

RECOMMENDED ACTION MEMO

Agency: Federal Bureau of Investigation
Topic: Strengthening the National Instant Criminal Background Check System (NICS) in Point of Contact (POC) States
Date: November 2020

Recommendation: Ensure, through training, auditing, and accountability measures, that POCs properly:

- conduct proper background checks in response to requests from FFLs in their jurisdictions, including requests related to interstate transfers of long guns, and proceed only with transfers to lawful possessors
- report delays and denials of gun purchases and transfers to NICS
- publish yearly statistical reports summarizing their operations for the year, similar to what the FBI's NICS section does.

I. Summary

Description of recommended executive action

The Federal Bureau of Investigation (FBI) administers the National Instant Criminal Background Check System (NICS), which is used to conduct background checks on gun purchasers. Some states have chosen to appoint state or local agencies to act as “points of contact” (POCs) for the system, meaning that gun dealers contact these agencies for the background checks instead of the FBI directly. These agencies then administer background checks on gun purchasers using the NICS system. In order to ensure that these agencies properly administer federal law, however, the FBI must provide oversight. Under this proposal, the FBI would strengthen the training it provides these agencies, more frequently audit these agencies to ensure they are properly administering the law, and impose accountability measures on those agencies that do not. In some circumstances, this may involve removing the agencies’ authority to act as POCs.

Overview of process and time to enactment

Within the first year of the next administration, the FBI should announce requirements for annual training to ensure that all individuals administering background checks on behalf of POCs are competent to do so. During that time period, the FBI should also begin requiring states that have appointed POCs to issue yearly statistical reports summarizing their operations for the year. The first such reports should be published by the end of 2023. The FBI should also audit each state’s POCs at least every three years, and the results of these audits should be made public. If an audit reveals significant issues with a POC’s administration of NICS, the FBI should conduct a follow-up audit within the next year. If the issues continue, the FBI may choose to withdraw its authorization for the agency to act as a POC.

II. Current state

NICS is the federal government's most important tool in ensuring that prohibited people are not able to obtain guns. The Brady Handgun Violence Prevention Act (the Brady Act) requires federal firearms licensees (FFLs), including gun dealers, to conduct background checks on prospective gun purchasers.¹ The act required the attorney general to establish NICS for this purpose.²

The Brady Act also required the attorney general to determine the means by which FFLs would contact NICS.³ The attorney general has delegated this responsibility to the FBI, and the FBI has given each state the option to have a state or local agency act as a POC for NICS.⁴ If the state chooses to have a state or local agency act as a POC, the FFLs contact the state or local agency, rather than the FBI for the background check of any gun purchaser. If the state chooses not to have a state or local agency act as a POC, the FFLs in the state contact the FBI directly for the background check.⁵ The rationale for providing states with the option of having a state or local agency act as a POC is that, because the information available to the FBI is limited, the POCs are sometimes able to search additional databases besides NICS, and therefore have the potential to identify prohibiting records that the FBI may lack, such as mental health or final disposition records.⁶

According to FBI regulations:

POC (Point of Contact) means a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order.⁷

The following 13 states are known as "full-POC states" and use a POC for all gun sales or permits that require a background check: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, Virginia.

¹ Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, § 102(b) (codified at 18 U.S.C. § 922(f)).

² *Id.* § 103(b) (codified at 34 U.S.C. § 40901(b)).

³ *Id.* § 103(a)(1) (codified at 34 U.S.C. § 40901(a)(1)).

⁴ See Federal Bureau of Investigation, "1998-1999 NICS Operations Report," 5, March 1, 2000, https://www.fbi.gov/file-repository/operations_report_98_99.pdf/view; 28 C.F.R. § 25.2.

⁵ 28 C.F.R. § 25.6.

⁶ See Notice of Proposed Rule, National Instant Criminal Background Check System Regulations, 63 Fed. Reg. 30430, 30431 (June 4, 1998).

⁷ 28 C.F.R. § 25.2.

In addition, the following seven states act as “partial-POC states,” which means that state or local agencies conduct background checks for handgun, but not long gun sales. In partial POC states, FFLs contact the FBI directly for long gun (rifle and shotgun) sales: Iowa, Maryland, Nebraska, New Hampshire, North Carolina, Washington, Wisconsin.

The remaining 30 states and the District of Columbia are non-POC states and run all of their firearm background checks through the FBI.⁸

In conducting a background check on a prospective gun purchaser, a POC must determine whether “receipt of a firearm by a prospective transferee would violate section 922 of title 18 [of the United States Code] or State law.” Consequently, a POC must be familiar with the applicable provisions of section 922 and state laws.

One factor that complicates the job of POCs is that firearm purchasers are not always residents of the state where they are purchasing a gun. Federal law allows an FFL to sell or transfer a long gun (rifle or shotgun) to a resident of another state only if the transfer complies with the laws of both states.⁹ This provision means that when a POC conducts a background check at the request of an FFL who is selling a rifle or shotgun to a resident of another state, the POC is called upon to enforce not just federal law and the law of its own state, but also the law of the state of residence of the purchaser. As described below, POC states have not always succeeded in doing that.

When a prospective gun purchaser fails a background check run by a POC, federal regulations require the POC to report the failed gun sale to the FBI. Similarly, a POC must also report to the FBI when a background check run by the POC is delayed. When the FBI promulgated these requirements in 2004, it explained the change:

Receiving information about POC denials will enable the FBI to refer all denials, not just those made by the FBI NICS Operations Center, to ATF for investigation. Receiving notification of open POC transactions will allow the FBI to retain information about the POC transaction for up to 90 days, or until the transaction's status is changed to proceed before the expiration of 90 days, in the same way the FBI will retain information about open transactions handled by the FBI NICS Section.¹⁰

⁸ FBI, “NICS Participation Map,” accessed October 14, 2020, <https://www.fbi.gov/file-repository/nics-participation-map.pdf/view>

⁹ Federal law prohibits the transfer of a handgun from an FFL in one state to a resident of another state. However, federal law allows an FFL to transfer a long gun (rifle or shotgun) to a resident of another state provided that: “the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States)...” 18 U.S.C. § 922(b)(3).

¹⁰ Final Rule, National Instant Criminal Background Check Regulation, 69 Fed. Reg. 43892, 43898 (July 23, 2004). Until that time, it had been optional for POCs to report NICS denials to the FBI, and the regulations did not mention the reporting of open transactions (those that are delayed and neither

In addition, when a POC denies a gun sale and reports the denial to the FBI, the FBI is able to add that record to the NICS Index, one of the databases searched when a person tries to buy a gun. If the person who was denied tries to buy a gun again, the existence of this record within the NICS Index may allow the purchase to be denied more readily, especially if the person is trying to buy a gun in a different state. In some cases, a denial is authorized only after extensive research of criminal history records. The failure of POCs to enter these denials in the NICS Index may make that critical denial record unavailable to other jurisdictions.

Every year since NICS was established, the FBI's NICS section has published a report detailing its operations for the year. These reports provide statistical data about background checks, including numbers regarding approvals, denials, and delays; the availability of the system; the proportion of checks processed via "E-Check"; the answer speed, immediate determination, and abandonment rates; the days and weeks with the highest number of checks; and the number of denials broken down by the eligibility criteria that led to those denials. For example, the 2018 operations report states that 44,806 of the 99,252 denials that the NICS section issued in 2018 were due to felony convictions, and that ultimately, the NICS section denies 1.21 of every 100 background checks. The reports also describe the number of denials referred to the ATF in situations where a firearm may have been transferred to a prohibited person because the background check was not completed fast enough.

Some, but not all states that serve as POCs have provided similar reports. Pennsylvania, for example, publishes annual reports similar in scope and detail to the NICS operations reports.¹¹ Certain states that have appointed a POC produce less comprehensive reports.¹² Other states that have appointed a POC or POCs publish no information about the operations of these POCs. As a result, policymakers, advocates, and the public are left in the dark as to the accuracy and effectiveness of gun purchaser background checks in these states.

III. Proposed action

The FBI should strengthen its oversight of POCs. More particularly, the FBI must ensure through training, auditing, and accountability measures, that POCs properly:

1. conduct proper background checks in response to requests from FFLs in their jurisdictions, including requests related to interstate transfers of long guns, and proceed only those transfers to lawful possessors
2. report denials of gun purchases and transfers to NICS

immediately approved or denied). The new regulation mandates that POCs report all denials, open transactions, and approvals of open transactions to NICS.

¹¹ See, e.g., Pennsylvania State Police, "Firearms Annual Report 2019," accessed October 14, 2020, https://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2019_Firearms_Annual_Report.pdf.

¹² See, e.g., Colorado Bureau of Investigation, Department of Public Safety, "Current Year Statistics," accessed October 14, 2020, <https://www.colorado.gov/pacific/cbi/currentyearstatistics>,

3. publish yearly statistical reports summarizing their operations for the year, similar to what the FBI's NICS section does.

IV. Legal justification

1. Conducting background checks

As described above, POCs play a major role in administering NICS. In 2018, states processed 17,946,594 background checks while the FBI processed 8,235,342.¹³ Of the background checks processed by states, at least 5,293,391 were associated with firearm transactions (presumably processed by POCs); the remaining 12,653,203 were run by state agencies issuing firearms- or explosives-related permits. (State and local agencies can use NICS to issue these permits, even if they are not related to the sale or transfer of a firearm.)

Unfortunately, there are indications that POCs struggle to apply federal law properly while conducting their background checks, thereby increasing the risk that firearms will fall into the hands of prohibited people. A 2018 Government Accountability Office report found that states report denials at approximately one-third the rate the FBI reports denials.¹⁴ There are a variety of potential explanations for the discrepancy, but an evident and alarming one is that POCs are improperly approving a significant number of transactions.

In order to protect public safety against the threat that POCs might approve a gun sale or transfer to a prohibited person, the FBI must ensure that all POCs are properly trained to conduct background checks and identify records that demonstrate that a person is prohibited from purchasing or possessing firearms. As noted above, an out-of-state prospective purchaser increases the risk that a POC may improperly approve a gun sale or transfer.

The risk in this situation was demonstrated in April 2019, when many schools in Colorado were forced to close after an 18-year-old woman from Florida, who was reportedly "infatuated" with the Columbine massacre, flew to Denver and purchased a shotgun from a gun dealer.¹⁵ The sale should not have been allowed, because Florida requires residents to be 21 or older to purchase any firearm. Colorado is a full-POC state. It remains unclear why neither the dealer nor the state agency tasked with running background checks flagged that the sale was illegal.

¹³ FBI, "2018 NICS Operations Report," accessed October 14, 2020, <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view>.

¹⁴ Government Accountability Office, "LAW ENFORCEMENT Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions," September 2018, 8, <https://www.gao.gov/assets/700/694290.pdf>.

¹⁵ Paul Murphy Holly Yan, Ralph Ellis and Madeline Holcombe, "Website thought connected to woman 'infatuated' with Columbine massacre draws FBI attention," CNN, April 17, 2019, <https://www.cnn.com/2019/04/17/us/columbine-threat-search-for-woman/index.html>.

The incident prompted a bipartisan group of members of Congress from Colorado to send a letter to the DOJ OIG, requesting an investigation of FBI audits into POC background checks.¹⁶ The FBI is responsible for conducting audits of POC systems, but these audits have never been made public.¹⁷ In January 2020, the OIG responded to the letter saying, “we anticipate continuing our oversight of [FBI’s administration of NICS] by initiating an audit of selected aspects of it, including whether the FBI appropriately evaluates Point of Contact state compliance with firearm background checks.”¹⁸

During the ongoing coronavirus pandemic, the demand on POCs and the FBI to conduct background checks on gun sales has reached an unprecedented level. Between March and June of this year, background checks were up 95% compared to the same period in 2019, including a 148% increase in June alone. This surge in background checks makes it even more important that POCs are correctly administering the law and denying potential sales to prohibited people.

2. Reporting denials and open transactions to the FBI

FBI regulations require POCs to report NICS transaction determination messages electronically to the FBI for all transactions that are denied or not resolved before the end of the day. These electronic messages must be provided to NICS immediately when the POC communicates the determination to the FFL.¹⁹ A 2016 report by the Department of Justice Office of Inspector General (OIG) found that POCs do a poor job of reporting delayed or denied background checks to NICS, as required by law.²⁰ That report stated:

From 2008 through 2014, states handled about 68 million of the more than 119 million NICS transactions. To help ensure the completeness of the NICS database, states are required to update it with supporting documents when a prospective purchaser attempts to buy a firearm and is approved, denied, or delayed. We reviewed a judgmental sample of 631 state processed transactions and determined that in 630 of them the states did not fully update the NICS database or inform the FBI of the transaction’s outcome.

¹⁶ “REPRESENTATIVE NEGUSE LEADS BIPARTISAN INQUIRY LETTER REQUESTING ANSWERS FROM FBI REGARDING RECENT COLORADO INCIDENT & POINT OF CONTACT SYSTEM,” July 23, 2019, <https://neguse.house.gov/media/press-releases/representative-neguse-leads-bipartisan-inquiry-letter-requesting-answers-fbi>.

¹⁷ FBI, “National Instant Criminal Background Check System Audit Methodology,” accessed October 14, 2020, <https://www.fbi.gov/file-repository/nics-audit.pdf/view> (delineating audit standards but not identifying any specific POC audit)

¹⁸ “DOJ INSPECTOR GENERAL ACKNOWLEDGES NEED FOR OVERSIGHT IN RESPONSE TO CONGRESSMAN NEGUSE’S BIPARTISAN REQUEST FOR INVESTIGATION INTO SOL PAIS GUN VIOLENCE INCIDENT,” January 23, 2020, <https://neguse.house.gov/media/press-releases/doj-inspector-general-acknowledges-need-for-oversight-in-response-to-congressman-neguses-bipartisan-request-for-investigation-into-sol-pais-gun-violence-incident>.

¹⁹ 28 C.F.R. § 25.6(h).

²⁰ Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” U.S. Department of Justice, September 2016, 23, <https://oig.justice.gov/reports/2016/a1632.pdf>.

These failures mean the NICS database is incomplete, and increases the risk that individuals found by states to be prohibited purchasers could be able to purchase firearms in the future.

As noted above, POCs must report delayed and denied background checks to NICS so that the ATF has an opportunity to follow up with the prospective gun purchaser to ensure they do not otherwise seek out a gun.

In addition, reporting these checks to NICS ensures that these purchasers are not able to pass a background check at another time. When a POC fails to provide this information to NICS, this increases the risk of an inconsistent response from NICS and the likelihood that the system will approve someone who has previously been denied. During a background check, states often provide information necessary to determine whether a person is eligible to possess a gun. For example, in some cases, NICS may be able to identify that a person was arrested and charged with a particular crime but the disposition of the case was not properly recorded; in such cases, the records in NICS do not immediately reveal whether the person was convicted of that crime or not. When this happens, the system will seek further information from the court or law enforcement agency associated with the arrest. If the person was in fact convicted, the sale will be denied. If that person seeks to buy another firearm from a different FFL, the process will occur again, unless the system already has a record that the person is prohibited. For that reason, the records of POCs records that identify people who have been denied can make NICS more efficient and consistent in its determinations.

As the FBI explained in proposing the 2004 update to the regulation:

Unfortunately, most POC states currently do not transmit this information to the NICS system. This means that a potential purchaser could be prohibited under state or federal law (based upon information available to a state from records available to that state only), yet the NICS system would not have access to that determination. If the prohibited purchaser then traveled to another state and again attempted to purchase a firearm, the NICS system would be unable to stop the prohibited purchase.²¹

In order to avoid these dangerous situations, the FBI must ensure that POCs properly report denials and delayed transactions to NICS.

3. Publishing yearly statistical reports summarizing their operations

Policymakers, advocates, and the public are less informed about the operations of POCs than about the FBI's NICS operations. This information provided in NICS operations reports is crucial for policymakers, advocates, and appropriators. Without such data, policymakers cannot determine the efficacy of POC background checks or the funding needs of POCs.

²¹ Notice of Proposed Rule, National Instant Criminal Background Check System Regulation, 66 Fed. Reg. 35567, 35569 (July 6, 2001).

As noted above, the Brady Act gave the attorney general the authority to determine the means by which the FFLs would contact NICS. The attorney general has delegated this responsibility to the FBI, and the FBI has given each state the option of having a state or local agency act as a POC. The FBI, therefore, has full discretion to determine the terms and conditions under which a state can use this option. Since data about the operations of POCs would be helpful, the FBI should require that states that have appointed POCs gather and provide it.

4. The FBI must enforce these requirements through training, auditing, and accountability measures

The three duties of a POC mentioned above are not self-enforcing. The FBI must regularly provide training to POCs to ensure the individuals administering the system have the necessary knowledge and expertise to fulfill these responsibilities. The FBI already conducts some training for POCs. The 2018 NICS operations report noted:

The NICS training instructors conducted approximately 40 training sessions to over 340 agencies hosting over 800 attendees in 2018. Agencies receiving training included POC state agencies, ATF-Qualified Alternate Permit state agencies, state-designated trainers, agencies performing disposition of firearm checks, and two U.S. territories.²²

Nevertheless, as described above, it is clear that these training sessions have not been sufficient to ensure that POCs properly conduct background checks so that prohibited purchasers are not approved to buy guns, particularly when prospective purchasers do not reside in the state. The FBI should do more to ensure that this training occurs.

The FBI must also regularly audit POCs to ensure that they continue to fulfill their responsibilities. Although the FBI has established a process for auditing POCs,²³ it is not clear how frequently these audits are conducted and what the results of these audits are. The FBI does not release any significant public information about these audits. This lack of transparency leaves policymakers and the public in the dark regarding the effectiveness of POC background checks.

Finally, the Brady Act gives the attorney general sufficient discretion over the operation of the background check system to impose accountability on POCs that fail to comply with their obligations. At first, this accountability may involve more frequent or thorough audits, or additional mandatory training. The FBI may also choose to appoint an employee to provide continuous oversight for a POC. Ultimately, the FBI can withdraw authorization for a state or local agency to act as a POC. Because of the lack of transparency regarding the FBI's

²² Criminal Justice Information Services Division, Federal Bureau of Investigations, "National Instant Criminal Background Check Section 2018 Operations Report," accessed October 14, 2020, 28, <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view>. According to the NICS Operations Reports, these trainings have been conducted annually since at least 2000.

²³ FBI, "National Instant Criminal Background Check System Audit Methodology," accessed October 14, 2020, <https://www.fbi.gov/file-repository/nics-audit.pdf/view>.

management of POCs, it is not known whether the FBI has done this in the past. Withdrawing authorization from a POC would also require the FBI's NICS section's funding to be increased proportional to the number of additional background checks it would be required to conduct. Nevertheless, when the FBI determines that a POC is unable to administer the background check system properly, as required by federal law, it should no longer operate as a POC, and the FBI should resume conducting background checks for gun purchases in that state.

Opposition arguments and responses

1. Burden on POCs and overall impact on public safety

Those who oppose stronger enforcement of the requirements for state and local agencies that act as POCs may argue that the requirements overburden these agencies, and that this burden may cause states to withdraw their decision to have those agencies act as POCs. They may also argue that this burden will discourage other states from choosing to appoint POCs in their states. The federal government does not provide funding to states or local agencies specifically so that they can act as POCs for NICS. Whether or not a state chooses to appoint a state or local agency as a POC, has always been a matter within the state's discretion. As a result, a state that does not wish to comply with the requirements described above may simply choose to disallow its agency or agencies to act as POCs.

How a state's decision to disallow a state or local agency to act as a POC would affect public safety may depend on several factors, including whether the POC has been more or less effective than the FBI in identifying prospective gun purchasers who are prohibited from purchasing or possessing firearms. As noted above, the primary benefit of a state or local agency acting as a POC is that the state or local agency may have immediate access to information that the FBI does not.²⁴ Over the last decade, however, states have significantly improved their reporting to NICS, meaning that the FBI now has direct access to much more of the information needed to identify whether prospective gun purchasers are eligible. Notably, in 2012, NICS began accepting files from states that identify people who are prohibited from possessing guns under state law, even if those people are not prohibited under federal law, enabling a NICS check to be used to identify those people.²⁵ As a result, the benefits of a state appointing a POC may be less than they once were, since the records that a state or local agency could search are now also available to the FBI directly.

However, at least one study has found that the practice of conducting firearm purchaser background checks through state or local agencies, as opposed to through the FBI, is

²⁴ See also James M. Tien, et al., "Cost-Benefit of Point-of-Contact (POC) Versus Non-POC Firearm Eligibility Background Checks," Research report submitted to the Department of Justice (May 2008), <https://www.ncjrs.gov/pdffiles1/bjs/grants/222674.pdf>.

²⁵ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, "National Instant Criminal Background Check System (NICS) Operations 2012," accessed October 14, 2020, <http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report>

associated with reduced firearm death rates, especially with respect to suicides.²⁶ The authors of the study speculated that the reduced firearm suicide rates may arise from other factors besides the availability of records. This reduction in firearm suicide rates shows a measurable benefit for states that choose to appoint state or local agencies to act as POCs, a strong reason why states should continue to allow those agencies to do so, even if the FBI chooses to conduct better oversight, as this memo suggests.

2. Privacy concerns

Those who are wary of federal information collection efforts may also object to the forwarding of “delay” and “denial” determinations to the FBI. In particular, the gathering of information, including names and identifying information of people who attempt to buy guns, may raise privacy concerns. However, the FBI already retains this information for individuals who attempt to buy guns in non-POC states, and these concerns should be no greater based on whether the state has chosen to appoint POCs or not.

Furthermore, people who are denied guns through background checks have often lied on the firearm transaction form, falsely stating that they do not fall within a prohibited category. Since making a false statement on this form is a crime, this information can lead to federal criminal charges against the person. Consequently, information about gun purchaser denials rightfully belongs in the hands of the FBI.

Finally, NICS information is subject to stringent data restrictions and privacy regulations, and there is no evidence that this information has been used improperly. For example, NICS regulations strictly limit authorized law enforcement access to, and use of, the NICS Index.²⁷ Consequently, privacy concerns should not prevent the FBI from gathering this important information from POCs.

Conclusion

State and local agencies that act as POCs play an important role in administering the gun purchaser background check system. The FBI should not hesitate to provide proper oversight of these agencies to ensure that guns don't fall into the wrong hands. The public also deserves proper transparency regarding the operations of these agencies. The training, auditing, and accountability measures described above are responsible steps the FBI should take to ensure that POCs fulfill their responsibilities to ensure public safety.

²⁶ Steven Sumner et al., “Firearm Death Rates and Association with Level of Firearm Purchase Background Check,” *Am. J. Prev. Med.* 35, no. 1, July 2008, [http://www.ajpmonline.org/article/S0749-3797\(08\)00310-3/fulltext](http://www.ajpmonline.org/article/S0749-3797(08)00310-3/fulltext).

²⁷ 28 CFR 25.6.