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RE: OPPOSITION to the Proposed Emergency Regulations Regarding "Large-Capacity Magazines" and "Large-Capacity Magazine Conversion Kits"

To Whom It May Concern:

We write on behalf of our clients, the National Rifle Association of America ("NRA") and the California Rifle & Pistol Association, Incorporated ("CRPA"), as well as their respective members throughout California and the United States. We write in opposition to the California Department of Justice's ("DOJ") proposed emergency regulations relating to "large-capacity magazines"¹ (OAL File Nos. 2016-1223-02E Parts 1a and 1b and 2016-1223-02 Part 2).

For the following reasons, the Office of Administrative Law ("OAL") should reject the proposed regulations and require DOJ to follow the standard rulemaking process:

1. The laws covering "large-capacity magazines" ("LCMs"), affected by the proposed emergency regulations, have been on California's books for 17 years.
2. The laws restricting "large-capacity magazine conversion kits" ("Conversion Kits")

¹ These regulations also, briefly, address "large-capacity magazine conversion kits." Because these regulations predominantly cover "large-capacity magazines," and for the sake of brevity, we will refer to these regulations as covering "large-capacity magazines." But we will address the concerns relating to "large-capacity magazine conversion kits" as well.

went into effect in 2014.

3. The new laws restricting the possession of LCMs do not go into effect until July 1, 2017. There is no change to the restrictions on conversion kits.
4. DOJ presented zero evidence that an emergency exists, and there is ample time to address the regulations using the standard rulemaking procedure.
5. There is no need to clarify the existing or the new laws. DOJ has let the California public and firearm industry dictate the definitions of key terms used in California law without clarification or guidance.
6. The regulations are not necessary to avoid serious harm to the public. More troubling is the fact that if these regulations go into effect, DOJ will create unwitting felons without adequate notice or giving the public reasonable opportunity to comment.

Both the content of DOJ's proposed regulations and the timing of their submission are suspect. Our clients are gravely concerned about DOJ's attempt to circumvent the notice and hearing requirements of the California Administrative Procedure Act ("APA") during a time that encompasses both a holiday and one of the busiest periods of the year for firearm dealers and manufacturers.

On December 23, 2016, DOJ submitted its proposed regulations to the OAL, seeking an emergency exception to the requirements of the APA. This submission occurred on the Friday before Christmas Eve (Saturday) and Christmas (Sunday). Monday, December 26, is the federally-observed holiday for Christmas this year and taken as a holiday by many other Californians due to its connection to the Christmas weekend. It is also one of the busiest shopping days of the year. The timing of DOJ's submission is dubious at best if not downright deceitful.

As explained below, no actual emergency exists to justify the application of the regulations here. Even if there is an emergency, DOJ's proposed regulations do not address it, as the regulations are not needed to implement or enforce the new ban on LCM possession. And the shortened notice and comment period that DOJ seeks, along with the consequences of certain proposed regulations, will lead to detriment and damages for thousands of Californians.

I. BACKGROUND

A. The Current Law for "Large-Capacity Magazines" and "Large-Capacity Magazine Conversion Kits" and How Permanently Altering a "Large-Capacity Magazine" Can Exempt a Device from the Definition and Restrictions for "Large-Capacity Magazines"

The current restrictions relating to LCMs were part of Senate Bill 23, which passed in 1999. They have been on the books for 17 years and were relatively unchanged for that entire period of time. Meanwhile, the laws defining and restricting "large-capacity magazine conversion kits" went into

effect in 2014 and remained unchanged from their original versions.²

1. Definition of “Large-Capacity Magazine”

The definition of “large-capacity magazine” has also been relatively unchanged since 2000. Back then, “‘large-capacity magazine’ mean[t] any ammunition feeding device with the capacity to accept 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 nor shall it include any .22 caliber tube ammunition feeding device.”³

Today, the Penal Code defines “large-capacity magazine” as:

“‘[A]ny ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

- (a) *Feeding devices that have been permanently altered so that they cannot accommodate more than 10 rounds.*
- (b) A .22 caliber tube ammunition feeding device.
- (c) A tubular magazine that is contained in a lever-action firearm.”⁴

2. Definition of “Large-Capacity Magazine Kit”

A “large-capacity magazine conversion kit” “is a device or combination of parts of a fully functioning large-capacity magazine, including, but not limited to, the body, spring, follower, and floor plate or end plate, capable of converting an ammunition feeding device into a large-capacity magazine.”⁵

3. Restrictions on “Large-Capacity Magazine”/“Large-Capacity Magazine Conversion Kit” Activities, Not Possession

The original restrictions on LCMs stated that: “Commencing January 1, 2000, [any person who] manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes

² Compare Enacted Legislation Stats. 2013, c. 728 (A.B. 48) with Cal. Penal Code § 32311.

³ See, e.g., Cal. Penal Code § 12020, subd. (c)(25) (2000); see also Enacted Legislation Stats. 1999, c. 129 (S.B. 23). Former Penal Code section 12020 was broken up by the general renumbering of the “dangerous weapons” sections of the Penal Code in 2012.

⁴ Cal. Penal Code § 16740 (emphasis added). California law does not explain further what an LCM is. However, in its definition of “detachable magazine,” California states that an “ammunition feeding device” includes “any belted or linked ammunition” but not “clips, en bloc clips, or stripper clips that load cartridges into the magazine.” (Cal. Code Regs. tit. 11, § 5469, subd. (a).)

⁵ Cal. Penal Code § 32311.

for sale, or who gives, or lends, any large-capacity magazine” will be punished by imprisonment.⁶ A violation of these restrictions is punishable as a misdemeanor or a felony.⁷ Of note, possession of “large-capacity magazines” was not restricted. So those in possession of “large-capacity magazines” before January 1, 2000 could continue to possess them under California law.

The current restrictions on LCMs state that LCMs are illegal to make, manufacture, import, sell, keep or expose for sale, give, buy, receive, or loan within California.⁸ The restrictions on buying and receiving LCMs were added to the code on 2014.⁹ Violation of any of these restrictions remains a misdemeanor or felony pursuant to the prosecutor or court’s discretion.¹⁰

Just like LCMs, the *possession* of conversion kits is not a restricted activity that violates the law. “Any person in [California] who knowingly manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives” a conversion kit violates California law.¹¹ Unlike the punishments for LCMs, a person may only be prosecuted for a misdemeanor for violating the restrictions relating to conversion kits.¹²

4. *Exceptions to the Restrictions*

Penal Code section 12020, the precursor to the current restrictions on LCMs, lumped LCMs with other weapons. Therefore, there were exceptions that applied to that entire group of weapons, including LCMs. Today, those exceptions are located under the exceptions for “generally prohibited weapons,” of which LCMs are included.¹³ In addition, LCMs were provided their own specific exceptions.¹⁴ Hence, there are two sets of exceptions that apply to LCMs: those for “generally prohibited weapons” and those specific to LCMs. All of the exceptions for LCMs also apply to conversion kits.¹⁵

⁶ Cal. Penal Code § 12020, subd. (a)(2) (2000).

⁷ See Cal. Penal Code § 12020, subd. (a) (2000).

⁸ Cal. Penal Code § 32310, subd. (a).

⁹ See Enacted Legislation Stats. 2013, c. 728 (A.B. 48) (adding “buys” and “receives” to the list of restricted activities in Penal Code section 32310, subdivision (a)).

¹⁰ See Cal. Penal Code § 32310, subd. (a).

¹¹ Cal. Penal Code § 32311, subd. (a).

¹² See *id.*

¹³ See Cal. Penal Code §§ 17700 *et seq.*

¹⁴ See Cal. Penal Code §§ 32400 *et seq.*

¹⁵ See Cal. Penal Code § 32311, subd. (a).

a. Interplay of the Exceptions and DOJ's "Large-capacity Magazine" Permit

There are a number of exceptions to the restrictions for LCMs. However, these exceptions have an interesting interplay. For those who want to import LCMs or conversion kits into California, the law is clear that they have to first obtain an LCM Permit from DOJ for the importation.¹⁶ The law is also clear that the restrictions on LCMs and conversion kits "do not apply to the importation into this state of, or sale of, any large-capacity magazine by" such Permit holders, "when those activities are in accordance with the terms and conditions of that permit."¹⁷ But once the LCMs and conversion kits are in California, however, another exception to the general restriction must be used (e.g., sell to law enforcement or the entertainment industry) in order to lawfully transfer the device(s).

b. DOJ's Lack of Guidance and Clarification Resulting in (Heretofore Accepted) Industry and Public Modification of "Large-Capacity Magazines" Based on the "Permanent Alteration" Exception

For 17 years, Californians knew that an ammunition feeding device holding more than 10 rounds would lose its LCM status if someone *permanently alters* it so that it can no longer accept more than 10 rounds.¹⁸ We know of no cases where DOJ and law enforcement ever questioned or challenged any of the many types of alterations people used to modify their LCMs to hold no more than 10 rounds.

When the original restrictions on LCMs passed in 2000, DOJ attempted to define "permanently altered" in the California Code of Regulations, but it then deleted the definition¹⁹ and never provided further regulations or guidance. Therefore, over the course of so many years, Californians naturally assumed that DOJ did not have its own definition of "permanently altered" and that common sense modifications to LCM would suffice.

For the last 17 years, Californian firearm owners, dealers, and manufacturers made or remade LCMs "California compliant" through "permanent alteration." There are countless articles and videos online on how to modify LCMs to hold 10 rounds. And there are a number of different ways to restrict a magazine so that it cannot hold more than 10 rounds. Yet, to reiterate, there has *never* been a case to our knowledge where DOJ (or any law enforcement/prosecuting agency for that matter) has challenged

¹⁶ See Cal. Penal Code § 32315.

¹⁷ Cal. Penal Code § 32430.

¹⁸ See Cal. Penal Code § 16740, subd. (a).

¹⁹ See generally *Notice of Modification to Text of Proposed Regulations*, California Department of Justice, Office of the Attorney General, <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/sb23rev.pdf> (last visited Dec. 20, 2016).

an alteration of a magazine restricting its capacity to 10 rounds or less.

Thus, because of DOJ's silence on this issue, firearm dealers, manufacturers, and members of the public, have, for years, been "permanently altering" LCMs according to make them "California compliant." In its package of materials submitted to the OAL, DOJ does not state (much less cite to factual evidence showing) that this 17-year-old industry standard has in any way harmed public peace, health, safety, or welfare. DOJ's long-lasting silence and apparent support of these modifications support the lack of emergency for the pending regulations.

B. The New Ban on the Possession of "Large-Capacity Magazine" Introduced by Senate Bill 1446 and Proposition 63

Beginning on July 1, 2017, the possession of LCMs shall generally be illegal within California.²⁰ This is due to the passage of Senate Bill ("SB") 1446 on July 1, 2016 and the people's decision to pass Proposition 63 on November 8, 2016.

It is important to note:

1. There are no appreciable differences between the texts of SB 1446 and Proposition 63.
2. Aside from expanding the restrictions on LCMs to include possession and making minor changes to the exceptions to those restrictions, SB 1446 and Proposition 63 leave current law relatively unchanged.
3. The restriction on the possession of LCMs for both SB 1446 and Proposition 63 goes into effect on July 1, 2017.

SB 1446 generally prohibits the possession of LCMs in California, unless the possessor qualifies for an exception (e.g., being a certain kind of museum or historical society).²¹ Meanwhile, Proposition 63 is an initiative measure that also bans the possession of LCMs in California. It just eliminates some of the exceptions available under SB 1446 and presents a slightly different punishment²² – differences that have no bearing on how the possession ban itself is to be implemented or enforced by DOJ's proposed emergency regulations.

Significantly, both SB 1446 and Proposition 63 state that the new ban on LCM possession will not take effect until July 1, 2017, which is a full year after the passage of SB 1446 and more than half a

²⁰ Cal. Penal Code § 32310, subd. (b) (effective July 1, 2017). Certain local jurisdictions, such as Los Angeles and Sunnyvale, already have restrictions on LCMs.

²¹ *See generally* Stats. 2016, c. 58 (S.B.1446).

²² For instance, Proposition 63 states in its Findings and Declaration section that "[n]o one except trained law enforcement should be able to possess [LCMs]." (*See generally* 2016 Cal. Legis. Serv. Prop. 63 (Proposition 63) (West).)

year after the passage of Proposition 63.²³ Under both SB 1446 and Proposition 63, firearm owners have until July 1, 2017 to (1) permanently alter or (2) dispose of their LCMs if the magazines are affected by the new law.²⁴ A person can lawfully dispose of an LCM by any of the following means:

- (1) Remove the LCM from the state;
- (2) Sell the LCM to a licensed firearms dealer;
- (3) Destroy the LCM; or
- (4) Surrender the LCM to a law enforcement agency for destruction.²⁵

Neither SB 1446 nor Proposition 63 changed any laws covering conversion kits. The changes in the laws only relate to the possession of LCMs, not conversion kits.

C. The Content at Issue in DOJ's Proposed Emergency Regulations

DOJ says that it is issuing emergency regulations in response to the new ban on LCM *possession* implemented by SB 1446 and Proposition 63. In its most relevant parts, DOJ's set of proposed emergency regulations:

- Require firearm dealers to get a separate LCM Permit for each licensed location;²⁶
- Require LCM Permit holders to keep records of the sales of LCMs and require this to be done within 24 hours of any sale;²⁷
- Expand the scope of violations constituting LCM Permit revocation;²⁸
- Provide guidance stating that a lawful possessor/owner of an LCM may take it apart and put it back together;²⁹

²³ See generally Cal. Penal Code § 32310, subd. (b) (effective July 1, 2017).

²⁴ See *id.*

²⁵ *Id.*

²⁶ Cal. Code Regs., tit. 11, § 5480, subd.(d) (proposed).

²⁷ See Cal. Code Regs., tit. 11, § 5483, subds. (b)-(f) (proposed).

²⁸ See Cal. Code Regs., tit. 11, § 5484, subds. (b)-(e) (proposed).

²⁹ See Cal. Code Regs., tit. 11, § 5490 (proposed).

- Clarify that an owner of an LCM may modify the magazine and clarify the ways the LCM can be “permanently altered” for purposes of exempting it from the definition of “LCM”³⁰ (i.e., DOJ “has determined the acceptable minimum level of permanence”³¹);
- State how magazine capacity for shotguns ought to be measured (i.e., either based on shotgun shells that are 2.75 inches or the shotgun shell standard indicated on the firearm);³²
- Provide the circumstances under which magazines, each having a 10-round capacity or less, would be deemed “LCMs” when they are attached to each other (e.g., with tape or welded together);³³
- Designate certain shotguns to have LCMs if they are equipped with more than one magazine tube that can hold (collectively) more than 10 shells, and can either (1) fire all of the shells without the use of a magazine tube selector switch or (2) have a switch that allows the user to utilize the shells from both tubes;³⁴ and
- Clarify what constitutes a conversion kit and that a person may disassemble his or her lawfully-possessed LCM and reassemble it without violating Penal Code section 32311.³⁵

II. DOJ’S PROPOSED “EMERGENCY” REGULATIONS ARE NOT NECESSARY TO ADDRESS AN EMERGENCY

DOJ cannot utilize the APA’s emergency rulemaking process. DOJ had, and still has, time to act via the APA’s “standard” (i.e., non-emergency) rulemaking process, and it does not justify its failure (or refusal) to abide by the APA’s “standard” rulemaking process. Simply put, there is no emergency based on time frame. Further, there is also no emergency based on the level of harm that is threatening public peace, health, safety, or welfare. It is significant that **DOJ does not present any evidence suggesting an emergency exists.**

Not only is there no harm that needs to be addressed when it comes to the new ban on LCM possession, but there is also no uncertainty that needs to be addressed. Accordingly, DOJ’s proposed regulations do not address any unresolved issues arising from the new ban on LCM possession. In the

³⁰ See Cal. Code Regs., tit. 11, § 5491, subds. (a)-(b)(2) (proposed).

³¹ DOJ, *Finding of Emergency* (submitted with the proposed emergency regulations at issue), page 2 (2016).

³² Cal. Code Regs., tit. 11, § 5491, subd. (b)(3) (proposed).

³³ Cal. Code Regs., tit. 11, § 5491, subd. (b)(4) (proposed).

³⁴ Cal. Code Regs., tit. 11, § 5491, subd. (b)(5) (proposed).

³⁵ Cal. Code Regs., tit. 11, § 5492 (proposed).

end, it appears as if DOJ is yoking the new ban to its proposed regulations as a means to poach a deadline, however artificial it may be, to further its attempt to circumvent the APA's "standard" rulemaking process.

A. The Law Governing the Shortened Notice/Comment Period for the APA's Emergency Rulemaking Process and the Requisite Finding of "Emergency"

1. *The Law re: Shortened Notice and Comment Period for Emergency Regulations, Contrasted with the APA's "Standard" Rulemaking Process*

Emergency regulations are not subject to the regular notice and comment procedures set forth in the APA. The emergency rulemaking process, rather, has specific requirements outlined in section 11346.1 of the Government Code. The section provides a brief notice period,³⁶ a short public comment period,³⁷ and limited time for the OAL to approve or deny the emergency regulations based on an adjudication of whether they are necessary to address an emergency.³⁸ If approved by the OAL, the emergency regulation will be effective upon filing with the Secretary of State and thrust upon the unsuspecting public. Thus, DOJ's "emergency" LCM regulations can become effective and fully applicable to all Californians in just 17 days or so without any further notice.

In contrast, the "standard" APA rulemaking process requires the state agency to: give the public a 45-day opportunity to comment on the proposed regulation (and hold a public hearing if any member of the public requests one within 15 days prior to the close of that 45-day written comment period); consider the public's comments as it decides whether to amend its proposed regulations; (if it does decide to make amendments,) make the amendments available for public comment for at least 15 or 45 days depending on the substantiality of the amendment; summarize and respond on the record to timely public comments that are directed to it; and then submit a rule-making action to the OAL, which then has 30 days to reach a decision on whether to approve or deny the proposed regulations.³⁹

Based on simple arithmetic—and even providing additional buffer room for time spent on consideration, research, and everyday delays—common sense dictates that the APA's "standard" rulemaking process can be completed in approximately 4 to 5 months. Moreover, a final regulation just has to be filed between March 1 and May 31, 2017 to become effective on July 1, 2017.⁴⁰

It bears repeating, then, that the laws covering LCMs have been around for *17 years* (including the "permanently altered" exception). And the restrictions for conversion kits were implemented in 2014. DOJ had ample time to implement regulations in a timely fashion, which would have allowed for

³⁶ Cal. Govt. Code, § 11346.1, subd. (a)(2).

³⁷ Cal. Code Regs., tit. 1, § 55, subd. (b).

³⁸ See Cal. Code Regs., tit. 1, § 56, subd. (a)(1).

³⁹ See *Guide to Public Participation in the Regulatory Process*, Office of Administrative Law, <http://www.oal.ca.gov/files/2016/10/How-2-Participate-102016.pdf> (last visited Dec. 20, 2016).

⁴⁰ See *id.* at page 18.

public comment and criticism as intended by the APA. As discussed below, DOJ cannot justify its fabricated “emergency.”

Furthermore, the timing of its “emergency” regulations, over the holiday season, calls into serious question DOJ’s motives and willingness to provide Californians ample notice or opportunity to comply and/or comment on the pending laws.

2. *The Law re: The Requisite Finding of Emergency for the APA’s Emergency Rulemaking Process*

Presumably because there is such a marked difference between the notice and comment periods for the APA’s “standard” rulemaking process and that of its emergency rulemaking process, California has safeguards in place to ensure that the emergency rulemaking process is not abused and only used when it is truly needed. Hence, California only allows the APA’s emergency rulemaking process to be used when “the adoption of a regulation . . . is necessary to address an emergency[.]”⁴¹

According to state law, “[e]mergency” means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.”⁴² To establish a sufficient “emergency,” DOJ “must . . . *describ[e] specific facts supported by substantial evidence* that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation,” unless the situation is expressly deemed an emergency by statute.⁴³

In addition, if the emergency existed and was known by the agency in sufficient time to have been addressed through non-emergency regulations, the finding of emergency shall include facts explaining the failure to address the situation through non-emergency regulations. *A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, is not adequate to demonstrate the existence of an emergency.*⁴⁴

⁴¹ See Cal. Govt. Code, § 11346.1(b)(1).

⁴² Cal. Govt. Code, § 11342.545.

⁴³ *About the Emergency Rulemaking Process*, Office of Administrative Law, http://www.oal.ca.gov/regulations/emergency_regulations/emergency_regulation_process/ (last visited Dec. 20, 2016) (citing Cal. Govt. Code, § 11346.1, subd. (b)(2)) (emphasis added).

⁴⁴ *Id.* (emphasis added).

B. DOJ's "Finding of Emergency" Does Not Sufficiently Demonstrate that the Proposed Regulations Are Necessary to Address an Emergency and to Avoid Serious Public Harm

1. Assuming Arguendo that the Proposed Emergency Regulations Are Even Needed to Implement/Enforce/Clarify the New Law, There Is No Emergency Based on Time Frame

DOJ turns a blind eye on the fact that it has had sufficient time to address its claimed "emergency" through non-emergency regulations. In the documents it submitted to the OAL, DOJ willfully overlooks the facts that: (1) the new ban on LCM possession does not go into effect until July 1, 2017, (2) DOJ knew as early as *July 1, 2016* that a ban on LCM possession would occur starting on July 1, 2017, and (3) therefore, DOJ has had ample time—and *still* has time—to issue the regulations it thinks it needs by going through the "standard" APA rulemaking process.

DOJ cannot claim that it was waiting for the November 8, 2016 vote on Proposition 63 to act because the Governor already signed the LCM restrictions in Proposition 63 into law on July 1, 2016 when he passed SB 1446. The differences between Proposition 63 and SB 1446 do not affect the substance of DOJ's proposed regulations (*see* Section I.B above).⁴⁵

What was DOJ doing since July 1, 2016 that prevented it from drafting its proposed regulations—a mere five pages—until just a couple of days ago?

And, more importantly, what is preventing DOJ from proceeding via the APA's "standard" rule making process now, given the facts that the process can be completed in 4 months *and DOJ has until May 31, 2017 to file final regulations for a July 1, 2017 deadline?*

DOJ failed to address these crucial concerns and, therefore, failed to show that an emergency exists to justify the utilization of the APA's emergency rulemaking process. Half-heartedly, DOJ attempts to argue on page 1 of its *Finding of Emergency* that "[t]hese regulations need to be established as soon as possible so [DOJ] has time to notify gun owners and gun owners have time to make the necessary changes to comply with the ban."⁴⁶

The logic of this argument fails on many levels. For one, as shown in Section II.B.3 below, DOJ's proposed emergency regulations are not needed to implement, clarify, or enforce the new law banning the possession of LCMs (i.e., the *only* law that DOJ identified in its *Finding of Emergency* that comes with a deadline). So there is no time pressure to notify gun owners about the proposed regulations if DOJ is truly worried about ensuring people's compliance with the new ban. And the

⁴⁵ DOJ states on page 1 of its *Finding of Emergency* that "the Legislature pre-amended Proposition 63 with the passage of Senate Bill 1446 . . . The clarifying amendments take effect on January 1, 2017." This is not only confusingly worded, but it also gives the wrong impression that a January 1, 2017 deadline somehow looms on the horizon for DOJ.

⁴⁶ DOJ, *Finding of Emergency* (submitted with the proposed emergency regulations at issue), page 1 (2016).

proposed regulations relating to permit applications, record keeping, and revocation are certainly not needed in an “emergency” capacity (and DOJ makes absolutely no attempt to connect them with any deadline or temporal urgency).

Second, due to its longer periods for public comment, hearing, and feedback, the APA’s “standard” rulemaking process gives Californians more notice of a proposed regulation than the APA’s emergency rulemaking procedure. If DOJ is truly worried about lack of notice to gun owners and giving them more time to comply with the law, DOJ should have proceeded via the APA’s “standard” rulemaking process. At that point, Californians would have ample opportunity to review, understand, and make suggestions to DOJ’s regulations, and, indeed, DOJ would have the ability to not only correct errors and oversights in the current regulations, but also to make corrections so that the regulations are more workable for the public.

As a result, DOJ altogether fails to show why there is a time crunch necessitating the finding of an emergency and the issuance of emergency regulations.

2. *Assuming Arguendo that an Emergency Exists and DOJ Has Run Out of Time to Proceed via the APA’s “Standard” Rulemaking Process, DOJ Fails to Justify Its Failure to Meet the Non-Emergency Deadlines*

Because DOJ’s alleged “emergency” “existed and was known by [DOJ] in sufficient time to have been addressed through non-emergency regulations,” DOJ must meet its burden to justify its “failure to address the situation through non-emergency regulations[.]”⁴⁷ DOJ has failed to do so.

Essentially, all DOJ does is state in its *Explanation of Failure to Adopt Nonemergency Regulations* that it:

is unable to develop regulations in the standard manner because of the short timeframes [sic] provided in the legislation. The legislation was signed into law on July 1, 2016, and the ban commences on July 1, 2017.⁴⁸

It is not sufficient to state the (comfortable) length of time one has to act and then dismiss it with a short, unqualified, and incorrect statement that the length of time to enact non-emergency regulations is too short. As explained above in Section II.B.1, the time frame given to DOJ was not too short. Actually, DOJ could propose, hold public comment, modify, and submit for final approval a number of regulations back-to-back during this timeframe. DOJ does not seem to have any countering explanation as to why a year is too short.

⁴⁷ *Id.* at page 2.

⁴⁸ *Id.* at page 1.

3. DOJ's Proposed Regulations Are Not Necessary to Implement/Enforce/Clarify the New "Large-Capacity Magazine" Possession Ban

In its *Finding of Emergency*, DOJ disingenuously states that its proposed emergency regulations are

necessary to provide guidance to California's gun owners so that by July 1, 2017, they will be in compliance with the law. The proposed regulations provide options for disposal of large-capacity magazines, as well as instructions for reducing the capacity of a large-capacity magazine[.]⁴⁹

Any reasonable person reading the texts of SB 1446 and Proposition 63, and who understands just the general contours of California's LCM laws during the last 17 years and conversion kit laws over the last three, would know that DOJ's assertion rings false.

A reasonable review of the texts reveals that neither SB 1446 nor Proposition 63 introduce any new legal requirements *necessitating new*, clarifying regulations on how an LCM Permit holder should keep records, how "permanent alteration" should be defined, how magazine capacity for shotguns ought to be measured, how magazines attached to one another can be LCMs, how dual-tube shotguns can be LCMs, etc.

The issues addressed by DOJ's proposed emergency regulations arose long before California even contemplated SB 1446 and Proposition 63, and have been on the horizon for quite some time. Accordingly, Californians have asked DOJ numerous times to address these issues. DOJ has generally refused to do so. As a result of years of silence from DOJ, firearm manufacturers, dealers, and owners created their own compliance mechanisms independent of DOJ. All these years, DOJ failed to provide guidance, comment, and even challenges to these mechanisms.

So why do these issues only *now* need to be addressed over the holiday season? What possible part of SB 1446 and Proposition 63 changes the status quo and/or landscape of LCM law in a way to make the regulations so necessary? Why didn't DOJ identify such a provision or explain how the status quo was changed in the materials it submitted to the OAL?

DOJ's meaningful silence on this matter and the statutory language itself show that the proposed emergency regulations are not needed to implement, enforce, and/or clarify the new ban on LCM possession. Unlike the case with the new "assault weapon" laws taking effect on January 1, 2017,⁵⁰ there is no indication that California gun owners cannot comply with the new laws banning LCM possession in the absence of DOJ's regulations. There is no need for DOJ to be so paternalistic or officious when it comes to grown-up gun owners, saying that the regulations are *necessary* for compliance.

⁴⁹ *Id.* at page 5 (emphasis added).

⁵⁰ Cal. Penal Code §§ 30515, 30680, 30900 (effective January 1, 2017).

4. DOJ's Proposed Regulations Are Not Necessary to Avoid Serious Harm to the Public

DOJ provides no “specific facts supported by substantial evidence” as to why its proposed regulations need to be *immediately* adopted now to address “a situation that calls for immediate action to *avoid serious harm* to the public peace, health, safety, or general welfare.”⁵¹ For instance, it is significant that DOJ fails to address the fact that Californians have known about the “permanently altered” exception to the LCM definition for 17 years now. Correspondingly, DOJ does not address how the public was harmed in the absence of such regulations during the past 17 years. If the public was not harmed, much less *seriously harmed*, in the absence of such regulations, then there is absolutely no need to issue the regulations now as an emergency measure.

The same argument applies to all the other proposed regulations as well. If the current LCM restrictions (i.e., restricting the manufacture, importation, sale, transfer, and loan of LCMs) that have been on the books for 17 years are not seriously harming the public without DOJ regulations, then how does a restriction banning the *possession* of LCMs seriously harm the public? At any rate, DOJ conspicuously makes no effort to show how the simple possession of an LCM is so much worse than, say, the willful manufacture, importation, sale, loan, purchase, or receipt of LCMs *in light of the regulations required to address it*.

Remember: the restrictions on selling, importing, and making LCMs to the majority of the California public took effect on January 1, 2000. The only way most Californians could currently be in lawful possession of LCMs now is to have possessed them prior to January 1, 2000. The same law-abiding owners of these magazines in January 1, 2000 are the same ones in possession of the magazines today. It is fatal that DOJ does not, and cannot, identify a provision from SB 1446 and Proposition 63 that changes the status quo so as to make emergency regulations somehow necessary now to prevent or alleviate a public harm.

In the end, DOJ's failure to act in a timely manner neither is, nor creates, an emergency to bypass the usual notice and hearing/comment procedures set forth in the APA. “The term ‘emergency’ has been given a practical, commonsense meaning in the California case law:

“[E]mergency” has long been accepted in California as an *unforeseen situation calling for immediate action*. [Citations.] This is the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman.⁵²

Any “emergency” DOJ speaks of is not unforeseen, but, rather, one of DOJ's own making due to its procrastination, mismanagement of time, and/or misrepresentation of their need. Proof of such

⁵¹ Cal. Govt. Code, § 11342.545; *About the Emergency Rulemaking Process*, Office of Administrative Law, http://www.oal.ca.gov/regulations/emergency_regulations/emergency_regulation_process/ (last visited Dec. 20, 2016) (citing Cal. Govt. Code, § 11346.1, subd. (b)(2)) (emphasis added).

⁵² *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306 (quoting *Sonoma Cnty. Org. of Public/Private Employees, Local 707, SEIU, AFL-CIO v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276-277) (double emphasis added.)

procrastination is the fact that, as of the writing of this Opposition, DOJ has yet to issue the regulations that are sorely needed for the new “assault weapon” laws taking effect on January 1, 2017.⁵³ Instead, DOJ is wasting its time applying for a finding of “emergency” in regard to unneeded regulations for a ban on LCM possession that won’t even take effect until July 1, 2017.

Through present and past action, and the undeniable arithmetic underlying the timelines for DOJ’s actions, DOJ cannot show that an emergency exists to warrant emergency regulations. DOJ should have abided by the APA’s usual notice and hearing/comment procedures, as there was, and is, sufficient time to do so.

III. DOJ’S PROPOSED “EMERGENCY” REGULATIONS PRESENT SIGNIFICANT PROBLEMS FOR CALIFORNIA FIREARM DEALERS AND OWNERS

DOJ’s proposed emergency regulations should also be denied on the additional ground that they cause irreparable problems for many firearm dealers and owners.

A. California-Licensed Firearm Retailers and Dealers

Perhaps most greatly affected by the proposed “emergency” regulations are California-licensed firearm retailers (“FFLs”). For years, firearm manufacturers and dealers have been “permanently altering” LCMs to make them “California compliant.” Some of these alterations, for the last 17 years, do not comply with DOJ’s suggested modifications. Yet, these modifications have been allowed by DOJ, law enforcement, and prosecutors all this time. As a result, there are thousands of modified magazines sitting on FFLs’ shelves that are not currently considered LCMs (and that FFLs have no suspicion of being LCMs). But those magazines will *immediately* be considered LCMs the moment DOJ adopts its emergency regulations, changing a decades-long notion of what constitutes “permanent alteration.”

Because the notice period for emergency regulations is so abbreviated, unlike the case with the APA’s “standard” rulemaking process, there would be no time to notify these FFLs of DOJ’s new requirements for “permanent alterations.” Consequently, DOJ’s emergency regulations would cause thousands of unsuspecting FFLs to become overnight felons for unlawfully offering and exposing for sale LCMs. This is hardly fair, and it violates the spirit of Penal Code section 32310.

In a similar vein, many FFLs currently thinking that they have “California compliant” shotguns on the shelves will be horrified to discover that DOJ’s adoption of emergency regulations transformed those shotguns into firearms with internal LCMs (e.g., based on their dual tube configuration or how their magazine capacity is now measured by DOJ). They too would face jail time and the taint of a criminal record even though they had every intention of complying with the law.

Because DOJ’s “emergency” regulations would only give FFLs a handful of days to change industry practices that have been in place for close to two decades, DOJ is not giving FFLs sufficient

⁵³ Pending Penal Code section 30900(b)(5) requires DOJ to create regulations relating to the registration of firearms newly designated as “assault weapons.” The registration period, according to the statute, should open January 1, 2017 but require the regulations before the process can go into effect. (Cal. Penal Code § 30900, subd. (b)(1) (effective January 1, 2017).

notice to lawfully modify magazines or dispose of firearms affected by its proposed regulations. Hence, DOJ will, alarmingly and unjustifiably, cause Californians to experience legal detriment if it is allowed to circumvent the APA's "standard" rulemaking procedures.

B. Individual Firearm Owners

Also seriously affected by DOJ's proposed emergency regulations are individual firearm owners. While DOJ's regulations engender criminal risk for FFLs, they engender the risk of bodily harm for individual firearm owners. Specifically, DOJ's proposed regulations will prompt firearm owners to have their LCMs "permanently altered" by inserting restrictors into their magazines and, for the most part, permanently sealing the magazines.⁵⁴

However, most of these methods of "permanent alteration" prevent the magazine from being taken apart. As a result, the magazine cannot be cleaned. And dirty magazines are dangerous to their owners and to bystanders because they cause the firearm to malfunction.

The very fact that DOJ included such regulations as part of its proposed emergency regulations suggests that DOJ cares more about its own convenience and advantage than it does about California firearm dealers and owners. DOJ could not even be bothered to analyze or research the ramifications that its regulations would have on the lives of firearm dealers and owners. This would not have been a problem had DOJ proceeded via the APA's "standard" rulemaking process because the public comments would have helped DOJ formulate improved regulations. But, in a flagrant display of delay, neglect, and gamesmanship, DOJ chose not to do so. We respectfully urge the OAL to see through DOJ's actions and to reject DOJ's proposed emergency regulations.

IV. CONCLUSION

The purpose of the APA is to ensure that the public has the opportunity to participate in the promulgation of regulatory measures, thereby promoting open government and keeping regulatory bodies accountable. Only in the most urgent circumstances should a government agency be permitted to circumvent the strict procedural requirements of the APA.

This is not one of those times.

DOJ was given almost a year to promulgate such regulations and *still* has time to do so via the APA's "standard" rulemaking process. Further, DOJ's delay and neglect are even more glaring when one realizes that DOJ is *actually* issuing the proposed regulations in response to restrictions against LCMs (that have already been in effect) for more than a decade. Any finding of "emergency" now would be laughable.

Additionally, as established above, DOJ failed to identify any real harm that will come to the general public should DOJ be allowed to follow the APA's non-emergency rulemaking process in adopting its proposed LCM regulations. The regulations DOJ has put forth are not necessary to protect

⁵⁴ See Cal. Code Regs., tit. 11, § 5491, subd. (b)(1), (b)(2) (proposed).

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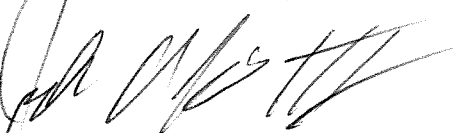
the public welfare. Instead, DOJ's finding of emergency is based solely on its own bare desire for expediency and convenience.

Lastly, the proposed "emergency" regulations are wrought with practical problems that harm California firearm dealers and owners. If DOJ had sought input from the public through proper rulemaking channels from the beginning, many of these problems could have been avoided or mitigated. Instead, DOJ seeks to adopt the regulations as an "emergency" measure, significantly reducing the time for public comment on these issues and shutting down the ability of the public to work *with* DOJ to create feasible regulations.

For the foregoing reasons, we respectfully request that the OAL reject DOJ's proposed emergency regulations and require DOJ to follow the "standard" APA rulemaking process. Should you have any questions or concerns regarding the content of this letter, please contact my office.

Sincerely,

Michel & Associates, P.C.

A handwritten signature in black ink, appearing to read "Joseph A. Silvos, III", written over a horizontal line.

Joseph A. Silvos, III