

## **RECOMMENDED ACTION MEMO**

**Agency:** Federal Bureau of Investigation  
**Topic:** NICS Denial Notifications in Domestic Violence Cases  
**Date:** November 2020

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**Recommendation: Establish an alert system for failed background checks, so that various state and local officials are notified when a person in their community who is prohibited from gun possession due to domestic violence has tried to buy a gun.**

### **I. Summary**

#### **Description of recommended executive action**

Under federal law, it is a crime to knowingly provide false information to a gun dealer when attempting to purchase a firearm. When an individual violates this law by providing false information on the form used to complete background checks—ATF Form 4473—and subsequently fails the background check, federal law enforcement is notified. However, current law does not ensure that state or local law enforcement is made aware of these situations. Promptly notifying local law enforcement of these background check denials can help ensure that the prohibited purchaser does not attempt to access firearms in other ways, such as through an unregulated private sale or over the internet. Increasing transparency by notifying state and local law enforcement provides more time to help prevent prohibited buyers from getting their hands on a gun to commit violent crimes. Under this proposal, the FBI would establish an alert system for failed background checks in cases involving individuals prohibited because of prior domestic violence, so that various state and local officials are notified when an ineligible person in their community has tried to buy a gun.

#### **Overview of process and time to enactment**

The FBI can operationalize this recommendation administratively without the need for any type of formal rulemaking process. Because this proposal builds upon an effort begun under the Obama administration, it is likely that progress is already underway to meet this goal, and it could be completed early in the next administration.

### **II. Current state**

#### **Federal denials**

When an individual attempts to buy a gun from a licensed dealer, they are required to complete ATF Form 4473, a form that asks for certain identifying information about the individual, and

specific questions to ascertain whether the individual is prohibited from buying a gun.<sup>1</sup> The form includes a series of checkboxes asking the purchaser to answer “yes” or “no” with respect to each prohibiting category under federal law. Lying on this form is a federal crime, punishable by up to 10 years in prison, a fact which is clearly stated on the 4473 form itself.<sup>2</sup> One clear indication that an individual may have lied on the 4473 is when they check all of the boxes indicating that they are not prohibited from buying guns under federal law, yet fail the background check when the dealer contacts the National Instant Criminal Background Check System (NICS). In 2019, 10,948 individuals failed a background check, because they had either been convicted of a misdemeanor crime of domestic violence, or were subject to a domestic violence restraining order.<sup>3</sup>

When a prospective purchaser is denied a gun transfer in a state that relies on the federal background check system to determine gun eligibility, the NICS section relays this information to the ATF Denial Enforcement and NICS Intelligence (DENI) Branch. There, the DENI branch reviews the transaction to determine if it should be referred to one of ATF’s 25 field divisions for further investigation and potential prosecution for lying on the 4473. In cases where a gun has been transferred before the denial determination was made, known as a “delayed denial,” ATF field officers must retrieve the firearm and contact the individual with a notice warning them not to try to obtain a gun again. For standard denials, in which a gun has not been transferred, the ATF can prioritize which cases should be investigated and referred to a United States Attorney’s Office (USAO) for prosecution.

These investigations are resource intensive and must meet stringent criteria to be prosecuted. As a result, the ATF generally only refers cases to USAOs where “aggravating circumstances exist,” such as a history of violent felonies or frequent offenses.<sup>4</sup> In one analysis, the GAO found that most USAOs actively require the ATF to refer denial cases that involve convictions of domestic violence.<sup>5</sup> However, because cases proving a prohibited person knowingly lied on a Form 4473 can be difficult to build and are often deemed not a priority for federal prosecutors, prosecution of even these cases is rare. In Fiscal Year 2017, 112,090 federal denials were made, of which 12,710 were investigated by ATF field offices, and only 12 prosecuted by USAOs.<sup>6</sup>

## State denials

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<sup>1</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, “Firearms Transaction Record,” U.S. Department of Justice, revised May 2020, <https://www.atf.gov/file/61446/download>.

<sup>2</sup> 18 U.S.C. § 922(a)(6); 18 U.S.C. § 924(a)(2).

<sup>3</sup> U.S. Department of Justice, “2019 Operations Report,” accessed October 15, 2020, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>.

<sup>4</sup> 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 2020, <https://www.gao.gov/assets/700/694290.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

In addition to being a violation of federal law, providing false information to a gun dealer in connection with a prospective purchase may also violate state laws regarding making false statements. The fact that an individual who is prohibited from gun possession even attempted to buy a gun can be a crucial piece of information for local law enforcement about the potential risk that person poses to public safety in the community. Some states have begun to take these lie-and-try-to-buy cases more seriously by investigating and, when appropriate, prosecuting offenders for this illegal conduct.

In 2014, Oregon implemented new statewide protocols for police on how to investigate denials: when an individual fails a background check at a gun store, the state police are alerted through the state's Firearm Instant Check System, and state troopers are dispatched immediately to the dealer to investigate.<sup>7</sup> In the first six months of the program, 1,071 firearm denial investigations were initiated, and 462 cases were referred to the district attorney for prosecution.<sup>8</sup> Virginia state police have aggressively investigated individuals who fail background checks too. Since 2000, the state police notifies local law enforcement when a resident of its jurisdiction fails a background check and the local police conduct further investigation. This process has resulted in a number of criminal prosecutions.<sup>9</sup> In Pennsylvania, the State Police Firearms Division initiates investigations when a denial is issued as well. Between 1999 and 2013, a total of 1,627 prohibited individuals were convicted for illegally attempting to buy firearms in the state.<sup>10</sup>

More recently, Washington, Hawaii, and Tennessee have enacted so-called lie-and-try laws. Washington state's lie-and-try law was implemented in 2017, and requires FFLs to notify the Washington Association of Sheriffs and Police Chiefs (WASPC) when a prohibited person attempts to buy a gun; WASPC then notifies local law enforcement to investigate. In its first year of enactment, more than 3,200 transactions were denied and 669 were referred to law enforcement for investigation.<sup>11</sup> Recognizing the threat of an armed abuser, Washington also created an automated protected person notification system allowing a person to register to receive notification if an individual subject to a domestic violence order attempts to purchase a firearm. Legislation passed in 2020 made Washington a full point-of-contact state, requiring the

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<sup>7</sup> Oregon State Police Training Bulletin, "Handling Denied Firearms Transactions" June 16, 2014, <http://www.oregonfirearms.org/wp-content/uploads/2014/06/FICS-Bulletin-.pdf>.

<sup>8</sup> Oregon State Police, "Oregon State Police Firearms Instant Check System (FICS) Denied Firearm Transactions & Investigations" 2015, [https://web.archive.org/web/20170619205239/http://www.oregon.gov/osp/ID/docs/FICS%20DENIAL%20REPOTS/201406\\_12%20FICS%20Denial%20Report%20-%202014.pdf](https://web.archive.org/web/20170619205239/http://www.oregon.gov/osp/ID/docs/FICS%20DENIAL%20REPOTS/201406_12%20FICS%20Denial%20Report%20-%202014.pdf).

<sup>9</sup> Virginia State Police, "Facts and Figures Report" 2013, [http://www.vsp.state.va.us/downloads/Annual\\_Report\\_Facts\\_Figures/Update-%202013%20Facts%20and%20Figures1.pdf](http://www.vsp.state.va.us/downloads/Annual_Report_Facts_Figures/Update-%202013%20Facts%20and%20Figures1.pdf); Mark Bowes, "Stats Show Background Checks are Effective," *Richmond Times-Dispatch*, February 17, 2013, [https://richmond.com/news/virginia/stats-show-background-checks-are-effective/article\\_ac6626fd-8bf5-55d7-83cf-d464e379000a.html](https://richmond.com/news/virginia/stats-show-background-checks-are-effective/article_ac6626fd-8bf5-55d7-83cf-d464e379000a.html).

<sup>10</sup> Pennsylvania State Police, "2013 Firearms Annual Report" 2013, [http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania\\_State\\_Police\\_2013\\_Firearms\\_Annual\\_Report.pdf](http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2013_Firearms_Annual_Report.pdf).

<sup>11</sup> "Letter from Steven D. Strachan, Washington Association of Sheriffs and Police Chiefs Executive Director, to Governor Inslee, Lieutenant Governor Habib and Speaker Chopp," November 8, 2018, <https://assets.documentcloud.org/documents/5348030/2018-Denied-Firearms-Transactions-Annual-Report.pdf>.

creation of its own background check system. Thirty days after the Washington State Patrol issues a notification to dealers that the state firearms background check system has been established, the state patrol is required to report each denial to the local law enforcement agency in the jurisdiction where the attempted purchase or transfer took place. The reported information will include the identifying information of the applicant, the date of the application and denial of the application, the basis for the denial of the application, and other information deemed appropriate by the Washington State Patrol.<sup>12</sup>

In 2017, Hawaii also enacted a law requiring the chief of police to report individuals whose permit applications are denied because the applicants are prohibited from purchasing or possessing a firearm under state or federal law. This law requires the chief of police to report denied individuals to the prosecuting attorney in the county where the permit was denied, the state attorney general, the United States attorney for the District of Hawaii, and the state director of public safety. If the permit to acquire was denied because the applicant is subject to a domestic violence order, the chief of police must, within three business days from the date of denial, send written notice to the court that issued the order. When the director of public safety receives notice that an applicant has been denied a permit because of a prior criminal conviction, the director of public safety must determine whether the applicant is currently serving a term of probation or parole. If so, the director must send a written notice of the denial to the applicant's probation or parole officer.<sup>13</sup>

Under Tennessee law, if a person who has been adjudicated as a "mental defective" or judicially committed to a mental institution attempts to purchase a firearm and is denied through the Tennessee Bureau of Investigation (TBI), the TBI must contact the chief law enforcement officer of the jurisdiction where the attempted purchase occurred within 24 hours to initiate an investigation into a possible violation of law.<sup>14</sup>

### **Attempts to establish a federal alert system**

More must be done at the federal level to prevent prohibited individuals who have actively attempted to obtain a firearm from gaining access to one through another avenue. In recent years, the ATF DENI branch has increased the number of denials referred to field offices for investigation: from Fiscal Year 2011 to Fiscal Year 2017, standard denial referrals increased more than 200%.<sup>15</sup> However, the ATF has not received corresponding increases in staffing or resources to investigate these cases in the swift manner needed to keep communities safe. By

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<sup>12</sup> Giffords Law Center to Prevent Gun Violence, "Background Check Procedures in Washington," accessed October 15, 2020, <https://giffords.org/lawcenter/state-laws/background-check-procedures-in-washington/>.

<sup>13</sup> Giffords Law Center to Prevent Gun Violence, "Background Check Procedures in Hawaii," accessed October 15, 2020, <https://giffords.org/lawcenter/state-laws/background-check-procedures-in-hawaii/>.

<sup>14</sup> Giffords Law Center to Prevent Gun Violence, "Background Check Procedures in Tennessee," accessed October 15, 2020, <https://giffords.org/lawcenter/state-laws/background-check-procedures-in-tennessee/>.

<sup>15</sup> 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, <https://www.gao.gov/assets/700/694290.pdf>.

incorporating state and local law enforcement into this process, the ATF can share this investigative burden. State and local law enforcement may already be aware of particularly dangerous individuals, and may be able to offer additional insight into a case's threat level.

In 2016, as part of a comprehensive set of executive actions to address gun violence announced by the Obama-Biden administration, President Obama announced that the FBI would partner with the US Digital Service to improve the background check system, including by "improving notification of local authorities when certain prohibited persons unlawfully attempt to purchase a firearm."<sup>16</sup> In the Senate's Fiscal Year 2019 Commerce, Justice, Science and Related Agencies Appropriations Bill, language was included that stated "The Committee encourages the ATF to, when possible, notify local law enforcement when a felon in their jurisdiction tries to buy a firearm. If the NICS check is not completed within three days and a felon obtains a firearm, the Committee encourages the ATF to notify and utilize the help of local law enforcement in retrieving the firearm."<sup>17</sup> Similarly, bicameral bipartisan legislation has been introduced in recent Congresses to require notification of state and local law enforcement within 24 hours of a background check denial.

As of 2020, the agencies have not established a system to accomplish this goal, but certain attempts to better connect NICS with state and local law enforcement have been made. The FBI has begun the process of integrating NICS with the National Data Exchange (N-DEx)—a repository of local, state, tribal, and federal records designed to share those records across jurisdictions. In its Fiscal year 2021 budget request to Congress, the FBI requested an increase in staff to allow examiners the opportunity to search N-DEx when performing a NICS check, which might—as it did in the case of the 2015 Charleston shooter's background check—contain prohibiting information not otherwise contained in the NICS system.<sup>18</sup> Because N-DEx can be used to connect federal law enforcement with their local counterparts, this system could be used to operationalize a denial notification system.

The same could be said for the National Crime Information Center (NCIC), one of the three databases searched by NICS during a background check. All law enforcement agencies have access to NCIC, which houses millions of crime records in 21 different files. Among those files is one solely dedicated to denied NICS transactions. Currently, law enforcement agencies can search this file at their discretion as a shared clearinghouse among many levels of law enforcement. Adding a notification for state and local law enforcement when this file gains a denial from their jurisdiction would ensure appropriate cases gain local attention.

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<sup>16</sup> The White House Office of the Press Secretary, "FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer," January 4, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>.

<sup>17</sup> Mr. Moran, "Report accompanying S. 2584," Senate Committee on Appropriations, <https://www.congress.gov/116/crpt/srpt127/CRPT-116srpt127.pdf#page=104>.

<sup>18</sup> U.S. Department of Justice, "FY 2021 Authorization and Budget Request to Congress," February 2020, <https://www.justice.gov/doj/page/file/1246311/download>.

## **Armed abusers increase risk**

While federal law enforcement may have previously believed individuals who lie-and-try represent a minimal threat to public safety, a 2006 internal ATF report shows that over a seven year period, 10 to 21% of individuals in denial cases referred to field offices for investigation were later arrested for gun crimes.<sup>19</sup> Today, that number is likely higher given the easy availability of guns through the internet and the rise of build-it-yourself ghost guns. Of the nearly 36,000 standard denials referred to ATF field divisions from Fiscal Year 2011 to Fiscal Year 2017, 46% were denied for domestic violence-related reasons.

By focusing notification on individuals prohibited for domestic violence reasons, law enforcement will prioritize individuals who pose a particularly time-sensitive threat. People with prior histories of domestic violence are likely to re-abuse in the short term, and even more likely to re-abuse in the long term.<sup>20</sup> One long-term study of males arrested for abusing female intimate partners in Massachusetts found that 60% of the men were rearrested for a new domestic assault, or had a protective order taken out against them within the 10-year follow up period.<sup>21</sup> Allowing these individuals to be armed greatly increases risk for victims of domestic abuse: the presence of a gun in a situation of domestic violence increases the likelihood of death by 500%. But these individuals present a threat to public safety outside the home as well, as a significant correlation exists between mass shooters and individuals with histories of domestic violence; an analysis of 749 mass shootings over a six-year period found that approximately 60% of those shootings were either domestic incidents or perpetrated by men who had previously committed acts of domestic violence.<sup>22</sup>

## **III. Proposed action**

The next administration should build upon the progress made during the Obama administration by operationalizing an automatic alert system, through which local law enforcement will be notified when an individual in their jurisdiction fails a background check because they are prohibited from gun possession due to a domestic violence disqualifier. Such an alert system would not only allow federal law enforcement to continue to investigate and prosecute these cases when appropriate, but would also ensure that local law enforcement agencies are aware of potential threats in their communities, and are equipped with relevant information to determine if a state prosecution for this conduct is warranted.

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<sup>19</sup> Jose Pagliery, "Gun form liars may go on to commit gun crimes, internal ATF research suggests," CNN Investigates, December 21, 2018, <https://www.cnn.com/2018/12/21/us/gun-form-liars-atf-invs/index.html>.

<sup>20</sup> Andrew R. Klein, "Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges," U.S. Department of Justice, June 2009, <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

<sup>21</sup> Andrew R. Klein and Terri Tobin, "A longitudinal Study of Arrested Batterers, 1995-2005: Career Criminals," *Violence Against Women* Vol. 14, no. 2, (2008), <https://journals.sagepub.com/doi/abs/10.1177/1077801207312396>.

<sup>22</sup> Jackie Gu, "Deadliest Mass Shootings Are Often Preceded by Violence at Home," *Bloomberg*, June 30, 2020, <https://www.bloomberg.com/graphics/2020-mass-shootings-domestic-violence-connection/>.

The attorney general should work with the FBI and ATF to determine the most appropriate way to operationalize this alert system. As discussed above, either N-DEx or NCIC may be appropriate systems to use for this purpose.

#### **IV. Legal justification**

There is nothing in the laws or regulations governing the National Instant Criminal Background Check System (NICS) that prohibits the creation of this type of alert system. Notifying local law enforcement of background checks denials related to domestic violence would not implicate any of the prohibited activities enumerated in the regulations,<sup>23</sup> nor would it result in the creation of a registry of gun owners, which is also prohibited.<sup>24</sup> While the regulations require that all identifying information pertaining to background checks that are allowed must be purged from the system after 24 hours, the FBI is permitted to retain data pertaining to background checks that are denied indefinitely.<sup>25</sup> This type of alert system also does not implicate regulations restricting access to NICS, since it would not require gun dealers or local law enforcement to access the system proactively, but rather would involve the FBI communicating this information out.<sup>26</sup>

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<sup>23</sup> 28 C.F.R. §25.11.

<sup>24</sup> 28 C.F.R. § 25.9(b)(3).

<sup>25</sup> 28 C.F.R. § 25.9.

<sup>26</sup> 28 C.F.R. § 25.6 - 25.8.