

Institute of Scrap Recycling Industries (ISRI) Opposition Testimony to HB 328

Chair Abrams, Vice Chair Williams, Ranking Member Brown, and members of the House Criminal Justice Committee, thank you for the opportunity to provide opponent testimony on HB 328 regarding the sale of catalytic converters in Ohio. My name is John Carney, I am Partner with Porter Wright. I am here today on behalf of the Ohio Valley and Northern Ohio Chapters of the Institute of Scrap Recycling Industries (ISRI). We represent over 115 member businesses across Ohio who process, broker and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. These businesses are an integral part of the manufacturing process, with the industry in Ohio supporting over 26,000 jobs and generating a total economic impact of \$6 billion. These are the original recyclers in Ohio.

ISRI members understand and appreciate the importance of cracking down on property theft, including catalytic converter theft. In the early 2000s, when copper metal theft from homes was a very significant problem, ISRI partnered with Rep. Bill Seitz, local law enforcement and the Department of Public Safety (DPS) to create the current regulatory framework of scrap recycling laws. This regulatory framework was tailored to help law enforcement identify the individuals who were attempting to use scrap recyclers as a fence to sell their stolen goods. Any business engaged in the buying or selling of scrap metal, must register and abide by this legal framework. The final law required that registered scrap recyclers make tens of thousands of dollars of investments in computers, cameras and staff training in order to comply with the new regulations. These investments were necessary in furtherance of providing detailed purchase information concerning what was sold to scrap recyclers, and by whom it was sold, so law enforcement could identify scrap metal thieves and bring them to justice.

When a licensed scrap recycler wishes to purchase an item, including catalytic converters, prior to purchasing the item from the seller the licensed scrap recycler record the date and time of the transaction, record the seller's name and address, take a photo of the seller, obtain an electronic scan of the seller's state issued photo ID, document the license of the vehicle the seller is driving and search to see if the seller is listed on the state's Do Not Buy List. By noon the day after the transaction, the current law requires that all of this information then must be transmitted to DPS so that law enforcement may use this information to help identify, apprehend and prosecute criminals. Since implementation of the scrap recycling laws, ISRI businesses have consistently complied with the regulatory requirements and sent countless referrals to law enforcement of activities that have appeared suspicious or unlawful. Furthermore, ISRI has pressed DPS, Homeland Security and the Bureau of Motor Vehicles to investigate unregistered scrap recyclers and salvage auto dealers who they believe are the source of the vast majority of improper and unlawful conduct. **Please review the attached email correspondence from July, 2021 urging DPS to increase its enforcement efforts as a result of concerns related to noncompliance by unregistered scrap recyclers.**

Over the years since the passage of the initial scrap metal laws, compliant scrap businesses have partnered with law enforcement and DPS to identify stolen property by reporting suspicious materials, suspicious sellers, unregistered operators and responding to theft alerts issued by law enforcement. Past enforcement efforts by the infrastructure integrity unit within DPS and local police departments have helped to identify bad actors and educate business owners who were unaware of the current law's requirements. These past enforcement efforts assisted law enforcement in catching property thieves.

Unfortunately, the retirement of Mr. Bob Schlicher from DPS, the pandemic and the significant spike in violent crime impacted these successful enforcement efforts. Local law enforcement were stretched thin and unable to spend the time and effort previously spent on sting operations to identify bad actors.

For the past several years, ISRI has continued to educate their members on the requirements of the Ohio scrap metal law and encouraged its members to work with local law enforcement to identify unregistered

and non-compliant operators so as to create a level playing field whereby all businesses are held to the same standard.

It has become apparent that not all Ohio businesses comply with the current scrap laws, whether out of ignorance or intent. The industry has seen an increase in the number of unlicensed scrap recyclers that are purchasing items and not adhering to the reporting requirements by which licensed businesses are required to abide. ISRI has continually urged DPS, Homeland Security, and law enforcement to investigate the unlicensed dealers. This includes alerting law enforcement to unlicensed activity, reporting flyers of businesses advertising the purchase of catalytic converters and other goods, and filing complaints with DPS and Homeland Security. The investigation and enforcement of the unlicensed dealers in Ohio is necessary for fighting catalytic converter theft in Ohio.

Former DPS Director Stickrath and legal counsel at DPS have repeatedly indicated that they do not believe that they have the legal authority to investigate unregistered scrap metal recyclers whom ISRI believes are the source of the ongoing criminal activity. DPS legal counsel points to Fourth Amendment search and seizure prohibitions. In fact, we have traded several legal memos outlining how we believe that DPS, Homeland Security and local law enforcement absolutely have the right to investigate unregistered scrap metal dealers. The bill being considered today fails to address this problem. In the event that this issue remains unaddressed, ISRI believe that the passage of this legislation will do little to nothing to address catalytic converter theft.

Over the past year, Andy Wilson became the new Director of DPS and Mark Porter became the new Director of Homeland Security. In July, representatives of ISRI met with Mr. Porter urging him to pursue enforcement activities against unregistered scrap metal recyclers. At that meeting, Mr. Porter committed to working with ISRI to better police the bad actors.

ISRI appreciates the effort of the Sponsors and the Committee to address the need to stop catalytic converter theft. However, we believe that this bill does not get to the heart of the problem, the illegal purchasing by unlicensed dealers. Given the lack of enforcement efforts over the past several years, any legislative or regulatory efforts to create additional regulatory requirements for registered scrap recyclers will only result in harming businesses that already comply with the law, while those who are unregistered and operating in the shadows will continue to operate illegally with impunity and serve as a fence for stolen catalytic converters.

ISRI has asked on countless occasions that all interested parties, including regulators and law enforcement, be brought to the table to find an actual solution to the problem of catalytic converter theft. Chair Abrams has agreed to hold an interested party meeting on the legislation and we urge the Sponsors and the Committee to work with the industry, regulatory agencies, and state and local law enforcement to determine the most appropriate language for inclusion in HB 328 to actually stop catalytic converter theft.

In closing, ISRI does not believe that HB 328 in its current form will do anything to curb catalytic converter theft. In fact, ISRI believes that this bill only adds additional costs and regulation to law abiding businesses. In short, this bill serves to benefit the unlicensed buying and selling of catalytic converters by the same rogue actors ISRI has been begging DPS to investigate to no avail. Thank you for the opportunity to provide interested-party testimony on HB 328. We appreciate being able to provide input on this legislation and look forward to continuing to work with you.

Carney, John P.

Subject: FW: [EXTERNAL]RE: #EXT# Scrap Metal Investigations

From: mawise@dps.ohio.gov <mawise@dps.ohio.gov>

Sent: Friday, July 16, 2021 10:01 AM

To: Carney, John P. <JCarney@porterwright.com>

Cc: blquinn@dps.ohio.gov; jsstearmer@dps.ohio.gov; CClark@dps.ohio.gov; jmmcwilliams@dps.ohio.gov; Romito, Ronald J. <RRomito@porterwright.com>; mhlepas@imperialaluminum.com; Josh Joseph (Josh@muskingumiron.com) <Josh@muskingumiron.com>; Tim Wilson <twilson@triplemetal.com>; Lee Jurek (lee@theaceadvantage.com) <lee@theaceadvantage.com>; Jeff Miller <jcmiller@progressrail.com>; Andy Cohen <acohen@metalconversions.com>; Dan.McCarthy@governor.ohio.gov

Subject: RE: [EXTERNAL]RE: #EXT# Scrap Metal Investigations

Good Morning Mr. Carney:

We have a meeting scheduled for Monday and I think it would be beneficial to discuss some of the details in your message.

From a legal standpoint, as we both have alluded to, OHS is permitted to appear at registered scrap yards during business hours to examine records. Since OHS's statutory investigative authority does not explicitly extend beyond records, OHS must proceed with caution before examining other areas of a yard to ensure the search is reasonable within the confines of the Fourth Amendment. Obviously, OHS takes its constitutional obligations seriously, and evidence searched or seized in violation of the Fourth Amendment would be inadmissible in a criminal or administrative hearing.

For registered yards, I think it would be helpful to have insight from ISRI members on the effectiveness of OHS conducting in-person inspections at yards versus the value of a desk review of the yard's records. As you know, the yard is required to upload most of its transactions into CIMS, and OHS personnel can review those by logging into CIMS. You have outlined your concern that yards want to know whether inspections are being carried out. What is ISRI's opinion on on-site reviews versus desk reviews with a notice to the yard that OHS conducted a review of its records? Obviously, OHS can conduct more reviews without traveling to the yard, and appearing on-site has practical concerns such as interfering with the yard's operations (particularly for unannounced inspections) and whether reviewing records on-site would be a more effective investigative technique than reviewing what is uploaded into CIMS. Does ISRI believe bad actors are keeping transaction records that are not being uploaded into CIMS? Would a review of these records be beneficial in curbing criminal or administrative violations, knowing that such records of wrongdoing are likely to be concealed from OHS investigators? Does ISRI believe that OHS's presence at the yard, even if no violations are discovered, would be a significant factor in limiting bad behavior because it sends a message that OHS is watching them for non-compliance? Please also bear in mind that the pandemic has had, and will continue to have an ongoing impact on OHS's ability to conduct on-site record reviews.

It appears we have significant disagreements on OHS's authority with respect to unregistered yards. Certainly, OHS is willing to meet and discuss this issue with the Governor's Office or the Attorney General at any time. Theft, receiving stolen property, and unregistered scrap dealing are criminal violations subject to law enforcement authority. We can discuss this matter further on Monday as well.

Michael Wise
Associate Legal Counsel

From: Carney, John P. <JCarney@porterwright.com>
Sent: Wednesday, July 14, 2021 1:26 PM
To: Wise, Michael <mawise@dps.ohio.gov>
Cc: Quinn, Brian <blquinn@dps.ohio.gov>; Stearmer, Janille <jsstearmer@dps.ohio.gov>; Clark, Christy <CCClark@dps.ohio.gov>; McWilliams, Jonathan <jmmcwilliams@dps.ohio.gov>; Romito, Ronald J. <RRomito@porterwright.com>; mhlepas@imperialaluminum.com; Josh Joseph (Josh@muskingumiron.com) <Josh@muskingumiron.com>; Tim Wilson <twilson@triplemmetal.com>; Lee Jurek (lee@theaceadvantage.com) <lee@theaceadvantage.com>; Jeff Miller <jcmiller@progressrail.com>; Andy Cohen <acohen@metalconversions.com>; McCarthy, Daniel <Dan.McCarthy@governor.ohio.gov>
Subject: [EXTERNAL]RE: #EXT# Scrap Metal Investigations

Good afternoon Mr. Wise,

The analysis you provided confirms that scrap metal dealers fall into the category of "pervasively regulated industries" under the Supreme Court's jurisprudence, which means there is a lesser expectation of privacy for scrap metal dealers than for other businesses that are not as highly regulated. The analysis you provided further confirms that ORC 4737.04(E)(1) states that records required to be maintained by the dealer shall be open for inspection by the representative of any law enforcement agency and the department of public safety during all business hours. Therefore, the business owner is on notice that the department of public safety vis a vis individuals from Ohio Homeland Security (OHS) may appear unannounced on their premises to inspect their records for purposes of compliance. To the extent that OHS inspectors discover a violation, there will be a need to work with local law enforcement and the local prosecutor to bring charges.

This is precisely what we have been asking OHS to do for several years now. Our concern is that OHS is not performing inspections, as they clearly have the right to perform under the ORC, with any sort of frequency that will encourage greater compliance. Furthermore, if an individual is operating an unregistered scrap recycling business nothing is stopping OHS from alerting local law enforcement and the prosecutor of this fact and seeking a warrant to enter the premises. Given that the legal analysis you provided in fact confirms the authority for OHS to perform the investigations we are seeking, we would like an explanation for why OHS is not doing more of these inspections. Is it the lack of personnel or a lack of a sufficient budget to support these efforts? Because based upon our discussions with the Bureau of Motor Vehicles their investigators are pursuing these unannounced visits on salvaged auto dealers which they believe are encouraging compliance.

Furthermore, I had a discussion with Attorney General Yost regarding this issue just yesterday. Mr. Yost indicates that his office has not been consulted on this particular issue by the Ohio Department of Public Safety, but he appeared to welcome the opportunity to work with you and your staff to clarify any concerns the Department of Public Safety or OHS might have relative to this issue. At least his initial feedback seemed to align with our belief that the Ohio Department of Public Safety and OHS are authorized to examine the records of any business who is purporting to participate in commerce in Ohio as a scrap metal dealer regardless of whether they are registered or unregistered.

As previously discussed, the lack of significant investigatory effort from OHS is particularly frustrating to ISRI member businesses who are in compliance with the Ohio scrap metal law and have spent tens of thousands of dollars and significant time in furtherance of their compliance efforts. It is our hope that we can work with the Ohio Department of Public Safety, OHS, Attorney General Yost and Governor DeWine to come up with ways in which the state is able to

increase its inspections to encourage greater compliance with state law for both registered and unregistered scrap recycling businesses.

Please help us to understand what barriers exist that are preventing OHS from fulfilling its duty to appropriately enforce the state's scrap metal law and engage in the necessary level of investigatory effort to ensure increased compliance. At this point, I think it would be helpful if you can provide written feedback on what OHS plans to do to better enforcement efforts prior to scheduling another meeting. To the extent that you still believe there are significant barriers to enforcement, our suggestion would be to include the Attorney General's Office and the Governor's Office in the next meeting.

Sincerely,

John Carney, on behalf of Northern Ohio and Ohio Valley ISRI Leadership

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From: mawise@dps.ohio.gov <mawise@dps.ohio.gov>

Sent: Friday, July 9, 2021 2:06 PM

To: Romito, Ronald J. <RRomito@porterwright.com>

Cc: blquinn@dps.ohio.gov; jsstearmer@dps.ohio.gov; CClark@dps.ohio.gov; jmmcwiliams@dps.ohio.gov

Subject: #EXT# Scrap Metal Investigations

#External Email#

Good Afternoon:

You asked about limitations on the investigatory authority of Ohio Homeland Security to inspect scrap yards and violations of scrap metal laws.

The Fourth Amendment prohibits the government from engaging in unreasonable searches and seizures. The ultimate touchstone of the Fourth Amendment is reasonableness, and whether the government's actions intrude upon a reasonable expectation of privacy. When a business is regulated by the government, a search is deemed reasonable only when the inspection program is made pursuant to law, and the regulatory provisions that authorize a search provide an adequate substitute for a warrant. Specifically, the inspection laws or rules must advise the owner of the commercial premises that a search is permitted by law, and that search has a properly defined scope with limitations on the discretion of the inspectors. [While there are many cases concerning administrative inspections, the best case for a summary of the issues involved is *New York v. Burger* 482 U.S. 691 (1987)]

The scrap metal statutes are contained in Ohio Revised Code Sections 4737.01 to 4737.045. Revised Code 4737.04(E)(1) states that records required to be maintained by the dealer shall be open for inspection by the representative of any law enforcement agency and the department of public safety during all business hours. Two administrative rules echo this authority. Ohio Administrative Code Section 4501:5-3-04(A) states that dealer records shall be maintained for

inspection. Ohio Administrative Code Section 4501:5-3-05(A) states that DPS may enter a dealer's place of business during normal business hours to inspect a dealer's records. These provisions permit DPS to appear on the premises of a registered scrap metal dealer during normal business hours and inspect records. Therefore, the explicit investigatory authority is limited to registered yards, during normal business hours, and only to inspect records. The regulations do not address the inspection of articles on the premises of a scrap yard, and the reasonableness of any such inspection would depend on the facts and circumstances of each search.

Furthermore, the department of public safety does not have the authority to take action against individuals who engage in unregistered scrap metal dealing. Pursuant to OAC 4501:5-3-05(B), DPS may only deny a registration application, or otherwise revoke, suspend, or take other action against a dealer's certificate of registration. As a result, DPS's jurisdiction is limited to certified dealers and applicants for certification. Engaging in scrap metal dealing, as defined in ORC 4737.01(A)(1), without registering is a felony. ORC 4737.99(D). In addition, ORC 4737.99(D) only permits the court to issue an injunction against further unregistered dealing. The Director of Public Safety cannot issue an injunction. Therefore, the Department of Public Safety does not have a remedy at law to discipline or otherwise sanction unregistered dealers. Criminal prosecution by law enforcement and criminal prosecutors through the court system is the only enforcement mechanism against unregistered actors.

Pursuant to your request, enclosed are the administrative actions taken by the Department of Public Safety against registered dealers who have violated scrap metal regulations. There are 14 cases instituted between October 2018 to the present. These only represent the formal actions taken against dealers, and do not include actions taken by other DPS employees to bring dealers into compliance without resorting to formal charges. Please let me know if you would like additional records, though be advised that records maintained in CIMS are not public records.

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