



Calgunsfoundation.org

Defending California  
Firearm rights

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February 6, 2009

Alison Merrilees  
Deputy Attorney General  
Division of Law Enforcement  
Department of Justice  
4949 Broadway  
Sacramento, CA 95820  
[Alison.Merrilees@doj.ca.gov](mailto:Alison.Merrilees@doj.ca.gov)

RE: Underground Regulation – “Capacity to accept”  
VIA EMAIL AND FEDEX

Dear Mrs. Merrilees:

I write to you in the hope that this matter will not end up before the Office of Administrative Law, as it appears that the California Bureau of Firearms (henceforth “BoF”) has again been promulgating an “underground regulation.”

Specifically, it appears that the BoF has attempted to create a new underground regulation by attempting to interpret 11 C.C.R. 5469 in a fashion that creates uncertainty around the clearly defined term “capacity to accept.”

Here is a quote from your letter (attached as Exhibit 1) and dated September 29, 2008 to Mr. Mike Badella of Dolorian Capital, Inc. of Fresno:

“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 regulation would create an illegal ‘underground regulation.’”

- **Exhibit 1**, [emphasis added]

Though it is ironic that you now claim to be attempting to comply with the Administrative Procedures Act<sup>1</sup> you are, in fact, attempting to promulgate a new interpretation of the term "capacity to accept a detachable magazine" in direct contravention thereof. Your paragraph above is incorrect as a matter of law in a number of areas. These are outlined below.

**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.

**- Exhibit 1 [emphasis added]**

First, when you state "there is no question that such a configuration would **render the magazine** of a rifle to be non-detachable," you 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** a magazine. Once the rifle no longer has the capacity to accept a "detachable magazine" as that term is defined in 11 C.C.R.<sup>2</sup>, it can no longer be defined as an "assault weapon" for purposes of the Penal Code.<sup>3</sup>

Therefore, the correct response would be:

"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. **There is no question that such a configuration would render the weapon into a rifle with a non-detachable magazine.**

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<sup>1</sup> See "Certification" from Attorney General Edmund Brown, dated September 20, 2007, and attached hereto as Exhibit 2.

<sup>2</sup> As you know, Section 5469 defines "detachable magazine" as "any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required."

<sup>3</sup> Assuming that it is at least 30 inches long and does not have a magazine capable of holding more than 10 rounds.

**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.

**Exhibit 1** *[emphasis added]*

You are incorrect when you state that it is "unclear whether such a configuration negates the rifle's 'capacity to accept' a detachable magazine." Indeed, the Penal Code and the C.C.R. are both quite clear on the matter.

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

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

- (1) A semiautomatic, centerfire rifle that has the capacity to accept **any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required.**<sup>4</sup> A bullet or ammunition cartridge is considered a tool. [and] any of the following[..]

*[Emphasis Added]*

Contrary to your 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. Your claim otherwise is disingenuous.

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

Therefore, the correct response to the inquiry would be:

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<sup>4</sup> *Ibid.*

**Since there are statutes and regulations directly on point 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 able to declare rifles configured with the 'Prince 50 Kit' or 'bullet button' to be legal.**

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

Third, the BoF's own 2000 Rulemaking that lead to 11 C.C.R. 5469 shows that your office 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 your Department of Justice 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 an unlisted AR-pattern 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.

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.

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

To your final assertion that to declare a rifle legal would amount to an underground regulation, you are again incorrect on 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."

Furthermore, 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. As it is clear that rifles (of the correct length and magazine capacity) which are properly equipped with a "Prince 50 Kit" or "bullet button" device do not meet the definition of "assault weapons" from the Penal Code and C.C.R., it is the duty of BoF to so clarify. Otherwise, the BoF may be undermining the Penal Code by making it unconstitutionally vague as applied and enforced. If the agency tasked with interpreting the statutory scheme finds the scheme "unclear," then how can District Attorneys, law enforcement agencies and their personnel, or the general public determine what is or is not an "assault weapon?"

Finally 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.

**Conclusion**

We would prefer to resolve this directly with your office. You may simply supply us with a letter of clarification that the "capacity to accept" language is fully constrained by the definition of "detachable magazine" in 11 C.C.R. 5469, and that rifles with correctly installed "Prince 50 Kits" or "bullet button" devices do not meet the definition of an "assault weapon."<sup>5</sup>

We suggest a template exactly like your letter to Mr. Chuck Michel dated January 7, 2002 (attached as Exhibit 3), regarding the legality of the magazine-fixing device for the DS Arms SA-58. We also suggest that such a letter contain warnings about incorrectly using the "Prince 50 Kit" - as there are certain modes that clearly fit the definition of "assault weapon" while the "bullet button" device does not have the same failure modes. We stand ready to make available exemplars and, if necessary, an appropriate demonstration of the function of the magazine fixing devices in question.

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<sup>5</sup> Obviously this is true as long as such rifles meet the overall length and total round capacity requirements elsewhere in the Penal Code.

Mrs. Alison Merrilees  
February 6, 2009  
Page -6-

Thank you for your prompt attention to this matter. Should we not be able to come to a timely agreement to settle this issue or we don't hear back from you before February 20, 2009, we will ask for a determination from OAL. Please do not hesitate to contact me if I can be of assistance in helping you favorably resolve this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Gene Hoffman, Jr.', with a long, sweeping horizontal line extending to the right.

Gene Hoffman, Jr.  
Chairman  
The Calguns Foundation

cc: Wilfredo Cid, Chief – Bureau of Firearms  
Don Kilmer, Counsel  
Kevin Thomason, Counsel

Enclosures (3)

EDMUND G. BROWN JR.  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



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

September 29, 2008

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

Re: Request for Approval of HAS-15 Rifle

Dear Mr. Badella:

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

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

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

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


Mr. Badella  
September 29, 2008  
Page 2

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

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

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

Sincerely,

  
ALISON Y. MERRILEES  
Deputy Attorney General  
Bureau of Firearms

For EDMUND G. BROWN JR.  
Attorney General





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

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Susan Lapsley  
Director

September 21, 2007

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

Re: CTU-07-0712-01

Dear Mr. Hoffman:

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

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

Sincerely,

A handwritten signature in black ink that reads "Susan Lapsley".

Susan Lapsley  
Director

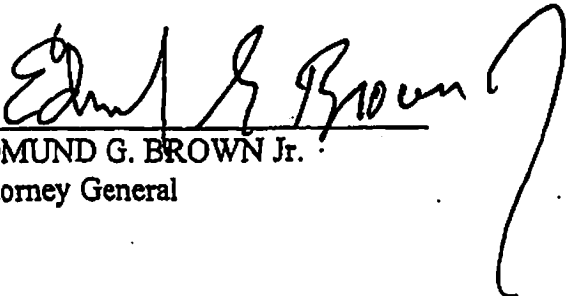
CERTIFICATION

RECEIVED 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

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

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



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January 7, 2002

Trutanich-Michel  
Chuck Michel  
Port of Los Angeles  
407 North Harbor Boulevard  
San Pedro, California 90731-3356

RE: DSA Arms

Dear Mr. Michel:

As per our conversation this morning, the SA 58 your client sent to the California Department of Justice Firearms Division was inspected by Special Agent Ignatius H. Chinn. Because the magazine cannot be removed without the use of a "tool" the firearm is not technically an assault weapon under California Law. However, it is strongly recommended that your client make the modifications suggested by SA Chinn. The firearm in its current configuration is easily modifiable and as such poses a significant risk of modification by consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy L. Palmieri", written in a cursive style.

NANCY L. PALMIERI  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

State of California  
Department of Justice  
Firearms Division  
P.O. Box 163487, Sacramento, CA 95816-0487  
**INVESTIGATION REPORT**

Subject: DSA Arms		FD Case Number: 01-20041
Investigation Requested by: Dale A. Ferranto Assistant Director		Type of Report: Opening/Closing
Reporting Agent: Ignatius H. Chinn Special Agent Supervisor	Office: Sacramento	Report Number: 1
Type of Assault Weapons Evaluation (12276.1 PC) Case:		Date: 12/10/01

**SYNOPSIS:**

During December of 2001, I, Special Agent Supervisor Ignatius H. Chinn was requested to evaluate a weapon being developed by DSA Arms Illinois, for sale in California. This report will detail my evaluation as to whether this weapon is or is not an assault weapon as defined under the California Penal Code (PC) section 12276.1.

**DETAILS**

On 12/07/01, I examined the SA 58 sent to our Division by DSA Arms. It appeared to be a FAL derivative with a clip mounting guide on the top of the receiver, and no magazine release. The magazine appeared to be a shortened twenty round magazine. The serial number on this weapon was DS19042. The fore end, pistol grip, and stock was a finely finished wood and on the muzzle was a fake flash suppressor.

During previous conversations with DSA Arms, we were told that the shortened magazine could be removed for cleaning only. I then disassembled the weapon to locate the point of disassembly for the shortened magazine for cleaning. I observed that there were no rivets or weld marks to secure the magazine. I then observed that the traditional magazine release had been shortened and a hex set screw was machined into the release, placing pressure on the magazine well wall to hold the latch in a fixed position.

I was able to loosen and adjust the hex set screw out enough to release the magazine. Following this procedure, I was able to insert and lock in-place a twenty round magazine for the FN FAL. The magazine was able to withstand the release of the bolt from the locked position without falling out.

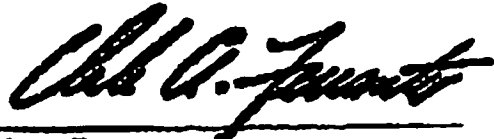
I then took a spring from a pen, modified it to fit between the magazine latch and the magazine well wall, using the hex set screw as a guide. This procedure allowed the shortened magazine latch to now act as the traditional latch, making this weapon into a detachable magazine model rather than a fixed magazine model.

I believe in the AR-15 fixed model which was evaluated earlier. The magazine well was closed, and the insert was fixed with a rivet as suggested by Bureau of Alcohol, Tobacco, and Firearms. The SA 58 as configured is easily changed into a detachable magazine, with a pistol grip attached and if detected and seized unregistered could be considered by some of our 58 elected District Attorneys as an assault weapon as defined under California Penal Code section 12276.1. thus, placing the customer in jeopardy.

The problem can be remedied if the magazine body was permanently attached to the receiver (welded), and the floor plate of the magazine body modified to accept a hinged type floor plate as in a Remington 700 BDL, or Winchester model 70.



Ignatius H. Chim  
Special Agent Supervisor



Dale A. Ferranto  
Assistant Director