



Tuesday, December 27, 2016

VIA U.S. MAIL AND E-MAIL

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Department of Justice - Bureau of Firearms
Attn: Jacqueline Dosch
P.O. Box 160487
Sacramento, CA 95816

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

RE: Proposed Emergency Adoption of Regulations Regarding Large-Capacity Magazines

Dear Department of Justice (“DOJ”), Office of Administrative Law (“OAL”), and Ms. Dosch:

I write you today on behalf of Firearms Policy Coalition and its many members and supporters regarding the California Department of Justice Bureau of Firearms “proposed emergency adoption of regulations regarding large-capacity magazines” (the “Proposed Emergency Regulations”) as set forth at <https://oag.ca.gov/firearms/regs>.

1. GENERAL OBJECTION: THERE IS NO “EMERGENCY” AND ANY REGULATION OF LARGE-CAPACITY MAGAZINES SHOULD FOLLOW THE STANDARD RULEMAKING PROCESS.

When the Legislature first enacted the statutes that primarily underlie the Proposed Emergency Regulations, Jennifer Lopez wondered “If You Had My Love,” Ricky Martin was “Livin’ la Vida Loca,” and Destiny’s Child was singing about “Bills, Bills, Bills.”¹

Indeed, in July 1999, the California Legislature passed—and Governor Gray Davis approved—Senate Bill 23 (Perata), which established at Penal Code § 12020,² California’s large-capacity magazine ban: “Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison.... Commencing January 1, 2000, manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, or lends, any large-capacity magazine.”

In December 2012, then-Assemblymember Nancy Skinner introduced Assembly Bill 48, which sought to regulate magazine parts (eventually calling such parts a “conversion kit” in the bill’s final language).

¹ *Billboard* “The Hot 100 – 1999 Archive”, available online at <http://www.billboard.com/archive/charts/1999/hot-100>.

² Penal Code § 12020 is now at § 32310 following the reorganization and renumbering of the Penal Code in 2010. The text and history of SB 23 can be viewed on the State of California’s Legislative Information Web site at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=199920000SB23.

That measure was amended to also prohibit buying or receiving a large-capacity magazine, was passed by the Legislature in September, and was approved by Governor Jerry Brown in October 2013.³

After the Legislature proscribed the knowing manufacture, cause for manufacture, importation into the state, keeping for sale, offering or exposing for sale, giving, lending, buying, and receiving any “large capacity magazine conversion kit” in 2013, the Department did not see any cause or “emergency” warranting the promulgation of any regulations at all, let alone those it now seeks to achieve in these Proposed Emergency Regulations.

And, as history shows, there was no “emergency” need for regulations before or after the State was sued for ambiguity over the large capacity magazine laws in *Hunt v. Lockyer*, Fresno Superior Court No. 01CECG03182, which settled in 2008—nearly 9 years ago.

Gov’t Code § 11346.1(b)(2) states, in part, that a “finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations . . . , the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.” (emphasis added.)

The DOJ’s Finding of Emergency⁴ related to their Proposed Emergency Regulations contains no “facts explaining the[ir] failure to address the situation through nonemergency regulations” at all.

But the total vacuum of facts in the DOJ’s Finding of Emergency underscores the one relevant fact in all of this: The State of California’s statutory structure on large-capacity magazines has been practically static since 1999,⁵ and in spite of the passage of Assembly Bill 48 in 2013, DOJ did not believe it necessary to promulgate any regulations. No such need presents now, and the DOJ’s purported “emergency” now is nothing but a sham.

To recap:

- The DOJ has offered no facts to support its attempted “emergency” rulemaking here.
- Virtually all of DOJ’s Proposed Emergency Regulations are based upon statutes that have been in effect for over 3 to as many as 16 years.
- The Department has had many years to weigh in on the issues raised in their Proposed Emergency Regulations, but chose not to.

³ The text and history of Assembly Bill 48 (2013) is available online at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB48.

⁴ The Finding of Emergency is available online at <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/lcmp-finding-of-emerg-121516.pdf?>

⁵ We acknowledge here the July 2016 gubernatorial approval of Senate Bill 1446, which slightly amended the existing statutory structure to prohibit the *possession* of “large-capacity magazines” except for, e.g., law enforcement purposes (as specified). And we also acknowledge the voters’ November 8, 2016, approval of Proposition 63 (the “Safety for All Act”). However, both SB 1446 and Proposition 63’s large-capacity magazine provisions simply extend the existing statutory scheme to prohibit the *possession* of large-capacity magazines; all other material aspects of the Penal Code as relates to large-capacity magazines and conversion kits pre-existed SB 1446 and Proposition 63 by a minimum of 3 years.

- The DOJ’s newfound interest in rulemaking on large-capacity magazines does not itself create or prove an “emergency.” Their record on this issue, however, does compel a deliberative, open, transparent, and normal rulemaking process.
- To the extent that there is any *bona fide* need for regulations at all, that need could easily be satisfied by simply repealing any existing regulations that are in conflict with the Penal Code and promulgating new regulations under the standard rulemaking process.
- The law-abiding People of the State of California and visitors who will be harmed and impacted by the DOJ’s rulemaking activities deserve a full opportunity to weigh in and participate in the regulatory process.

The DOJ’s Proposed Emergency Regulations are improper and should be withdrawn or rejected.

2. SPECIFIC OBJECTIONS TO THE TEXT OF THE PROPOSED EMERGENCY REGULATIONS.

We incorporate here by reference Section 1 of this letter (“General Objection”), *supra*, as if fully set forth herein. All references below are to the text of the Proposed Emergency Regulations⁶ as would be found in Title 11, Division 5 of the California Code of Regulations were they to be adopted. The below list of specific objections is not an exhaustive analysis and does not constitute the entirety of our opposition to the Proposed Emergency Regulations. Our intention in providing this list is to illustrate the overwhelming number of defects in the DOJ’s Proposed Emergency Regulations.

A. Specific Objection(s) as to Proposed § 5480

- 1) The underlying authority cited for this Proposed Emergency Regulation was enacted in 1999. No facts or cause for “emergency” rulemaking has been provided for this Proposed Emergency Regulation.
- 2) There is no explicit or implicit statutory authority for subsection (d).
- 3) There is no explicit or implicit statutory authority for subsection (e).

B. Specific Objection(s) as to Proposed § 5483

- 1) The underlying authority cited for this Proposed Emergency Regulation was enacted in 1999. No facts or cause for “emergency” rulemaking has been provided for this Proposed Emergency Regulation.
- 2) There is no explicit or implicit statutory authority for subsection (b).
- 3) There is no explicit or implicit statutory authority for subsection (c).
- 4) There is no explicit or implicit statutory authority for subsection (d).
- 5) There is no explicit or implicit statutory authority for subsection (e).

⁶ The full text of the Proposed Emergency Regulations can be found online at <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/lcmp-text-of-regs.pdf?>.

6) There is no explicit or implicit statutory authority for subsection (f).

C. Specific Objection(s) as to Proposed § 5484

1) The underlying authority cited for this Proposed Emergency Regulation was enacted in 1999. No facts or cause for “emergency” rulemaking has been provided for this Proposed Emergency Regulation.

2) There is no explicit or implicit statutory authority for subsection (b).

3) There is no explicit or implicit statutory authority for subsection (c).

4) There is no explicit or implicit statutory authority for subsection (d).

D. Specific Objection(s) as to Proposed § 5490

1) The underlying authority cited for this Proposed Emergency Regulation was enacted in 2013. No facts or cause for “emergency” rulemaking has been provided for this Proposed Emergency Regulation.

E. Specific Objection(s) as to Proposed § 5491

1) Virtually all of the underlying authority cited for this Proposed Emergency Regulation was enacted in 1999 and 2013, respectively. No facts or cause for “emergency” rulemaking has been provided for this Proposed Emergency Regulation.

2) There is no explicit or implicit statutory authority for subsection (b).

F. Specific Objection(s) as to Proposed § 5492

1) The underlying authority cited for this Proposed Emergency Regulation was enacted in 2013. No facts or cause for “emergency” rulemaking has been provided for this Proposed Emergency Regulation.

2) There is no explicit or implicit statutory authority for subsection (a).

3) There is no explicit or implicit statutory authority for subsection (b).

3. CONCLUSION.

“Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carryout those provisions of the statute, no regulation adopted is valid unless it is consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” Gov’t Code § 11342.2.

The DOJ’s Proposed Emergency Regulations discussed above are improper and cannot stand as they are untimely, unreasonable, unnecessary, inconsistent with the underlying statutes, beyond the authority of the Department of Justice to implement, and unclear.

Accordingly, we object to the Proposed Emergency Regulations and recommend that the Department of Justice: (1) withdraw the Proposed Emergency Regulations; (2) seek sufficient public and stakeholder input through the normal Administrative Procedures Act rulemaking process; and, (3) craft appropriate, legally sound regulations without defective language.

Alternatively, the Office of Administrative Law must reject the DOJ’s improper, defective, and unlawful Proposed Emergency Regulations in their entirety.

Please feel free to call me at (916) 378-5785 if you have any questions or concerns.

Sincerely,



Craig DeLuz
Legislative and Regulatory Advocate

Cc: File
Counsel