COMMENTARY

ON POINT
By Catherine McClure

Our new right to bear arms: the bad news and the good

The Supreme Court recently closed out their term with a bang by granting Americans a brand new constitutional right to bear arms in the case of *District of Columbia v. Heller*. It has been a long time since the court declared a new constitutional right, in fact since the last truly activist court under Chief Justice Earl Warren found a constitutional right of privacy buried in the Bill of Rights. The 5-4 *Heller* decision, written by Justice Antonin Scalia, thus confirms for court watchers everywhere that we have another activist Supreme Court, leaning in a decidedly different direction than the Warren court, but activist just the same.

Of course not all of us wanted this particular constitutional right, and the *Heller* decision is therefore a mix of bad news and good. The bad news is the case holding itself, that to preserve the individual's right to own and use firearms government may not effectively ban handgun ownership, regardless of public safety concerns. Good news also lurks in language of the case, however, which warns that the right is not absolute but may be limited by reasonable regulations enacted by local communities to keep their streets safe. Justice Scalia's enumeration of sanctioned gun regulations suggests that in fact the state will retain considerable police power to regulate the ownership and possession of firearms. Unfortunately, Michigan has a little catching up to do in that regard.

The *Heller* case challenged on Second Amendment grounds a District of Columbia law — widely regarded as one of the strictest in the country — which bars residents from owning handguns, and allows shotguns and rifles to be kept in homes only if registered, unloaded, and either disassembled or equipped with trigger locks. Although the Supreme Court had never directly ruled on the scope of the Second Amendment, language from a 1939 case suggested that the right to bear arms is a collective right only, and nine federal circuit courts have accordingly held there is no individual right to own a gun.

The Supreme Court majority in *Heller* found otherwise based on a strictly originalist analysis of the text and history of the amendment. In wiping away years of lower court precedent, the court tied the individual right to bear arms squarely to the lawful purpose of self-defense, and held that the D.C. law was unconstitutional because the law made it impossible for D.C. citizens to use guns to protect themselves in their homes.

Constitutional scholars have been quick to claim that by invalidating a law adopted by popularly elected lawmakers, where interpretation of the text and history of the Second Amendment is questionable at best, this court has thrown off any claim to judicial restraint and is displaying its most activist instincts. In this and other decisions of the last two terms, critics contend the court has too often ignored precedent and the will of the people in favor of conservative ideology and politics. As Justice Stevens so aptly put it in his *Heller* dissent, the court's decisions "will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries."

The decision could have been worse, however. While the court ruled that government may not adopt gun restrictions so onerous as to destroy the right to self-defense in the home, it also indicated that most gun control measures in place across the country are constitutional. The court sanctioned prohibitions on the possession of firearms by felons and the mentally ill, prohibitions on carrying concealed weapons in sensitive places like schools and government buildings, reasonable regulation of the commercial sale of arms, and restrictions on the sale of "dangerous and unusual weapons" such as machine guns, which are not typically used for self-defense.

Commentators suggest that in fact the ruling will have little practical effect across most of the country, and as the ABA noted in a recent press release, the case is "not a signal to rescind regulations or ignore legitimate restrictions on gun ownership and use that are grounded in reason and practicality." To the contrary, the decision should encourage lawmakers to redouble efforts to ensure reasonable gun restrictions are in place to keep our communities safe.

Michigan could do more in that regard. While we have state laws regulating gun dealers and the licensing of handgun purchasers, the state earned just 22 points out of 100 in a recent Brady Campaign scorecard accessing state gun safety laws. Michigan comes up short in all categories, including its regulation of firearm trafficking, background checks and concealed weapons. Of particular concern is our lack of effective restrictions against the sale and possession of military-style automatic weapons and child access prevention (CAP) laws which subject gun owners to criminal and civil penalties when children gain access to and are subsequently harmed by negligently stored firearms.

Faced as we are with an activist Supreme Court and this new unassailable right to own a gun, Michigan state lawmakers must introduce legislation to address these deficiencies. We need strong regulatory protections in place now more than ever before.

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Franchisors must follow new rules effective July 1, 2008

By Tom Branigan

As of July 1, 2008 franchisors like fast food and hotel system operators were required to follow a new set of federal rules that govern the way they offer franchises for sale, the information they provide to potential franchisees pre sale and the way they do business in general with their franchisees. The Federal Trade Commission ("FTC") is charged with the responsibility of writing and enforcing federal regulations applicable to franchisors and the way they do business with their franchisees. The FTC's original rule was promulgated in 1978, however, since that date most states have enacted their own disclosure laws that require use of a Uniform Franchise Offering Circular ("UFOC") as part of the franchise sales activity. Michigan has its own statute applicable to franchise relationships and franchise agreement. Michigan's law is known as the Franchise Investment Act.

Naturally, this combination of federal and state laws applicable to franchise relationships has lead to confusion and, in some cases, duplicate rules. This, in part, drove the FTC to amend the federal rule. The amendments to the federal rules bring those rules into much closer alignment with state franchise disclosure laws, which are based upon the UFOC Guidelines, developed and administered by the North American Securities Administrators Association ("NASAA"). Although the amended federal rule closely tracks the UFOC Guidelines, in some instances it requires more extensive disclosures – mostly with respect to certain aspects of the franchisee-franchisor relationship. For example, the amended Rule requires more extensive disclosures on: lawsuits the franchisor has filed against franchisees; the franchisor's use of so-called "confidentiality clauses" in lawsuit settlements; a warning when there is no exclusive territory; an explanation of what the term "renewal" means for each franchise system; and trademark-specific franchisee associations. In a few instances, the amended Rule requires less than the UFOC guidelines – for example, it does not require disclosure of so-called "risk factors," franchise broker information, or extensive information about every component of any computer system that a franchisee must purchase.


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The amended Rule is intended to give prospective purchasers of franchises the material information they need in order to weigh the risks and benefits of such an investment. The amended Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. Required disclosure topics also include information about past and current franchisees and their contact information, any exclusive territory that comes with the franchise, assistance the franchisor provides franchisees, and the cost of purchasing and starting up a franchise. If a franchisor makes representations about the financial performance of the franchise, this topic also must be covered, as well as the material basis backing up those representations.

The original Rule was also updated to adapt to changes in the marketing of franchises and new technologies, reducing compliance costs where possible and addressing complaints voiced by many franchisees during the amendment proceeding about the franchisees' experience with franchisors after they have signed an agreement and entered into a franchise relationship.

The amended Rule has the following key features that will impact you whether you are a franchisor, franchisee or a potential franchise:

• **Delivery of UFOC Documents.** Franchisors must now deliver the UFOC at least 14 calendar days before the franchisee signs a contract with the franchisor or pays any money to the franchisor. Previously, the requirement was delivery to the prospective franchisee at the earlier of the "first personal meeting" or 10 business days before receipt of money or execution of any franchise-related agreements.

• **Litigation.** Franchisors will be required to disclose material franchisor-initiated litigation against its franchisees. However, the amended Rule will be more lenient as a franchisor will only have to disclose actions that the franchisor filed during its last fiscal year – not the last 10 years.

• Financial Performance Representations. The amended Rule encourages franchisors to provide financial performance representations but it is still voluntary. Franchisors may provide a more detailed cost and expense analysis which could be helpful for prospective franchisees.

• **Use of unaudited financial statements.** Start-up franchisors may phase-in the use of audited financial statements. In this case the franchisor must clearly and conspicuously disclose that the franchise has not been in business for three or more years and cannot include all required financial statements. (There may still be requirements to submit audited opening balance sheets in registration states). Obviously, franchisees should be certain to review the financials carefully as always.

The amended Rule also raises a number of other important but still unresolved issues – for example, exactly how or if states like Michigan might adopt the amended Rule and when will they implement it? Will all the states implement the amended Rule, or will there be individual state differences? These issues will undoubtedly be the subject of a fair amount of attention as time goes by.

Copies of the amended Rule are available from the FTC's Web site at http://www.ftc.gov and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

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