



March 2, 2022

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 1021

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is a Section 501(c)(4) all-volunteer, non-partisan, non-profit 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 HB 1021.

The Bill:

The bill would create a new Section 5-145.1 in the Public Safety Article of the Maryland Code that would impose new security requirements on licensed dealers in Maryland. Specifically, the bill provides that a dealer MAY NOT CONDUCT BUSINESS AND STORE FIREARMS AT A LOCATION UNLESS the premises on which the dealer operates is EQUIPPED WITH . . . (1) EQUIPMENT CAPABLE OF FILMING AND RECORDING VIDEO FOOTAGE INSIDE AND OUTSIDE BUILDINGS WHERE FIREARMS ARE STORED; (2) BARS OR SECURITY SCREENS DESIGNED TO PREVENT UNAUTHORIZED ENTRY ON ALL EXTERIOR DOORS AND WINDOWS OF ALL BUILDINGS WHERE FIREARMS ARE STORED; (3) A BURGLARY ALARM SYSTEM THAT IS CONTINUALLY MONITORED; AND (4) PHYSICAL BARRIERS DESIGNED TO PREVENT THE USE OF MOTOR VEHICLES TO BREACH ALL BUILDINGS WHERE FIREARMS ARE STORED. The bill then provides that, outside of business hours, the dealer must LOCK[] ALL FIREARMS STORED ON THE PREMISES IN: (I) A VAULT; (II) A SAFE; OR (III) A SECURE ROOM.

The bill imposes a civil penalty of \$1,000 for the first violation. For a second and subsequent violations, the bill imposes a criminal penalty of 3 years imprisonment and/or a fine of \$10,000 if the offense was COMMITTED KNOWINGLY AND WILLFULLY. This criminal penalty effectively renders the dealer a disqualified person under both federal and state law, thereby ending the ability of the dealer to possess any firearm or modern ammunition for life. See 18 U.S.C. 921(a)(20)(B), MD Code, Public Safety, § 5-101(g)(3). The ability of the dealer to make a living as a dealer is thus destroyed upon indictment, 18 U.S.C. § 922(n), and/or conviction, 18 U.S.C. § 922(g), for this offense.

The Bill Is Senselessly Over Broad

Firearms dealers are already among the most heavily regulated businesses in the United States. This State imposes very strict regulation of firearms dealers, requiring that these dealers 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 licensees and are thus heavily regulated by the ATF, a component of the U.S. Department of Justice. The ATF likewise imposes substantial requirements concerning business operations of FFLs. See 18 U.S.C. § 923; 27 C.F.R. Part 478.

This bill expressly applies to any “LICENSED DEALER” who operates at A LOCATION, but makes no attempt to either define the terms “licensed dealer” or “location” or otherwise differentiate between different types of dealers. See <https://bit.ly/34Stsng> (listing different types of federally licensed dealers). The term “licensed dealer” is not otherwise defined in Maryland law. See MD Code, Public Safety, § 5-101(d),(p) (defining “dealer” and “licensee” but not the term “licensed dealer”). See, e.g., *Trail v. Terrapin Run, LLC*, 174 Md.App. 43, 920 A.2d 597 (2007) (“It is beyond question that different words or phrases may connote different meanings.”). Nothing in the bill limits its application only to dealers who operate a traditional retail store. On its face, the bill would apply to all federally licensed dealers in accordance with the federal definition of that specific term. See 18 U.S.C. § 921(a)(11) (“The term ‘licensed dealer’ means any dealer who is licensed under the provisions of this chapter.”). At the very least, the scope of the bill is ambiguous and vague. As set forth below, such vagueness is fatal to the bill’s constitutionality under both the federal and Maryland constitutions.

The bill, as thus written, applies to individual, Class 03 dealers of curio and relics. Class 03 dealers are collectors and use their Class 03 license simply to trade or add to their own private collections of vintage firearms. Under federal law, a curio or relic is defined as those firearms which are at least 50 years old or are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons. 27 C.F.R. § 478.11. Like other types of personal collections, such Class 03 dealer collections are typically stored in the homes of the dealers. This bill would thus require Class 03 dealers to install bollards or other types of “PHYSICAL BARRIERS” around their homes as well as implement the other security measures specified in Section 5-145.1(A)(1) of the bill. Yet, such measures would draw attention to these individuals and will make them and their families more vulnerable to attack and theft, not less. No sane person would willingly subject themselves to such costs and risks. Such Class 03 dealers would thus likely move out of Maryland.

The bill likewise applies equally to a large Class 07 federally licensed manufacturer of firearms, such as LWRC, which is located in Cambridge, MD, and which may produce thousands of firearms over the course of a year. This bill, as written would require LWRC to store its firearms, which may be in various stages of manufacture, in a safe or a vault every night. One can only imagine how costly or disruptive such a storage requirement would prove. A Class 07 manufacturer thus would have a powerful financial incentive to

move out of Maryland, just as Beretta USA left Maryland and exited to Tennessee after passage of the Firearms Safety Act of 2013. <https://bit.ly/35f37zo>.

The bill also applies to a Class 06 dealer, a type of dealer who is licensed to manufacture only ammunition. While such a Class 06 manufacturer would presumably have no firearms to put away at night, it would still be required to have the video recording equipment, the bars and security screens, the burglary alarm system and the physical barriers required by Section 5-145.1(A)(1) of the bill. The requirements would apply to a Class 10 dealer, who is licensed to manufacture destructive devices and armor-piercing ammunition. If the bill is intended to protect **firearms** from theft, it is pointless to apply its requirements to such manufacturers, yet the bill, as written, would require such measures. These manufacturers, many of whom may be federal contractors, would likewise have a strong incentive to move out of Maryland. Applying this bill's requirements to all "licensed dealers" is plainly senseless.

The Bill Will Likely Put Many Dealers Out of Business

Dealers who sell firearms at retail to the public are typically Class 01 dealers and the overwhelming majority of these types of dealers are small businessmen and women. The costs imposed by these new requirements will be devastating to their businesses. For example, the requirement, imposed by the bill, to erect **PHYSICAL BARRIERS DESIGNED TO PREVENT THE USE OF MOTOR VEHICLES TO BREACH ALL BUILDINGS WHERE FIREARMS ARE STORED** is likely impossible for some dealers who rent space from third parties who thus control the physical layout of the facility. That requirement is even more senseless for Class 03 curio and relics dealers operating out of their homes.

Even if possible, the cost of installing bollards or heavy planters or other types of barriers outside a Class 01 dealer's retail store could easily run into the tens of thousands of dollars, a cost that must be borne under this bill before the October 1, 2022, effective date of the bill. Yet, such costs would be largely pointless, as there is hardly any assurance that such barriers would actually work to prevent a break-in. While retail dealers have been broken into by ramming the store with a vehicle, nothing in this bill will prevent a thief from breaching all barriers using different methods. For example, even assuming *arguendo* that the barriers would withstand heavy ramming (not a safe assumption), all the thief need do is run a chain or steel cable from a vehicle to the store and collapse the store front by pulling it down. No reasonable "barrier" or "bars" or "security screens" can or will "prevent" such a breach. In short, it is quite impossible, as a practical matter, to prevent a determined thief from entering a dealer's facility. Such thieves are not as stupid as this bill supposes.

The additional requirement, imposed by this bill, that the dealer lock **ALL FIREARMS** in A **SAFE, A VAULT OR A SECURE ROOM** outside of business hours is hopelessly expensive. For some dealers with moderately large inventories, it would take multiple man-hours to accomplish such a task every night, even assuming that they had a suitable storage facility. More likely, these dealers would be required to procure an enormous, very expensive vault or safe or build an armored annex to accomplish such storage. For example, the cost of just **one** relatively low quality safe with a capacity from 42-100 guns is over \$13,200. See <https://bit.ly/3H8LTRm>. Many dealers, of course, have inventories well exceeding 100 guns. The up-front costs of obtaining such storage would be huge for a small business.

For example, one dealer, Engage Armament in Rockville is a manufacturer and has 2,077 firearms on site. See attached Engage Testimony on Senate Bill 773 (requiring vault storage). Engage estimates that it would have to increase the size of its existing vault (which would cost an estimated \$40,000 to build today) by 4 times to comply with the overnight storage vault requirement. Engage simply cannot fit a vault of that size at its current location and cannot afford the costs that would be necessary to expand and construct such a vault. One need only visit the large Bass Pro Shops store in Hanover, Maryland, and view the number of firearms on display to grasp the magnitude of these requirements. The Bass Pro Shops corporation might or might not be able to afford these costs, but a small business operation cannot.

The higher costs imposed on Maryland dealers 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 and take possession of 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. These states do not lack for dealers near the Maryland line. 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/>.

Marylanders may also purchase handguns from out-of-state dealers simply by having the handgun shipped to a Maryland dealer after purchase. In such cases, the Maryland dealer can and does charge a transfer fee for doing the paperwork, but that fee will not even approach the profit that a dealer may enjoy from making the sale itself. 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 this bill. Market forces alone will ensure that few Maryland dealers will survive over time. That result is so obvious and natural it must be presumed to be intended. See, e.g., *State Farm Fire & Casualty Co. v. Estate of Hehlman*, 589 F.3d 105, 114 (3d Cir. 2009) (“An actor is presumed to intend the natural and expected results of his actions.”). Compare MD Code, Public Safety, § 5-142(b) (presuming from the mere fact of possession of a firearm with an obliterated serial number that the defendant obliterated the serial number); MD Code, Criminal Law, § 4-203(a)(2) (establishing “a rebuttable presumption” that a person who wears, carries, or transports a handgun in a vehicle does so “knowingly”).

The Bill Is Vague

The bill is also vague, as it does not define the meaning of a LICENSED DEALER or the meaning of A VAULT or A SECURE ROOM. These terms are susceptible to a multitude of meanings. Again, the attached testimony of Engage Armament on Senate Bill 773 (requiring vault storage for regulated firearms) is on point. Engage notes that the term “VAULT” is not defined and it is simply impossible to know what sort of construction would be deemed sufficient. That testimony is equally applicable to the ambiguity associated with the term

“A SECURE ROOM” in this bill. As Engage Armament states, “[s]ince no guidance is offered in the law, we have no way to know whether we are in compliance and how such compliance would be interpreted until, of course, our license is taken as per this law.”

Such vagueness violates the Due Process Clause of the Fourteenth Amendment under which a penal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). See also *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (“Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”). The same is true under Article 24 of the Maryland Declaration of Rights. Under Article 24, “[t]he void-for-vagueness doctrine as applied to the analysis of penal statutes requires that the statute be “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.” *Galloway v. State*, 365 Md. 599, 614, 781 A.2d 851 (2001). Under Article 24, a statute must provide “legally fixed standards and adequate guidelines for police ... and others whose obligation it is to enforce, apply, and administer [it]” and “must eschew arbitrary enforcement in addition to being intelligible to the reasonable person.” (Id. at 615). The General Assembly has an “obligation to establish adequate guidelines for enforcement of the law.” *Ashton v. Brown*, 339 Md. 70, 88, 660 A.2d 447, 456 (1995). This bill fails that test.

The Bill Raises Constitutional Issues Under the Second Amendment

This impact on dealers also has constitutional implications. Law-abiding citizens have a Second Amendment right 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,” including the ancillary right to sell firearms to law-abiding citizens. *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*.”).

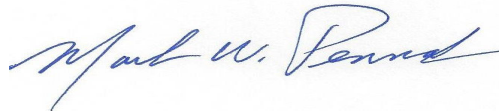
Plainly, under these principles, the State may not make it illegal for a dealer to sell firearms. Nor may the State accomplish the same result by making it so burdensome to sell firearms that few businesses would engage in such sales. See, e.g., *Fairbank v. United States*, 181 U.S. 283 (1901) (noting “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. As noted, dealers are limited in the extent to which they are able to pass along to their customers the costs imposed by this bill, as higher prices alone will drive down sales. Dealers also face the risk of going to prison for 3 years if they violate (a second time) any of these provisions of the bill. A simple failure to adequately lock up a single firearm at night could be sufficient to land the dealer in prison. Whether such a failure to do so was willing or knowingly is a jury question. The dealer would still face the crippling litigation costs associated with a criminal prosecution. In sum, the bill creates huge costs on dealers by imposing costly requirements and then the bill severely criminalizes a second offense. Few dealers will risk continuing their businesses where doing so is fraught with the legal risks and costs imposed by these new requirements. Many dealers, especially smaller FFLs, will simply cease doing business so as to avoid the risk of these draconian punishments and the consequent lifetime firearms disqualification. The bill’s underlying intent to eliminate dealers is apparent and that intent is constitutionally illegitimate. See, e.g., *Grossbaum v. Indianapolis-Marion Co. Bldg. Authority*, 100 F.3d 1287, 1294 (7th Cir. 1996) (“courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue”).

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 the first and last names being capitalized and prominent.

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



**WRITTEN TESTIMONY OF ANDREW RAYMOND, OWNER OF ENGAGE ARMAMENT LLC, AGAINST
SENATE BILL 773**

10 FEB 2022

To Whom It May Concern,

My name is Andrew Raymond and I am the owner of Engage Armament LLC. We are a type 10 FFL (manufacturer) located in Rockville MD. We have manufacturing both handguns and rifles for almost 12 years now, but we also do custom coatings, engraving, gunsmithing, and retail sales.

The above referenced bill has numerous issues and ambiguities which would negatively affect not just our business but all firearm dealers/manufacturers in the state.

One of the most glaring issues is this section:

(a) (1) The Secretary shall suspend a dealer's license if the licensee:

(vii) has knowingly or willfully manufactured, offered to sell, or sold a handgun not on the handgun roster in violation of § 5-406 of this title; or

As a manufacturer, we make several models and variants, some of which may require approval from the MD handgun roster to be sold in MD. It would appear from the above referenced part of the law, that it would now be prohibited for us to manufacture a new model for submission to the MD handgun roster board. This portion of the law basically says "You need to submit a sample to the MD roster board for MD compliance, however it is illegal for you to actually manufacture the required sample". It would also appear to be illegal to manufacture a not yet approved handgun model that was solely intended for a market outside of Maryland.

Another major issue is going to be the ambiguity of this law and its possible cost. The law does not define a vault. It does not specify materials, burglar/fire resistance. Its only guidance is that is must be bolted to the floor. The committee should consider the following:

- From a technical perspective, are my walls not "bolted" to the floor?
- If I bolt a series of safes into the floors is that considered a vault as per the law?
- Are my armor roll down doors enough?





-Would a simple fence which is bolted to the floor suffice?

-Would a square room constructed entirely of dry wall (but bolted to the floor) suffice? How about sheet metal or wood or newspaper?

-Can it be built on a wood floor which could be easily defeated by coming in from below?

-Is there a required height to the walls? It appears I could just bolt some metal beams to my floor and call it a vault.

As a firearm manufacturer, these regulatory ambiguities where enforcement may be required are dangerous. Since no guidance is offered in the law, we have no way to know whether we are in compliance and how such compliance would be interpreted until, of course, our license is taken as per this law.

From a practical standpoint we have done our best with the money we have to make our actual store a vault. We selected a location where you cannot ram a vehicle through and have reinforced walls and security throughout knowing that we are a target. We do have a "vault" which in 2012 cost us approx \$12,000 to build and only required one reinforced wall and a door. To rebuild that simple vault with ceiling and 4 walls today might cost \$40,000. A quick internet search of vault and bunkers show costs ranging from \$20,000 up to \$60,000 for something reasonable.

As of today, we have 1746 regulated firearms (2077 total) in our inventory. Our current vault measures 8x15ft and stores approx 400 of them. It seems we would need something 4 times that size to follow this law. I don't know how much just the construction of a vault that size would cost, but I do know I cannot afford it. We also simply cannot fit it in our current location, so now we would have to lease an adjoining space or an entirely new location PLUS the "vault" build out. Again, we do not have the money for this.

All of this just puts unreasonable burden on law abiding firearm dealers who are already stretched with regulations. I probably could construct the vault from stacked copies of federal and state firearm regulations.

I would suggest making a theft or burglary of a firearm from an FFL or MD regulated firearms dealer a separate, state level felony with substantial mandatory minimum. Also, the Maryland State Police certainly also has security experts in its ranks, and could use firearm/dealer application fees to finance free security consultations with FFLs to better inform them of their security weaknesses and best security practices.

I urge an unfavorable report.

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