

# THE ENHANCED BACKGROUND CHECKS ACT DEFAULT PROCEEDS AND THE CHARLESTON LOOPHOLE

## THE PROBLEM

Though 91% of NICS background checks are completed within minutes, about 9% of cases require further investigation and review by the Federal Bureau of Investigation (FBI). Due to the federal “default proceed” rule, FBI is allowed only three business days to conduct and finish its investigation. Under current federal law, if a dealer who has initiated a background check has not been notified that the purchaser is prohibited under state or federal law within three business days, the dealer can decide whether or not to proceed with the sale at his or her discretion. FBI notifies the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) any time a default proceed sale occurs.

This “default proceed” provision allowed 4,864 prohibited purchasers to buy guns in 2017 before a background check cleared. Many default proceed cases require extra time and attention precisely because the firearm purchaser has a long record of dangerous red flags; according to data compiled by Mayors Against Illegal Guns, **default proceed sales are eight times more likely to involve a prohibited purchaser than other background checks**. In cases where a sale went through under the default proceed procedure and the FBI was ultimately able to complete a background check, the FBI has reported that nearly 25% of the individuals investigated were determined to be legally prohibited from purchasing or possessing a firearm.

One of the most glaring examples of this loophole’s danger occurred in 2015 when a 21-year old white supremacist shot and killed nine African-American worshippers at the Emanuel AME Church in Charleston, South Carolina. Although the shooter should have failed a background check because of his history of unlawful controlled substance use, his background check was not completed within three business days. In this case, the dealer proceeded to transfer the gun to the Mother Emanuel shooter after the three business days elapsed. Approximately two months later, the shooter used the gun purchased in the default proceed sale to murder the churchgoers.

## THE SOLUTION

The FBI has recommended extending the three business day period to allow agents more time to complete background check investigations and to reduce the number of prohibited purchasers who are able to purchase firearms by default.

According to FBI data from a **2000 GAO report of the NICS system**, for 2,519 default-proceed transfers that resulted in a transfer to a prohibited person, an average of 25 business days elapsed between the initial NICS inquiry and the date the FBI determined that the purchase should have been denied.

**H.R. 1112 will address this dangerous loophole in our laws by allowing the FBI much-needed additional time to investigate whether the firearm should be transferred to the individual**, thereby preventing potentially dangerous people from obtaining the gun. This bill would also minimize the risk to ATF agents and reduce wasting their limited resources to retrieve guns from people who should not have had them in the first place. For the average law-abiding citizen, this bill would have no impact on their ability to purchase a gun. If you walk into a store to buy a gun and pass a background check, then you would be able to leave with your gun that same day, just the same as you can today.

## PROTECTING DUE PROCESS

H.R. 1112 would establish a procedure that fully complies with the Due Process requirements of the Constitution. Courts have held that a person who has not diligently pursued their claim cannot complain of a delay. This bill simply requires a person to assert that 10 business days or more have passed and the gun sale or transfer has not been approved. The petition puts the FBI on notice that if they are not able to determine whether the person is prohibited within the following 10 business days, the person may receive the firearm by default.

A court addressing a due process claim weighs the following three factors:

1. The interests of the individual and the injury threatened by the official action;
2. The risk of error through the procedures used and probable value, of the procedural safeguards;
3. The costs and administrative burden of the additional process, and the interests of the government in efficient adjudication.

In other words, a court faced with a due process challenge to this bill would balance the risk that a dangerous, prohibited person might obtain a gun by default against the risk that a law-abiding and responsible person might be temporarily deprived of the gun. Given the danger posed by guns in the wrong hands, the court would uphold the new requirements.

## PUBLIC OPINION AND RESPONSE

Recognizing the irresponsibility of the default proceed rule, some gun dealers, including Walmart—the biggest seller of firearms in the country—refuse to engage in default proceed transactions and have made it a matter of policy to only sell firearms when the individual affirmatively passes a background check.

Most Americans believe that any person who seeks to lawfully acquire a firearm must pass a background check before obtaining the gun. A January 2013 poll found that 76.3% of Americans—including 67% of gun owners—support giving law enforcement up to five business days, if needed, to complete a background check for gun buyers.