

## Guidance for Law Enforcement Agencies on Enforcement of Ballot Measure 114 in the Event the Measure Takes Effect

As you may be aware, the federal judge hearing the case against Measure 114 issued a 122-page opinion regarding the case, and she found that Measure 114 was entirely constitutional. The state lawsuit in Harney County is scheduled for trial September 18, 2023.

Here is a summary of the federal judge's analysis. The Measure has two major components - a prohibition on "large capacity magazines" and a requirement that a person obtain a permit prior to being able to purchase a firearm (permit to purchase). As to the large capacity magazine issue, the judge found that the large capacity magazine restriction did not violate the 2<sup>nd</sup> Amendment to the US Constitution because: 1) she found that large capacity magazines are not "arms" protected by the 2<sup>nd</sup> Amendment; 2) she found that large capacity magazines are not in common use for self-defense; 3) she found that large capacity magazines have features that make them unusually dangerous; 4) she found that the restriction on large capacity magazines is consistent with our nation's history and tradition of firearms regulation, and 5) she found that large capacity magazines represent a "dramatic technological change" from historical firearms.

As to the permit to purchase portion of the Measure, the judge held that the permitting process imposed by BM 114 does not violate the 2<sup>nd</sup> Amendment because it is a permissible shall-issue permit system analogous to those in many other states. She also found that the provisions do not violate the 5<sup>th</sup> Amendment as they are not an impermissible "taking" by the government, and she found that the Measure does not violate the 14<sup>th</sup> Amendment guarantee of due process of law. She ruled in favor of the state defendants on all issues.

While you may disagree with all or part of the judge's analysis, her decision would allow the entirety of the Measure to go into effect if it were not for the current stay from the Harney County court in the state proceeding challenging the Measure. Unless the federal judge's opinion is overturned by the 9<sup>th</sup> Circuit Court of Appeals or the US Supreme Court – her decision that the Measure is constitutional under the Second Amendment remains the law in Oregon. An appeal has been filed with the 9<sup>th</sup> Circuit Court of Appeals, but it may take months or years to get a final decision.

The state case is scheduled for trial in September, and if the Harney County judge were to also find the Measure constitutional under the Oregon Constitution (Article 1, section 27), the Measure could go into effect. In light of that, OSSA has prepared some guidance to help Sheriff's Offices across the state understand the Measure and its enforcement. This is not legal advice, and each Sheriff is encouraged to discuss the matter with local counsel. Our intent in issuing this guidance is to hopefully answer some common questions about the Measure and to help ensure that enforcement of the Measure, assuming it goes into effect, is consistent across the state to the extent possible. There will continue to be many questions about the Measure which will only be answered by the judicial branch interpreting the language of the Measure.

### **FBI Background Checks**

As you are all aware, the Measure provides specific language regarding required background checks by the Oregon State Police which a person must complete successfully in order to get a permit to purchase.

The Oregon State Police (OSP) have informed OSSA and the Oregon Chiefs of Police (OACP) that the Federal Bureau of Investigation (FBI) has flatly refused to provide a criminal

background check for a purchase permit, as required by the Measure. OSP has indicated that they intend to provide a report back to the permit agent (local law enforcement) that they have completed seven of the eight required steps, as they are not currently able to complete the required FBI check.

Our guidance on this issue is clear, unambiguous and simple – **no permit agent should issue a permit to purchase a firearm unless the Oregon State Police reports that the person is fully qualified to obtain a permit, including that they have successfully passed the required FBI background check.** The Measure contains specific language directing when a permit agent may issue a permit in Section 4, (1)(b):

(b) A person is qualified to be issued a permit-to-purchase under this section if the person: (A) Is not prohibited from purchasing or acquiring a firearm under state or federal law, including but not limited to successfully completing a criminal background check as described under paragraph (e) of this subsection;

The language of paragraph (e) provides:

The permit agent shall request the department to conduct a criminal background check, including but not limited to a fingerprint identification, through the Federal Bureau of Investigation. The Federal Bureau of Investigation shall return the fingerprint cards used to conduct the criminal background check and may not keep any record of the fingerprints. Upon completion of the criminal background check and determination of whether the permit applicant is qualified or disqualified from purchasing or otherwise acquiring a firearm the department shall report the results, including the outcome of the fingerprint-based criminal background check, to the permit agent.

In order to be “qualified” for a permit to purchase a firearm, the Measure plainly requires that the person successfully complete a criminal background check which specifically includes the required FBI check. No permit agent may legally issue a permit to purchase unless the applicant successfully completes a background check as described in paragraph (e), because the person is by the plain text of the Measure not “qualified” until they successfully pass the entire background check, including the FBI check. Until the FBI agrees to perform the required criminal background checks and OSP can certify that the person is qualified because they have successfully passed the entire background, no purchase permit may be legally issued by any permit agent because no applicant will be “qualified” as specifically set forth in the Measure.

This conclusion is reinforced by the language of Section 4 (3)(a) which provides:

Within 30 days of receiving an application for a permit under this section, **if** the permit agent has verified the applicant’s identity and determined that the applicant has met each of the qualifications described in paragraph (1)(b) of this section, the permit agent shall issue the permit-to-purchase.

It is apparent that without the required background check, no permit agent could determine that the applicant has met each of the qualifications because the FBI check is one of the specific qualifications listed in the Measure. Issuing a permit to purchase to a person who is not fully qualified (including passing the required FBI background check) would violate the requirements of the Measure and would be unlawful.

### **Large Capacity Magazines**

There are a number of enforcement issues related to the Measure’s restriction of large capacity magazines (LCM). Section 11, (1)(d) of the Measure defines an LCM:

“Large-capacity magazine” means a fixed or detachable magazine, belt, drum, feed strip, helical feeding device, or similar device, including any such device

joined or coupled with another in any manner, or a kit with such parts, that has an overall capacity of, or that can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition and allows a shooter to keep firing without having to pause to reload, but does not include any of the following:

- (A) An ammunition feeding device that has been permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition;
- (B) An attached tubular device designed to accept, and capable of operating only with 0.22 caliber rimfire ammunition; or
- (C) A tubular ammunition feeding device that is contained in a lever-action firearm.

**Perhaps the most important issue regarding LCMs is the fact that the Measure makes the use, possession or transfer of an LCM a crime, subject to some narrow exceptions for gun dealers, manufacturers, police and military.** People with a concealed handgun license are not exempt from prohibition, nor are off-duty police officers who use, possess or transfer an LCM. Any police officer is justified in arresting any person who manufactures, imports, possesses, uses, purchases, sells or transfers an LCM who doesn't fit one of the narrow exceptions.

Section 11 (2) of the Measure states that a person commits the crime of unlawful manufacture, importation, possession, use, purchase, sale or otherwise transferring of large-capacity magazines if the person manufactures, imports, possesses, uses, purchases, sells or otherwise transfers any large-capacity magazine in Oregon on or after the effective date of this 2022 Act, except as provided in sections (3) to (5) of section 11.

Section (3) provides that a gun dealer has a 180-day period after the Act takes effect to dispose of all LCMs by one of the methods set out in the section.

Section (4) provides that a gun dealer or gun manufacturer can continue to sell or manufacture LCMs for military and law enforcement use, subject to specific requirements.

Section (5) provides an affirmative defense if a person can prove that they owned the LCM prior to the Act taking effect or that they inherited it from a person in legal possession of the LCM AND that they kept the LCM in a specific way, in specific locations at all times.

As noted above, the Measure makes the possession, use and transfer of an LCM a crime. An affirmative defense doesn't change the fact that the conduct is a crime, it simply provides a person who has been arrested and charged with a crime the opportunity to prove to the jury they fit into the narrow exceptions that allow the defense. If they can prove that the affirmative defense applies, they get acquitted of the charge. If they fail to convince a jury that the affirmative defense applies, they get convicted and sentenced. An affirmative defense requires that the person charged with the crime must provide all the evidence necessary to prove the affirmative defense applies and they have the burden to persuade the jury.

A person can raise the affirmative defense if the following apply, and the person is able to prove to a jury that they apply:

- (a) The large-capacity magazine was owned by the person before the effective date of this 2022 Act and maintained in the person's control or possession; or
- (b) The possession of a large-capacity magazine was obtained by a person who, on or after the effective date of this section, acquired possession of the large-capacity

magazine by operation of law upon the death of a former owner who was in legal possession of the large-capacity magazine; and

(c) In addition to either (a) or (b) of this subsection the owner has not maintained the large-capacity magazine in a manner other than:

(A) On property owned or immediately controlled by the registered owner;

(B) On the premises of a gun dealer or gunsmith licensed under 18 U.S.C. 923 for the purpose of lawful service or repair;

(C) While engaging in the legal use of the large-capacity magazine, at a public or private shooting range or shooting gallery or for recreational activities such as hunting, to the extent permitted under state law; or

(D) While participating in firearms competition or exhibition, display or educational project about firearms sponsored, conducted by, approved or under the auspices of a law enforcement agency or a national or state-recognized entity that fosters proficiency in firearms use or promotes firearms education; and

(E) While transporting any large-capacity magazines in a vehicle to one of the locations authorized in paragraphs (c)(A) to (D) of this subsection, the large-capacity magazine is not inserted into the firearm and is locked in a separate container.

To be clear, a person who has owned an LCM for many years, and who is using the LCM only on property they own and control is still committing a crime, and may be arrested. They can of course attempt to prove that the affirmative defense applies to them.

The language of the affirmative defense raises many questions about enforcement of the Measure. Some of these questions do not have a clear answer, and we will have to wait for further guidance from the judicial branch.

Question 1 – The affirmative defense uses the phrase “On property owned or immediately controlled by the registered owner.” What does the phrase “registered owner” mean? Oregon has never required a person to register a firearm, and there are literally millions of unregistered firearms in the State. Likewise, there is no process to register ownership of an LCM. The phrasing leads us to believe that the drafters of the Measure must have intended the phrase “registered owner” to refer to the owner of the firearm or the LCM being used, and that they were under the misimpression that firearms and/or LCMs were registered to a specific person. Our best guess is that the drafters intended that the defense apply to people using an LCM on real property they owned or immediately controlled and the phrase “registered owner” was simply a misnomer.

Question 2 - The affirmative defense uses the phrase “On property owned or immediately controlled by the registered owner.” What does it mean to “immediately control” property? Unfortunately, there is nothing in the text of the Measure to assist in what the drafter’s of M 114 intended with this phrase. Assuming that the drafters were talking about using an LCM on real property that the user of the LCM either owned or had immediate control over, the principles of real property appear to provide some guidance. A person can either own real property outright, or they can have the right to control the real property through various legal mechanisms, such as a leasehold, life estate, a trust or even a license. We believe that the drafters likely intended that the person using an LCM on real property has some legally recognized right to be there and exert control the property, as opposed to simply using an LCM on public property such as state or national forest land. A tenant or other resident of real property with a legal right to be there (not a squatter or trespasser) would appear to have the right to “immediately control” the property. A landlord who has entered into a lease and has given the right of possession to the renter would not normally have the right to “immediately control” the property, as that right would be held by the renter during the term of the lease. The phrasing of the Measure would appear

to indicate that a person could not go to a friend's property and use an LCM unless the property were a public or private shooting range or shooting gallery or the person was engaged in hunting. Section 11(5)(c)(C). We would note that for many types of hunting, using an LCM would not comply with ODFW regulations as the regulations limit the number of rounds that may be used. If the property were hosting a firearms competition, exhibition or display that fits into the exception of Section 11(5)(c)(D) then using an LCM would be allowed.

Question 3 - how can an LCM be permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition? This question has obvious implications for law enforcement (LE) officers, as they are not allowed to carry LCM's off-duty (their use of LCM must be directly related to the performance of their official duties.) Almost every LE in the state carries a semi-automatic pistol with detachable magazines, such as a Glock or Sig Sauer. 10-round magazines are readily available for these pistols, but the base-plate of these pistol magazines are almost universally removable – many with nothing more than a ball-point pen. New base-plates which add additional round capacity to the magazine are cheap, readily available, and can be installed in minutes. For all magazines that have a detachable base-plate, the reality is that the magazine appears to fit the definition of an LCM because they are readily capable of being adapted to hold more than 10 rounds. It would appear that even drilling and riveting a base-plate to the magazine in order to more permanently attach it would not take it out of the definition of LCM, since a rivet can easily be removed and thus the magazine could again be capable in the future of holding more than 10 rounds. There have been suggestions that using epoxy to glue a base-plate to a 10-round magazine might make it compliant with the Measure. The issue of course is that the base-plate and epoxy could be easily removed with a grinder and a new base plate installed. It is entirely unclear at this point how a person can permanently alter a magazine with a detachable base-plate so that it cannot readily be restored in the future accept more than 10 rounds.

Question 4 – Does it matter whether the LCM is loaded or unloaded, or if it is carried concealed or in the open? No, the Measure makes the possession, use or transfer of an LCM unlawful subject to some narrow exceptions described above. The fact that the LCM is carried openly, or that it is unloaded, does not change the fact that mere possession is a crime for which a person can be arrested.

Question 5 – How should an LE agency address the use or possession of LCMs when an officer is off-duty? The Measure is explicit, Section 11 (4)(c) provides that a peace officer may acquire, use or possess an LCM, provided that **“any acquisition, possession or use is related directly to activities within the scope of that person’s official duties.”** The plain language of the Measure says that any use or possession must be directly related to the officer's official duties, and it is difficult to see how that can be stretched to apply to an officer's off-duty carry of an LCM. Granted, many if not most LE officers currently carry a weapon when off-duty, for both self-protection and so that they are prepared to take law enforcement action if the need arises. The vast majority of those officers carry LCMs when off-duty. While a person could certainly make an argument that the officer is carrying an LCM so they have the ability to take off-duty law enforcement action, and thus it is directly related to their duties, we are not aware of any agency that **requires** their officers to carry off-duty and to take LE action. Most LE policies allow officers to take off-duty action if the officer feels it necessary, it is safe to do so, etc. An officer could certainly argue that their use or possession of an LCM is directly related to their duties, but if they are wrong, they would be committing a crime and potentially jeopardizing their career. Our guidance is that officers should not carry LCMs off-duty unless specifically required by their agency, such as members of a SWAT team on call for emergency response.