

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Federal Bureau of Investigation
Topic: Fugitive from Justice
Date: November 2020

Recommendation: Issue new guidance overturning the Trump administration’s dangerous narrowing of the “fugitive from justice” prohibitor.

I. Summary:

Description of recommended executive action

The Gun Control Act of 1968 (GCA) places limits on who can purchase or possess a firearm under federal law.¹ Included in the GCA is a prohibition on gun possession by or transfer to a fugitive from justice (FFJ).² The GCA defines fugitive from justice as “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.”³

In 2017, the Trump administration released new guidance narrowing the Federal Bureau of Investigation’s (FBI) interpretation of FFJ under the GCA.⁴ The new guidance (2017 guidance memo) narrowed the FBI’s long-standing interpretation of FFJ by adding a heightened *mens rea* requirement that is difficult to prove with the limited data available within the National Instant Criminal Background Check System (NICS), the system used to conduct background checks on gun purchasers.

Specifically, the 2017 Guidance Memo states that an individual qualifies as an FFJ if they: (1) have an outstanding arrest warrant, (2) fled the state of prosecution, and (3) did so ***with the purpose*** of avoiding prosecution or to avoid giving testimony in a criminal proceeding.⁵ The 2017 guidance memo does not say how the NICS Section of the Criminal Justice Information Services (CJIS) division, the FBI subunit responsible for conducting background checks, can prove this *mens rea* requirement. Prior to this change, the FBI interpreted “fugitive from justice” to mean, simply, individuals with an outstanding arrest warrant.

NICS contains criminal history and other relevant records to determine whether or not the person is disqualified by law from receiving or possessing firearms. The system is not designed

¹ 18 U.S.C. § 921 et seq.

² 18 U.S.C. § 922(d)(2), (g)(2).

³ 18 U.S.C. § 922(a)(1).

⁴ Letter from Robin A. Stark-Nutter, “New Guidance Regarding Persons who are Fugitives from Justice,” FBI, NICS Section, CJIS Division, February 15, 2017, <https://www.documentcloud.org/documents/3493269-Fugitive-From-Justice-Guidance-State.html>.

⁵ *Id.*

to collect facts that aid in drawing inferences of specific mental states. As a result, following the Trump administration's change, NICS saw the number of federal denials under the FFJ prohibitor drop by over 70% in the first year, despite the number of total NICS checks increasing.⁶

In addition to narrowing the FFJ definition, the FBI's 2017 guidance memo also ordered the NICS Section to "immediately remove" all FFJ records. According to the memo, "[a]s a temporary measure, to ensure the accuracy of new submissions to the NICS Index, entries will not be permitted under the ... 'fugitive from justice' category until further notice."⁷ As a result, all 500,000 records were removed from the FBI database as of the spring of 2020, undermining the quality of the database in the future.⁸

To overturn the Trump administration's dangerous narrowing of the FFJ prohibitor and restore all appropriate records to the NICS system, the next administration should do the following.

- (1) **Rescind the 2017 guidance memo by issuing new guidance via the FBI that clarifies the definition of FFJ.** Specifically, the new guidance should clarify that an individual qualifies as an FFJ if they: (1) have an outstanding arrest warrant, (2) fled the state of prosecution, and (3) have *exhibited some indicia* they did so intentionally. Critically, the new guidance should provide a non-exhaustive list of indicia that would satisfy this lower *mens rea* requirement, including: (i) the individual knew misdemeanor or felony charges were pending against him or her, or (ii) the individual attempted to purchase a gun in a state that is not the warrant-issuing state.
- (2) **Restore all NICS records purged by the Trump administration.** Ideally, this would result in approximately 500,000 records being restored to NICS, which would help identify individuals who cannot legally possess firearms and prevent them from obtaining them in the future.

The memorandum should make clear that this guidance only affects the administration of NICS, and should not alter the enforcement of the gun prohibitor through criminal prosecutions, which has a different *mens rea* requirement.

Overview of process and time to enactment

Issuing agency guidance is an expedient and discretionary process, and the next administration should take this step immediately upon assuming office. Because the guidance will be released

⁶ Comparing 2016 and 2016 NICS numbers. Federal Bureau of Investigation, "2017 NICS Operations Report," accessed October 26, 2020, <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view>; Federal Bureau of Investigation, "2016 NICS Operations Report," accessed October 26, 2020, <https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view>;

⁷ 2017 Guidance Memo *supra* note 4.

⁸ Federal Bureau of Investigation, "Active Records in the NICS Indices," updated September 30, 2020, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view.

in the form of a non-binding policy statement, rather than through a new rule, the policy statement does not need to go through the Administrative Procedure Act's (APA's) notice-and-comment-rulemaking (NCRM) proceedings.

To comply with best practices for agency guidance, the document should acknowledge that such guidance does not have legislative authority; provide details on how the public may submit a complaint seeking the rescission or modification of the guidance; and provide an explanation for the change. Once finalized, the document should be published on the FBI's website.

II. Current state

FFJ prohibitor

Under the Brady Handgun Violence Prevention Act (Brady 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.⁹ Federal law contains nine prohibitors, including a prohibition outlawing the purchase or possession of firearms by a “fugitive from justice,” defined as “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.”¹⁰

The NICS system is run by the NICS Section of CJIS, a subcomponent of the FBI.¹¹ 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—which contain criminal history and other relevant records, to determine whether or not the person is disqualified by law from receiving or possessing firearms.

While the FBI maintains NICS and administers the background check provisions of the GCA, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has several duties related to NICS and the GCA, including investigating whether denied persons made false statements in connection with a firearms transfer and firearms retrieval whenever delayed transactions and incomplete background checks possibly result in prohibited persons acquiring firearms.¹²

As a result, both the FBI and the ATF must interpret the GCA to carry out their duties, including the FFJ prohibitor. However, the two agencies have long disagreed about how to interpret “fugitive from justice” under the GCA. Prior to 2017, the FBI interpreted “fugitive from justice” to mean, simply, individuals with an outstanding arrest warrant. This interpretation was not codified by FBI regulations. By contrast, the ATF's definition of FFJ is codified by regulations:

⁹ 18 U.S.C. § 922(t)(1).

¹⁰ 18 U.S.C. § 921(a)(15), 922(g)(2).

¹¹ 18 U.S.C. §922(t) and 28 C.F.R. Part 25.

¹² Congressional Research Service, “Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation,” October 17, 2019, <https://fas.org/sgp/crs/misc/R45970.pdf>.

Fugitive from justice. Any person who has fled from any State to avoid prosecution for a felony or a misdemeanor; or any person who leaves the State to avoid giving testimony in any criminal proceeding. The term also includes any person who knows that misdemeanor or felony charges are pending against such person and who leaves the State of prosecution.¹³

In effect, this definition means the ATF requires a more exhaustive set of requirements before an individual is considered a “fugitive from justice,” including that the individual: (1) has an outstanding arrest warrant, (2) fled the state of prosecution, and (3) has done so to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding, which can be established by showing the individual knows that misdemeanor or felony charges are pending against such person, and leaves the state of prosecution.

The ATF has also published informal guidelines for interpreting FFJ, which includes a “variety of factors [which] may be utilized to establish the element of knowledge.”¹⁴ These may include, but are not limited to:

Before leaving the state, the person was aware of pending/potential criminal charges, current criminal charges, or a criminal testimonial obligation (e.g., expert witness, material witness, victim, or informant) relative to the warrant.

The person was aware of the warrant before they left the state.

Before leaving the state, the person was aware of an underlying criminal obligation with which he/she later failed to comply.¹⁵

In 2016, the inspector general of the Department of Justice (DOJ) conducted an audit of NICS and urged the DOJ’s Office of Legal Counsel to issue guidance in order to resolve this disagreement.¹⁶ The audit noted the disagreement had been particularly disruptive in the context of delayed denials, since the ATF has frequently declined to retrieve a firearm because it disagreed with the NICS Section’s application of the FFJ prohibitor.¹⁷ From November 1999 through May 2015, there were 2,183 instances in which the ATF declined to retrieve a firearm from an individual identified by the NICS Section as a “fugitive from justice.”¹⁸

¹³ 27 C.F.R. § 478.11.

¹⁴ ATF, “Guidelines for Establishing Title 18, United States Code (U.S.C.), Section 922(g)(2)—Fugitive from Justice,” updated November 17, 2017, [https://wilenet.org/html/cib/news-fbi/Guidance%20for%20922\(g\)\(2\)%20Fugitive%20from%20Justice%20Federal%20Firearm%20Prohibition.pdf](https://wilenet.org/html/cib/news-fbi/Guidance%20for%20922(g)(2)%20Fugitive%20from%20Justice%20Federal%20Firearm%20Prohibition.pdf).

¹⁵ *Id.*

¹⁶ Office of the Inspector General, Dept. of Justice, “Audit of the Handling of Firearms Purchase Denials,” September 2016, <https://oig.justice.gov/reports/2016/a1632.pdf#page=1>.

¹⁷ *Id.*

¹⁸ *Id.*

In late 2016, according to public reporting, the Office of Legal Counsel was set to strike a balance between the two definitions and clarify that gun purchases could be denied under the FFJ prohibitor if an individual: (1) has an outstanding arrest warrant, and (2) fled the state of prosecution.¹⁹ This change was never announced or published publicly before President Trump took office.

Trump administration's narrowing of FFJ definition

On February 15, 2017, in a memorandum (the 2017 guidance memo), which was not released publicly, the FBI announced it was narrowing its interpretation of the FFJ prohibitor to be *less inclusive than both* the Office of Legal Counsel compromise position and the ATF definition:

The Department of Justice recently reviewed the “fugitive from justice” prohibitor and the application of the prohibitor in NICS background checks. The Department determined that the GCA does not authorize the denial of firearm transfers under the “fugitive from justice” prohibitor based on the mere existence of an outstanding arrest warrant. To comply with the Department’s determination, the FBI will implement a new policy for applying the “fugitive from justice” prohibitor. This policy will require NICS to establish that the prospective purchaser: 1) has fled the state; 2) has done so to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding; and 3) is subject to a current or imminent criminal prosecution or testimonial obligation.²⁰

The FBI’s revised FFJ definition is similar to the ATF definition but has a significant difference. While the ATF requires some knowledge on the part of the individual, it requires only that they know that misdemeanor or felony charges are pending against him or her.²¹ The ATF definition does not require the NICS Section to establish the individual left *for the purpose of avoiding those charges*, a state of mind which is difficult to prove. Rather, the ATF definition allows the NICS Section to infer that purpose by establishing that an individual “knows that misdemeanor or felony charges are pending against [them].”²²

The current FBI definition, on the other hand, requires the NICS Section to bear the burden of establishing an individual’s mental state—that he or she fled a state *with the purpose* of avoiding criminal prosecution or testimonial obligation. It does not explicitly allow for an inference of that purpose to be established by knowledge of pending charges. As such, the 2017 guidance memo increases the risk that individuals who are prohibited from possessing firearms under federal law are able to gain access to firearms.

¹⁹ Sari Horwitz, “Tens of thousands with outstanding warrants purged from background check database for gun purchases,” *Washington Post*, November 22, 2017, https://www.washingtonpost.com/world/national-security/tens-of-%20thousands-with-outstanding-warrants-purged-from-background-check-database-for-gun-%20purchases/2017/11/22/b890643c-ced1-11e7-9d3a-bcbe2af58c3a_story.html.

²⁰ 2017 Guidance Memo *supra* note 4.

²¹ 27 C.F.R. § 478.11.

²² *Id.*

As a result, following the Trump administration's change, NICS saw the number of federal denials under the FFJ prohibitor drop by over 70% in the first year, despite the number of total NICS checks increasing.²³

Trump administration purging FFJ records

In addition to narrowing the FFJ definition, the FBI's 2017 guidance memo also ordered that NICS "immediately remove" all FFJ records and "[a]s a temporary measure, to ensure the accuracy of new submissions to the NICS Index, entries will not be permitted under the ... 'fugitive from justice' category until further notice."²⁴

This decision resulted in the removal of 500,000 records from NICS, including records that were still relevant under the FBI's revised definition of FFJ. To date, of the 500,000 that were purged, only 2,500 entries have been restored.²⁵

III. Proposed action

To overturn the Trump administration's dangerous narrowing of the FFJ prohibitor and restore all appropriate records to the NICS system, the FBI, under the next administration, should issue new guidance clarifying the definition of FFJ, and restore all records to NICS that were purged by the Trump administration.

A. Substance of guidance

Upon taking office, the FBI should rescind the 2017 guidance memo, and issue new guidance to NICS officers and state points of contact for how to interpret the FFJ prohibitor. In particular, the guidance should provide that the following three elements are sufficient to create a presumption that a person falls within the prohibitor for purposes of the background check system.

- **Element 1.** The person is subject to a current or pending/potential criminal prosecution or testimonial obligation.
 - As in the case of ATF guidance, this could be established by showing: the individual has an active warrant for a felony or misdemeanor arrestable offense, or a criminal testimonial obligation (e.g., expert witness, material witness, victim, or informant).

²³ Comparing 2016 and 2016 NICS numbers. Federal Bureau of Investigation, "2017 NICS Operations Report," accessed October 26, 2020, <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view>; Federal Bureau of Investigation, "2016 NICS Operations Report," accessed October 26, 2020, <https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view>.

²⁴ *Supra* note 3.

²⁵ Federal Bureau of Investigation, "Active Records in the NICS Indices," updated September 30, 2020, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view.

- **Element 2.** The person has left the issuing state. As in the case of ATF guidance, this could be established in several ways, including by showing:
 - The prospective buyer’s state of purchase (SOP) is not the same as the warrant-issuing state.
 - The prospective buyer’s state of residence (SOR) is not the same as the warrant-issuing state.
 - If the prospective buyer’s SOP and SOR are the same as the warrant-issuing state, any other information indicating the person has, at some point, left the warrant issuing state, including:
 - information from the agency which demonstrates the subject has left the warrant-issuing state
 - a date of arrest from a state other than the state of warrant which occurred after the date of warrant or underlying criminal obligation
 - a previous, related NICS transaction initiated after the date of warrant or underlying criminal obligation in a state other than the state of the warrant

- **Element 3.** Some indication of intent.
 - The guidance should explicitly say this could be established in several ways, including by showing:
 - The individual knew misdemeanor or felony charges were pending against him or her.
 - The person was aware of the warrant or the underlying criminal charge or testimonial obligation before they left the state.
 - The prospective buyer’s state of purchase (SOP) or state of residence (SOR) is not the same as the warrant-issuing state.

In addition to providing guidelines for establishing an FFJ prohibitor, the new guidance memo should also do the following.

- **Instruct NICS officials to restore all NICS records related to the FFJ prohibitor that were purged by the Trump administration.** This ideally would result in approximately 500,000 records being restored to NICS, which would help identify individuals who cannot legally possess firearms, and prevent them from obtaining them.

- **Clarify the guidance applies to establishing FFJ for purposes of a NICS background check, not a criminal prosecution under the GCA or application of the sentencing guidelines.** Importantly, the GCA imposes a higher *mens rea* requirement for criminal prosecution for prohibited possession of a firearm than for denying a firearm sale. Specifically, 18 U.S.C. § 924(2) states: “Whoever **knowingly** violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” (emphasis added).²⁶ Given this additional

²⁶ Relevant here, this includes violations related to the FFJ prohibitor. See, 18 U.S.C. § 922(d)(2), (g)(2).

mens rea requirement in the criminal context, the FBI should explicitly confine the new guidance as applicable to establishing FFJ for purposes of a NICS background check, not a criminal prosecution or sentencing. This is particularly relevant for establishing “element three” outlined above.

B. Process

This type of guidance may appropriately be considered an interpretive rule because it is “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”²⁷ The APA’s NCRM requirement “does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” unless another statute provides otherwise.²⁸

Unlike notice and comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating “a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component.”²⁹ Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the administrative conference, most recently updated on June 13, 2019.³⁰ The most relevant recommendations concern transparency and public participation. These include: (1) providing “members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule,” (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint, and (3) avoiding the

²⁷ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

²⁸ 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase “interpretive rule,” the phrase “interpretive rule” is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

²⁹ Executive Office of the President, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” Executive Order 13891, October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

³⁰ Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

use of mandatory language (such as “shall” or “must”) to reflect the non-legislative nature of the guidance accurately.³¹

C. Legal justification

The attorney general has the power to prescribe “such rules and regulations as are necessary to carry out the provisions of” the GCA.³² This includes policy statements, interpretive rules, and rules of agency procedure. Operation of the NICS system has been delegated to the FBI.³³

Using this authority, the FBI has repeatedly released guidance to clarify terms within the GCA in order to provide guidance to NICS officers and state points of contact, including guidance related to the FFJ prohibitor.³⁴

IV. Risk analysis

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components: first, the action must mark the “consummation” of the agency’s decision-making process—it cannot be of a tentative or intermediate nature. Second, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”³⁵ Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action.

If a court determines the guidance document is a final agency action, however, it can be judicially challenged for being beyond the agency’s statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.³⁶ The FBI’s authority to interpret and provide guidance on the definition of FFJ is clear, as demonstrated by its history of doing so.³⁷ The Supreme Court has also made clear that laws that impose conditions and qualifications on the commercial sale of firearms are presumptively lawful,³⁸ therefore constitutional challenges are unlikely to succeed. As a result, the two most likely challenges against the new guidance memo are those claiming the FBI has not properly complied with procedural requirements, and the FBI’s new guidance is arbitrary or capricious agency action.

A. Procedural challenges

³¹ *Id.*

³² 18 U.S.C. § 926(a).

³³ 28 CFR § 25.1 et al.

³⁴ 2017 Guidance Memo *supra* note 4.

³⁵ *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

³⁶ 5 U.S.C. § 706.

³⁷ 2017 Guidance Memo *supra* note 4.

³⁸ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

As noted above, the APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute provides otherwise.³⁹ However, the NCRM requirement does apply to legislative rules. Courts are commonly asked to determine whether interpretive rules such as guidance documents are legislative rules in disguise, and the gun industry will likely challenge the FBI's guidance under this theory.

In the preceding three decades, the DC Circuit has focused its inquiry on whether a rule has "binding effects," in which case it is legislative.⁴⁰ There are multiple indicia of "binding effects."

- A rule is more likely to be legislative if it repeatedly includes mandatory language⁴¹ or characterizes itself as a regulation,⁴² notwithstanding boilerplate disclaimers to the contrary.⁴³ Conversely, a rule is less likely to be legislative if it is "replete with words of suggestion," such as speculation that an agency "may" or "might" act in a particular fashion depending on specific facts.⁴⁴
- Regardless of the rule's text, "[t]he most important factor" ⁴⁵ in identifying legislative rules is its actual legal effects, ⁴⁶ e.g., the creation of new substantive law and/or consistent on-the-ground application in permitting or enforcement decisions.⁴⁷ A rule is not

³⁹ 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

⁴⁰ *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017).

⁴¹ *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

⁴² *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

⁴³ *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).

⁴⁴ *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (crediting statements in guidance that regulators "retain their discretion" based on "specific conditions"). See also *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); cf. *The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (government duties described in guidance were unenforceable because, though they occasionally used mandatory language, they were generally "imprecise").

⁴⁵ *Nat'l Min. Ass'n*, 758 at 252 (no legal effect where EPA merely recommended that state agencies entrusted with administration of the Clean Water Act pay closer attention to water quality, such that "state permitting authorities and permit applicants [could] ignore EPA's Final Guidance without facing any legal consequences").

⁴⁶ *Appalachian Power Co.*, 208 F.3d at 1028 (guidance imposing testing requirements for power plants under the Clean Air Act was legislative rule where it delegated authority to states in ways not explicitly contemplated in underlying rulemaking); *Mendoza*, 754 F.3d at 1009 (D.C. Cir. 2014) (letters explaining visa requirements were legislative where they "impose[d] different minimum wage requirements and provide[d] lower standards for employer-provided housing" than underlying regulations).

⁴⁷ *Gen. Elec.*, 290 F.3d at 385 (rejecting EPA's argument that guidance was not binding as a practical matter where EPA did not identify examples of deviation from the guidance); cf. *Sierra Club v. EPA*, 955 at 65 (warning, in finality context, of guidance that "impose[s] obligations by chicanery") (citation omitted).

legislative merely because it is *cited* in downstream adjudications, though dispositive *reliance* on the rule in those adjudications may reveal the rule to be legislative.⁴⁸

- A rule is likely to be legislative if it is explicitly contemplated by the organic statute.⁴⁹

While the gun industry will likely challenge the proposed guidance as being a legislative rule that needed to go through NCRM, the FBI has a strong argument in response that the guidance is just interpretive in nature. The guidance memo wouldn't significantly restrict a NICS reviewer's discretion. While the guidance memo would entitle NICS reviewers to make a presumption about an individual's mental state given a particular evidentiary record, it doesn't require the NICS reviewer to do so if the individual's record suggests that presumption would not be appropriate. Therefore, the guidance memo retains the NICS reviewers' ability to apply the FFJ prohibitor on a case-by-case basis. Courts are less likely to characterize a statement as a legislative rule if it permits agency staff to make case-by-case determinations.⁵⁰

B. Substantive challenges

Assuming a plaintiff is successful in arguing the new guidance is "final agency action," a court will invalidate the guidance if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁵¹

Here, the gun industry will likely argue the guidance is "not in accordance with law" by claiming that the GCA definition of FFJ requires a *mens rea* of intent to be established before a gun sale can be denied under the prohibitor. By allowing an inference of intent with such little evidence, such an argument might follow, the new guidance is not in accordance with the GCA definition of FFJ.

When a court reviews an agency's interpretation of a statute it is charged with administering, the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.⁵² Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."⁵³ If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."⁵⁴ In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable-agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.⁵⁵ This reflects the fact that "*Chevron* recognized that

⁴⁸ *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (Roberts, J.).

⁴⁹ *Am. Min. Cong.*, 995 F.2d at 1109.

⁵⁰ Jared P. Cole & Todd Garvey, "General Policy Statements: Legal Overview," Congressional Research Service, April 14, 2016, <https://fas.org/sgp/crs/misc/R44468.pdf>.

⁵¹ 5 U.S.C. § 706(2)(A).

⁵² *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

⁵³ *Id.* at 842.

⁵⁴ *Id.* at 842-43.

⁵⁵ *Id.* at 843.

[t]he power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁵⁶

Here, a court is likely to find the plain text of “fugitive from justice” sufficiently ambiguous to move on to step two of the *Chevron* analysis, where it will defer to the FBI’s reasonable interpretation of the FFJ prohibitor’s *mens rea* requirement. In the context of criminal prosecutions, where the GCA explicitly includes a *mens rea* requirement of “knowingly,” circuit courts that have considered the FFJ definition agree that it contains some *mens rea* element, though even they disagree on what that *mens rea* is. As noted by the Fifth Circuit:

The Ninth and Eleventh Circuits have held that, to establish that a defendant is a fugitive from justice, the government must show that the defendant fled with the intent to avoid prosecution. The Fourth and Seventh Circuits, however, have rejected this approach. But these latter two circuits do require that, to qualify as a fugitive from justice, a defendant must have had knowledge that charges against him are pending.⁵⁷

All of these cases, however, arose in the context of a criminal prosecution or sentencing, rather than a challenge to a denial of a gun based on a background check. Given the disagreement among circuit courts in the context of an even more clearly established *mens rea* requirement, a court will likely find the FBI’s guidance on establishing that requirement in the context of NICS background checks reasonable.

⁵⁶ *Id.* at 55–56 (internal quotation marks and citation omitted).

⁵⁷ *United States v. Soza*, 874 F.3d 884, 891 (2017).