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Re: Proposed Amended Regulations for "Microstamping"

Dear Mr. Amador:

We again write on behalf of our clients, the National Rifle Association, the California Rifle and Pistol Association, and their hundreds of thousands of members throughout California, to renew our clients' objections to the Department of Justice's (DOJ) proposed regulations, even in their latest amended form, concerning the implementation and certification of the microstamping technology required by the Unsafe Handgun Act (California Penal Code §§ 12125-12233).

I. INTRODUCTION

The amended regulations being proposed are in response to Assembly Bill 1471 (AB 1471), which was passed into law in 2007. AB 1471 requires, commencing January 1, 2010, that all semi-automatic pistols not listed on the roster of handguns approved for direct sale by retailer firearm dealers found at Penal code section 12131 be "designed and equipped" with microstamping technology, "provided that the Department of Justice certifies that the technology used to create the imprint is available to more than one manufacturer *unencumbered by any*

patent restrictions."[1]

As of the date of this letter, there is still *no* microstamping technology that has been certified by the DOJ, let alone any such technology that is unencumbered by patents.

Our office previously submitted a letter in opposition to virtually the same proposed regulations on February 15, 2010. None of the concerns raised in that correspondence have been addressed by the DOJ's latest amendments to the proposed regulations. For that reason, our clients hereby renew their objections with this correspondence.

II. ANALYSIS

A. The Regulations Are Not Necessary at this Time

The Administrative Procedures Act (APA) governs the rulemaking processes of government agencies, including the DOJ. Under the APA, the validity of an agency's proposed regulation is evaluated in light of the following criteria: necessity, authority, clarity, consistency, reference, and non-duplication.[2] The APA defines "necessity" as meaning "the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record."[3]

Despite any assertions by the DOJ that the regulations are necessary for implementation of the "microstamping" requirement, they simply are not.

1. The Underlying Statute Has Not Been and May Never Be Implemented

As mentioned, no microstamping technology has been certified by the DOJ. The only potentially certifiable system remains encumbered by a patent. In fact, it is questionable whether that technology is sufficient to be certified, regardless of the encumbrance. In determining whether a regulation satisfies the "necessity" requirement under the APA, we are to "tak[e] into account the totality of the record." Thus, the "totality of the record" must "demonstrat[e] by substantial evidence the *need* for a regulation."[4] The record here includes the fact that no certifiable technology is currently available. Because no certifiable technology is available, and may never be available, regulations concerning microstamping technology *cannot be needed* at this time, and are thus not necessary.

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[1] *See* Cal. Pen. Code § 12126(b)(7).

[2] California Government Code §11349.1.

[3] Gov't Code § 11349(a).

[4] *See* Gov't Code § 11349(a) (emphasis added).

Furthermore, Government Code section 11349.8 indicates a regulation should be repealed when its underlying statutory authority has become inoperative.[5] Here, where there is no proof that the technological requirements of the applicable statute will ever be met (leaving the statute inoperative by its own terms), DOJ would be adopting regulations that would plainly be subject to repeal. Because the proposed regulations will likely run afoul of section 11349.8, they should not be adopted.

2. It Is Bad Policy to Spend Limited Resources to Draft and Consider Proposed Regulations for a Statute that May Not Be Implemented

The timing of these proposed regulations could not be worse. Not only is the implementation of the underlying statute uncertain, but the state of California continues to face severe economic hardships. As pointed out in our previous letter, this reality has been recognized by the California Police Chiefs Association ("CPCA"), a law enforcement organization that generally supports the creation and implementation of microstamping technology. The CPCA wrote a letter to the Attorney General requesting that the DOJ forego the implementation of microstamping at this time. The CPCA's request is based on two key points: 1) the viability of microstamping technology has not been confirmed; and 2) the costs associated with implementing the proposed regulations at this time would be detrimental to the already suffering budgets of California law enforcement agencies.

The NRA and CRPA agree with the CPCA on these points. The DOJ should not be spending scarce time and money drafting regulations, and vetting them in the extensive rulemaking process, when there is no indication when, if ever, the statue will be implemented. This is especially true given the dire economic straits California currently faces. For the foregoing reasons, the proposed regulations are not necessary, and our clients must therefore object to their adoption.

B. Suggested Regulatory Provisions

Just as with the previous versions of these proposed regulations, our clients unequivocally object to their consideration and adoption at this time. If, despite our clients' objection, the DOJ decides to proceed with the rulemaking process for regulations implementing microstamping technology, our clients hereby renew their previous request that certain regulatory actions be considered.

1. The Certification Process for Microstamping Technology Must Be Conducted Pursuant to the APA and Allow Public Participation

Proposed section 4075(f) requires that the certification and approval of "an alternative method of microstamping technology by the Attorney General" be made by "notice via regulations adopted by the Attorney General. . ." Although our clients agree that certification of any *alternative* method should be done pursuant to noticed regulations under the APA, they

[5] *See* Gov't Code § 11349.8 (providing the office of administrative law a mechanism for repealing regulations based on inoperative statutory authority).

contend that the same should apply to the *original* microstamping technology to be certified by DOJ as well, for which there are currently no existing or proposed regulations. It would make little sense if the public could comment regarding later technology but not the original. Remedies under the APA would help to ensure the public has the ability to avoid any potentially unworkable technology that may be implemented.

2. Restrictions for Entities Proposing Microstamping Technology

Just as DOJ regulations prohibit a person from managing a DOJ-certified laboratory if that person has an affiliation with a manufacturer, importer, wholesaler, distributor, or dealer of handguns (or has a contractual, financial, or familial relationship with any of those entities), so should DOJ regulations restrict the relationships between persons and entities involved with making microstamping technology. Specifically, the DOJ should monitor whether any patent holder of microstamping technology is affiliated with any other person or entity that is applying for technological certification. Such relationships should be strictly prohibited in a similar fashion to the restrictions mentioned.

3. Removal of California Code of Regulations § 4055 Creates Due Process Issues

In addition to considering adoption of regulations relating to microstamping, DOJ is also considering removal of Title 11, section 4055 of the California Code of Regulations, which allows an applicant to request a refund of application fees if the DOJ does not timely process the applicant's application for certification as a "DOJ-Certified" handgun testing laboratory.[6] Section 4055 also provides a route for appealing a refund-request denial.[7]

Removal of Section 4055 will give the DOJ carte blanche to delay processing of applications without consequence, and will leave disregarded applicants without recourse. The repeal of the statute *requiring* applications be processed with in a specific time frame (Gov. Code sections 15374-15378) does not grant the DOJ unlimited discretion to prescribe its own time limits for applications. A lack of a time limit for processing applications deprives applicants of fair notice as to whether and when an application will be processed.

Thus, Section 4055 should not be repealed because due process demands that a reasonable time limit be put on the DOJ's processing of applications.

III. CONCLUSION

In sum, the proposed regulations are not necessary as required under the APA. The underlying statute for these proposed regulations is strongly opposed and still has not been implemented, even though the implementation deadline passed nearly one year ago. Despite this, the DOJ continues to spend time and money drafting and considering regulations for a statute

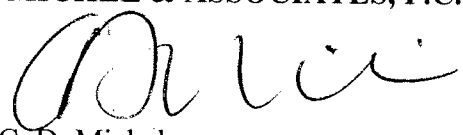
[6] Code Regs. tit 11, § 4055(a).

[7] *Id.* § 4055(c).

that may not ever be implemented. For the foregoing reasons, our clients must object to the consideration and implementation of the proposed regulations.

We thank you for your time and consideration. If you have any further questions or concerns, please do not hesitate to contact us.

Sincerely,
MICHEL & ASSOCIATES, P.C.



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