*The Law Offices of*
**DAVIS & ASSOCIATES**

27281 Las Ramblas, Ste 200, Mission Viejo, California 92691
Direct (949) 310-0817 / Fax (949) 288-6894 Jason@CalGunLawyers.com
www.CalGunLawyers.com

February 18, 2010

Jeff Amador, Field Representative
Department of Justice
Division of Law Enforcement/Bureau of Firearms
P.O. Box 160487
Sacramento, CA 95816-0487

**VIA EMAIL JEFF.AMADOR@DOJ.CA.GOV**

Re: **Proposed Microstamping Regulations & Public Records Act Request**

Mr. Amador,

I write on behalf of The Calguns Foundation in response to the proposed microstamping regulations. The Calguns Foundation ("CGF") is a nonprofit organization incorporated under the laws of California with its principal place of business in Redwood City, California. CGF's purposes include supporting the California firearms community by promoting education for all stakeholders about California and Federal firearm laws, rights, and privileges, and protecting the civil rights of California gun owners. CGF represents these members and supporters.

Pursuant to California Penal Code sections 12125 and 12126, only handguns that are on a DOJ Roster of handguns identified as not "unsafe" can be sold by licensed firearms dealers in this state. As of January 1, 2010, the Penal Code mandates that for a new model of semiautomatic pistol to be placed on the DOJ roster of "not unsafe" handguns (models currently on the roster are excluded), the pistol must be 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 workings parts of the pistol, that are transferred by imprinting on each cartridge case expended from the pistol when the firearm is fired. But, under the statute, the requirement only takes effect "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."

In order to withstand review by the Office of Administrative Law and comply with the Government Code, the proposed regulations must withstand scrutiny of the following factors: (1) Necessity, (2) Authority, (3) Clarity, (4) Consistency, (5) Reference, and (6) Non-duplication. Additionally, in order to survive a challenge, the regulations must not be in violation of any other law. Here, the proposed regulations cannot survive, as they: (1) create an underground regulation through their failure to create

a method to certify the *original* technology, (2) are unnecessary, (3) unclear, (4) inconsistent, and (5) they violate the Second Amendment.

**1. The Proposed Regulations Assume an Underground Regulation**

Penal Code section 12126 states, in part, that in order for the statute to be applied, the Department of Justice *must certify* that the technology used to create the imprint is available to more than one manufacturer, unencumbered by any patent restrictions. In order to "certify" a technology, the Department of Justice must adopt a regulation:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State . . . .

(Govt Code 11340.5.)

Nothing in these proposed regulations provides a mechanism for certifying the original technology described in Penal Code section 12126; nor do they expressly certify the technology. There is no procedure within these proposed regulations for certifying said technology; there is no standard upon which said technology can be analyzed; and there is no standard by which said technology can be deemed free from encumbrance of any patent restrictions. For instance, to what depth in microns or other unit of measurement must the etching or imprint be made on the cartridge? What method is used to measure the etching or imprinting? To whom must the etching or imprinting be visible to? What must the laboratory technicians' vision be when examining the imprint, as individuals vision ranges drastically from person to person?

The proposed regulations do, however, identify a method of testing and applying for certification of an "*alternative* method of microstamping." (Emphasis added.) But the proposed regulations are void of comparable standards for the **original method** of microstamping. As such, even if the proposed regulations are enacted, the underlying statute cannot be implemented without a subsequent round of regulations, due to the fact that the underlying technology cannot be certified without being adopted as a regulation and filed with the Secretary of State.

**2. The Proposed Regulations are not Reasonably Necessary to Effectuate the Statute at This Time**

A proposed regulation satisfies the requirement of "necessity" if 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. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

(Govt Code 11349(a).)

These proposed regulations are not reasonably necessary to effectuate the purpose of the statute. (Govt Code §11342.2.) Specifically, Penal Code section 12126(a)(7) states that the proposed technology used to create the imprint must be available to more than one manufacturer and unencumbered by any patent restrictions. To date, there is no substantial evidence of a single proposed technology used to create the required imprint that is available to more than one manufacturer unencumbered by any patent restrictions. As such, there is no need to certify any such technology, as the technology does not exist at this time - nor is there a need to implement these regulations, which detail the certification process.

Further, the Department of Justice provides no mechanism to effectuate the statute by certifying the technology, thereby making these proposed changes unnecessary until such a mechanism is in place.

To the extent that the Department of Justice believes there exists a technology used to create the imprint that is available to more than one manufacturer unencumbered by any patent restrictions, please provide a copy of all writings offering evidence of any such technology and its lack of encumbrances. (The term "writings" is used in Evidence Code 250, pursuant to the California Public Records Act.)

### 3. The Proposed Regulations Are Unclear

A proposed regulation satisfies the requirement of "clarity" if the record of the rulemaking proceeding demonstrates that the proposed regulations are "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Govt Code 11349(c).)

It is unclear from these proposed regulations how the Department of Justice intends to certify that the initial or subsequent technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions – as the regulations are void of any policies, procedures, or application standards.

Further, the term "*high quality digital photographs*," as used in section 4060(h)(2) and throughout the proposed regulations, is undefined, subjective, and unclear. In the realm of digital photography, quality is subjective and dynamic as technology improves. In order to be understood in a legal context, "high quality digital photograph" must be defined through a number of factors, including (but not limited to) a specific recorded resolution or minimum resolution in terms of pixel count, a maximum compression ratio (using this type of content) or minimum "quality factor" if lossy compression algorithms are used (JPEG, wavelet, etc.), a relation between image size in pixels vs. distance units, the chosen color space, and white balance (if not black & white). The photography setup needs to be

specified in terms of (and not limited to) distance of photographed area from lens, any magnification setting, and illumination standards.

Also, the phrase "*each set of cartridge casings expended from each tested pistol of that make and model of semiautomatic pistol*," as used in section 4060(h)(1)(3) is unclear in its application here. Specifically, the proposed regulation states that the DOJ-certified Laboratory shall "repeat the examination process described above for each set of cartridge casings expended from each tested pistol of that make and model of semiautomatic pistol." It is unclear as to whether this applies to the two, and only two, cartridges that are selected for testing pursuant to section 4060(g), or to the hundreds of cartridges test fired as a result of all of the testing conducted pursuant to the Unsafe Handgun Act testing requirements, such as the drop tests and misfire testing.

**4. The Proposed Regulations are Inconsistent With Penal code Section 12126 and the Second Amendment**

A proposed regulation satisfies the requirement of "consistency" if the record of the rulemaking proceeding demonstrates that the proposed regulations are in "harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. (Govt Code 11349(d).) Here, as discussed above, the proposed regulation contradicts Penal Code section 12126 by completely failing in its statutory duty to provide a mechanism, protocol, and/or standard by which 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.

Furthermore, as the Department is fully aware, the Unsafe Handgun Act, for which these regulations apply, is currently being challenged[1] on the basis that the Act violates the Second Amendment to the United States Constitution. While that case has been stayed pending a determination by the Supreme Court on the issue of incorporation of the Second Amendment, that suit is likely to prevail – thereby mooting this entire regulatory process. In the interest of economy and preservation of resources, the Department of Justice should, at a minimum, withdraw these proposed regulations pending the outcome in the *Peña* matter.

Sincerely,
**DAVIS & ASSOCIATES**

*s/Jason Davis*

JASON DAVIS
cc: Alison Merrilees

[1] See *Pena v. Cid*, Case No. 2:09-cv-01185 in the United States District Court - Eastern District of California.