

## RECOMMENDED ACTION MEMO

**Agency:** Department of Justice, Federal Bureau of Investigation  
**Topic:** N-DEx Rule  
**Date:** November 2020

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**Recommendation:** Promulgate a regulation allowing the NICS section access to the National Data Exchange (N-DEx) System.

### I. Summary

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

A September 2016 audit by the DOJ Office of the Inspector General found that the FBI National Instant Criminal Background Check System (NICS) section—the branch of the FBI responsible for operating the firearm background check system—does not currently have access to N-DEx. The Office of the Inspector General found that had N-DEx been available to the NICS section, it would have identified the Charleston, South Carolina, gunman as a prohibited purchaser because of a previous drug-related arrest, and he would have failed a background check and been unable to buy a gun from a licensed gun dealer.

The FBI is currently working to implement use of N-DEx as a *secondary* search database that would be searched only if a prospective firearm purchaser is flagged in the existing primary databases during a NICS check. Under this proposal, we recommend the DOJ issue a rule amending the NICS implementing regulations to add N-DEx as a primary database during a NICS check.

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

The US Department of Justice (DOJ) originally promulgated regulations to implement NICS in 1998 and has since amended those regulations multiple times, the last one occurring in 2014. This proposal, recommending that the DOJ once again amend the NICS implementing regulations, would follow the same notice-and-comment rulemaking procedure, as previously followed, pursuant to Section 553 of the Administrative Procedure Act. The DOJ should begin process by issuing a Notice of Proposed Rulemaking to this effect within the first 100 days of the next administration.

### II. Current state

#### **National Instant Criminal Background Check System**

The National Instant Criminal Background Check System (NICS) was established through the passage of the Brady Act and launched by the FBI in 1998.<sup>1</sup> The act established that such a

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<sup>1</sup> See 34 U.S.C. §§ 40901 *et seq.* Federal law prohibit the following persons from receiving firearms: (1) persons under indictment for or convicted of a crime punishable by imprisonment for a term exceeding 1 year; (2) fugitives from justice; (3) unlawful users and/or addicts of any controlled substances; (4) persons

system would determine “whether receipt of a firearm by a prospective transferee would violate [Federal] or State law.”<sup>2</sup>

NICS comprises three separate databases: the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index. NCIC contains information on protective orders and active felony or misdemeanor warrants; III contains individual criminal history records; and the NICS Index contains information provided by federal, state, and local agencies on other prohibited persons such as undocumented persons, and persons who have renounced their citizenship, been adjudicated mentally defective, been dishonorably discharged from the military, or deemed controlled-substance abusers.<sup>3</sup>

The FBI maintains and operates NICS, which is implemented by the regulations found at 28 CFR Part 25. In 2008, in the wake of the mass shooting at Virginia Tech, Congress addressed NICS again, through the NICS Improvement Amendments Act of 2007 (NIAA).<sup>4</sup> The NIAA addresses certain information gaps regarding “prohibiting mental health adjudications and commitments and other prohibiting backgrounds.”<sup>5</sup>

### **The NICS process**

A federal firearms licensee (FFL) “may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act.”<sup>6</sup> The background check process is initiated when an FFL receives a firearms transaction record, more commonly

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adjudicated as mentally defective or who have been committed to any mental institution; (5) illegal aliens or aliens admitted to the United States under a nonimmigrant visa; (6) persons dishonorably discharged from the U.S. Armed Forces; (7) those who have renounced their U.S. citizenship; (8) subjects of a protective court order; and (9) persons convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. § 922(d), (g).

<sup>2</sup> *Id.*

<sup>3</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, <https://oig.justice.gov/reports/2016/a1632.pdf>; see also US Department of Justice, Federal Bureau of Investigation, “National Instant Criminal Background Check System Posts NICS Index Data,” March 18, 2016, <https://www.fbi.gov/news/pressrel/press-releases/national-instant-criminal-background-check-system-posts-nics-index-data> (“The NICS Index was created specifically for use by the NICS and contains descriptive information on persons determined to be disqualified from possessing a firearm based upon state or federal law. Local, state, federal, and tribal entities voluntarily contribute information to the NICS Index. This information contains prohibiting information that may not be found in the III or the NCIC.”).

<sup>4</sup> See Pub. Law 110-180.

<sup>5</sup> US Department of Justice, Bureau of Justice Statistics, “The NICS Improvement Amendments Act of 2007,” accessed August 19, 2020, <https://www.bjs.gov/index.cfm?ty=tp&tid=49>.

<sup>6</sup> 28 C.F.R. § 25.6(a).

referred to as ATF Form 4473, from a prospective purchaser, and contacts the FBI NICS Operations Center or their state's point of contact (POC),<sup>7</sup> if one exists.<sup>8</sup>

#### *Access to NICS through the FBI NICS Operations Center*

In non-POC states, when an FFL contacts the FBI NICS Operations Center and provides the requisite information from the ATF Form 4473, NICS is searched to determine whether the purchaser matches any records in the three databases (NICS Index, NCIC, III).<sup>9</sup> If no matches are found, the FFL is instructed to proceed with the transfer of the firearm. If a match, or "hit", is found, a NICS examiner may conduct a quick review and evaluation of the records and then provide one of three possible responses to the FFL:

- (A) "Proceed" if there is no disqualifying record in the NICS Index, NCIC, or III.
- (B) "Deny" if there is a match with a record indicating the transferee is prohibited under federal or state law
- (C) "Delay" if the NICS search finds a match that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by federal or state law. A "delay" response to the FFL indicates that the firearm transfer should not proceed until a "proceed" response is received from NICS, or the expiration of three business days (unless prohibited by local law), whichever occurs first.<sup>10</sup>

#### *Access to NICS through POCs*

The FBI has given each state the option of having a state or local agency act as a point-of-contact (POC) for NICS.<sup>11</sup> If the state chooses to have a state or local agency act as a POC, 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, FFLs in

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<sup>7</sup> A "point-of-contact" or "POC" is as "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." *Id.* § 25.2

<sup>8</sup> States determine whether they will serve as a POC.

<sup>9</sup> The FBI will, on behalf of the FFL: "(1) Verify the FFL Number and code word; (ii) Assign a NICS Transaction Number (NTN) to a valid inquiry and provide the NTN to the FFL; (iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and (iv) Provide [one of three possible] NICS responses based upon the consolidated NICS search results to the FFL that requested the background check." 28 C.F.R. § 25.6(c)(1)(i) - (iv).

<sup>10</sup> *Id.* § 25.6(c)(1)(iv)(A) - (C). The three responses do not "contain any of the underlying information in the records checked by the system." *Id.* § 25.6(c)(2).

<sup>11</sup> See Federal Bureau of Investigation, "1998-1999 NICS Operations Report," 5, [https://www.fbi.gov/file-repository/operations\\_report\\_98\\_99.pdf/view](https://www.fbi.gov/file-repository/operations_report_98_99.pdf/view); 28 C.F.R. § 25.2.

the state contact the FBI directly for the background check.<sup>12</sup> POCs have electronic access to NICS “virtually 24 hours each day through the NCIC communication network.”<sup>13</sup> The POC “transmit[s] the request for a background check via the NCIC interface to the NICS.”<sup>14</sup> Upon receipt of the request, “POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems.”<sup>15</sup>

Similar to non-POC states, when NICS receives the POC request, NICS searches the relevant databases for any matching record(s). If no matches are found, the POC instructs the FFL to proceed with the transfer of the firearm. If a match, or “hit”, is found, the POC may conduct a quick review and evaluation of the records and then provide the FFL with one of the three responses described above—proceed, deny, delay.<sup>16</sup> If the FFL receives a “delay” response, the POC conducts further research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal or state law.<sup>17</sup>

## **N-DEx**

The FBI’s National Data Exchange (N-DEx) system is “an unclassified national information sharing system that enables criminal justice agencies to search, link, analyze, and share local, state, tribal, and federal records.”<sup>18</sup> N-DEx enables users to link investigations and investigators by connecting seemingly unrelated data on people, places, and things. According to the FBI, N-DEx “complements” NCIC and III (two of the three databases checked in a NICS check).<sup>19</sup>

The N-DEx system is not enumerated in the NICS implementing regulations as one of the databases to be checked prior to an FFL transaction; however, the N-DEx contains information that is not included in the three named databases, including “incident, arrest, and booking reports; pretrial investigations; supervised released reports; calls for service; photos; and field contact/identification records.”<sup>20</sup> The N-DEx system is currently used by criminal justice professionals, including corrections personnel, detectives, patrol officers, probation and parole officers, and regional dispatchers.<sup>21</sup>

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<sup>12</sup> 28 C.F.R. § 25.6.

<sup>13</sup> *Id.* § 25.6(d).

<sup>14</sup> *Id.* § 25.6(d)(1)–(2).

<sup>15</sup> *Id.* § 25.6(e).

<sup>16</sup> US Department of Justice, Federal Bureau of Investigation, “About NICS,” accessed August 19, 2020, <https://www.fbi.gov/services/cjis/nics/about-nics>; Owen Greenspan & Richard Schauffler, “State Progress in Record Reporting for Firearm-Related Background Checks: Fingerprint Processing Advances Improve Background Checks,” September 2016, <https://www.ncjrs.gov/pdffiles1/bjs/grants/250275.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> US Department of Justice, Federal Bureau of Investigation, “National Data Exchange (N-DEx) System,” accessed June 30, 2020, <https://www.fbi.gov/services/cjis/ndex>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (The N-DEx System “fills information gaps and provides situational awareness.” It also “complements other well-known FBI systems, such as” NCIC, III, and Next Generation Identification.).

<sup>21</sup> *Id.* Although we could not confirm in any publicly available research, we believe that dealers that used state-based NICS programs could also obtain access to N-DEx.

## **N-DEX as a “secondary” search database**

As described in further detail below, the Charleston shooter was able to pass a background check to obtain a gun, because NICS failed to contain sufficient information to determine that he was prohibited from possessing firearms. In response to the Charleston shooting, a pilot program was conducted using N-DEX that demonstrated how N-DEX can improve the system’s ability to identify ineligible purchasers. Based on the pilot program’s results, the FBI began working to implement use of N-DEX as a “secondary search database,” meaning that it would be searched only if a prospective firearm purchaser is flagged in the existing primary databases during a NICS check.

### **III. Proposed action**

To “improve the “efficacy and effectiveness”<sup>22</sup> of NICS background checks and to avert potential consequences associated with missing a record that may be available in federal datasets, the FBI should amend the NICS implementing regulation (28 CFR Part 25) to **add the N-DEX system as the fourth database searched as a part of a NICS check, making the N-DEX system a primary search database.**

Specifically, the FBI should add:

- the following to the definitions at 28 C.F.R. § 25.2: “N-DEX system (National Data Exchange System) means the unclassified national information sharing system that enables criminal justice agencies to search, link, analyze, and share local, state, tribal, and federal records.”
- the following sentence at the end of 28 C.F.R. § 25.4: “Information in the N-DEX system that will be searched during a background check has been or will be contributed voluntarily by federal, tribal, state, and local, criminal justice agencies.”
- “N-DEX” in the subsections in § 25.6 that list the relevant databases (NICS Index, NCIC, III).\<sup>23</sup>
- “N-DEX” in the last sentence, after “III” of § 25.9(a)

As discussed above (see section National Instant Criminal Background Check System), when a NICS background check is initiated, NCIC, III, and the NICS Index are the primary databases searched for records that might prohibit the transferee from purchasing firearms.<sup>24</sup> However,

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<sup>22</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, <https://oig.justice.gov/reports/2016/a1632.pdf> (recommending that the FBI “implement the FBI Inspection Division report’s recommendation that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI, potentially including the N-DEX database.”).

<sup>23</sup> *E.g.*, 28 C.F.R. §§ 25.6(c)(iii), (iv)(A), (iv)(C); (f), (f)(2).

<sup>24</sup> US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, “National Instant Criminal Background Check System (NICS) Operations,” May 3, 2017, <https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view> (2016 NICS

the N-DEx system contains records not included in the three primary NICS databases, records that can serve to complement the primary databases.

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

An agency is “free to change their existing policies as long as they provide a reasoned explanation for the change.”<sup>25</sup> When an agency changes its existing position, it “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>26</sup> However, an agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.”<sup>27</sup>

In addition, “[i]n explaining its changed position, an agency must also be cognizant that long-standing policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>28</sup> “[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice” and that “an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.”<sup>29</sup>

Accordingly, in its explanation for the Proposed Rule, the ATF should explain the addition of N-DEx as a primary search database by reference to the public safety danger associated with failures of the system to identify ineligible gun purchasers. As described below, the Charleston shooting demonstrated the horrific results when a background check fails to identify a person prohibited from possessing firearms, allowing the person to purchase weapons. In addition, the pilot program that was conducted in response to the shooting using N-DEx, demonstrated how N-DEx can improve the system’s ability to identify ineligible purchasers. The ATF can point to the results of this pilot program in explaining this change.

#### **Danger when background checks fail to identify ineligible purchasers**

A 2016 DOJ inspector general audit acknowledged the “potential consequences associated with missing even a single record that may be available in existing federal datasets” and recommended that “the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI, potentially including the N-DEX

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operations report explaining that While only NCIC, III, and the NICS Index are explicitly identified as “relevant databases” in the background check regulations, U.S. Immigration and Customs Enforcement databases also are searched by the NICS for non-US citizens who attempt to receive firearms in the US).

<sup>25</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat’l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 981–982 & *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-864 (1984)).

<sup>26</sup> *Encino*, 136 S. Ct. at 2125 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

<sup>27</sup> *Encino*, 136 S. Ct. at 2126.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (internal quotations and citations omitted).

database.”<sup>30</sup> That audit was the result of the June 2015 mass shooting at Emanuel AME Church in Charleston, South Carolina. According to that audit, the shooting “demonstrate[d] that even a single firearm background check error can contribute to tragic results.”<sup>31</sup> In the wake of the shooting, the FBI discovered that the gunman “should not have been allowed to purchase the gun” used in the shooting.<sup>32</sup> The NICS background check revealed a felony arrest for a drug charge, but without documentation of a conviction or admission, the background check did not result in an automatic denial.<sup>33</sup> Rather, approval was delayed while NICS examiners pursued additional documentation to assist in the determination; however, because of paperwork errors and difficulty finding the proper authorities to confirm whether the gunman had been convicted,<sup>34</sup> the gunman was subject to a “default proceed” after three business days and was able to obtain the firearm.

While several mistakes were made during that background check process,<sup>35</sup> the DOJ inspector general cited the inability of NICS examiners to access N-DEX as a particular hindrance to denying the gunman’s purchase.

N-DEX contained data that would have revealed the prohibiting incident report for the alleged shooter in the Charleston shooting. However, the N-DEX database is not included as a NICS dataset. . . . FBI officials told us that as of August 2016, the NICS Section was unable to access N-DEX in order to conduct firearm background checks . . . .<sup>36</sup>

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<sup>30</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 23, <https://oig.justice.gov/reports/2016/a1632.pdf>.

<sup>31</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 8, <https://oig.justice.gov/reports/2016/a1632.pdf>.

<sup>32</sup> US Department of Justice, Federal Bureau of Investigation, “Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase,” July 10, 2015, <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase>.

<sup>33</sup> See US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 22, <https://oig.justice.gov/reports/2016/a1632.pdf> (explaining that the gunman had admitted that he had possessed a controlled substance without a prescription, but this information was included in an incident report not contained in NICS, NCIC, or Ill). See ECF No. 93, United States’ Local Civ. Rule 26.03 (D.S.C.) Statement, at 1, 3, *Sanders v. United States*, 2:16-cv-2356-RMG (D.S.C. Dec. 16, 2019).

<sup>34</sup> For example, the arrest record incorrectly indicated that the Lexington County Sheriff’s Office was the arresting authority. US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 22, <https://oig.justice.gov/reports/2016/a1632.pdf>.

<sup>35</sup> See, e.g., ECF Nos. 50-1 to 50-3, Inspector’s Report, *Sanders v. United States*, 2:16-cv-2356-RMG (D.S.C. Jan. 26, 2018) (describing issues including “[t]he lack of timely responses and/or incomplete records,” “outdated and inefficient means of communication with various state and local agencies,” “prioritiz[ation of] volume over resolution,” and increased demand within the NICS section while “resources remained essentially the same” over the past decade).

<sup>36</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 22-23, <https://oig.justice.gov/reports/2016/a1632.pdf>. At the time of a CJIS manager’s deposition in October

## The results of the pilot program

Largely in response to the Charleston shooting, the NICS section conducted a pilot program designed to study the usefulness of incorporating N-DEX into the NICS background check system.<sup>37</sup> The pilot program lasted 42 days, during which NICS searched N-DEX on 67,554 records.<sup>38</sup> NICS reviewed 6,980 “hits” out of 11,417.<sup>39</sup> The program found no prohibitors for 5,982 of the records, and possible prohibitors on 655 records.<sup>40</sup> NICS made final decisions on 59 transactions: 31 denials and 28 proceeds.<sup>41</sup> Importantly, the pilot study demonstrated that a large majority of the ultimate denials, 24 of 31, “would have been given an immediate “proceed” if the N-DEX had not been searched as a primary search.”<sup>42</sup> While these 24 denials represent a small number of the overall records searched in N-DEX for the pilot study, they emphasize a significant weakness of the current background check system, a weakness that N-DEX could help address.

The following examples from the NICS Section 2016 pilot study demonstrate a significant weakness in NICS that can have significant consequences, and show the criticality of using N-DEX.<sup>43</sup> In one case, an individual with a mental health adjudication had been approved for a firearm purchase, because the current search databases revealed only one driving under the influence (DUI) charge.<sup>44</sup> Yet, several other DUI arrests were revealed in N-DEX, along with information that the individual “had been found to be a danger to himself or others and had received court-ordered treatment because of the alcohol abuse.”<sup>45</sup> Therefore, the individual met the mental adjudication criteria and should have been prohibited from purchasing a gun.

In another case, only a primary search of N-DEX would have identified the prospective purchaser, because no issues had been found in NICS, III, or NCIC.<sup>46</sup> Only N-DEX “documented the person was under indictment for a felony theft of property offense.<sup>47</sup> He had an indictment by the grand jury, and there was no evidence of that within III.”<sup>48</sup> That individual had already been transferred a gun, and “ATF was notified to submit for a firearm retrieval

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2017 in litigation against the government by survivors and relatives of victims of the Charleston shooting, NICS did not have N-DEX access. See ECF No. 43-20, Excerpt of Oct. 12, 2017 Dep. Tr. Of Christopher Alan Nicholas, at 135:22–136:8, *Sanders v. United States*, 2:16-cv-2356-RMG (D.S.C. Nov. 30, 2017).

<sup>37</sup> US Department of Justice, Federal Bureau of Investigation, “Criminal Justice Information Services Division Advisory Policy Board Meeting Minutes,” December 7-8, 2016, Phoenix, Arizona, 11.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Federal law required NICS to purge any records not reviewed within 24 hours.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at Appendix H, PowerPoint slide 19.

<sup>43</sup> See *id.* at 12.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



referral.”<sup>49</sup> Thus, while it is a promising first step to use N-DEx as a secondary search database, doing so will still fail to capture prohibited individuals whose information is only in N-DEx.

While NCIC, III, and the NICS Index contain a variety of information, records exist outside these databases that can fill gaps and provide a more complete overview of an individual’s history.

### **Impact on the system**

NICS is an already overburdened system. The addition of N-DEx may cause additional purchasers, who might otherwise have been immediately approved, to have their purchases delayed. However, the NICS section’s 2016 pilot program, which studied the usefulness of incorporating N-DEx into NICS, identified 24 of 31 denials in a 42-day period that would have been given an immediate “proceed” if the N-DEx had not been searched as a primary database.<sup>50</sup> Separately, a 2016 OIG report recommended that the FBI identify and review additional databases because of the “potential consequences associated with missing even a single record that may be available in existing federal datasets.”<sup>51</sup> While further delays are possible, the consequence of not using the available systems are horrific.<sup>52</sup>

The potential for further delays could be eliminated through additional NICS examiners. The NICS Section 2016 pilot study estimated the number of additional staff members who would be needed to accommodate the use of N-DEx as either a primary or secondary search database: “60 Full-Time Equivalents (FTEs) would be required to perform the additional 107,074.24 work hours if N-DEx was used as a primary search and 50 FTEs would be required to perform the additional 88,429.10 work hours if N-DEx was used as a secondary search.”<sup>53</sup> It is not clear how these numbers were calculated.

The department may wish to address these staffing needs by hiring more employees, reassigning employees, or a combination of the two. It is unclear how many, if any, employees have been hired to assist with N-DEx searches, or how many, if any, existing employees’ duties have changed to account for using N-DEx as a secondary search database. As demonstrated by the pilot study, using N-DEx may mean following up on more leads with law enforcement. Currently, 72% of background checks identify no problem and the purchaser is quickly approved.<sup>54</sup> It can be expected that the percentage of automatic approvals will decrease with the use of N-DEx, and the number of prospective

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<sup>49</sup> *Id.*

<sup>50</sup> CJIS Advisory Policy Board Meeting Minutes, December 7-8, 2016, Phoenix, Arizona, 11.

<sup>51</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 23, <https://oig.justice.gov/reports/2016/a1632.pdf>.

<sup>52</sup> See Ann Givens & Andrew Knapp, “FBI to Add Major Law Enforcement Database to Gun Background Check System,” *The Trace*, July 10, 2018, <https://www.thetrace.org/2018/07/fbi-background-check-system-nics-ndex-charleston/>.

<sup>53</sup> CJIS Advisory Policy Board Meeting Minutes, December 7-8, 2016, Phoenix, Arizona, 13.

<sup>54</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, 4, <https://oig.justice.gov/reports/2016/a1632.pdf>.

purchasers who may require further investigation may increase. Critically, however, N-DEx records are supplied by individual “record-owning agencies” and may require independent verification, because they are “limited to duplicates and summaries of records obtained and separately managed” by said agencies.<sup>55</sup> These duplicates and summaries may in fact speed the process, rather than slow it down, since they may help NICS examiners complete their analyses. Consequently, it is not clear how many, if any, additional staff should assist with these cases.

Notably, the need for additional staff may also be mitigated by legislation. Current law allows for the approval of a firearm purchase by default if a NICS determination is not made within three business days of the initial request.<sup>56</sup> Coupled with understaffing, the result is that hundreds of thousands of guns are sold to individuals, not because they have been affirmatively approved, but because they have been approved by default, i.e. were issued a “default proceed.”<sup>57</sup>

However, in February 2019, the House of Representatives passed H.R. 1112 (Clyburn), which would extend the three-business day deadline for the background check process to be completed before a firearm sale can proceed by default. If such a bill were to become law, NICS examiners (and their equivalents in POCs) would have additional time to complete their evaluation of the records included in NICS searches. Consequently, the addition of N-DEx as a primary search database might not increase the need for additional staff all that much, as existing staff will have more time to complete the checks.

## Privacy

If N-DEx is added to the NICS, an increased number of individuals who are currently unable to access the personal information, such as NICS examiners and state POCs, will have access to personal information in N-DEx. This raises privacy concerns.

However, N-DEx privacy safeguards will still apply. For example, pursuant to the N-DEx policy and operating manual, the record-owning agency retains responsibility, control, and ownership of N-DEx records.<sup>58</sup> N-DEx allows the agency to “protect their data in accordance with the

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<sup>55</sup> US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, “Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual,” September 21, 2018, Section 2.5.3, <https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view>.

<sup>56</sup> See, e.g., 18 U.S.C. § 922(t)(1)(B) (no licensee shall transfer a firearm unless “3 business days . . . have elapsed since the licensee contacted the [NICS background check] system”).

<sup>57</sup> See, e.g., Ann Givens, “The Gun Background Check System Is Overburdened and Understaffed, DOJ Budget Request Shows,” *The Trace*, March 21, 2018, <https://www.thetrace.org/2018/03/gun-background-check-staff-shortage-justice-department-budget/> (“NICS checkers are often so overloaded that they don’t even have time to start a check until they are nearing the end of the 72-hour window”); see also Kevin Johnson, “FBI official: ‘Perfect storm’ imperiling gun background checks,” *USA Today*, January 19, 2016, <https://www.usatoday.com/story/news/nation/2016/01/19/fbi-guns-background-checks/78752774/> (“new positions are desperately needed, authorities said, to support the seriously stressed NICS system”).

<sup>58</sup> See, e.g., US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, “Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual,” September 21, 2018, Section 1.4.2, <https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view>.

laws and policies which govern dissemination and privacy for their jurisdictions.”<sup>59</sup> Access to the N-DEx must be through secure internet connections or the FBI’s Criminal Justice Information Services (CJIS) Wide Area Network.<sup>60</sup> Additionally, the NICS privacy safeguards and the retention and destruction policies applicable to the three current databases will apply to the N-DEx as a primary database.<sup>61</sup>

### **Procedural question**

Adding N-DEx as a fourth database in a NICS check through the rulemaking process could be viewed as an unnecessary burden. The district court in the Charleston litigation rejected the government’s conclusion that for the NICS Section to access N-DEx, CJIS Advisory Policy Board approval (which has now been granted) and a change in the regulation are required.<sup>62</sup> The court found that “the Director of the FBI has full authority to allow NICS examiners to access N-DEx” and “could do so today.”<sup>63</sup> Likewise, “FBI’s Office of General Counsel has already determined that background checkers can start to access N-DEx without the FBI changing any regulations.”<sup>64</sup>

Even though the FBI director may direct NICS examiners to access N-DEx for NICS checks, the installation of a new director or administration could reverse that directive. A regulation, on the other hand, has the force and effect of law, creating a mandate resulting in consistent use of N-

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<sup>59</sup> US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, “Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual,” September 21, 2018, Section 1.4.3, <https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view>.

<sup>60</sup> See, e.g., US Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, “Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System Policy and Operating Manual,” September 21, 2018, Section 1.4.5, <https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf/view>.

<sup>61</sup> 28 C.F.R. Subpart A. See also National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58303, 58303 (Oct. 30, 1998) (“The FBI will not establish a federal firearms registry. The FBI is expressly barred from doing so by section 103(i) of the Brady Act.”).

<sup>62</sup> US Department of Justice, Office of the Inspector General, “Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System,” September 28, 2016, ii, <https://oig.justice.gov/reports/2016/a1632.pdf>. The December 2016 CJIS APB meeting minutes do note that as part of the expansion of the NICS background checks to include N-DEx, the “FBI’s Office of the General Counsel [is] to develop a modification to the current federal regulation for the NICS” that will “allow for the inclusion of the query of the N-DEx.” CJIS Advisory Policy Board Meeting Minutes, December 7-8, 2016, Phoenix, Arizona, Appendix D, 10. The NICS Section recommended that “the revised regulation encompass future information systems managed by the FBI.” *Id.* This suggests that, beyond the textual changes advised in Section III. A of this memorandum specific to N-DEx, an updated regulation would be broader and provide more opportunity to query additional search databases as appropriate.

<sup>63</sup> *Sanders v. United States*, 324 F. Supp. 3d 636, 648–49 (D.S.C. 2018) (rejecting government’s argument), rev’d on other grounds, 937 F.3d 316 (4th Cir. 2019).

<sup>64</sup> See Ann Givens & Andrew Knapp, “FBI to Add Major Law Enforcement Database to Gun Background Check System,” *The Trace*, July 10, 2018, (citing June 2018 CJIS APB meeting minutes).

DEX for NICS checks.<sup>65</sup> Any attempt to reverse the regulation by another administration would require their adherence to the notice-and-comment procedures.

## **V. Next steps and additional action**

### **Steps that could be taken in 2020**

There are several actions that can be taken now to advance the proposal. First, Ann Givens, a journalist at *The Trace*, recommended reaching out to primary sources who would likely be able to provide important information about the background check system and the FBI's consideration of N-DEX as a primary or secondary search database—including Frank Campbell, one of the original NICS designers and former Department of Justice attorney, and Ross Loder, former vice chair of the CJIS Advisory Policy Board NICS Subcommittee and former bureau chief for weapon permits of the Iowa Department of Public Safety. Their insight would be particularly useful to understand concerns about adding N-DEX as a primary search database. Second, the proposed text of a draft rule that includes N-DEX in the current NICS regulation should be developed. To the extent the FBI's Office of General Counsel has drafted a modified rule already, it can be evaluated for comment during the public comment process.

### **Related areas of advocacy for executive action**

The NICS section needs more resources, both human and economic. A significant unanswered question, also discussed above (see section Legal Justification), is whether the addition of N-DEX as a primary search database (or even as a secondary search database) will create a net benefit if Congress does not provide NICS with additional resources, or provides NICS with more time to make these determinations. Thus, efforts to increase capacity of the NICS section would address the limiting factor of finite—and overburdened—staff and resources, and should also be a focus of the administration.

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<sup>65</sup> See Sanders, 937 F.3d at 332–34 (rejecting argument that failure to check N-DEX violated a mandatory directive where N-DEX is not identified as a “relevant database” in 28 C.F.R. § 25.6 and is not included in the definition of “NICS Index” in 28 C.F.R. § 25.2).