

Gene Hoffman, Jr.
751 Sylvan Way
Emerald Hills, California 9062
Phone: 650-298-9185
Fax: 650-522-4481
hoffmang@hoffmang.com

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Jeff Amador, Field Representative
Department of Justice
Firearms Licensing and Permits Section
P.O. Box 820200
Sacramento, CA 94203-0200
jeff.amador@doj.ca.gov

BY US MAIL AND EMAIL

RE: Notice of Proposed Rulemaking dated June 27, 2006

Dear Jeff:

I am writing to comment on the Department of Justice Notice of Proposed Rulemaking dated June 27, 2006. I believe that this proposed rulemaking is deficient in its stated purpose, may contradict legislative intent, and only serves to further confuse an already complicated area of the law.

The authority listed in the Authority and Reference section to promulgate regulations is misplaced. Penal Code section 12276.5(i) refers to Chapter 12276.5, not Chapter 12276.1. 12276.1 is the Chapter where the definitions in question reside. As such the regulatory power granted to the Department in 12276.5(i) is the regulatory power granted to declare specific rifles assault weapons or "Series" weapons as contemplated in 12276.5 (a) (1) and 12276.5 (a) (2) pursuant to The Roberti-Roos Assault Weapons Control Act of 1989 and further refined by *Harrott v. County of Kings* (25 P.3d 649 (Cal. 2001)). As such, the legislative mandate that the Department is supposedly relying upon in 12276.5 (i) is actually to update the promulgated lists - not to make changes to the definitions resulting from SB-23.

The definition of "capacity to accept a detachable magazine" as "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" impermissibly broadens the scope of SB-23 as passed by the legislature. Had the legislature intended to place outside of regulation only those weapons that had been permanently altered, they would have stated as such. In fact, in the same bill, the legislature did state in 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."

Had the intent of the legislature been to regulate a semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and other features but to exclude from regulation only those rifles that have been “permanently altered,” the statutory language would have been directly stated. The statutory plain language of SB-23 makes no mention of “permanently altered” as to centerfire rifles while the concept of “permanently altered” was known to both the legislature and the people of the state at the time of the passage of SB-23. During the 2000 rulemaking process to implement SB-23, a definition of “permanently altered” was dropped from the 2000 rulemaking:

“As originally noticed to the public, the statutory term ‘permanently altered’ was defined to mean ‘any irreversible change or alteration.’ However, after consideration of public comment received during the initial comment period (December 31, 1999 through February 28, 2000), the Department determined that the proposed definition failed to provide any additional clarity to the statutory term ‘permanently altered.’ Furthermore, the Department found that none of the comments considered provided additional clarity while maintaining the legislative intent. The term ‘permanently altered’ as used in the statute appears to be sufficiently understood without further definition. As such, the regulations were revised to delete this originally proposed definition and it has not been adopted by the Department.”

During the process of adopting the definition of “Detachable Magazine” in 2000, it was clear that the Department understood that “permanently altered” magazine acceptance was not part of the definition of “centerfire rifle with detachable magazine”:

“The proposed definition as originally noticed to the public defined a detachable magazine as ‘any magazine that can be readily removed without the use of tools.’ During the initial public comment period (December 31, 1999 through February 28, 2000), comments were received that caused the Department to make revisions to the definition. Comments expressed concern about the use of the term ‘magazine,’ which is often erroneously used to describe clips that are used to load ammunition into a fixed magazine. Recognizing that to be true, the Department changed the word ‘magazine’ to the statutory term ‘ammunition feeding device’ (PC section 12276.1(c)(1)). The Department also added the phrase ‘without disassembly of the firearm action’ as a result of public comment stating that there are firearms with fixed magazines that can be field stripped (disassembled in the field) without using any tools (such as the M1 Garand). Including those firearms in the definition of a ‘detachable magazine’ would have been inconsistent with the legislative intent of the statute. Several comments were made that claimed that an assault weapon pursuant to PC section 12276 has a detachable magazine requiring the use of a bullet tip or cartridge to remove it from the firearm. The comments claimed that if a bullet or ammunition cartridge were to be considered a tool, these types of firearms statutorily defined as assault weapons would not meet the

definition of having a detachable magazine. For that reason the Department added 'For the purpose of this definition, a bullet or ammunition cartridge is not a tool.' It was also necessary to add linked or belted ammunition to the definition of an ammunition feeding device because that type of ammunition system feeds cartridges directly into the firing chamber, like the spring and follower of a box-type magazine. The definition was accordingly revised to read 'detachable magazine means any ammunition feeding device that can be removed readily from the firearm without disassembly of the firearm action or the use of a tool(s). For the purpose of this definition, a bullet or ammunition cartridge is not a tool. Ammunition feeding device includes any belted or linked ammunition.' This revised definition was noticed to the public in the first of two 15-day comment periods (May 10 through May 30, 2000). The change in terms from a magazine to an ammunition feeding device prompted new comments relating to firearms that use clips, stripper clips, and en bloc clips to load ammunition into fixed magazines. Although people affected by the regulations understand ammunition clips are clearly not considered magazines, use of the statutory term 'ammunition feeding device' caused the affected parties to speculate that clips may be included in the definition. The exclusion of clips from the definition is necessary to keep the legislative intent of the statute intact. 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. Ammunition feeding device includes any belted or linked ammunition, but does not include clips, en bloc clips, or stripper clips that load cartridges into the magazine.' This second revision prompted a second 15-day comment period (July 12 through July 31, 2000). None of the comments received during the second 15-day comment period warranted additional revisions to the definition."

As the Department recognized in 2000, there exist a large number of centerfire rifles that would have the capacity to accept a detachable magazine through disassembly with a tool and that may have other features that would otherwise make a rifle a Category 3 assault rifle. The Department took specific notice of the M1 Garand which is not permanently altered such that it can not accept a detachable magazine. The M1 is capable of being modified by simple disassembly such that it can accept a detachable magazine kit readily available in interstate commerce. As such, the current new definition of "capacity to accept a detachable magazine" would mean that many M1 Garand rifles, especially ones that have aftermarket stocks with pistol grips, are now SB-23 "Category 3" assault

weapons and those thousands of Californians who own them are either already felons in possession of an unregistered assault weapon or have a due process right to open a new registration period to allow them to register their newly redefined, previously legal rifle as an assault weapon.

More troubling is the situation of all SKS owners in California. A tool can easily be used to remove the "fixed" magazine on legal SKS rifles. If the use of a tool is not good enough to render a magazine "fixed" into a centerfire rifle then all California SKS owners own a banned by name (SKS with Removable Magazine) Category 1 Assault Weapon and have for the past six years. Alternatively, all SKS rifles in California will have to be registered as assault weapons after codification of this Proposed Rulemaking.

Both the M1 and SKS issue cast serious doubt onto the statement, "[the] proposed definition will add clarity to the existing statutes but will not change or affect their current application and enforcement." These are the types of weapons that were being considered in comment A1.06 in the 2000 final regulations (<http://ag.ca.gov/firearms/regs/fsor.pdf>). The Department specifically stated in 2000, "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." A non listed SKS rifle sold in every gun shop and sports store in the California is not a centerfire rifle, "that has been permanently altered so that it cannot accommodate a detachable magazine," under the widely understood definition of "permanently altered" that the Department took notice of in 2000. The current Proposed Rulemaking contradicts the intent of the Legislature.

Under the current CCR 978.20 AR and AK type rifles that are not specifically listed are legal to possess. Additionally, AR or AK weapons that have had their magazines fixed by means that are compliant with the definition of "Detachable Magazine" are legal to possess in California. If the ammunition feeding device can not be readily removed without either employing a tool or disassembling the action, a fixed magazine AR or AK rifle is legal to own even if it has other listed features like flash suppressors, pistol grips, or telescoping stocks. Alison Merilees stated the opinion of the Department in a letter dated December 21, 2005:

"Finally you asked about whether a 'receiver that is neither a Category 1 nor a Category 2 weapon...is also not subject to Category 3 compliance.' A receiver with a magazine that is not 'readily detachable' is not subject to the ban on generic characteristics set forth in section 12276.1(a)(1)."

It would seem that the only intent of this change is to otherwise control those rifles. If that is not the intent, then the Proposed Rulemaking is moot. As this Proposed Rulemaking is specifically forecasted in the Department's various "IMPORTANT

NOTICE California Department of Justice Information Regarding the Sale/Possession of Unnamed AR-15/AK 47 'Series' Firearms" documents, it is quite clear that this Rulemaking is attempting to state that AR and AK series rifles that do not have readily detachable magazines are otherwise covered by 12276.1(a)(1) and prospectively section 978.20(f).

It is important to note that should 978.20(f) be finalized in its present form and be understood as making currently legal configurations of AR and AK type rifles illegal, that would trigger a due process right to register these existing but now non-compliant configurations. Additionally, this rulemaking would likely bring into scope of Category 3 assault rifles a large number of centerfire rifles that no one expected and the legislature did not intend.

There exist two reasonable alternatives not listed on the proposed rulemaking. The first is to do nothing and is most in line with the intent of the legislature and this Department's understanding of the concept of a detachable magazine in 2000 when SB-23 was passed. The plain language of SB-23 states that the rifles that are regulated are those with detachable magazines AND one or more other features. Rifles that resemble rifles that would otherwise be restricted due to their features but do not have a detachable magazine are not regulated according to the plain language of 12276.1(a)(1).

However, if it is the Department's contention that it was the intent of the legislature to regulate AR and AK series weapons with otherwise fixed magazines, there exists a second reasonable alternative based upon the statutory process for "Series" weapons in section 12276.5. The department already has a process that is outside of the Office of Administrative Law Rulemaking procedures to list new AR and AK Series weapons. That obligation and process were further reinforced by the *Harrott v. County of Kings* decision which made it clear that rifles that were not listed by the Department were not Category 1 or Category 2 rifles and that only the Department may utilize the statutory process outlined in 12276.5 to add new makes and models to the listing. The Department has the ability to address any issues related to AR and AK Series rifles and these are "Reasonable Alternatives" that are both simpler, clearer, and have a smaller impact on the entirety of rifle owners in California.

Essentially, this Proposed Rule attempts to define "the capacity to accept the capacity to accept" a detachable magazine. As such, this Proposed Rule will not be clear to the average rifle owner and will likely fail for being unconstitutionally vague.

As to the finding that there will be "No Significant Adverse Economic Impact on Any Business" the proposed rulemaking would have a significant impact on a host of new small businesses that have recently started. Those businesses have begun to supply devices and kits to construct centerfire rifles in such a way that they are compliant with 12276.1(a)(1). These businesses are both California based and California focused due to

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the uniqueness of California's weapons laws and as such would suffer a significant disadvantage by having their products mooted in the marketplace by this regulation.

In closing, the Proposed Rulemaking as drafted is either moot, obviated by the obligation or opportunities available to the Department under 12276.5, or will open the largest assault weapons registration period in California's history. I would suggest that the Department reconsider the Proposed Rulemaking or simply look to the statutory path in 12276.5 that is already available to address any issues that this Rulemaking is supposed to address.

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.