



President  
Mark W. Pennak

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## WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 159 and HB 162

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 the District of Columbia and the Bar of Maryland. 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 and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in opposition to SB 159 and the cross-file, HB 162 (collectively “the Bill”).

**The Bill:** This Bill creates a new subtitle 9 to the Public Safety article of Maryland Code to provide that a person may voluntarily enroll in a “do not sell firearm registry” to be maintained by the Maryland State Police if that person wishes to prohibit any sale of a firearm to him or her. The Bill then amends MD Code, Public Safety, § 5-134(b) to provide that “[a] dealer or other person may not sell, rent, loan, or transfer a **regulated firearm** to a purchaser, lessee, borrower, or transferee who the dealer or other person knows or has reasonable cause to believe” is on that voluntary “do not sell” list. A “regulated firearm” is essentially any handgun in Maryland. See MD Code, Public Safety, § 5-101(r) (defining regulated firearm). The Bill also amends MD Code, Public Safety, § 5-207 to provide that “[a] licensee or any other person may not sell, rent, transfer, or loan a **rifle or shotgun** to a purchaser, lessee, transferee, or recipient who the licensee or other person knows or has reasonable cause to believe” is on the voluntary “do not sell” list.

**State and Federal Law:** Under current law, dealers are required by federal law to conduct a background check through The National Instant Criminal Background Check System (“NICS”). NICS is run by the FBI, as required by the Brady Handgun Violence Prevention Act of 1993, codified at 18 U.S.C. § 922(t). <https://www.fbi.gov/services/cjis/nics>. Current federal law bans the sale of firearms that have moved in interstate commerce by persons other than a Federal Firearms Licensee (“dealer” or “FFL”). 18 U.S.C. § 922(a). Federal law provides that a NICS check must be performed for all sales. See 18 U.S.C. § 922(t). See also Preamble to ATF Regulations at 63 FR 58272-01, 1998 WL 750214 (October 29, 1998), currently codified at 27 C.F.R. Part 478 (“the law clearly states that the permanent provisions

apply to all firearms, including rifles and shotguns”). A “dealer” is defined as any person engaged in the business of selling firearms at wholesale or retail. 18 U.S.C. § 921(11)(A).

Background checks for sales of rifles and shotguns in Maryland are governed exclusively by federal law. Specifically, Maryland is a Point of Contact (“POC”) State for NICS checks only for sales of **handguns**. <https://www.fbi.gov/file-repository/nics-participation-map.pdf/view/>. Thus, for handgun sales by a dealer or by any other person in a private sale, the Maryland State Police serves as the Point of Contact for purposes of contacting the FBI for a NICS check. The Maryland State Police regulates all sales of handguns by requiring an application, State form 77R, to be submitted to the State Police for such sales. See MD Code, Public Safety, § 5-124. However, the Maryland State Police is not the Point of Contact for long gun sales and thus does not conduct a background check for sales of long guns. Only the dealer does the NICS checks on sales of long guns, using Federal form 4473, and only dealers (and relatively few other authorized persons) have access to NICS.

In addition to sales regulated by federal law, the Maryland State Police may also access NICS “in connection with the issuance of a firearm-related or explosives-related permit or license....” 28 C.F.R. § 25.6(j). However, the use of the NICS system for other reasons is strictly prohibited. “State or local agencies, FFLs, or individuals” who misuse their NICS access privileges are “subject to a fine not to exceed \$10,000 and subject to cancellation of NICS inquiry privileges.” 28 C.F.R. § 25.11(a). The Bill does not disturb this basic allocation of responsibility. The State Police would remain the Point of Contact for handgun sales and the dealer would continue to be responsible for obtaining the NICS background check for all dealer-conducted long gun sales. Such background checks for **private** long gun sales, rentals and transfers are now **also** conducted through Federal Firearms Licensees under MD Code, Public Safety, § 5-204.1(c).

**Discussion:** The foregoing federal and State regulatory system is fatal to the Bill in so far as it applies to long gun sales under MD Code, Public Safety, § 5-207. The type of firearm prohibitors for which the NICS system is available is **controlled by federal law**. NICS is a federal database controlled **solely** by the FBI. See, e.g., 28 C.F.R. § 25.6(a) (“FFLs may initiate a NICS background check only in connection with a proposed firearms transfer as required by the Brady Act.”).

Federal prohibitors are listed in 18 U.S.C. § 922, and include, for example, any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1). That provision is further defined in 18 U.S.C. 921(a)(20)(B), to mean “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” Maryland’s list of prohibitors is quite similar to the federal list, see MD Code, Public Safety, § 5-101(g), and to the extent that these State prohibitions are felonies or are misdemeanor crimes punishable by more than 2 years imprisonment, persons subject to such prohibitions may be added to the NICS database under 18 U.S.C. § 921(a)(20)(B) and 18 U.S.C. § 922(g)(1). As noted, Section 922(g)(1) includes any person “who has been convicted in **any court**” of this type of crime. A voluntary “do not sell” list is not a prohibitor under federal law and

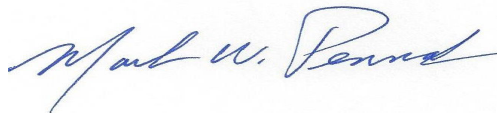
is thus not authorized to be included in the NICS database. Any attempt to use the NICS system for an unauthorized purpose is, as noted above, strictly forbidden.

The legal prohibition on adding the “do not sell” list to NICS is fatal to the background checks contemplated by the Bill for long guns. As noted, the Bill amends Section 5-207 to ban any sale, rental, transfer or loan of a long gun to any person on the “do not sell” list. Yet, the State Police do not conduct background checks for sales of long guns. The State Police is the POC for handgun sales. That means the State Police can and do consult State databases for handgun sales, in addition to running a NICS check on such a sale. Thus, for handgun sales, it would be possible for the State Police to comply with the Bill’s amendments to MD Code, Public Safety, 5-134(b)(15), which regulates sales of **regulated** firearms (handguns). The State Police need only consult a State database to find persons on the “do not sell” list created by this Bill for handgun sales. That ability to consult State databases make NICS irrelevant for purposes of this Bill for sales of handguns.

However, as noted, the State Police is not the POC for **long gun** sales and thus all background checks for such sales of long guns are conducted by the dealers who employ **only** the NICS database for that purpose. Dealers (and other persons regulated by Section 5-207), do not have access to State databases. If the “do not sell” list is not on NICS, there is no way for any dealer or other person to comply with the amendments made to MD Code, Public Safety, 5-207(c)(16) by this Bill. A NICS check will not disclose such persons.

Stated differently, since the “do not sell” list cannot be entered into NICS, the dealers will simply have no way of knowing whether any given person is on the “do not sell” list or not. It would be grossly inappropriate and a violation of basic notions of Due Process to expose a dealer or other persons regulated by Section 5-207 to the possibility of arrest and prosecution for any sales, rentals, transfer or loans of long guns to a person on the “do not sell” list. Any such sale, rental, transfer or loan of a long gun is severely punished under subsection 5-207(d), which provides that “[a] person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$10,000 or both.” Such a violation of Section 5-207 could also result in the lost of the dealer’s State license under MD Code, Public Safety, § 5-114, and federal license under 18 U.S.C. § 923. In short, a voluntary “do not sell” list may only be reasonably created as to handguns. Such a list could not stop the purchase of a long gun and thus would be of limited utility for its intended purposes. We urge an unfavorable report for these reasons.

Sincerely,



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