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BY US MAIL AND EMAIL

RE: Notice of Proposed Rulemaking dated June 27, 2006

Dear Jeff:

I write to point out a substantive list of issues in the current Proposed Regulations. Before moving to the substantive issues of the changes in the proposed regulations themselves I wish to point out that the current 15 day notice and response period is a violation of Government Code Section 11346.

Procedures

Government Code Section 11346 requires that a 15 day comment period be announced and completed after changes to a Proposed Regulation where those changes are "Sufficiently Related" Changes.

California Code of Regulations ("CCR") Title 1 Section 42 defines "Sufficiently Related" Changes as:

Changes to the original text of a regulation shall be deemed to be "sufficiently related," as that term is used in Government Code Section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted.

No reasonable member of the public affected by this proposed regulation could have determined that a 159 word newly Proposed Regulation could result from a 34 word initially Proposed Regulation. In fact, the public in question does not assume that any of the requirements beyond the definition in 978.20 (a) (now 5469 (a)) were not the standard that determines the detachability of a magazine as referred to in 12276.1.

The fact that the revised Proposed Regulations exceed the Sufficiently Related standard as compared to the original Proposed Regulations means that the public should have a new 45 day period in which to comment and the right to a new public hearing. **I formally**

request a public hearing on the newly revised Proposed Regulations and a 45 day period in which to submit written comments because the changes are not Sufficiently Related to the initial Proposed Rulemaking. I am foreclosed from requesting a public hearing 15 days prior to the end of the submission due to the fact that I did not in fact receive notice until the day 15 days prior to the close of submission of comments.

The Office of Administrative Law (“OAL”) states that a regulation must have Necessity, Authority, Consistency, and Clarity amongst other items per the Government Code and Title 1 of the California Code of Regulations.

Necessity

The Department of Justice Firearms Division (“DOJ”) originally asserted that the Necessity for the original Proposed Regulation was:

“It has come to the Department’s attention that many gun enthusiasts and firearm dealers in California have misconstrued the term “capacity to accept a detachable magazine” as used in PC section 12276.1. Amending the current regulation by defining “capacity to accept a detachable magazine” as used in PC section 12276.1 will facilitate the accurate identification of statutorily restricted assault weapons by law enforcement and the public. The proposed definition will add clarity to the existing statutes but will not change or affect their current application and enforcement. As noted below under “Technical, Theoretical, and/or Empirical Study, Reports, or Documents Relied Upon”, the proposed definition is derived virtually word for word from the statutory definition of the very similar term "capacity to accept more than 10 rounds." Therefore, it should be abundantly clear that the proposed definition is completely consistent with the original intent of the California legislature.”

There are many problems with this Necessity statement, especially as it applies to the current revised Proposed Regulation.

1. The basis of the Necessity statement is that firearms dealers and gun enthusiasts have misconstrued the term capacity to accept a detachable magazine. The term detachable magazine has been defined for six years as essentially “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” where, “[a] bullet or ammunition cartridge is considered a tool.” The basis for the Necessity of this regulation is at best the supposition of the DOJ that this has been misconstrued. CCR Title 1 Section 10 (b) (2) requires that to “meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking shall include:”

“information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall

include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.”

Reasonable “gun enthusiasts” believe that the term capacity to accept a detachable magazine remains well defined by the definition of “detachable magazine” adopted in an earlier rulemaking and serving with the force of law in California since 2000. The DOJ has not asserted any facts, studies, expert opinions, or other information that there has been anyone misconstruing the definition of capacity to accept a detachable magazine. Simple unsupported opinion or political desire is not Necessity under the Government Code or the CCR. In fact, DOJ needs “substantial evidence” which is defined as “such evidence as a reasonable person reasoning from the evidence would accept as adequate to support a conclusion.” A simple assertion by DOJ does not seem to meet even this relatively low threshold.

2. The revised Proposed Rulemaking is now not “derived virtually word for word from the statutory definition of the very similar term ‘capacity to accept more than 10 rounds.’ It is therefore **not** “abundantly clear that the proposed definition is completely consistent with the original intent of the California legislature.”

3. The Necessity statement asserts without support that the “proposed definition will add clarity to the existing statutes but will not change or affect their current application and enforcement.” As will be shown below, this assertion is not in fact true.

As to the actual Necessity of the regulations, legislative history of SB-23 in which 12276.1 was enacted shows that the legislature was concerned with the functional capability that a detachable magazine imparted upon the user of a firearm so equipped. Anyone who modifies a firearm such that an ammunition feeding device of less than 10 rounds is attached to a semiautomatic centerfire rifle in such a way that removal of that ammunition feeding device requires a tool to remove is specifically complying with both the spirit and intent of the legislature that Californians not have the ability to quickly and readily fire a large number of rounds or quickly reload to fire additional rounds.

Authority

The DOJ does not have the authority to enlarge the scope of Penal Code Section 12276.1 (a) (1). The relevant statutory language defines a category of assault weapons as:
“A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following”

The penal code then goes on to specify certain features which have colloquially become known as “evil features.” Possessing, manufacturing or selling a semiautomatic centerfire rifle that meets the definition of having a capacity to accept a detachable magazine and one “evil feature” that was not registered during the now expired registration window is punishable by felony prosecution, fines, and extended incarceration.

The current version of proposed (f) attempts to read the concept of “readily modifiable” into the plain language used in 12276.1 (a) (1). A valid reading of the statute should the revised Proposed Rulemaking take effect would change the sentence in 12276.1 (a) (1) to:

“A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine, or is readily modifiable to receive a detachable magazine, and any one of the following”

This would impermissibly enlarge the scope of 12276.1 by subjecting more rifles to the “evil features” test than the Legislature and the current CCR contemplate which is impermissible under Government Code 11342.1 which provides, “[e]ach regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”

More importantly, this is an artifice to respond to the more obvious infirmity of the original Proposed Regulations where DOJ attempted to find the term “Permanently Altered” in 12276.1 at the same time that term was utilized in another context in the same legislation contemporaneously passed at 12276.1(d)(2) (see my previous comment letter dated August 11, 2006, the DOJ’s own Necessity section, and “Technical, Theoretical, and/or Empirical Study, Reports, or Documents Relied Upon” section.) Pursuant to the CCR Title 1 Section 14, the OAL must use construction standards from California Appellate Courts and The California Supreme Court. Those construction standards show that the previous regulatory interpretation was clearly wrong as it attempted to place words that the Legislature showed it could use in another section of the legislation into the relevant part where those words did not exist (see OAL’s DECISION OF DISSAPPROVAL OF REGULATORY ACTION, BOARD OF LICENSED VOCATIONAL NURSES AND PSYCHIATRIC TECHNICIANS, OAL File No. 02-0228-09S - <http://www.oal.ca.gov/decision/02-0228-09S.pdf>.) The modified Proposed Regulation attempts a new but grammatically equivalent phrasing of “Permanently Altered.” “Readily modifiable” is an antonym of “Permanently Altered” that is now being used in the positive instead of the previous negative (the original was “not to be construed ... to include a firearm that has been permanently altered.”)

Consistency

"Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law (Government Code, Section 11349(d).) When the definition of the defined term “detachable magazine” from

978.20(a) (“(a)”) is substituted for the words “a detachable magazine” in the proposed (f) (“(f)”), it becomes obvious that the resulting regulation is either contradictory or moot and therefore lacks Consistency. To illustrate, after substituting the definition of “detachable magazine” in the Proposed Regulation (f) reads:

“(f)(1)“Capacity to accept a detachable magazine” means currently able to receive any ammunition feeding device that can be removed readily from the firearm with neither the disassembly of the firearm action nor the use of a tool being required or readily modifiable to receive any ammunition feeding device that can be removed readily from the firearm with neither the disassembly of the firearm action nor the use of a tool being required.

(2) A firearm is readily modifiable to receive any ammunition feeding device that can be removed readily from the firearm with neither the disassembly of the firearm action nor the use of a tool being required if it has a device that prevents the magazine from being released but allows the firearm to accept any ammunition feeding device that can be removed readily from the firearm with neither the disassembly of the firearm action nor the use of a tool being required when the device is removed, reversed, or disengaged, without alterations to the magazine well.

(3) A firearm is not readily modifiable to receive any ammunition feeding device that can be removed readily from the firearm with neither the disassembly of the firearm action nor the use of a tool being required if, for example:

- (A) it does not have a magazine well;
- (B) the magazine is fixed to the receiver by a continuous ribbon of welding around the perimeter of the magazine well, or by multiple ribbons of welding that are each at least one half inch in length;
- (C) the magazine is fixed to the receiver with a rivet (or other irreversible locking device) that is driven through the magazine well and fixed in place with epoxy; or
- (D) the modification requires disassembly of the action.”

(f) attempts to define a phrase where (a) already defines the last two words of that phrase. This redefinition is done in a way entirely inconsistent with the existing definition of "detachable magazine" in subsection (a) that the Proposed Regulation in subsection (f) do not and can not seek to modify. This leads to multiple valid interpretations as I discuss further below.

Additionally, (f) is further inconsistent with (a) because (f) conflicts with (a)’s attempt to keep certain firearms that require the use of a bullet tip to remove the magazine from being improperly identified as a semiautomatic centerfire rifles with detachable magazines. DOJ, in its comments on the final Rulemaking in 2000 stated:

“Comments also claimed that a bullet or ammunition cartridge should be considered a tool because the type of firearm that utilizes a bullet or ammunition

cartridge to release the magazine is a firearm with a fixed magazine, clearly not intended by the Legislature to be categorized as an assault weapon. The Department further researched the claims and confirmed that it is necessary to identify a bullet or ammunition cartridge as a tool to allow certain firearms with fixed magazines to remain fixed by definition. The definition was again revised to read ‘detachable magazine means any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor the use of a tool being required. A bullet or ammunition cartridge is considered a tool.’”

In general, semiautomatic centerfire rifles that only require a bullet tip to remove the magazine do have a magazine well, do not have a continuous ribbon of welding or 1/2” welded strips, do not have a rivet or other irreversible locking device, nor do they require the action to be disassembled to remove the magazine. Those semiautomatic centerfire rifles that only require a bullet to remove as identified in the 2000 Rulemaking will not meet the “readily modifiable to accept” standard proposed in the current Proposed Rulemaking.

The new Proposed Regulation still suffers from the SKS issues that I pointed out in my previous letter dated August 11, 2006. The final statement of reasons for the 2000 Rulemaking (<http://ag.ca.gov/firearms/regs/fsor.pdf>) stated in A1.12 that the SKS was not covered due to a bullet tip being defined as a tool. However, the SKS is readily modifiable to accept a detachable magazine by only the use of a tool and without disassembly of the action.

Clarity

The revised Proposed Regulation has a number of significant “Clarity” issues.

The DOJ can only create “Clarity” if they modify (a). However, if (a) is modified, it will be clear that the Proposed Regulation is an impermissible expansion or change to the legislative intent of 12276.1 as it would change the scope of which rifles are controlled. Should any rifle fall newly into the class of controlled “assault weapon” the owner of that rifle would have Federal and State Constitutional claims related to Ex Post Facto Laws, Takings, and Due Process. These claims arise because the legislation does not enable the DOJ to open a new registration period for rifles that were previously legal under the understood definition of (a) that would now be illegal to possess or sell based on the new Proposed Regulation in (f). Further, the DOJ does not have an authority to compel owners of previously legal firearms to modify their firearms with compensation.

The Proposed Regulations can readily be understood to have two meanings. One meaning is derived from (a) and that is that if an ammunition feeding device requires a tool of any sort including a bullet tip to remove, it can not be “readily removed from the firearm” as defined in (a), and thus that semiautomatic centerfire rifle can have one or more “evil features” like a pistol grip. However, another interpretation based on (f) is that if an allen

screw that requires a tool to remove and keeps a magazine release from being actuated (thus satisfying (a)) is the only “device” holding the magazine into the firearm, then it may actually be an assault weapon and illegal to possess in California. Both are equally valid readings of the plain language of the combined regulation and thus the regulation is not clear.

There are many terms that DOJ uses to attempt to define acceptable non “readily modifiable” modifications that are not clear to the public. The term “magazine well” is not defined. Due to the lack of this definition, the term “magazine well” may be construed to apply to an M1 Garand Rifle, which DOJ clearly understood to be outside the scope of regulations during its 2000 Rulemaking. Further, a firearm with an ammunition feeding device installed that requires a tool to detach may not have “magazine well” under one valid reading of the rulemaking.

Under the proposed regulation DOJ specified what “readily modifiable” is not. DOJ **does not define** what readily modifiable is. It is unclear how quickly modifiable “readily modifiable” is or whether it requires a tool or a special subclass of tools. Readily modifiable can have different orders of magnitude if it assumes a person without competence in metalwork or welding versus assuming the skills of a gunsmith. Additionally, DOJ does not cite any authority or support that the non readily modifiable exceptions are in fact not readily modifiable.

A rivet is commonly understood, but it would seem that a rivet is not commonly understood as an “other irreversible locking device.” An “irreversible locking device” is also not defined. Performing a Google search on the term “irreversible locking device” does not in the first 10 results lead to any document or definitions that relate to any version of the concept in the rulemaking. “[D]riven through” is additionally unclear as it assumes force being used with the undefined term “other irreversible locking device” which may or may not require force.

Additionally, during the 2000 Rulemaking DOJ took notice of public comment at that time that stated that the term magazine was indistinct. Therefore DOJ eschewed the use of the term “magazine” in favor of the statutory term “ammunition feeding device.” For clarity, DOJ should maintain the use of the term ammunition feeding device in lieu of the term magazine in the current Proposed Regulations.

Finally, “disassembly of the action” is not as clear as it appears on first impression. It is not clear whether “the action” includes the trigger group in an SKS rifle. It is also not clear whether separating the “lower” from the “upper” in an AR-15 like rifle constitutes “disassembly of the action.” These are but two examples of the large possible configurations of the assembly of semi automatic centerfire rifles that might have one evil feature.

DOJ asserts that this rulemaking is a clarification of the existing statute and CCR. DOJ's own prior legal opinions conflict this assertion. In 2005, .50 caliber rifles that were previously legal in California were required to be registered. .50 Caliber Rifles registered in 2005 had to comply with 12276.1. The Barrett 82A1/82A1-CA is a semi automatic centerfire rifle with a swing down magazine only secured by a screw but also features a pistol grip that protrudes below the action. None of the proposed (f) regulation's exceptions apply to this rifle. DOJ opined in a written letter dated August 13, 2002 (see http://www.50bmgstore.com/barrett50bmgstore_M82A1_CAletter.htm) that the magazine was not a detachable magazine as it was defined at the time by (a). The manufacturer and purchasers relied upon that letter to conduct importation, sale, and possession of the Barrett 82A1/82A1-CA. Subsequently as required by AB-50, all Californians who registered .50 Caliber Barrett 82A1/82A1-CA rifles registered them under the clear presumption, based on legal opinion rendered by the DOJ, that they were not assault weapons under 12276.1. Assault weapons under 12276.1 had to have been registered under the registration window in 2000 that had long expired prior to the passage of AB-50.

The plain language of the regulation would now apply to the Barrett 82A1/82A1-CA. As such, to sustain the position that (f) is and always has been the law, Californians who registered the Barrett 82A1 are now and have always been felons in the State of California. Without the change in the regulations, those gun owners reliance upon DOJ will be nullified in contravention of the Ex Post Facto clause under both the California State Constitution and the Constitution of the United States at Article I section 10. See also: *Collins v. Youngblood*, [497 U.S. 37](#), 41 (1990) – “The definition of an ex post-facto law as one that (1) punishes as a crime an act previously committed, which was innocent when done[...].”

It follows that if the operative definition of detachability is contradicted by the new (f) then any person who modified a semi automatic centerfire rifle with an evil feature in any way that requires a tool or bullet tip to detach the magazine before the adoption of (f) and in reliance on (a) was performing activity that was innocent when done and in fact was complying with the law as it was understood by both the general public and the DOJ at the time.

Conclusion

The Proposed Regulation is barred by many facets of the APA as outlined above.

Worse, if the proposed regulation is actually a change, has the effect of a change, or is ambiguous it is barred by the Ex Post Facto doctrine and the rule outlined in *People ex rel Daniel Lungen v. Superior Court* (1996) 14 Cal.4th 294, at 305, “[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted ...

Stated differently, 'where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.' A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose."

The Legislature's apparent purpose was for gun owners that owned firearms that were covered by the enactment of SB-23 to be on notice per their right of Due Process and right to be free from Takings to register their weapons during a period of time shortly after enactment of SB-23. To change the regulations six years later frustrates the clear intent of the Legislature as the window of opportunity to register covered weapons has closed. The Legislature's intent in allowing registration of covered rifles and then foreclosing prospective importation, sale, or subsequent unregistered possession was to avoid Ex Post Facto, Due Process, and Takings Constitutional infirmities that retrospective criminalization of possession would create for the underlying statute. DOJ's proposed rulemaking is in conflict with the 12276.1 by retroactively proclaiming that a class of rifles that even the DOJ believed to be legal at a time shortly before the Proposed Regulations "is now and always has been illegal" while DOJ has no concurrent legal authority to affect the sought change in any way that does not create a de-facto Ex Post Facto law.

Sincerely yours,

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

Gene Hoffman, Jr.