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Updated March 10, 2021

Firearms Eligibility: Stalking- and Domestic Violence-Related Provisions in H.R. 1620

In March 2022, the 117th Congress passed the Violence Against Women Act [VAWA] Reauthorization Act of 2022, by folding a Senate-introduced bill, S. 3623, into the Consolidated Appropriations Act, 2022 (P.L. 117-103). The VAWA reauthorization includes the NICS Denial Notification Act of 2022, provisions of which require the Attorney General to notify federal, state, tribal, territorial, and local authorities about NICS denials within 24 hours, and to cross-deputize those authorities to increase federal investigation and prosecution of firearms-related eligibility offenses tied to domestic violence.

In March 2021, the House passed a VAWA reauthorization bill (H.R. 1620) that included similar NICS denial notification provisions in a House-passed VAWA reauthorization bill, H.R. 1620. However, the House-passed bill included other provisions that were not enacted under P.L. 117-103. Those House-passed provisions in H.R. 1620 would have amended federal law to (1) prohibit persons convicted of misdemeanor stalking crimes from receiving or possessing a firearm or ammunition; (2) revise related provisions governing domestic violence protection orders; and (3) redefine the term "intimate partner" to capture "former dating partners," as a means to close off the "boyfriend loophole." The House previously passed a bill with provisions similar to those in H.R. 1620 in the 116th Congress (H.R. 1585).

Prohibited Persons and Domestic Violence

Current law (18 U.S.C. §922(g)) prohibits nine categories of persons from receiving or possessing firearms or ammunition; and (18 U.S.C. §922(d)) prohibits any person from transferring or otherwise disposing 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 nine categories. Two of those 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)); and
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> persons convicted of a misdemeanor crime of domestic violence (18 U.S.C. §§922(d)(9) and (g)(9)).

"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. 1620 would have expanded this definition to include

> a dating partner or former dating partner (as defined in section 2266 [of Title 18, United States Code]); and
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> 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. 1620 would have made any person convicted of a "misdemeanor crime of stalking" a tenth category of prohibited persons. It would have defined such a crime as any misdemeanor stalking offense under federal, state, tribal, or municipal law; and one that (1) is a course of harassment, intimidation, or surveillance of another person that 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 (2) causes, attempts to cause, or would reasonably be expected to cause, emotional distress to any of those persons.

The proposed definition would have been subject to certain mitigating factors. A person would not have been 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 have been 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.

"Protection Orders" or "Court-Order Restraints"

H.R. 1620 would have also expanded 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;
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> (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
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> (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. 1620 would have substantively amended the domestic violence protection order prohibition (18 U.S.C. §922(g)(8), and §922(d)(8), by reference) to include specifically 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. 1620 would have added the following at the end of 18 U.S.C. §922(g)(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 was potentially a source of debate about the balance between due process and public safety.

Firearms Background Checks and Investigations and Prosecutions of Denied Persons

The Gun Control Act of 1968 (GCA; 18 U.S.C. §§921-931) sets out certain recordkeeping and background check requirements for persons licensed federally to deal in firearms, otherwise known as federal firearms licensees (FFLs). The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473 is the linchpin of the GCA recordkeeping process, in addition to the maintenance of a bound log of firearms acquisitions and dispositions. As part of any firearms transaction between an FFL and an unlicensed, private person, both the FFL and prospective unlicensed purchaser must truthfully and completely fill out, and sign, an ATF Form 4473.

In turn, the FFL must verify the prospective purchaser's name, date of birth, state residency, and other information by examining government-issued identification, which typically includes a state-issued driver's license. The prospective purchaser attests that they (1) are not a prohibited person, (2) are who they say they are, and (3) are the actual buyer. Straw purchases are a federal crime: it is illegal to pose as the actual buyer, when in fact you are buying the firearm for another person. Making any materially false statement to an FFL is punishable by up to 10 years' imprisonment.

The completed and signed Form 4473 serves as the FFL's authorization to initiate the National Criminal History Background Check System (NICS) pursuant to 18 U.S.C. §922(t). Administered by the Federal Bureau of Investigation (FBI), NICS queries several data systems for records disqualifying an individual from receiving and possessing a firearm under federal or state law. NICS will respond with one of three instructions: proceed, denied, or delayed. In the latter case, a firearms transaction is delayed for up to three business days, at which point, the FFL may proceed with the transaction at his or her own discretion, if (s)he has not received a final NICS determination.

Following these background checks, the FBI routinely makes referrals to the ATF on persons who have been denied a firearms transfer (standard denial); and those who were found to be ineligible, but were transferred a firearm after the delayed sale period and before a final determination of ineligibility (deferred denial). ATF agents often refer to such cases colloquially as "lying and trying" and "lying and buying," respectively. In the case of a deferred denial, based on an FBI-referral and when justified, ATF and/or the chief law enforcement officer (CLEO) in the relevant jurisdiction will initiate a firearms retrieval action. In some cases, denied persons could be prosecuted for making false statements to an FFL.

H.R. 1620 and S. 3623 included several similar provisions designed to increase NICS denial investigations and prosecutions, particularly in those cases related to domestic violence and stalking. The provisions in S. 3623 were enacted under the NICS Denial Notification Act of 2022 (P.L. 117-103). This act amends the GCA to require the Attorney General to notify certain federal, state, tribal, and local law enforcement agencies about any NICS denial within 24 hours. It also requires the Attorney General to report to Congress annually on the number of NICS denials, denials overturned on appeal, and denials investigated. In addition, the act authorizes the Attorney General to cross-deputize state, tribal, territorial, and local government prosecutors and law enforcement officers for the purposes of investigating and prosecuting NICS denial cases. In addition, the act requires the Attorney General to identify no less than 75 jurisdictions with high rates of firearms-related violence among intimate partners, where local authorities lack the resources to address such violence, and prioritize the cross-deputization of state, tribal, territorial, and local government prosecutors and law enforcement officers to assist those jurisdictions in initiating criminal cases related to NICS denials.

William J. Krouse, Specialist in Domestic Security and Crime Policy

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