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MEMORANDUM OF LAW

Re: Attorney General Freezes Number of Semiautomatic Pistols Available for Sale in California

Date: June 5, 2013

I. Introduction

Despite the flaws in the technology, the obvious ways a criminal will circumvent the technology, and the difficulties crime labs will have in deciphering the marks, on May 17, 2013, the California Attorney General certified that microstamping is available to firearm manufacturers. With this simple announcement, new and safer state-of-the-art pistol models essential for home and family defense became impossible for Californians to acquire, as all new semi-automatic pistol models to be sold in California will be required to have microstamping incorporated into their design. Given the manufacturing costs involved, it is highly unlikely that any manufacturers will adopt the technology, particularly considering their current pistol production can barely meet the demand from other states.

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II. California's "Unsafe Handguns" Law

With limited exceptions,¹ before a handgun can be sold in the State of California from a licensed firearm dealer, that handgun must *not* meet the definition of an "unsafe handgun." Cal. Penal Code § 32000. Despite the double negative, California law is written this way. A firearm is an "unsafe handgun" if:

For a revolver:

- (1) *It does not have a safety device that, either automatically in the case of a double-action firing mechanism, or by manual operation in the case of a single-action firing mechanism, causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge.*
- (2) *It does not meet the firing requirement for handguns.*
- (3) *It does not meet the drop safety requirement for handguns.*

For a pistol:

- (1) *It does not have a positive manually operated safety device, as determined by standards relating to imported guns promulgated by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives.*
- (2) *It does not meet the firing requirement for handguns.*
- (3) *It does not meet the drop safety requirement for handguns.*
- (4) *Commencing January 1, 2006, for a center fire semiautomatic pistol that is not already listed on the roster pursuant to Section 32015, it does not have either a chamber load indicator, or a magazine disconnect mechanism.*
- (5) *Commencing January 1, 2007, for all center fire semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it does not have both a chamber load indicator and if it has a detachable magazine, a magazine disconnect mechanism.*
- (6) *Commencing January 1, 2006, for all rimfire semiautomatic pistols that are not already listed on the roster pursuant to Section 32015, it does not have a magazine disconnect mechanism, if it has a detachable magazine.*
- (7) (A) *Commencing January 1, 2010, for all semiautomatic pistols that*

¹ The exceptions to the "unsafe handgun" requirements are listed in Penal Code sections 32000(b) and 32100-32110. These typically involve single action revolvers, single shot pistols, listed Olympic target pistols, and miscellaneous exceptions (i.e. private party transfers, intrafamilial transfers, and sales to military and law enforcement, etc.). They typically do not exempt new modern pistols.

are not already listed on the roster pursuant to Section 32015, it is not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired, 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.

- (B) *The Attorney General may also approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a firearm from spent cartridge casings discharged by that firearm than that which is set forth in this paragraph, to be thereafter required as otherwise set forth by this paragraph where the Attorney General certifies that this new method is also unencumbered by any patent restrictions. Approval by the Attorney General shall include notice of that fact via regulations adopted by the Attorney General for purposes of implementing that method for purposes of this paragraph.*
- (C) *The microscopic array of characters required by this section shall not be considered the name of the maker, model, manufacturer's number, or other mark of identification, including any distinguishing number or mark assigned by the Department of Justice, within the meaning of Sections 23900 and 23920.*

Cal. Penal Code § 31910.

The requirements for pistols have changed over the years. Initially, pistols did not need a chamber load indicator and/or magazine disconnect. At the time of the changes to California law, pistols that were already on the “Roster of Handguns Certified for Sale” were exempted from the new requirements. In other words, the pistols on the Roster prior to the chamber load indicator and/or magazine disconnect requirement can still be sold by a licensed firearm dealer without those features, provided they were on the Roster (and kept on the Roster) before those requirements took effect.

The same applies to the microstamping requirement. From May 17, 2013, following the certification that microstamping is available, and in order for new a model to be placed on the Roster, a semiautomatic pistol must also be fitted with microstamping technology.

III. The Roster of Handguns Certified for Sale

Handguns that are successfully tested and meet the above requirements may be placed on

the “Roster of Handguns Certified for Sale” in California. The California Department of Justice is tasked with keeping and maintaining the Roster. Cal. Penal Code § 32015. Manufacturers who wish for their handguns to be published on the Roster must pay a fee for the required testing, a fee for placement on the Roster, and an annual renewal fee to keep their firearms on the Roster. *Id.* Failure to renew is basis for a handgun to be removed from the Roster. *Id.*

Firearms similar to ones already on the Roster may be added to the Roster provided the new firearm differs from the one already on the list only in one or more of the following ways:

- (1) *Finish, including, but not limited to, bluing, chrome-plating, oiling, or engraving.*
- (2) *The material from which the grips are made.*
- (3) *The shape or texture of the grips, so long as the difference in grip shape or text does not in any way alter the dimensions, material, linkage, or functioning of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm.*
- (4) *Any other purely cosmetic feature that does not in any way alter the dimensions, material, linkage, or functioning of the magazine well, the barrel, the chamber, or any of the components of the firing mechanism of the firearm.*

Cal. Penal Code § 32030(a). To request a firearm similar to one already on the Roster be added based on the forgoing, a manufacturer must complete pursuant to a special application process. Cal. Penal Code § 32030(b).

IV. Microstamping Technology

Microstamping technology has been around for years. The California law requiring microstamping was enacted in 2007 as part of AB 1471. (The Penal Code was renumbered in 2012. The language relating to microstamping previously appeared in section 12126. The wording of then section 12126 [current section 31910] was unchanged). Presumably, the intent behind this requirement was to “catch criminals.” Ironically, the analysis for the California Assembly stated that microstamping will “help reduce gun trafficking of new semi-automatic handguns” and the process will place no “burden on gun owners” with the (laughable) additional cost amounting to “\$0.50 to \$2” per pistol.

Since 2007, it was presumed that microstamping was years away from being fully implemented, not because the process, which is described below, didn’t exist (no matter how flawed), but because the process was encumbered by a patent. California law possesses a restriction that microstamping would not be required until the process was available to more than one firearm manufacturer unencumbered by patents. This kept the microstamping requirement

from taking effect until the Attorney General released the certification on May 17th that microstamping has become available to more than one firearm manufacturer.

Presumably, microstamping works by imprinting information from the pistol's firing pin and extractor or ejector onto a cartridge casing and primer. When a round is discharged, the firing pin stamps the information on the primer, and the same information is imprinted on the casing some other way when the casing is extracted from the chamber and ejected from the firearm.

Prior to May 17th, in order for semiautomatic pistols (barring an exception) to be sold through a licensed firearm dealer in California, they needed: (1) a positive manually operated safety device; (2) to meet the firing requirement; (3) to meet the drop safety requirement; (4) for centerfire semiautomatic pistols, both a chamber load indicator, and if the pistol possessed a detachable magazine, a magazine disconnect mechanism; and (5) for rimfire semiautomatic pistols, a magazine disconnect, if the pistol possessed a detachable magazine.

Even though the Attorney General has certified microstamping for all new semiautomatic pistols, the microstamping technology still has its flaws. There are obvious ways that a criminal could circumvent the technology, as well as the difficulties crime labs could face when it comes to deciphering the markings.

V. Practical Effect of the Attorney General's Certification of Microstamping

As a result of the Attorney General's recent certification, in order for a semiautomatic pistol to be added to the Roster, it must possess microstamping, possess a DOJ-approved alternative to microstamping (discussed below), or be substantially similar to a pistol already on the list (as discussed above). In other words, as of now, no more semiautomatic pistols will be added to the Roster *unless* manufacturers implement microstamping, and it is highly unlikely that manufacturers will do so due to the costs involved.

Manufacturers will be unable to sell new semiautomatic pistol models in California without microstamping, and Californians will be unable to purchase new pistol models available throughout the rest of the country.

A. Alternative Method of Microstamping Technology

Under California law, there is one, pie in the sky, option for manufacturers who can create an alternative to the microstamping process.

According to Penal Code section 31910(b)(7)(B), a manufacturer can request permission from the California DOJ to use an alternative method to microstamping. 11 C.C.R. § 4075. A description of the process must be provided, including an explanation as to how the alternative

method identifies the serial numbers for the firearm on the spent casing, the process must be tested by a DOJ-certified laboratory (the first two and last two casings from the 600 round test firing requirement must be legible), and the process must be unencumbered by *any* patent restrictions.

B. Effect on Public, Firearm Dealers, and Manufacturers

The current 1,279 handguns² on the Roster will still be available (provided their status on the Roster is maintained). Handguns can fall off the Roster easily if a manufacturer fails to pay the annual renewal fee. The Penal Code also allows for a retesting of handguns that are on the Roster by DOJ. If a handgun fails the retesting, it can be removed. Cal. Penal Code § 32020.

As with any product over time, manufacturers stop making them, either due to the lack of demand or because they wish to introduce a new version. As a result, there is little incentive for the manufacturer to continue paying to keep discontinued models on the Roster. As of January 1, 2013, 51 handgun models “fell off” the Roster.³ This will eventually mean that dealers will have to make semiautomatic pistols with microstamping or give up on the California market altogether. Over time, the California public will be unable to access new models of semiautomatic pistols.

VI. Conclusion

The guarantees of the Second Amendment are in jeopardy as a result of this “crime stopping” process. New, safer, and more reliable semiautomatic pistols will be unavailable to the California general public, unless handguns possess microstamping. The microstamping requirement arguably limits “the inherent right to self-defense” because it bans an “entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.” *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

Stay tuned to [www.CalGunLaws.com alerts] concerning this and other firearm related topics.

For Further Assistance:

For links to free information on firearms laws, the Legal Resources section of our www.calgunlaws.com website has subsections on various firearms law topics. Check it out!

² <http://certguns.doj.ca.gov> (last visited May 21, 2013).

³ See “Recently Removed Handguns. pdf” located at <http://certguns.doj.ca.gov>.

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