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Firearm Background Checks: Current Federal Framework and the House-Passed Proposals in the 116th Congress

Federal law requires a background check for many, but not all, firearms transfers. The Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536, established the federal framework for firearms background checks. Under the Act, the Federal Bureau of Investigation (FBI) established the National Instant Criminal Background Check System (NICS), which queries various government records that could reveal a prospective transferee is ineligible to receive a firearm. Since the Brady Act became law in 1993 and NICS went live in 1998, the framework governing the background check system has remained largely unchanged. Amendments to the Brady Act generally have addressed getting more records entered into the system by state and federal entities. The House passed two measures in February 2019, however, that would amend the background check process, itself: H.R. 8 would expand background checks to more transfers, and H.R. 1112 would impose new restrictions on when a transfer would be permitted if a NICS check does not provide a definitive instruction to deny or proceed with the sale.

Background Checks Under the Brady Act

Under 18 U.S.C. §§ 922(g) and (n), it generally is unlawful for certain categories of persons to receive a firearm, such as persons convicted of certain felony offenses; persons "adjudicated as . . . mental[ly] defective" or who have been committed to a mental institution; unlawfully present aliens; and persons subject to certain court orders relating to domestic violence or who have committed domestic violence misdemeanors. The Brady Act mandates that federally licensed firearms dealers (Federal Firearms Licensees, or FFLs) initiate background checks for most firearms transfers to ensure that prospective purchasers are not prohibited from acquiring a firearm under state or federal law. The Act requires only those "engaged in the business" of dealing firearms (including FFLs) to conduct background checks. Private persons who make only "occasional sales" from personal collections or as a hobby need not perform background checks under the Brady Act.

The Brady Act gave the FBI broad parameters to establish within 5 years a background system "that any licensee may contact, by telephone or by other electronic means . . . for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee" would violate federal or state law. In turn, the FBI launched NICS, which searches three FBI-maintained databases for relevant records that may reveal that a prospective firearms purchaser is disqualified from obtaining a firearm under 18 U.S.C. § 922(g) or (n):

- **National Crime Information Center Database (NCIC):** contains crime data related to persons and property, including persons subject to protective orders, fugitive records, and aliens removed or who are removable due to certain criminal activity;
- **Interstate Identification Index System (III):** contains criminal history information for persons arrested or indicted for any federal or state felony or serious misdemeanor; and
- **NICS Index:** created solely for NICS checks, a catchall index housing records that do not fit under NCIC or III, including mental health records.

The databases rely on record submissions from multiple federal agencies and voluntary submissions from the states.

The NICS background check process is outlined in 28 C.F.R. §§ 25.1-25.11. An FFL must contact a state "point of contact" (POC) or the FBI NICS Operations Center, so that entity conducts the background check. POC states access the NICS databases and can also access state databases that may contain other prohibiting records. A state must consent to serving as a POC, and it might also opt to be a POC for only certain FFL firearms transfers (e.g., handguns, but not rifles). The FBI conducts background checks when there is not a state POC for a particular type of firearms transfer.

The Supreme Court held in *Printz v. United States*, 521 U.S. 898 (1997), that Congress cannot, consistent with constitutional principles of federalism, conscript or directly compel states to perform background checks on behalf of the federal government. Instead, Congress encourages state participation in the NICS system through grant incentives.

After the NICS check is performed (typically in a matter of minutes), the FFL is directed to (1) proceed with the sale; (2) deny the sale, if the check shows the transferor is prohibited from acquiring the firearm; or (3) delay the sale if a NICS investigation reveals that the name of the prospective purchaser matches a record in the system, but does not definitely show that the person is prohibited from being transferred a firearm. If a delay instruction is given, the FFL is permitted (but not required) to complete the transfer if the FFL does not receive a "proceed" or "deny" instruction after 3 business days. (These transfers are often called "default proceed" sales.) If NICS gives a deny instruction and the prospective transferee believes it was caused by incorrect information in the NICS system, he or she may seek administrative or judicial review to correct the record. 18 U.S.C. §§ 922 note, 925A.

A NICS check for a transaction is valid for 30 calendar days in accordance with 27 C.F.R. § 478.102. If a firearms

transfer is not completed within that period, a new NICS check would be required for the transfer to occur.

Under 18 U.S.C. §§ 922(t)(5) and 924(a)(5), an FFL who knowingly violates the Brady Act's statutory requirements may be subject to civil and criminal penalties, including fines, imprisonment up to 1 year, and license suspension or revocation. Violations may occur if an FFL transfers a firearm to an unlicensed person without having undergone the background check process or disregards an instruction to deny or delay a sale. By regulation, 28 C.F.R. § 25.11, fines up to $10,000 may be imposed on state or local agencies, FFLs, or individuals for misusing the NICS system by, for example, accessing the system for an unauthorized purpose or purposefully providing incorrect information to the system to obtain a proceed response.

Amendments to the Brady Act

Congress has enacted two measures to increase the number of records that federal and state agencies submit to the FBI for inclusion in the NICS databases: (1) the NICS Improvements Amendment Act of 2007 (NIAA), Pub. L. No. 110-180, 121 Stat. 2559, and (2) the Fix NICS Act of 2018, Pub. L. No. 115-141, 132 Stat. 348.

NIAA aims to increase the submission of records related to mental illness, misdemeanors of domestic violence, and protection orders that would render a person ineligible to purchase or possess a firearm. To increase state submissions, NIAA authorizes monetary incentives and penalties tied to submitting records to NICS. For example, NIAA established the NICS Act Record Improvement Program (NARIP), which, in part, provides states money to automate their record systems and transmit to NICS the targeted prohibiting records. NIAA also directs the Attorney General to withhold, subject to waiver, up to 5% of funds available from the Edward Byrne Memorial Justice Assistance Grant Program (which provides federal funds for local law enforcement initiatives) if a state provides less than 90% of its available prohibiting records.

The Fix NICS Act aims to increase prohibiting record submissions through incentive and accountability measures. For states, monetary incentives are tied to creating and substantially complying with an "implementation plan" designed to ensure maximum record submission. Names of states that do not substantially comply with NIAA's implementation are to be published by the Attorney General. At the federal level, agencies must semi-annually certify whether they are submitting all prohibiting records on at least a quarterly basis. Federal agencies also must create an implementation plan. The Attorney General is to publish and semi-annually submit to Congress the names of agencies that fail to either create or obtain substantial compliance with an implementation plan. Political appointees within a federal department or agency that fail to either certify compliance or substantially comply with an implementation plan will be ineligible for bonus pay.

House-Passed Proposals in the 116th Congress

Two bills purporting to amend the background check process were marked up and passed out of the House Judiciary Committee on February 13, 2019: (1) H.R. 8, the Bipartisan Background Checks Act of 2019, and (2) H.R. 1112, the Enhanced Background Checks Act of 2019.

H.R. 8, as passed in the House, would expand background checks to capture many private transfers—that is, transfers between persons who are not FFLs. (A similar proposal was introduced in the Senate, S. 42.) H.R. 8 generally would make it unlawful for non-FFLs to sell or transfer a firearm without an FFL serving as an intermediary and initiating a NICS check on the transfer. Though often referred to as a "universal" background check measure," the bill contains numerous exceptions: A background check would not be required for (1) certain transfers to law enforcement, private security professionals, and members of the armed services; (2) gifts between spouses, domestic partners, parents and children (including step relationships), aunts or uncles and nieces or nephews, or grandparents and grandchildren; (3) certain transfers to execute a trust or estate upon a person's death; (4) temporary transfers to prevent imminent death or great bodily harm; (5) temporary transfers while in the presence of the transferor at a shooting range or while hunting; and (6) transfers approved under the National Firearms Act, 26 U.S.C. § 5812, which separately regulates certain categories of firearms, like machine guns. H.R. 8 also would preclude any implementing regulations from requiring FFLs to facilitate private transfers or from capping the fee that an FFL may choose to charge for conducting the NICS check. Additionally, regulations required by the bill would direct that Immigration and Customs Enforcement be notified when a NICS check reveals that the prospective purchaser cannot possess a firearm under 18 U.S.C. § 922(g)(5) (related to alien firearm possession).

As passed in the House, H.R. 1112 would modify the "default proceed" process that allows an FFL to transfer a firearm when the NICS transaction process has not been completed within three business days. The bill provides a mechanism for a transfer to occur if the FFL does not receive instructions from the NICS system on whether to proceed with or deny a proposed transaction within 10 business days. If the transferee wishes to proceed with the sale in such cases, he or she must file a petition (electronically or via first-class mail) to the Attorney General certifying that the transferee does not believe he or she is prohibited from acquiring the firearm. If a response is not provided within 10 business days, the FFL would be allowed to proceed with the transfer. The Committee report accompanying the bill, H. Rept. 116-2, appears to construe these 10-day periods as occurring in succession rather than concurrently (i.e., the delay period might last up to 20 business days). Finally, if, after three business days since first contacting the system, NICS informs the FFL that the transfer may proceed, the FFL may complete the transfer without initiating a new NICS check so long as the transfer takes place within the longer of (1) 25 calendar days after the FFL receives the proceed instruction, or (2) 30 calendar days after initially contacting NICS.

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