

**OFFICE OF ADMINISTRATIVE LAW**

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IN THE OFFICE OF

2009 APR 27 PM 3: 08



SUSAN LAPSLEY  
Director

Date: April 27, 2009

To: Gene Hoffman

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 10 (S)**  
**(CTU2009-0227-01)**

(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Petition challenging as an underground regulation a letter from the Department of Justice regarding a rifle's "capacity to accept" a detachable magazine.

On February 27, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a letter from the Department of Justice (DOJ) regarding a rifle's "capacity to accept" a detachable magazine constitutes an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>1</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

A rule which meets the definition of "regulation" in Government Code section 11342.600 is required to be adopted pursuant to the APA. The letter you challenge was in reply to a firearms dealer regarding a device 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. The letter states that there is no question that such a configuration would render the magazine of a rifle to be non-detachable. It further states that "it is unclear whether such a configuration negates the rifle's capacity to accept" a detachable magazine.

Penal Code section 12276.1 lists firearms with specified characteristics that are considered to be assault weapons. Subdivision (a)(1) lists one such firearm to be "[a] semiautomatic centerfire rifle that has the capacity to accept a detachable magazine" and also has any one of a list of other

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<sup>1</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

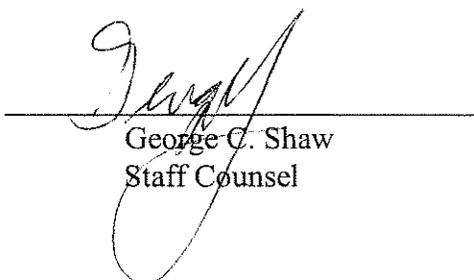
characteristics. Pursuant to this subdivision, whether a semiautomatic centerfire rifle is an assault weapon is determined, among other characteristics, by whether that rifle has the “capacity to accept a detachable magazine.” This subdivision does not indicate whether the attachment of a non-detachable magazine negates this “capacity to accept a detachable magazine.”

The letter you challenge merely restates the law and specifically avoids going beyond the requirements of the statute or attempting to interpret it by specifying another rule. The letter does not further supplement or interpret the existing law regarding “the capacity to accept a detachable magazine” in Penal Code section 12276.1. This letter does not meet the definition of “regulation” in Government Code section 11342.600 and, therefore, does not need to be adopted pursuant to the APA.

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.<sup>2</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

  
 for SUSAN LAPSLEY  
 Director

  
 George C. Shaw  
 Staff Counsel

Copy: Jerry Brown

<sup>2</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
  - (D) The challenged rule has expired by its own terms.
  - (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.