

# **Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation**

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# Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation

The Federal Bureau of Investigation (FBI) administers a computer system of systems that is used to query federal, state, local, tribal, and territorial criminal history record information (CHRI) and other records to determine an individual's firearms transfer/receipt and possession eligibility.

This FBI-administered system is the National Instant Criminal Background Check System (NICS). NICS, or parallel state systems, must be checked and the pending transfer approved by the FBI or state point of contact before a federally licensed gun dealer may transfer a firearm to any customer who is not also a federally licensed gun dealer. Current federal law does not require background checks for intrastate (same state), private-party firearms transactions between non-dealers, though such checks are required under several state laws.

In the 116<sup>th</sup> Congress, the House of Representatives passed three bills that would expand federal firearms background check requirements and firearms transfer/receipt and possession ineligibility criteria related to domestic violence.

The **Bipartisan Background Checks Act of 2019** (H.R. 8), a “universal” background check bill, would make nearly all intrastate, private-party firearms transactions subject to the recordkeeping and NICS background check requirements of the Gun Control Act of 1968 (GCA). For the past two decades, many gun control advocates have viewed the legal circumstances that allow individuals to transfer firearms intrastate among themselves without being subject to the licensing, recordkeeping, and background check requirements of the GCA as a “loophole” in the law, particularly within the context of gun shows. Gun rights supporters often oppose such measures, underscoring that it is already unlawful to knowingly transfer a firearm or ammunition to a prohibited person. In addition, some observers object to these circumstances being characterized as a loophole, in that the effects of the underlying provisions of current law are not unintended or inadvertent.

The **Enhanced Background Checks Act of 2019** (H.R. 1112) would lengthen the amount of time firearms transactions could be delayed pending a completed NICS background check from three business days under current law to several weeks. The timeliness and accuracy of FBI-administered firearms background checks through NICS—particularly with regard to “delayed proceeds”—became a matter of controversy following the June 17, 2015, Charleston, SC, mass shooting at the Emanuel African Methodist Episcopal Church. The assailant in this incident had acquired a pistol following a three-business-day-delayed sale under current law and an unresolved background check. While it has never been definitely determined whether the assailant's arrest record would have prohibited the firearms transfer, this incident prompted gun control advocates to label the three-business-day delayed transfer provision of current law as the “Charleston loophole.” Gun rights supporters counter that firearms background checks should be made more accurate and timely, so that otherwise eligible customers are not wrongly denied a firearms transfer, and ineligible persons are not allowed to acquire a firearm.

The **Violence Against Women Reauthorization Act of 2019** (H.R. 1585) would expand federal firearms ineligibility provisions related to domestic violence to include former dating partners under court-ordered restraints or protective orders and persons convicted of misdemeanor stalking offenses. Gun control advocates see this proposal as closing off the “boyfriend loophole.” Gun rights supporters are wary about certain provisions of this proposal that would allow a court to issue a restraining order *ex parte*; that is, without the respondent/defendant having the opportunity for a hearing before a judge or magistrate.

This report provides an overview of federal firearms background check procedures, analysis of recent legislative action, discussion about possible issues for Congress, and related materials.

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## Introduction

The Federal Bureau of Investigation (FBI) administers a computer system of systems that is used to query federal, state, local, tribal, and territorial criminal history record information (CHRI) and other records to determine if an individual is eligible to receive and possess a firearm.<sup>1</sup> This FBI-administered system is the National Instant Criminal Background Check System (NICS). This system, or parallel state systems, must be checked and the transfer approved by an FBI NICS examiner or state point of contact (POC) before a federally licensed gun dealer may transfer a firearm to any customer who is not similarly licensed federally as a gun dealer.

Under current law, persons who buy and sell firearms repeatedly for profit and as a principal source of their livelihood must be licensed federally as gun dealers. Federally licensed gun dealers—otherwise known as federal firearms licensees (FFLs)—are permitted to engage in interstate and, by extension, intrastate (i.e., within a state) firearms commerce with certain restrictions. For example, they may not transfer a handgun to an unlicensed, out-of-state resident.

Conversely, persons who occasionally buy and sell firearms for personal use, or to enhance a personal collection, are not required to be licensed federally as a gun dealer. Those unlicensed persons, however, are prohibited generally from making interstate firearms transactions—that is, engaging in interstate firearms commerce—without engaging the services of a federally licensed gun dealer. On the other hand, current law does not require background checks for intrastate, private-party firearms transactions between non-dealing, unlicensed persons, though such checks might be required under several state laws.<sup>2</sup> Nevertheless, it is unlawful for anybody, FFLs or private parties, to transfer a firearm or ammunition to any person they have reasonable cause to believe is a prohibited person (e.g., a convicted felon, a fugitive from justice, or an unlawfully present alien).<sup>3</sup>

In the 116<sup>th</sup> Congress, the House of Representatives has passed three bills that would significantly expand the federal firearms background check requirements and the current prohibitions on the transfer or receipt and possession of firearms related to domestic violence. Those bills are the

- Bipartisan Background Checks Act of 2019 (H.R. 8), a bill to expand federal firearms recordkeeping and background check requirements to include private-party, intrastate firearms transfers;

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<sup>1</sup> Under the Gun Control Act of 1968 (GCA), as amended, the term “state” includes the “District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).” The term “possession” includes the five current, permanently inhabited U.S. territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands). Hereinafter, the term “state and local” will be used to include the 50 states, the District of Columbia, and the five U.S. territories, as well as city, municipal, and county governments. See 18 U.S.C. §921(a)(2).

<sup>2</sup> For example, in Hawaii, Illinois, and Massachusetts, state law requires all firearms purchasers to obtain a permit to buy a firearm and the permitting process includes a background check that might be more thorough than a federal firearms background check. District of Columbia law and New Jersey state law require both a permit and point of sale background check through an FFL. Maryland and Pennsylvania require both a permit and point of sale background check through an FFL for handguns, but not for long guns. In 10 states (California, Colorado, Connecticut, Delaware, Nevada, New York, Oregon, Rhode Island, Vermont, and Washington), state law requires a point of sale background check be conducted through an FFL for all firearms (handguns and long guns), though Nevada has yet to implement its law. For more information, see Giffords Law Center to Prevent Gun Violence, *Universal Background Checks*, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/>.

<sup>3</sup> 18 U.S.C. §922(d). Under 18 U.S.C. §924(a)(2), violations are punishable by a fine or up to 10 years imprisonment, or both.

- Enhanced Background Checks Act of 2019 (H.R. 1112), a bill to extend the amount of time allowed to delay a firearms transfer, pending a completed background check to determine an individual's eligibility; and
- Violence Against Women Reauthorization Act of 2019 (H.R. 1585), a bill to expand firearms transfer or receipt and possession prohibitions to include dating partners with histories of domestic violence and stalking misdemeanors.

In addition, several multiple-casualty shootings have highlighted possibly systemic vulnerabilities in the NICS-related federal background check procedures, particularly with regard to making records on prohibited persons accessible to federal data systems queried as part of the federal background check process.<sup>4</sup> This report provides an overview of federal firearms statutes related to firearms transactions in interstate and intrastate commerce, dealer licensing, receipt and possession eligibility, NICS background check procedures, analysis of recent legislative action, and discussion about possible issues for Congress.

## Federal Firearms Statutes

Two major federal statutes regulate firearms commerce and possession in the United States. The Gun Control Act of 1968 (GCA; 18 U.S.C. §921 et seq.) regulates all modern (non-antique) firearms.<sup>5</sup> In addition, the National Firearms Act, enacted in 1934 (NFA; 26 U.S.C. §5801 et seq.), regulates certain other firearms and devices that Congress deemed to be particularly dangerous because they were often the weapons of choice of gangsters in the 1930s.<sup>6</sup> Such

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<sup>4</sup> High-profile, multiple-casualty shootings include the June 17, 2015, Charleston, SC, church shooting (9 killed/1 nonfatally wounded). Federal authorities were unable to complete the offender's background check, because of confusion over municipal- and county-level reporting of a drug-related arrest. He was later transferred a firearm after a three-business-day delayed proceed period under federal law had expired. With that pistol, he shot to death nine parishioners at a Bible school class. Another example includes the November 5, 2017, Sutherland Springs, TX, church shooting (26 killed/20 wounded). U.S. Air Force authorities failed to report or make accessible the offender's court martial conviction for a domestic violence offense, for which he was dismissed from the Air Force on a bad conduct discharge. A more recent example is the February 15, 2019, Aurora, IL, workplace shooting (5 killed/7 nonfatally wounded (6 by gunfire)). In this case, Illinois state authorities issued the offender a firearms owner's identification card (FOID) in March 2014, after an automated search of criminal history records that were electronically accessible at both the state and federal level failed to show the offender's 1995 Mississippi domestic violence-related felony aggravated assault conviction. Soon thereafter, the offender applied for a concealed carry permit, and his felony conviction was discovered based on a fingerprint-based nationwide criminal history background check. The Illinois State Police sent the offender a letter informing him of his firearms ineligibility and subsequent FOID revocation, but he apparently never surrendered either his FOID or the firearm he bought with that document. Nearly five years passed between felony conviction discovery by state authorities and the shooting. Notwithstanding possible gaps in Illinois state law, the search for criminal history records nationwide—as required under current federal law—should have identified the offender as a prohibited person, resulting in the denial of an Illinois FOID and subsequent handgun purchase. It appears that Mississippi authorities had made the offender's fingerprint file accessible to the Interstate Fingerprint Identification System (IAFIS), but a corresponding arrest and conviction record had not been made accessible through the Interstate Identification Index (III). Both systems are managed by the Federal Bureau Investigation (FBI), but both of these criminal history record information (CHRI) systems are also dependent on state-level participation, management, and maintenance.

<sup>5</sup> P.L. 90-618, October 22, 1968, 82 Stat. 1213. The GCA was preceded by the Federal Firearms Act of 1938. It too required anyone who engaged in the business of manufacturing, importing, shipping, and selling firearms in interstate commerce to be licensed federally and maintain records on such sales, including the names of unlicensed purchasers. However, as long as a person only engaged in intrastate firearms commerce, they were not required to be federally licensed. See P.L. 75-785, June 30, 1938, 52 Stat. 1250, codified at 15 U.S.C. §§901 to 910 (1964 ed.).

<sup>6</sup> P.L. 73-474, June 26, 1934, 48 Stat. 1236. As Title II of the GCA, Congress amended and repassed the NFA, though the NFA remained codified as Chapter 53 of the Internal Revenue Code (26 U.S.C. §5801 et seq.), as it had been previously. The GCA, by comparison, was codified at Chapter 44 of the federal criminal code, Title 18 of the United

weapons include machine guns, short-barreled rifles and shotguns, suppressors (silencers), a catch-all class of concealable firearms classified as “any other weapon,” and destructive devices (e.g., grenades, rocket launchers, mortars, other big-bore weapons, and related ordnance).

Congress passed both the NFA and GCA to reduce violent crimes committed with firearms. More specifically, the purpose of the GCA is to assist federal, state, local, tribal, and territorial law enforcement in the ongoing effort to reduce crime and violence.<sup>7</sup> It is not intended to place any undue or unnecessary federal restrictions or burdens on citizens in regard to lawful acquisition, possession, or use of firearms for hunting, trapshooting, target shooting, personal protection, or any other lawful activity.<sup>8</sup>

Many observers have long noted that the assassinations of President John F. Kennedy and his brother, Senator Robert F. Kennedy, and civil rights leader Martin Luther King provided the impetus to pass the GCA. Perhaps equally compelling were the August 1, 1966, University of Texas tower mass shooting<sup>9</sup> and social unrest that accompanied the 1960s.<sup>10</sup>

Under the Attorney General’s delegation, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the principal agency that administers and enforces these statutes.<sup>11</sup> In addition, ATF administers several provisions of the Arms Export Control Act of 1976 (AECA) with regard to the importation of certain firearms, firearms parts, and ammunition that are also regulated under the GCA and NFA.<sup>12</sup>

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States Code (18 U.S.C. §921 et seq.).

<sup>7</sup> Section 101 of P.L. 90-618, October 22, 1968, 82 Stat. 1213.

<sup>8</sup> Ibid.

<sup>9</sup> For example, within a week of the August 1, 1966, University of Texas, Austin, tower shooting, President Lyndon B. Johnson called on Congress to pass gun control legislation. See Gary M. Laverne, *A Sniper in the Tower: The Charles Whitman Murders*, University of North Texas Press 1997, p. 268. See also James Alan Fox and Jack Levin, *Extreme Killing*, 2014, pp. 287-293.

<sup>10</sup> Adam Winkler, *Gun Fight: The Battle over the Right to Bear Arms in America*, W.W. Norton & Company, 2013, pp. 231 and 249.

<sup>11</sup> ATF was originally established as a stand-alone bureau in the Department of the Treasury (Treasury) in 1972 by Treasury Department Order No. 120-1. As part of the Homeland Security Act, Congress transferred ATF’s enforcement and regulatory functions for firearms and explosives to the Department of Justice (DOJ) from Treasury, adding “explosives” to ATF’s title. See P.L. 107-296, 116 Stat. 2135, November 25, 2002, §1111 (effective January 24, 2003). The regulatory aspects of alcohol and tobacco commerce are the domain of the Tax and Trade Bureau (TTB), which encompasses former components of ATF that remained at Treasury, when other components of ATF described above were transferred to DOJ on January 24, 2003, under P.L. 107-296.

<sup>12</sup> Title II of P.L. 94-329, June 30, 1976, 90 Stat. 729, codified at 22 U.S.C. §2751 et al. ATF administers provisions of 22 U.S.C. §2778. Under AECA, the Departments of State and Commerce share responsibility for regulation of small arms exports under their respective International Trafficking in Arms Regulations (ITAR, 22 C.F.R. Parts 120-130) and Export Administration Regulations (EAR, 15 C.F.R. Parts 730-774). During the Obama Administration, an export control reform initiative anticipated that responsibility for the export of most firearms (other than machineguns, small arms with barrel bores of greater than one-half inch in diameter, and high-capacity ammunition magazines) would be transferred from the purview of State to Commerce. The Department of Commerce has traditionally handled sporting shotgun exports as well as rifle scopes and other optics. The Department of State, with the Department of Defense, has traditionally regulated all other firearms that could be considered small arms.

The Trump Administration published proposed rules to implement further this phase of export control reform. See Department of State, “International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III,” 83 *Federal Register* 101, May 24, 2018; and Bureau of Industry and Security, Department of Commerce, “Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML),” 38 *Federal Register* 24166, May 24, 2018. Senator Bob Menendez, however, invoked a provision of the AECA and placed a hold on the transfer of this regulatory authority over certain firearms from State to Commerce. Among other things, Senator Menendez voiced concern about the exportation of certain



For the most part, however, the FBI maintains NICS and administers the background check provisions of the GCA.<sup>13</sup> Nonetheless, as discussed below, ATF is charged with investigating whether denied persons made false statements in connection with a firearms transfer; when filling out federal firearms transaction forms. In addition, ATF is also charged with firearms retrieval actions, whenever delayed transactions and incomplete background checks possibly result in prohibited persons acquiring firearms.

## **Firearms and Ammunition Ineligibility**

The GCA sets firearms eligibility age restrictions under certain circumstances, as well as prohibits various categories of persons from firearms receipt and possession, among other factors. For example, as enacted, the GCA prohibits federally licensed gun dealers (i.e., FFLs) from transferring

- a long gun (shoulder-fired rifle or shotgun) or ammunition to anyone under 18 years of age; and
- a handgun or ammunition suitable for a handgun to anyone under 21 years of age.<sup>14</sup>

In 1994, Congress amended the GCA to prohibit anyone from transferring a handgun to a juvenile, or anyone under 18 years of age.<sup>15</sup> Congress also made it unlawful for a juvenile to possess a handgun.<sup>16</sup> Congress also provided exceptions to these juvenile transfer and possession prohibitions. Exceptions include temporary transfers in the course of employment in ranching or farming, in target practice, or hunting, all with the written consent of the parents or guardians and in accordance with federal and state laws; for self- or household-defense; or in other specified situations.<sup>17</sup>

Under the GCA, as amended, there are 10 categories of persons prohibited from receiving firearms. For 9 of those categories, those persons are also prohibited from possessing a firearm. More specifically, under 18 U.S.C. §922(g), there are nine categories of persons prohibited from shipping, transporting, receiving, or possessing a firearm or ammunition, which has been shipped or transported in interstate or foreign commerce:<sup>18</sup>

1. persons convicted in any court of a felony crime punishable by imprisonment for a term exceeding one year and state misdemeanors punishable by imprisonment for a term exceeding two years;
2. fugitives from justice;
3. unlawful users or addicts of any controlled substance;<sup>19</sup>

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firearms-related technology, especially computer assisted design (CAD) files that could be posted on the internet and easily downloaded, and used with three-dimensional (3D) printers to produce firearms that would not be fully detectable to metal detectors and other controlled firearms parts (e.g., AR-15 lower receivers).

<sup>13</sup> 18 U.S.C. §922(t) and 28 C.F.R. Part 25.

<sup>14</sup> 18 U.S.C. §922(b)(1).

<sup>15</sup> See Subtitle B—Youth Handgun Safety, Section 110201 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, September 13, 1994, 108 Stat. 1796, 2014, codified at 18 U.S.C. §922(x)(1).

<sup>16</sup> 18 U.S.C. §922(x)(2).

<sup>17</sup> 18 U.S.C. §922(x)(3).

<sup>18</sup> 18 U.S.C. §922(g).

<sup>19</sup> “Controlled substances” as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802).



4. persons adjudicated as “a mental defective,”<sup>20</sup> found not guilty by reason of insanity, or committed to mental institutions;
5. unauthorized immigrants and nonimmigrant visa holders (with exceptions in the latter case);<sup>21</sup>
6. persons dishonorably discharged from the U.S. Armed Forces;
7. persons who have renounced their U.S. citizenship;
8. persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner;<sup>22</sup> and
9. persons convicted of a misdemeanor crime of domestic violence.<sup>23</sup>

Under 18 U.S.C. §922(n), there is a 10<sup>th</sup> class of persons prohibited from shipping or transporting firearms or ammunition, or from receiving (but not possessing) firearms or ammunition that had been shipped or transported in interstate or foreign commerce:

10. persons under indictment in any court of a crime punishable by imprisonment for a term exceeding one year.<sup>24</sup>

It is unlawful for any person under any circumstances to sell or otherwise dispose of a firearm or ammunition to any of the prohibited persons enumerated above, if the transferor (seller, federally licensed or unlicensed) has reasonable cause to believe that the transferee (buyer/recipient) is prohibited from receiving those items.<sup>25</sup>

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<sup>20</sup> Under 27 C.F.R. §478.11, the term “adjudicated as a mental defective” is defined to include a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to himself or others, or (2) lacks the mental capacity to manage his own affairs. This term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).

This definition was promulgated by an ATF final rule: *Federal Register*, vol. 62, no. 124, June 27, 1997, p. 34634.

<sup>21</sup> Until 2011, ATF interpreted this provision to apply to any noncitizen whose immigration status was “nonimmigrant alien,” regardless of whether the alien had been required to obtain a visa prior to arrival at a U.S. port of entry. In 2011, ATF was informed by the DOJ Office of Legal Counsel (OLC) that its interpretation was too broad and that the prohibition “applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status.” See 2011 WL 6260326 (O.L.C) (Oct. 28, 2011). As such, nonimmigrants who enter the country validly without a visa (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition; however, those individuals must meet a residency requirement, which requires them to demonstrate that they have “the intention of making a home” in the state where they wish to purchase the firearm. See 77 *Federal Register* 33625-33634 (June 7, 2012).

<sup>22</sup> See Subtitle D—Domestic Violence, Section 110401 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, September 13, 1994, 108 Stat. 1796, 2014, codified at 18 U.S.C. §922(g)(8).

<sup>23</sup> See Section 658 of Omnibus Consolidated Appropriations Act, 1997, September 30, 1996, 110 Stat. 3009, 3009-3371, codified at 18 U.S.C. §922(g)(9).

<sup>24</sup> 18 U.S.C. §922(n).

<sup>25</sup> 18 U.S.C. §922(d).

## Firearms Commerce as a Business

Under the GCA as enacted, persons who, or firms that, are “engaged in the business” of importing, manufacturing, or selling firearms must be federally licensed.<sup>26</sup> In 1986, Congress amended the GCA to define the term “engaged in the business.” For dealers it means:

a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.<sup>27</sup>

ATF issues federal firearms licenses to firearms importers, manufacturers, dealers, pawnbrokers, and collectors.<sup>28</sup> As summarized by ATF in January 2016 guidance:

A person engaged in the business of dealing in firearms is a person who “devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”

Conducting business “with the principal objective of livelihood and profit” means that “the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”

Consistent with this approach, federal law explicitly exempts persons “who make occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”<sup>29</sup>

Under the GCA, only FFLs are allowed to transfer firearms commercially from one state to another, that is, to engage in *interstate* (or *foreign*) firearms commerce.<sup>30</sup> At the same time, it would be highly improbable for any firearms business to compete successfully in the U.S. civilian gun market by only selling firearms manufactured in the state in which it does business; that is, to

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<sup>26</sup> The term “engaged in the business” is defined at 18 U.S.C. §921(a)(21). The terms “**persons**” and “**whoever**” are defined to include any individual, corporation, company, association, firm, partnership, society, or joint stock company at 18 U.S.C. §921(a)(1).

<sup>27</sup> 18 U.S.C. §921(a)(1)(C).

<sup>28</sup> 18 U.S.C. §923. The Treasury and General Government Appropriations Act, 2000 (P.L. 106-58) requires that background checks be conducted when former firearms owners seek to reacquire a firearm that they sold to a pawnshop. Hence, pawnbrokers who hold firearms as collateral and remit those firearms at times back to their owners must be federally licensed gun dealers.

Federally licensed firearms collectors are allowed to engage in limited interstate transfers of “curios and relics,” whereas in nearly all cases an unlicensed person must engage the services of a federally licensed gun dealer to facilitate interstate firearms transfers to another unlicensed person. See 27 C.F.R. §478.11 for the definition of “curios or relics,” which generally include firearms that are 50 years old, of museum interest, or derive a substantial amount of their value from the fact that they are novel, rare, bizarre, or because they are associated with some historical figure, period, or event.

<sup>29</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Do I Need A License to Buy and Sell Firearms?* January 2016, p. 2, <https://www.atf.gov/file/100871/download>.

<sup>30</sup> See 18 U.S.C. §922(a)(1)(A). Violations are punishable by a fine and imprisonment of not more than five years under 18 U.S.C. §924(a)(1)(D). Also, under 18 U.S.C. §921(a)(2), the term “**interstate or foreign** commerce” is defined to include “commerce between any place in a State and any place outside a State, or with any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce within the same State but through any place outside of that State.”

engage exclusively in intrastate commerce. As a practical matter, any person who deals in firearms as a business, either in interstate or intrastate commerce, needs to be federally licensed firearms manufacturer, importer, or dealer.<sup>31</sup>

FFLs may transfer a long gun—a shoulder-fired rifle or shotgun—to unlicensed persons from another state as long as such transfers are legal in both states and they meet in person to make the transfer.<sup>32</sup> However, FFLs may not transfer a handgun to any unlicensed resident of another state.<sup>33</sup> Since 1986 there have been no similar restrictions on the interstate transfer of ammunition, because Congress repealed those restrictions at the request of ATF.<sup>34</sup> Furthermore, a federal firearms license is not required to sell ammunition; however, such a license is required to either manufacture or import ammunition.

In addition, FFLs are required to maintain bound logs of firearms acquisitions and dispositions to and from their business inventories by date, make, model, and serial number of individual firearms and transactions records for firearms sales to unlicensed, private persons.<sup>35</sup> ATF periodically inspects these FFLs to monitor their compliance with federal and state law.

Under current law, there are statutory prohibitions against ATF, or any other federal agency, maintaining a registry of firearms or firearms owners.<sup>36</sup> Nevertheless, the system of recordkeeping described above allows ATF agents to trace, potentially, the origins of a firearm from manufacturer or importer to a first retail sale and buyer. ATF agents assist other federal agencies, as well as state and local law enforcement, with criminal investigations.<sup>37</sup> The ATF also makes technical judgements about firearms, including the appropriateness of manufacturing and importing certain makes and models of firearms and firearms parts.

As described in greater detail below, since November 30, 1998, all FFLs are required to initiate a background check for both handguns and long guns on any prospective firearms purchaser who is otherwise unlicensed federally to engage in firearms commerce as a business.<sup>38</sup> The FBI facilitates these background checks nationwide through NICS. However, for some states, these FBI-facilitated background checks are routed to state or local authorities (points of contact, or POCs) for all firearms (handguns and long guns), or just for handgun transfers or permits for other states.

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<sup>31</sup> David B. Kopel, “Background Checks for Firearms Sales and Loans: Law, History, and Policy,” *Harvard Journal on Legislation*, vol. 53, 2016, pp. 306-313.

<sup>32</sup> See 18 U.S.C. §922(b)(3).

<sup>33</sup> *Ibid.* Violations are punishable by a fine and imprisonment of not more than five years under 18 U.S.C. §924(a)(1)(D).

<sup>34</sup> Section 103(a)(7) of Firearms Owners’ Protection Act, 1986, P.L. 99-308, May 19, 1986, 100 Stat. 449, 454, amended the GCA recordkeeping provisions at 18 U.S.C. 923(g) to exclude ammunition. See also, U.S. Congress, House Committee on the Judiciary, *Federal Firearms Law Reform Act of 1986*, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 14, 1986, S.Rept. 99-495, p. 17.

<sup>35</sup> 18 U.S.C. §923(g).

<sup>36</sup> 18 U.S.C. §926(a)(3).

<sup>37</sup> 18 U.S.C. §923(g).

<sup>38</sup> 18 U.S.C. §922(t).

## Private Party Transfers

For the most part, the GCA does not regulate firearms transactions between two unlicensed persons, who reside in the same state; that is, private-party, intrastate firearms transfers. Such transfers are not covered under current federal law as long as the parties are:

- not “engaged in the business” of dealing in firearms “as a regular course of trade or business with the principal objective of livelihood and profit”;
- residents of the same state, where the transfer is made;
- not prohibited from receiving or possessing firearms; and
- the recipients are of age (at least 18 years old).<sup>39</sup>

It follows, therefore, that private firearms transactions between persons who are not “engaged in the business” of firearms dealing and, thus, who are not required to be federally licensed, are not covered by the recordkeeping or the background check provisions of the GCA if those parties reside in the same state. The meaning of “state of residence” is not defined in the GCA, but ATF has defined the term to mean:

The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State. If an individual is on active duty as a Member of the Armed Forces, the individual’s State of residence is the State in which his or her permanent duty station is located. An alien who is legally in the United States shall be considered to be a resident of a State only if the alien is residing in the State and has resided in the State for a period of at least 90 days prior to the date of sale or delivery of a firearm.<sup>40</sup>

However, these intrastate, private firearms transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances. As noted above, unlicensed persons are prohibited generally from engaging in interstate and intrastate firearms commerce as a business; however, they are permitted to change state residences and take their privately owned non-NFA firearms with them under federal law, but they must comply with the laws of their new state of residence.<sup>41</sup>

The GCA generally prohibits an unlicensed person from directly transferring any firearm—handgun or long gun—to any other unlicensed person who resides in another state.<sup>42</sup> Similarly, it is unlawful for an unlicensed person to receive a firearm from any unlicensed person who resides in another state. On the other hand, the GCA does not prohibit an unlicensed person from transferring a firearm to an out-of-state FFL, who may be willing to serve as a proxy for an unlicensed person to transfer a firearm or firearms to another unlicensed person who resides in

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<sup>39</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF Best Practices: Transfers of Firearms by Private Sellers*, ATF P 4300.21, January 2013, <https://www.atf.gov/firearms/docs/guide/atf-p-530021-best-practices-transfers-firearms-private-sellers/download>.

<sup>40</sup> 27 C.F.R. §478.11. Also, according to an opinion of the U.S. Attorney General on the Firearms Owners’ Protection Act, 1986 (P.L. 99-308), a person is generally considered to be the resident of the locale where he is “permanently or for substantial periods of time physically located.” See *Congressional Record*, vol. 114 (1968), p. 22,786, cited by David T. Hardy in “Firearms Owners’ Protection Act: A Historical and Legal Perspective,” *Cumberland Law Review*, vol. 17, no. 3, 1986-1987, p. 634.

<sup>41</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Federal Firearms Regulations Reference Guide* (2014), p. 198, <https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download>.

<sup>42</sup> See 18 U.S.C. §922(a)(5). Violations are punishable by a fine and imprisonment of not more than five years under 18 U.S.C. §924(a)(1)(D).

the state where the FFL is licensed federally to do business. The facilitating, out-of-state FFL, in turn, must treat that firearm as if it were part of his business inventory, triggering the recordkeeping and background check provisions of the GCA. Generally, the facilitating FFL will charge a fee for such transactions conducted on behalf of an unlicensed person, which would likely be passed on to the unlicensed buyer/transferee in most cases.<sup>43</sup>

According to a 2015 survey, about one-in-five firearms transfers (22%) are conducted privately between unlicensed persons.<sup>44</sup> In addition, a 2016 survey of state and federal prisoners—conducted by the Department of Justice (DOJ), Bureau of Justice Statistics (BJS)—who possessed a firearm during the offense for which they were serving time suggested that:

- more than half (56%) had either stolen the firearm (6%), found it at the scene of the crime (7%), or obtained it off the street or from the underground market (43%);
- most of the remainder (25%) had obtained the firearm from a family member or friend, or as a gift; and
- seven percent had purchased the firearm under their own name from a licensed firearm dealer, or FFL.<sup>45</sup>

Based on this survey data, private firearms sales at gun shows or any similar venue did not appear to be a significant source of guns carried by these offenders, while private transfers among family members, friends, and acquaintances did appear to account for a significant source of such firearms.<sup>46</sup>

## **ATF Form 4473, Firearms Transaction Record**

The ATF Form 4473 and bound log of firearms acquisitions and dispositions are the essential federal documents underlying the recordkeeping process mandated by the GCA. Both FFLs and prospective, federally unlicensed purchasers must truthfully and completely fill out, and sign, an ATF Form 4473. Prospective purchasers attest to three things:

1. they are not prohibited persons,
2. they are who they say they are, and
3. they are the actual buyers.

Straw purchases are a federal crime. It is illegal for anybody to pose as the actual buyer, when in fact he is buying the firearm for someone else. Making any materially false statement to an FFL is punishable by a fine and/or up to 10 years imprisonment.<sup>47</sup> There is also a lesser penalty for

<sup>43</sup> While FFLs have reportedly facilitated private-party, interstate firearms transfers for many years, as no provision of federal law prohibited such facilitated transfers, ATF did not officially provide written procedural guidance for such facilitated transfers until after the December 14, 2012, Newtown, CT, mass shooting. See U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *FFL Newsletter, Federal Firearms Licensee Information Service*, “Private Party Transfers,” vol. 2, September 2013, p. 1. This article announces ATF Procedure 2013-1, which was superseded by ATF Procedure 2017-1, “Recordkeeping and Background Check Procedure for Facilitation of Private Party Firearms Transfers,” July 28, 2017.

<sup>44</sup> Matthew Miller, Lisa Hepburn, and Deborah Azrael, “Firearm Acquisition Without Background Checks,” *Annals of Internal Medicine*, 2017, p. 233.

<sup>45</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates*, 2016, NCJ 251776, January 2019, pp. 7-8.

<sup>46</sup> *Ibid.*

<sup>47</sup> 18 U.S.C. §§922(a)(6) and 924(a)(2).

making any false statement or representation in any record (e.g., the Form 4473) that an FFL is required to maintain. Some straw purchases are also prosecuted under this provision. Violations are punishable by a fine and up to five years imprisonment.<sup>48</sup>

For their part, FFLs must verify a prospective purchaser's name, date of birth, state residency, and other information by examining government-issued identification, which most often include a state-issued driver's license.

FFLs must also file completed Form 4473s in their records. If a purchased firearm from FFLs should be recovered at any crime scene, ATF can trace a firearm from its original manufacturer or importer to the first-time FFL retail seller and the first-time private buyer (by the make, model, and serial number of the firearm). Successful firearms traces have generated leads in criminal investigations. In addition, aggregated firearms trace data provide criminal intelligence on illegal firearms trafficking patterns.

## 1993 Brady Act and Background Checks

After six years of debate, Congress passed the Brady Handgun Violence Prevention Act, 1993 (Brady Act).<sup>49</sup> Sponsors of the Brady Act initially proposed requiring a seven-day waiting period for handgun transfers. Instead, Congress amended the GCA with the Brady Act to require electronic background checks on any federally unlicensed individual seeking to acquire a firearm from an FFL. The Brady Act included both interim and permanent provisions.

Under the interim provisions, FFLs were required to contact local chief law enforcement officers (CLEOs) to determine the eligibility of prospective customers to be transferred a handgun. CLEOs were given up to five business days to make such eligibility determinations.<sup>50</sup> From February 28, 1994, to November 29, 1998, under the interim provisions, 12.7 million firearms background checks (for handguns) were completed, resulting in 312,000 denials.<sup>51</sup>

The permanent provisions of the Brady Act became effective when the FBI activated the National Instant Criminal Background Check System (NICS) on November 30, 1998.<sup>52</sup> Under these provisions, FFLs are required to initiate a background check through NICS on any prospective unlicensed customer, who seeks to acquire a firearm from them through a sale, trade, or redemption of firearms exchanged for collateral. Failure to conduct a NICS check is punishable by a fine of up to \$1,000 and one year imprisonment, or both.<sup>53</sup> FFLs may engage in firearms transfers among themselves without conducting background checks.

The Brady Act includes a provision that prohibits the establishment of a registration system of firearms, firearms owners, or firearms transactions or dispositions with NICS-generated records, except for records on NICS denials for persons who are prohibited from receiving or possessing firearms under the GCA.<sup>54</sup> In addition, in the FY2012 Consolidated Appropriations Act, Congress

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<sup>48</sup> 18 U.S.C. §924(a)(1)(A).

<sup>49</sup> P.L. 103-159, November 30, 1993, 107 Stat. 1536.

<sup>50</sup> 18 U.S.C. §922(s).

<sup>51</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearms, 2015—Statistical Tables*, November 2017, p. 5.

<sup>52</sup> 18 U.S.C. §922(t).

<sup>53</sup> 18 U.S.C. §924(a)(5).

<sup>54</sup> See subsection 103(i) of P.L. 103-159, November 30, 1993, 107 Stat. 1536, 1542.



included a permanent appropriations limitation that requires the FBI to destroy background check records within 24 hours on persons who are eligible to receive firearms.<sup>55</sup>

From November 30, 1998, through 2018, the FBI NICS Section facilitated nearly 305 million firearms-related background checks transactions.<sup>56</sup> Corresponding data on individual background checks and denials under the permanent provisions of the Brady Act are given and discussed below for both the FBI and for point of contact states that have chosen to either fully or partially implement the Brady Act.

## **NICS Process Under Federal Law**

Building on the GCA firearms transaction recordkeeping process, the completed and signed ATF Form 4473 serves as the authorization for an FFL to initiate a check through NICS. The FFL submits a prospective firearms transferee's name, sex, race (or ethnicity), complete date of birth, and state of residence to the FBI through NICS.<sup>57</sup> Social security numbers and other numeric identifiers are optional, but the submission of these data could possibly increase the timeliness of the background check and reduce misidentifications.<sup>58</sup>

## **NICS Responses**

The NICS Section is to respond to an FFL or POC state official with a NICS Transaction Number (NTN) and one of four outcomes as follows, as described in greater detail below:

1. "proceed" with transfer or permit/license issuance, because a prohibiting record was not found;
2. "denied," indicating a prohibiting record was found;
3. "delayed proceed," indicating that the system produced information that suggested the prospective purchaser could be prohibited; or
4. "canceled" for insufficient information provided.<sup>59</sup>

In the case of a "proceed," the background check record is purged from NICS within 24 hours;<sup>60</sup> "denied" requests are kept indefinitely. Under the third outcome, "delayed proceed," a firearms transfer may be "delayed" for up to three business days while NICS examiners or state designees (i.e., POCs) attempt to ascertain whether the person is prohibited.

"Delayed proceeds" are often the result of partial, incomplete, and/or even ambiguous criminal history records. The FBI NICS Section often must contact state and local authorities to make final firearms eligibility determinations. Under federal law, at the end of the three-business-day period following a "delayed proceed," FFLs may proceed with the transfer at their discretion if they have not heard from the NICS Section about those matters. The NICS Section, meanwhile, will

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<sup>55</sup> Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, November 18, 2011, 125 Stat. 552, 632; 18 U.S.C. 922 note.

<sup>56</sup> U.S. Department of Justice, Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS) Section, 20<sup>th</sup> Anniversary, 2018 Operations Report*, May 14, 2019, p. 13.

<sup>57</sup> 28 C.F.R. §25.7(a).

<sup>58</sup> 28 C.F.R. §25.7(b).

<sup>59</sup> SEARCH and National Center for State Courts, *State Progress in Record Reporting for Firearm-Related Background Checks: Fingerprint Processing Advances Improve Background Checks*, by Owen Greenspan and Richard Schauffler, September 2016, p. 5.

<sup>60</sup> Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, November 18, 2011, 125 Stat. 552, 632; 18 U.S.C. §922 note.



continue to work the NICS adjudications for up to 30 days, at which point the background checks will drop out of the NICS examiner's queue if unresolved. At 88 days, all pending background check records are purged from NICS, even when they remain unresolved. About two-thirds of FBI NICS Section-administered background checks are completed within hours, if not minutes. Nearly one-fifth are delayed, but are completed within the three-business-day delayed transfer period.

If the FBI ascertains that the person is not in a prohibited status at any time within this 88-day period, then the FBI contacts the FFL through NICS with a "proceed" response. If the person is subsequently found to be prohibited, the FBI also contacts the FFL to ascertain whether a firearms transfer had been completed following the three-business-day "delayed transfer" period. If so, the FBI makes a referral to ATF. In turn, ATF initiates a firearms retrieval process. Such circumstances are referred to as a "delayed denial," or more colloquially described as "lying and buying."

By comparison, standard denials are known as "lying and trying," under the supposition that most persons knew they were prohibited before they filled out the ATF Form 4473 and underwent a background check. ATF is also responsible for investigating standard denials based on FBI NICS Section referrals. As noted above, making any false statement to an FFL in connection with a firearms transfer is punishable under two GCA provisions.<sup>61</sup>

As part of the NICS process, under no circumstances are FFLs informed about the prohibiting factor upon which denials are based.<sup>62</sup> However, denied persons may challenge the accuracy of the underlying record(s) upon which their denials are based.<sup>63</sup> They would initiate this process by requesting (usually in writing) the reason for their denial from the agency that initiated the NICS check (the FBI or POC). Under the Brady Act, the denying agency has five business days to respond to the request.<sup>64</sup> Upon receipt of the reason and underlying record for their denials, the denied persons may challenge the accuracy of that record. If the records are found to be inaccurate, the denying agency is legally obligated under the Brady Act to correct that record.<sup>65</sup> If the denials are overturned within 30 days, the transfers in question may proceed.<sup>66</sup> Otherwise, FFLs must initiate another background check through NICS on the previously denied prospective purchaser.<sup>67</sup>

## **NICS-Queried Computer Systems and Files**

The feasibility of establishing NICS was largely founded upon the interstate sharing of federal, state, local, tribal, and territorial criminal history record information (CHRI) electronically through FBI computer systems and wide area network (WAN).<sup>68</sup> Based on the prospective

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<sup>61</sup> 18 U.S.C. §§922(a)(6) and 924(a)(1)(A).

<sup>62</sup> U.S. Department of Justice, Federal Bureau of Investigation, "National Instant Criminal Background Check System Regulation," 63 *Federal Register* 58303-58312, October 30, 1998.

<sup>63</sup> 28 C.F.R. §25.10(c).

<sup>64</sup> Subsection 103(f) of P.L. 103-159, February 28, 1984, 107 Stat. 1536.

<sup>65</sup> Subsection 103(g) of P.L. 103-159.

<sup>66</sup> 28 C.F.R. §25.10(e).

<sup>67</sup> *Ibid.*

<sup>68</sup> A wide area network (WAN) is a "physical or logical network that provides data communications to a larger number of independent users than are usually served by a local area network (LAN) and that is usually spread over a larger geographic area than that of a LAN." Source: National Institutes of Standards and Technology, *Guide to Industrial Control Systems (ICS) Security*, NIST SP 800-82 Rev. 2 (API 1164), p. B-18, May 2015, <https://doi.org/10.6028/>

customer's name and other biographical descriptors, NICS queries four national data systems for records that could disqualify a customer from receiving and possessing a firearm under federal or state law. Those systems include the:

- Interstate Identification Index (III) for records on persons convicted or under indictment for felonies and serious misdemeanors;
- National Crime Information Center (NCIC) for files on persons subject to civil protection orders and arrest warrants, immigration law violators, and known and suspected terrorists;
- NICS Indices for federal and state record files on persons prohibited from possessing firearms, which would not be included in either III or NCIC; and
- Immigration-related databases maintained by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) for non-U.S. citizens.<sup>69</sup>

An internal FBI inspections report found that access to N-DEx could have helped reveal that the individual, who later shot and killed nine people in a Charleston, SC, church, had an arrest record that was possibly sufficient grounds to deny him a firearms transfer.<sup>70</sup> N-DEx is a repository of unclassified criminal justice files that can be shared, searched, and linked across jurisdictional boundaries.

For more information about these computer systems and files see **Appendix B**.

### **NICS Participation: POCs and Non-POCs**

As shown in **Figure 1**, under the Brady Act, states may opt to conduct firearms-related background checks entirely or partially for themselves through state and local agencies serving as POCs, or they may opt to have such checks handled entirely by the FBI, through its NICS Section, which is part of the FBI's Criminal Justice Information Services (CJIS) Division.

- In 13 full POC states, an FFL initiates a firearms-related background check under the Brady Act by contacting a state or local agency serving as a POC for both long gun- and handgun-related transfers. These states are CA, CO, CT, FL, HI, IL, NJ, NV, OR, PA, TN, UT, and VA.
- In four partial POC states, an FFL initiates a firearms-related background check by contacting the state and local agencies serving as POCs for handgun transfers, and by contacting the NICS Section through a call center for long gun transfers. These states are MD, NH, WA, and WI.
- In three partial POC states, an FFL initiates a firearms-related background check under the Brady Act by contacting the state and local agencies serving as POCs for handgun permits, and contacts the NICS Section through a call center for long gun transfers. These states include IA, NC, and NE.
- In 36 jurisdictions (30 states, the District of Columbia, and the five U.S. territories), an FFL initiates a firearms-related background check by contacting the NICS Section through a call center for all firearms-related background checks, both long gun and handgun transfers. These thirty states are AK, AL, AR,

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NIST.SP.800-82r2.

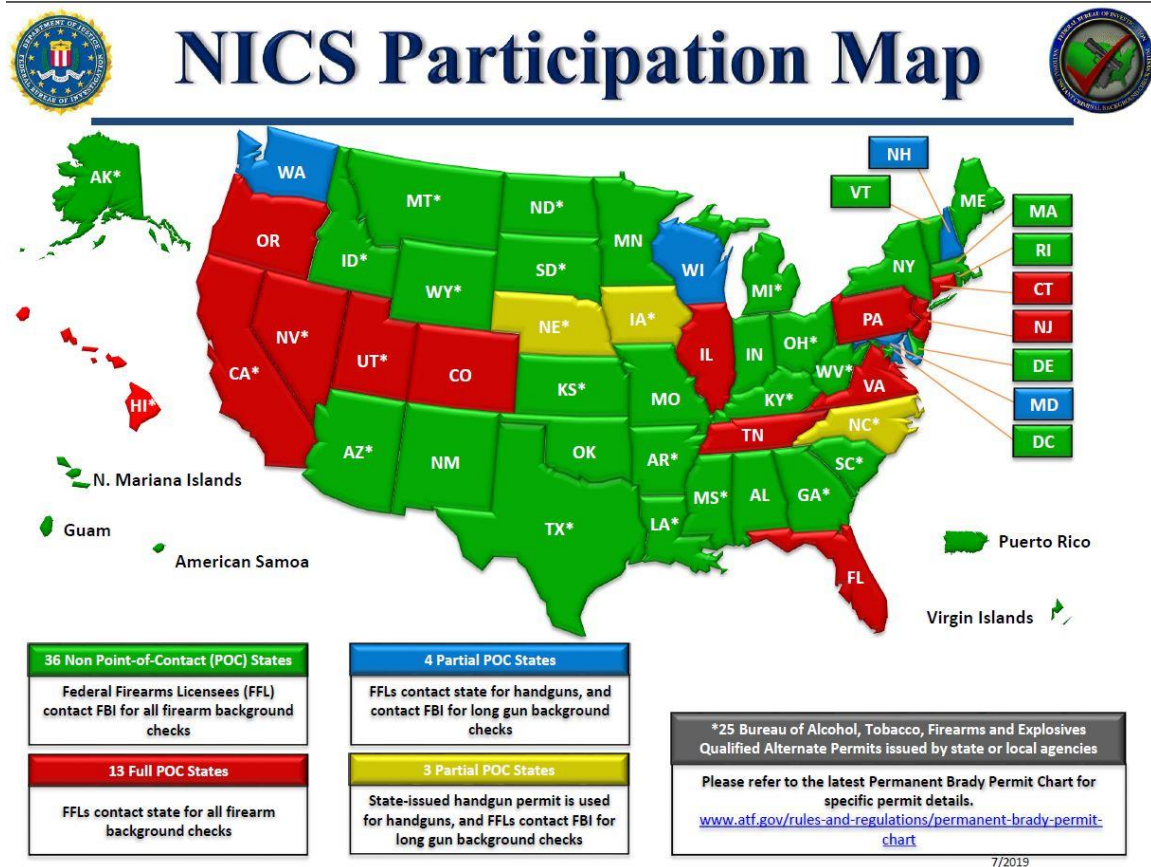
<sup>69</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations*, 2018, May 14, 2019, pp. 1-2.

<sup>70</sup> U.S. Department of Justice, Office of the Inspector General, *Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System*, Audit Division 16-32, September 2016, p. ii.

AZ, DE, GA, ID, IN, KS, KY, LA, MA, ME, MI, MN, MO, MS, MT, ND, NM, NY, OH, OK, RI, SC, SD, TX, VT, WY, and WV. The five territories are AS, GU, MP, PR, and VI.

- Twenty-five states are “Brady exempt,” meaning that certain valid, state-issued handgun and concealed carry weapons (CCW) permits may be presented to the FFL in lieu of a background check for firearms transfers through the NICS Section or state and local agencies serving as POCs. Those states are AK, AR, AZ, CA, GA, HI, IA, ID, KS, KY, LA, MI, MS, MT, NC, ND, NE, NV, OH, SC, SD, TX, UT, WV, and WY. For further information, see **Appendix C**.

**Figure 1. Point of Contact (POC) and Non-POC States**



**Source:** U.S. Department of Justice, Federal Bureau of Investigation.

## NICS Transactions, November 30, 1998, Through 2018

**Figure 2** shows annual NICS transactions from November 30, 1998, through 2018 (20 years and one month). FBI transactions are shown on the base of the columns and the state and local POC transactions are shown on the top of the columns. Over this period, the FBI NICS Section and state and local agencies serving as POCs made 304.6 million NICS transactions. The NICS Section handled 128.6 million of these transactions (42.2% of all NICS transactions), whereas POCs initiated 176 million transactions (57.8% of all NICS transactions).

There is a one-to-one correspondence between FBI NICS transactions and individual background checks, and the 128.6 million FBI transactions—that is, background checks—resulted in 1.6

million denials (1.24%). Some of these FBI NICS Section-administered background checks were for firearms transactions involving multiple firearms; consequently, NICS transactions/background checks serve as an imperfect proxy for firearms sales.

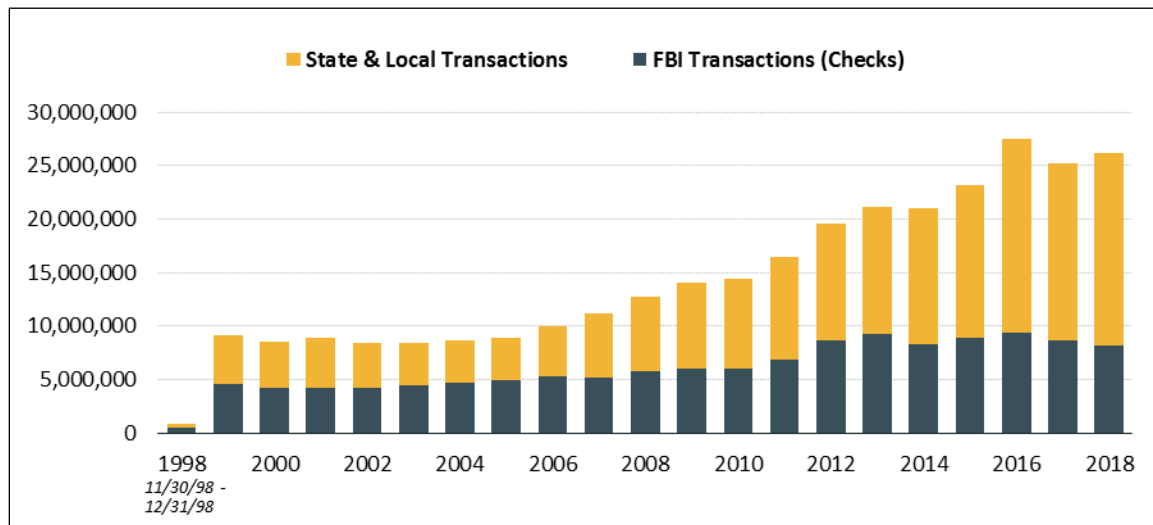
Unlike FBI NICS background checks, some state background checks involved more than one background check transaction. In some states, for example, there may be permitting or licensing processes that could take several weeks and administrators would run multiple NICS queries on a single applicant. In other cases, a background check administrator might be unclear about an applicant's first and last name and would run two NICS queries on the applicant, reversing both names as first and last names. More fundamentally, some states are running periodic NICS queries on concealed carry permit holders. These periodic rechecks are not considered individual background checks.

The FBI does not have the state data to report on how many state and local background checks correspond with those transactions. Nor does the FBI report the total number of state and local firearms transfer or license denials. The Bureau of Justice Statistics (BJS), however, collects and analyzes the data as part of its Firearm Inquiry Statistics Program and reports annually on the total number of firearms-related background checks and related denials conducted under the Brady Handgun Violence Prevention Act (P.L. 103-159).

In June 2017, BJS reported that state and local POCs had conducted 81.7 million firearms-related background checks from November 30, 1998, through 2015. According to the FBI, these POC-conducted background checks corresponded with 123.3 million NICS transactions. About 54.9% of these state transactions involved background checks related to firearms permits/licenses, an unreported percentage of which were for concealed carry permits. It is also noteworthy that some state-issued concealed-carry permits exempt the holder from any further background checks for non-NFA firearms. Hence, state and local NICS transactions also serve as an imperfect proxy for firearms sales. See **Appendix C** for a list of state permits that have been certified by ATF as Brady exempt.

**Figure 2. Firearms-Related NICS Background Check Transactions**

State and Local POC and NICS Section Transactions, November 30, 1998, Through 2018



**Source:** U.S. Department of Justice, Federal Bureau of Investigation.

**Notes:** It is notable that some firearms-related background checks conducted by state and local POCs involve more than one NICS transaction. By comparison, background checks conducted by the NICS section involve a single transaction per background check.

From 2006 through 2018, total NICS transactions more than doubled from 10 million to 26 million or more, peaking in 2016 at 27.5 million and then dropping to 25.2 million in 2017, and rising again to 26.2 million in 2018. For the same years, total NICS transactions/checks handled entirely by the FBI NICS Section increased from 5.3 million to 9.4 million from 2006 to 2016, then dropped to 8.6 million in 2017, and dropped again to 8.2 million in 2018. In addition, NICS transactions handled by state and local agencies increased from 4.8 million to 18.2 million from 2006 to 2016, then dropped to 16.6 million in 2017, but rose again to 17.9 million in 2018.

In **Figure 2** POC transactions account for an increasing proportion of all NICS transactions, but as discussed above some POC background checks involve more than one NICS transaction, whereas each NICS Section transaction corresponds with a single background check. As shown in **Figure 3**, for the years 1999 through 2015, the FBI CJIS Division's NICS Section conducted as many or more background checks than state or local POC agencies.

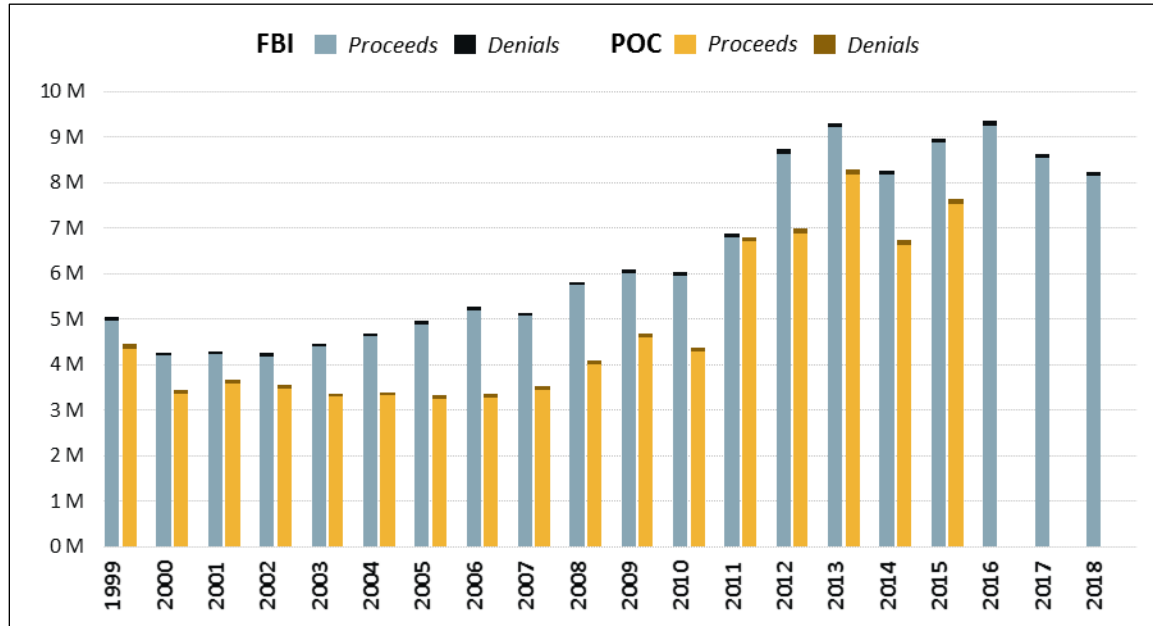
**Figure 3** also shows the number of annual denials made pursuant to federal or state law. As noted above, over the 20 years and one month, the FBI CJIS Division's NICS Section conducted 128.7 million background checks, resulting in nearly 1.6 million denials, for an overall initial denial rate of 1.2%. As discussed below, about 2.7% of those denials were appealed and eventually overturned.

BJS reported that state and local POC agencies conducted nearly 81.7 million background checks from November 30, 1998, through 2015 for firearms transfers and permits.<sup>71</sup> To date, BJS has not published any data for state and local POC agencies for 2016, 2017, and 2018. Nevertheless, for those 17 years and one month, POC checks resulted in nearly 1.46 million denials, for an overall denial rate of 1.8%, according to BJS. For the same years (and one month), the FBI NICS Section processed 102.4 million background checks, resulting in 1.27 million denials of firearms transfers, for an overall denial rate of 1.2%. See **Appendix A** for the data shown in **Figure 3**, as well as FBI and POC denials by prohibiting categories.

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<sup>71</sup> The 81,687,782 state and local POC background checks corresponded with 123,251,425 NICS transactions.

**Figure 3. Firearms-Related Background Checks Pursuant to the Brady Act**  
Federal Bureau of Investigation Compared to State and Local Points of Contact (POCs)



**Source:** U.S. Department of Justice, Federal Bureau of Investigation and Bureau of Justice Statistics.

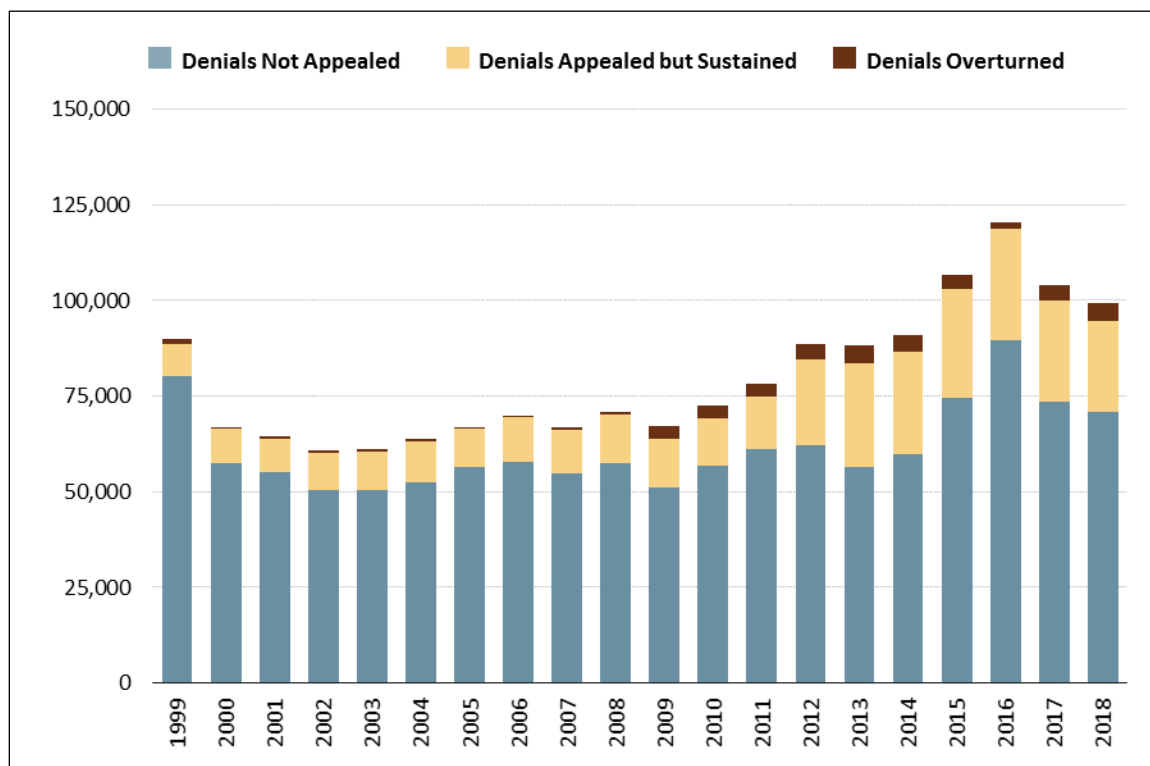
**Notes:** M = millions.

### FBI NICS Section Brady Denials Appealed and Overturned

As with other screening systems, particularly those that are largely name-based, false positives occur as part of the NICS process, but the frequency of these misidentifications is unreported. Nevertheless, the FBI has taken steps to mitigate false positives (i.e., denying a firearms transfer to an otherwise eligible person). In July 2004, DOJ issued a regulation that established the NICS Voluntary Appeal File (VAF), which is part of the NICS Indices (described above). DOJ was prompted to establish the VAF to minimize the inconvenience incurred by some prospective firearms transferees (purchasers) who have names or birth dates similar to those of prohibited persons. So as not to be misidentified in the future, these persons agree to authorize the FBI to maintain personally identifying information about them in the VAF as a means to avoid future delayed transfers. As noted above, current law requires that NICS records on approved firearm transfers, particularly information personally identifying the transferee, be destroyed within 24 hours.



**Figure 4. Brady Act Denials Appealed and Overturned**  
1999-2018



**Source:** U.S. Department of Justice, Federal Bureau of Investigation.

**Figure 4** shows annual NICS Section denials, denials appealed but sustained, and denials overturned from November 30, 1998, through 2018. During this time, it appears that about one-fifth of NICS Section denials were appealed, and about one-tenth of those appealed denials were overturned, or an estimated 2.7% of NICS Section denials, according to the annual CJIS Division’s NICS operations reports.<sup>72</sup> The majority of these overturned denials were due to misidentifications.<sup>73</sup> In any screening system, such as NICS, there is a balance between false positives and false negatives. Misidentifications and improperly interpreted criminal history and other records would constitute false positives. Allowing an otherwise prohibited person to acquire a firearm would constitute a false negative.

Under the GCA, there is also a provision that allows the Attorney General (previously, the Secretary of the Treasury) to consider petitions from a prohibited person for “relief from disabilities” and to have his firearms transfer and possession eligibility restored.<sup>74</sup> Since FY1993, however, a limitation (or “rider”) on the ATF annual appropriations for salaries and expenses has

<sup>72</sup> CRS analysis of data gleaned from Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System Operations Reports for 1998/1999 Through 2018*, <https://www.fbi.gov/services/cjis/nics#Reports-%20Statistics>.

<sup>73</sup> Ibid.

<sup>74</sup> 18 U.S.C. §925(c). See also Relief from Disabilities Under the Act, 27 C.F.R. §478.144.



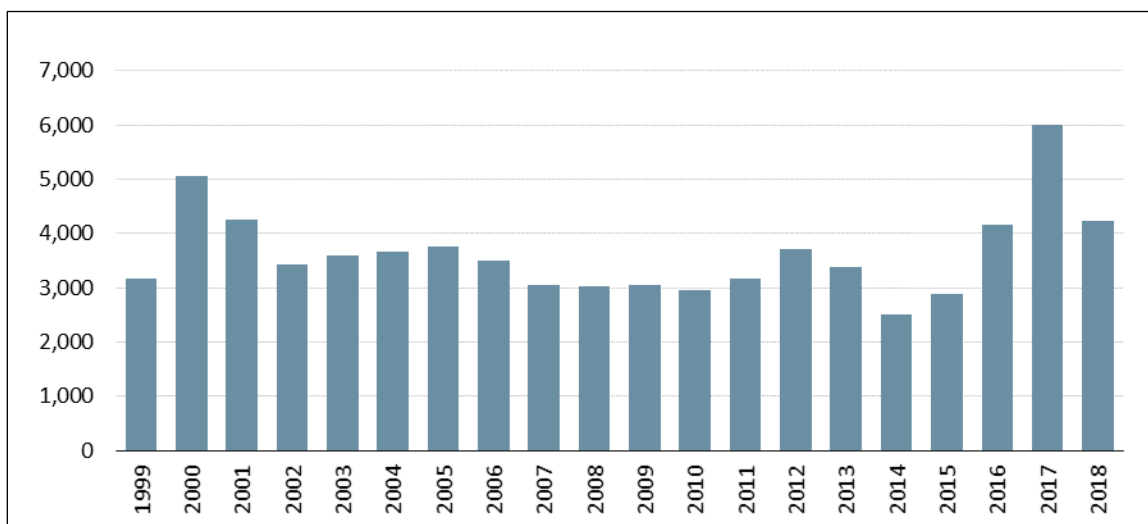
prohibited the expenditure of any appropriated funding for ATF to process such petitions from individuals.<sup>75</sup>

Conversely, under the NICS Improvement Amendments Act of 2007 (P.L. 110-180), any federal agency that submits any records on individuals considered to be too mentally incompetent to be trusted with a firearm under the GCA must provide an avenue of administrative relief to those individuals, so if their mental health or other related conditions improve, their firearms rights and privileges may be restored. As a condition of grant eligibility, as described below, states must provide similar administrative avenues of relief for those purposes, that is, “disability relief.” See **Appendix D** for a list of states that have enacted and implemented ATF-certified relief from disability programs under P.L. 110-180.

## NICS Denials and Firearm Retrieval Actions

**Figure 5** shows annual NICS denials and firearm retrieval action from November 30, 1998, through 2018. For the 20 years and one month, the NICS section made an average of 3,600 firearm retrieval action referrals to the ATF annually for follow-up. In many of these cases, an otherwise prohibited person had been transferred a firearm. According to the Government Accountability Office (GAO), following up on these possibly illegal firearms receipts—or “delayed denial investigations”—consumes an increasing and considerable amount of ATF resources. For example, such investigations accounted for 32% of ATF investigations opened in FY2003 and 53% in FY2013.<sup>76</sup>

**Figure 5. FBI Firearm Retrieval Action Referrals to ATF**  
1999-2018



**Source:** Federal Bureau of Investigation

<sup>75</sup> For FY1993, see P.L. 102-393, 106 Stat. 1732 (1992). For FY2019, see P.L. 116-6, 103 Stat. 107 (2019) and the ATF appropriation for salaries and expenses. It reads: “That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code.”

<sup>76</sup> U.S. Government Accountability Office, *Bureau of Alcohol, Tobacco, Firearms and Explosives, Enhancing Data Collection Could Improve Management of Investigations*, GAO-14-553, June 30, 2014, p. 18.

It appears that in a relatively small percentage of cases the suspected offenders have been prosecuted federally for what is commonly known as either “lying and buying” or “lying and trying.” According to the Government Accountability Office (GAO), ATF processed 3,933 delayed denials in FY2017. Of those denials, 38 cases were referred to U.S. Attorney’s Offices for prosecution. Nine of those cases were federally prosecuted.<sup>77</sup>

Also in a relatively small percentage of cases, an FFL could potentially proceed with a firearms transfer after the three-business-day delayed transfer period has expired, but never receive a final NICS determination; or the FFL could potentially decline to transfer the firearm to an unlicensed customer until he received a definitive NICS Section response, which the FFL may not receive from the FBI.<sup>78</sup>

## **NICS Section Budget**

NICS is maintained and administered by the FBI Criminal Justice Information Services (CJIS) Division and its NICS Section, located in Clarksburg, WV. Recent increases in the volume of firearms-related commerce and attendant background checks have strained the NICS Section and additional staff and funding has been requested by the FBI, which Congress has provided through appropriated funding.<sup>79</sup> For FY2016, the NICS Section program budget allocation was \$81 million and 668 funded permanent positions.<sup>80</sup> As described below, for FY2019, the FBI anticipated that the NICS Section program budget would be allocated \$103 million and 679 positions, representing a \$22 million and 11 position increase over FY2016. The Administration’s FY2020 request would increase FY2020 NICS Section program budget to \$115 million and 719 positions.

For FY2017, the Obama Administration requested \$121.1 million for the NICS program, including an additional \$35 million. Of this budget increase \$15 million was requested to sustain 75 professional support positions funded for FY2016; and another \$20 million was requested to

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<sup>77</sup> U.S. Government Accountability Office, *Law Enforcement: Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions*, GAO-18-440, September 2018, p. 14.

<sup>78</sup> According to the FBI CJIS Division, in 2014, the FBI conducted 8,256,688 NICS background checks for non-POC states. Of those checks, 2,785,966 (33.7%) were delayed, because they required further research. However, 2,557,960 of those delayed checks were completed within the three-business-day window. This means the 228,006 of those checks might have resulted in an FFL going ahead with a firearms transaction at his own discretion after the three-business day delayed transfer. (It could be that some of those checks were for state-issued pistol permits, in which case those instances would not have resulted in a firearms transaction.) About 175,000 of those checks were unresolved and were likely purged from NICS at the 88-day mark. In those cases, the FFL may have never heard any outcome about the NICS check. More significantly, in those cases, a transfer could have gone through, when the individual was actually prohibited under federal or state law, and there could possibly have been no follow-up by the FBI, ATF, or state and local authorities to determine whether an illegal transfer had been made. Those 175,000 unresolved background checks accounted for about 2.1% of NICS checks for 2014 that were handled by the NICS Section.

<sup>79</sup> For FY1999 through FY2012, Congress has included a provision in the annual CJS appropriations acts that prohibits the Department of Justice from using appropriations to levy a fee for firearms-related background checks under NICS. This provision was crafted to counter a Clinton Administration proposal to levy a \$5 fee for such checks. After FY2012, this provision was not included in any subsequent CJS appropriations, possibly because of the futurity language in the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55), which appears to have been intended to make this provision permanent law. The Fix NICS Act of 2017 (P.L. 115-141, Div. S, Title VI) amended the NICS Improvement Amendments Act of 2007 (P.L. 110-180) to prohibit the FBI from charging a user fee for background checks for firearms through NICS.

<sup>80</sup> U.S. Department of Justice, Federal Bureau of Investigation, *FY2018 Authorization and Budget Request to Congress*, May 2017, p. 5-17, <https://www.justice.gov/file/968931/download>.

hire 160 contractors to support NICS firearms background checks and related activities. The remaining \$5.1 million was requested to annualize operational costs associated with the NICS base budget. Report language accompanying both the Senate- and House-reported FY2017 Commerce, Justice, Science, and Related Agencies appropriations bills (S. 2837 and H.R. 5393) indicated that those bills would have provided the requested \$35 million for NICS. The Explanatory Statement accompanying H.R. 244, submitted by the House Committee on Appropriations Chair, Representative Rodney Frelinghuysen, indicated that P.L. 115-31 included \$511.3 million for CJIS, and that this amount would fully support CJIS programs, including NICS.<sup>81</sup>

For FY2018, the Trump Administration requested \$79.2 million for the NICS program, including an additional \$8.9 million to fund an additional 85 permanent positions.<sup>82</sup> Such an increase would have brought the number of funded permanent positions for the NICS program to 676.<sup>83</sup> According to the FBI, the enacted NICS budget allocation for FY2018 was \$111.3 million and 679 positions.<sup>84</sup> For FY2019, the Administration did not request any budget increases for the FBI or NICS. The FBI anticipated that the FY2019 NICS budget and staff allocation would be about \$103 million and 679 positions.<sup>85</sup>

For FY2020, the Administration has requested a NICS budget increase of \$4.23 million and 40 positions and \$7.8 million in base budget increases, which would bring the total FY2020 NICS budget to \$115 million and 719 positions.<sup>86</sup> House-report language accompanying the FY2020 Commerce, Justice, Science, and Related Agencies Appropriations Act (H.R. 3055) indicates that this bill would fully support the NICS Section operations and activities for the upcoming fiscal year.<sup>87</sup>

## Improving NICS Access to Prohibiting Records

The efficacy of NICS and firearms-related background checks is dependent in large part on state and local governments making criminal history record information (CHRI), as well as other disqualifying records (e.g., mental incompetency records), accessible electronically to several different national data sharing systems maintained by the FBI. As described above, those systems include principally the III, NCIC, and the NICS Indices. Congress, meanwhile, has authorized two grant programs to incentivize state and local governments to maintain CHRI and other disqualifying records and make them accessible to NICS in a timely manner.

Under the Brady Act, Congress authorized a grant program known as the National Criminal History Improvement Program (NCHIP), the initial goal of which was to improve electronic

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<sup>81</sup> Rep. Rodney Frelinghuysen, Explanatory Statement Submitted by Mr. Frelinghuysen of New Jersey, Chairman of the House Committee on Appropriations, Regarding the House Amendment to the Senate Amendments on H.R. 244, *Congressional Record*, daily edition, vol. 163, book II (May 3, 2017), pp. H3327, H3371.

<sup>82</sup> U.S. Department of Justice, Federal Bureau of Investigation, *FY2018 Authorization and Budget Request to Congress*, May 2017, p. 5-18, <https://www.justice.gov/file/968931/download>.

<sup>83</sup> Ibid.

<sup>84</sup> U.S. Department of Justice, Federal Bureau of Investigation, *FY2020 Authorization and Budget Request to Congress*, March 2019, p. 5-9, <https://www.justice.gov/jmd/page/file/1144031/download>.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> U.S. Congress, House Committee on Appropriations, *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., June 3, 2019, H.Rept. 116-101 (Washington: GPO, 2019), p. 56.

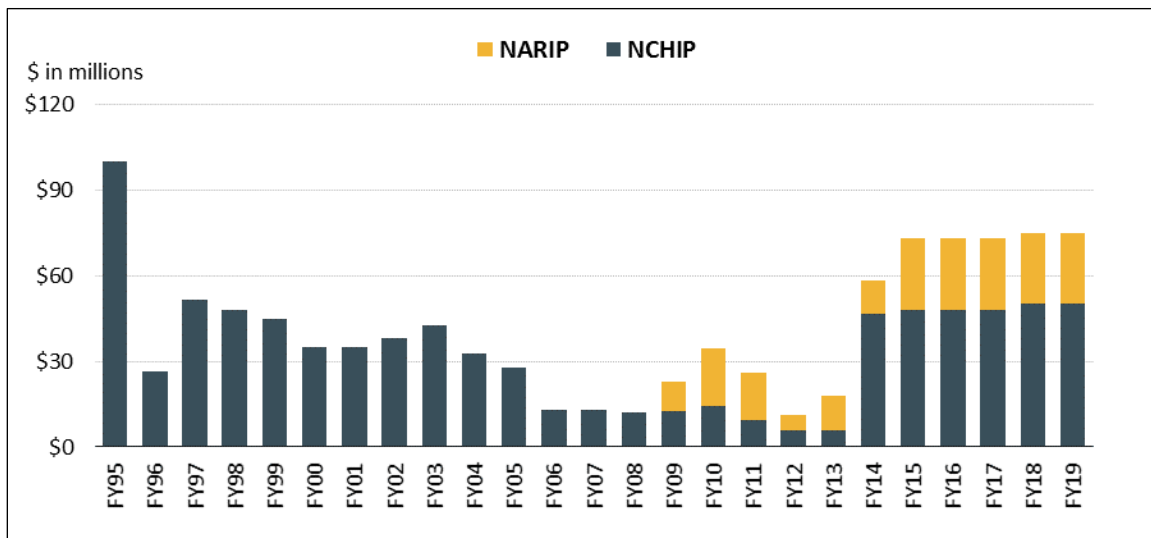
access to firearms-related disqualifying records, felony indictment, and conviction records, for the purposes of both criminal and non-criminal background checks.

Congress passed the NICS Improvement Amendments Act (NIAA) of 2007 (P.L. 110-180)<sup>88</sup> following the April 16, 2007, Virginia Tech tragedy.<sup>89</sup> Along the lines of the Brady Act, the NIAA included provisions designed to encourage states, tribes, and territories to make available to the Attorney General certain records related to persons who are disqualified from acquiring a firearm, particularly records related to domestic violence misdemeanor convictions and restraining orders, as well as mental health adjudications. As a framework of incentives and disincentives, the Attorney General was authorized to make grants, waive grant match requirements, or reduce law enforcement grant assistance depending upon a state's compliance with the act's goals of bringing firearms-related disqualifying records online.

The Attorney General was required to report annually to Congress on federal department and agency compliance with the act's provisions. The Attorney General, in turn, has delegated responsibility for grant-making and reporting to DOJ's Bureau of Justice Statistics (BJS). BJS designated the grant program under the act as the "NICS Act Record Improvement Program (NARIP)," although congressional appropriations documents generally referred to it as "NICS improvement" or the "NICS Initiative" program.

**Figure 6. National Criminal History Improvement Program (NCHIP) and NICS Amendments Record Improvement Program (NARIP) Funding**

Annual Appropriations in Millions of Dollars, FY1995-FY2019



Source: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics

**Figure 6** shows annual congressional appropriations for NCHIP and NARIP for FY1995-FY2019. Over this 25-year period, Congress has appropriated nearly \$859 million for NCHIP and \$201 million for NARIP, for a total of \$1.06 billion. During this time period, NCHIP grants were made available to states for purposes other than just identifying persons ineligible to receive firearms, such as identifying persons ineligible to hold positions involving vulnerable populations (e.g., children, disabled, and elderly). Nevertheless, the principal purpose of NCHIP was to

<sup>88</sup> P.L. 110-180; January 8, 2008; 121 Stat. 2559.

<sup>89</sup> On April 16, 2007, a student at Virginia Polytechnic Institute and State University (Virginia Tech) shot 32 people to death and wounded 17 others.

improve the accuracy and timeliness of background checks, particularly those administered pursuant to the Brady Act.

For FY2009 through FY2013, Congress authorized \$1.3 billion in appropriations for NARIP. Actual appropriations, however, fell short of such authorizations. For those fiscal years, Congress appropriated \$63.6 million for NARIP, although neither the House nor Senate Committee on Appropriations adopted “NARIP” as a grant program designation. Instead, the appropriations statute provided such funding for the grant-making activities authorized under P.L. 110-180.

For FY2014 through FY2019, Congress continued to appropriate funding for both NCHIP and the grant-making activities authorized under P.L. 110-180 (i.e., NARIP) under the “NICS Initiative,” even though the authorization for appropriations under P.L. 110-180 had lapsed. For those years, Congress appropriated \$429.5 million for NCHIP and NARIP, or the “NICS Initiative,” of which \$137 million was set aside for purposes authorized under NIAA, bringing total appropriated NARIP funding for FY2009 through FY2019 to \$200.6 million. Under the NICS Initiative, BJS has awarded a total of \$142 million in NARIP grants to 30 states and one Native American tribe from FY2009 through FY2018.<sup>90</sup> To date, however, BJS has not levied any of the reward and penalty provisions of NIAA, possibly because of methodological difficulties in ascertaining state progress towards meeting the goals of this act.

With NICS Initiative grants (NCHIP and NARIP) in part, state and local governments have increased the availability of mental health- and domestic violence-related records to NICS Indices and other data systems queried by NICS. For example, from CY2007 to CY2018, the number of mental health records in the NICS Indices increased from 518,499<sup>91</sup> to 5,419,894,<sup>92</sup> a 9.5-fold increase. The number of misdemeanor crime of domestic violence (MCDV) records in the NICS Indices increased from 46,286<sup>93</sup> to 175,376,<sup>94</sup> nearly tripling (a 278.9% increase). Many instances domestic violence misdemeanor crimes are serious enough in nature that the records are deposited in the III, meaning the offenders were fingerprinted.

A Department of Justice-sponsored report found that in many cases such criminal records are not adequately flagged in the III for firearms eligibility determination purposes, leading to NICS delayed transfers in some cases.<sup>95</sup> Inadequately flagged records in the III increase the possibility

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<sup>90</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, “NICS Act Record Improvement Program (NARIP) Awards FY 2009-2018,” <https://www.bjs.gov/index.cfm?ty=tp&tid=491#funding>.

<sup>91</sup> SEARCH (National Consortium for Justice Information and Statistics) and National Center for State Courts, *State Progress in Record Reporting for Firearm-Related Background Checks: Mental Health Submissions*, by Becki Goggin and Anne Gallegos, February 2016, p. 12, <https://www.search.org/searchncsc-report-examines-state-progress-in-reporting-mental-health-data-for-firearm-related-background-checks/>.

<sup>92</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Checks System (NICS) Section, “Active Records in the NICS Indices as of December 31, 2018 [by state and federal agency],” p. 4, <https://www.fbi.gov/file-repository/active-records-in-the-nics-indices-by-state.pdf/view>.

<sup>93</sup> SEARCH (National Consortium for Justice Information and Statistics) and National Center for State Courts, *State Progress in Record Reporting for Firearm-Related Background Checks: Misdemeanor Crimes of Domestic Violence*, by Becki Goggin and Anne Gallegos, December 2016, p. 1, <https://www.search.org/fingerprint-processing-advances-mcdv-states-progress-in-reporting-records-for-firearm-related-background-checks/>.

<sup>94</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Checks System (NICS) Section, “Active Records in the NICS Indices as of December 31, 2018 [by state and federal agency],” p. 4.

<sup>95</sup> SEARCH (National Consortium for Justice Information and Statistics) and National Center for State Courts, *State Progress in Record Reporting for Firearm-Related Background Checks: Mental Health Submissions*, by Becki Goggin and Anne Gallegos, February 2016, p. 2.



that a prohibited person might be transferred a firearm after the NICS three-business-day delayed transfer period expires. Similarly, it was reported that domestic violence protection orders are increasingly being placed in the NICS Indices, even though the authors of the report argued that it would probably be most appropriate to place such records in the National Crime Information Center (NCIC), so that such records would be available to law enforcement for purposes besides firearms-related background checks.<sup>96</sup>

Responding to these issues in part, Congress passed the Fix NICS Act of 2018 (P.L. 115-141). The act reauthorized NARIP, as well as authorized appropriations of \$125 million annually for FY2018 through FY2022. It also reauthorized NCHIP itself, as well as authorized appropriations of \$250 million annually for FY2018 through FY2022. For FY2018, Congress appropriated \$75 million for the “NICS Initiative,” of which \$25 million was set aside for purposes authorized under NIAA, as amended by the Fix NICS Act (or NARIP).<sup>97</sup> For FY2019, Congress appropriated the same amount and set aside.<sup>98</sup>

For FY2020, the Administration has requested \$65 million for NCHIP and \$10 million for NARIP.<sup>99</sup> The House-reported Commerce, Justice, Science, and Related Agencies Appropriations bill (H.R. 3055; H.Rept. 116-101) would provide \$80 million for these grant programs under the “NICS Initiative,” of which \$27.5 million would be set aside for purposes authorized under NIAA, as amended by the Fix NICS Act (or NARIP).<sup>100</sup>

## 116<sup>th</sup> Congress and NICS Operations-Related Legislation

This final section of the report briefly summarizes NICS-related legislative action to date in the 116<sup>th</sup> Congress. It then provides a summary and some analysis of three bills that have passed the House and await Senate action.

In the 116<sup>th</sup> Congress, the House has passed three bills that would expand federal firearms-related background check requirements. On January 8, 2019, Representative Mike Thompson introduced the **Bipartisan Background Checks Bill of 2019** (H.R. 8), a bill that would require a background check for most private-party, intrastate firearms sale, or “universal” background checks.<sup>101</sup> On

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<sup>96</sup> SEARCH (National Consortium for Justice Information and Statistics) and National Center for State Courts, *State Progress in Record Reporting for Firearm-Related Background Checks: Protection Order Submissions*, by Becki Goggin and Anne Gallegos, April 2016, p. 4.

<sup>97</sup> Consolidated Appropriations Act, 2018 (Division B), P.L. 115-141, March 23, 2018. Explanatory Statement by Mr. Frelinghuysen, Chairman of the House Committee on Appropriations, Regarding the House Amendment to Senate Amendment on H.R. 1625, *Congressional Record*, daily edition, vol. 164, part II (March 22, 2018), p. H2093.

<sup>98</sup> Consolidated Appropriations Act, 2019 (Division C), P.L. 116-6, February 15, 2019, 133 Stat. 107. Making Further Continuing Appropriations for the Department of Homeland Security for Fiscal Year 2019, and for Other Purposes, Conference Report to Accompany H.J.Res. 31, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., February 13, 2019, H.Rept. 116-9 (Washington: GPO, 2019), p. 102.

<sup>99</sup> U.S. Department of Justice, Office of Justice Programs, *FY2020 Authorization and Budget Request to Congress, March 2009*, p. 15, <https://www.justice.gov/doj/fy-2020-congressional-budget-submission>.

<sup>100</sup> U.S. Congress, House Committee on Appropriations, *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., June 3, 2019, H.Rept. 116-101 (Washington: GPO, 2019), p. 69.

<sup>101</sup> Representative Mike Thompson, “Chairman Thompson Joins Democrats and Republicans to Introduce Bipartisan Background Checks Act of 2019,” January 8, 2019, press release, <https://mikethompson.house.gov/newsroom/press-releases/chairman-thompson-joins-democrats-and-republicans-to-introduce-bipartisan>. Representative Thompson has chaired the House Gun Violence Prevention Task Force at the bequest of then-Democratic Minority Leader,

February 6, 2019, the House Committee on the Judiciary held a hearing on “Preventing Gun Violence in America.”<sup>102</sup> On February 8, 2019, Representative James Clyburn introduced the **Enhanced Background Checks Act of 2019** (H.R. 1112), a bill to lengthen the number of days a firearms transfer could be delayed pending a final firearms eligibility determination. On February 13, 2019, the House Committee on the Judiciary amended and ordered reported both bills: H.R. 8 (H.Rept. 116-11) and H.R. 1112 (H.Rept. 116-12). On February 27 and 28, 2019, respectively, the House amended and passed H.R. 8 and H.R. 1112.

On March 7, 2019, Representative Karen Bass introduced the **Violence Against Women Reauthorization Act of 2019** (H.R. 1585). On March 27, 2019, the House Committee on the Judiciary amended and reported H.R. 1585. This bill includes provisions that would expand existing firearms transfer/receipt and possession prohibitions to include dating partners with histories of domestic violence and persons convicted of stalking-related misdemeanor offenses. The House passed H.R. 1585 on April 4, 2019.

Also, of note, on March 13, 2019, the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies held a hearing on “Gun Violence Prevention and Enforcement.”<sup>103</sup> On March 18, 2019, the Federal Bureau of Investigation (FBI) released its FY2020 congressional budget request that includes a \$4.2 million increase for the NICS, which would bring the total program budget to \$114.7 million for FY2020.<sup>104</sup> On the same date, the Office of Justice Programs (OJP) released its congressional budget request that includes \$75 million for state, local, tribal, and territorial governments to upgrade criminal and mental incompetency records and make those records accessible to NICS for firearms eligibility determination purposes.<sup>105</sup>

On June 3, 2019, the House Committee on Appropriations reported an FY2020 Commerce, Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 3055, H.Rept. 116-101). House report language indicates that the bill would fully support the FBI request for increased NICS funding.<sup>106</sup> The bill would also provide \$80 million for OJP-administered NICS improvement grants under NCHIP and NARIP.<sup>107</sup>

On September 26, 2019, Senate Committee on Appropriations reported an FY2020 CJS Appropriations bill (S. 2584; S.Rept. 116-127). Senate report language indicates that the bill \$131 million to increase NICS capacity and efficacy.<sup>108</sup> This amount is \$16.3 million above the Trump

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Representative Nancy Pelosi, following the December 2012, Newtown, CT, tragedy.

<sup>102</sup> U.S. Congress, House Committee on the Judiciary, *Preventing Gun Violence: A Call to Action*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., February 6, 2019, <https://judiciary.house.gov/legislation/hearings/preventing-gun-violence-call-action>.

<sup>103</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Gun Violence Prevention and Enforcement*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., March 13, 2019, [https://appropriations.house.gov/subcommittees/commerce-justice-science-and-related-agencies-116th-congress/congress\\_hearing](https://appropriations.house.gov/subcommittees/commerce-justice-science-and-related-agencies-116th-congress/congress_hearing).

<sup>104</sup> U.S. Department of Justice, Federal Bureau of Investigation, *FY2020 Authorization and Budget Request to Congress*, May 2017, p. 5-9, <https://www.justice.gov/jmd/page/file/1144031/download>.

<sup>105</sup> U.S. Department of Justice, Office of Justice Programs, *FY2020 Authorization and Budget Request to Congress*, March 2009, p. 15, <https://www.justice.gov/doj/fy-2020-congressional-budget-submission>.

<sup>106</sup> U.S. Congress, House Committee on Appropriations, *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., June 3, 2019, H.Rept. 116-101 (Washington: GPO, 2019), p. 56.

<sup>107</sup> *Ibid.*, p. 69.

<sup>108</sup> U.S. Congress, Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., September 26, 2019, S.Rept. 116-127 (Washington: GPO, 2019), p. 95.



Administration's FY2020 request. The bill would also provide \$78.3 million for OJP-administered NICS improvement grants under NCHIP and NARIP, of which \$25 is for the latter program.<sup>109</sup>

In addition, on March 26, 2019, the Senate Committee on the Judiciary held a hearing on "Red Flag Laws: Examining Guidelines for State Action."<sup>110</sup> Seventeen states and the District of Columbia have passed "Red Flag" laws.<sup>111</sup> These laws essentially allow concerned persons, including family members in some cases, to petition a court to file an extreme risk protection order against an individual that would allow for the suspension of that individual's firearms eligibility under certain circumstances. These state laws vary considerably from state to state. Related proposals in the 116<sup>th</sup> Congress would make subjects of such protective orders ineligible to receive or possess firearms under federal law in any state or would establish grant programs to encourage states to adopt such laws.

On September 10, 2019, the House Committee on the Judiciary ordered reported such a bill, the Extreme Risk Protection Order Act (H.R. 1236).<sup>112</sup> In addition, this Committee also ordered reported the Disarm Hate Act (H.R. 2708), which make persons convicted of a misdemeanor hate crime ineligible to receive or possess a firearm or ammunition.<sup>113</sup>

## **The Bipartisan Background Checks Act of 2019 (H.R. 8)**

The **Bipartisan Background Checks Act of 2019** (H.R. 8), a "universal" background check bill, would expand federal firearms background checks and, hence, recordkeeping requirements under the Gun Control Act of 1968 (GCA; 18 U.S.C. §921 et seq.) to include firearms transfers made in the same state (intrastate) between unlicensed persons. H.R. 8 would essentially prohibit unlicensed persons from transferring a firearm to any other unlicensed person, unless a federally licensed firearms dealer, or FFL, takes possession of such firearm and facilitates such a transaction by running a background check on the unlicensed prospective transferee (buyer).

H.R. 8 includes exceptions for transfers between immediate family members; U.S. military, law enforcement members, or armed private security professionals in the course of official duties; temporary transfers under circumstances involving an imminent threat of bodily harm or death; and legitimate activities involving target shooting, hunting, trapping, or fishing.

H.R. 8 would prohibit any implementing regulations that would (1) require FFLs to facilitate private firearms transactions; (2) require unlicensed sellers or buyers to maintain any records with regard to FFL-facilitated background checks; or (3) place a cap on the fee FFLs may charge for facilitating a private firearms transfer. H.R. 8 would also prohibit FFLs from transferring possession of, or title to, any firearm to any unlicensed person, unless the FFL provides notice of the proposed private firearm transfer prohibition under this bill. Further, H.R. 8 would extend a

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<sup>109</sup> Ibid., p. 122.

<sup>110</sup> U.S. Congress, Senate Committee on the Judiciary, *Red Flag Laws: Examining Guidelines for State Action*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., March 26, 2019, <https://www.judiciary.senate.gov/meetings/red-flag-laws-examining-guidelines-for-state-action>. Senator Dianne Feinstein has introduced a related bill, the Extreme Risk Protection Act of 2019 (S. 506).

<sup>111</sup> Those states are California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, according to the Giffords Law Center to Prevent Gun Violence, *Extreme Risk Protection Orders*, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#federal>.

<sup>112</sup> For additional information, see CRS In Focus IF11205, *Firearm "Red Flag" Laws in the 116th Congress*, by Michael A. Foster.

<sup>113</sup> Senator Robert P. Casey, Jr. introduced a related bill, the Disarm Hate Act (S. 1462).

provision of current law that prohibits the DOJ from charging a fee for a NICS background check.

Under H.R. 8, facilitating FFLs would be required to treat firearms to be transferred on behalf of any unlicensed persons as if they were part of their business inventory. Thus, they would be required to comply with the GCA recordkeeping and background check requirements. As part of this process, FFLs would enter the firearm(s) to be exchanged into their bound log of firearms acquisitions and dispositions. The FFLs and unlicensed prospective transferees would then complete and sign a firearms transaction forms (ATF Form 4473) under penalty of law that everything entered onto that form was truthful. FFLs would then initiate a background check on the intending transferee through NICS. And either the FBI NICS Section or a state or local authority—point of contact (POC)—would conduct a background check to determine an intending transferee’s firearms eligibility. Such a requirement, if enacted, would close off what some have long characterized as the “Gun Show loophole.”<sup>114</sup>

For the past two decades, many gun control advocates have viewed the legal circumstances that allow individuals to transfer firearms intrastate among themselves without being subject to the licensing, recordkeeping, and background check requirements of the GCA as a “loophole” in the law, particularly within the context of these intrastate, private transactions at gun shows and other public venues or through the internet.<sup>115</sup> Gun control advocates also maintain that expanding background checks to cover intrastate, private-party firearms sales would help stem gun trafficking; that is, the illegal diversion of firearms from legal channels of commerce to the black market, where federal, state, local, tribal, and territorial laws could be evaded. They maintain that prohibited persons or their friends or acquaintances could easily buy a firearm at a gun show, from an online seller, or in a person-to-person “private” sale.<sup>116</sup> They also point to studies that suggest that there is moderate evidence that expanded background checks might reduce firearms-related homicides and suicides.<sup>117</sup> Gun control advocates underscore that 20 states and the District of Columbia (DC) currently have laws that require background checks for certain types of firearms transfers not currently covered by federal law. Although these laws vary considerably

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<sup>114</sup> Amy Sherman, “PolitiFact Sheet: 3 Things to Know About the ‘Gun Show Loophole,’” PolitiFact, January 7, 2016, <https://www.politifact.com/truth-o-meter/article/2016/jan/07/politifact-sheet-3-things-know-about-gun-show-loop/>.

<sup>115</sup> As noted in the introduction, private, intrastate firearms transfers are generally permissible under current law without background checks. Hence, these legal circumstances, at least semantically, do not technically constitute a “loophole,” in that, they are not an inadvertent, unintended effect of a poorly worded or constructed statute. See Anthony Braga and David Kennedy, “Gunshows and the Illegal Diversion of Firearms,” *Georgetown Public Policy Review*, vol. 6, no. 1 (Fall 2000), p. 10.

<sup>116</sup> Center for American Progress, *Gun Debate 1 Year After Newtown: Assessing Six Key Claims About Gun Background Checks*, by Arkadi Gerney and Chelsea Parsons, December 13, 2013, <https://www.americanprogress.org/issues/guns-crime/reports/2013/12/13/80795/the-gun-debate-1-year-after-newtown/>.

<sup>117</sup> See Jens Ludwig and Philip J. Cook, “Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act,” *JAMA*, vol. 284, no. 5, 2000, pp. 585-591; B. Sen and A. Panjamapirom, “State Background Checks for Gun Purchases and Firearms Deaths: An Exploratory Study,” *Preventive Medicine*, vol. 55, no. 4, 2012, pp. 346-350; Mark Duggan, Randi Hjalmarsson, and Brian A. Jacob, “The Short-Term and Localized Effect of Guns Shows: Evidence from California and Texas,” *Review of Economics and Statistics*, vol. 93, no. 3, 2011, pp. 786-799; Mark Guis, “The Effects of State and Federal Background Checks on State-Level Gun-Related Murder Rates,” *Applied Economics*, vol. 47, no. 38, 2015a, pp. 4090-4101; and James M. LaValle, “‘Gun Control’ v. ‘Self-Protection’: A Case Against the Ideological Divide,” *Justice Policy Journal*, vol. 10, no. 1, 2013, pp. 1-26; as evaluated and cited in RAND Corporation, *Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States* (2018), pp. 43-54.

from state to state, 11 states and DC require background checks for nearly all firearms transfers.<sup>118</sup>

Gun rights advocates contend that intrastate, private transfers are regulated already under federal law, in that it is a felony to transfer a firearm or ammunition knowingly to an underage or prohibited person.<sup>119</sup> They contend further that most criminals would not submit to a background check. They ask, “Why would anyone submit to a background check unless they believed they were not prohibited and would pass?”

Moreover, they argue that making private-party, intrastate transfers subject to the recordkeeping and background check provisions of the GCA could potentially criminalize firearms transfers under circumstances that could be characterized as legitimate and lawful. For example, it has been argued that H.R. 8 might prohibit a person from sharing a firearm with another person while target shooting on one’s own property.<sup>120</sup> Although H.R. 8 would provide exceptions for “temporary transfers” for target shooting and other related activities, some gun rights advocates argue that such exceptions are too narrow. For example, they argue further that H.R. 8 would prohibit a person from loaning a neighbor a firearm for a hunting trip with a background check being required for both the loan to the neighbor and the return of the firearm to its lawful owner. Perhaps more fundamentally, H.R. 8 would prohibit a person from loaning a firearm to another person—who may be facing some threat of death or serious bodily injury—for self-defense purposes, unless that threat were “imminent.”<sup>121</sup>

Gun rights advocates might also see such a measure as a significant step towards a national—albeit decentralized—registry of firearms and firearms owners, since its practical implementation would likely necessitate recordkeeping on such transfers.<sup>122</sup> Such advocates cite an Obama Administration, Department of Justice official who observed that “universal background checks” are unenforceable without a comprehensive registry of firearms.<sup>123</sup>

Legislation to expand federal recordkeeping and background check requirements to cover private, intrastate firearms transfers saw action in the 106<sup>th</sup> and 108<sup>th</sup> Congresses following the April 20, 1999, Columbine, CO, high school mass shooting;<sup>124</sup> in the 113<sup>th</sup> Congress following the December 14, 2012, Newtown, CT, elementary school mass shooting;<sup>125</sup> and in the 114<sup>th</sup>

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<sup>118</sup> Giffords Law Center to Prevent Gun Violence, “Universal Background Checks: Summary of State Law,” <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/>.

<sup>119</sup> David B. Kopel, “Background Checks for Firearms Sales and Loans: Law, History, and Policy,” *Harvard Journal on Legislation*, vol. 53, 2016, pp. 306-313.

<sup>120</sup> *Ibid.*, pp. 313 and 316.

<sup>121</sup> *Ibid.*

<sup>122</sup> James B. Jacobs and Zoe Fuhr, “Potential and Limitation of Universal Backgroundchecking for Gun Purchasers,” *Wake Forest Journal of Law and Policy*, vol. 7, June 2017, p. 550.

<sup>123</sup> National Rifle Association, Institute for Legislative Action, “What Lurks Behind ‘Universal’ Background Checks,” by Chris W. Cox, February 22, 2019, quoting then-Department of Justice, National Institute of Justice, Deputy Director, Greg Ridgeway, “Summary of Select Firearm Violence Prevention Strategies,” January 4, 2019, <https://www.nraila.org/articles/20190222/what-lurks-behind-universal-background-checks>.

<sup>124</sup> For further information, see “Gun Control Agreement Eludes Conferees, Derails Juvenile Crime Legislation,” *Congressional Quarterly 1999 Almanac, 106<sup>th</sup> Congress, 1<sup>st</sup> Session*, vol. LV, 2000, pp. 18-3 through 18-25; and “Senate Defeats Gun Liability Bill,” *Congressional Quarterly 2004 Almanac, 108<sup>th</sup> Congress, 2<sup>nd</sup> Session*, vol. LX, 2005, pp. 12-13 through 12-14.

<sup>125</sup> For further information, see CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

Congress following the December 2, 2015, San Bernardino, CA, social services center all-staff meeting and June 12, 2016, Orlando, FL, Pulse night club mass shootings.<sup>126</sup>

Over time, related legislative proposals have varied in the scope and type of intrastate, private party (non-dealer) firearms exchanges between federally unlicensed persons that would fall under their respective background check provisions. Since the 113<sup>th</sup> Congress, such proposals fall under two basic types that, respectively, have been labeled as either “Universal” or “Comprehensive” background check bills.

“Comprehensive” background checks would cover transfers at gun shows and similar public venues (e.g., flea markets and public auctions) and firearms that are advertised via some public fora, including newspaper advertisements and the Internet.<sup>127</sup>

“Universal” background checks would cover private transfers under a much wider set of circumstances (sales, trades, barter, rentals, or loans), with more limited exceptions.<sup>128</sup>

In the Senate, from the 113<sup>th</sup> Congress forward, the principal sponsors of “universal” background check bills have been Senators Charles Schumer, Christopher Murphy, and Richard Blumenthal.<sup>129</sup> The principal sponsors of “comprehensive” background check amendments have been Senators Joe Manchin and Pat Toomey.<sup>130</sup> “Universal” background check bills were introduced in the House in the 113<sup>th</sup> and 114<sup>th</sup> Congresses.<sup>131</sup> While Representatives Peter King and Mike Thompson introduced proposals that were similar to Manchin-Toomey “comprehensive” background check bills in the past three Congresses,<sup>132</sup> they have sponsored and supported a “universal” background check proposal (H.R. 8) in the 116<sup>th</sup> Congress.

## Enhanced Background Checks Act of 2019 (H.R. 1112)

The House-passed **Enhanced Background Checks Act of 2019** (H.R. 1112) would revise the GCA background check provision to lengthen the delayed sale period, which is three business days under current law. Under H.R. 1112, for background checks that do not result in a “proceed with transfer” or “transfer denied,” the FBI NICS Section and POC state officials would have 10 business days to place a hold on a firearms-related transaction. At the end of 10 business days, the prospective transferee could petition the Attorney General for a final firearms eligibility determination. If the FFL does not receive a final determination within 10 days of the date of the petition, he or she could proceed with the transfer.

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<sup>126</sup> For further information, see CRS Report R44655, *Gun Control: Federal Law and Legislative Action in the 114th Congress*, by William J. Krouse.

<sup>127</sup> Cristiano Lima, “Fate of Manchin-Toomey Background Check Proposal Hinge on Trump, Lawmaker Says,” *Politico*, February 26, 2018.

<sup>128</sup> Thomas Ferraro, “Gun Bill, Background Checks, Head to Senate Battle,” *Reuters*, March 21, 2013; and Mark Memmott, “Bipartisan Bill Would Extend Background Checks to Gun Shows,” *Two Way, National Public Radio*, April 10, 2013.

<sup>129</sup> See Fix Gun Checks Act (S. 374) and Safe Communities, Safe Schools Act of 2013 S. 374 (S. 649) in the 113<sup>th</sup> Congress; Fix Gun Checks Act of 2016 (S. 2934) in the 114<sup>th</sup> Congress; and Background Check Expansion Act (S. 2009) in the 115<sup>th</sup> Congress.

<sup>130</sup> See S.Amdt. 715 to S. 649 in the 113<sup>th</sup> Congress and S.Amdt. 2874 to H.R. 3762 in the 114<sup>th</sup> Congress.

<sup>131</sup> For other universal background check proposals, see Fix Gun Checks Act of 2013 (H.R. 137) in the 113 Congress and Fix Gun Checks Act of 2015 (H.R. 3411) in the 114<sup>th</sup> Congress.

<sup>132</sup> See Public Safety and Second Amendment Rights Protection Act of 2013 (H.R. 1565), Public Safety and Second Amendment Rights Protection Act of 2015 (H.R. 1217), and Public Safety and Second Amendment Rights Protection Act of 2017 (H.R. 4240).

The timeliness and accuracy of FBI-administered firearms background checks through NICS—particularly with regard to “delayed proceeds”—became a matter of controversy following the June 17, 2015, Charleston, SC, mass murder at the Emanuel African Methodist Episcopal Church. The assailant had acquired a handgun from an FFL in the Columbia, SC, area. According to press accounts, the NICS check on the assailant was initiated on April 11, 2015 (a Saturday).<sup>133</sup> The FBI found an arrest record for him, but the arrest record was ambiguous with regard to the arrest’s final disposition and the assailant’s firearms receipt and possession eligibility. Therefore, the NICS response to the FFL was to delay the transfer for three business days as required under federal law. At his discretion, the FFL made the transfer on April 16, 2015 (a Thursday) as allowed under federal law. According to FBI, the NICS check would have remained active in the NICS examiner’s queue for 30 days (until May 11, 2015), and would have remained in an “active status” in the NICS system for 88 days (until July 8, 2015).

According to the assailant’s arrest record, he had been processed for arrest by the Lexington County, SC, Sheriff’s Department, so the FBI contacted the Lexington County court, sheriff’s department, and prosecutor’s office. The Lexington County Sheriff’s Department responded that it did not have a record on the alleged assailant and advised the NICS examiner to contact the City of Columbia, SC, Police Department. However, the NICS examiner contacted the West Columbia, SC, Police Department, because it was listed on the NICS contact sheet for Lexington County. In turn, the West Columbia Police Department responded that it did not have a record on the alleged assailant either. The NICS examiner reportedly focused on Lexington County and missed the fact that the City of Columbia, SC, Police Department was listed as the contact for Richland County, the county in which most of the City of Columbia, SC, is located. Consequently, the NICS examiner did not contact the Columbia, SC, Police Department, the agency that actually held the arrest record for the assailant.<sup>134</sup>

If the FBI had ascertained during the 88 days that this person was prohibited, the NICS examiner would have likely contacted the FFL to verify whether a firearms transfer had been made after the three-business-day delay, and then would have notified the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and a firearms retrieval action would have possibly been taken by that agency. In this case, the FBI did not ascertain that the assailant was possibly a prohibited person until after the June 17, 2015, mass shooting. Some gun control advocates have characterized these circumstances as the “Charleston loophole.”<sup>135</sup>

In addition to the “Charleston loophole,” gun control advocates sometimes refer to “delayed proceeds” that could result in a possibly prohibited person acquiring a firearm after three business days have expired as “default proceeds.”<sup>136</sup> They argue that extending the delayed proceed period would reduce the chance that an otherwise prohibited person might inadvertently be transferred a firearm, a circumstance that would likely necessitate an ATF firearms retrieval action had more time been allotted to complete the background check.

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<sup>133</sup> Andrew Knapp, “FBI Had Resources to Halt Dylann Roof’s Gun Buy, But It Didn’t Use Them—And Still Doesn’t,” *Post and Courier*, February 4, 2018, [https://www.postandcourier.com/church\\_shooting/fbi-had-resources-to-halt-dylann-roof-s-gun-buy/article\\_452b95ea-0705-11e8-8bc9-8723f84ce9dd.html](https://www.postandcourier.com/church_shooting/fbi-had-resources-to-halt-dylann-roof-s-gun-buy/article_452b95ea-0705-11e8-8bc9-8723f84ce9dd.html).

<sup>134</sup> Erika Williams, “Fourth Circuit Revives Charleston Church Shooting Liability Case,” *Courthouse News Service*, August 30, 2019, <https://www.courthousenews.com/fourth-circuit-revives-charleston-church-shooting-liability-case/>.

<sup>135</sup> Joshua Eaton, “New Data on the Massive Background Check Loophole the NRA Doesn’t Want to Fix,” *ThinkProgress*, February 27, 2018, <https://thinkprogress.org/default-proceed-2017-909efb375a4d/>.

<sup>136</sup> ThinkProgress, “As Congress Considers a Fix to Gun Loophole, New FBI Data Shows the Size of the Problem,” by Joshua Eaton, March 6, 2019, <https://thinkprogress.org/exclusive-as-congress-considers-a-fix-to-gun-loophole-new-fbi-data-shows-the-size-of-the-problem-093354b9c31f/>.



According to data acquired by a gun control advocacy group, about 3.59% of FBI-administered background checks in 2017 were unresolved after a delayed proceed response and the three-business-day window had passed. To this advocacy group, this suggested that a relatively small number of people (310,232) would be affected, and any inconvenience to them would be outweighed by increasing the probability that a prohibited person might be prevented from acquiring a firearm.<sup>137</sup>

According to the FBI, it referred 6,004 “delayed denial” cases to the ATF in 2017 that could have possibly resulted in a finding of ineligibility and subsequent firearms retrieval action. In addition, the FBI reported that 4,864 of those cases involved individuals who were possibly prohibited and had probably acquired a firearm.<sup>138</sup>

Gun rights advocates would counter that a large percentage (98.1%) of background checks that resulted in a delayed proceed response involved persons who were not actually ineligible, prompting them to refer to such default proceed responses as “default infringements.”<sup>139</sup> They maintain that the “delayed proceeds” should be viewed as an indicator of understaffing and incomplete recordkeeping on prohibited persons.<sup>140</sup> Gun rights advocates underscore further that if the overall timeliness and accuracy of FBI background checks were improved, the process would be less likely to inconvenience an otherwise eligible person and, at the same time, less likely to allow a firearm to be transferred to a prohibited person.<sup>141</sup>

According to the GAO, ATF processed 3,933 delayed denials in FY2017. Of those denials, 38 cases were referred to U.S. Attorney’s Offices for prosecution. Nine of those cases were federally prosecuted.<sup>142</sup>

## **Violence Against Women Reauthorization Act of 2019 (H.R. 1585)**

The House-passed **Violence Against Women Reauthorization Act of 2019** (H.R. 1585) includes several provisions that seek to reduce firearms-related intimate partner violence (homicides and injury) by amending federal law to prohibit persons convicted of misdemeanor stalking crimes from receiving or possessing a firearm or ammunition. This bill would also revise provisions related to domestic violence protection orders and a definition of “intimate partner” under current law. The bill also includes other provisions related to leveraging state, local, tribal, and territorial resources to increase federal investigations and prosecutions of firearms-related eligibility offenses related to domestic violence and stalking.

As discussed earlier, there are nine categories of persons prohibited under current law (18 U.S.C. §922(g)) from receiving or possessing firearms or ammunition (e.g., convicted felons, fugitives from justice, and unlawfully present aliens). Under 18 U.S.C. §922(n), a tenth category of prohibited persons—those under felony indictment—are prohibited from receiving, but not

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<sup>137</sup> Ibid.

<sup>138</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, *National Instant Criminal Background Check System (NICS) Operations, 2017*, <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view>.

<sup>139</sup> National Rifle Association, Institute for Legislative Action, “Default Proceeds Replaced by Default Infringement,” March 8, 2019, <https://www.nraila.org/articles/20190308/default-proceeds-replaced-by-default-infringement>.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> U.S. Government Accountability Office, *Law Enforcement: Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions*, GAO-18-440, September 2018, p. 14.

possessing firearms. In addition, under 18 U.S.C. §922(d), it is unlawful for any person to transfer or otherwise dispose of a firearm or ammunition to any person, if the transferor has reasonable cause to believe the transferee would be prohibited under one of those 10 categories. Two of the categories speak directly to domestic violence:

persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner (18 U.S.C. §§922(d)(8) and (g)(8));<sup>143</sup> and

persons convicted of a misdemeanor crime of domestic violence (MCDV) (18 U.S.C. §§922(d)(9) and (g)(9)).<sup>144</sup>

### **Qualifying Domestic Violence Protection Order (DVPO)**

According to ATF, a qualifying DVPO order includes the following elements. The defendant/respondent must receive actual notice and opportunity to participate in a hearing before a judge, magistrate, or other judicial official. After such hearing, a DVPO may be issued by a criminal or civil court, such as a divorce court, family court, magistrate, or general jurisdiction court. The plaintiff/petitioner is an “intimate partner” of the defendant/respondent (subject). An intimate partner includes:

1. a spouse or former spouse of the subject; a person who cohabitates or cohabitated with the subject, who resides or resided in a sexual/romantic relationship with the subject, or
2. a person with whom the subject has or had a child in common (regardless of whether they ever married or cohabitated).

A qualifying court order must also restrain the subject from harassing, stalking, or threatening an intimate partner or child of that intimate partner, or engaging in conduct that would place either of them in reasonable fear of bodily injury. There must also be a finding that the subject is a credible threat to the physical safety of the intimate partner or child, or explicitly prohibit the use of physical force.<sup>145</sup>

### **Qualifying Misdemeanor Conviction of Domestic Violence (MCDV)**

According to ATF, a qualifying misdemeanor conviction of domestic violence (MCDV) must include the following elements. Such offense is a misdemeanor crime under federal, state, or tribal law and involves the use or attempted use of physical force, or the threatened use of a deadly weapon. At the time of the offense, the offender must have been:

1. A current or former spouse, parent, or guardian of the victim;

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<sup>143</sup> In 1994, the late Senator Paul Wellstone offered the amendment that provided the DVPO provision. See S.Amdt. 1179 to the Violent Crime Control and Law Enforcement Act of 1993 (S. 1607). The Senate passed this amendment on November 11, 1993, by a voice vote. This provision was ultimately included in the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322, September 13, 1994, 108 Stat. 1796, 2014).

<sup>144</sup> In 1996, the late Senator Frank Lautenberg offered the amendment that provided for the MCDV provision. See S.Amdt. 5241 to the Treasury, Postal Service, and General Government Appropriations Act, 1997 (H.R. 3756). The Senate passed this amendment by a roll call vote, 97-2 (Record Vote No. 289) on September 12, 1996. This provision was ultimately included in the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208, September 30, 1996, 110 Stat. 3009, 3009-371).

<sup>145</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Protection Orders and Federal Firearms Prohibitions*, ATF Information 3310.2, revised September 2011, <http://www.atf.gov/file/58781/download>.



2. A person with who the victim shared a child in common;
3. A person who was cohabitating with or had cohabitated with the victim as a spouse, parent, or guardian; or
4. A person who was or had been similarly situated to a spouse, parent, or guardian of the victim.<sup>146</sup>

### **“Intimate Partner” Definition**

Under current law, the term “intimate partner” means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person (18 U.S.C. §921(a)(32)). H.R. 1585 would expand the “intimate partner” definition to include

a dating partner or former dating partner (as defined in section 2266 [of Title 18, United States Code]); and

any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

Under 18 U.S.C. §2266(a)(10), the term “dating partner” refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser; and the existence of such a relationship is based on a consideration of (1) the length of the relationship; (2) the type of relationship; and (3) the frequency of interaction between the persons involved in the relationship.

### **“Misdemeanor Crime of Stalking”**

H.R. 1585 would make any person convicted of a “misdemeanor crime of stalking” a tenth category of persons prohibited from receiving and possessing a firearm under 18 U.S.C. §922(g).<sup>147</sup> The bill would define such a crime as any misdemeanor stalking offense under federal, state, tribal, or municipal law; and one that in a course of harassment, intimidation, or surveillance of another person, places that person in reasonable fear of material harm to the health or safety of her- or himself, an immediate family member of that person, a household member of that person, or a spouse or intimate partner of that person; or that causes, attempts to cause, or would reasonably be expected to cause emotional distress to any of those persons.

The proposed definition is subject to certain mitigating factors. A person would not be considered to have been convicted of a misdemeanor crime of stalking unless (1) the person was represented by counsel in the case, or (2) they knowingly and intelligently waived the right to counsel in the case. In the case of a prosecution for a misdemeanor crime of stalking for which a person was entitled to a jury trial, a person would not be considered convicted in the jurisdiction in which the case was tried, unless (1) the case was tried by a jury; or (2) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea, or otherwise.

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<sup>146</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Misdemeanor Crimes of Domestic Violence and Federal Firearms Prosecutions*, ATF Information 3310.3, revised September 2012, <http://www.atf.gov/file/58786/download>.

<sup>147</sup> As discussed above, on September 10, 2019, the House Committee on the Judiciary reported the Disarm Hate Act (H.R. 2708), a bill that would make persons convicted of a misdemeanor hate crime ineligible to receive or possess a firearm under 18 U.S.C. §922(g).

### **“Protection Orders” or “Court-Order Restraints”**

H.R. 1585 would also expand the scope of “protection orders” or “court-order restraints” under 18 U.S.C. §§922(d)(8) and (g)(8). Under current law these provisions prohibit any person from firearms receipt, possession, or transfer, who is subject to a court order that:

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

H.R. 1585 would substantively amend the domestic violence protection order prohibition (18 U.S.C. §922(g)(8), and §922(d)(8), by reference) to specifically include restraining orders under state, tribal, or territorial law that are issued after an “ex parte” hearing, and to expand it to include restraining orders related to “witness intimidation.” The legal term “ex parte” (“for one party”) refers generally to court motions, hearings, or orders granted on the request of and for the benefit of one party only without the respondent/defendant being present. H.R. 1585 would add the following at the end of 18 U.S.C. §922(g)(8)(A):

in the case of an ex parte order, relative to which notice and opportunity to be heard are provided—(I) within the time required by State, tribal, or territorial law; and (II) in any event within a reasonable time after the order is issued, sufficient to protect the due process rights of the person.

Notwithstanding the reference to “due process” in the amending language, this language could potentially generate considerable debate about the balance between due process and public safety. In addition, at the end of clause 18 U.S.C. §922(g)(8)(B), it would add, “intimidating or dissuading a witness from testifying in court,” which may appear less controversial, but critics might argue that such language has little to do with domestic violence.

As discussed in the body of this report, Congress has passed legislation to encourage states to make DVPO and MCDV records accessible promptly to NICS. Progress has been made, but many state, tribal, and territorial authorities still find such reporting challenging, if not daunting. Gun control advocates, meanwhile, have argued that the definition of “intimate partner” ought to be expanded under the DVPO and MCDV definitions of “intimate partner” to include current and former dating partners, as well as persons convicted of misdemeanor stalking offenses. Expanding the grounds for firearms transfer or receipt and possession ineligibility is one avenue along which intimate partner gun violence could be addressed, perhaps effectively, but such an expansion could also strain ongoing federal-state efforts to ensure that prohibiting records under current law are accurate and reported to NICS in a timely manner in order to be accessible electronically during background checks.

## Appendix A. FBI and POC Firearms-Related Background Checks Pursuant to the Brady Act

### FBI NICS Section Checks and Denials, November 30, 1998, Through 2018

As **Table A-1** shows, from November 30, 1998, through 2018, the FBI CJIS Division's NICS Section conducted 128.7 million background checks, resulting in nearly 1.6 million denials, for an overall initial denial rate of 1.2%. About 2.7% of those denials were appealed and eventually overturned.

**Table A-1. FBI NICS Section-Conducted Background Checks and Denials, 1998-2018**

Year	FBI NICS Section Checks	% Change	FBI NICS Section Denials	% Change	% of Checks Resulting in Denials
1998 <sup>a</sup>	506,554	NA	8,836	NA	1.7%
1999	4,538,020	NA	81,000	NA	1.8%
2000	4,260,270	-15.5%	66,808	-25.6%	1.6%
2001	4,291,926	0.7%	64,500	-3.5%	1.5%
2002	4,248,893	-1.0%	60,739	-5.8%	1.4%
2003	4,462,801	5.0%	61,170	0.7%	1.4%
2004	4,685,018	5.0%	63,675	4.1%	1.4%
2005	4,952,639	5.7%	66,705	4.8%	1.3%
2006	5,262,752	6.3%	69,930	4.8%	1.3%
2007	5,136,883	-2.4%	66,817	-4.5%	1.3%
2008	5,813,249	13.2%	70,725	5.8%	1.2%
2009	6,083,428	4.6%	67,324	-4.8%	1.1%
2010	6,037,394	-0.8%	72,659	7.9%	1.2%
2011	6,875,625	13.9%	78,211	7.6%	1.1%
2012	8,725,425	26.9%	88,479	13.1%	1.0%
2013	9,315,963	6.8%	88,203	-0.3%	0.9%
2014	8,256,688	-11.4%	90,895	3.1%	1.1%
2015	8,973,538	8.7%	106,556	17.2%	1.2%
1998 <sup>a</sup> -2015	102,427,066	NA	1,273,232	NA	1.2%
2016	9,360,833	4.3%	120,497	13.1%	1.3%
2017	8,638,246	-7.7%	103,985	-13.7%	1.2%
2018	8,235,342	-4.7%	99,252	-4.6%	1.2%
<b>Total</b>	<b>128,661,487</b>	<b>NA</b>	<b>1,596,966</b>	<b>NA</b>	<b>1.2%</b>

**Source:** U.S. Department of Justice, Federal Bureau of Investigation (FBI).

**Notes:** NA = Not Applicable

- a. Under FBI administration, the National Instant Criminal Background Check System (NICS) became operational on November 30, 1998.

**Table A-2** shows FBI NICS Section denials by prohibiting category. Over the 20-year and one month period (November 30, 1998, through 2018) that NICS has been in operation, over half of FBI firearms transfer denials were based on a prior felony conviction. For 2018, by comparison, a smaller percentage (45.1%) were based on a felony conviction. This percentage decrease can be attributed to at least two factors. One, over time, persons with past felony convictions could be less likely to risk a background check through NICS. Two, since the establishment of NICS, state and local government submissions of prohibiting records—particularly those related to mental incompetency—have increased. As shown in **Table A-2**, such records accounted for 2.5% of denials over the 20-year period, but accounted for 6.1% of denials for 2018.

**Table A-2. FBI NICS Section Denials by Prohibited Category, 2018 and 1998-2018**

Firearms Eligibility Prohibiting Categories	2018	% of Total	1998-2018	% of Total
Felony Conviction	44,806	45.1%	841,084	52.7%
Fugitive from Justice	5,754	5.8%	184,988	11.6%
Unlawful User/Addicts of Certain Controlled Substances	13,597	13.7%	147,460	9.2%
Adjudicated Mental Health/Commitment	6,033	6.1%	39,188	2.5%
Unlawful Aliens and Certain Nonimmigrant Visa Holders	2,973	3.0%	26,058	1.6%
Dishonorable Discharge	67	0.1%	1,201	0.1%
Renounced U.S. Citizenship	10	0.0%	101	0.0%
Domestic Violence Restraining Order	2,936	3.0%	60,254	3.8%
Domestic Violence Misdemeanor Conviction	7,587	7.6%	145,826	9.1%
Felony Indictment	7,862	7.9%	56,355	3.5%
Federally Denied Persons <sup>b</sup>	151	0.2%	6,332	0.4%
State Prohibitors <sup>c</sup>	7,476	7.5%	88,119	5.5%
<b>Total Federal Denials</b>	<b>99,252</b>	<b>100.0%</b>	<b>1,596,966</b>	<b>100.0%</b>

**Source:** U.S. Department of Justice, Federal Bureau of Investigation.

- Under FBI administration, the National Instant Criminal Background Check System (NICS) became operational on November 30, 1998.
- Federally denied persons include individuals who are predetermined to have firearm prohibitions without listing the specific category.
- State prohibitors include individuals who are prohibited based on state law only. This category is unique to each state/territory and dependent upon state law.

As discussed below, Congress prioritized such reporting as part of the NICS Improvement Amendments Act of 2007 (P.L. 110-180), in the aftermath of the April 20, 2007, VA Tech mass shooting. Ten years later, Congress passed the Fix NICS Act of 2017 in an effort to strengthen and streamline provisions previously enacted under P.L. 110-180, and authorize future appropriations for grant and other programs designed to assist state, tribes, and territories with improving the quality of prohibiting records and increasing their accessibility to NICS (P.L. 115-141, Div. S, Title VI).

### State and Local POC Background Checks and Denials, November 30, 1998, Through 2015

As shown in the **Table A-3** below, the Bureau of Justice Statistics (BJS) has reported that state and local POC agencies conducted nearly 81.7 million background checks from November 30,

1998, through 2015 for firearms transfers and permits.<sup>148</sup> These checks resulted in nearly 1.46 million denials, for an overall denial rate of 1.8%, according to BJS. Over the same time period, the FBI NICS Section processed 102.4 background checks, resulting in 1.27 million denials of firearms transfers, for an overall denial rate of 1.2%.

**Table A-3. State and Local POC Agency-Conducted Firearms-Related Background Checks Facilitated Through NICS, November 30, 1998-2015**

Year/Month	State and Local POC Checks	% Change	State & Local POC Denials	% Change	% Denials of Total Checks
1998 <sup>a</sup>	386,127	NA	9,811	NA	2.5%
1999	4,083,315	NA	123,455	NA	3.0%
2000	3,438,373	-23.1%	86,279	-35.3%	2.5%
2001	3,666,000	6.6%	86,000	-0.3%	2.3%
2002	3,556,899	-3.0%	75,234	-12.5%	2.1%
2003	3,368,345	-5.3%	65,011	-13.6%	1.9%
2004	3,398,791	0.9%	62,167	-4.4%	1.8%
2005	3,325,234	-2.2%	65,211	4.9%	2.0%
2006	3,349,449	0.7%	64,512	-1.1%	1.9%
2007	3,521,362	5.1%	69,000	7.0%	2.0%
2008	4,087,462	16.1%	76,355	10.7%	1.9%
2009	4,680,809	14.5%	82,689	8.3%	1.8%
2010	4,367,169	-6.7%	80,191	-3.0%	1.8%
2011	6,806,225	55.8%	81,987	2.2%	1.2%
2012	6,992,873	2.7%	103,564	26.3%	1.5%
2013	8,285,708	18.5%	104,361	0.8%	1.3%
2014	6,736,720	-18.7%	102,468	-1.8%	1.5%
2015	7,636,921	13.4%	119,368	16.5%	1.6%
<b>Total</b>	<b>81,687,782</b>	<b>NA</b>	<b>1,457,663</b>	<b>NA</b>	<b>1.8%</b>

**Source:** U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

**Notes:** NA = Not Applicable

- a. The FBI made the National Instant Criminal Background Check System (NICS) operational on November 30, 1998.

BJS also reports on the reasons (prohibitors) for some, but not all, state and local POC denials. For example, as shown in **Table A-3**, while state and local POCs made 119,368 denials for firearms transfers and permits in 2015, BJS reported the reason for 84,199 (70.5%) of such denials. Similarly, state and local POCs made 102,468 denials in 2014, but BJS reported the reason for 57,001 (55.6%) of them.

In addition, over the years, BJS sometimes reported for both state and local POC agencies, and in other years only for state POC agencies. Moreover, BJS's methodology for making estimates

<sup>148</sup> The 81,687,782 state and local POC background checks corresponded with 123,251,425 NICS transactions.

about state and local POC background checks and denials over the years has been revised. Notwithstanding these data limitations, **Table A-4** shows the BJS-reported reasons for some, but not all denials made by state and local POCs for 2014 and 2015.

**Table A-4. State and Local POC Denials by Prohibiting Categories, 2014 and 2015**

Firearms Eligibility Prohibiting Categories	2014	% of Total	2015	% of Total
Felony Conviction	12,259	21.5%	22,750	27.0%
Fugitive from Justice	5,638	9.9%	5,593	6.6%
Unlawful User/Addicts of Certain Controlled Substances	2,954	5.2%	4,351	5.2%
Adjudicated Mental Health/Commitment	3,134	5.5%	6,530	7.8%
Unlawful Aliens and Certain Nonimmigrant Visa Holders	1,406	2.5%	1,673	2.0%
Dishonorable Discharge	NR/NA	NR/NA	NR/NA	NR/NA
Renounced U.S. Citizenship	NR/NA	NR/NA	NR/NA	NR/NA
Domestic Violence Restraining Order	2,774	4.9%	4,138	4.9%
Domestic Violence Misdemeanor Conviction	4,086	7.2%	6,511	7.7%
Felony Indictment	4,521	7.9%	1,508	1.8%
Federally Denied Persons <sup>a</sup>	NR/NA	NR/NA	NR/NA	NR/NA
State Prohibitors <sup>b</sup>	14,406	25.3%	17,784	21.1%
Felony Arrest with No Disposition <sup>c</sup>	2,358	4.1%	9,115	10.8%
Other Prohibitors <sup>d</sup>	3,465	6.1%	4,246	5.0%
<b>Total</b>	<b>57,001</b>	<b>100.0%</b>	<b>84,199</b>	<b>100.0%</b>

**Source:** U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

**Notes:** NR/NA = Not Reported or Not Applicable

- Federally denied persons include individuals who were predetermined to have firearm prohibitions without listing the specific category.
- State prohibitors include individuals who are prohibited based on state law only. This category is unique to each state/territory and dependent upon state law.
- Felony arrest with no disposition includes arrest records that are incomplete in that there are no updated records to indicate whether the cases went to trial, were pled out to a lesser charge, or dismissed.
- Other prohibitors include denials for which the underlying prohibiting criterion was not readily identifiable in the state and local POC denial data provided to BJS.

Looking at the data in **Table A-4**, it is notable that there either appears to be no denials based upon dishonorable discharges or renounced U.S. citizenship, or such denials were not estimated by BJS based on data submitted by state and local POC agencies. In addition, the percentages of felony conviction denials for either year, 2014 or 2015, are roughly half of the percentages of federal denials made by the FBI NICS Section. As a percentage of the total, it could be that these percentages are based on incomplete data and, therefore, are not particularly comparable with the percentages for federal denials, which are based on complete data.



## **Appendix B. NICS-Queried Computer Systems and Files**

As part of a NICS check, the transferee's information is crosschecked against three computerized databases/systems to determine firearms transfer and possession eligibility. Those systems are the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Indices. If prospective transferees indicate that they are non-U.S. citizens, then their information is also checked against the immigration and naturalization databases maintained by the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE).<sup>149</sup>

### **Interstate Identification Index (III)**

The III, or "Triple I," is a computerized criminal history index pointer system that the FBI maintains so that records on persons arrested and convicted of felonies and serious misdemeanors at either the federal or state level can be shared nationally. This criminal history records exchange system includes arrest and disposition information on individuals charged with felonies and certain misdemeanors. Felony crimes generally include any offense that is punishable by a term of imprisonment exceeding one year. Under state law, there are misdemeanor crimes that are punishable by a term of imprisonment exceeding two years, which are also shared nationally through the III. By virtue of this record sharing, other information accessible through III also includes records on persons under felony indictment, fugitives from justice, persons found not guilty by reason of insanity or adjudicated incompetent to stand trial, persons convicted of misdemeanor crimes of domestic violence, and persons subject to domestic violence protection orders. All records in III are supported by fingerprint records which are exchanged through the Interstate Automated Fingerprint Identification System (IAFIS), though NICS checks do not entail fingerprint-based background checks under current law.

### **National Crime Information Center (NCIC)**

The NCIC is a database of documented criminal justice information that is made available to law enforcement and authorized agencies, with the goal of assisting law enforcement in apprehending fugitives, finding missing persons, locating stolen property, and further protecting law enforcement personnel and the public. NCIC includes 21 files, 10 of which are queried by NICS. Those 10 NCIC files include

- Wanted Persons;
- Protection Orders;
- Immigration Violators;
- Protective Interest;
- Foreign Fugitive;

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<sup>149</sup> Those databases include the Central Index System (CIS); Computer Linked Application Information Management System (CLAIMS); Deportable Alien Control System (DACS); National Automated Immigration Lookout System (NAIL II); Nonimmigrant Information System (NIIS); Student and Exchange Visitor Information System (SEVIS); Redesignated Naturalization Casework System (RNACS); Refugee, Asylum, and Parole System (RAPS); Enforcement Case Tracking System (ENFORCE); and TECS (previously known as the Treasury Enforcement Communications System).

Supervised Release;  
National Sex Offender Registry;  
Gang File;  
Known/Appropriately Suspected Terrorist (KST),<sup>150</sup> and  
Violent Person.

## **NICS Indices**

The NICS Indices contain records of persons prohibited from receiving or possessing firearms under federal, state, local, tribal, or territorial law that are not shared nationally in either the III or NCIC. Those records include

- felony arrest and disposition records (not included in the III);
- felony indictments;
- fugitives from justice;
- addicts and other unlawful users of controlled substances;
- involuntary commitments to mental institutions and other related adjudications;
- illegal or unlawful aliens;
- dishonorable discharges;
- renunciations of U.S. citizenship;
- domestic violence protection orders;
- domestic violence misdemeanor convictions;
- previous NICS denials under state laws (by POCs); and
- previous NICS denials made federally (by NICS Section).

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<sup>150</sup> Following the September 11, 2001, terrorist attacks, the U.S. government reevaluated its terrorist screening procedures. In February 2004, the DOJ and FBI modified the NICS background check procedures and recalibrated NICS to query an additional file in the National Crime Information Center (NCIC) that included terrorist watchlist records. Prior to that, the FBI did not conduct terrorist watchlist queries as part of firearms background checks because being a known or suspected terrorist was not a disqualifying factor for firearms transfer and possession eligibility; nor is it today under current law. Under the new procedures, information related to the subjects of NICS-generated terrorist watchlist matches are passed on to the FBI Counterterrorism Division and special agents in the field, who are usually members of Joint Terrorism Task Forces (JTTFs). These FBI agents, in turn, verify the match between the individual and the watchlist record, and they check for information that would prohibit that individual—the prospective transferee, licensee, or permittee—from possessing firearms or explosives (e.g., illegal immigration or fugitive status). In the 114<sup>th</sup> Congress, the Senate considered, but did not pass, amendments that would have authorized the Attorney General to deny firearms transfers to certain watchlisted persons who were deemed to be especially dangerous. For further information, see CRS Report R44655, *Gun Control: Federal Law and Legislative Action in the 114th Congress*, by William J. Krouse.

## Appendix C. ATF-Certified Permanent Brady Permits

**Table C-1. Permanent Brady Permit Chart**

State / Territory	Qualifying Permits
Alabama	None
Alaska	Concealed weapons permits are marked NICS-Exempt.
American Samoa	None
Arizona	Concealed weapons permits qualify.
Arkansas	Concealed weapons permits issued on or after April 1, 1999, qualify.
California	Entertainment Firearms Permit only
Colorado	None
Connecticut	None
Delaware	None <sup>a</sup>
District of Columbia	None <sup>a</sup>
Florida	None <sup>a</sup>
Georgia	Georgia firearms licenses qualify.
Guam	None <sup>a</sup>
Hawaii	Permits to acquire and licenses to carry qualify.
Idaho	Concealed weapons permits qualify.
Illinois	None
Indiana	None
Iowa	Permits to acquire and permits to carry concealed weapons qualify.
Kansas	Concealed handgun licenses issued on or after July 1, 2010, qualify as alternatives to the background check.
Kentucky	Concealed Deadly Weapons License (CDW) and Judicial Special Status CDW issued on or after July 12, 2006, qualify.
Louisiana	Concealed handgun permits issued on or after March 9, 2015, qualify.
Maine	None <sup>a</sup>
Maryland	None <sup>a</sup>
Massachusetts	None <sup>a</sup>
Michigan	Licenses to Purchase a Pistol qualify. Concealed Pistol Licenses (CPLs) issued on or after November 22, 2005, qualify as an alternative to a NICS check. CPLs issued prior to November 22, 2005, and Temporary Concealed Pistol Licenses do not qualify as NICS alternative.
Minnesota	None
Mississippi	Licenses to carry a concealed pistol or revolver issued to individuals under Miss. Stat. Ann. §45-9-101 qualify. (Note: security guard permits issued under Miss. Stat. Ann. §97-37-7 do not qualify.)
Missouri	None <sup>a</sup>
Montana	Concealed weapons permits qualify.
Nebraska	Concealed handgun permits qualify as an alternative. Handgun purchase certificates qualify.

State / Territory	Qualifying Permits
Nevada	Concealed carry permits issued on or after July 1, 2011, qualify.
New Hampshire	None
New Jersey	None
New Mexico	None
New York	None
North Carolina	Permits to purchase a handgun and concealed handgun permits qualify.
North Dakota	Concealed weapons permits issued on or after December 1, 1999, qualify.
Northern Mariana Islands	None
Ohio	Concealed weapons permits issued on or after March 23, 2015, qualify as an alternative to the background check requirements.
Oklahoma	None <sup>a</sup>
Oregon	None <sup>a</sup>
Pennsylvania	None
Puerto Rico	None
Rhode Island	None
South Carolina	Concealed weapons permits qualify.
South Dakota	Gold Card Concealed Pistol Permits and Enhanced Permits to Carry a Concealed Pistol issued on or after January 1, 2017, qualify.
Tennessee	None
Texas	Concealed weapons permits qualify.
U.S. Virgin Islands	None
Utah	Concealed weapons permits qualify.
Vermont	None
Virginia	None
Washington	None
West Virginia	Concealed handgun licenses issued on or after June 4, 2014, qualify.
Wisconsin	None
Wyoming	Concealed weapons permits qualify.

**Source:** Bureau of Alcohol, Tobacco, Firearms, and Explosives, Office of Enforcement Programs and Services, last updated May 2017, last reviewed September 14, 2018, <https://www.atf.gov/rules-and-regulations/permanent-brady-permit-chart>.

**Notes:**

- a. While certain permits issued in these states prior to November 30, 1998, were “grandfathered” as Brady alternatives, none of these grandfathered permits would still be valid under state law as of November 30, 2003. Notwithstanding the dates set forth above, permits qualify as alternatives to the background check requirements of the Brady law for no more than five years from the date of issuance. The permit must be valid under state law in order to qualify as a Brady alternative.

## Appendix D. ATF-Certified State Relief from Disabilities Statutes

**Table D-1. NICS Improvement Amendments Act of 2007**

List of States with Qualified 922(d)(4) and (g)(4) Relief Programs

<b>2009 Approved Certifications (3)</b>	<b>Statutory Authority</b>
Nevada	Nevada Revised Statutes §179A.163
New York	New York Consolidated Laws §13.09(g)
Oregon	O.R.S. §161.387(1); Oregon PSRB Order #2-2011
<b>2010 Approved Certifications (6)</b>	
Florida	Florida Statutes §790.065(d)
Idaho	Idaho Code §66-356
Illinois (through Illinois State Police)	Illinois Code §430 ILCS 65/10(c)
New Jersey	New Jersey Statutes §§30:4-80.8 – 30:4-80.10
Texas	Texas Code §574.088
Wisconsin	Wisconsin Statutes §§51.20, 51.45, 54.10, 55.12
<b>2011 Approved Certifications (6)</b>	
Arizona	Arizona Revised Statutes §13-925
<del>Connecticut<sup>a</sup></del>	<del>Connecticut General Statutes §45a-100</del>
Iowa	Iowa Code §724.31
Kansas	Kansas Statutes §75-7c27
Kentucky	Kentucky Revised Statutes §237.108
North Dakota	North Dakota Century Code §62.1-02-01.2
Virginia	Virginia Code §§18:2-308.1:1 – 18:2-308.1:3
<b>2012 Approved Certifications (4)</b>	
Indiana	Indiana Code §§33-23-15-1 – 33-23-15-3
Nebraska	Nebraska Revised Statutes §71-963
Missouri	Louisiana Revised Statutes §28:57
West Virginia	Code of Maryland §5-133.3

**2014 Approved Certifications (4)**

Alaska	Alaska Statutes §47.30.851
Hawaii	Hawaii Revised Statutes §134
South Carolina	South Carolina Code of Laws §23-31-1030
Utah	Utah Code §76-10-532

**2015 Approved Certifications (2)**

Oklahoma	Oklahoma Statutes §21 O.S. 1290.11
Tennessee	Tennessee Code Annotated §16-10-213

**2016 Approved Certifications (3)**

Massachusetts	Massachusetts General Laws Chapter 123 §35
New Mexico	New Mexico Statutes §34-9-19(D)
North Carolina	North Carolina Gen. Stat. §122C-54.1

**Qualified, But Not Certified (1)**

Colorado	Colorado Revised Stat. §13-5-142.5
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**Source:** U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (Last updated March 28, 2018)

**Notes:**

- a. Connecticut's 2011 certification is no longer considered qualified or approved by ATF due to 2013 changes in the state's mental health law. Consequently, Connecticut would need to reapply to ATF for a renewed certification. This table includes 32 certified and ATF-approved relief programs. Colorado is qualified, but not certified.

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