



RECOMMENDED ACTION MEMO

Agency: Federal Bureau of Investigation
Topic: Expanding the Release of NICS Operations Data
Date: November 2020

Recommendation: Expand the public release of data regarding the operations of NICS, including the release of data related to background checks for firearms sales that have taken longer than three business days to complete.

I. Summary

Description of recommended executive action

Each year, the NICS section of the Criminal Justice Information Services (CJIS) division, a subcomponent of the Federal Bureau of Investigation (FBI), publicly releases data regarding the National Instant Criminal Background Check System (NICS), the system used to conduct background checks on gun purchasers. This data—which includes the number of background checks conducted by NICS, the number of firearms transactions denied under NICS, and the system’s Immediate Determination Rate—provide critical insights into the functioning of the nation’s background check system and the state of gun sales in America. In turn, this information helps to inform the development of smart policies and programs to address gun violence at the local, state, and federal level.

While the public release of this data is critical, it fails to provide a full picture of NICS operations. In particular, the NICS section does not currently publish enough data regarding NICS checks that took longer than three business days. Because federal law allows gun sales to proceed if a NICS background check is not completed within three days, these “default proceed” sales pose a significant risk to public safety.

To ensure policymakers, researchers, and advocates have a full understanding of these sales, and federal action is taken to limit the harms they pose, the next administration should expand the public release of NICS data regarding default proceed sales.

Overview of process and time to enactment

Releasing additional NICS data is currently within the NICS section’s authority, and as such, no further regulatory or sub-regulatory action would be needed. As discussed below, while gun activists could argue a provision included in appropriations bills since 2004 can be interpreted to require the destruction of some information by the FBI, the rider is explicitly limited to “identifying information” about individual gun transactions, such as the names of potential purchasers. It does not restrict the FBI’s ability to release aggregate data on NICS operations. As such, the

NICS section should be able to include additional data in both its bi-annual release of NICS data in the fall of 2021 and in its annual operations report for the 2021 calendar year.

II. Current state

NICS background checks

Under the Brady Handgun Violence Prevention Act (Bady Act), before a firearm dealer can transfer a firearm to an unlicensed individual, the dealer must initiate a background check through NICS to determine whether the prospective firearm transfer would violate federal or state law.¹ The system is run by the NICS section of CJIS, a subcomponent of the FBI. During a NICS check, descriptive data provided by an individual, such as name and date of birth, are used to search three national databases—managed by the FBI—containing criminal history and other relevant records, to determine whether or not the person is disqualified by law from receiving or possessing firearms.

States may choose among three options for performing NICS checks: (1) the state can conduct all of its own background checks, referred to as point-of-contact (POC) states, (2) the state and the FBI's NICS section can share responsibility for background checks, referred to as partial-POC states, or (3) the NICS section can conduct all background checks for a state.

According to the FBI, in 2019, NICS experienced the highest volume in its history, as 28,369,750 firearm background checks were processed.² Of these, the FBI's NICS section processed 8,177,732 transactions and designated state and local criminal justice agencies processed 20,192,018.³

The Charleston Loophole

Though 90% of background checks conducted through NICS provide an answer in under two minutes (the system's "immediate determination rate"), about 10% of cases require further investigation and review by FBI agents.⁴ Under federal law, if the FBI or state agency cannot complete that investigation and make a final determination within three days (i.e., a determination of proceed or deny), the gun dealer may transfer the firearm, unless state law provides otherwise.⁵ Roughly 3% of sales take longer than three days to complete, allowing thousands of individuals to purchase firearms without a completed background check.⁶ These

¹ 18 U.S.C. § 922(t)(1).

² FBI, "2019 NICS Operations Report," accessed October 21, 2020, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>.

³ *Id.*

⁴ Giffords Law Center, "Fixing the Default Proceed Flaw," May 2018, <https://giffords.org/wp-content/uploads/2018/05/lawcenter-Default-Proceeds-Factsheet-Giffords-Law-Center.pdf>.

⁵ 18 U.S.C. § 922(t)(1)(B)(ii). States can establish their own firearm laws, such as additional prohibiting categories or additional time frames for completing checks before a dealer may transfer the firearm.

⁶ Joshua Eaton, "FBI Never Completes Hundreds of Thousands of Gun Checks," Roll Call, December 3, 2019, <https://www.rollcall.com/2019/12/03/fbi-never-completes-hundreds-of-thousands-of-gun-checks/>.

“default proceed sales” are commonly referred to as the “Charleston Loophole,” because the provision allowed the shooter who gunned down nine people at Emanuel AME Church in Charleston, South Carolina, to purchase his weapon despite being barred by federal law.

Due to the Charleston Loophole, between 2014 and 2018, an average of 3,963 firearms were transferred to people who are prohibited purchasers *each year*.⁷

The FBI can continue to research a transaction for potentially prohibiting information for up to 90 days even after a gun sale proceeds without a completed background check. However, after 90 days, all information related to the transaction must be destroyed, to comply with federal record-retention requirements.⁸ In practice, to ensure compliance with this destruction of records requirement, NICS is programmed to purge records of unresolved transactions within 88 days.

When the FBI makes a denial determination within this period (after three business days, but before 88 days), it is called a “delayed denial.” In delayed denial cases, the FBI determines if the firearm dealer transferred the firearm to the individual and, if so, refers these cases to the Department of Justice’s (DOJ) Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for possible retrieval of the firearm.

Recent surge in gun sales and impact on “default proceed”

According to FBI data, March 2020 set the all-time record for the number NICS background checks conducted since the creation of the system over 20 years ago.⁹ According to an analysis by Everytown, each of the five days that followed the announcement of federal social distancing guidelines in mid-March made the top-10 list for most background checks ever conducted in a single day.¹⁰ No other year has had more than one day in the top 10 since NICS was first created, let alone five in one week.¹¹ By the end of March 2020, NICS saw 3.7 million background check requests, 1.1 million more than the same month last year.¹²

This surge in gun sales exacerbated the Charleston loophole. According to historical trends, pandemic panic-buying in March likely resulted in at least 35,000 potential “default proceeds.”¹³ At least 523 were transferred to prohibited persons and, of those, close to one quarter went to prohibited domestic abusers.¹⁴ Likely, due to social-distancing requirements and the strain put on government resources by COVID-19, these numbers were much higher.

⁷ Everytown, “How COVID-19 Has Made a Federal Background Check Loophole Even Deadlier,” April 13, 2020, <https://everytownresearch.org/report/covid-default-proceed/>.

⁸ 28 C.F.R. § 25.9.

⁹ FBI, “NICS Firearm Checks: Month/Year,” accessed October 21, 2020, https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf/view.

¹⁰ Supra note 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

NICS data publication

Since NICS first became operational in 1998, the NICS section has published an annual NICS operations report.¹⁵ These reports have traditionally included a message from the NICS section chief and an analysis of data related to the previous calendar year's NICS operations. For example, the 2018 NICS operations report included the following data:¹⁶

- Transactions
 - the number of background checks conducted by NICS
- Records
 - the total number of records held within NICS indices
- Denials
 - the number of firearms transactions denied under NICS
 - the number of firearms transactions denied under NICS broken down by category of prohibition (e.g. felony conviction)
 - the number of denial challenge requests
- Processing time
 - the system's immediate determination rate
- "Default proceed"
 - the number of background check denials forwarded to the ATF for firearm retrieval¹⁷

The 2019 NICS operations report included expanded data on default proceed sales. In addition to the data outlined above, the report included the following data:¹⁸

- Default Proceed
 - the number of NICS checks that took longer than three business days;
 - the number of NICS checks that took longer than three business days but were purged after the 88 day window expired

Along with publishing an annual report, the NICS section publishes bi-annual data on its website, including:¹⁹

¹⁵ CJIS, "National Instant Criminal Background Check System (NICS): Reports & Statistics," accessed October 21, 2020, <https://www.fbi.gov/services/cjis/nics>.

¹⁶ FBI, "2018 NICS Operations Report," October 21, 2020, <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view>.

¹⁷ This only includes instances where final determination results in a deny decision and the NICS Section is advised by the federal firearms licensee ("FFL") that the firearm was transferred.

¹⁸ Supra note 2.

¹⁹ Supra note 15.

- Transactions
 - the number of background checks conducted by NICS per month
 - the number of background checks conducted by NICS per day
 - the number of background checks conducted by NICS per month by state
 - the ten days with the highest number of NICS checks
- Records
 - the total number of records held within NICS indices
 - the total number of records held within NICS indices by state
- Denials
 - the number of firearms transactions denied under NICS

III. Proposed action

To help policymakers better understand the impact the Charleston Loophole has on gun violence, the FBI, under the next administration, should expand the public release of data regarding the operations of NICS. In particular, the FBI's NICS section should include additional data in both its annual operations reports and in its bi-annual public data releases.

As noted above, since 2019, the NICS operations report has included some data on default proceed sales. While this additional data disclosure is helpful, it fails to provide a full picture of the potential danger these sales pose to the public. In particular, while the data provides a window into the scope of potentially dangerous sales (i.e. the number of delayed denials forwarded to ATF for firearm retrieval, plus the number of NICS checks that took longer than three business days but were purged after the 88 day window expired), it does not provide insight into federal action to limit the potential harm associated with these sales.

To correct for this shortcoming, future NICS operations reports should include the following data.

- The number of NICS checks that took longer than three business days but were resolved and denied before the 88 day window expired (the 2019 operations report only included data on sales where the NICS section was advised by the FFL that the firearm was transferred).
- Of these checks, the number of sales where either: (1) the NICS section was advised by the FFL that the firearm was transferred (included in the 2019 operations report) or (2) the NICS section did not receive a response from the FFL confirming the firearm had not been transferred.
- The number of successful retrieval actions taken by the ATF.

In addition to publishing additional data in NICS operations reports, the NICS section should begin publishing default proceed data in its bi-annual data releases. In particular, the NICS section should publish the following, broken down by state and month of purchase:

- the number of NICS checks that took longer than three business days
- the number of NICS checks that took longer than three business days but were purged after the 88 day window expired
- the number of NICS checks that took longer than three business days but were resolved and denied before the 88 day window expired
- the number of background check denials forwarded to ATF for firearm retrieval

IV. Risk analysis

Some might argue the Tiahrt amendment restricts the FBI's ability to release additional NICS statistics. Such arguments would fail.

The two riders within the Tiahrt amendment that are arguably relevant here are: (1) a rider on the release of gun tracing information and the information that gun dealers retain and report, and (2) a rider on the destruction of approved gun purchaser records. The one on the release of gun tracing information and the information gun dealers retain and report has an explicit exception for aggregate data. Hence, the FBI has released aggregate NICS data every year since the Tiahrt amendment was first passed. Indeed, the term "aggregate data" is used generally in the law to refer to statistical information that does not disclose any individual person involved.²⁰

The second rider only limits the FBI's ability to release "identifying information" about individual gun transactions, such as the names of potential purchasers. It does not restrict the FBI's ability to release aggregate data on NICS operations.

In relevant part, the Tiahrt amendment requires the FBI to destroy all approved gun purchaser records within 24 hours of the official NICS response to the dealer.²¹ A version of this requirement has been included in appropriations bills funding DOJ since 2004, including the 2012 version that was made permanent through the use of futurity language.²²

²⁰ See, e.g., 7 U.S.C. § 2276.

²¹ Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011).

²² See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 617, 118 Stat. 3 (2004); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 615, 118 Stat. 2809, 2915 (2005); Science, State, Justice, Commerce, and Related Appropriations Act of 2006, Pub. L. No. 109-108, § 611, 119 Stat. 2290, 2336 (2005); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (2007); Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844 § 512 (2007); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 511, 123 Stat. 524 (2008), Consolidated

The language of the rider is explicitly limited to “identifying information”:

Hereafter, none of the funds appropriated pursuant to this Act or any other provision of law may be used for... (2) any system to implement subsection 922(t) of title 18, United States Code, that does not require and result in the ***destruction of any identifying information*** submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the prospective transferee would not violate subsection (g) or (n) of section 922 of title 18, United States Code, or State law.²³ (emphasis added).

As such, aggregate data regarding NICS transactions, such as the number of background checks conducted by NICS and the number of successful retrieval actions taken by the ATF, does not fall within the Tiahrt amendment’s destruction of records requirement.

Appropriations Act 2010, Pub. L. No. 111–117, 123 Stat. 3128-3129 (2009); Consolidated and Further Continuing Appropriations Act 2012, Pub. L. No. 112-55, § 511, 125 Stat. 552 (2011). This language includes “futurity language” making these restrictions permanent until Congress makes an affirmative effort to remove them.

²³ Supra note 20.