



February 20, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 816 and HB 1257

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of Maryland and of the Bar of the District of Columbia. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland firearms law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License (“HQL”) and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home and in muzzle loader. I appear today as President of MSI in opposition to SB 186 and HB 1257.

These Bills and Current Law: The New Burdens And Conflicts

This State imposes very strict regulation of firearms dealers, requiring that these dealer obtain a state-issued firearms license and submit to inspections on a regular basis by the Maryland State Police. See, e.g., MD Code Public Safety §5-110, §5-114, §5-115, §5-145. Additional regulatory burdens on dealers were imposed with the enactment of SB 281, the Firearms Safety Act of 2013, including amending MD Code Public Safety 5-145 to impose additional record keeping requirements. In addition to state regulation, all these dealers are also Federal Firearms Licensees (“FFLs”) and are thus heavily regulated by the ATF, a component of the U.S. Department of Justice. The ATF likewise imposes substantial record-keeping requirements, along with many other requirements concerning the conduct of business, on FFLs. See 18 U.S.C. § 923; 27 C.F.R. Part 478.

These bills would impose a vast array of new burdens on State licensed dealer. First, it would amend MD Code Public Safety 5-145 to require that the dealer keep ELECTRONIC records. The ATF does not permit electronic records. Rather FFL records must be kept in a “bound form” under a format specified in the regulations. See 27 C.F.R. §478.125(e). Any alternative format for records must receive special permission, requiring an application, and may not be employed by the FFL until approval is received. *Id.* at §478.125(h). Thus, this bill would effectively require the dealer to keep two sets of records, one in electronic format and one in paper format (as required by the ATF). Indeed, the bills effectively negate the provision in existing law (Section 5-145(a)(4)) that provides that “[r]ecords maintained under 18 U.S.C. § 923(g)(1)(a) may be used to satisfy the requirements of this section, if the Secretary is granted access to those records.”

The bills would also amend Section 5-145 requiring dealers to keep new records, including requiring the dealer to CREATE A VIDEO AND AUDIO RECORDING OF ALL RECEIPTS, SALES, AND OTHER DISPOSITIONS OF FIREARMS CONDUCTED AT THE DEALER'S BUSINESS. The dealer must also keep each such audio and video record FOR AT LEAST 1 YEAR AFTER THE RECEIPT, SALE, OR DISPOSITION and submit any such record or recording to the State Police upon demand. The dealer is required to supply such records not only to the State Police upon request, but also to a Federal agency and to any party in a civil suit simply upon releasing a discovery demand. This release of information to a federal agency is contradicted by 27 C.F.R. § 478.126, which sets forth the manner in which information is released to the ATF, and it authorizes submission only of information "required by this subpart." That regulation precludes any alternative form of submission without special approval. The mandated release of information in a civil suit is breathtaking in scope and includes disposition information of the name, date of birth, address and driver's license number of the non-licensee and a copy of Federal Form 4473. 26 C.F.R. §478.125(e).

The bills also amend Section 5-145 to impose a host of new security procedures and hardware, requiring the dealer to DEVELOP AND KEEP A WRITTEN STANDARD OPERATING PROCEDURE TO PROTECT INVENTORY FROM THEFT OR UNAUTHORIZED ACCESS. That procedure must include locks, exterior lighting, surveillance cameras and an alarm system. No such requirements are imposed upon FFLs by the federal regulations.

The bills also amend MD Code Public Safety 5-147 to impose new employment criteria on dealers. Under this provision, as amended, a dealer may not only not employ a prohibited person, but is also barred from employing any person FOR WHOM THE LICENSED DEALER HAS NOT OBTAINED A STATE AND NATIONAL CRIMINAL HISTORY RECORDS CHECK AS REQUIRED BY THIS SECTION. The bills go on to require the dealer to apply, by June 30 of EACH YEAR, TO THE CENTRAL REPOSITORY FOR A STATE AND NATIONAL CRIMINAL HISTORY RECORDS CHECK BY SUBMITTING TO THE CENTRAL REPOSITORY: TWO COMPLETE SET OF FINGERPRINTS OF THE EMPLOYEE and THE FEE for such checks. Finally, if the dealer should fail to comply with any of these new requirements (or any of the requirements of existing law), the dealer may be fined \$1,000 for the first offense and imprisoned for 3 YEARS and a fine of \$10,000 or BOTH for the second such offense.

Next, the bills create a new Section 5-148 to provide that A LICENSED DEALER SHALL AT ALL TIMES MAINTAIN LIABILITY INSURANCE FOR THE ACTS OF ANOTHER USING A FIREARM SOLD, RENTED, OR TRANSFERRED BY THE LICENSED DEALER IN THE AMOUNT OF AT LEAST \$2,000,000. A violation of this provision is punishable by a civil penalty of \$1,000 on first offense and 3 years in prison and a \$10,000 fine for any subsequent offense. The bills also mandate, in new Section 5-149, that a dealer REPORT ANY THEFT OF A FIREARM FROM THE LICENSED DEALER'S PLACE OF BUSINESS TO A LAW ENFORCEMENT AGENCY, AS DEFINED IN § 3-201 OF THIS ARTICLE, IMMEDIATELY UPON DISCOVERING THE THEFT. Any failure to "immediately" report the theft is punishable by a \$1,000 civil fine on the first offense and 3 years imprisonment and a \$10,000 fine for any second offense. Nowhere does the bill explain why dealers should be required to insure against the harm caused by the wrongful acts of another where the sale was otherwise fully legal. At common law, the negligent or unlawful acts of another are an intervening or superseding cause for which the dealer cannot be held liable. See *Pittway*

Corp. v. Collins, 409 Md. 218, 248-49 (2009); Section 442 of the Restatement (Second) of Torts. Dealers are not guarantors against harm inflicted by otherwise lawful purchasers.

Finally, the bills create a new Section 5-150 which governs day-to-day business activities. Under this Section, the dealer must STORE EACH FIREARM IN A LOCKING DISPLAY CASE OR ANOTHER SECURE LOCATION THAT IS INACCESSIBLE TO CUSTOMERS and ENSURE THAT EACH FIREARM THAT IS DISPLAYED TO A CUSTOMER IS RENDERED INOPERABLE WITH A TRIGGER LOCK OR ANOTHER MECHANISM. This provision effectively kneecaps the dealer. Virtually every potential purchaser demands to work the action and pull the trigger of a firearm before making any purchase. Banning this practice will ensure that the buyer will go elsewhere. After business hours, the bills mandate that the dealer SHALL LOCK ALL FIREARMS IN: (I) A VAULT; (II) A SAFE; OR (III) A REINFORCED DISPLAY CASE WITH SHATTERPROOF GLASS. This requirement just adds to the costs. The first violation by dealer is punishable by a \$1,000 civil fine while any subsequent violation is punishable by 3 years imprisonment and a \$10,000 fine.

The Burdens Imposed By These Bills Will Drive Dealers Out Of Business:

It is evident that the intent of these bills is to drive dealers out of business. Most dealers are small businessmen and women. The costs imposed by these new requirements will be devastating to their businesses. This impact has constitutional implications. Law-abiding citizens have a Second Amendment to acquire or purchase firearms under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010). The Second Amendment also confers “ancillary rights necessary to the realization of the core right.” *Teixeira v. City of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc). See also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579–80 (1980) (“[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.”).

That right to acquire firearms necessarily implies a right to sell firearms because the right to acquire would be meaningless in the absence of sellers. Thus, *Teixeira* and other courts have recognized that “[c]ommerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense.” *Teixeira*, 873 F.3d at 682. See also *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) (“If there were somehow a categorical exception for [commercial] restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.”). Plainly, under these principles, the State may not make it illegal for a dealer to sell firearms. Nor may the State accomplish the same result by making it so burdensome to sell firearms that few businesses would engage in such sales. See, e.g., *Fairbank v. United States*, 181 U.S. 283 (1901) (noting “the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.”); *Lebron v. Secretary*, 710 F.3d 1202, 1217 (11th Cir. 2013) (“where an individual’s federal constitutional rights are at stake, the state cannot accomplish indirectly that which it has been constitutionally prohibited from doing directly”).

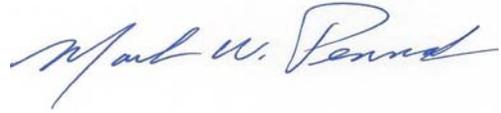
The risk of that “untenable result” is quite real. Dealers are limited in the extent to which they are able to pass along to their customers the huge costs imposed by these bills, as

higher prices alone will drive down sales. Dealers also face the risk of going to prison for 3 years if they violate these many detailed and varied provisions. The bills create strict liability crimes, as the bills do not require a knowing violation or impose any other *mens rea* requirement. One minor slip up for the second time and, **viola**, jail time. In sum, the bills impose huge costs on dealers by imposing detailed and costly requirements and then severely criminalize a failure to abide by these many and varied requirements. Few dealers will risk jail time just in order to do business where doing business is fraught with the risks of an unknowing violation of these new requirements. For example, under these bills all a dealer need do in order to earn prison time is to be late in submitting an employee's fingerprints by June 30 or inadvertently letting the \$2,000,000 insurance policy lapse. Many dealers, especially smaller FFLs, will simply cease doing business so as to avoid the risk of these draconian punishments for such minor paperwork violations.

The higher costs imposed on Maryland dealers will also will also make it impossible for Maryland dealers to compete with out-of-state dealers. It is perfectly legal for law-abiding citizens of Maryland to purchase long guns in other states, where dealers are not subjected to these costly requirements. Specifically, ever since 1986, with the enactment of PL 99-308, 100 Stat. 449 (May 19, 1986), residents of one state may purchase long guns in any other state "if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States." 18 U.S.C. § 922(b)(3). Similarly, MD Code Public Safety § 5-204 provides that a resident of Maryland who is eligible to purchase a long gun in Maryland may purchase a long gun in an "adjacent" state, defined to include Delaware, Pennsylvania, Virginia or West Virginia. More than half of all manufactured firearms are long guns. <https://www.statista.com/statistics/215540/number-of-total-firearms-manufactured-in-the-us-by-firearm-category/>. Out-of-state dealers will be able to substantially undercut the prices that Maryland dealers would have to charge in order to pass along the costs imposed by these bills. Market forces alone will ensure that few Maryland dealers will survive over time.

Indeed, what is true for long gun sales may well soon be true with respect to the sale of handguns. Federal law currently bans sales of handguns to out-of-state residents. See 18 U.S.C. § 922(a). That ban was sustained against a Second Amendment challenge in *Mance v. Sessions*, 896 F.3d 699 (5th Cir. 2018). However, the plaintiffs in that suit have filed a petition for certiorari with the Supreme Court in that case and that petition has been pending since last Term. See *Mance v. Barr*, No. 18-663 (filed Nov. 19, 2018). The case is obviously being held by the Supreme Court pending a decision in *NYSRPA v. NYC*, No. 18-280, *cert. granted*, 139 S.Ct. 939 (Jan 22, 2019). The Supreme Court heard oral argument in *NYC* on December 2, 2019, and a decision is expected by June. After a merits decision in *NYC*, we expect the Court to vacate the decision in *Mance* and remand it for further consideration in light of the Court's decision in *NYC*. It is thus entirely possible that the federal ban on interstate sales of handguns will be struck down after *NYC*. Any similar state ban would meet the same fate. At that point, the market pressures on Maryland dealers will preclude their survival because price conscious purchasers will simply make all of their firearms acquisitions in other states. We urge an unfavorable report.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Mark W. Pennak
President, Maryland Shall Issue, Inc.
mpennak@marylandshallissue.org