



President  
Mark W. Pennak

January 20, 2021

**WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT,  
MARYLAND SHALL ISSUE,  
AS INFORMATION WITH RESPECT TO SB 190 AND HB 415**

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 the District of Columbia and the Bar of Maryland. I 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 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 and personal protection in the home and outside the home and muzzle loading. I appear today as President of MSI to provide information with respect to SB 190 and HB 415.

While different (HB 415 is more extensive), both bills provide that “a person may not be denied the right to purchase, possess, or carry a firearm under this title solely on the basis that the person” is authorized to use medical cannabis under title 13, subtitle 33 of the Health – General Article of Maryland law. Like similar bills in the past, MSI takes no position with respect to the merits of these bills. However, as before, we do wish to point out some legal realities for purposes of informing the debate on these bills.

With the recent changes in Maryland law concerning medical marijuana, see MD Code, Health - General, § 13-3304 et seq., and the push to legalize the use of marijuana in Maryland, a recurring issue is how such marijuana use would affect Second Amendment rights. The short answer is that it may well act to abrogate those rights by (1) barring a FFL from selling a firearm to such a user and (2), by making such a user a prohibited person under federal law.

1. As to FFLs, the pertinent statutory provision under federal law is 18 U.S.C. 922(d)(3), which provides:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

\* \* \*

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

The ATF has issued a bulletin to all Federal Firearms Licensees that advises FFLs that “if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have ‘reasonable cause to believe’ that the person is an unlawful user of a controlled substance.” See Open Letter to All Federal Firearms Licensees, Sept. 21, 2011, available at [www.atf.gov/file/60211/download](http://www.atf.gov/file/60211/download). That means that the FFL (or any other person with such knowledge) is prohibited from selling a firearm to such a person with a medical marijuana card. This ATF prohibition has been sustained in federal court. *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 1396 (2017).

Moreover, the latest version of Federal Form 4473 (attached hereto in relevant part) continues to expressly ask if the purchaser is “an unlawful user of . . . any controlled substance” and states in bold type: **“Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”** A false statement or answer on Form 4473 is federal felony under 18 U.S.C. 922(a)(6) (barring material misrepresentations “in connection with the acquisition” of a firearm). See *Abramski v. United States*, 134 S.Ct. 2259 (2014). A violation of Section 922(a)(6) is punishable by up to 10 years in prison. See 18 U.S.C. 924(a)(2).

2. As to becoming a disqualified person, under federal law, a user of marijuana is a disqualified person under 18 U.S.C. 922(g)(3) which states:

(g) It shall be unlawful for any person--

\* \* \*

(3) who is *an unlawful user* of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” (Emphasis added).

A violation of Section 922(d)(3) or Section 922(g)(3) is a federal felony, punishable with up to 10 years in prison. See 18 U.S.C. 924(a)(2). Both of these provisions define the term “unlawful user” by reference to the Controlled Substances Act, a federal law. A “controlled substance” under federal law specifically includes marijuana as marijuana is expressly classified as a Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. § 812(c). See also ATF regulations 27 C.F.R. § 478.11. **Any** use of marijuana makes a person an “unlawful user” under that federal law. **Period.**

Indeed, while the medical marijuana law of Maryland permits the use of marijuana under the circumstances specified in that law, the mere possession of marijuana in Maryland remains otherwise illegal in any other circumstance. See *Robinson v. State*, 451 Md. 94 (2017). That is so even though possession of small amounts of marijuana has also been decriminalized in Maryland. See *Robinson*, 451 Md. at 98 (“Simply put, decriminalization is not synonymous with legalization, and possession of marijuana remains unlawful.”). Under the Supremacy Clause of the Constitution,

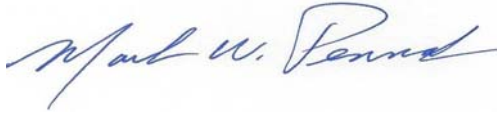
Article VI, Clause 2, these federal law provisions cannot be abrogated by State law. And they cannot be simply ignored, if only because every purchaser of a firearm from a FFL must fill out ATF Form 4473. As noted above, a false statement in filling out that form is a felony.

It is important to note that for years Congress has adopted an appropriations rider that prohibits the Department of Justice from spending funds to “prevent” the “implementation” of State medical marijuana laws. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (also known as the Rohrabacher–Blumenauer amendment). *McIntosh v. United States*, 833 F.3d 1163 (9<sup>th</sup> Cir. 2016). That amendment has been reenacted since then as an appropriations rider. This amendment was renewed and signed into law on December 27, 2020, effective through September of 2021. Consolidated Appropriations Act, 2021, PL 116-260, 134 Stat 1182 §531 (Dec. 27, 2020). As it is only an appropriation provision that prohibits the expenditure of the appropriated funds for these enforcement purposes, the prohibition must be renewed annually to remain effective. The underlying conduct (possession of marijuana) remains a federal crime.

Specifically, the enforcement bar imposed by this rider only extends to the expenditure of funds for prosecutions that “prevent” the “implementation” of medical marijuana laws. See *United States v. Nixon*, 839 F.3d 885 (9<sup>th</sup> Cir. 2016) (holding that the appropriations rider does not impact the ability of a federal district court to restrict a defendant’s use of medical marijuana as a condition of probation). It does not address enforcement of federal **gun** laws, such as 18 U.S.C. §922, or ATF regulation of FFLs. See *United States v. Bellamy*, 682 Fed. Appx. 447 (6<sup>th</sup> Cir. 2017) (sustaining a felon-in-possession conviction under 18 U.S.C. § 922(g)(3) for possession of a gun while being a user of medical marijuana). Enforcement of such gun laws does not “prevent” the “implementation” of medical marijuana laws; it simply means that medical marijuana users may not possess or purchase firearms. See *McIntosh*, 833 F.3d at 1178 (the rider “prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana”). Congress could restore funding tomorrow (or the appropriation rider could lapse) and the government could then prosecute individuals who committed offenses while the government lacked funding. See *McIntosh*, 833 F.3d at 1179 n.5. The federal government can prosecute such offenses for up to five years after they occur. See 18 U.S.C. § 3282.

The question the Committee should ask itself is whether passage of this bill might mislead medical marijuana users into thinking that they may use and possess medical marijuana without any fear of losing their gun rights. Under federal law, that is not an assurance that the State is in a position to accord. For example, on a practical level, this bill, if enacted into law, could easily fool something into expending time and resources to acquire an HQL from the State Police only to find that all that time and money was wasted when the dealer refuses to complete the sale because the person cannot honestly complete ATF Form 4473. That has actually happened. The HQL is useless.

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

# Firearms Transaction Record

**WARNING:** The information you provide will be used to determine whether you are prohibited by Federal or State law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine. Any person who exports a firearm without a proper authorization from either the Department of Commerce or the Department of State, as applicable, is subject to a fine of not more than \$1,000,000 and up to 20 years imprisonment.

Transferor's/Seller's  
Transaction Serial  
Number (if any)

**Read the Notices, Instructions, and Definitions on this form.** Prepare in original only at the licensed premises (including business temporarily conducted from a qualifying gun show or event in the same State in which the premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). **All entries must be handwritten in ink unless completed under ATF Rul. 2016-2. PLEASE PRINT.**

### Section A - Must Be Completed By Transferor/Seller Before Transferee/Buyer Completes Section B

1. Manufacturer and Importer (if any) (If the manufacturer and importer are different, include both.)	2. Model (if designated)	3. Serial Number	4. Type	5. Caliber or Gauge
1.				
2.				
3.				
6. Total Number of Firearms to be Transferred (Please spell total number e.g., one, two, etc. Do not use numerals.)		7. Check if any part of this transaction is a pawn redemption. <input type="checkbox"/>		
		Record Line Number(s) From Question 1:		
		8. Check if this transaction is to facilitate a private party transfer. <input type="checkbox"/>		

### Section B - Must Be Completed Personally By Transferee/Buyer

9. Transferee's/Buyer's Full Name (If legal name contains an initial only, record the initial followed by "IO" in quotes. If no middle initial or name, record "NMN".)  
 Last Name (including suffix, e.g., Jr, Sr, II, III) | First Name | Middle Name

10. Current State of Residence and Address (U.S. postal abbreviations are acceptable. Cannot be a post office box.)  
 Number and Street Address | City | State | ZIP Code | County/Parish/Borough

11. Place of Birth  
 U.S. City and State | -OR- Foreign Country

12. Height  
 Ft. \_\_\_\_\_  
 In. \_\_\_\_\_

13. Weight (lbs.) \_\_\_\_\_

14. Sex  
 Male  
 Female  
 Non-Binary

15. Birth Date  
 Month | Day | Year

16. Social Security Number (optional, but will help prevent misidentification)

17. Unique Personal Identification Number (UPIN) or Appeals Management Database Identification (AMD ID) (if applicable)

18.a. Ethnicity  
 Hispanic or Latino  
 Not Hispanic or Latino

18.b. Race (Select one or more race in 18.b. Both 18.a. and 18.b. must be answered.)  
 American Indian or Alaska Native  
 Black or African American  
 White  
 Asian  
 Native Hawaiian or Other Pacific Islander

19. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.)  
 United States of America (U.S.A)  Other Country/Countries (Specify):

20. If you are an alien, record your U.S.-issued alien or admission number (AR#, USCIS#, or I94#):

21. Answer the following questions by checking or marking either the "yes" or "no" box to the right of the questions:

	Yes	No
a. Are you the actual transferee/buyer of the firearm(s) listed on this form and any continuation sheet(s) (ATF Form 5300.9A)? <b>Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you.</b> Exception: If you are only picking up a repaired firearm(s) for another person, you are not required to answer 21.a. and may proceed to question 21.b.	<input type="checkbox"/>	<input type="checkbox"/>
b. Are you under indictment or information in any court for a <b>felony</b> , or any other crime for which the judge could imprison you for more than one year, or are you a current member of the military who has been charged with violation(s) of the Uniform Code of Military Justice and whose charge(s) have been referred to a general court-martial?	<input type="checkbox"/>	<input type="checkbox"/>
c. Have you ever been convicted in any court, including a military court, of a <b>felony</b> , or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation?	<input type="checkbox"/>	<input type="checkbox"/>
d. Are you a fugitive from justice?	<input type="checkbox"/>	<input type="checkbox"/>
e. <b>Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?</b> <b>Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.</b>	<input type="checkbox"/>	<input type="checkbox"/>

