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6

7

8 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN FRANCISCO / OAKLAND DIVISION

10

MARK AARON HAYNIE, THE
11 CALGUNS FOUNDATION, INC.,
and THE SECOND AMENDMENT
12 FOUNDATION, INC.,

13

Plaintiffs,

14

vs.

15

KAMALA HARRIS, Attorney General
16 of California (in her official capacity)
and CALIFORNIA DEPARTMENT
17 OF JUSTICE, and DOES 1 TO 20,

18

Defendants.

19

20

21

22 I, GENE HOFFMAN, declare as follows:

23

1. I am the Chairman and co-founder of The Calguns Foundation (CGF) a party
24 in this action.

25

2. CGF (www.calgunsfoundation.org) is a 501(c)3 nonprofit organization serving
26 its members by providing Second Amendment-related education, strategic
27 litigation and defending innocent California gun owners from improper
28 prosecution.

Case No.: CV 10 1255 SI

**DECLARATION OF GENE
HOFFMAN OPPOSING
DEFENDANTS' MOTION TO
DISMISS**

Date: June 10, 2011

Time: 9:00 a.m.

Courtroom: 10

Judge: Honorable Susan Illston

Trial Date: N/A

Action Filed: March 25, 2010

- 1 3. CGF works to educate the general public and the government in an ongoing
2 effort to protect the rights of individuals to acquire, own and lawfully use
3 firearms in California.
- 4 4. The formation of CGF was partially inspired by a desire to counteract a
5 disinformation campaign orchestrated by the California Department of
6 Justice (DOJ) in response to gun owners realizing the implications of the
7 California Supreme Court Decision in *Harrot v. County of Kings* and the
8 expiration of the Federal Assault Weapons laws.
- 9 5. In late 2005, various individuals and licensed gun stores began importing
10 into California AR pattern rifles and the receivers for them.
- 11 6. In response to inquiries about the legality of importing and possessing
12 certain AR and AK pattern rifles and receivers, DOJ began replying in their
13 official letters that while THEY were of the opinion that these rifles were
14 legal, local District Attorneys might disagree and prosecute anyway. True
15 and correct copies of these letter are attached as Exhibit A and they all follow
16 a similar pattern of declaring a certain gun part (receiver) legal to import
17 into California and then warning the recipient that California's 58 District
18 Attorneys may have a different opinion that could result in prosecution. See:
- 19 i. December 12, 2005 letter from DOJ to Ms. Amanda Star
20 rendering an opinion about the legality of a Stag-15 Lower
21 receiver but warning that local prosecutors may disagree and
22 prosecute accordingly.
 - 23 ii. January 18, 2006 letter from DOJ to BST Guns also opining out
24 the legality of firearms, but giving the same warning the 58
25 county prosecutors could potentially prosecute anyway.
 - 26 iii. December 28, 2005 letter from DOJ to Matthew Masuda. Same
27 pattern.
 - 28 iv. December 27, 2005 letter from DOJ to Christopher Kjellberg.

- 1 Same pattern.
- 2 v. December 27, 2005 letter from DOJ to Kirk Haley. Same
- 3 pattern.
- 4 vi. December 28, 2005 letter from DOJ to Mark Mitzel. Same
- 5 pattern.
- 6 vii. December 28, 2005 letter from DOJ to Jason Paige. Same
- 7 pattern.
- 8 7. From February to May 2006, the California Department of Justice issued a
- 9 series of memorandums that were obtained as part of a California Public
- 10 Records Request. A true and correct copy of that disclosure is Attached as
- 11 Exhibit B. The memorandums are remarkable because:
- 12 a. The Department of Justice made changes to the various versions of
- 13 this memorandum due to Jason Davis, then an attorney for the
- 14 National Rifle Association, pointing out legal flaws in the various
- 15 iterations.
- 16 b. In all versions of the memorandum, the Department of Justice directly
- 17 conflicted the previously published Assault Weapons Information
- 18 Guide by stating that owners of a firearm with features had to,
- 19 “permanently alter the firearm so that it cannot accept a detachable
- 20 magazine.” “Permanent alteration” is not required in the Penal Code,
- 21 the Assault Weapons Information Guide, or the then existing
- 22 California Code of Regulations 11 C.C.R. 5469.
- 23 8. On or about May 10, 2006, DOJ counsel Alison Merrilees informed a member
- 24 of the public that the DOJ wished to create a test case, “[w]e are eagerly
- 25 awaiting a test case on this, because we think we’ll win.” A true and correct
- 26 copy of the email that was obtained as part of a Public Records Act request is
- 27 attached as Exhibit C.
- 28 9. In May 2006, DOJ issued an internal memo to phone staff that stated, “It is

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

13 10. On or about June 6, 2006, DOJ issued a Notice of Proposed Rulemaking. The
 14 proposed amendment would have “define[d] a sixth term, “capacity to accept
 15 a detachable magazine”, as meaning “capable of accommodating a detachable
 16 magazine, but shall not be construed to include a firearm that has been
 17 permanently altered so that it cannot accommodate a detachable magazine.”
 18 A true and correct copy of the notice is attached as Exhibit E.

19 11. On or about November 1, 2006, DOJ issued a “Text of Modified Regulations”
 20 The updated text attempted to define “detachable magazine” as “currently
 21 able to receive a detachable magazine or readily modifiable to receive a
 22 detachable magazine” and had other “permanency” requirements. A true and
 23 correct copy of the notice is attached as Exhibit F.

24 12. I allege on information and belief, DOJ did not submit the Modified
 25 Regulations to the Office of Administrative Law (“OAL”) and thus the 2006
 26 Rulemaking did not take effect.

27 13. On or about July 11, 2007, I petitioned the OAL to have them find that the
 28 continued publication of the “Important Notice” Memorandum after the 2006

1 Rulemaking that was not submitted to OAL was an “Underground
2 Regulation.” See Exhibit G.

3 14. On or about September 11, 2007, OAL accepted my petition. See Exhibit H.

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

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

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

17 “Since there are no statutes, case law, or regulations concerning
18 whether a rifle that is loaded with a fixed, removeable magazine can
19 also be considered to have the ‘capacity to accept a detachable
20 magazine,’ we are unable to declare rifles configured with the ‘Prince
21 50 Kit’ or ‘bullet button’ to be legal or illegal.”

22 See Exhibit J, with special attention to Attachment A, which is the letter
23 dated September 29, 2008.

24 18. On or about November 3, 2008, DOJ replied to Kern County DA Edward
25 Jagels:

26 “Since there are no statutes, case law, or regulations concerning
27 whether a rifle that is loaded with a fixed, removeable magazine
28 can also be considered to have the ‘capacity to accept a

1 detachable magazine,' we are unable to declare rifles configured
2 with the 'Prince 50 Kit' or 'bullet button' to be legal or illegal."

3 A true and correct copy of this letter is attached as Exhibit K. The letter is
4 hard to read due to multiple copies. If discovery proceeds in this matter, I
5 would expect to obtain a cleaner copy.

6 19. Now, not only is DOJ claiming it has no duty to issue a clarifying bulletin to
7 the State's District Attorneys and Law Enforcement Community, on this
8 issue; they have apparently engaged in a pattern of disinformation and
9 confusion on the issue of whether a rifle fitted with a device that makes it
10 incapable of accepting a detachable magazine is legal to own in California.
11 In other words, it could be argued that DOJ's firearms division has a
12 separate and distinct duty to clear up the confusion they have created,
13 separate and apart from any constitutional, statutory and/or common law
14 duty.

15 20. The Calguns Foundation has defended many incidents of law abiding gun
16 owners and retailers whose firearms were either seized, the individual was
17 arrested and/or charged with violating Assault Weapons Control Act.

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

21 b. In November 2008, John Crivello had a semiautomatic centerfire rifle
22 with a bullet button seized from his home in Santa Cruz, California by
23 the Santa Cruz Police Department. Counsel provided by CGF educated
24 the Santa Cruz District Attorney's office. Counsel to CGF was advised
25 that DOJ stated that it was unclear whether the bullet button was
26 legal but that the District Attorney should file anyway. The District
27 Attorney (ADA Dave Genochio and/or Charlie Baum) dropped charges
28 and the firearm was returned to Mr. Crivello. CGF spent \$645.00

- 1 defending Mr. Crivello.
- 2 c. On or about November 3, 2009, Deputy J. Finley of Orange County
- 3 Sheriff's Department seized a bullet button equipped Stag Arms AR-15
- 4 style firearm from Stan Sanders. CGF counsel was engaged to explain
- 5 the legality of the firearm to the Orange County Sheriff's Department
- 6 and the firearm was subsequently returned to Mr. Sanders. The
- 7 Orange County Training Bulletin was issued partially in response to
- 8 this incident. CGF spent \$650.00 defending Mr. Sanders.
- 9 d. On or about March 30, 2010, Robert Wolf was arrested by the
- 10 Riverside County Sheriff's Department for possession of a
- 11 semiautomatic centerfire rifle with a "Prince 50 Kit." CGF counsel
- 12 intervened and had the case dismissed on or about November 11, 2010
- 13 with the firearm subsequently returned to Mr. Wolf. CGF spent
- 14 \$5975.00 defending Mr. Wolf.
- 15 e. In May of 2010, Brendan Richards was arrested, charged, and held in
- 16 jail in Sonoma County for six days before he was released on bail for
- 17 possession of a semiautomatic center-fire pistol with a bullet button.
- 18 All charges were dropped on or about September 9, 2010. To date, CGF
- 19 has spent \$11,224.86 defending Mr. Richards.¹
- 20 f. Confusion about the legality of semiautomatic centerfire rifle with a
- 21 bullet buttons resulting from DOJ's misinformation continues. On or
- 22 about March 29, 2011, the Cotati Police Department seized a
- 23 semiautomatic center-fire rifle with a bullet button from Max
- 24 Horowitz. The Cotati Police Department has forwarded a police report
- 25 to the Sonoma County DA's office. CGF counsel has been retained to
- 26 defend Mr. Horowitz.

27

28 ¹ There is a federal civil rights case in the process of being filed and a Notice of Related case will be filed and an Administrative Motion to Relate will be filed shortly in this matter.

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 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

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 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 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 24th, 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 9th 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, please visit our new

websites at www.stopthenra.com and www.nrablacklist.com

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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

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 9th 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/>.

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

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. 5469.¹

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*.²

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.³

¹ “**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).

² 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.

³ “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 specific⁴ 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.⁵

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

A) Background

In 1999, the California Legislature passed SB-23⁶ 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

⁴ “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).

⁵ 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.

⁶ 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

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.⁷

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.⁸

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

⁷ 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.

⁸ 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.**⁹

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)¹⁰.

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.¹¹

(emphasis added)

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

¹⁰ 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.

¹¹ *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 rifles¹³. 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. 5469.¹⁴

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)¹⁵. 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 5th 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:

¹³ 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

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

¹⁵ 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.4th 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

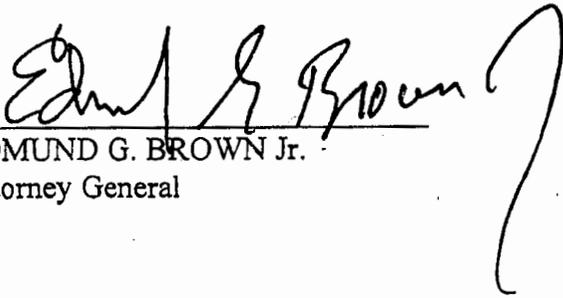
CERTIFICATION

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

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. 5469.¹

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*.²

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.³

¹ “**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).

² 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.

³ “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 specific⁴ 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.⁵

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

A) Background

In 1999, the California Legislature passed SB-23⁶ 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

⁴ “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).

⁵ 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.

⁶ 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

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.⁷

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.⁸

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

⁷ 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.

⁸ 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.**⁹

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)¹⁰.

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.¹¹

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

¹⁰ 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.

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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).

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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.

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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 rifles¹³. 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. 5469.¹⁴

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)¹⁵. 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 5th 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.

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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> .

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

¹³ 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

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

¹⁵ 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

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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. 5469¹ 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

¹ “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*.²

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.³

The interpretation as stated in the “CTA Letter” thus attempts to interpret⁴ 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.⁵

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).

² 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.

³ “[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).

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

⁵ 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.⁶, it can no longer be defined as an "assault weapon" for purposes of the Penal Code.⁷

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.**⁸ 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

⁶ 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."

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

⁸ 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. 5469.⁹

⁹ 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

Gene Hoffman
The Calguns Foundation

Page 8
“Capacity To Accept” Underground Regulation
2/25/2009

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)¹⁰. 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 5th 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.

¹⁰ 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
2/25/2009
"Capacity To Accept" Underground Regulation

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.4th 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.)

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.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.4th 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].¹ 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 Section¹ 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

¹All statutory references are to the California Penal Code, unless otherwise indicated.

Mr. Jagels
November 3, 2008
Page 2

Cal.4th 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 4th 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.4th 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.4th 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

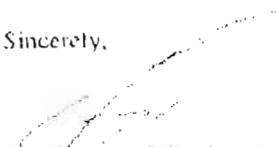
but allow the magazine to be removed from the rifle with the use of a tool. While there is no question that such a configuration would render the magazine of a rifle to be non-detachable, it is unclear whether such a configuration negates the rifle's "capacity to accept" a detachable magazine. Since 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