF counsel  
26                     intervened and had the case dismissed on or about November 11, 2010,  
27                     with the firearm subsequently returned to Mr. Wolf. CGF spent  
28                     \$5,975.00 defending Mr. Wolf.

1 107. Plaintiffs allege on information and belief that there may be other innocent  
 2 gun owners, who without the resources of THE CALGUNS FOUNDATION,  
 3 INC., and/or THE SECOND AMENDMENT FOUNDATION, were charged  
 4 under these vague and ambiguous statutes/regulations and plead guilty (or  
 5 no contest) to lesser charges to avoid a felony conviction.

6 **FACTS – Semi-Automatic, Center-Fire Rifles and Handguns**  
 7 **are “Arms” Protected by the Second Amendment.**

8 108. Plaintiffs herein allege that semi-automatic center-fire rifles and handguns  
 9 with detachable magazines and any number of additional features (e.g., pistol  
 10 grips, collapsible stocks, flash suppressors, etc...) are “arms” protected by the  
 11 Second Amendment to the United States Constitution. Furthermore, to the  
 12 extent that California seeks to regulate the manufacturing, acquisition and  
 13 possession of semi-automatic, center-fire rifles with detachable magazines, it  
 14 must define them in a way that is not vague and ambiguous.

15 109. Even assuming *arguendo* that Plaintiffs are wrong and some semi-automatic,  
 16 center-fire rifles and handguns with detachable magazines are not protected  
 17 by the Second Amendment – California’s Assault Weapon laws are still  
 18 unconstitutional because innocent gun owners continue to be arrested for  
 19 mere possession of the sub-class of these weapons that are legal and therefore  
 20 absolutely protected by the Second Amendment.

21 110. Plaintiff herein allege that the state of confusion caused by the current vague  
 22 and ambiguous statutes/regulations continues to result in the wrongful  
 23 arrests of innocent gun-owners while they are exercising a fundamental  
 24 “right to keep and bear” lawful firearms. These wrongful arrests and the  
 25 chilling of fundamental rights violates the Second Amendment to the United  
 26 States Constitution as that right is incorporated against state action through  
 27 the Fourteenth Amendment.

28 *////*

**FIRST CLAIM FOR RELIEF:  
SECOND AMENDMENT, UNITED STATES CONSTITUTION  
42 USC §§ 1983, 1988; 28 USC § 2201, 2202  
INJUNCTIVE/DECLARATORY RELIEF  
ALL PLAINTIFFS vs DEFENDANTS: HARRIS AND  
CALIFORNIA DEPT OF JUSTICE**

1  
2  
3  
4  
111. Paragraphs 1 through 110 are incorporated by reference as though fully set  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
forth.

112. California’s Assault Weapon Statutes and Regulations are unconstitutionally  
vague and ambiguous and have resulted in the wrongful arrest, detention  
and prosecution of law-abiding citizens exercising their Second Amendment  
right to ‘keep and bear arms’ that are in common use for lawful purposes.

113. California’s Assault Weapon Statutes and Regulations are unconstitutionally  
vague and result in the wrongful confiscation of common and ordinary  
firearms, that are protected by the Second Amendment, from their law-  
abiding owners.

**SECOND CLAIM FOR RELIEF:  
FOURTH AMENDMENT, UNITED STATES CONSTITUTION  
42 USC §§ 1983, 1988; 28 USC § 2201, 2202  
INJUNCTIVE/DECLARATORY RELIEF  
RICHARDS vs DEFENDANTS: HARRIS AND  
CALIFORNIA DEPT OF JUSTICE**

114. Paragraphs 1 through 110 are incorporated by reference as though fully set  
forth.

115. California Penal Code § 25850(b) is unconstitutional on its face, and as  
applied in this case. Mere possession of a firearm, (i.e., exercising a  
fundamental right) when otherwise lawful, cannot support a finding of  
probable cause to believe a crime has been committed, such that the Fourth  
Amendment’s warrant requirement can be legislatively disregarded.

116. Plaintiff BRENDAN RICHARDS requests declaratory and/or prospective  
injunctive relief under 42 U.S.C. § 1983 that Penal Code § 25850(b) – on its  
face and as applied – is a violation of his constitutional right to be free from

1 unreasonable seizure under the Fourth Amendment to the United States  
2 Constitution, while he is exercising his Second Amendment rights to “keep  
3 and bear” lawful firearms.

4 117. Plaintiffs THE CALGUNS FOUNDATION, INC., and THE SECOND  
5 AMENDMENT FOUNDATION, INC., also requests declaratory and/or  
6 prospective injunctive relief under 42 U.S.C. § 1983 that Penal Code §  
7 25850(b) is unconstitutional on its face. It is tantamount to a legislatively  
8 issued general warrant applicable only against gun owners transporting  
9 firearm on public roads and highways. General warrants were a particular  
10 evil that the Fourth Amendment was adopted to prevent.

11 **THIRD CLAIM FOR RELIEF:**  
12 **FOURTH AMENDMENT | UNITED STATES CONSTITUTION**  
13 **42 USC § 1983, 1988 - DAMAGES**  
**RICHARDS vs DEFENDANTS: CITY OF ROHNERT PARK**  
**AND OFFICER BECKER**

14 118. Paragraphs 1 through 110 are incorporated by reference as though fully set  
15 forth.

16 119. Plaintiffs BRENDAN RICHARDS and THE CALGUNS FOUNDATION,  
17 INC., seek damages against the Defendants CITY OF ROHNERT PARK and  
18 OFFICER BECKER in an amount according to proof for losses incurred as a  
19 result of the warrantless search of RICHARDS’ vehicle, his arrest and the  
20 subsequent illegal seizure of his person and of the valuable property  
21 (firearms); and for expenditures (fees/costs) associated with the defense of the  
22 criminal charges.

23  
24 WHEREFORE, the Plaintiffs requests that this Court:

- 25 A. Issue a declaratory judgment and/or injunctive relief that California’s
- 26 Assault Weapon Statutes and Regulations are unconstitutional.
- 27 B. Issue a declaratory judgment and/or injunctive relief that California
- 28 Penal Code § 25850(b) is unconstitutional.

- 1 C. Damages from CITY OF ROHNERT PARK and OFFICER BECKER,  
2 in an amount according to proof.
- 3 D. Award costs of this action to all the Plaintiffs.
- 4 E. Award reasonable attorney fees and costs to the Plaintiffs on all  
5 Claims of the complaint, including but not limited to fee/cost awards  
6 under 42 USC §§ 1983, 1988 and/or California Code of Civil Procedure  
7 § 1021.5.
- 8 F. Damages and/or Declaratory relief under 28 USC §§ 2201, 2202.
- 9 G. Such other and further relief as this Court may deem appropriate.
- 10

11 Respectfully Submitted.

12 Dated: November 1, 2012,

13

14 /s/  
Donald Kilmer, Jr. [SBN: 179986]  
15 Law Offices of Donald Kilmer, APC  
16 1645 Willow Street, Suite 150  
San Jose, California 95125  
Voice: (408) 264-8489  
Fax: (408) 264-8487  
17 E-Mail: [Don@DKLawOffice.com](mailto:Don@DKLawOffice.com)

14 /s/  
Jason A. Davis [SBN: 224250]  
15 Davis & Associates  
27281 Las Ramblas, Suite 200  
Mission Viejo, CA 92691  
Voice: (949) 310-0817  
Fax: (949) 288-6894  
17 E-Mail: [Jason@CalGunLawyers.com](mailto:Jason@CalGunLawyers.com)

18

Attorneys for Plaintiffs

19

20

21

22

23

24

25

26

27

28



# TRAINING BULLETIN

ORANGE COUNTY SHERIFF'S DEPARTMENT

## BULLETIN NO. 10-3

### ASSAULT WEAPONS

This training bulletin is intended to provide some helpful information when encountering firearms (rifles, pistols and shotguns) in the field and whether they are legal or not. This training bulletin will also help eliminate confusion as to what actually makes a rifle, pistol or shotgun legal or illegal to possess and what makes them an "assault weapon."

Whenever you take lawful possession of a firearm in the field, you should **always** run the firearm's serial number through the Automated Firearms System (AFS) to see if that firearm is legally registered or not. Here is an example of what a registered rifle's teletype print out will look like.

**\* REGISTRATION**

\*\*DO NOT ARREST BASED SOLELY ON THIS RESPONSE \*\*

SER/902XXXXX MAK/STE STEYR CAL/223

TYP/RI RIFLE SEMI-AUTOMATIC MOD/AUG SA

DOT/1992XXXX BBL/20

NAM/SMITH, JOHN DOB/19XX11XX ADR/27XXX CAXXXX

CTY/USAXXXXXX ZIP/92XXX CCC/3000

CII/0851XXXX OLN/N743XXXX

REG/**REGISTRATION**

ORI/CA034XXX OCA/AW59XXX

FCN/1869221XXXXXX

#### Assault Weapons

The term "assault weapon" means any designated semiautomatic firearms as defined by Penal Code section 12276. Assault weapons are divided into three categories. These are:

- Category 1** Firearms specifically listed in Penal Code section 12276 subdivisions (a), (b), and (c) (Roberti-Roos Assault Weapons Control Act of 1989).
- Category 2** Additional firearms specifically listed by make and model expanding on the AR and AK "series" firearms in Penal Code section 12276 subdivisions (e) and (f) (Kasler v. Lockyer (2000) 23 Cal. 4th 472, AK and AR-15 series weapons).
- Category 3** Firearms that are defined by generic characteristic features of the firearm in Penal Code section 12276.1 (Senate Bill 23 or "SB 23 features").





# TRAINING BULLETIN

ORANGE COUNTY SHERIFF'S DEPARTMENT

Under Category 3, PC 12276.1 (a) Notwithstanding Penal Code section 12276, "assault weapon" shall also mean the following:

## Rifles

- (1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine **and** any **one** of the following:
  - (A) A pistol grip that protrudes conspicuously beneath the action of the weapon.
  - (B) A thumbhole stock.
  - (C) A folding or telescoping stock.
  - (D) A grenade launcher or flare launcher.
  - (E) A flash suppressor.
  - (F) A forward pistol grip.
- (2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.
- (3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

## Notes

- Bayonets and bayonet lugs are not considered characteristics of assault weapons under California law.
- There has been an increase of AR-15 and AK-47 type firearms sold in California that at first glance appear to be an assault weapon, but these firearms have a device installed called a "Bullet Button". This device prevents the shooter from depressing the magazine release button with a finger. The magazine can quickly be released by using a "tool", which can be the tip of a bullet or some other tool to depress the enclosed magazine release button. Once a bullet button is installed and there is an attached magazine capable of holding only 10 rounds, the firearm no longer has a "detachable magazine" as required for a Category 3 type of assault weapon as per Penal Code Section 12276.1(a)(1). This is an example of a bullet button.





# TRAINING BULLETIN

ORANGE COUNTY SHERIFF'S DEPARTMENT

- Companies have become creative and have a "10/30 round magazine". These magazines look just like a 30 round magazine, but have been permanently altered to only hold 10 rounds. If you are basing an assault weapon charge on the fact that a rifle has a fixed magazine with the capacity to accept more than 10 rounds, make sure you can in fact load more than 10 rounds into the magazine, Penal Code 12276.1(a)(2). **Note in your report that you were able to load more than 10 rounds into the magazine.**

## **Pistols**

- (4) A semiautomatic pistol that has the capacity to accept a detachable magazine **and one** of the following:
  - (A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
  - (B) A second handgrip.
  - (C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.
  - (D) The capacity to accept a detachable magazine at some location outside of the pistol grip.
- (5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

## **Shotguns**

- (6) A semiautomatic shotgun that has **both** of the following:
  - (A) A folding or telescoping stock.
  - (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.
- (7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
- (8) Any shotgun with a revolving cylinder.

## **.50 caliber BMG (Browning Machinegun) Semi-automatic and Single-shot Rifles**

It is a felony for any person to manufacture, distribute, transport, import into California, or keep or offer for sale, or give or lend, an assault weapon or .50 BMG rifle (Penal Code § 12280).

Any person who lawfully possesses an assault weapon or .50 BMG rifle must have registered it as such with the Department of Justice (Penal Code § 12285).

If a firearm or receiver has neither a 12276.1- specified combination of characteristic features, nor is listed by make and model in PC 12276/11 CCR § 979.10 or 11 CCR § 979.11, it is **not** an assault weapon.



# TRAINING BULLETIN

ORANGE COUNTY SHERIFF'S DEPARTMENT

Do **not** just book the firearm into Property for Safekeeping, especially if you are unsure of its assault weapon characteristics. Book the weapon as Evidence. Booking the weapon as Evidence will allow for follow-up investigation, if needed. When booking a firearm into property, you **shall** obtain a FCN from Teletype for each firearm booked.

Included are links to "California Firearms Laws-2007", "Assault Weapons Identification Guide" and "California Centerfire, Semi-Auto Rifle Identification Flowchart." These resources should help personnel determine if an assault weapon is lawful to possess.

Clicking on the link below will take you to the Department of Justice (DOJ) Bureau of Firearms website "California Firearms Laws-2007". This publication includes the firearms sections as well as that of dangerous weapons:

<http://ag.ca.gov/firearms/forms/pdf/Cfl2007.pdf>

For comprehensive assault weapon information, click on the following link that will take you to the California Attorney General's "Assault Weapons Identification Guide-3<sup>rd</sup> Edition, Nov. 2001":

<http://ag.ca.gov/firearms/forms/pdf/awguide.pdf>

The "California Centerfire, Semi-Auto Rifle Identification Flowchart" is an easy to follow flowchart listing yes/no questions showing the characteristics and related penal code sections of assault weapons and .50 BMG rifles. The second page of the flowchart lists all of the banned assault rifles by make and model (Class I and II) and lists the characteristics (Class III) of assault weapons. This is a resource only, much like a "quick code" and not to be used for official citation. Click on the following link:

<http://www.calguns.net/caawid/flowchart.pdf>

For further information or clarification as to whether a firearm is unlawful to possess or is an assault weapon, contact Property/Evidence Sergeant Greg Schuch at (714) 834-6485, the Katella Armory at (714) 538-2612 or Range Sergeant Paul Gilmore at (714) 538-2464.





# Investigations Division Training Bulletin

November, 18<sup>th</sup> 2008

Ref.#: 2008-1

## Assault Weapon Cases

There has been an increase over the last two years of AR-15 & AK-47 type firearms sold in CA that at first glance appear to be an assault weapon. These firearms have a device installed called a "Bullet Button". The device prevents the shooter from depressing the magazine release button with a finger. However, the magazine can quickly be released by using the tip of a bullet or other tool to depress the enclosed magazine release button.

Once a bullet button device is installed the firearm no longer has a "detachable magazine" as required in Penal Code Section 12276.1(a)(1) and as defined in the California Code of Regulations. This allows someone to legally possess a rifle built on an off-list (not listed in PC 12276) lower receiver with a pistol grip, folding/telescoping stock, flash suppressor or a forward pistol grip because the firearm has a "fixed magazine".



1

**Detective Halstead  
Sacramento Police Department  
(916) 433-0671**

There are several ways to classify a firearm as an Assault Weapon. The two most common ways to determine if a firearm is an assault weapon is to refer to Penal Code Sections 12276 & 12276.1.

Penal Code Section 12276 contains a list of all the category 1 assault weapons. Any firearm named on the list in Penal Code Section 12276 is considered an assault weapon and if not registered as an assault weapon with DOJ is a violation of Penal Code Section 12280.

Penal Code Section 12276.1 is used to classify a firearm based on its generic characteristics. The make and model have no bearing on whether a firearm is an assault weapon under this section. Penal Code Section 12276.1(a) provides three separate definitions that officers can refer to when attempting to determine if a rifle is an assault weapon. A rifle only has to meet one of the following three definitions to be an assault weapon. Penal Code Section 12276.1(a) defines an assault rifle as anyone of the following:

- (1) A semiautomatic, centerfire rifle that has the capacity to accept a **detachable magazine** and any one of the following:
  - a) A pistol grip that protrudes conspicuously beneath the action of the weapon.
  - b) A thumbhole stock.
  - c) A folding or telescoping stock.
  - d) A grenade or flare launcher.
  - e) A flash suppressor.
  - f) A forward pistol grip.

OR

- (2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than ten rounds.

OR

- (3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

A rifle equipped with a "Bullet Button" can't fall under Penal Code Section 12276.1(a)(1) because it no longer has a detachable magazine. However, Penal Code Section 12276.1(a)(2) does apply to a rifle equipped with a "Bullet Button" if it has a magazine installed that can hold more than 10 rounds.

Companies that manufacture magazines have become creative in working with California's Assault Weapon laws. They have created a magazine called a "10/30 round magazine". These magazines look just like a 30 round magazine. However, they have been permanently altered to only hold 10 rounds. Some of these magazines are marked as 10 round magazines, but many are not. If you are basing an assault weapon charge on the fact that a rifle has a fixed magazine with the capacity to hold more than 10 rounds make sure you can load more than 10 rounds into the magazine. \*\*Note in your report that you were able to load more than 10 rounds into the magazine.

At first glance the rifle below appears to be an assault rifle. However, it is a completely legal firearm in California. The rifle is an off-list, semiautomatic, centerfire rifle with a telescoping stock, pistol grip, a fixed 10 round magazine and overall length of 31 inches.



Contact Detective Halstead if you have any questions at (916) 433-0671.



# California Centerfire, Semi-Auto, Rifle Identification



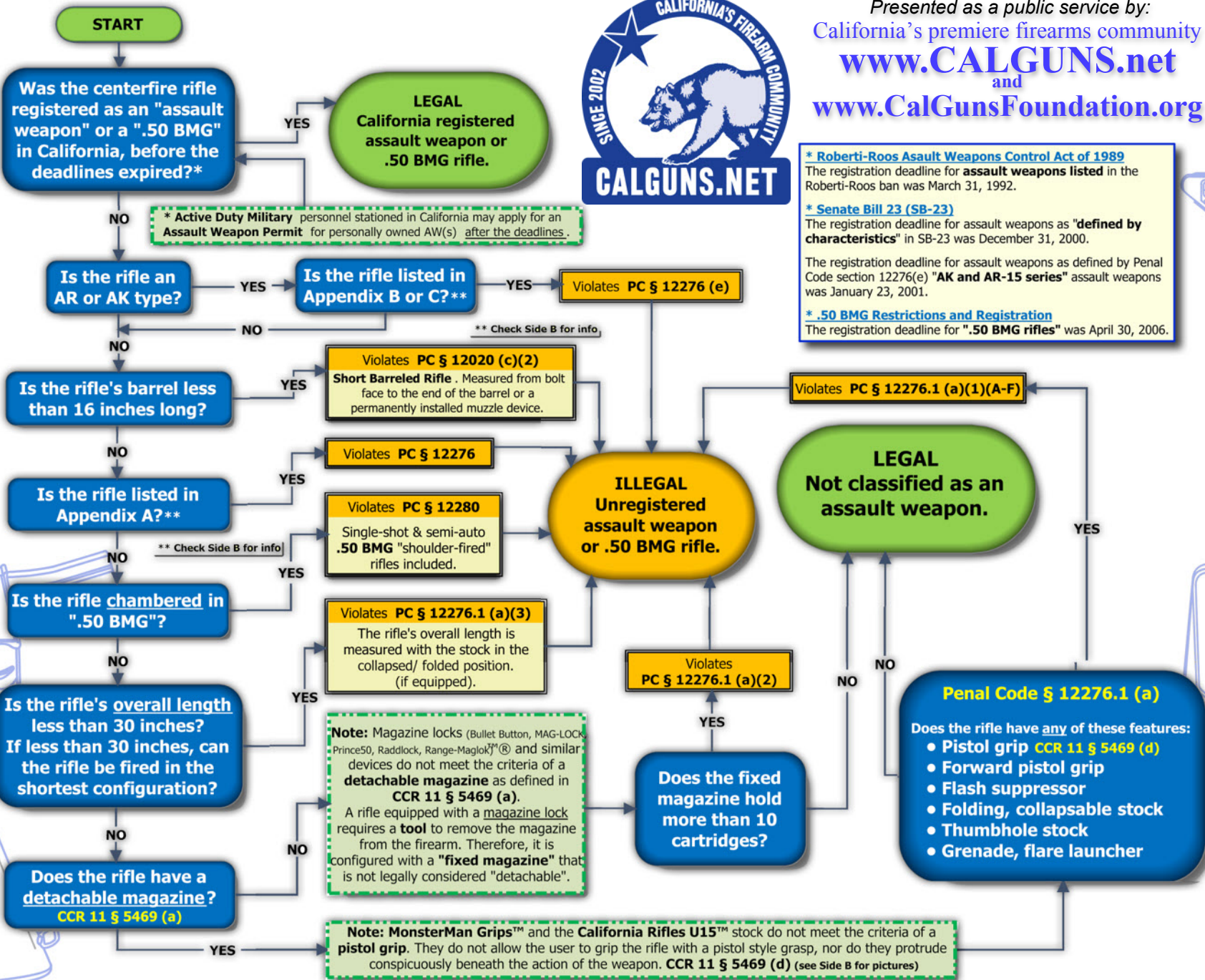
Presented as a public service by:  
 California's premiere firearms community  
[www.CALGUNS.net](http://www.CALGUNS.net)  
 and  
[www.CalGunsFoundation.org](http://www.CalGunsFoundation.org)

**\* Roberti-Roos Assault Weapons Control Act of 1989**  
 The registration deadline for **assault weapons** listed in the Roberti-Roos ban was March 31, 1992.




**\* Senate Bill 23 (SB-23)**  
 The registration deadline for assault weapons as "defined by characteristics" in SB-23 was December 31, 2000.

The registration deadline for assault weapons as defined by Penal Code section 12276(e) "AK and AR-15 series" assault weapons was January 23, 2001.

**\* .50 BMG Restrictions and Registration**  
 The registration deadline for ".50 BMG rifles" was April 30, 2006.





Appendix A Roberti-Roos AW list	Appendix B AR Series	Appendix C AK Series	The 3 categories of an assault weapon in California
Armalite: AR-180 Beretta: AR-70 Bushmaster Assault Rifle Calico: M-900 Colt: AR-15 (all) Daewoo: AR 100, AR110 C Daewoo: K-1, K-2, Max 1, Max 2 Fabrique Nationale: 308 Match, Sporter Fabrique Nationale: FAL, LAR, FNC HK: 91, 93, 94, PSG-1 IMI: Galil, Uzi J&R ENG: M-68 MAADI CO: AK47, ARM Made in China: 56, 56S, 84S, 86S, AKS Made in China: AK, AK47, AK47S, AKM Made in Spain: CETME Sporter MAS: 223 Norinco: 56, 56 S, 84S, 86S Poly technologies: AK47, AKS RPB Industries, Inc.: sM10, sM11 SIG: AMT, PE-57, SG 550, SG 551 SKS w/ detachable magazine Springfield Armory: BM59, SAR-48 Sterling: MK-6 Steyr: AUG SWD Incorporated: M11 Valmet: M62S, M71S, M78S Weaver Arms: Nighthawk	American Spirit: USA Model Armalite: AR 10 (all), M15 (all) Armalite: Golden Eagle Bushmaster: XM15 (all) Colt: Law Enforcement (6920) Colt: Match Target (all) Colt: Sporter (all) Dalphon: B. F. D. DPMS: Panther (all) Eagle Arms: EA-15 A2 H-BAR, EA-15 E1 Eagle Arms: M15 (all) Frankford Arsenal: AR-15 (all) Hesse Arms: HAR 15A2 (all) Knights: RAS (all), SR-15 (all) Knights: SR-25 (all) Les Bae: Ultimate AR (all) Olympic Arms: AR-15, Car-97, PCR (all) Ordnance, Inc.: AR-15 Palmetto: SGA (all) Professional Ordnance, Inc.: Carbon 15 Rifle PWA: All Models Rock River Arms, Inc.: Car A2 Rock River Arms, Inc.: Car A4 Flattop Rock River Arms, Inc.: LE Tactical Carbine Rock River Arms, Inc.: NM A2 - DCM Legal Rock River Arms, Inc.: Standard A-2 Rock River Arms, Inc.: Standard A-4 Flattop Wilson Combat: AR-15	American Arms: AK-C 47, AK-F 47 American Arms: , AK-Y 39, AK-F 39 Arsenal: SLG (all) Arsenal: SLR (all) B-West: AK-47 (all) Hesse Arms: Model 47 (all) Hesse Arms: Wiegler STG 940 Rifle Inter Ordnance - Monroe, NC: AK-47 (all) Inter Ordnance - Monroe, NC: M-97 Inter Ordnance - Monroe, NC: RPK Kalashnikov USA: Hunter Rifle / Saiga MAADI CO: MISR (all) MAADI CO: MISTR (all) Mitchell Arms, Inc.: AK-47 (all) Mitchell Arms, Inc.: AK-47 Cal .308 (all) Mitchell Arms, Inc.: M-76, M-90 Mitchell Arms, Inc.: RPK Norinco: 81 S (all) Norinco: 86 (all) Norinco: AK-47 (all) Norinco: Hunter Rifle Norinco: MAK 90 Norinco: NHM 90, 90-2, 91 Sport Norinco: RPK Rifle Ohio Ordnance Works: AK-74 Ohio Ordnance Works: ROMAK 991 Valmet: 76 S, Hunter Rifle WUM: WUM (all)	<p><b>Category 1</b> - are firearms listed on the original <b>Roberti-Roos assault weapons list</b> PC section 12276 (a), (b), and (c).</p> <p><b>Category 2</b> - was the legally ambiguous definition targeting AR and AK "series" firearms in PC 12276(e). This definition was modified by the California Supreme Court in 2001 in what is known as the <b>Harrott v. County of Kings (2001) 25 Cal.4th 1138</b>. The DOJ was required to create an additional list of firearms by make and model. It is available in CCR 11 § 5499 and is sometimes referred to as the "series list". Then came <b>AB2728</b>, which prevents the DOJ from ever updating the list after Jan 2007.</p> <p><b>Category 3</b> - are defined by characteristic features listed in PC 12276.1. These are sometimes referred to as "<b>SB23 features</b>" (Senate Bill 23).</p>
			<p><b>Characteristics of a Assault Weapon PC 12276.1 (a)</b></p>
<p><b>Harrott v. County of Kings (2001) 25 Cal. 4th 1138</b>                      ...a trial court may not find a semiautomatic firearm a series assault weapon under section 12276, subdivision (e), unless the firearm has first been included in the list of series assault weapons promulgated by the Attorney General pursuant to section 12276.5, subdivision (h)</p>			<p><b>12276.1 (a)</b> Notwithstanding PC section 12276, assault weapon shall also mean the following: Rifles                      (1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine <b>CCR 11 § 5469 (a)</b> and any one of the following:                      (A) A pistol grip <b>CCR 11 § 5469 (d)</b>                      (B) A thumbhole stock. <b>CCR 11 § 5469 (e)</b>                      (C) A folding or telescoping stock.                      (D) A grenade launcher or flare launcher.                      (E) A flash suppressor. <b>CCR 11 § 5469 (b)</b>                      (F) A forward pistol grip. <b>CCR 11 § 5469 (c)</b></p> <p>(2) A semiautomatic, centerfire rifle that has a <b>fixed magazine</b> with the capacity to accept <b>more than 10 rounds</b>.</p> <p>(3) A semiautomatic, centerfire rifle that has an <b>overall length of less than 30 inches</b>.</p>
<p><b>Definition of a "Detachable Magazine" CCR 11 § 5469 (a)</b></p>			<p><b>Definition of a "Thumbhole Stock" CCR 11 § 5469 (e)</b></p> <p>"thumbhole stock" means a stock with a hole that allows the thumb of the trigger hand to penetrate into or through the stock while firing.</p>
<p><b>Definition of a "Pistol Grip" PC 12276.1 &amp; CCR 11 § 5469 (d)</b></p> <p>"pistol grip that protrudes conspicuously beneath the action of the weapon" means a grip that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed below the top of the exposed portion of the trigger while firing.</p>			<p><b>Definition of a "Flash Suppressor" CCR 11 § 5469 (b)</b></p> <p><b>"flash suppressor"</b> means any device designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. <b>CCR 11 § 5469 (b)</b></p>
<p><b>U15 Stock</b></p>  <p><b>California Rifles</b></p>			<p><b>Flash Suppressor/ Flash Hider</b> is a device attached to or integral with the muzzle of a firearm, designed to eliminate or reduce the incandescent flash of the firearm's discharge. Although they can reduce the visibility of the firearm's location when fired, they are primarily designed to prevent the shooter's vision from being blinded by the flash at night. Many flash hiders also act as a muzzle brake.</p>
<p><b>MonsterMan Grips</b></p> 			<p><b>Characteristics of a flash suppressor:</b> The majority of these devices come in two styles. The multi prong and the birdcage flash suppressor. The inner cavity of the muzzle device is usually several times the diameter of the bore. The muzzle device usually has large slots to allow the propelling gasses to blow through: redirecting, reducing, eliminating the muzzle flash from the shooters field of vision.</p> <p><b>Muzzle Brake/ Muzzle Compensator</b> is a device attached to or integral with the muzzle of a firearm, designed to redirect the propelling gasses to counter the firearm's: recoil, muzzle rise.</p> <p><b>Characteristics of muzzle brake:</b> The major difference between a flash suppressor and a muzzle brake is the size of the inner cavity. The inner cavity of a muzzle brake is usually just slightly larger than the diameter of the bore. This better traps the propelling gasses behind the bullet. This forces/redirects more of the gasses to escape through small ports/slots in the muzzle device. These ports/slots are usually machined/drilled in strategic locations or angled to divert the gasses to reduce the firearm's: recoil, muzzle rise.</p>  <p><b>Muzzle Brake</b></p> <p><b>Flash Suppressor</b></p> <p>Each individual is compelled to become familiar with Federal, State and local firearms laws as relate to their purchase, sale, transfer, possession, assembly, modification and/or use. The information presented and views contained herein shall not be construed as legal advice or as a substitute for legal representation, which can only be given by an attorney. This is a best-efforts compilation by gun rights activists, based upon our <b>experience and research</b>, who make no claim as to the legality or basis of the information contained herein. Although this publication is believed to be current at the time if its printing, we urge the reader to investigate these topics in detail as laws and regulations change over time. Calguns.net and the Calguns Foundation shall not be liable for the improper use of or reliance upon such information as may found at <a href="http://www.calguns.net">www.calguns.net</a>, <a href="http://www.calgunsfoundation.org">www.calgunsfoundation.org</a> or in this publication</p>

**BILL LOCKYER**  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



FIREARMS DIVISION  
P.O. BOX 820200  
SACRAMENTO, CA 94203-0200  
Facsimile: (916)263-0676

December 12, 2005

Ms. Amanda Sitar  
Stag Arms  
515 John Downey Drive  
New Britain, CT 06051  
Fax: (860) 229-3738  
Phone: (860) 229-9994

Re: Importation of Stag-15 Lower Receiver into California

Dear Ms. Sitar:

I am writing in response to your inquiry about whether it is legal to send a Stag-15 lower receiver to California.

The Stag-15 is not listed as a Category One assault rifle in California Penal Code 12276. Although technically the receiver is legal to purchase and possess in California at this time (assuming it does not have the characteristics listed in Penal Code section 12276.1(a)(1), (a)(2) or (a)(3)), you should be aware that the Stag-15 lower receiver is virtually identical to rifles that are now listed as assault weapons by the Department. It will be added shortly to the DOJ Assault Weapons Identification Guide and will soon be classified as an assault weapon.

Also, please realize that this opinion is not conclusive about the legality of the firearm. A local prosecutor in one of California's 58 counties could decide to prosecute you, or the gun dealer who orders the Stag-15 for illegal importation of an assault weapon, regardless of this letter.

I hope this information was helpful. Please feel free to write to me again if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

**BILL LOCKYER**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**



FIREARMS DIVISION  
P.O. Box 160487  
Sacramento, CA 95816-0487

Public: 916-263-0802  
Facsimile: 916-263-0676

January 18, 2006

BST Guns  
A.J. Robello  
1307 Scott Street, Suite D  
Petaluma, CA 94954

Re: Importation of Unlisted Lower Receivers into California: Stag 15, Fulton Armory, Ameetec  
Mega Gator, Superior, Sun Devil

Dear Mr. Robello:

I am writing in response to your inquiry about whether it is legal to send the unlisted AR-15 lower receivers listed above, into California.

The receivers about which you inquired are not listed as Category One assault rifles in California Penal Code 12276, and are not yet named as Category Two assault rifles. Although technically the receivers are legal to purchase and possess in California at this time (assuming they do not have the characteristics listed in Penal Code section 12276.1(a)(1), (a)(2) or (a)(3)), you should be aware that they are virtually identical to assault weapons that are now illegal in California. You should also be aware that we may add them soon to the DOJ Assault Weapons Identification Guide. Therefore, the lower receivers may soon be classified as assault weapons.

Also, please realize that this opinion is not conclusive about the legality of the receivers. A local prosecutor in one of California's 58 counties could decide to prosecute you for illegal importation of assault weapons, regardless of this letter.

I hope this information was helpful. Please feel free to write to me again if you have any additional questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General

For **BILL LOCKYER**  
Attorney General





**BILL LOCKYER**  
Attorney General

State of California  
**DEPARTMENT OF JUSTICE**

**FIREARMS DIVISION**  
P.O. BOX 160487  
SACRAMENTO, CA 95816-0487  
Facsimile (916) 263-0676

December 28, 2005

Matthew C. Masuda  
1182 N. Abbott Avenue  
Milpitas, CA 95035

Re: Importation of Stag-15 Lower Receiver into California

Dear Mr. Masuda:

I am writing in response to your inquiry about whether it is legal to send a Stag-15 lower receiver to California.

The Stag-15 is not listed as a Category One assault rifle in California Penal Code 12276, and is not yet a Category Two assault rifle. Although technically the receiver is legal to purchase and possess in California at this time (assuming it does not have the characteristics listed in Penal Code section 12276.1(a)(1), (a)(2) or (a)(3)), you should be aware that the Stag-15 lower receiver is virtually identical to rifles that are now illegal assault weapons. You should also be aware that we intend to add it soon to the DOJ Assault Weapons Identification Guide. Therefore, the Stag-15 will soon be classified as an assault weapon.

Also, please realize that this opinion is not conclusive about the legality of the firearm. A local prosecutor in one of California's 58 counties could decide to prosecute you, or the gun dealer who orders the Stag-15 for illegal importation of an assault weapon, regardless of this letter.

I hope this information was helpful. Please feel free to write to me again if you have any additional questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General  
Firearms Division

For **BILL LOCKYER**  
Attorney General

**BILL LOCKYER**  
Attorney General

State of California  
**DEPARTMENT OF JUSTICE**



**FIREARMS DIVISION**  
P.O. BOX 820200  
SACRAMENTO, CA 94203-0200  
Facsimile: (916)263-0676

December 27, 2005

Mr. Christopher Kjellberg  
6225 Garfield Court  
Rocklin, CA 95765

Re: Importation of Stag-6.8 Lower Receiver into California

Dear Mr. Kjellberg:

I am writing in response to your inquiry about whether it is legal to send a Stag-6.8 lower receiver to California.

The Stag-6.8 is not listed as a Category One assault rifle in California Penal Code 12276, and is not yet a Category Two assault rifle. Although technically the receiver is legal to purchase and possess in California at this time (assuming it does not have the characteristics listed in Penal Code section 12276.1(a)(1), (a)(2) or (a)(3)), you should be aware that the Stag-6.8 lower receiver is virtually identical to rifles that are now illegal assault weapons. You should also be aware that we intend to add it soon to the DOJ Assault Weapons Identification Guide. Therefore, the Stag-6.8 will soon be classified as an assault weapon.

Also, please realize that this opinion is not conclusive about the legality of the firearm. A local prosecutor in one of California's 58 counties could decide to prosecute you, or the gun dealer who orders the Stag-6.8 for illegal importation of an assault weapon, regardless of this letter.

I hope this information was helpful. Please feel free to write to me again if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General

For **BILL LOCKYER**  
Attorney General

**BILL LOCKYER**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**



**FIREARMS DIVISION**  
P.O. BOX 820200  
SACRAMENTO, CA 94203-0200  
Facsimile: (916)263-0676

December 27, 2005

Mr. Kirk P. Haley  
7389 Pocket Road  
Sacramento, CA 95822

Re: L.A.R. Manufacturing Inc. Grizzly .223 CAL receiver

Dear Mr. Haley:

I am writing in response to your letter dated December 5, 2005, inquiring about the L.A.R. Manufacturing Inc. Grizzly .223 CAL receiver. You asked about the legality of purchasing and possessing a L.A.R. Manufacturing Inc. Grizzly .223 CAL receiver in California. We are not familiar with that particular make and model of firearm, so cannot give a definitive opinion about whether or not it is legal in California. We would be happy to examine the firearm itself, or a photo thereof, in order to render an opinion.

You should be aware, however, that the receiver may be illegal if it has any of the characteristics listed in Penal Code 12276.1. Also, a local prosecutor in one of California's 58 counties could decide to prosecute you for possession of an assault weapon, regardless of our opinion about the legality of the firearm.

Please feel free to contact me again if you have any additional questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General

For **BILL LOCKYER**  
Attorney General



**BILL LOCKYER**  
**Attorney General**

*State of California*  
**DEPARTMENT OF JUSTICE**

**FIREARMS DIVISION**  
P.O. BOX 160487  
SACRAMENTO, CA 95816-0487  
Facsimile (916) 263-0676

December 28, 2005

Mark A. Mitzel  
486 Medanos Court  
Fremont, CA 94539

Re: Importation of FAR-15 Lower Receiver into California

Dear Mr. Mitzel:

I am writing in response to your inquiry about whether it is legal to send a FAR-15 lower receiver to California.

The FAR-15 is not listed as a Category One assault rifle in California Penal Code 12276, and is not yet a Category Two assault rifle. Although technically the receiver is legal to purchase and possess in California at this time (assuming it does not have the characteristics listed in Penal Code section 12276.1(a)(1), (a)(2) or (a)(3)), you should be aware that the FAR-15 lower receiver is virtually identical to rifles that are now illegal assault weapons. You should also be aware that we intend to add it soon to the DOJ Assault Weapons Identification Guide. Therefore, the FAR-15 will soon be classified as an assault weapon.

Also, please realize that this opinion is not conclusive about the legality of the firearm. A local prosecutor in one of California's 58 counties could decide to prosecute you, or the gun dealer who orders the FAR-15 for illegal importation of an assault weapon, regardless of this letter.

I hope this information was helpful. Please feel free to write to me again if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General  
Firearms Division

For **BILL LOCKYER**  
Attorney General





**BILL LOCKYER**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**

**FIREARMS DIVISION**  
P.O. BOX 160487  
SACRAMENTO, CA 95816-0487  
Facsimile (916) 263-0676

December 28, 2005

William Jason Paige  
4436 Sierra Express Drive  
Camino, CA 95709

Re: Importation of DSA ZM4 Lower Receiver into California

Dear Mr. Paige:

I am writing in response to your inquiry about whether it is legal to send a DSA ZM4 lower receiver to California.

The DSA ZM4 is not listed as a Category One assault rifle in California Penal Code 12276, and is not yet a Category Two assault rifle. Although technically the receiver is legal to purchase and possess in California at this time (assuming it does not have the characteristics listed in Penal Code section 12276.1(a)(1), (a)(2) or (a)(3)), you should be aware that the DSA ZM4 lower receiver is virtually identical to rifles that are now illegal assault weapons. You should also be aware that we intend to add it soon to the DOJ Assault Weapons Identification Guide. Therefore, the DSA ZM4 will soon be classified as an assault weapon.

Also, please realize that this opinion is not conclusive about the legality of the firearm. A local prosecutor in one of California's 58 counties could decide to prosecute you, or the gun dealer who orders the DSA ZM4 for illegal importation of an assault weapon, regardless of this letter.

I hope this information was helpful. Please feel free to write to me again if you have any additional questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alison Merrilees".

ALISON MERRILEES  
Deputy Attorney General  
Firearms Division

For **BILL LOCKYER**  
Attorney General



**BILL LOCKYER**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**

### FAX TRANSMISSION COVER SHEET

**IMPORTANT/CONFIDENTIAL:** This communication is intended only for the use of the individual or entity to which it is addressed. This message contains information from the State of California, Attorney General's Office, which may be privileged, confidential and exempt from disclosure under applicable law. If the reader of this communications is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited.

**DATE:** May 24<sup>th</sup>, 2006      **TIME:** 5:00 PM      **NO. OF PAGES:** 10  
(INCLUDING COVER SHEET)

**TO:** \_\_\_\_\_

**NAME:** Gene Hoffman, Jr.

**OFFICE:** \_\_\_\_\_

**LOCATION:** \_\_\_\_\_

**FAX NO:** (650) 522-4481      **PHONE NO.:** \_\_\_\_\_

**FROM:** \_\_\_\_\_

**NAME:** Alison Merrilees

**OFFICE:** Department of Justice, Firearms Division

**LOCATION:** Sacramento, CA

**FAX NO:** (916) 263-0676      **PHONE NO.:** \_\_\_\_\_

### MESSAGE/INSTRUCTIONS

Documents Enclosed

**PLEASE DELIVER AS SOON AS POSSIBLE!**  
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER

**BILL LOCKYER**  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



FIREARMS DIVISION

P.O. BOX 160487  
SACRAMENTO, CA 95816-0487  
Facsimile: (916) 263-0676  
(916) 263-0699

May 24, 2006

Mr. Gene Hoffman Jr.  
751 Sylvan Way  
Emerald Hills, CA. 94062

Re: Public Records Act Request

Dear Mr. Hoffman:

I am writing in response to your letter dated May 11, 2006 requesting "copies of records relating to the various iterations of the memoranda or "Important Notices" regarding sales or possession of Unnamed AR-15/AK 47 "Series" Firearms." You requested "copies of all of the revisions of this memo/notice since December 1, 2005." You also requested "any meeting notices, emails, internal memoranda or other written or electronic records directly relating to the analysis in the various versions of these notices."

According to our records, we have posted three notices on our website regarding series-style assault weapons since December 1, 2005. The first notice was posted on February 6, 2006. The February 6, 2006 contained two typographical errors regarding the year of the *Harrott* decision and an error regarding the closing date for registration of SB 23 assault weapons. I have enclosed a copy of the February 6, 2006 notice, which is labeled as "Attachment A." That document was edited to correct the errors and to add the DOJ seal on February 7, 2006. I have enclosed a copy of the February 7, 2006 notice, which is labeled as "Attachment B."

On May 1, 2006, we removed the February 7, 2006 notice from the Firearms Division website. On May 9, 2006, we posted a revised notice regarding series-style weapons that was prepared in consultation with attorneys within the Department. It represents the Department's final policy regarding series-style weapons that have not been identified as assault weapons by the Department. I have enclosed a copy of the May 9<sup>th</sup> notice, which is labeled as "Attachment C."

None of the other documents that you requested are subject to public disclosure because they are privileged under the Evidence Code. (California Government Code §6245(k)). Therefore, we will not comply with the portion of your Public Records Act request in which you request those documents.

Hoffman PRA Request  
May 24, 2006  
Page 2

Sincerely,



ALISON Y. MERRILEES  
Deputy Attorney General

For: BILL LOCKYER  
Attorney General

Attachments

# Attachment A

**BILL LOCKYER**  
California  
Attorney General  
JUSTICE

State of  
**DEPARTMENT OF**

FIREARMS DIVISION  
P.O. Box 160487  
Sacramento, CA 95816-0487

Public: 916-263-4887

## **IMPORTANT NOTICE**

### **California Department of Justice Information Regarding the Sale/Possession of Newly Identified AR-15/AK 47 "Series" Firearms**

The Department of Justice (hereafter "the Department") has received numerous contacts from the public and firearms industry personnel regarding the legality of various AR-15/AK 47 "series" style firearms that have not yet been identified as "series" assault weapons by the Department. The Department is also aware of the recent high volume of sales of these firearms.

The Department has the statutory authority to identify "series" assault weapons. In 2000, the California Supreme Court upheld that authority in *Kasler v. Lockyer* (2000) 23 Cal. 4th 472. The Department updated the list of "series" weapons in 2000 (as "Category 2" assault weapons), shortly after the *Kasler* decision.

The California Supreme Court reiterated in 2003 that "the Attorney General has the authority to determine that certain semiautomatic firearms are assault weapons by simply identifying them as such in the list published by the Attorney General in the California Code of Regulations...two types of firearms defined in Penal Code (PC) section 12276 by the use of the term series, namely the AK-47 series and the Colt AR-15 series." *Harrott v. County of Kings* (2003) 25 Cal. 4th 1138, 1155.

Accordingly, the Department is currently in the process of identifying those firearms in the state that are variations, with minor differences, of AR-15/AK 47 "series" weapons. Once this process is complete, the Department will promulgate a list and file it with the Secretary of State's office. Concurrently, the Department will begin updating the Assault Weapon Identification Guide which is currently available via the Department's website at <http://ag.ca.gov/firearms/forms/index.html>. Once the list of newly identified "series" weapons is filed with the Secretary of State, citizens who possess those weapons will have 90 days to register them with the Department of Justice.

**Newly identified "series" weapons cannot legally have the features listed**

2/2006

## IMPORTANT NOTICE

Page Two

The registration period for assault weapons with those characteristics (Category 3 assault weapons) ended on December 31, 2000. Because *non-"series"* assault weapons with PC section 12276.1 features may not be offered for sale, manufactured, imported, or possessed in California, it follows that newly registered *"series"* weapons may not have the features listed in PC section 12276.1, either.

The prohibition on the features listed in PC section 12276.1 is consistent with current DOJ policy that named *"series"* weapons are illegal, unless registered, regardless of whether they have the PC section 12276.1 features. It is also consistent with the intent of the California state legislature to ban assault weapons, expressed in 1991 when PC section 12276(f) was enacted.

This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in Section 12276.5, and any other models which are only minor variations of those weapons with minor differences, regardless of the manufacturer [emphasis added].

It should be noted that individuals who timely registered "Category 1" and "Category 2" assault weapons were allowed to keep or add the PC section 12276.1 features on their firearms. Those generic features were not illegal during the registration period for Category 1 assault weapons. In August of 2000, when the Department identified the Category 2 *"series"* weapons, it was legal to register weapons with those characteristics as Category 3 assault weapons. Firearms with those features could no longer be registered as of January 1, 2001. Therefore, newly identified *"series"* (Category 4) weapons likewise cannot have those features.

**Registrants of newly identified series weapons cannot legally add PC section 12276.1 features to those firearms.** The Department intends to enforce this restriction through the assault weapon registration process. Registration acknowledgment letters will include an admonition to registrants that adding prohibited features to newly registered assault weapons will invalidate the registration. The basis for valid registration will rest solely on the fact that the Department identifies the receivers for these firearms as variations, with minor differences, of already controlled AR-15/AK 47 *"series"* weapons. All additional features of the newly identified *"series"* weapons must conform with current California law.

Firearm manufacturers, wholesalers and dealers who misinform the public about the ability to legally add prohibited features to these newly listed firearms risk criminal prosecution. They could also face civil penalties of up to \$2,500 per violation under the state's Unfair Practices Act (California Business & Professions Code section 17000 et seq.).

This information will be distributed to criminal justice agencies throughout the state, as well as to firearm dealers listed on the Department's Centralized List, via the formal Information Bulletin process.

in PC section 12276.1 when they are registered. Those features cannot legally be added after the firearms are registered as assault weapons. The PC section 12276.1 features have been banned since January 1, 2000, when Senate Bill 23 went into effect. The public was notified of the prohibition on the specified features many years ago.



# Attachment B

**BILL LOCKYER**  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



FIREARMS DIVISION  
P.O. Box 160487  
Sacramento, CA 95816-0487

Public: 916-263-4887

## IMPORTANT NOTICE

### California Department of Justice Information Regarding the Sale/Possession of Newly Identified AR-15/AK 47 "Series" Firearms

The Department of Justice (hereafter "the Department") has received numerous contacts from the public and firearms industry personnel regarding the legality of various AR-15/AK 47 "series" style firearms that have not yet been identified as "series" assault weapons by the Department. The Department is also aware of the recent high volume of sales of these firearms.

The Department has the statutory authority to identify "series" assault weapons. In 2000, the California Supreme Court upheld that authority in *Kasler v. Lockyer* (2000) 23 Cal. 4th 472. The Department updated the list of "series" weapons in 2000 (as "Category 2" assault weapons), shortly after the *Kasler* decision.

The California Supreme Court reiterated in 2001 that "the Attorney General has the authority to determine that certain semiautomatic firearms are assault weapons by simply identifying them as such in the list published by the Attorney General in the California Code of Regulations...two types of firearms defined in Penal Code (PC) section 12276 by the use of the term series, namely the AK-47 series and the Colt AR-15 series." *Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1155.

Accordingly, the Department is currently in the process of identifying those firearms in the state that are variations, with minor differences, of AR-15/AK 47 "series" weapons. Once this process is complete, the Department will promulgate a list and file it with the Secretary of State's office. Concurrently, the Department will begin updating the Assault Weapon Identification Guide which is currently available via the Department's website at <http://ag.ca.gov/firearms/forms/index.html>. Once the list of newly identified "series" weapons is filed with the Secretary of State, citizens who possess those weapons will have 90 days to register them with the Department of Justice.

Newly identified "series" weapons cannot legally have the features listed in PC section 12276.1 when they are registered. Those features cannot legally be added after the firearms are registered as assault weapons. The PC section 12276.1 features have been banned since January 1, 2000, when Senate Bill 23 went into effect. The public was notified of the prohibition on the specified features many years ago.

## IMPORTANT NOTICE

Page Two

The registration period for assault weapons with those characteristics (Category 3 assault weapons) ended on December 31, 2000. Because *non-series* assault weapons with PC section 12276.1 features may not be offered for sale, manufactured, imported, or possessed in California, it follows that newly registered *series* weapons may not have the features listed in PC section 12276.1, either.

The prohibition on the features listed in PC section 12276.1 is consistent with current DOJ policy that named *series* weapons are illegal, unless registered, regardless of whether they have the PC section 12276.1 features. It is also consistent with the intent of the California state legislature to ban assault weapons, expressed in 1991 when PC section 12276(f) was enacted.

This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in Section 12276.5, and any other models which are only minor variations of those weapons with minor differences, regardless of the manufacturer [emphasis added].

It should be noted that individuals who timely registered "Category 1" and "Category 2" assault weapons were allowed to keep or add the PC section 12276.1 features on their firearms. Those generic features were not illegal during the registration period for Category 1 assault weapons. In August of 2000, when the Department identified the Category 2 *series* weapons, it was legal to register weapons with those characteristics as Category 3 assault weapons. Firearms with those features could no longer be registered as of January 1, 2001. Therefore, newly identified *series* (Category 4) weapons likewise cannot have those features.

**Registrants of newly identified series weapons cannot legally add PC section 12276.1 features to those firearms.** The Department intends to enforce this restriction through the assault weapon registration process. Registration acknowledgment letters will include an admonition to registrants that adding prohibited features to newly registered assault weapons will invalidate the registration. The basis for valid registration will rest solely on the fact that the Department identifies the receivers for these firearms as variations, with minor differences, of already controlled AR-15/AK 47 *series* weapons. All additional features of the newly identified *series* weapons must conform with current California law.

Firearm manufacturers, wholesalers and dealers who misinform the public about the ability to legally add prohibited features to these newly listed firearms risk criminal prosecution. They could also face civil penalties of up to \$2,500 per violation under the state's Unfair Practices Act (California Business & Professions Code section 17000 et seq.).

This information will be distributed to criminal justice agencies throughout the state, as well as to firearm dealers listed on the Department's Centralized List, via the formal Information Bulletin process.

# Attachment C

**BILL LOCKYER**  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



FIREARMS DIVISION  
P.O. Box 160487  
Sacramento, CA 95816-0487

Public: 916-263-4887

## **IMPORTANT NOTICE**

### **California Department of Justice Information Regarding the Sale/Possession of Unnamed AR- 15/AK 47 "Series" Firearms**

The Department of Justice (hereafter "the Department") has received numerous inquiries from the public and firearms industry personnel about the legality of various AR-15/AK 47 "series" style firearms that have not been named by the Department as "series" assault weapons. The Department believes that the public and law enforcement are best served by reference to the generic definition of assault weapons set forth in SB 23, rather than reliance upon a scheme of identifying assault weapons by name. Therefore, the Department will not update the list of "series" assault weapons.

SB 23 has banned the possession, sale and manufacture of firearms with the characteristics of assault weapons as defined in California Penal Code §12276.1 since January 1, 2000. A semiautomatic centerfire rifle with the capacity to accept a detachable magazine and any of the generic features listed in Penal Code §12276.1(a)(1) is contraband unless it was registered prior to January 1, 2001. It is illegal to manufacture, cause to be manufactured, distribute, transport, import, keep for sale, offer or expose for sale, give or lend such a weapon, except as permitted by law.

Law enforcement officials, firearm dealers and the public should be aware that semiautomatic centerfire rifles that are modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1). The Department intends to exercise its power pursuant to Penal Code section 12276.5(i) to adopt regulations as "necessary or proper to carry out the purposes and intent" of California law to ban assault weapons in the state.

Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or permanently alter the firearm so that it cannot accept a detachable magazine.

It remains illegal to possess assault weapons banned by name (either in statute or regulation), unless those assault weapons are registered and possessed in accordance with state law. The time limits for registration, which depend on the make and model of the assault weapon, are set forth in Penal Code §12285.

**Alison Merrilees - Re: CA assault weapons - introduction**

**From:** Alison Merrilees  
**To:** Luis Tolley  
**Date:** 5/10/2006 9:43 AM  
**Subject:** Re: CA assault weapons - introduction

Luis,

Hi Luis,

We don't think there is any "taking" issue that would require compensation/registration. We believe that our interpretation of "capacity to accept" is consistent with current law and regulations. We have never given our blessing to any of the temporary fixes that these guys now ASSUME are legal. We are eagerly awaiting a test case on this, because we think we'll win.

The gun guys bragged repeatedly that they could restore their "California legal AR's" to fully functional AW's in a matter of seconds. I don't think a judge or jury would find that such a configuration complies with the letter or the intent of the law.

A few of them clearly are on our side, but I expect them to get worn down and stop speaking up. That does not bother me. They are never going to be happy as long as we say they can't have what they want : AW's that are legal. Our current position is pretty easy to defend. I'm not worried.

>>> Luis Tolley <[REDACTED]> 05/09/06 6:46 PM >>>  
Hi Alison:

Oh my, I just read through part of the CalGuns thread. The gun guys are upset aren't they. Sounds like you did good.

They may have a point in the question of how a revised definition of "capacity to accept a detachable magazine" impacts weapons that were formerly approved by DOJ. We would not want anything that opens up a new registration process if that process enables them to add features prohibited by SB 23. I'm not quite sure how that all works out.

Luis Tolley  
Project Concern International

----- Original Message -----

**From:** Alison Merrilees  
**To:** Brian Siebel  
**Cc:** Ellyne Bell ; [REDACTED]  
**Sent:** Wednesday, May 10, 2006 6:41 AM  
**Subject:** Re: CA assault weapons - introduction

FYI -

We posted an updated memo on our website today.  
<http://caag.state.ca.us/firearms/forms/pdf/AWpolicyrev4.pdf>

Of course, the gun guys are going nuts about it, <http://www.calguns.net/calgunforum/showthread.php?t=33601>

We feel confident that our plan will hold up to any legal challenges.

>>> Brian Siebel <[REDACTED]> 05/09/06 12:39 PM >>>  
Friday may work better for all concerned. Ellyne is going to try to set up a call.

In advance of that, did LCAV prepare a memo for the Attorney General on the AW receivers and detachable magazine issues? I'd appreciate reading anything you can share with me in advance of our call.

Thank you,

BJS

>>> "Alison Merrilees" <Alison.Merrilees@doj.ca.gov> 5/9/2006 2:43:42 PM >>>

Thanks, Brian. I look forward to speaking with you. I am available on Friday at 1 p.m.

I regularly check in with the calguns guys, but had not seen the one you sent me. I get a lot of useful information from them, at least to the extent that I can tolerate their rantings!

By the way, I am also available today until 1 p.m. our time if you want to try and catch me today.

Thanks.

Alison

Alison Y. Merrilees  
Deputy Attorney General  
Counsel, Firearms Division  
California Department of Justice  
[REDACTED] 16)263-0802  
Fax- (916)263-0676

>>> Brian Siebel <[REDACTED]> 05/09/06 11:20 AM >>>

Alison:


I am sending this e-mail by way of introduction. I have been receiving information from your office by way of Luis Tolley and Ellyne Bell. I am a Senior Attorney with the Brady Center, and have been here almost ten years. During my tenure, I have been involved extensively with the assault weapons issue in California. For example, I was involved in the

Kasler v. Lungren, Harrott v. County of Kings, and People v. Dingman cases, the 101 California Street lawsuit, and other issues. I also represented the 12 city and county plaintiffs in the municipal gun suit.

You should be aware of some of what is being said on various gun-nut message boards about DOJ's plans. Here is a sample of one such discussion. <http://www.calguns.net/calgunforum/showthread.php?t=33533>

My direct contact information is below. I understand Ellyne is trying to set up a conference call for Friday of this week (I'm traveling tomorrow and Thursday). I look forward to speaking with you on the phone and offering my expertise to the Attorney General.

Sincerely,

Brian J. Siebel  
Brady Center to Prevent Gun Violence  
Legal Action Project  
1225 Eye Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
(202) 218-4642  
(202) 898-0059 fax  


In addition to our website at [www.gunlawsuits.org](http://www.gunlawsuits.org), please visit our new websites at [www.stopthenra.com](http://www.stopthenra.com) and [www.nrablacklist.com](http://www.nrablacklist.com)  
This communication and any attachments may contain information that is confidential and protected from disclosure by the attorney-client privilege, as attorney work product, or by other applicable privileges.

If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, copying or communication of this message is strictly prohibited. If you have received this communication in error, please notify me and delete this message.

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use



or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.



## How to Respond to Telephone and Email Inquiries from the Public About 5/10/06 Important Notice re Unlisted AR/AK Series Firearms:

- Current law defines a semiautomatic centerfire rifle with the capacity to accept a detachable magazine and any of the generic features listed in Penal Code §12276.1(a)(1) as an assault weapon.
- Such a firearm is contraband unless it was registered in a timely fashion pursuant to Penal Code §12285.
- It is DOJ's opinion that under current law, a semiautomatic centerfire rifle that is modified to be *temporarily incapable of accepting a detachable magazine*, but can be restored to accommodate a detachable magazines, is an assault weapons if it has any of the features listed in §12276.1(a)(1).
- Regulations will be adopted to clarify current law. The regulations will not change DOJ's opinion about firearms that DOJ now considers to be legal.
- The public will have an opportunity to comment on our proposed regulations, as permitted under the California Administrative Procedures Act.
- Individuals who alter a firearm designed and intended to accept a detachable magazine in an attempt to make it incapable of accepting a detachable magazine do so at their legal peril.
- Whether or not such a firearm remains capable of accepting a detachable magazine is a question for law enforcement agencies, district attorneys, and ultimately juries of twelve persons, **not the California Department of Justice**.
- We cannot anticipate how any or all of the above entities will view the conversion of a firearm.
- DOJ has approved several models of **commercially manufactured** firearms that we believe have been altered to be permanently incapable of accepting detachable magazines. However, we have warned those manufacturers that other law enforcement entities could view the legality of those firearms differently. Local law enforcement agencies and district attorneys could consider the firearms to be capable of accepting detachable magazines, and therefore assault weapons under California law.
- For your protection, you should ensure that your firearm either does not have the capacity to accept a detachable magazine, or does not have any of the features listed in Penal Code §12276.1(a)(1).
- You have the responsibility to protect yourself from the wide variety of potential law enforcement entities and how they may view the legality of your modification.

## **TITLE 11. DEPARTMENT OF JUSTICE NOTICE OF PROPOSED RULEMAKING**

The Department of Justice (“Department” or “DOJ”) proposes to amend Section 978.20 of Division 1, Title 11 of the California Code of Regulations (CCR) regarding definitions of terms used to identify assault weapons after considering all comments, objections, and recommendations regarding the proposed action.

### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

Penal Code (PC) section 12276.1 identifies restricted assault weapons based on specific characteristics or features. Currently, California Code of Regulations (CCR) section 978.20 of Title 11 defines five terms used in § 12276.1 PC. The proposed amendment will define a sixth term, “capacity to accept a detachable magazine”, as meaning “capable of accommodating a detachable magazine, but shall not be construed to include a firearm that has been permanently altered so that it cannot accommodate a detachable magazine.”

### **AUTHORITY AND REFERENCE**

Authority: Penal Code section 12276.5(i)

Reference: Penal Code sections 12276.1, 12276.5, 12280, 12285, and 12289

### **WRITTEN COMMENT PERIOD**

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department. The written comment period closes at 5:00 p.m. on August 16, 2006. Only comments received at the Department offices by that time will be considered. Please submit written comments to:

Mail: Jeff Amador, Field Representative  
Department of Justice  
Firearms Licensing and Permits Section  
P.O. Box 820200  
Sacramento, CA 94203-0200

or

Email: [jeff.amador@doj.ca.gov](mailto:jeff.amador@doj.ca.gov)

### **PUBLIC HEARING**

The Department will hold a public hearing beginning at 9:00 a.m. on Wednesday, August 16, 2006 for the purpose of receiving public comments regarding the proposed regulatory action. The hearing will be held in the Department of Water Resources auditorium located at 1416 9<sup>th</sup> Street, Sacramento, California. The auditorium is wheelchair accessible. At the hearing, any person may present oral or written comments regarding the proposed regulatory action. The Department requests, but does not require, that persons who make oral comments also submit

written copy of their testimony at the hearing.

## **DISCLOSURES REGARDING THE PROPOSED ACTION**

The Department has made the following determinations:

Mandate on local agencies or school districts: None

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.

Cost impacts that a representative person or business would incur in reasonable compliance with the proposed action: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant effect on housing costs: None.

Small business determination: The Department has determined the proposed amendment does not affect small business. This determination is based on the fact that the proposed amendment simply defines a term used to identify assault weapons but does not place any additional cost burden on small businesses nor their customers.

Assessment regarding effect on jobs/businesses: The proposed amendment will not (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing businesses within California; or (3) affect the expansion of businesses doing business within California.

## **CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5(a)(13), the Department must determine that no reasonable alternative considered by the Department, or that has otherwise been identified and brought to the attention of the Department, would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations. The Department invites any person interested in presenting statements or arguments with respect to alternatives to the proposed regulations to do so at the scheduled hearing or during the written comment period.

## **CONTACT PERSONS**

Please direct inquiries concerning the proposed administrative action to Jeff Amador at (916) 227-3661. The backup contact person is Troy Perry at (916) 227-3707. The mailing address for Jeff Amador and Troy Perry is:

Department of Justice  
Firearms Licensing and Permits Section  
P.O. Box 820200  
Sacramento, CA 94203-0200

## **AVAILABILITY OF RULEMAKING FILE INCLUDING THE INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS**

The DOJ will have the entire rulemaking file available for inspection and copying throughout the rulemaking process. The initial statement of reasons and the text of proposed regulations are currently available at the DOJ website at <http://caag.state.ca.us/firearms/regs/>. You may also obtain copies by contacting Troy Perry at the telephone number or address listed above.

## **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. The Department will accept written comments on the modified text for 15 days after the date on which they are made available. Copies of any modified text will be available from the DOJ website at <http://caag.state.ca.us/firearms/regs/>. You may also obtain a written copy of any modified text by contacting Troy Perry at the telephone number or address above.

## **AVAILABILITY OF FINAL STATEMENT OF REASONS**

Upon completion, the final statement of reasons will be available at the DOJ website at <http://caag.state.ca.us/firearms/regs/>. You may also obtain a written copy of the final statement of reasons by contacting Troy Perry at the telephone number or address above.

## **AVAILABILITY OF DOCUMENTS ON THE INTERNET**

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in strikeout format, as well as the Final Statement of Reasons once it is completed, can be accessed through the DOJ website at <http://caag.state.ca.us/firearms/regs/>.

## Text of Modified Regulations

The Department has illustrated changes to the originally proposed language as follows: originally proposed language is shown in regular text; deletions from the originally proposed language are shown in strikethrough using a “-”; and additions to the originally proposed language are shown with an underline.

### Chapter 12.8 Department of Justice Regulations for Assault Weapons and Large Capacity Magazines

#### Article 2. Definitions of Terms Used to Identify Assault Weapons

##### ~~978.20~~ 5469. Definitions

The following definitions apply to terms used in the identification of assault weapons pursuant to Penal Code section 12276.1:

- (a) “detachable magazine” means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool. Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine.
- (b) “flash suppressor” means any device designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter’s field of vision.
- (c) “forward pistol grip” means a grip that allows for a pistol style grasp forward of the trigger.
- (d) “pistol grip that protrudes conspicuously beneath the action of the weapon” means a grip that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed below the top of the exposed portion of the trigger while firing.
- (e) “thumbhole stock” means a stock with a hole that allows the thumb of the trigger hand to penetrate into or through the stock while firing.
- (f)(1) “capacity to accept a detachable magazine” means ~~capable of accommodating a detachable magazine, but shall not be construed to include a firearm that has been permanently altered so that it cannot accommodate a detachable magazine.~~ currently able to receive a detachable magazine or readily modifiable to receive a detachable magazine.

- (2) A firearm is readily modifiable to receive a detachable magazine if it has a device that prevents the magazine from being released but allows the firearm to accept a detachable magazine when the device is removed, reversed, or disengaged, without alterations to the magazine well.
- (3) A firearm is not readily modifiable to receive a detachable magazine if, for example:
  - (A) it does not have a magazine well;
  - (B) the magazine is fixed to the receiver by a continuous ribbon of welding around the perimeter of the magazine well, or by multiple ribbons of welding that are each at least one half inch in length;
  - (C) the magazine is fixed to the receiver with a rivet (or other irreversible locking device) that is driven through the magazine well and fixed in place with epoxy; or
  - (D) the modification requires disassembly of the action.

NOTE: Authority cited: Section 12276.5(i), Penal Code.

Reference: Sections 12276.1, 12276.5, 12280, 12285, and 12289, Penal Code.



Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

Attention: Chapter 2 Compliance Unit

**Petition to the Office of Administrative Law**

Re: ““IMPORTANT NOTICE” California Department of Justice Information  
Regarding the Sale/Possession of Unnamed AR-15/AK 47 ‘Series’ Firearms”

From: Gene Hoffman, Jr.

Date: July 11, 2007

**1. Identifying Information:**

Gene Hoffman, Jr.  
751 Sylvan Way  
Emerald Hills, CA 94062  
650-XXX-XXXX  
[hoffmang@hoffmang.com](mailto:hoffmang@hoffmang.com)

**2. State agency or department being challenged:**

California Department of Justice, Bureau of Firearms (“BOF”)

**3. Description of the Underground Regulation and the Department Action By Which it was Issued**

A document entitled “*IMPORTANT NOTICE California Department of Justice Information Regarding the Sale/Possession of Unnamed AR-15/AK 47 ‘Series’ Firearms*” available from the California Department of Justice, Bureau of Firearms homepage and more specifically located at: <http://ag.ca.gov/firearms/forms/pdf/AWpolicyrev4.pdf> (Attachment A hereto) (hereinafter, “Important Notice”) published on or about May 9, 2006.

**4. The Legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable:**

The California Administrative Procedure Act, California Government Code §11400 et seq., defines “regulation” to mean “every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it . . .” §11342.600.

Furthermore, “[a] regulation subject to the APA . . . 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 enforced or administered by the agency, or govern the agency’s procedure.’ ” *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (emphasis added) (internal citations omitted).

*A) The “Important Notice” is a Regulation*

The “Important Notice” is a “regulation” within the meaning of §11342.600, as it purports to generally inform law enforcement officials, firearm dealers and the public of requirements of Penal Code §12276.1 and 11 C.C.R. 5469.<sup>1</sup>

*B) The “Important Notice” Applies Generally*

This rule applies generally, since it applies to all owners and sellers of semi automatic centerfire rifles in the State, therefore satisfying the first element of *Tidewater*.<sup>2</sup>

*C) The “Important Notice” Purports to Implement, Interpret and Make Specific California Penal Code § 12276.1*

The “Important Notice” is an attempt to promulgate a completely new rule that requires owners of semiautomatic centerfire rifles that are modified to be **temporarily or currently** incapable of accepting detachable magazines (and have features listed in 12276.1) to **permanently** alter their rifle or face felony criminal prosecution.<sup>3</sup>

---

<sup>1</sup> “**Law enforcement officials, firearm dealers and the public** should be aware that semiautomatic centerfire rifles that are modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1).” *Important Notice*, para 3 (emphasis added).

<sup>2</sup> The “Important Notice” purports to apply to all “[i]ndividuals who own firearms that meet the generic definition of assault weapons banned by SB 23.” *Important Notice*, para 4.

<sup>3</sup> “Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or **permanently alter** the firearm so that it cannot accept a detachable magazine.” *Important Notice*, para 4 (emphasis added).

The rule as stated in the “Important Notice” thus attempts to interpret and make specific<sup>4</sup> the definition of exactly which semiautomatic centerfire rifles are prohibited in the State by Penal Code §12276.1 and 11 C.C.R. 5469, therefore satisfying the second element of *Tidewater*.

No express APA exemption in Government Code §11340.9 applies to the “Important Notice” and there are no express exemptions to the APA for the BOF in the relevant Penal Code sections.<sup>5</sup>

## 5. Legal Basis for why the “Important Notice” is an underground regulation

### A) Background

In 1999, the California Legislature passed SB-23<sup>6</sup> which added a generic definition to the Assault Weapons Control Act in §12276.1 of the Penal Code. This definition hinged on whether or not a semi-automatic centerfire rifle had a “detachable magazine” **and** any of a list of prohibited features (such as a pistol grip, collapsible stock or “flash hider”).

However, such prohibited features are perfectly legal under SB-23 as long as the rifle has a fixed magazine (i.e., does not have a “detachable magazine”).

To further define and implement the newly enacted provisions of SB-23, the BOF (then known as The Department of Firearms) conducted a regulatory process in compliance with the APA that resulted in the enactment of 11 C.C.R. 5469 (the “2000 Rulemaking”).

Part of this rulemaking process addressed the exact definition of fixed magazine vs. “detachable magazine”, as will be shown *infra*.

From 2000 to 2006, little changed regarding the enforcement of Penal Code §12276.1 and 11 C.C.R. 5469. Then, in early 2006 certain firearms enthusiasts and firearms sellers realized the implications of the combined impact of *Harrot v. County of Kings* (2001) 25 Cal.4th 1138 and the expiration of the Federal Assault Weapons Ban, on California law.

Sellers and enthusiasts realized that they could legally import, buy, sell, and assemble rifles that were very similar (but not identical) to rifles that were considered “Assault

---

<sup>4</sup> “A semiautomatic centerfire rifle with the **capacity to accept** a detachable magazine and any of the generic features listed in Penal Code §12276.1(a)(1) is contraband unless it was registered prior to January 1, 2001.” “*Important Notice*”, para 2 (emphasis added).

<sup>5</sup> AB-2728 which passed in 2006 and became effective January 1, 2007 removed the only unrelated exception to the APA that the BOF had in the Penal Code relating to firearms.

<sup>6</sup> Bill text and legislative history available at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_23&sess=9900&house=B&author=perata](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_23&sess=9900&house=B&author=perata)

Weapons” in California as long as they complied with Penal Code §12276 (so called “named assault weapons”) and the feature restrictions in §12276.1 as interpreted by 11 C.C.R. 5469.

As outlined above, the feature restrictions contained in §12276.1 prohibit, e.g. pistol grips, collapsible stocks and/or flash hidere **only** on rifles that have a “**detachable magazine**,” thus making the definition of what exactly constitutes a **fixed magazine** to be of paramount importance.

In an attempt to make an end-run around the plain meaning of the law that defines fixed magazines, the BOF responded to this influx of new rifles with the “Important Notice.”

In effect, the “Important Notice” is an underground regulation purporting to interpret Penal Code §12276.1 and 11 C.C.R. 5469 in a way that the legislature did not intend or require, and that the BOF knows or should have known is outside of the BOF’s *own previous interpretations* of Penal Code §12276.1.

In fact, the “Important Notice” substantially changes the definition of fixed magazine, thereby turning tens of thousands of firearms owners who relied on the previous definition of a fixed magazine, into felons.<sup>7</sup>

*B) The Current Definition of Fixed Magazine Does Not Require “Permanent Alteration”*

In the 2000 Rulemaking, BOF promulgated the definition of “detachable magazine” as:

(a) "detachable magazine" means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool.<sup>8</sup>

Issues with a type of rifle known as the “SKS” led to the definition of what would be considered a fixed magazine (and therefore not a “detachable magazine”) rifle subject to §12276.1. The BOF stated in the *Final Statement of Reasons for the 2000 Rulemaking* (emphasis added):

Comment

A1.12 - The SKS rifle with a detachable magazine cannot be changed without using a bullet tip as a tool, thus the regulations conflict with the specific listing of SKS rifles with detachable magazines in the Roberti-Roos Assault Weapons

---

<sup>7</sup> Penal Code §12280. (a) (1) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for four, six, or eight years.

<sup>8</sup> Title 11 California Code of Regulations 5469 (a)

Control Act. DOJ has no authority to contradict existing law.

#### Response

The Department disagrees with the comment because any magazine that requires the use of a bullet or any other tool for its removal is a **fixed magazine**, not a detachable magazine. The SKS with a true detachable magazine does not require a bullet or any other tool to remove and is a controlled assault weapon under Penal Code section 12276. Identifying a bullet as a tool allows for the proper categorization of an SKS with a fixed magazine. **Therefore, the SKS referred to in the comment has a fixed, not detachable magazine.**<sup>9</sup>

There is no requirement in either Penal Code §12276.1 or 11 C.C.R. 5469 that a rifle with a fixed magazine be **permanently altered** in any way. Quite the opposite is true, in fact. As outlined above, the BOF has clearly stated that rifles that required merely the use of a “bullet tip” to remove the magazine were nonetheless classified as having a fixed magazine.

Furthermore, if the intent of the legislature was to require that rifles be “**permanently altered**,” the statutory language would have said so. However, the statutory plain language of SB-23 makes no mention of “permanently altered” in §12276.1 (a)<sup>10</sup>.

In the *Final Statement of Reasons for the 2000 Rulemaking* the BOF itself reiterated that that modifications to semiautomatic rifles did not need to be “permanent:”

#### Comment

C5.04 - The firearm should have to be **permanently modified** so that it lacks the capacity to accept a detachable magazine or any of the offensive features in order for the Department to accept cancellation of a registration.

#### Response

The Department disagrees with the comment. Registration cancellation is not exclusive to modification of the firearm, **nor does the Department believe permanent modification** is required.<sup>11</sup>

(emphasis added)

---

<sup>9</sup> *Final Statement of Reasons for the 2000 Rulemaking*, <http://ag.ca.gov/firearms/regs/fsor.pdf>, Attachment A pg. 2.

<sup>10</sup> Compare that with the definitions applicable to “large-capacity magazines” passed concurrently in SB-23; §12276.1. (d) (2) “Capacity to accept more than 10 rounds” shall mean capable of accommodating more than 10 rounds, but shall not be construed to include a feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

<sup>11</sup> *Ibid.* Attachment A pg. 36

Paragraphs 3 and 4 of the “Important Notice” now purport to interpret both Penal Code §12276.1 (a) (1) and 11 C.C.R. 5469 by adding a new test of whether a modification to a rifle is **temporary** or **permanent** to the test of whether a rifle has a detachable magazine (and is therefore regulated by Penal Code §12276.1).

Paragraphs 3 and 4 of the “Important Notice” state:

Law enforcement officials, firearm dealers and the public should be aware that semiautomatic centerfire rifles that are **modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate** detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1). The Department intends to exercise its power pursuant to Penal Code section 12276.5(i) to adopt regulations as “necessary or proper to carry out the purposes and intent” of California law to ban assault weapons in the state.

Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or **permanently alter** the firearm so that it cannot accept a detachable magazine.

(emphasis added)

This is the **exact opposite** of what the BOF has earlier stated in the Final Statement of Reasons for the 2000 Rulemaking, and is in direct conflict with the law as written.

It is black letter law that an administrative agency may not alter, extend, limit, or enlarge a statute that it administers (*First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550.) The BOF’s attempt to add a new test of whether a rifle is “**temporarily incapable**” of accepting a detachable magazine (vs. “**permanently altered**”) is thus an impermissible attempt to enlarge the number and types of rifles controlled by Penal Code §12276.1 and §12280(a)(1)&(2) while directly contradicting existing law and previous BOF opinions.

Therefore, the “Important Notice” should be removed from BOF’s website and no further attempt to issue or enforce a new definition of rifles controlled by Penal Code §12276.1 should be attempted without opening a new APA compliant proposed regulation process.

**6. The petition raises an issue of considerable public importance requiring prompt resolution.**



Various estimates place the number of newly imported semiautomatic centerfire rifles during the past 18 months at between 30,000 to more than 50,000 rifles<sup>13</sup>. Owners and sellers of these rifles are now unclear whether they can simply follow the law **as written** in the Penal Code and the C.C.R. or whether they have to take **additional and expensive steps** to modify their rifles comply with the law. Some rifle owners already have been arrested and their cases have taken additional time and expense for both citizens and District Attorneys to resolve due to confusion caused by the BOF's underground regulation of Penal Code §12276.1 (a) (1) and 11 C.C.R. 5469.<sup>14</sup>

Of additional concern are the rifle owners who relied upon the 2000 Rulemaking to clarify whether they actually had to register their rifles as assault weapons based on the definition in 11 CCR, Section 5469 (a)<sup>15</sup>. Those who took the plain language of the law to mean that they did not have to permanently alter their rifle did not take the opportunity to register during the limited window of time in 2000, as they thought their rifles were exempt (since those rifles had a fixed magazine).

They now are in a constitutionally difficult position as they are either unintentional felons or are forced by the BOF's underground regulation to make permanent and expensive changes to their property (and be deprived thereof in contravention to their 5<sup>th</sup> Amendment rights and their right to be free from "*ex-post-facto*" law).

As outlined above, the "Important Notice" most certainly meets the criteria of an underground regulation. The "Important Notice" specifically and directly contradicts existing law. The "Important Notice" contradicts the BOF's own legitimately adopted regulations and previous statutory interpretation.

Furthermore, should the "Important Notice" be enforced, it contradicts individual rights under both the Federal Constitution and the Constitution of the State of California, and turns thousands of otherwise law-abiding California citizens into felons.

## 7. Attachments

Exhibit A hereto is a true and correct copy of the "Important Notice" available from: <http://ag.ca.gov/firearms/forms/pdf/AWpolicyrev4.pdf> .

## 8. Certification

I certify that I have submitted a copy of this petition and all its attachments to:

---

<sup>13</sup> See <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060410/NEWS01/604100333>, and [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_2701-2750/ab\\_2728\\_cfa\\_20060829\\_231230\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2701-2750/ab_2728_cfa_20060829_231230_asm_floor.html)

<sup>14</sup> See for example *People v. Matthew Corwin*, Case No. GA069547, Los Angeles Superior Court

<sup>15</sup> Title 11 CCR 5469, "detachable magazine" means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool...

William Cid  
Director  
Bureau of Firearms  
4949 Broadway  
Sacramento, CA 95820  
916-263-4887

I certify that all of the above information is true and correct to the best of my knowledge.

/s/

\_\_\_\_\_  
Gene Hoffman, Jr.

July 11, 2007

\_\_\_\_\_  
Date

**ATTACHMENT A**

**BILL LOCKYER**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**



FIREARMS DIVISION  
P.O. Box 160487  
Sacramento, CA 95816-0487  
Public: 916-263-4887

## **IMPORTANT NOTICE**

### **California Department of Justice Information Regarding the Sale/Possession of Unnamed AR- 15/AK 47 “Series” Firearms**

The Department of Justice (hereafter “the Department”) has received numerous inquiries from the public and firearms industry personnel about the legality of various AR-15/AK 47 “series” style firearms that have not been named by the Department as “series” assault weapons. The Department believes that the public and law enforcement are best served by reference to the generic definition of assault weapons set forth in SB 23, rather than reliance upon a scheme of identifying assault weapons by name. Therefore, the Department will not update the list of “series” assault weapons.

SB 23 has banned the possession, sale and manufacture of firearms with the characteristics of assault weapons as defined in California Penal Code §12276.1 since January 1, 2000. A semiautomatic centerfire rifle with the capacity to accept a detachable magazine and any of the generic features listed in Penal Code §12276.1(a)(1) is contraband unless it was registered prior to January 1, 2001. It is illegal to manufacture, cause to be manufactured, distribute, transport, import, keep for sale, offer or expose for sale, give or lend such a weapon, except as permitted by law.

Law enforcement officials, firearm dealers and the public should be aware that semiautomatic centerfire rifles that are modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1). The Department intends to exercise its power pursuant to Penal Code section 12276.5(i) to adopt regulations as “necessary or proper to carry out the purposes and intent” of California law to ban assault weapons in the state.

Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or permanently alter the firearm so that it cannot accept a detachable magazine.

It remains illegal to possess assault weapons banned by name (either in statute or regulation), unless those assault weapons are registered and possessed in accordance with state law. The time limits for registration, which depend on the make and model of the assault weapon, are set forth in Penal Code §12285.

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225 FAX (916) 323-6826

Susan Lapsley, Director



September 11, 2007

Gene Hoffman, Jr.  
751 Sylvan Way  
Emerald Hills, CA 94062

Re: CTU-07-0712-01

Dear Mr. Hoffman:

On July 12, 2007, the Office of Administrative Law received your petition alleging that the Department of Justice, Bureau of Firearms has issued, used, enforced, or attempted to enforce an underground regulation. The specific alleged underground regulation is:

The Department of Justice, Bureau of Firearms issued a document entitled, "IMPORTANT NOTICE California Department of Justice Information Regarding the Sale/Possession of Unnamed AR-15/AK 47 "Series" Firearms" which informed owners and dealers of firearms that semiautomatic centerfire rifles that are modified to be temporarily incapable of accepting detachable magazines, but that can be restored to accommodate detachable magazines are assault weapons if they have any of the features listed in Penal Code §12276.1(a)(1). It also notifies these individuals that they must remove the features, sell the firearm without the features or permanently alter the firearm in order to comply with the law.

After reviewing your petition and the accompanying documentation, we accept the petition for consideration. Pursuant to Title 1, California Code of Regulations, section 270, please note the following time table:

Publication of Petition in Notice Register: September 28, 2007

Deadline for Public Comments: October 29, 2007

Deadline for Agency Response: November 13, 2007

Deadline for Petitioner Rebuttal: No later than 15 days after receipt of the agency's response

Deadline for OAL Decision: January 28, 2008

Sincerely,

A handwritten signature in cursive script that reads "Susan Lapsley".

Susan Lapsley  
Director

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225 FAX (916) 323-6826



**Susan Lapsley**  
Director

September 21, 2007

Gene Hoffman, Jr.  
751 Sylvan Way  
Emerald Hills, CA 94062

Re: CTU-07-0712-01

Dear Mr. Hoffman:

The Office of Administrative Law has received your petition alleging that the Department of Justice has issued, used, enforced, or attempted to enforce an underground regulation. The Department of Justice has certified, pursuant to California Code of Regulations, title 1 section 280, that it will not issue, use, enforce, or attempt to enforce the alleged underground regulation you challenged, except on a case by case basis as permitted by *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 572. OAL, therefore, pursuant to section 280, will suspend all action on the petition.

Our decision in no way reflects on the merits of the underlying issue presented by your petition. It does not constitute a judgment or opinion on any issue raised in your petition. Nothing in our decision restricts your right or ability to pursue this matter directly with the Department of Justice or in court.

Sincerely,

A handwritten signature in cursive script that reads "Susan Lapsley".

Susan Lapsley  
Director



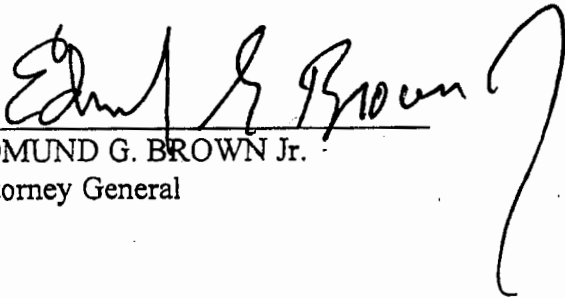
CERTIFICATION

ENDORSED FILED  
IN THE OFFICE OF

I, EDMUND G. BROWN Jr., Attorney General, hereby certify:

2007 SEP 21 PM 3:16

1. The California Department of Justice received notice that Gene Hoffman, Jr. had filed a petition with the Office of Administrative Law (OAL) alleging that a document entitled "Important Notice" which was posted on the website maintained by the Bureau of Firearms within the California Department of Justice constituted an "underground regulation." A copy of the petition is attached hereto as Exhibit A.
2. The California Department of Justice will not issue, use, enforce, or attempt to enforce the policy at issue as a rule of general application, but reserves the right to interpret the law in any case that may arise in the course of a case-specific adjudication, as authorized in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 572.



EDMUND G. BROWN Jr.  
Attorney General

DATED: September 20, 07

Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

Attention: Chapter 2 Compliance Unit

**Petition to the Office of Administrative Law**

Re: ““IMPORTANT NOTICE” California Department of Justice Information  
Regarding the Sale/Possession of Unnamed AR-15/AK 47 ‘Series’ Firearms”

From: Gene Hoffman, Jr.

Date: July 11, 2007

**1. Identifying Information:**

Gene Hoffman, Jr.  
751 Sylvan Way  
Emerald Hills, CA 94062  
650-XXX-XXXX  
[hoffmang@hoffmang.com](mailto:hoffmang@hoffmang.com)

**2. State agency or department being challenged:**

California Department of Justice, Bureau of Firearms (“BOF”)

**3. Description of the Underground Regulation and the Department Action By Which it was Issued**

A document entitled “*IMPORTANT NOTICE California Department of Justice Information Regarding the Sale/Possession of Unnamed AR-15/AK 47 ‘Series’ Firearms*” available from the California Department of Justice, Bureau of Firearms homepage and more specifically located at: <http://ag.ca.gov/firearms/forms/pdf/AWpolicyrev4.pdf> (Attachment A hereto) (hereinafter, “Important Notice”) published on or about May 9, 2006.

**4. The Legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable:**

The California Administrative Procedure Act, California Government Code §11400 et seq., defines “regulation” to mean “every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it . . . .” §11342.600.

Furthermore, “[a] regulation subject to the APA . . . 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 enforced or administered by the agency, or govern the agency’s procedure.’ ” *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (emphasis added) (internal citations omitted).

*A) The “Important Notice” is a Regulation*

The “Important Notice” is a “regulation” within the meaning of §11342.600, as it purports to generally inform law enforcement officials, firearm dealers and the public of requirements of Penal Code §12276.1 and 11 C.C.R. 5469.<sup>1</sup>

*B) The “Important Notice” Applies Generally*

This rule applies generally, since it applies to all owners and sellers of semi automatic centerfire rifles in the State, therefore satisfying the first element of *Tidewater*.<sup>2</sup>

*C) The “Important Notice” Purports to Implement, Interpret and Make Specific California Penal Code § 12276.1*

The “Important Notice” is an attempt to promulgate a completely new rule that requires owners of semiautomatic centerfire rifles that are modified to be **temporarily or currently** incapable of accepting detachable magazines (and have features listed in 12276.1) to **permanently** alter their rifle or face felony criminal prosecution.<sup>3</sup>

---

<sup>1</sup> “**Law enforcement officials, firearm dealers and the public** should be aware that semiautomatic centerfire rifles that are modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1).” *Important Notice*, para 3 (emphasis added).

<sup>2</sup> The “Important Notice” purports to apply to all “[i]ndividuals who own firearms that meet the generic definition of assault weapons banned by SB 23.” *Important Notice*, para 4.

<sup>3</sup> “Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or **permanently alter** the firearm so that it cannot accept a detachable magazine.” *Important Notice*, para 4 (emphasis added).

The rule as stated in the “Important Notice” thus attempts to interpret and make specific<sup>4</sup> the definition of exactly which semiautomatic centerfire rifles are prohibited in the State by Penal Code §12276.1 and 11 C.C.R. 5469, therefore satisfying the second element of *Tidewater*.

No express APA exemption in Government Code §11340.9 applies to the “Important Notice” and there are no express exemptions to the APA for the BOF in the relevant Penal Code sections.<sup>5</sup>

## 5. Legal Basis for why the “Important Notice” is an underground regulation

### A) Background

In 1999, the California Legislature passed SB-23<sup>6</sup> which added a generic definition to the Assault Weapons Control Act in §12276.1 of the Penal Code. This definition hinged on whether or not a semi-automatic centerfire rifle had a “detachable magazine” **and** any of a list of prohibited features (such as a pistol grip, collapsible stock or “flash hider”).

However, such prohibited features are perfectly legal under SB-23 as long as the rifle has a fixed magazine (i.e., does not have a “detachable magazine”).

To further define and implement the newly enacted provisions of SB-23, the BOF (then known as The Department of Firearms) conducted a regulatory process in compliance with the APA that resulted in the enactment of 11 C.C.R. 5469 (the “2000 Rulemaking”).

Part of this rulemaking process addressed the exact definition of fixed magazine vs. “detachable magazine”, as will be shown *infra*.

From 2000 to 2006, little changed regarding the enforcement of Penal Code §12276.1 and 11 C.C.R. 5469. Then, in early 2006 certain firearms enthusiasts and firearms sellers realized the implications of the combined impact of *Harrot v. County of Kings* (2001) 25 Cal.4th 1138 and the expiration of the Federal Assault Weapons Ban, on California law.

Sellers and enthusiasts realized that they could legally import, buy, sell, and assemble rifles that were very similar (but not identical) to rifles that were considered “Assault

---

<sup>4</sup> “A semiautomatic centerfire rifle with the **capacity to accept** a detachable magazine and any of the generic features listed in Penal Code §12276.1(a)(1) is contraband unless it was registered prior to January 1, 2001.” “*Important Notice*”, para 2 (emphasis added).

<sup>5</sup> AB-2728 which passed in 2006 and became effective January 1, 2007 removed the only unrelated exception to the APA that the BOF had in the Penal Code relating to firearms.

<sup>6</sup> Bill text and legislative history available at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_23&sess=9900&house=B&author=perata](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_23&sess=9900&house=B&author=perata)

Weapons” in California as long as they complied with Penal Code §12276 (so called “named assault weapons”) and the feature restrictions in §12276.1 as interpreted by 11 C.C.R. 5469.

As outlined above, the feature restrictions contained in §12276.1 prohibit, e.g. pistol grips, collapsible stocks and/or flash hidere **only** on rifles that have a “**detachable magazine**,” thus making the definition of what exactly constitutes a **fixed magazine** to be of paramount importance.

In an attempt to make an end-run around the plain meaning of the law that defines fixed magazines, the BOF responded to this influx of new rifles with the “Important Notice.”

In effect, the “Important Notice” is an underground regulation purporting to interpret Penal Code §12276.1 and 11 C.C.R. 5469 in a way that the legislature did not intend or require, and that the BOF knows or should have known is outside of the BOF’s *own previous interpretations* of Penal Code §12276.1.

In fact, the “Important Notice” substantially changes the definition of fixed magazine, thereby turning tens of thousands of firearms owners who relied on the previous definition of a fixed magazine, into felons.<sup>7</sup>

*B) The Current Definition of Fixed Magazine Does Not Require “Permanent Alteration”*

In the 2000 Rulemaking, BOF promulgated the definition of “detachable magazine” as:

(a) "detachable magazine" means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool.<sup>8</sup>

Issues with a type of rifle known as the “SKS” led to the definition of what would be considered a fixed magazine (and therefore not a “detachable magazine”) rifle subject to §12276.1. The BOF stated in the *Final Statement of Reasons for the 2000 Rulemaking* (emphasis added):

Comment

A1.12 - The SKS rifle with a detachable magazine cannot be changed without using a bullet tip as a tool, thus the regulations conflict with the specific listing of SKS rifles with detachable magazines in the Roberti-Roos Assault Weapons

<sup>7</sup> Penal Code §12280. (a) (1) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for four, six, or eight years.

<sup>8</sup> Title 11 California Code of Regulations 5469 (a)

Control Act. DOJ has no authority to contradict existing law.

#### Response

The Department disagrees with the comment because any magazine that requires the use of a bullet or any other tool for its removal is a **fixed magazine**, not a detachable magazine. The SKS with a true detachable magazine does not require a bullet or any other tool to remove and is a controlled assault weapon under Penal Code section 12276. Identifying a bullet as a tool allows for the proper categorization of an SKS with a fixed magazine. **Therefore, the SKS referred to in the comment has a fixed, not detachable magazine.**<sup>9</sup>

There is no requirement in either Penal Code §12276.1 or 11 C.C.R. 5469 that a rifle with a fixed magazine be **permanently altered** in any way. Quite the opposite is true, in fact. As outlined above, the BOF has clearly stated that rifles that required merely the use of a “bullet tip” to remove the magazine were nonetheless classified as having a fixed magazine.

Furthermore, if the intent of the legislature was to require that rifles be “**permanently altered**,” the statutory language would have said so. However, the statutory plain language of SB-23 makes no mention of “permanently altered” in §12276.1 (a)<sup>10</sup>.

In the *Final Statement of Reasons for the 2000 Rulemaking* the BOF itself reiterated that that modifications to semiautomatic rifles did not need to be “permanent:”

#### Comment

C5.04 - The firearm should have to be **permanently modified** so that it lacks the capacity to accept a detachable magazine or any of the offensive features in order for the Department to accept cancellation of a registration.

#### Response

The Department disagrees with the comment. Registration cancellation is not exclusive to modification of the firearm, **nor does the Department believe permanent modification** is required.<sup>11</sup>

(emphasis added)

---

<sup>9</sup> *Final Statement of Reasons for the 2000 Rulemaking*, <http://ag.ca.gov/firearms/regs/fsor.pdf>, Attachment A pg. 2.

<sup>10</sup> Compare that with the definitions applicable to “large-capacity magazines” passed concurrently in SB-23; §12276.1. (d) (2) “Capacity to accept more than 10 rounds” shall mean capable of accommodating more than 10 rounds, but shall not be construed to include a feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

<sup>11</sup> *Ibid.* Attachment A pg. 36



Paragraphs 3 and 4 of the “Important Notice” now purport to interpret both Penal Code §12276.1 (a) (1) and 11 C.C.R. 5469 by adding a new test of whether a modification to a rifle is **temporary** or **permanent** to the test of whether a rifle has a detachable magazine (and is therefore regulated by Penal Code §12276.1).

Paragraphs 3 and 4 of the “Important Notice” state:

Law enforcement officials, firearm dealers and the public should be aware that semiautomatic centerfire rifles that are **modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate** detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1). The Department intends to exercise its power pursuant to Penal Code section 12276.5(i) to adopt regulations as “necessary or proper to carry out the purposes and intent” of California law to ban assault weapons in the state.

Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or **permanently alter** the firearm so that it cannot accept a detachable magazine.

(emphasis added)

This is the **exact opposite** of what the BOF has earlier stated in the Final Statement of Reasons for the 2000 Rulemaking, and is in direct conflict with the law as written.

It is black letter law that an administrative agency may not alter, extend, limit, or enlarge a statute that it administers (*First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550.) The BOF’s attempt to add a new test of whether a rifle is “**temporarily incapable**” of accepting a detachable magazine (vs. “**permanently altered**”) is thus an impermissible attempt to enlarge the number and types of rifles controlled by Penal Code §12276.1 and §12280(a)(1)&(2) while directly contradicting existing law and previous BOF opinions.

Therefore, the “Important Notice” should be removed from BOF’s website and no further attempt to issue or enforce a new definition of rifles controlled by Penal Code §12276.1 should be attempted without opening a new APA compliant proposed regulation process.

**6. The petition raises an issue of considerable public importance requiring prompt resolution.**

Various estimates place the number of newly imported semiautomatic centerfire rifles during the past 18 months at between 30,000 to more than 50,000 rifles<sup>13</sup>. Owners and sellers of these rifles are now unclear whether they can simply follow the law **as written** in the Penal Code and the C.C.R. or whether they have to take **additional and expensive steps** to modify their rifles comply with the law. Some rifle owners already have been arrested and their cases have taken additional time and expense for both citizens and District Attorneys to resolve due to confusion caused by the BOF's underground regulation of Penal Code §12276.1 (a) (1) and 11 C.C.R. 5469.<sup>14</sup>

Of additional concern are the rifle owners who relied upon the 2000 Rulemaking to clarify whether they actually had to register their rifles as assault weapons based on the definition in 11 CCR, Section 5469 (a)<sup>15</sup>. Those who took the plain language of the law to mean that they did not have to permanently alter their rifle did not take the opportunity to register during the limited window of time in 2000, as they thought their rifles were exempt (since those rifles had a fixed magazine).

They now are in a constitutionally difficult position as they are either unintentional felons or are forced by the BOF's underground regulation to make permanent and expensive changes to their property (and be deprived thereof in contravention to their 5<sup>th</sup> Amendment rights and their right to be free from "*ex-post-facto*" law).

As outlined above, the "Important Notice" most certainly meets the criteria of an underground regulation. The "Important Notice" specifically and directly contradicts existing law. The "Important Notice" contradicts the BOF's own legitimately adopted regulations and previous statutory interpretation.

Furthermore, should the "Important Notice" be enforced, it contradicts individual rights under both the Federal Constitution and the Constitution of the State of California, and turns thousands of otherwise law-abiding California citizens into felons.

## 7. Attachments

Exhibit A hereto is a true and correct copy of the "Important Notice" available from: <http://ag.ca.gov/firearms/forms/pdf/AWpolicyrev4.pdf> .

## 8. Certification

I certify that I have submitted a copy of this petition and all its attachments to:

---

<sup>13</sup> See <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20060410/NEWS01/604100333>, and [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_2701-2750/ab\\_2728\\_cfa\\_20060829\\_231230\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2701-2750/ab_2728_cfa_20060829_231230_asm_floor.html)

<sup>14</sup> See for example *People v. Matthew Corwin*, Case No. GA069547, Los Angeles Superior Court

<sup>15</sup> Title 11 CCR 5469, "detachable magazine" means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool...

William Cid  
Director  
Bureau of Firearms  
4949 Broadway  
Sacramento, CA 95820  
916-263-4887

I certify that all of the above information is true and correct to the best of my knowledge.

/s/

\_\_\_\_\_  
Gene Hoffman, Jr.

July 11, 2007

\_\_\_\_\_  
Date

**ATTACHMENT A**

**BILL LOCKYER**  
*Attorney General*

*State of California*  
**DEPARTMENT OF JUSTICE**



FIREARMS DIVISION  
P.O. Box 160487  
Sacramento, CA 95816-0487  
Public: 916-263-4887

## **IMPORTANT NOTICE**

### **California Department of Justice Information Regarding the Sale/Possession of Unnamed AR- 15/AK 47 "Series" Firearms**

The Department of Justice (hereafter "the Department") has received numerous inquiries from the public and firearms industry personnel about the legality of various AR-15/AK 47 "series" style firearms that have not been named by the Department as "series" assault weapons. The Department believes that the public and law enforcement are best served by reference to the generic definition of assault weapons set forth in SB 23, rather than reliance upon a scheme of identifying assault weapons by name. Therefore, the Department will not update the list of "series" assault weapons.

SB 23 has banned the possession, sale and manufacture of firearms with the characteristics of assault weapons as defined in California Penal Code §12276.1 since January 1, 2000. A semiautomatic centerfire rifle with the capacity to accept a detachable magazine and any of the generic features listed in Penal Code §12276.1(a)(1) is contraband unless it was registered prior to January 1, 2001. It is illegal to manufacture, cause to be manufactured, distribute, transport, import, keep for sale, offer or expose for sale, give or lend such a weapon, except as permitted by law.

Law enforcement officials, firearm dealers and the public should be aware that semiautomatic centerfire rifles that are modified to be temporarily incapable of accepting detachable magazines, but can be restored to accommodate detachable magazines, are assault weapons if they have any of the features listed in §12276.1(a)(1). The Department intends to exercise its power pursuant to Penal Code section 12276.5(i) to adopt regulations as "necessary or proper to carry out the purposes and intent" of California law to ban assault weapons in the state.

Individuals who own firearms that meet the generic definition of assault weapons banned by SB 23 must do one of the following in order to comply with existing law: remove the features, sell the firearm (without the features), or permanently alter the firearm so that it cannot accept a detachable magazine.

It remains illegal to possess assault weapons banned by name (either in statute or regulation), unless those assault weapons are registered and possessed in accordance with state law. The time limits for registration, which depend on the make and model of the assault weapon, are set forth in Penal Code §12285.

Gene Hoffman  
The Calguns Foundation

Page 1  
"Capacity To Accept" Underground Regulation

2/25/2009

Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

Attention: Chapter 2 Compliance Unit

**Petition to the Office of Administrative Law**

Re: Bureau of Firearms "Capacity to accept" Underground Regulation

From: Gene Hoffman, Jr., Chairman, The Calguns Foundation

Date: February 26, 2007

**1. Identifying Information:**

Gene Hoffman, Jr.  
Chairman  
The Calguns Foundation  
3200 Bridge Parkway Suite 202C  
Redwood City, CA 94065  
650-275-1015  
hoffmang@calgunsfoundation.org

**2. State agency or department being challenged:**

California Department of Justice, Bureau of Firearms ("BoF")

**3. Description of the Underground Regulation and the Department Action By Which it was Issued**

BoF is promulgating an Underground Regulation as exemplified in a letter dated September 29, 2008 to Mr. Mike Badella of Dolorian Capital, Inc. of Fresno (Attachment A hereto) (hereinafter, the Capacity to Accept Letter or "CTA Letter") which is in response to Mr. Badella's letter dated September 25, 2008 (Attachment B hereto.) That letter states in pertinent part:

Regarding your question about using the "Prince 50 Kit" it is our understanding that such a device is designed to temporarily attach a magazine to a rifle, but allow the magazine to be removed from the rifle with the use of a tool. While there is no question that such a configuration would render the magazine of a rifle to be non-detachable, **it is unclear whether such a configuration negates the rifle's "capacity to accept" a detachable magazine.** Since there are no statutes,



Gene Hoffman  
The Calguns Foundation

Page 2  
“Capacity To Accept” Underground Regulation

2/25/2009

case law, or regulations concerning whether a rifle that is loaded with a fixed, removable magazine can also be considered to have the “capacity to accept a detachable magazine,” we are unable to declare rifles configured with the “Prince 50 Kit” or “bullet button” to be legal or illegal. To do so without regulation would create an illegal “underground regulation.”

*Attachment A*, para 5, (emphasis added.)

**4. The Legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable:**

The California Administrative Procedure Act, California Government Code §11400 et seq., defines “regulation” to mean “every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it . . . .” §11342.600.

Furthermore, “[a] regulation subject to the APA . . . 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 enforced or administered by the agency, or govern the agency’s procedure.’ ” *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (emphasis added, internal citations omitted).

*A) The “CTA Letter” is a Regulation*

The “CTA Letter” is a “regulation” within the meaning of §11342.600, as it attempts to supplement, interpret, revise, and make specific the validly adopted definition of the term “detachable magazine” in Penal Code §12276.1 and 11 C.C.R. 5469<sup>1</sup> by re-interpreting the phrase “capacity to accept a detachable magazine.” On knowledge and belief the “CTA Letter” materially reflects the standard of general application that BoF provides to District Attorneys throughout California when they inquire about the legality of various non-detachable magazine semiautomatic rifles.

*B) The “CTA Letter” Applies Generally*

---

<sup>1</sup> “While there is no question that such a configuration would render the magazine of a rifle to be non-detachable, **it is unclear whether such a configuration negates the rifle’s ‘capacity to accept’ a detachable magazine.**” (emphasis added).

Gene Hoffman  
The Calguns Foundation

Page 3  
“Capacity To Accept” Underground Regulation

2/25/2009

This rule applies generally, as it applies to all owners and sellers of semiautomatic centerfire rifles in the State, therefore satisfying the first element of *Tidewater*.<sup>2</sup>

*C) The “CTA Letter” Purports to Implement, Interpret and Make Specific California Penal Code § 12276.1*

The “CTA Letter” is an attempt to promulgate a new interpretation of the term “detachable magazine” for semiautomatic centerfire rifles that are modified to be incapable of accepting detachable magazines (and have features listed in 12276.1.) This is an attempt to force owners to alter the configuration of their rifle or face felony criminal prosecution.<sup>3</sup>

The interpretation as stated in the “CTA Letter” thus attempts to interpret<sup>4</sup> and make specific the definition of exactly which semiautomatic centerfire rifles are prohibited in the State by Penal Code §12276.1 and 11 C.C.R. 5469 by disingenuously inserting some heretofore unknown uncertainty in the definition of the APA defined term “**detachable magazine**” supposedly brought about by the phrase “**capacity to accept,**” therefore satisfying the second element of *Tidewater*.

No express APA exemption in Government Code §11340.9 applies to the “CTA Letter” and there are no express exemptions to the APA for the BOF in the relevant Penal Code sections.<sup>5</sup>

## 5. Legal Basis for why the “CTA Letter” is an underground regulation

### *A) Background*

Penal Code §12276.1 defines certain semiautomatic centerfire rifles as “assault weapons” that are prohibited from being manufactured, transported or possessed in California on penalty of a felony. One definition of “assault weapon” hinges on whether or not a semiautomatic centerfire rifle has a “detachable magazine” **and** any of a list of prohibited features (such as a pistol grip, telescoping stock or flash hider).

---

<sup>2</sup> The “CTA Letter” applies to all firearms manufacturers and sellers regulated by BoF, “This letter is in response to your request dated September 25, 2008 for advice about whether it would be legal to sell a particular rifle in California.” “*CTA Letter*”, para 1.

<sup>3</sup> “[I]t is unclear whether such a configuration negates the rifle’s ‘**capacity to accept a detachable magazine**.’ Since there are no statutes, case law, or regulations concerning whether a rifle that is loaded with a fixed, removable magazine can also be considered to have the ‘capacity to accept a detachable magazine,’ we are unable to declare rifles configured with the ‘Prince 50 Kit’ or ‘bullet button’ to be legal...” “*CTA Letter*”, para 5 (emphasis added).

<sup>4</sup> “[I]t is unclear whether such a configuration negates the rifle’s ‘**capacity to accept a detachable magazine**.’” “*CTA Letter*”, para 5 (emphasis added).

<sup>5</sup> AB-2728 which passed in 2006 and became effective January 1, 2007 removed the only unrelated exception to the APA that the BOF had in the Penal Code relating to firearms.

Gene Hoffman  
The Calguns Foundation

Page 4  
"Capacity To Accept" Underground Regulation

2/25/2009

However, such prohibited features are perfectly legal under Penal Code §12276.1 as long as the rifle has a fixed magazine (i.e., does not have a "detachable magazine").

BoF (then known as The Department of Firearms) conducted a regulatory process in compliance with the APA that resulted in the enactment of 11 C.C.R. 5469 (the "2000 Rulemaking".)

Part of this rulemaking process addressed the exact definition of fixed magazine vs. "detachable magazine", as will be shown *infra*.

In an attempt to make an end-run around the meaning of the law that defines the nature and scope of fixed magazines, the BoF recently promulgated an underground regulation that attempted to require permanence for any non detachable or "fixed magazine" rifle. Mr. Hoffman petitioned OAL in a letter dated July 11, 2007 to review that underground regulation. OAL accepted that petition for review and assigned it a reference number of CTU-07-0712-01. BoF subsequently withdrew the "permanence" underground regulation in a questionably worded certification letter to OAL from Attorney General Brown dated September 20, 2007.

While BoF appears to be complying with its certification that it will not illegally take the position that permanence is required for a fixed magazine, BoF has begun to promulgate a new interpretation of the phrase "capacity to accept a detachable magazine" that is in conflict with its own previous interpretations and is incorrect as a matter of law.

*B) The Current Definition of "Detachable Magazine" Is Not Altered By The Phrase "Capacity To Accept"*

**The Phrase "Non-detachable" Applies to Rifles, not to Magazines**

Regarding your question about using the "Prince 50 Kit" it is our understanding that such a device is designed to temporarily attach a magazine to a rifle, but allow the magazine to be removed from the rifle with the use of a tool. While there is no question that such a configuration would **render the magazine** of a rifle to be non-detachable, it is unclear whether such a configuration negates the **rifle's "capacity to accept" a detachable magazine**.

- **Attachment A** *[emphasis added]*

First, when BoF states, "there is no question that such a configuration would **render the magazine** of a rifle to be non-detachable," they misinterpret the actual test in the Penal Code. To wit, PC §12276.1(a)(1) states clearly that the "non-detachable" nature refers to rifles, not to magazines.

The statute reads in relevant part, "[a] semiautomatic, **centerfire rifle** *that* has the capacity to accept a detachable magazine." The word "*that*" refers to "a ... rifle" and **not**

Gene Hoffman  
The Calguns Foundation

Page 5  
"Capacity To Accept" Underground Regulation

2/25/2009

a magazine. Once the rifle no longer has the capacity to accept a "detachable magazine" as that term is defined in 11 C.C.R.<sup>6</sup>, it can no longer be defined as an "assault weapon" for purposes of the Penal Code.<sup>7</sup>

**The Penal Code and C.C.R are Quite Clear Regarding Capacity to Accept**

. . . it is unclear whether such a configuration negates the rifle's "capacity to accept" a detachable magazine. Since there are no **statutes**, case law, or **regulations** concerning whether a rifle that is loaded with a fixed, removable magazine can also be considered to have the "capacity to accept a detachable magazine," we are unable to declare rifles configured with the "Prince 50 Kit" or "bullet button" to be legal or illegal.

**Attachment A** *[emphasis added]*

Second, BoF states that it is "unclear whether such a configuration negates the rifle's 'capacity to accept' a detachable magazine." However, the Penal Code and the C.C.R. are both quite clear on the matter.

To ascertain the plain meaning of the statute, as modified by BoF's own APA-compliant rulemaking, one merely substitutes the appropriate definition from 11 C.C.R. 5469 into the text of PC §12276.1(a)(1) as follows:

**12276.1.** (a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:

- (1) A semiautomatic, centerfire rifle that has the capacity to accept **any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required.**<sup>8</sup> A bullet or ammunition cartridge is considered a tool. [and] any of the following..

*[Emphasis Added]*

Contrary to BoF's attempt to assert that there is no statute or regulation on point, there in fact is a statute **and** a validly adopted regulation directly on point.

A rifle correctly configured with a "Prince 50 Kit" or "bullet button" device simply does not have the capacity to accept any ammunition feeding device that can be removed

---

<sup>6</sup> Section 5469 defines "detachable magazine" as "any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required."

<sup>7</sup> Assuming that it is at least 30 inches long and does not have a fixed magazine capable of holding more than 10 rounds.

<sup>8</sup> 11 C.C.R. 5469.

Gene Hoffman  
The Calguns Foundation

Page 6  
"Capacity To Accept" Underground Regulation

2/25/2009

readily from the firearm with neither disassembly of the firearm action nor use of a tool being required.

**"Fixed Removable Magazines" were Contemplated by the 2000 Rulemaking**

Since there are no statutes, case law, or regulations concerning whether a rifle that is loaded with a **fixed, removable magazine** can also be considered to have the "capacity to accept a detachable magazine," we are unable to declare rifles configured with the "Prince 50 Kit" or "bullet button" to be legal or illegal.

**Attachment A** *[emphasis added]*

Third, the BoF's own 2000 Rulemaking that lead to 11 C.C.R. 5469 shows that BoF fully contemplated "fixed removable magazines", in the Final Statement of Reasons:

Comment

A1.12 - The SKS rifle with a detachable magazine cannot be changed without using a bullet tip as a tool, thus the regulations conflict with the specific listing of SKS rifles with detachable magazines in the Roberti-Roos Assault Weapons Control Act. DOJ has no authority to contradict existing law.

Response

The Department disagrees with the comment because any magazine that requires the use of a bullet or any other tool for its removal is a **fixed magazine**, not a detachable magazine. The SKS with a true detachable magazine does not require a bullet or any other tool to remove and is a controlled assault weapon under Penal Code section 12276. Identifying a bullet as a tool allows for the proper categorization of an SKS with a fixed magazine. **Therefore, the SKS referred to in the comment has a fixed, not detachable magazine.**

*[Emphasis added]*

If it is true that BoF cannot determine that a rifle with a "fixed removable magazine" is legal, then how can any member of the public determine if the SKS that they thought was legally owned is in fact an "SKS with detachable magazine" long prohibited by the Penal Code?

In reality, both the traditional SKS with a non-detachable magazine and a semiautomatic centerfire rifle with a "bullet button" device installed are functionally identical as to their magazine function. It is an underground regulation to attempt to claim that either or both are prohibited.

Gene Hoffman  
The Calguns Foundation

Page 7  
"Capacity To Accept" Underground Regulation

2/25/2009

Any attempt to assert that SKS rifles are prohibited would also be an **unadoptable regulation**, as the BoF does not have the authority to contradict existing law as BoF noted in the 2000 Rulemaking.

**To Declare a Rifle Legal is Not the Same as Promulgating an Underground Regulation**

Finally, BoF's assertion that to declare a rifle legal would amount to an underground regulation, is incorrect as a matter of law.

Government Code Section 11340.9(f) exempts any rule or interpretation that would be considered, "[a] regulation that embodies the only legally tenable interpretation of a provision of law." Correctly installed, a rifle equipped with a "Prince 50 Kit" or a "bullet button" device follows the only legally tenable interpretation of PC §12276.1(a)(1) and 11 C.C.R. 5469. Therefore, it is within the authority of BoF to declare via advisory letter that rifles so equipped are in fact not "assault weapons."

PC §12276.5 (c) requires the BoF to adopt rules and regulations that are necessary and proper to carry out the purposes and intent of the section. If the agency tasked with interpreting the statutory scheme finds the scheme "**unclear**," then how can District Attorneys, law enforcement agencies, and their personnel, courts, or the general public determine what is or is not an "assault weapon?"

**Conclusion**

The attempt by BoF to legally embellish upon its own validly adopted C.C.R. provisions is specifically prohibited by the APA as interpreted by the California courts – see *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 272 Cal.Rptr. 886.

**6. The petition raises an issue of considerable public importance requiring prompt resolution.**

Owners and sellers of these rifles are now unclear whether they can simply follow the law **as written** in the Penal Code and the C.C.R. or whether they have to take **additional and expensive steps** to modify their rifles comply with the law. Rifle owners have been and continue to be arrested and their cases have taken additional time and expense for both citizens and District Attorneys to resolve due to confusion caused by the BoF's underground regulation of the phrase "capacity to accept a detachable magazine" in Penal Code §12276.1 (a) (1) and 11 C.C.R. 5469.<sup>9</sup>

---

<sup>9</sup> The Calguns Foundation has provided, and continues to provide, technical and financial assistance to individual defendants who have been arrested for possession of assault rifles. In four (4) recent cases in Northern California (that the Foundation has been associated with) the charges were dismissed and/or the D.A. declined to file a case after it was pointed out that tools were required to remove the magazines from the rifles. In at least one case, an individual had to post a \$60,000 bond (\$6,000 in non-refundable cash to a



Of additional concern are the rifle owners who relied upon the 2000 Rulemaking to clarify whether they actually had to register their rifles as assault weapons based on the definition in 11 CCR, Section 5469 (a)<sup>10</sup>. Those who took the plain language of the law to mean that they did not have to alter their rifle did not take the opportunity to register during the limited window of time in 2000, as they thought their rifles were exempt (since those rifles had a fixed magazine as those are defined in the 2000 Rulemaking).

These people are now in a constitutionally difficult position as they are either unintentional felons or are forced by the BoF's underground regulation to make expensive changes to their property (and be deprived thereof in contravention to their 5<sup>th</sup> Amendment rights and their right to be free from "*ex-post-facto*" law).

As outlined above, the "CTA Letter" most certainly meets the criteria of an underground regulation. The "CTA Letter" specifically and directly contradicts existing law. The "CTA Letter" contradicts and attempts to confuse the BoF's own legitimately adopted regulations and previous statutory interpretation.

## 7. Attachments

Attached as Attachment A hereto is a true and correct copy of the "CTA Letter."  
Attached as Attachment B hereto is a true and correct copy of a letter from Mr. Mike Badella of Dolorian Capital, Inc. to BoF.

---

bail bondsman) to get out of jail on a felony charge of Assault Weapon possession. This was a case where the D.A. declined to even file criminal charges after the arrest, but the individual is still out the \$6,000 paid to the bondsman.

<sup>10</sup> Title 11 CCR 5469: "'detachable magazine' means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required. A bullet or ammunition cartridge is considered a tool..."

Gene Hoffman  
The Calguns Foundation

Page 9  
"Capacity To Accept" Underground Regulation

2/25/2009

### **8. Certification**

I certify that I have submitted a copy of this petition and all its attachments to:

Wilfredo Cid  
Director  
Bureau of Firearms  
4949 Broadway  
Sacramento, CA 95820  
916-263-4887

I certify that all of the above information is true and correct to the best of my knowledge.

\_\_\_\_\_  
Gene Hoffman, Jr.

February 25, 2009  
\_\_\_\_\_  
Date

Gene Hoffman  
The Calguns Foundation

Page 10  
"Capacity To Accept" Underground Regulation

2/25/2009

## **ATTACHMENT A**

EDMUND G. BROWN JR.  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



DIVISION OF LAW ENFORCEMENT  
P.O. BOX 160487  
SACRAMENTO, CA 95816-0487  
(916) 263-0699  
Facsimile: (916) 263-0676

September 29, 2008

Mr. Mike Badella  
Dolorian Capital, Inc.  
191 West Shaw Ave., Suite 205-A  
Fresno, CA 93704

Re: Request for Approval of HAS-15 Rifle

Dear Mr. Badella:

This letter is in response to your request dated September 25, 2008 for advice about whether it would be legal to sell a particular rifle in California.

The California Department of Justice (DOJ) has never had the legal duty or authority to *approve* a rifle, shotgun, or pistol for sale in the state on the basis that the firearm is not an assault weapon. At one time, DOJ had the legal authority pursuant to Section 12276.5, to declare a firearm to be a "series" assault weapon, or to obtain a court order that a firearm was an assault weapon. (See *Harrott v. County of Kings* (2001) 25 Cal.4<sup>th</sup> 1138, 1155.) However, that authority was revoked by statute in 2007. (Stats. 2006, ch. 793 (AB 2728).) Under current law, DOJ has the duty to prepare the Assault Weapons Guide and distribute the guide to law enforcement. (§ 12276.5, subd. (a).) DOJ's duty is essentially administrative. Consequently, determining what types of firearms are prohibited pursuant to Section 12276.1 is for the courts. (*Burden v. Snowden* (1992) 2 Cal.4<sup>th</sup> 556, 562.)

An agency is prohibited from adopting a regulation -- an interpretation of the law intended for general application -- unless that regulation has been formally adopted pursuant to the Administrative Procedures Act (APA). (Gov. Code, §§ 11340.5, subd. (a), 11342.600.) An interpretation of the law intended for general application that is not adopted in compliance with the APA is an illegal "underground regulation" that is entitled to no weight by the courts of the state. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4<sup>th</sup> 575, 581-582.) Rather, an interpretive policy is void when promulgated in violation of the APA. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571.)

Although DOJ cannot adopt general policies about whether a class or type of firearm is an assault weapon without complying with the APA, we can provide you with general information about California law governing assault weapons. A semiautomatic centerfire rifle with the "capacity to accept a detachable magazine" and any of a number

Mr. Badella

September 29, 2008

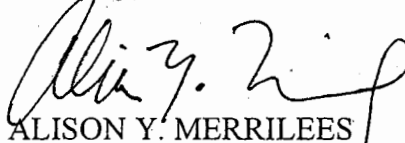
Page 2

of specified features, such as a "pistol grip that protrudes conspicuously below the action of the weapon," is an "assault weapon" under California law. (§ 12276.1, subd. (a).) DOJ regulations clarify that a "detachable magazine" is "any ammunition feeding device that can be removed with neither disassembly of the action nor use of a tool being required." (Cal. Code Regs., tit. 11, §978.20, subd. (b).)

Regarding your question about using the "Prince 50 Kit," it is our understanding that such a device is designed to temporarily attach a magazine to a rifle, but allow the magazine to be removed from the rifle with the use of a tool. While there is no question that such a configuration would render the magazine of a rifle to be non-detachable, it is unclear whether such a configuration negates the rifle's "capacity to accept" a detachable magazine. Since there are no statutes, case law, or regulations concerning whether a rifle that is loaded with a fixed, removable magazine can also be considered to have the "capacity to accept a detachable magazine," we are unable to declare rifles configured with the "Prince 50 Kit" or "bullet button" to be legal or illegal. To do so without a regulation would create an illegal "underground regulation."

I hope this information is helpful. Please feel free to contact me again if you need further clarification.

Sincerely,



ALISON Y. MERRILEES  
Deputy Attorney General  
Bureau of Firearms

For EDMUND G. BROWN JR.  
Attorney General

Gene Hoffman  
The Calguns Foundation

Page 11  
2/25/2009  
"Capacity To Accept" Underground Regulation

**ATTACHMENT B**





September 25, 2008

California Department of Justice Bureau of Firearms  
Alison Merrilees  
POB 160487  
Sacramento, CA 95816

We are sales representatives for High Standard Manufacturing Company, Inc. We would like to start selling a California legal variant of the High Standard HSA-15 rifle. We are planning on producing the rifle with a fixed 10 round magazine utilizing the Prince50 kit. I have attached a copy of the Prince50 Designs Instructions.

Would this rifle be legal to sale in the state of California? If not, what would it take to make it a California legal rifle?

Thank you for your time,

Mike Badella  
Dolarian Capital, Inc.  
191 West Shaw Avenue  
Suite 205-A  
Fresno, CA 93704  
559-243-0117 x207  
559-243-0126 FAX

---

Corporate  
191 W. Shaw Avenue  
Suite 205-A  
Fresno, CA 93704

Eastern Europe  
1, Vrbitskogo Str  
Kyiv 01021  
Ukraine

EDMUND G. BROWN JR.  
Attorney General



State of California  
DEPARTMENT OF JUSTICE



DIVISION OF LAW ENFORCEMENT  
P.O. BOX 160987  
SACRAMENTO, CA 95816-0987  
(916) 263-0699  
Facsimile (916) 263-0676

November 3, 2008

Mr. Edward J. Jagels  
District Attorney  
Kern County  
1215 Truxton Ave.  
Bakersfield, CA 93301

Re: Request for Guidance and Clarification about on Assault Weapons

Dear District Attorney Jagels:

This letter is in response to your written request dated August 12, 2005, for "guidance from the BOF on how to determine whether firearms may be 'assault weapons' based on the features they possess [sic]." You also requested clarification from our office about whether a semi-automatic centerfire rifle would meet the definition of "assault weapon" set forth in California Penal Code Section<sup>1</sup> 12276.1, subdivision (a) if certain modifications were made to the rifle, or certain accessories, such as the "Prince 50 Kit," "bullet button," or "MonsterMan grip," were attached to the rifle.

The California Department of Justice has a long history of cooperating with law enforcement agencies throughout the state, including those in Kern County. The Bureau of Firearms recently established a regional office in Fresno. So far this year, our special agents in the Fresno office have seized more than 125 firearms (including seven assault weapons) and almost 20,000 round of ammunition from felons and other persons who are prohibited by law from possessing both firearms and ammunition. We have also worked with your office to prosecute individuals who have unlawfully possessed, used and sold firearms in Kern County. Your office recently filed felony charges based upon a Bureau of Firearms investigation alleging that the defendant, a felon, illegally possessed an assault weapon in violation of Section 12280, subdivision (b), a firearm in violation of Section 12021, subdivision (a), and ammunition in violation of Section 12316, subdivision (b). A felony arrest warrant has been issued in that case.

However, the California Department of Justice (DOJ) has never had the legal duty or authority to *approve* a rifle, shotgun, or pistol for sale in the state on the basis that the firearm is not an assault weapon. At one time, DOJ had the legal authority pursuant to Section 12276.5, to declare a firearm to be a "series" assault weapon, or to obtain a court order that a firearm was an assault weapon. (See *Harratt v. County of Kings* (2001) 25

<sup>1</sup>All statutory references are to the California Penal Code, unless otherwise indicated.

Mr. Jagels  
November 3, 2008  
Page 2

Cal.4<sup>th</sup> 1138, 1155.) However, that authority was revoked by statute in 2007 (Stats. 2006, ch. 793 (AB 2728).) Under current law, DOJ has the duty to prepare the Assault Weapons Guide and distribute the guide to law enforcement. (§ 12276.5, subd. (a) ) DOJ's duty is essentially administrative. Consequently, determining what types of firearms are prohibited pursuant to Section 12276.1 is for the courts. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

Explaining your need for guidance from the Bureau of Firearms, you mention a letter written by Deputy Attorney General (DAG) Nancy Palmieri that "approved" the DSA Arms model SA 58 "as not being 'an assault weapon under California law.'" You describe the letter as being the basis for a "policy" of the Department of Justice that firearms similar to the DSA SA 58 are not assault weapons.

A letter from a Deputy Attorney General cannot establish a DOJ "policy" that a particular type of firearm is, or is not, an assault weapon. An agency is prohibited from adopting a regulation -- an interpretation of the law intended for general application -- unless that regulation has been formally adopted pursuant to the Administrative Procedures Act (APA) (Gov. Code, §§ 11340.5, subd. (a), 11342.600 ) An interpretation of the law intended for general application that is not adopted in compliance with the APA is an illegal "underground regulation" that is entitled to no weight by the courts of the state. (*Morillon v. Royal Packing Co.* (2000) 22 Cal 4th 575, 581-582.) Rather, an interpretive policy is void when promulgated in violation of the APA. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal 4<sup>th</sup> 557, 571.)

In response to your request for "guidance from the BOF on how to determine whether firearms may be 'assault weapons' based on the features they possess [sic]," the Bureau of Firearms simply relies upon the state's statutes, regulations, and published appellate court decisions to determine whether an individual firearm is an assault weapon. Although we cannot adopt general policies about whether a class or type of firearm is an assault weapon, our office is happy to provide you with general information about California law governing firearms, including assault weapons. The Bureau of Firearms can also provide expert testimony about whether an individual firearm is an assault weapon in a court proceeding. An opinion rendered in a case-specific adjudication is not a "regulation" or policy that is subject to the APA. (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4<sup>th</sup> at p. 572.) Such an opinion would not be dispositive of the legal question whether a particular firearm is, in fact, an "assault weapon" because that question can only be answered by a finder of fact in a trial court (See *Harrott v. County of Kings, supra*, 25 Cal.4<sup>th</sup> at pp. 1155 ["And, of course, the Attorney General's identification of a particular firearm as a series assault weapon would, in an appropriate case, be subject to challenge. . . . [T]he Attorney General now asserts that the rifle is an AK 47 . . . . Therefore, the case should be remanded to the trial court for a resolution of this question "].)

Regarding your question about the "Prince 50 Kit" and "bullet button," it is our understanding that those devices are designed to temporarily attach a magazine to a rifle.

Mr. Jugels  
November 3, 2008  
Page 3

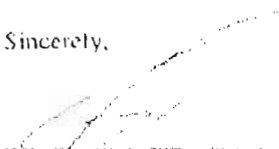
but allow the magazine to be removed from the rifle with the use of a tool. While there is no question that such a configuration would render the magazine of a rifle to be non-detachable, it is unclear whether such a configuration negates the rifle's "capacity to accept" a detachable magazine. Since there are no statutes, case law, or regulations concerning whether a rifle that is loaded with a fixed, removable magazine can also be considered to have the "capacity to accept a detachable magazine," we are unable to declare rifles configured with the "Prince 50 Kit" or "bullet button" to be legal or illegal. To do so without a regulation would create an illegal "underground regulation."

Regarding the "MonsterMan Grip," you state that this grip is not a pistol grip because it "does not permit a 'pistol-style grasp' and instead permits only a 'rifle style grasp' on AR or AK-type firearms." It is unclear what clarification you are seeking. If the MonsterMan Grip is truly not a pistol grip, then attaching it to a semiautomatic centerfire rifle that has the capacity to accept a detachable would not render such a rifle an assault weapon. Again, it should be noted that the Department does not have the authority to approve (or disapprove) such items for use in California.

Our staff continues to be available as a law enforcement resource for your office. If your staff has an inquiry about the law, your staff may contact Deputy Attorney General Alison Merrilees at (916) 274-6136. If your staff needs to identify a particular model of firearm or determine whether that firearm meets the definition of an "assault weapon" under California law, or if your office needs expert testimony in court, your staff may contact our firearms expert, Special Agent Blake Graham, at (916) 274-1025. If your office needs assistance with a criminal investigation, please contact DOJ Special Agent Supervisor Lee Carenga at the Bureau of Firearms regional office in Fresno at (559) 457-5024. We look forward to continuing our cooperative relationship with the Kern County District Attorney's office to enforce state firearms laws in California.

I hope this information is helpful. Please feel free to contact me again if you need further clarification.

Sincerely,



WILFREDO CID, Chief  
Bureau of Firearms

For EDMUND G. BROWN JR.  
Attorney General

## DECLARATION OF SONOMA COUNTY SHERIFF STEVE FREITAS

I, STEVE FREITAS, hereby declare as follows:

1. I am the current elected Sheriff-Coroner of the County of Sonoma, and assumed that office on January 3, 2011. Prior to that day, I had been employed as a peace officer with the Sonoma County Sheriff's Office for approximately 20 years, during which time I also served in the capacity as the Chief of Police of the Town of Windsor, California. During my 27-year career, I have worked in various agencies in both detention administration and law enforcement in several different capacities. The matters set forth below are true and correct based on my own personal experiences and opinions, unless otherwise indicated, and if called to testify in this action I could and would competently testify thereto.
2. Under current law, the presence of a "flash suppressor" on a firearm is one indicia of an illegal assault weapon under California's Assault Weapons Control Act. Per California regulations, the definition of a "flash suppressor" is "[a]ny device designed, intended, or that functions to perceptibly reduce or redirect muzzle flash from the shooter's field of vision. (See 11 C.C.R. §5469(b).) Based on my review of this law, my investigation of the issues with Sheriff's Office weapons experts, and my general experience in law enforcement, I have developed the following opinions.
3. In my opinion, it is very difficult for law enforcement officers in the field to determine whether a device attached to a firearm meets the definition of a "flash suppressor." This is because the definition of "flash suppressor" has no objective standard or measurement that can be used in the field to determine whether a device is an illegal "flash suppressor." In addition, "flash suppressors" can easily be confused with very similar-looking devices attached to the end of a rifle barrel that are not illegal, such as muzzle-brakes, muzzle-compensators, or harmonic balancers.
4. In my opinion, to determine whether a device attached to a weapon is an illegal "flash suppressor" or instead a legal device (such as a muzzle-brake) creates profound challenges to peace officers in the field. The differences between illegal "flash suppressors" and legal devices are fine distinctions, which require thorough examination, research into manufacturers' specifications, and/or firing the weapon – which practices are not available to officers in the field.
5. It is my opinion that there is no general training my Office could conduct that would assist Sheriff's Deputies in distinguishing between a legal muzzle brake and an illegal flash suppressor with certainty.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed on 5/22, 2012, in the City of Santa Rosa, County of Sonoma, State of California.

  
\_\_\_\_\_  
STEVE FREITAS