

MEMORANDUM

TO INTERESTED PARTIES

FROM GIFFORDS

DATE MARCH 26, 2020

RE Protecting the Background Check System during National Emergencies

In the early weeks of March 2020, gun sellers reported [huge increases in gun and ammunition sales](#), at least partially attributed to panic caused by the novel coronavirus pandemic. Although at the time of this memo's release the FBI has not yet published its monthly statistics, the agency reported that they are experiencing [increased demand](#). This increase appears to be putting a strain on the National Instant Criminal Background Check System (NICS), which licensed gun sellers (but not unlicensed sellers) are required to use for gun purchasers, threatening to allow more prohibited people, such as convicted felons and domestic abusers, to obtain guns. Due to this threat, the National Shooting Sports Foundation -- the firearms industry's trade association -- has [called on gun sellers to wait](#) for a definitive response from NICS before transferring a firearm, even if this means waiting longer than the required three business days to complete the sale.

Under federal law, a Federal Firearms Licensee (FFL) is required to contact NICS to initiate a background check before transferring a firearm. Most of these background checks are completed within minutes; however, some checks require more time for further review to determine if someone is legally eligible to purchase a gun. In these situations, NICS has three business days to further investigate and make this determination.¹ Often, this involves contacting local courts or law enforcement agencies for more information. After that time expires, if the FFL has not received a determination from NICS, the FFL may decide to proceed with the sale. Such sales, conducted in the absence of a completed background check, are known as "default proceeds." This loophole in federal law can have dangerous consequences: in 2015, an ineligible individual obtained his firearm through a default proceed and committed the horrific mass shooting at Emanuel AME Church in Charleston, South Carolina. In 2018, [at least 3,960 prohibited purchasers](#) obtained firearms this way.

Because of the danger posed by this loophole, Congressman Jim Clyburn introduced, and on February 28, 2019, the House of Representatives passed, [H.R. 1112, the Enhanced Background Checks Act of 2019](#). This bill would extend the time provided before an FFL can proceed with a gun sale or transfer without receiving a definitive response from NICS. The Senate has not yet given this bill a vote. **Given the current situation, the need for Congress to respond to this problem is more pressing than ever.**

¹ 18 U.S.C. § 922(t)(1)(B)(ii).

As more Americans are working remotely or not able to work at all in response to the novel coronavirus pandemic, there is a dangerous possibility of more guns being sold before a background check is completed and ending up in the hands of prohibited people due to:

- Longer response times from [local courts](#) and law enforcement employees responsible for record/information sharing;
- Reduced capacity at NICS because of quarantine-induced staff shortages;
- Increased demand from the public further straining NICS' capacity; and
- Reduced capacity at NICS to identify when default sales have occurred and at ATF to retrieve firearms in those cases.

Colorado [recently announced changes it has implemented](#) to respond to increased demand for background checks. Colorado is a “point-of-contact state,” meaning that NICS operates through a state agency, rather than solely through the FBI.² In response to the problems mentioned above, Colorado has taken steps to increase operating hours, utilize cross-trained employees, and modify the process for submitting background checks.

Similarly, Rhode Island Governor Gina Raimondo issued an [executive order](#) extending the state’s statutory seven-day period for gun purchaser background checks to 30 days. This order now prohibits the delivery of a firearm to a purchaser unless law enforcement has approved the purchaser or 30 days have elapsed. The order explains that, “as a result of the significant increase in the number of background checks requested by firearms dealers and reduced staffing levels, law enforcement agencies cannot reasonably complete the required background checks within the seven-day statutory timeframe.”

Many other states are similarly experiencing significant increases in gun sales and [implementing a variety of approaches](#) -- from extending the time period for background checks to letting individual counties decide whether to keep gun stores open to closing all gun stores statewide. **It is clear that a federal response is needed to minimize confusion among gun sellers and purchasers, protect public safety, and ensure that people prohibited from purchasing and possessing guns are not able to acquire them because of delays in the background check system.**

RECOMMENDED ACTIONS

In the short-term, Congress should consider taking the following steps to ensure that background checks are completed before a gun is sold or transferred, and that FBI and NICS have the resources and capabilities to adjust their processes during the current national emergency.

² DOJ regulations allow state agencies to choose to process NICS checks in lieu of the FBI’s NICS Section. 28 CFR § 25.6. Currently, state or local agencies in [21 states](#) act as points-of-contact or partial points-of-contact for the NICS.

1. Congress should temporarily suspend the 3-business-day deadline that allows a licensed gun dealer to proceed with a gun sale in the absence of a final determination from NICS and require that a background check be completed before a gun is sold or transferred. This could take the form of a moratorium on 18 U.S.C. section 922(t)(1)(B)(ii), which allows transfers to occur if the background check is not completed within 3 business days, so that default proceeds cannot occur in the interim. This moratorium should not be lifted until a date when the number of background checks that are completed within the initial 3-business day window returns to a base level, as determined by the FBI.
 - Under existing law, people who are affirmatively denied a gun through a background check can file an appeal.³ If gun sales are not allowed to proceed after the 3-business day deadline, people who do not receive an approval within a specified time frame could be allowed to file an appeal through this existing system.
 - The Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF), which provides some oversight for FFLs, could send them a notice telling them to cease transferring guns unless they have received approval from NICS.
2. Congress should ensure that FBI, NICS, state point-of-contacts, and federal, state, and local courthouses, and law enforcement agencies publicly disclose what measures they are putting in place to ensure that all background checks are completed within 3 or fewer business days. Relatedly, Congress should immediately request information from the FBI and points-of-contact that will lift the veil on the current status of NICS operations. This information may include, for each month within 2020, and for each week in March and thereafter, a breakdown of how many NICS background checks were initiated, how many were denied immediately, and how many were delayed, and for how long. More specifically, this information must be sufficient to show whether, and to what extent, there has been an increase in the number of background checks that remain incomplete, leading to potentially prohibited people receiving guns by default.
3. Congress should ensure that the FBI, NICS, state point-of-contacts, and federal, state, and local courthouses, and law enforcement agencies receive the guidance and resources they need to ensure that NICS can continue to operate effectively. In particular Congress must ensure that state and local courts and law enforcement are adequately staffed to respond to requests for information in NICS background checks.

Longer term, it is essential that Congress acts to ensure that these loopholes are closed and in the case of future emergencies, prohibited purchasers should be unable to easily access guns. Congress should also take action to ensure that the NICS system contains and has access to all relevant records in order to conduct complete background checks.

³ See 34 U.S.C. § 40901(g).

1. The Senate must pass legislation such as [H.R. 1112, the Enhanced Background Checks Act](#), that will establish a process for addressing incomplete background checks. The process outlined in H.R. 1112 appropriately balances the risk to public safety when prohibited people obtain guns and the difficulties associated with efficiently obtaining complete information about each prospective gun purchaser. Such a process should take into account the time it takes the FBI and state points-of-contact to actually complete background checks to minimize the risk that prohibited purchasers will obtain guns by default.
2. Ensure that state and local law enforcement and court personnel receive the training and funding they need through NICS Act Record Improvement Program (NARIP) and National Criminal History Improvement Program (NCHIP) grant funding to properly report all prohibitive criminal records to NICS. This may involve eliminating the requirement of a relief from eligibility process for people who are prohibited for mental health reasons. This requirement currently serves as an obstacle to states receiving this funding. See [H.R. 4600](#), which would allow the Attorney General to waive the requirement of a relief from eligibility process.
3. Ensure that the FBI completes the process of incorporating a check of the National Data Exchange (N-DEX) in NICS background checks as soon as possible. The N-DEX system is an unclassified national information sharing system that contains critical data not covered in other databases used in NICS, including incident and case reports, full Department of Justice (DOJ) case files, and corrections data. The FBI started exploring the possibility of using N-DEX in 2015, following an internal review that found that it could have prevented the Charleston gunman from obtaining his gun. See [H.R. 1324](#) or [H.R. 5949](#).
4. Ensure that the FBI retains records of background checks until they are completed and the purchaser is approved. Under current regulations, while the FBI maintains indefinitely records of background checks that result in denials, the FBI must destroy records of background checks that remain in an “open status” (are not completed) within 90 days of the initial request.⁴ These records are needed to identify prohibited purchasers who have obtained guns through default sales, and for the FBI to thoroughly audit its system. The FBI should cease the destruction of these records. See [H.R. 5949](#).
5. Ensure that the FBI regularly provides transparent, publicly available reports identifying the number of background check denials that occur after any statutorily mandated deadline, meaning situations where a prohibited person may have obtained a gun by default.

⁴ 28 C.F.R. § 25.9(b)(1)(ii).

ABOUT GIFFORDS

Giffords is a nonprofit organization dedicated to saving lives from gun violence. Led by former Congresswoman Gabrielle Giffords, Giffords inspires the courage of people from all walks of life to make America safer.