

**DEPARTMENT OF JUSTICE**

**Federal Bureau of Investigation**

**28 CFR Part 25**

**Docket No. FBI-159; AG Order No. 6099-2024**

**RIN 1110-AA35**

**Bipartisan Safer Communities Act of 2022 – Criteria for National Instant Criminal  
Background Check System (“NICS”) Background Checks of Firearm Handlers**

**AGENCY:** Federal Bureau of Investigation, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Department of Justice (“Department”) proposes several amendments to regulations pertaining to the National Instant Criminal Background Check System (“NICS” or “system”) of the Federal Bureau of Investigation (“FBI”). The proposed amendments implement parts of the Bipartisan Safer Communities Act (“BSCA”), which, in relevant part, require the Attorney General to promulgate regulations authorizing certain Federal Firearm Licensees (“FFLs” or “licensees”) to use NICS for purposes of voluntarily conducting employment background checks relating to certain current or prospective employees. As this Notice of Proposed Rulemaking (“NPRM”) describes in more detail, the Department proposes allowing FFLs to use NICS for employment background checks of their “firearm handlers” and other “eligible employees.”

**DATES:** Written comments must be postmarked, and electronic comments must be submitted, on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE

FEDERAL REGISTER]. Commenters should be aware the electronic Federal Docket Management System will not accept comments after 11:59 P.M. Eastern Time on the last day of the comment period.

**ADDRESS:** You may submit comments, identified by RIN 1110-AA35 or Docket No. FBI-159, by either of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Charles Klebe, Assistant General Counsel, Federal Bureau of Investigation, Office of the General Counsel, Module C-3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0110; ATTN: Docket No. FBI-159.

Instructions: All submissions received must include the agency name and RIN (1110-AA35) or docket number (FBI-159) for this NPRM. In general, all properly completed comments received will be posted without change to the Federal eRulemaking portal, <https://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Jill A. Montgomery, NICS Business and Liaison Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services Division, NICS Section. Telephone: (304) 625-0606 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

*A. Comments Sought*

The Department welcomes public comments from any interested person on any aspect of the changes proposed in this rule. In particular, and as discussed in more detail in the parts of this preamble that describe specific changes, the Department seeks comments from the public on the proposed amendments to NICS regulations to allow FFLs, as required by Congress under BSCA, Pub. L. 117-159, 136 Stat. 1313 (2022), to use NICS for purposes of conducting voluntary employment background checks of the FFLs' current and prospective employees. The Department seeks comments regarding that use in general as well as regarding the proposed revisions related to the processes surrounding that use of NICS. The Department will carefully consider all properly submitted public comments in drafting any final rules.

All comments must reference RIN 1110-AA35 or this document's docket number, FBI-159, and be legible. Please do not submit, under this proposed rule, any comments pertaining to a different rule that may be discussed in limited detail below. Public comments concerning those proposed rules should be submitted as directed within those rules.

Please note that all comments received are considered part of the public record and may be made available for public inspection online at <https://www.regulations.gov>. Information made available for public inspection may include personal identifying information (such as name, address, etc.) submitted by the commenter.

#### *B. Confidentiality*

In general, the Department will make all comments, whether submitted electronically or on paper, available for public viewing on the internet through the Federal eRulemaking Portal. If you do not want your name or other personal identification information posted on the internet as part of your comment, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal

identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the Department to redact. Personal identifying information identified and located as set forth above will be placed in the Department's public docket file but not posted online.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the Department may choose not to post that comment (or to post only part of the comment) on <https://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

### *C. Submitting Comments*

Submit comments in either of the following ways (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

- Federal eRulemaking Portal: The Department recommends that you submit your comments via the Federal eRulemaking portal at <https://www.regulations.gov> and follow the instructions. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.
- Mail: Send written comments to the address listed in the **ADDRESSES** section of this document.

## **II. Background and Purpose**

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

## 1. NICS Procedures

The Brady Handgun Violence Prevention Act of 1993 (“Brady Act”), Pub. L. 103-159, 107 Stat. 1536, required the Attorney General to establish NICS, a system that certain FFLs must contact before selling or otherwise transferring a firearm. Brady Act sec. 103. NICS provides, when possible, immediate information on whether receipt of a firearm by an unlicensed person would violate 18 U.S.C. 922(g) or (n), or State, local, or Tribal law. *See* 18 U.S.C. 922(t). The FBI manages and operates NICS by delegation of the Attorney General pursuant to 28 CFR 25.3. The NICS Section of the FBI’s Criminal Justice Information Services Division processed the first NICS background check on November 30, 1998.<sup>1</sup>

The Brady Act provides that persons federally licensed by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) as manufacturers, dealers, and importers under 18 U.S.C. 923 are required to initiate a NICS background check before transferring firearms to unlicensed persons. *See* 18 U.S.C. 922(t)(1); *see also* 921(a)(9)–(11). Persons licensed under 18 U.S.C. 923 as “collectors,” *see* 18 U.S.C. 923(b),<sup>2</sup> are not required to submit NICS transactions under 18 U.S.C. 922(t) because licensed collectors are not defined as “licensees” under the Brady Act. *See* 34 U.S.C. 40901(j)(1).

An FFL initiates a NICS background check by contacting the FBI NICS Section<sup>3</sup> or a State or local law enforcement agency known as a point of contact (“POC”)—i.e., certain State

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<sup>1</sup> *See* National Instant Criminal Background Check System Regulation, 63 FR 58303, 58303 (Oct. 30, 1998).

<sup>2</sup> *See also* 27 CFR 478.11 (defining “[c]ollector” as “[a]ny person who acquires, holds, or disposes of firearms as curios or relics,” and “[l]icensed collector” as “[a] collector of curios and relics only [who is] licensed under the provisions of this part”).

<sup>3</sup> The NICS Section was known as the “NICS Operation Center” until July 24, 2002. However, 28 CFR part 25 has not since been updated to reflect that change. The Department’s initial NICS regulations included definitions for “NICS Operations Center” and “NICS Operations Center’s regular business hours.” *See* 63 FR 58308. In 2001, “NICS Operations Center” was inadvertently deleted from the Federal Register publication. *See* FindLaw.com,

or local law enforcement agencies with express or implied authority to perform NICS inquiries and respond to FFLs with the results. *See* 28 CFR 25.2, 25.6(a), (d).<sup>4</sup> As of December 31, 2021, the NICS Section supported NICS background checks for 50,588 dealer and pawnbroker licensees conducting business in 31 States, 5 U.S. Territories, and the District of Columbia.<sup>5</sup> The NICS Section processed 11,106,931 firearm transactions from January 1, 2021, through December 31, 2021.<sup>6</sup> In addition, the NICS Section processed 138,518 explosive permit background checks for this same timeframe.<sup>7</sup>

Relevant databases for background checks are the NICS Index (now called the “NICS Indices”),<sup>8</sup> the National Crime Information Center (“NCIC”), and the Interstate Identification Index (“III”). *See* 28 CFR 25.2, 25.4, 25.6. The NICS Indices is a database of information

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*Code of Federal Regulations Title 28. Judicial Administration § 28.25.2 Definitions*, <https://codes.findlaw.com/cfr/title-28-judicial-administration/cfr-sect-28-25-2/> (last visited Nov. 5, 2024) (observing that the “official CFR appears to have inadvertently deleted [the] definition” of NICS Operations Center). The relevant intent of those 2001 revisions was only to delete the definition for and references to “NICS Operations Center regular business hours.” *See* National Instant Criminal Background Check System Regulation, 69 FR 43892, 43896, 43900 (July 23, 2004). The Department has proposed revisions here and within RIN 1110-AA36, FBI-158, to update references to the “NICS Operation Center” to the “NICS Section.” *See* proposed revisions in 28 CFR 25.2, 25.6, and 25.10.

<sup>4</sup> 28 CFR 25.2 defines “POC (Point of Contact)” as “[a] state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS.” That provision further states that 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, and respond to FFLs with the results of a NICS background check. In addition, a POC must be an agency with express or implied authority to perform POC duties pursuant to State statute, regulation, or executive order. POCs perform NICS inquiries on either all or only a subset of the NICS background checks that FFLs submit in the POC’s State. *See NICS Participation Map*, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics#NICS-Participation%20Map> (last visited Nov. 5, 2024).

<sup>5</sup> FBI, National Instant Criminal Background Check System Operational Report 2020–2021 7 (Apr. 2022), <https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view>.

<sup>6</sup> *Id.* at 12–13.

<sup>7</sup> *Id.* at 13.

<sup>8</sup> The NICS Index has become known by most NICS users as the “NICS Indices.” The Department has proposed revisions here and in RIN 1110-AA36, FBI-158, to update references to the “NICS Index” to the “NICS Indices.” *See* proposed revisions in 28 CFR 25.2, 25.4–25.6, 25.8, and 25.9.

provided by Federal, State, local, and Tribal agencies about persons who are prohibited from receiving firearms under Federal or State law. *See* 28 CFR 25.2. NCIC is searched for other criminal justice data, such as active warrants and protection orders, which would also demonstrate that a person is prohibited from receiving firearms.<sup>9</sup> III is part of the FBI's Next Generation Identification system and is used to search for criminal justice records such as arrests, charges, or case dispositions demonstrating the subject of the NICS transaction is prohibited from receiving firearms.<sup>10</sup> *See also* 28 CFR 25.6(c), (f).

After initiating a background check for the prospective transfer of firearms, FFLs receive one of three responses from NICS: "Proceed," "Delayed," or "Denied."<sup>11</sup> As currently defined, a "Proceed" response means the background check revealed no disqualifying (e.g., matching) records. 28 CFR 25.6(c)(1)(iv)(A). A "Denied" response means that receipt of a firearm by the prospective transferee would violate applicable law described in 18 U.S.C. 922(t). 28 CFR 25.6(c)(1)(iv)(C). For those transactions in which a search of NICS cannot provide a definitive response of either "Proceed" or "Denied" because additional research of a possible disqualification is required, the FFL receives a response of "Delayed." 28 CFR 25.6(c)(1)(iv)(B). FFLs do not review the record sources searched during a background check by NICS, nor does a response from NICS provide the FFL with any of the underlying information reviewed during the background check. 28 CFR 25.6(c)(2). Beyond one of the

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<sup>9</sup> *See* FBI, 2022 NICS Operations Report 7 (2022), <https://www.fbi.gov/file-repository/nics-2022-operations-report.pdf/view>.

<sup>10</sup> *See id.*

<sup>11</sup> Through RIN 1110-AA36, FBI-158, the Department has proposed a new status ("No Known Prohibitors: A state or local agency has not responded or cannot respond") and discusses new processes applicable when FFLs submit NICS background checks for prospective firearm transfers to persons under 21 years of age ("under-21 transactions"). However, because the provisions discussed in that rulemaking do not apply to FHCs, this rule has generally omitted discussion of proposed regulatory updates related to under-21 transactions.

previously noted responses, the only other information an FFL receives as part of a NICS background check is the NICS transaction number (“NTN”) and, for “Delayed” transactions,<sup>12</sup> a prospective transfer date, which is the day after “3 business days . . . have elapsed since the licensee contacted” NICS. 18 U.S.C. 922(t)(1)(B)(ii); *see also* 28 CFR 25.6(c)(1).

Under one of several BSCA provisions, “the Attorney General shall promulgate regulations allowing licensees to use [NICS] for purposes of voluntarily conducting an employment background check relating to a current or prospective employee.” 34 U.S.C. 40901(b)(2). Again, per 34 U.S.C. 40901(j)(1), “licensee[s]” include licensed importers, licensed manufacturers, and licensed dealers as those terms are defined under 18 U.S.C. 921(a)(9)–(11), respectively. An unlicensed person for purposes of 18 U.S.C. 922(t) is someone “not licensed under” chapter 44 of title 18. 18 U.S.C. 922(t)(1); *see also* 18 U.S.C. 923 (providing for licensing).<sup>13</sup>

Persons who fall within any of the prohibitions noted under 18 U.S.C. 922(g) or (n) are generally prohibited by Federal law from shipping, transporting, possessing, or receiving firearms and ammunition.<sup>14</sup> The Brady Act also prohibits the transfer of firearms to persons

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<sup>12</sup> *See* 28 CFR 25.2 (defining “Delayed” and “NTN (NICS Transaction Number)”); *see also* 28 CFR 25.6(c)(1)(iv)(B).

<sup>13</sup> Licensed collectors are also considered unlicensed persons during firearm transactions that involve firearms other than curios and relics. *See* 18 U.S.C. 921(a)(13); *see also* ATF, *Does a Collector’s License Afford Any Privileges to the Licensee with Respect to Acquiring or Disposing of Firearms Other than Curios or Relics in Interstate or Foreign Commerce?* (last reviewed May 26, 2020), <https://www.atf.gov/firearms/qa/does-collector%E2%80%99s-license-afford-any-privileges-licensee-respect-acquiring-or-disposing>.

<sup>14</sup> Federal law prohibits receipt of a firearm by a person under a qualifying indictment but does not prohibit mere possession of the firearm by the indicted individual. *See* 18 U.S.C. 922(n) (making it unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding 1 year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce). However, a State “possession” prohibition may also apply. *See, e.g.*, Haw. Rev. Stat. 134-7.



prohibited from receiving firearms under sections 922(d), (g), or (n), as appropriate, or State, local, or Tribal law. *See* 18 U.S.C. 922(t).<sup>15</sup>

## 2. Current Access to NICS for Purposes Other than Firearm Transfers

Federal statutes authorize access to NICS for certain entities for reasons other than a prospective firearm transfer under 18 U.S.C. 922(t). *See, e.g.*, 42 U.S.C. 2201a (authorizing use of NICS for background checks related to security personnel of Nuclear Regulatory Commission licensees and certificate holders). NICS regulations also permit access to NICS “for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t)” in three limited circumstances. 28 CFR 25.6(j). First, NICS may be used to provide information to Federal, State, local, or Tribal criminal justice agencies in connection with the issuance of firearm- or explosives-related licenses. 25 CFR 25.6(j)(1). Second, NICS may be used in responding to an inquiry from ATF in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. chapter 44) or the National Firearms Act (26 U.S.C. chapter 53). 25 CFR 25.6(j)(2). Third, Federal, State, local, and Tribal criminal justice agencies may use NICS to dispose of firearms in their possession. 25 CFR 25.6(j)(3).

Since their issuance, the Department’s NICS regulations have expressly prohibited FFLs from initiating NICS background checks for any purpose other than the prospective transfer of firearms as required by the Brady Act. *See* 28 CFR 25.6(a). With the enactment of BSCA, however, the Department must issue new regulations that allow FFLs to use NICS for another specified purpose: determining whether certain current or prospective employees are prohibited

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<sup>15</sup> Section II.E of this preamble contains a brief discussion of RIN 1110-AA36, FBI-158, another NPRM the Department has published. That rulemaking includes discussion regarding, among other topics, further disqualifying categories that Congress added to 18 U.S.C. 922(t) in 2022.

from possessing firearms.<sup>16</sup> This NPRM proposes amendments to the Department’s NICS regulations to allow licensees to voluntarily initiate NICS background checks for this new purpose.

*B. Using NICS for Voluntary Employment Background Checks*

Section 12004(h)(1)(B) of BSCA amended the Brady Act by requiring the Attorney General to promulgate rules allowing licensees to use NICS for purposes of voluntarily conducting an employment background check relating to a current or prospective employee (“employee”). 34 U.S.C. 40901(b)(2)(A).

The Department interprets “voluntarily” in this context to mean that licensees are not required to use NICS to conduct background checks of employees; rather, licensees have discretion to submit requests for NICS background checks. Licensees may not request a NICS background check without first providing written notice to and obtaining written consent of the affected employee. *See* 34 U.S.C. 40901(b)(2)(B). This consent requirement is discussed in Section II.E of this preamble.

Consistent with BSCA, the Department is proposing amendments to NICS regulations to generally allow licensees to initiate background checks of certain employees. *See* 34 U.S.C. 40901(b)(2)(A). This rule proposes to clarify that FFLs may voluntarily initiate NICS background checks of persons who are or would be “eligible employees” as further defined in proposed amendments to 28 CFR 25.2.

*C. Firearm Handler Background Checks*

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<sup>16</sup> In addition to BSCA, Congress in 2022 passed the Consolidated Appropriations Act, 2022, Pub. L. 117-103, 136 Stat. 49, which amended 18 U.S.C. 922(t) to reference firearm prohibitions imposed by “local” and “Tribal” governments. *See* 136 Stat. at 919, 921. Those provisions are accounted for where relevant in this rule’s preamble and the proposed regulatory revisions.

## 1. Synopsis of Proposed Rule

This rule proposes allowing licensees to use NICS as part of employment background checks of certain employees. Although other categories of employees are discussed further in this preamble, the core group of employees covered by this proposed rule consists of “firearm handlers.” Accordingly, the Department will generally refer to these NICS background checks as “Firearm Handler Background Checks” or “FHCs.” This rule proposes to define a “firearm handler” to include, with exceptions discussed in Section II.C.3.a of this preamble, a person who has or may have an opportunity to access firearms or ammunition because of the person’s duties as an employee of an FFL, regardless of whether the employee’s duties include or may include the actual or constructive transfer or handling of firearms or ammunition. This rule also proposes that licensed manufacturers may submit FHCs for persons who do not have access to firearms or ammunition, but whose employment duties allow or may allow them access to the materials or tools used in firearms or ammunition manufacturing. Further, this rule proposes that FHCs would not be available for any employee who does not or will not have employment duties that would allow the employee access to firearms or ammunition or any materials or tools necessary to manufacture firearms or ammunition. This rule’s proposed approach satisfies the text of section 12004 of BSCA, fulfills Congress’s purpose in enacting section 12004 of BSCA, and addresses important policy and operational interests of the FBI and FFL employees.

Next, the Department notes that FHC results indicating that an FFL is prohibited from transferring a firearm to an employee should not be construed to prohibit the licensee from employing that individual in a position that does not require the handling of or having access to a firearm or ammunition or the materials or tools used in firearms or ammunition manufacturing. Current responses to FFLs when they submit a request for a NICS background check for a

firearm transfer are limited to “Proceed,” “Delayed,” or “Denied,” which could cause confusion if they were also used in response to FHCs. Licensees may mistake a “Proceed” or “Denied” response during an FHC as a determination that the licensee must either hire or reject the subject of the FHC. Consequently, this NPRM proposes to amend 28 CFR 25.2 to reflect new responses to be used during FHCs: “Pass,” “Pending,” and “Did Not Pass.”<sup>17</sup> These terms and their definitions are discussed more fully in Section II.C.3.b of this preamble.

Section 40901(b)(2)(B) of title 34, as added by BSCA, also requires a licensee to provide the employee written notice “that the licensee intends to conduct the [NICS] background check” and to obtain the employee’s written consent to the NICS background check.<sup>18</sup> Finally, Congress mandated through amendments to section 40901(b)(2)(D) that, when the “employment background check” for an individual “indicates that the individual is prohibited from possessing a firearm or ammunition” under 18 U.S.C. 922(g) or (n), the individual may appeal the result “in the same manner and to the same extent as if the individual had been the subject of a background

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<sup>17</sup> This rule also proposes a technical amendment to 28 CFR 25.9(b)(1)(i) to reflect that “Denied” firearm transfer records in the NICS Audit Log are retained for 110 years under approved records schedules filed with the National Archives and Records Administration. *See* Request for Records Disposition Authority, National Instant Criminal Background Check System, Schedule Number NI-065-10-005 at 4 (Nov. 18, 2009), [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-10-005\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-10-005_sf115.pdf) (superseding, in part, Request for Records Disposition Authority, National Instant Criminal Background Check System, Schedule Number NI-065-07-003 at 4 (Oct. 13, 2006), [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-07-003\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-07-003_sf115.pdf)). Because there is no statute of limitations for appealing a “Denied” transaction, the FBI may sometimes need to access very old records of these transactions; retaining such records for 110 years ensures that the records are retained for a period that exceeds the relevant person’s expected life span. *See* Off. of Just. Programs, Comparison of Criminal History Information Systems in the United States and Other Countries 105 (Apr. 2, 2020), <https://www.ojp.gov/pdffiles1/bjs/grants/253816.pdf>.

<sup>18</sup> This rule proposes no specific method for licensees to document having obtained their eligible employees’ informed consent in writing. However, ATF’s proposed FHC form will include a notice that the information on the form may be used by the FFL to conduct a background check to determine whether the employee is prohibited from possessing or receiving firearms by Federal, State, local, or Tribal law, and that the employee’s signature on the FHC form constitutes consent for the FFL to conduct the voluntary background check.

check relating to the transfer of a firearm.”<sup>19</sup> The appeal of FHC results is discussed in Section II.C.4 of this preamble.

## 2. Purpose and Authority

This rule proposes to amend 28 CFR 25.1 to add FHCs as an additional authorized use of NICS in the subpart of the Department’s regulations governing NICS background checks. It would add BSCA as a source of authority for the subpart.

## 3. Definitions

The proposed rule would amend 28 CFR 25.2 to add several definitions relevant to FHCs.

### a. Eligible Employee and Firearm Handler

Section 103 of the Brady Act established NICS to enable licensed manufacturers, dealers, and importers to receive information about whether the transfer of a firearm to a non-licensee would violate section 922 or State law. *See* 34 U.S.C. 40901(b)(1). Section 12004(h) of BSCA amended section 40901(b) to require the Attorney General to promulgate rules to allow “licensees” to use NICS “for purposes of voluntarily conducting an employment background check relating to a current or prospective employee.” 34 U.S.C. 40901(b)(2)(A). Neither the text nor the legislative history provides further guidance as to the meaning of “current or prospective employee.”

If the language were read to cover any employee of any licensee, as well as any potential future employee, the number of people who could be subject to an FHC, as well as the burden on NICS, would be much greater than what Congress likely intended. Thus, the NPRM proposes to limit the employees for whom an FFL may seek a background check to certain “eligible employees.”

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<sup>19</sup> BSCA also exempted this new use of NICS from provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* *See* 34 U.S.C. 40901(b)(2)(C).

i. Statutory Context and Congressional Purpose

Section 12004 of BSCA, entitled the “Stop Illegal Trafficking in Firearms Act,” is focused on combating the straw purchasing and trafficking of firearms. Among other things, section 12004 added 18 U.S.C. 932 and 933, which criminalize straw purchasing and firearms trafficking, respectively, with punishments up to 25 and 15 years of imprisonment, respectively, as well as forfeiture pursuant to 18 U.S.C. 934. *See* BSCA sec. 12004(a)(1). Section 12004 also amended 18 U.S.C. 922(d), which prohibits selling or otherwise disposing of firearms or ammunition to listed categories of persons, to include in the prohibition those individuals who intend to sell or dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense or to a person in any of the other prohibited categories. 18 U.S.C. 922(d)(10)–(11). These measures demonstrate that, through BSCA, Congress sought to ensure that individuals prohibited from receiving firearms would not be able to obtain them.

Section 12004 also advances this congressional purpose by allowing a new use of NICS. As already explained, section 12004(h) requires the Attorney General to promulgate regulations that allow “licensees” to access NICS “for purposes of voluntarily conducting an employment background check relating to a current or prospective employee.” This provision recognizes that FFLs may inadvertently employ prohibited persons, who would then have access to firearms through their employment duties and who may be able to use their positions to engage in illegal trafficking of firearms or to otherwise illegally possess or use firearms. The expanded authorization to use NICS to conduct background checks of certain prospective and current employees is an additional tool for FFLs to help prevent illegal firearms trafficking and ensure prohibited persons do not obtain firearms.

FFLs collectively submit millions of NICS background checks related to firearm transfers each year.<sup>20</sup> Moreover, FFLs employ thousands of individuals who, through their employment, have access to firearms and the ability to enable straw purchasing and illegal firearm trafficking. The Department believes that, by amending 34 U.S.C 40901(b) through section 12004(h) of BSCA, Congress sought to provide a powerful new tool to reduce illegal firearm trafficking by giving FFLs the ability to use NICS to identify prohibited persons among their employees. This purpose informs the proper understanding of the term “employee.” Because Congress focused on preventing prohibited persons working for FFLs from obtaining firearms, the term “employee” in BSCA can be naturally understood to refer to the subset of individuals working for FFLs who, as a result of their employment, would be able to access firearms or related materials or tools. Reading the term “employee” to cover individuals without any opportunity to access firearms or related materials or tools would not advance the purpose of BSCA because employment of those individuals at FFLs does not create the same risk of prohibited persons obtaining firearms. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–46 (1997) (determining the meaning of the term “employee” under a different provision of law by considering statute itself, the context in which the word “employee” appeared, and the “primary purpose” of the law at issue).

ii. Policy and Operational Considerations: Impact on Employees

In addition to the statutory language, context, and congressional intent, the overall population of employees and several other factors relevant to employees or licensees impact the appropriate interpretation of the term “current or prospective employee.” The Department has concluded that important policy and operational factors support the Department’s interpretation

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<sup>20</sup> See FBI, NICS Firearm Background Checks: Month and Year by State and Type (Oct. 2024), [https://www.fbi.gov/file-repository/nics\\_firearms\\_checks\\_-\\_month\\_year\\_by\\_state\\_type-last-5-years.pdf/view](https://www.fbi.gov/file-repository/nics_firearms_checks_-_month_year_by_state_type-last-5-years.pdf/view).

of the term “employee.” As discussed in this section, permitting licensees to use NICS for employment background checks in overly broad circumstances could have negative impacts on both NICS and individuals whose employment duties with licensees are or may be wholly unrelated to firearms or ammunition. Therefore, it is important to ensure that regulations adopted under section 12004(h) have a scope that is both consistent with the statute and that accounts for the regulations’ potential impact on NICS and employees.

As noted previously, section 12004 of BSCA focuses on preventing the illegal trafficking, use, and possession of firearms. One component of that focus is a requirement that the Attorney General promulgate regulations allowing the use of NICS for employment background checks of current or prospective employees of licensees. *See* 34 U.S.C. 40901(b)(2)(A). However, not all employees of licensees will have the ability or authority to access, handle, or transfer firearms or ammunition—or, for licensed manufacturers, related materials or tools—during their employment.

ATF reports that, as of May 10, 2024, there are an estimated 130,000 total licensees and, of that total, the FBI anticipates this rule would apply to approximately 80,000 licensees throughout the United States.<sup>21</sup> This includes eight types of licenses for dealers, pawnbrokers,<sup>22</sup> manufacturers, and importers.<sup>23</sup> Internal FBI subject matter experts estimate that some large retail chains (colloquially known as “big box” stores) also hold approximately 3,500 dealer

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<sup>21</sup> *See* ATF, Report of Active Firearms Licenses - License Type by State Statistics (May 10, 2024), <https://www.atf.gov/firearms/docs/undefined/0524-ffl-list-completepdf/download>. This is the sum of subtracting Collectors of Curio and Relic licensees (approximately 50,000) from the estimated total licensees (130,000).

<sup>22</sup> Pawnbrokers are defined as dealers, but they have their own license, Type 2. *See* ATF, *Complete Federal Firearms Listings*, <https://www.atf.gov/firearms/listing-federal-firearms-licensees/complete> (last visited Nov. 5, 2024).

<sup>23</sup> *See id.*



licenses across their locations throughout the United States. Many large manufacturers, importers, or dealers have employees with duties wholly unrelated to accessing, handling, or transferring firearms or ammunition or related materials or tools. Examples may include certain store administrators (accountants, purchasing managers, secretaries, etc.), truck drivers, shipping and receiving clerks, pharmacists, deli counter workers, bakery workers, cooks, butchers, clothing salespersons, electronic salespersons, and cashiers. Allowing FFLs to use NICS for background checks of those employees who do not and will not have access to, handle, or transfer firearms or ammunition could impose burdens on those persons by preventing them from obtaining or maintaining any employment<sup>24</sup> with that licensee.<sup>25</sup>

For example, FBI subject matter experts estimate large, big box dealers of firearms currently employ nearly 1.7 million individuals in the United States.<sup>26</sup> The FBI estimates that, of those nearly 1.7 million current employees, approximately 793,000 are employed within retail stores that also hold dealer licenses. These numbers do not include individuals who would annually be considered for prospective employment at those licensed locations. These numbers, for just some of the nation's retail chains with multiple locations considered as licensees, may increase or decrease based on company policy, particularly with respect to individuals who may have access to firearms or ammunition. But regardless of this uncertainty, the fact remains that

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<sup>24</sup> See, e.g., Just. Pol'y Ctr, *Criminal Background Checks and Access to Jobs 1–5* (2017), [https://www.urban.org/sites/default/files/publication/91456/2001377-criminal-background-checks-and-access-to-jobs\\_2.pdf](https://www.urban.org/sites/default/files/publication/91456/2001377-criminal-background-checks-and-access-to-jobs_2.pdf) (discussing the obstacles to employment that criminal background checks can create); Nat'l Emp. L. Project, 65 MILLION “NEED NOT APPLY”: The Case for Reforming Criminal Background Checks for Employment 1–2 (2011), [https://www.nelp.org/app/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](https://www.nelp.org/app/uploads/2015/03/65_Million_Need_Not_Apply.pdf) (similar).

<sup>25</sup> This NPRM is not intended to discourage licensees, in accordance with applicable laws, from conducting other background checks relating to any employees.

<sup>26</sup> Examples of large, big box firearm dealers include Academy, Bass Pro Shops, Big 5 Sporting Goods, Cabela's, Sportsman's Warehouse, and Walmart. At the end of Fiscal Year 2024, Walmart alone employed approximately 1.6 million associates in the United States. See Walmart, *How Many People Work at Walmart?*, <https://corporate.walmart.com/askwalmart/how-many-people-work-at-walmart> (last visited Nov. 5, 2024).

FFLs, including big box retailers, employ and may consider for employment a vast number of people each year. Allowing FFLs to use NICS for background checks of all these employees (including employees who do not have access to firearms or ammunition) could have negative practical consequences for the affected individuals' employment with FFLs. These potential deleterious practical effects underscore the importance of interpreting the term "employee" in the specific context in which it appears in BSCA. And these operational concerns apply similarly to use of NICS for background checks of employees of licensed manufacturers who have or would have no access to the tools or materials necessary to manufacture firearms or ammunition.

### iii. Policy and Operational Considerations: Impact on the NICS Section

In addition to the negative practical impacts on employment, an improperly broad understanding of the term "employee" could negatively impact FBI's operation of NICS. The NICS Section may require additional support staff to process the additional FHC workload. Additional staffing may also be required at the NICS Contracted Call Center to address additional incoming calls for FHCs. The NICS Section and POCs have already experienced a recent, significant increase in record research (e.g., contacting State and local criminal justice and mental health facilities) because of the implementation of BSCA, which, as mentioned in Section II.E of this preamble, required enhanced background checks of juvenile justice and mental health records of all prospective transferees under 21 years of age. Congress allotted funding for additional staff to the NICS Section because of the workload increase anticipated with the passage of BSCA; however, much of that additional staff is still being hired. Training additional staff to process FHCs will also require adequate time. Hence, an overly broad application of FHCs could impose significant additional burdens on limited FBI resources.

Based upon initial feedback from POCs, FBI subject matter experts anticipate that the majority of POCs will not perform FHCs due to either a lack of resources or a lack of authority to conduct background checks other than for transfers of firearms.<sup>27</sup> Therefore, the Department anticipates that the majority of those FHCs submitted by licensees even in States in which POCs conduct some or all background checks for prospective firearm transfers will be processed by the FBI. Although the Department is unable to estimate the volume of requests for FHCs that will be received, any increase in volume would impact the NICS Section. The most likely impacts are a need for the NICS Section to hire more staff to receive and process the increased number of transactions this new use of NICS will likely cause, as well as an increase in overtime worked by NICS Section staff. The FBI will also need to devote additional staff resources to researching potentially prohibiting records linked to “Pending” FHCs and to processing the anticipated increase in appeals that will result from this new use of NICS.

The big box companies mentioned above are estimated to have approximately 1.7 million current employees in the United States, and the FBI estimates that 793,000 of these individuals are employed at company locations licensed under 18 U.S.C. 923. Conducting FHCs for such a large number of individuals would have significant consequences for the FBI’s NICS Section. If, however, NICS access is expanded under this rule only for those individuals whose prospective employment duties have at least some connection to firearms or ammunition, then the operational impact on the FBI would be greatly reduced.<sup>28</sup> Moreover, limiting background checks specifically to those employees with at least some potential to illegally traffic or aid in

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<sup>27</sup> For some POCs, the enabling State law may authorize the POC only to conduct NICS background checks for the prospective transfer of firearms.

<sup>28</sup> See Section II.C.3.a.v of this preamble for further discussion regarding the application of this rule to employees of licensed manufacturers.

straw purchases of firearms or ammunition, which are two specific activities that BSCA attempts to suppress, is consistent with both the statutory text and congressional intent of section 12004 of BSCA.

iv. Policy and Operational Considerations: Economic Incentives

There could be an economic incentive for a licensee to utilize NICS for employment checks—particularly if NICS regulations allowed FHCs to be conducted on all employees regardless of their current or anticipated handling, transferring, manufacturing, or accessing of firearms or ammunition or related materials or tools. The Department cannot charge a fee for an FHC under BSCA, *see* 34 U.S.C. 40901(b)(2)(A),<sup>29</sup> and the FBI understands that many licensees currently use a private background check service that does charge a fee. The incentive for licensees to rely on the free FHC for general employee background checks in lieu of a paid service could substantially increase the NICS transaction volume if the NICS Section permits licensees to submit FHCs for all employees regardless of whether the employees have or may have access to or otherwise handle, manufacture, or transfer firearms or ammunition or related materials or tools. The inclusion of a no-fee provision in BSCA and the fact that many employers currently use private background check services that charge a fee supports the Department’s proposal to limit the scope of FHCs.

v. Proposed Definition of “Eligible Employee”

Given section 12004’s focus on preventing the illegal trafficking of firearms; given the number of persons who could be considered current or prospective employees of an FFL regardless of whether they will ever have access to firearms or ammunition or, for licensed

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<sup>29</sup> BSCA does not prohibit POCs from charging a fee for performing FHCs. But, as noted earlier, many POCs may not perform FHCs because of a lack of resources or authority; the FBI would thus be responsible for such checks, and the economic incentive to rely on the free background checks performed by the FBI would still arise.

manufacturers, related materials or tools; and given the operational considerations discussed above, the proposed rule would permit FFLs to use NICS for employment background checks only where the job in question has at least some connection to firearms or ammunition. This NPRM thus proposes to limit use of FHC background checks to “eligible employees.” This term, as proposed, would not encompass every single employee of an FFL; instead, it would appropriately encompass those employees who have or are likely to have access to firearms or ammunition or, for licensed manufacturers, the materials or tools to make them.

The “eligible employee” definition, if finalized, would include “firearm handler[s].” A “firearm handler,” in turn, would be defined as “a person whose current or prospective employment duties for an FFL include or will include the opportunity to access firearms or ammunition, regardless of whether the person’s employment duties include or will include the actual or constructive transfer or handling in any way of firearms or ammunition.” The term also includes “persons whose employment duties allow them entry to any device, room, or facility where firearms or ammunition of the licensee are stored.” The FBI estimates that only 57,000 of the roughly 793,000 individuals employed within retail stores that also hold dealer licenses at this time would be considered “firearm handlers” under the definition proposed in this rule.

If finalized, the “eligible employee” definition would also include certain other employees of licensed manufacturers. Employees of licensed manufacturers may, for example, never have access to or otherwise handle a weapon that meets the Federal definitions of “firearm” or “ammunition” under 18 U.S.C. 921 and 27 CFR 478.11. Employees of licensed manufacturers may have access to or handle only the raw, unfinished materials or the tools or other equipment used to manufacture firearms or ammunition. However, access to the materials and tools used during the manufacturing of firearms or ammunition can also facilitate illegal

firearms trafficking. Based on the Department’s experience, when those materials or tools fall into the hands of prohibited persons, they can be used to illegally manufacture firearms or ammunition. Consequently, this rule proposes that licensed manufacturers may submit FHCs for persons whose employment duties include or will include access to any forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a firearm or ammunition (e.g., unformed block of metal, liquid polymer, or other raw material); or any tool or other equipment used to manufacture a firearm or ammunition or otherwise finish a component part of a firearm or ammunition.

The Department also intends to exclude from the definition of “eligible employee” “responsible persons”—i.e., those individuals of an FFL with the power to direct the management, policies, and practices of the business or activity as it pertains to firearms. *See* proposed § 25.2 (excluding “responsible person[s]” from the proposed definition of “Eligible Employee”). ATF already requires responsible persons to submit fingerprints, a photograph, and specific forms so that a background check can be conducted as part of the prospective FFL’s licensing requirements.<sup>30</sup> *See* 27 CFR 478.44. As part of ATF’s background check for a potential responsible person, NICS already responds if available information demonstrates that the individual is prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t), and conducting a separate FHC for responsible persons would accordingly be duplicative.<sup>31</sup>

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<sup>30</sup> *See* ATF, Application for Federal Firearms License (Oct. 2020), <https://www.atf.gov/file/61506/download> (“ATF Application”).

<sup>31</sup> ATF requires renewed background checks of responsible persons every 3 years. *See* ATF Application, *supra*.

The proposed rule thus proposes excluding any “responsible person” from the definition of “eligible employee.” In turn, this NPRM defines “Responsible Person” as “a sole proprietor or, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the corporation, partnership, or association, insofar as they pertain to any FFL.”

b. New NICS Status Responses for FHCs

As noted in Section II.C.1 of this preamble, after receiving an FFL’s request for a NICS background check for a prospective firearm transfer, NICS responses are currently limited to “Proceed,” “Delayed,” or “Denied.” The Department believes using these same responses during FHCs could confuse FFLs. In particular, the Department notes that FHC responses should not be construed to prohibit a licensee from employing an individual in a position that does not require the handling of or access to a firearm or ammunition or, as applicable, related materials or tools. Licensees may mistake a “Denied” response during an FHC as a determination that the licensee must deny all employment to the subject of that FHC. Consequently, this rule proposes new responses to be used during FHCs: “Pass,” “Pending,” and “Did Not Pass.” As a general matter, a “Pass” response would convey that available information revealed no firearm prohibitions for the eligible employee; a “Pending” response would convey that further research is needed; and a “Did Not Pass” response would convey that available information revealed a firearms prohibition applicable to that eligible employee.

A response from the system (or a POC) that the person “Did Not Pass” the FHC should not be construed to indicate that the FFL cannot employ the person. Rather, a “Did Not Pass” response indicates only that, based on information available to NICS, the person is not eligible to ship, transport, possess, or receive firearms. Thus, circumstances in which that person handles a

firearm during the person's employment could lead to criminal liability for the person (and potentially the licensee) under applicable Federal, State, local or Tribal law. This response, whether "Pass" or "Did Not Pass," will allow the licensee to make an informed decision of whether to hire the person.

#### 4. Appeals

When information available to NICS "indicates [the employee] is prohibited from possessing a firearm or ammunition pursuant to" 18 U.S.C. 922(g) or (n), the FHC will result in a "Did Not Pass" response. In such circumstances, BSCA requires that the employee be permitted to appeal that response "in the same manner and to the same extent as if the individual had been the subject of a background check relating to the transfer of a firearm." 34 U.S.C. 40901(b)(2)(D).

Under the Brady Act and its implementing regulations, when NICS has determined that a prospective firearm transferee is ineligible to receive a firearm, the FBI provides the FFL with a "Denied" response. *See* 18 U.S.C. 922(t); 28 CFR 25.2 (defining "Denied"); *see also* 28 CFR 25.6(c)(1) and (g) (further describing responses to FFLs). A denied transferee can then request the reasons for a denial and challenge the denial if the denied transferee believes it was erroneous. *See* 34 U.S.C. 40901(f)–(g);<sup>32</sup> 28 CFR 25.10(a)–(c) (further describing administrative appeals of denied firearm transfers). Federal law also allows any person denied a firearm due to

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<sup>32</sup> 34 U.S.C. 40901(f) allows individuals to request the reasons for a "determination" when NICS "determines that [the] individual is ineligible to receive a firearm." Reasons are to be provided "in writing, within 5 business days after the date of the request." *Id.* Similarly, 34 U.S.C. 40901(g) allows prospective transferees to request the reasons why NICS informed an FFL "that receipt of a firearm by a prospective transferee would violate subsection (g) or (n)" of 18 U.S.C. 922 or State law. That person may also "submit to the Attorney General information to correct, clarify, or supplement records of the system with respect to the prospective transferee." *Id.* If such a request is made, the FBI (under authority delegated by the Attorney General) has 60 days to determine if that denial was erroneous. *Id.*; *see also* 28 CFR 25.3 (establishing NICS within the FBI). If the denial is determined to have been erroneous, the FBI must correct any erroneous records. *See* 34 U.S.C. 40901(g).



erroneous information from a NICS background check to bring a limited civil action against the State or political subdivision responsible for providing the erroneous information, against the denying State or political subdivision, or against the United States. 18 U.S.C. 925A.<sup>33</sup> These provisions, however, do not apply where NICS has only “Delayed” the prospective firearm transfer.<sup>34</sup> See 28 CFR 25.2 (defining “*Delayed*”).

Because BSCA provides for appeals of FHCs “in the same manner and to the same extent” as appeals of firearm transfer background checks, the Department interprets the term “appeal” for FHCs to include the same administrative and civil action procedures as those for firearm transfer background checks. And because appeals for firearm transfer background checks are limited to appeals from “Denied” responses, the Department interprets the phrase “in the same manner and to the same extent” to limit FHC appeals to the question whether a “Did Not Pass” response provided by the FBI or the POC<sup>35</sup> was correctly issued. Just as “Delayed” responses for prospective firearm transfers cannot be appealed, the FHC appeal processes will not be available to challenge “Pending” responses from the system. Consistent with this limitation, the NPRM proposes to amend 28 CFR 25.10 to make these procedures available to individuals whose FHC led to a “Did Not Pass” response. Finally, the FHC appeal process will

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<sup>33</sup> Such actions may only seek an order directing that the erroneous information be corrected or that the transfer be approved, except that prevailing parties may also seek to recover costs, including a reasonable attorney’s fee. 18 U.S.C. 925A.

<sup>34</sup> Actions under 18 U.S.C. 925A are limited to persons who were “denied.” Similarly, the FBI’s website pertaining to administrative appeals provides, “[i]f you believe you have been wrongfully denied a firearm, you can request a firearm-related challenge (appeal). You may only challenge a denied firearm transaction, not a delayed one.” FBI, *Firearm-Related Challenge (Appeal) and Voluntary Appeal File (VAF)*, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/national-instant-criminal-background-check-system-nics-appeals-vaf> (last visited Nov. 5, 2024) (“*Appeal and VAF Webpage*”) (emphasis omitted). The website also notes how persons can submit a “Summary Request” to the FBI to obtain copies of their identification records.

<sup>35</sup> Further discussion of POCs is provided in Section II.A.1 of this preamble.

also not be used to reconsider or overturn a licensee's decision to not hire (or not retain) an employee, regardless of the employment position sought or held.

When prospective firearm transfers are "Delayed" for further research, prospective transferees sometimes pursue improper administrative challenges or civil actions regarding those responses. Accordingly, the NPRM also proposes some provisions to reduce operational burdens on the FBI related to processing administrative appeals (or defending actions brought under 18 U.S.C. 925A) with respect to FHCs, including meritless appeals filed by persons who were not seeking a position that included access to firearms or ammunition but were nevertheless denied employment by a licensee.

Similar to what sometimes occurs during NICS transactions involving the prospective transfer of a firearm, the Department anticipates improper attempts to appeal NICS-related decisions. First, some individuals might attempt to appeal while a decision is still "Pending;" such an appeal is premature. Second, some individuals might attempt to appeal the decision of an FFL not to hire the individual. Appeals, however, are available only to challenge the response of NICS itself. Whether to hire or retain someone on account of any response NICS provides is a decision belonging to the FFL; it is not a result required by BSCA or this rule, and hence FFL employment decisions cannot be appealed.

In situations involving these inappropriate appeals, the FBI will have to expend resources defending administrative challenges or civil actions that do not meet the criteria of 34 U.S.C. 40901(b)(2)(D). Thus, to further aid in reducing the time it takes NICS to respond to some FHCs, as well as to limit unnecessary and inappropriate appeals of "Pending" responses, this NPRM proposes to clarify that eligible employees of FFLs may use the Voluntary Appeal File ("VAF") as described in 28 CFR 25.10(g) for FHC purposes. Any individual may provide

written consent to the FBI to maintain information about the individual in the VAF.<sup>36</sup> Those individuals approved for the VAF are issued a Unique Personal Identification Number (“UPIN”) to use during future NICS transactions.<sup>37</sup> When provided during future transactions, a valid UPIN is placed on the ATF Form 4473 and transmitted to NICS to query the VAF.<sup>38</sup> NICS currently uses UPINs to compare records, if any, at the time the UPIN was issued with any current records. NICS conducts this comparison to prevent erroneous “Denied” or extended “Delayed” responses during prospective firearm transfers. *See* 28 CFR 25.10(g). Consistent with use of the VAF and UPINs with respect to firearm transfers, this NPRM proposes that the VAF and UPINs may be used by eligible employees of FFLs to prevent future erroneous “Did Not Pass” or extended “Pending” responses during FHCs.

The parameters this rule proposes regarding FHCs, such as applying FHCs only to “eligible employee[s]” of licensees and resolving appeals only when NICS responds that the person “Did Not Pass” the person’s FHC, will mitigate the appellate-related operational impacts highlighted previously. Such parameters will help prevent the FBI and courts from expending resources defending or overseeing voluminous appeals submitted by persons seeking to appeal an employment decision of an FFL or seeking to appeal even when NICS did not provide a “Did Not Pass” result for that FHC.

## 5. Frequency of FHCs

The earlier-referenced statistics regarding big box stores show that, if licensees submit FHCs on the same employee daily, weekly, or even monthly (even if only submitting for eligible

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<sup>36</sup> For further information about the VAF and for the VAF application, see *Appeal and VAF Webpage, supra*.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.*

employees), then FHCs could add millions of NICS background checks to current yearly totals. That volume of submissions could negatively impact transactions involving prospective transfers of firearms. With millions of NICS background checks being conducted, NICS staff would have to work overtime or be moved from another position to assist in working on FHCs during busier times of the year.

To address this concern, the proposed regulations would allow employers to ask for an FHC for a particular eligible employee only once every 12 months. This limit would not apply if the licensee believes it has received information demonstrating the employee has become subject to a potentially prohibiting event. For example, suppose that in June 2025 a licensee submits an initial FHC for an eligible employee who is expected to handle firearms, and the licensee then receives a “Pass” response from NICS. However, in February 2026, the licensee sees the employee’s picture on a local news segment stating that a grand jury indicted the employee for several felony-level offenses. Because that felony indictment results in a firearm restriction under 18 U.S.C. 922(n), the licensee would be authorized under this rule to submit another FHC of the eligible employee so long as the FFL had previously provided written notice to the employee that it intends to conduct the background check and had obtained written consent to conduct the background check from the employee. *See* 34 U.S.C. 40901(b)(2)(B). This rule does not provide for a licensee to initiate an FHC without the eligible employee’s prior written consent and does not address what, if any, recourse might be available to an employee or licensee where the licensee has not obtained that consent.<sup>39</sup>

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<sup>39</sup> This rule is not intended to address any and all employment-related matters that may arise and does not take a position on whether notice and consent are required to be obtained prior to each FHC or whether the employee can consent to subsequent FHCs when the employee consents to the initial FHC. This rule does not address whether, for example, an eligible employee can provide written consent once, with that consent then being used for future FHCs; or if the employee must provide written consent for each FHC. This rule also does not provide any guidance on whether it would be proper for a licensee to require an eligible employee to submit to an FHC as a (pre)condition of

## 6. Conforming Amendments

To account for the proposed revision of the regulations to permit use of NICS for FHCs, some definitions in the current regulations will need small changes. This NPRM proposes amendments to the definitions for “Appeal,” “FFL,” “NICS,” “NICS Section,” “NICS Representative,” and “POC,” consistent with the addition of FHCs to these regulations.

In addition, the Department proposes to amend 28 CFR 25.1, 25.2, 25.6, 25.8, 25.10, and 25.11 to establish procedures for FHCs that are separate from those concerning prospective firearm transfers. Proposed amendments to 28 CFR 25.6 provide the process for how an FFL or POC will submit a request for an FHC and the requirements of the submission. This amendment also describes the responses the NICS Section or POC can provide to licensees. Further, FBI proposes amendments to 28 CFR 25.8 that parallel existing safeguards for background checks for prospective firearm transfers. Lastly, when a person or entity purposefully provides false information to NICS in order to obtain a “Proceed” response, the person or entity is subject to a fine of up to \$10,000.00 and to potential loss of access to NICS. *See* 28 CFR 25.11. This NPRM proposes that 28 CFR 25.11 be amended to also apply monetary or access penalties to those persons who purposely provide misinformation to NICS to obtain a “Pass” response for an FHC.

### *D. Severability*

BSCA addresses critical but distinct components of the NICS background check process. The Department believes that its proposals to allow FFLs to conduct FHCs are well-supported in law, reflect sound policy, and, once finalized, should be upheld against any legal challenge. However, if any portion of the proposed rule, once finalized, is declared invalid or unenforceable

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obtaining or maintaining employment with the licensee. System misuse is discussed at 28 CFR 25.11, where a non-exhaustive list of examples of system misuse is provided.

by a court, the Department intends that the proposals contained herein, once finalized, be viewed as independent, necessary, and severable from each other to the maximum extent possible. As described previously, BSCA mandated that the Attorney General “promulgate regulations allowing licensees to use [NICS] for purposes of voluntarily conducting an employment background check relating to a current or prospective employee.” 34 U.S.C. 40901(b)(2)(A). Each of the policy and operational considerations described in Section II of this preamble is independently significant to the functioning of this rule. If a court were to invalidate one or more of the provisions of the final rule resulting from this NPRM, the Department intends that the remaining provisions of the rule be severed from any invalidated provision and that all remaining provisions stand.

To obviate any doubt as to the Department’s intent, even if a provision were deemed invalid (which, again, the Department does not believe is supported), the Department would still have proposed each of the other provisions in this NPRM. *Cf. American Fuel & Petrochemical Manufacturers v. E.P.A.*, 3 F.4th 373, 384 (D.C. Cir. 2021) (severing one section of a rule that the court found invalid where the agency had stated that it intended that relevant section to be “severable from” another section that “operate[d] independently”). Each proposed amendment in this rule stands on its own with no reliance on another proposed amendment. Each proposed amendment is necessary, for example, to notify the public, to provide for the implementation of FHCs, or to account for the potential application of existing regulations (such as appellate procedures and penalty provisions) to FHCs. Consequently, the Department is also proposing an amendment of 28 CFR 25.1 to include a general statement about the severability of the provisions within 28 CFR, part 25, subpart A.

#### *E. Related Issues*

As noted several times in Sections II.B and II.C of this preamble, BSCA requires licensees to provide an employee notice of the background check and obtain the employee's written consent prior to conducting the check. BSCA does not address particular requirements related to recordkeeping (e.g., form or retention period) or reporting to the Department with respect to FHCs. *See* 34 U.S.C. 40901(b)(2)(B)(i)–(ii). This rule also does not propose to impose a specific requirement on licensees to maintain records showing that the FFL provided notice of the FHC to the eligible employee or that the eligible employee provided written consent to conduct the FHC. ATF has drafted a new form that, when available, may be used by licensees for purposes of submitting FHCs. The Department anticipates that ATF will have acquired approval for the new form in time to facilitate FHCs conducted under the final rule resulting from this rulemaking. ATF's FHC Form (5300.47) currently proposes to include places to document NICS responses ("Pass," "Did Not Pass," or "Pending") and a statement indicating that the eligible employee's signature on the form constitutes the required written consent. The information provided by a licensee about an eligible employee for the purpose of conducting an FHC will be the same information provided by a licensee to NICS about a transferee for purposes of a prospective firearm transfer through the current ATF Form 4473. *See* 28 CFR 25.7.

The purpose of this rule is solely to propose updates to relevant NICS regulations to provide for the new use of NICS for FHCs, as mandated by Congress. This rule is not meant or intended to address matters that may or may not be impacted by jurisdiction-specific employment laws.

In addition to this proposed rule, the Department has issued two other rulemakings to address relevant provisions in the Consolidated Appropriations Act, 2022, Pub. L. 117-103, 136

Stat. 49 (2022), and other provisions of BSCA. *See* RIN 1110-AA36, FBI-158 (proposing regulations related to mandated NICS denial notifications, collection of additional residence address information for a prospective firearm transferee during some NICS transactions, expansion of the existing prohibiting categories to include firearm prohibitions Congress added to 18 U.S.C. 922(t) concerning restrictions imposed by applicable Tribal and local laws and 18 U.S.C. 922(d), and expanded background checks and additional delays during under-21 transactions); and RIN 1110 AA34, FBI-157 (allowing FFLs to receive information from NCIC's Gun File to check whether a firearm offered to the FFL has been reported as stolen).<sup>40</sup> Please consult those rulemakings for further substantive information about the regulatory amendments the Department is proposing on to those subjects.

### **III. Statutory and Executive Order Reviews**

*A. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 14094 (Modernizing Regulatory Review)*

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), The Principles of Regulation; Executive Order 13563, section 1(b), General Principles of Regulation; and Executive Order 14094. Both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify both costs and benefits, and of reducing costs, harmonizing rules, and promoting

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<sup>40</sup> The Department's interim final rule found at RIN 1110-AA34, FBI-157, was signed by the Attorney General on June 24, 2024, and published in the *Federal Register* on July 1, 2024. *See* Bipartisan Safer Communities Act—Access to Records of Stolen Firearms in the National Crime Information Center, 89 FR 54344.



flexibility. Executive Order 14094, among other things, amends section 3(f) of Executive Order 12866.

The Office of Management and Budget (“OMB”) has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), as amended, and accordingly this rule has been reviewed by OMB.

The Department has, to the extent possible, assessed the costs and benefits of this proposed rule and believes that the proposed regulatory approach selected maximizes net benefits. This proposed rule will benefit public safety and interested populations. First, this proposed rule benefits interested populations by further clarifying for the public how NICS may be used for FHCs. Next, this proposed rule benefits licensees, as specifically authorized by Congress, by allowing NICS to be used to submit requests for FHCs with respect to consenting eligible employees. This use of NICS, although voluntary, will benefit licensees and promote public safety by identifying eligible employees of the licensee who are subject to firearm prohibitions as described in 18 U.S.C. 922(t).

The anticipated costs to the public of this rule are likely to be small. There is no charge for this use of NICS. Although licensees will incur costs in terms of time necessary to notate system responses (“Pass,” “Did Not Pass,” or “Pending”) or obtain an eligible employee’s written consent, this rule does not propose mandating that licensees submit FHCs. There will be no costs for licensees to modify or upgrade their current means of accessing NICS. POCs may incur costs to conduct FHCs, including, for example, a minimal one-time cost to upgrade their existing systems, but POCs will incur these costs only if the POCs voluntarily choose to add FHC-related duties to their current duties as POCs. It is anticipated that FHCs could result in some costs to State, local, and Tribal government entities such as courts, prosecuting offices, and

law enforcement agencies if those entities choose to respond to requests for records when contacted during further research of a “Pending” response. But those governmental agencies are not required by this rule to respond to the NICS Section. Hence, any costs incurred would be voluntary.

The exact cost of the proposed regulations cannot be calculated. The full impact on the NICS Section due to the increase in NICS background checks resulting from the addition of FHCs cannot be projected due to uncertainty about the number of licensees that will choose to use NICS for this purpose. And the FBI cannot determine whether State, local, and Tribal governments will voluntarily choose to respond to record requests stemming from FHCs. Moreover, the FBI does not have historical information to use to estimate the number of eligible employees whose backgrounds would require the NICS Section or participating POCs to contact Federal, State, local or Tribal governmental entities, such as courts and law enforcement agencies, to request those agencies provide further information about (potentially) prohibiting records. In addition, the FBI can neither predict the frequency nor the volume of checks each licensee will initiate, and the FBI cannot determine the number of eligible employees who will provide written consent for an FHC. As a result, a quantitative impact analysis cannot be provided.

*B. Executive Order 13132 (Federalism)*

This proposed rule may have effects on the States to the extent State entities respond to NICS inquiries during research of a “Pending” transaction. Any such effects, however, will be only an indirect result of this rule because State entities may freely choose whether to respond to such NICS inquiries. In addition, such effects will not be substantial, nor will such effects concern the relationship between the Federal Government and the States, or the distribution of

power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Attorney General has determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*C. Executive Order 12988 (Civil Justice Reform)*

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*D. Regulatory Flexibility Act*

This proposed rule amends the Department's regulations to incorporate changes made by some provisions of BSCA. These changes are proposed to provide FFLs the ability to use NICS to voluntarily request background checks for eligible employees. The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, generally requires that when an agency issues a proposed rule or a final rule pursuant to section 553(b) of the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the *Federal Register*. See 5 U.S.C. 603, 604. An initial regulatory flexibility analysis is not required if the head of the agency certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

"[T]he term small entity shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction' defined in paragraphs (3), (4) and (5) of this section[.]" 5 U.S.C. 601(6). The term "small entities," therefore, comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000

people. *See* 5 U.S.C. 601(3)–(6). The Department anticipates that a majority of the licensees that will request FHCs under this rule would be considered small entities for purposes of the RFA.

The FBI anticipates that costs for FFLs that voluntarily undertake FHCs would be insignificant, consisting only of the minimal time it would take for the FFL to collect the employee’s consent and any information necessary to complete the ATF Form 5300.47, submit the FHC, and receive the response. Further, whether to take part in FHCs of any eligible employees is the voluntary choice of each FFL. *See* 34 U.S.C. 40901(b)(2)(A). Therefore, the rule has no impact, economic or otherwise, on any licensee, including small entity licensees, unless the licensee voluntarily chooses to request FHCs through NICS. Again, neither the FBI, nor this rule, imposes any fee upon any licensee to conduct a NICS background check. *See* 34 U.S.C. 40901(b)(2)(A).

As is the case with respect to further research during a “Delayed” NICS background check for purposes of a prospective firearm transfer, when the NICS Section (or a POC) contacts a State, local, or Tribal governmental unit (such as a police department or municipal court) for further information when researching a “Pending” response for an FHC, that governmental unit will not necessarily be burdened. This is because this rule does not require the governmental unit to take any specific action upon being contacted by NICS. This remains true regardless of whether that governmental unit would be considered a small entity.

An FFL will initiate an FHC and receive a response in the same manner the FFL uses to submit a NICS background check for the prospective transfer of a firearm. The FBI will not charge a fee for this service, and there are no mandatory maintenance or compliance costs imposed by this proposed rule. Because an FHC is a voluntary check; because there is no

mandatory requirement that POCs process these checks, *see* proposed § 25.2 (requiring that POCs process checks only for prospective firearm “transfers,” not FHCs); and because State, local, and Tribal agencies contacted for supplemental records are not required to respond to NICS contacts, the FBI certifies there will not be a significant economic impact on a substantial number of small entities. Accordingly, an initial regulatory flexibility analysis is not necessary for this rule.

The FBI welcomes any public comments concerning potential impacts or burdens that this rule may or will have on current or future NICS users and entities that may be contacted during research of NICS transactions.

*E. Unfunded Mandates Reform Act of 1995*

This proposed rule will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted for inflation) in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48. *See* 2 U.S.C. 1532.

*F. Paperwork Reduction Act*

This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163. *See* 44 U.S.C. 3501–3521.

*G. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)*

The Department has determined that formal Tribal consultation under Executive Order 13175 is not required because this proposed rule is provided as part of a public collaboration that includes Tribes and is being issued in order to implement Congress’s mandate that the Attorney

General promulgate regulations that allow licensees under 18 U.S.C. 923 to use NICS for purposes of FHCs as described in this proposed rule. Implementation of these regulations will not have any substantial direct effects on federally recognized Tribes.

### **List of Subjects**

Administrative practice and procedure, Arms and munitions, Computer technology, Privacy, Security measures, Telecommunications.

### **Authority and Issuance**

Accordingly, for the reasons set forth in the preamble, 28 CFR part 25, Subpart A, is proposed to be amended as follows:

### **PART 25, Subpart A—the National Instant Criminal Background Check System**

1. The authority citation for 28 CFR part 25 is revised to read as follows:

Authority: Public Law 103–159, 107 Stat. 1536, 49 U.S.C. 30501–30505; Public Law 101–410, 104 Stat. 890, as amended by Public Law 104–134, 110 Stat. 1321; Public Law 117–159, 136 Stat. 1313; 34 U.S.C. 40901; 18 U.S.C. 921, 922.

### **§ 25.1 [Amended]**

2. Revise § 25.1 to read as follows:

The purpose of this subpart is to establish policies and procedures implementing the Brady Handgun Violence Prevention Act (Brady Act), Public Law 103–159, 107 Stat. 1536. The Brady Act requires the Attorney General to establish a National Instant Criminal Background Check System (NICS) to be contacted by any licensed importer, licensed manufacturer, or licensed dealer of firearms for information as to whether the transfer of a firearm to any person who is not licensed under 18 U.S.C. 923 would be in violation of subsection (t) of 18 U.S.C. 922. The NICS may also be contacted, pursuant to the Bipartisan Safer Communities Act, Public Law

117–159, 136 Stat. 1313, by any Federal Firearms Licensee (FFL) for purposes of a firearm handler background check (FHC). The regulations in this subpart are issued pursuant to section 103(h) of the Brady Act, 107 Stat. 1542 (18 U.S.C. 922 note) and section 12004(h)(1) of the Bipartisan Safer Communities Act, 136 Stat. 1330–31 (34 U.S.C. 40901(b)(2)(A)), and include requirements to ensure the privacy and security of the NICS and appeals procedures for persons who have been determined not to have the right to receive a firearm as a result of a NICS background check, including an FHC, performed by the Federal Bureau of Investigation (FBI) or a state or local law enforcement agency. The provisions of this subpart shall be construed as being severable from one another and any remaining upheld or unchallenged provisions shall be treated independently of any invalidated provision.

### **§ 25.2 [Amended]**

3. In § 25.2,

(a) Revise the definitions of “Appeal,” “ARI,” “FFL,” “NICS,” “NICS Representative,” “NICS Section,” “NRI (NICS Record Identifier),” and “POC (Point of Contact);” and

(b) Add in alphabetical order the following new definitions for “Did Not Pass,” “Eligible Employee,” “Firearm Handler,” “Firearm Handler Background Check (FHC),” “Pass,” “Pending,” “Responding Agency,” and “Responsible Person.”

The revisions and additions read as follows:

### **§ 25.2 Definitions**

*Appeal* means a formal procedure to challenge the denial of a firearm transfer or a “Did Not Pass” response for an FHC.

*ARI* means a unique Agency Record Identifier assigned by the agency submitting records for inclusion in the NICS Indices.

\* \* \* \* \*

*Did Not Pass* means the response given by the NICS, in the case of an FHC, to indicate that at least one matching record was found that demonstrates the eligible employee is prohibited from receiving or being transferred a firearm as described in 18 U.S.C 922(t). The receipt of a “Did Not Pass” response should not be construed to indicate the person is not eligible for any employment with the FFL, but rather is solely a determination, based on information available to the NICS, that the person is not eligible to receive or be transferred firearms under 18 U.S.C 922(t). Circumstances in which that person handles a firearm during the person’s employment could lead to criminal liability for the person (and potentially the FFL) under applicable Federal, State, local or Tribal law.

\* \* \* \* \*

*Eligible Employee:* (1) For purposes of conducting FHCs, *eligible employee* means a person who is not listed as a responsible person of the FFL and is a

(A) Firearm handler; or a

(B) Person whose current or prospective employment duties for a licensed manufacturer include, or will include, access to, or the handling of, any

(i) Forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a firearm or ammunition (e.g., unformed block of metal, liquid polymer, or other raw material); or

(ii) Tool or other equipment used to manufacture a firearm or ammunition, or to otherwise finish a component part of a firearm or ammunition.



(2) Persons who have or will have access to tools or other equipment as described in paragraph (1)(B)(ii) of this definition include, but are not limited to, persons whose employment duties allow them entry to any device, room, or facility where such tools or other equipment of the manufacturer are used or stored.

*FFL (federal firearms licensee)* means:

(1) For purposes of a prospective firearm transfer under 18 U.S.C. 922(t), a person licensed by ATF as a manufacturer, dealer, or importer of firearms; and

(2) For purposes of an FHC, any licensee as defined under 34 U.S.C. 40901.

*Firearm Handler* means a person whose current or prospective employment duties for an FFL include or will include the opportunity to access firearms or ammunition, regardless of whether the person's employment duties include or will include the actual or constructive transfer or handling in any way of firearms or ammunition. Persons who have or will have access to firearms or ammunition include, but are not limited to, persons whose employment duties allow them entry to any device, room, or facility where firearms or ammunition of the licensee are stored.

*Firearm Handler Background Check (FHC)* means a NICS background check voluntarily initiated by an FFL pursuant to 34 U.S.C. 40901(b) for an eligible employee after that eligible employee has provided the FFL with the employee's written consent to the FHC.

\* \* \* \* \*

*NICS* means the National Instant Criminal Background Check System, which an FFL must, with limited exceptions, contact for information on whether receipt of a firearm by a person who is not licensed under 18 U.S.C. 923 would be prohibited as described in 18 U.S.C. 922(t). An FFL also may voluntarily contact the NICS for the purpose of conducting FHCs.

\* \* \* \* \*

*NICS Representative* means a person who receives telephone or electronic inquiries to the NICS Section from FFLs requesting background checks and provides a response as to whether the receipt or transfer of a firearm may proceed or is delayed or, for FHCs, whether an eligible employee “Passed” or “Did Not Pass” a NICS background check or whether the FHC is “Pending.”

*NICS Section* means the section of the FBI that receives telephone or electronic inquiries from FFLs, performs NICS background checks, including FHCs, makes determinations based upon available information as to whether the receipt or transfer of a firearm would be prohibited as described in 18 U.S.C. 922(t), researches criminal history records, tracks and finalizes appeals, and conducts audits of system use. For purposes of this subpart, the term NICS Operations Center shall be understood to refer to the NICS Section.

*NRI (NICS Record Identifier)* means the system-generated unique number associated with each record in the NICS Indices.

\* \* \* \* \*

*Pass* means, in the case of an FHC, the response given by the NICS to indicate that, at the time of the response, no information was available to the NICS demonstrating that the eligible employee is prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t).

*Pending* means, in the case of an FHC, the response given by the NICS to indicate that more research is required prior to the NICS being able to provide a “Pass” or “Did Not Pass” response.

*POC (Point of Contact)* means a state or local law enforcement agency serving as an intermediary between an FFL and the Federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs for prospective firearm transfers, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from receiving or being transferred a firearm as described in 18 U.S.C. 922(t), and respond to FFLs with the results of a NICS background check. A POC may also, if its state law allows, receive FHC requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an eligible employee is disqualified from receiving or being transferred a firearm as described in 18 U.S.C. 922(t), and respond to FFLs with the results of an FHC. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order.

\* \* \* \* \*

*Responding Agency* means, in the case of an FHC, a POC or the NICS Section, whichever provides the response that information available to the NICS demonstrates that the eligible employee is prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t).

*Responsible Person* means a sole proprietor or, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the corporation, partnership, or association, insofar as they pertain to any FFL.

\* \* \* \* \*

**§ 25.4 [Amended]**

4. Revise § 25.4 to read as follows:

**§ 25.4 Record source categories.**

It is anticipated that most records in the NICS Indices will be obtained from Federal agencies. It is also anticipated that a limited number of authorized state, local, and tribal law enforcement agencies will voluntarily contribute records to the NICS Indices. Information in the NCIC and III systems that will be searched during a background check has been or will be contributed voluntarily by Federal, state, local, tribal, and international criminal justice agencies.

**§ 25.5 [Amended]**

5. In § 25.5, revise paragraphs (a)(1)–(a)(4) and (b) to read as follows:

**§ 25.5 Validation and data integrity of records in the system.**

(a) \* \* \*

(1) Ensuring the accurate adding, canceling, or modifying of NICS Indices records supplied by Federal agencies;

(2) Automatically rejecting any attempted entry of records into the NICS Indices that contain detectable invalid data elements;

(3) Automatically purging records in the NICS Indices after they have been on file for a prescribed period of time; and

(4) Performing quality control checks in the form of periodic internal audits by FBI personnel to verify that the information provided to the NICS Indices remains valid and correct.

(b) Each data source will be responsible for ensuring the accuracy and validity of the data it provides to the NICS Indices and will immediately correct any record determined to be invalid or incorrect.

**§ 25.6 [Amended]**

6. In § 25.6,

(a) Revise paragraphs (a), (c)(1) introductory text, (d)(2), (f) introductory text, (f)(2), (h), (i), and (j) introductory text;

(b) Redesignate paragraph (c)(2) as paragraph (c)(3), and revise newly renumbered paragraph (c)(3); and

(c) Add new paragraphs (c)(2), (c)(4), and (g)(3).

The revisions, redesignations, and additions read as follows:

**§ 25.6 Accessing records in the system.**

(a) FFLs shall initiate a NICS background check in connection with a proposed firearm transfer as required by the Brady Act and may initiate a NICS background check in connection with an FHC. FFLs are strictly prohibited from initiating a NICS background check for any other purpose. The process of accessing the NICS for the purpose of conducting a NICS background check is initiated by an FFL's contacting the FBI NICS Section (by telephone or electronic dial-up access) or a POC. FFLs in each state will be advised by ATF whether they are required to initiate NICS background checks with the NICS Section or a POC and how they are to do so.

\* \* \* \* \*

(c)(1) The FBI NICS Section, upon receiving an FFL's request for a background check for the transfer of a firearm, will:

\* \* \* \* \*

(2) The FBI NICS Section, upon receiving an FFL telephone or electronic dial-up request for a background check for an FHC, will:

(i) 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 Indices, NCIC, III) for any matching records; and

(iv) Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check:

(A) “Pass” response, if no disqualifying information is found demonstrating the eligible employee is prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t).

(B) “Pending” response, if a NICS search requires more research to determine whether the eligible employee is prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t).

(C) “Did Not Pass” response, when at least one matching record is found that provides information demonstrating that the eligible employee is prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t).

(3) None of the responses provided to the FFL under paragraph (c)(1) or (c)(2) of this section will contain any of the underlying information in the records checked by the system.

(4) Except where an FFL believes it has received sufficient information demonstrating the eligible employee has become subject to a potentially prohibiting event (for example, a new criminal charge, conviction, or protection order), an FFL may conduct only one FHC for each eligible employee every 12 months.

(d) \* \* \*  
\* \* \* \*

(2) Enter a purpose code indicating that the query of the system is for the purpose of performing a NICS background check in connection with the transfer of a firearm or an FHC; and

\* \* \* \* \*

(f) When the NICS receives an inquiry from a POC, it will search the relevant databases (i.e., NICS Indices, NCIC, III) for any matching record(s) and will provide an electronic response to the POC. This response will consolidate the search results of the relevant databases and will include the NTN. The following types of responses may be provided by the NICS to a state or local agency conducting a background check:

\* \* \* \* \*

(2) Partial response, if the NICS has not completed the search of all of its records. This response will indicate the databases (i.e., NICS Indices, NCIC, and III) that have been searched and the databases that have not been searched. It will also provide any potentially disqualifying information found in any of the databases searched. A follow-up response will be sent as soon as all the relevant databases have been searched. The follow-up response will provide the complete search results.

\* \* \* \* \*

(g) \* \* \*

(1) \* \* \*

(2) In the case of a prospective firearm transfer, notify the FFL that the transfer may “Proceed,” is “Delayed” pending further record analysis, or is “Denied.” “Proceed” notifications made within 3 business days will be accompanied by the NTN or STN traceable to the NTN.

The POC may or may not provide a transaction number (NTN or STN) when notifying the FFL of a “Denied” response.

(3) In the case of an FHC, notify the FFL of a “Pass” or “Did Not Pass” result for the FHC, or that the FHC is “Pending.” The POC may or may not provide a transaction number (NTN or STN) when notifying the FFL of a “Did Not Pass” result.

(h)(1) POCs shall transmit electronic NICS transaction determination messages to the FBI for the following transactions:

(i) In the case of a prospective firearm transfer, “Delayed” transactions that are not resolved before the end of the operational day on which the check is requested; “Denied” transactions; transactions reported to the NICS as “Delayed” or “Open” and later changed to “Proceed;” and “Denied” transactions that have been overturned.

(ii) In the case of FHCs that a POC conducts, transactions resulting in a “Pass” or “Did Not Pass” response; and transactions that have been overturned.

(2) The FBI shall provide POCs with an electronic capability to transmit the information identified in paragraphs (h)(i) and (h)(ii) of this section. These electronic messages shall be provided to the NICS immediately upon communicating the POC determination to the FFL. For firearm transfer checks where a determination has not been communicated to the FFL, the electronic messages shall be communicated no later than the end of the operational day on which the check was initiated. With the exception of permit checks and FHCs, newly created POC NICS firearm transfer checks that are not followed by a determination message (“Denied” or “Delayed”) before the end of the operational day on which they were initiated will be assumed to have resulted in a “Proceed” notification to the FFL. The information provided in the POC determination messages for firearm transfer checks will be maintained in the NICS Audit Log



described in § 25.9(b). The NICS will destroy its records regarding POC determinations for firearm transfer checks in accordance with the procedures detailed in § 25.9(b).

(i)(1) In the case of a background check for the transfer of a firearm, FFLs are required to record the system response, whether provided by the FBI NICS Section or a POC, on the appropriate ATF form for audit and inspection purposes, under 27 CFR part 478 recordkeeping requirements. The FBI NICS Section response will always include an NTN and associated “Proceed,” “Delayed,” or “Denied” determination. POC responses may vary as discussed in paragraph (g) of this section. In these instances, FFLs will record the POC response, including any transaction number or determination.

(2) In the case of a background check for an FHC, FFLs may record the system response, whether provided by the FBI NICS Section or a POC, on the appropriate form for FHC checks. The FBI NICS Section response will always include an NTN and associated response of “Pass,” “Pending,” or “Did Not Pass.” POC responses may vary as discussed in paragraph (g) of this section. In these instances, FFLs may record the POC response, including any transaction number or determination. FFLs should follow the instructions on the applicable FHC form when recording responses.

(j) *Access to the NICS Indices for purposes unrelated to NICS background checks required by the Brady Act or an FHC.* Access to the NICS Indices for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) or an FHC shall be limited to uses for the purposes of:

\* \* \* \* \*

## **§ 25.8 [Amended]**

7. In § 25.8,

- (a) Revise paragraphs (a), (f)(2), and (g)(1);
- (b) Redesignate paragraph (g)(2) as (g)(2)(i); and
- (c) Add new paragraph (g)(2)(ii).

The addition and revisions read as follows:

**§ 25.8 System safeguards.**

(a) Information maintained in the NICS Indices is stored electronically for use in an FBI computer environment. The NICS central computer will reside inside a locked room within a secure facility. Access to the facility will be restricted to authorized personnel who have identified themselves and their need for access to a system security officer.

\* \* \* \* \*

(f) \* \* \*

\* \* \* \* \*

(2) FFLs will provide the NICS Representative with their FFL Number and code word, the type of sale or whether the background check is an FHC, and the name, sex, race, date of birth, and state of residence of the prospective buyer or eligible employee.

\* \* \* \* \*

(g) \* \* \*

(1) Access will be restricted to the initiation of a NICS background check in connection with the proposed transfer of a firearm or an FHC.

(2)(i) \* \* \*

(ii) The NICS Representative will only provide a response of “Pass,” “Pending,” or “Did Not Pass” (with regard to an FHC) and will not provide the details of any record information about the subject of the FHC. In cases where potentially disqualifying information is found in

response to an FFL query, the NICS Representative will provide a “Pending” response to the FFL. Follow-up “Pass” or “Did Not Pass” responses will be provided by the NICS Section during its regular business hours.

\* \* \* \* \*

**§ 25.9 [Amended]**

8. In § 25.9, revise paragraphs (a), (b)(1)–(4), (c)(1)–(2), and (d)(1)–(2) to read as follows:

**§ 25.9 Retention and destruction of records in the system.**

(a) The NICS will retain NICS Indices records that indicate that receipt of a firearm by the individuals to whom the records pertain would be prohibited as described in 18 U.S.C. 922(t). The NICS will retain such records indefinitely unless they are canceled by the originating agency. In cases where a firearms disability is not permanent (e.g., a disqualifying restraining order), the NICS will automatically purge the pertinent record when it is no longer disqualifying. Unless otherwise removed, records contained in the NCIC and III files that are accessed during a background check will remain in those files in accordance with established policy.

(b) \* \* \*

(1) *Contents.* The NICS Audit Log will record the following information: Type of transaction (inquiry or response), line number, time, date of inquiry, header, message key, ORI or FFL identifier, and inquiry/response data (including the name and other identifying information about the prospective transferee or, with respect to FHCs, employee and the NTN).

(i) NICS “Denied” and “Did Not Pass” transaction records obtained or created in the course of the operation of the system will be retained in the Audit Log for 110 years.

(ii) NICS Audit Log records relating to transactions remaining in an “Open” or “Pending” status, except the NTN and the NTN’s creation date, will be destroyed after not more than 90 days from the date of inquiry; and

(iii) In cases of NICS Audit Log records relating to allowed transactions, all identifying information submitted by or on behalf of the transferee will be destroyed within 24 hours after the FFL receives a “Pass” or “Proceed” response, as applicable. All other information, except the NTN and the NTN’s creation date, will be destroyed after not more than 90 days from the date of inquiry.

(2) *Use of information in the NICS Audit Log.* The NICS Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, and support audits of the use and performance of the system. Searches may be conducted on the Audit Log by timeframe, e.g., by day or month, or by a particular state or agency. Information in the NICS Audit Log pertaining to allowed transactions may be accessed directly only by the FBI and only for the purpose of conducting audits of the use and performance of the NICS, except that:

(i) Information in the NICS Audit Log, including information not yet destroyed under § 25.9(b)(1)(iii), that indicates, either on its face or in conjunction with other information, a violation or potential violation of law or regulation, may be shared with appropriate authorities responsible for investigating, prosecuting, or enforcing such law or regulation; and

(ii) The NTNs and their creation dates for allowed transactions may be shared with ATF in Individual FFL Audit Logs as specified in § 25.9(b)(4).

(3) *Limitation on use.* The NICS, including the NICS Audit Log, may not be used by any department, agency, officer, or employee of the United States to establish any system for the

registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited from receiving or being transferred a firearm as described in 18 U.S.C. 922(t). The NICS Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of NICS data.

(4) *Creation and Use of Individual FFL Audit Logs.* Upon written request from ATF containing the name and license number of the FFL and the proposed date of inspection of the named FFL by ATF, the FBI may extract information from the NICS Audit Log and create an Individual FFL Audit Log for transactions originating at the named FFL for a limited period of time. An Individual FFL Audit Log shall contain all information on denied transactions, and, with respect to all other transactions, only non-identifying information from the transactions. In no instance shall an Individual FFL Audit Log contain more than 60 days' worth of transaction records with a status of "Delayed," "Open," "Pass," "Pending," or "Proceed" originating at the FFL. The FBI will provide POC states the means to provide to the FBI information that will allow the FBI to generate Individual FFL Audit Logs in connection with ATF inspections of FFLs in POC states. POC states that elect not to have the FBI generate Individual FFL Audit Logs for FFLs in their states must develop a means by which the POC will provide such logs to ATF.

(c) \* \* \*

(1) All inquiry and response messages (regardless of media) relating to a background check that results in an allowed transfer or "Pass" status for an FHC; and

(2) All information (regardless of media) contained in the NICS Audit Log relating to a background check that results in an allowed transfer or "Pass" status for an FHC.

(d) \* \* \*

(1) All inquiry and response messages (regardless of media) relating to the initiation and result of a check of the NICS that results in an allowed transfer or “Pass” status for an FHC that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions; and

(2) All other records relating to the subject and result of a NICS check that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions.

#### **§ 25.10 [Amended]**

9. Revise § 25.10 to read as follows:

#### **§ 25.10 Correction of erroneous system information.**

(a) An individual may request the reasons for the denial of a firearm transfer from the agency that conducted the check of the NICS (the “denying agency,” which will be either the FBI or the state or local law enforcement agency serving as a POC). The FFL will provide to the denied individual the name and address of the denying agency and the unique transaction number (NTN or STN) associated with the NICS background check. In the case of an FHC, an individual may request the reasons for the “Did Not Pass” response from the agency that conducted the check of the NICS (the “responding agency,” which will be either the FBI or the state or local law enforcement agency serving as a POC). The FFL will provide the individual the name and address of the responding agency and the unique NTN or STN associated with the FHC. A request for the reasons for the “Denied” or “Did Not Pass” response must be made in writing to the denying or responding agency, as applicable. (POCs at their discretion may waive the requirement for a written request.)

(b) The denying or responding agency will respond to the individual with the reasons for the “Denied” or “Did Not Pass” response within five business days of its receipt of the individual’s request. The response should indicate whether additional information or documents are required to support an appeal, such as fingerprints in appeals involving questions of identity (i.e., a claim that the record in question does not pertain to the individual making the request).

(c) If the individual wishes to challenge the accuracy of the record upon which a “Denied” or “Did Not Pass” response is based, or if the individual wishes to assert that the individual’s right to possess a firearm has been restored, the individual may make application first to the denying or responding agency, i.e., either the FBI or the POC. If the denying or responding agency is unable to resolve the appeal, the agency will so notify the individual and shall provide the name and address of the agency that originated the document containing the information upon which “Denied” or “Did Not Pass” response was based. The individual may then apply for correction of the record directly to the agency from which it originated. If the record is corrected as a result of the appeal to the originating agency, the individual may so notify the agency that issued a “Denied” or “Did Not Pass” response, which will, in turn, verify the record correction with the originating agency (assuming the originating agency has not already notified the denying or responding agency of the correction) and take all necessary steps to correct the record in the NICS.

(d) As an alternative to the procedure as described in paragraphs (a) through (c) of this section, where a POC was the denying or responding agency, the individual may elect to direct the individual’s challenge to the accuracy of the record, in writing, to the FBI, NICS Section, Criminal Justice Information Services Division, 1000 Custer Hollow Road, Module C-1, Clarksburg, West Virginia 26306–0147. Upon receipt of the information, the FBI will

investigate the matter either by contacting the POC that provided the “Denied” or “Did Not Pass” response or by contacting the source of the data on which the “Denied” or “Did Not Pass” response was based. The FBI will request that the POC or the data source verify that the record in question pertains to the individual who was the subject of the “Denied” or “Did Not Pass” response or verify or correct the challenged record. The FBI will consider the information it receives from the individual and the response it receives from the POC or the data source. If the record is corrected as a result of the challenge, the FBI shall so notify the individual, correct the erroneous information in the NICS, and give notice of the error to any Federal department or agency, or any state, local, or tribal agency, that was the data source of such erroneous records.

(e) Upon receipt of notice of the correction of a contested record from the originating agency, the FBI or the agency that contributed the record shall correct the data in the NICS, and the denying or responding agency shall provide a written confirmation of the correction of the erroneous data to the individual for presentation to the FFL. In cases where multiple disqualifying or potentially disqualifying records are the basis for the “Denied” or “Did Not Pass” response, or where further disqualifying or potentially disqualifying records otherwise exist in the subject’s background, the individual must pursue a correction for each record before a “Proceed” or “Pass” response can be provided to the FFL. In the case of a prospective firearm transfer, if the appeal of a contested record is successful and 30 or fewer days have transpired since the initial check, and there are no other disqualifying or potentially disqualifying records upon which to continue the denial, the NICS will communicate a “Proceed” response to the FFL. If the appeal of a prospective firearm transfer is successful and more than 30 days have transpired since the initial check, the FFL must recheck the NICS before allowing the transfer to continue. In the case of an FHC, if the appeal of a contested record is successful and there are no



other disqualifying or potentially disqualifying records upon which to continue the “Did Not Pass” status, the NICS will communicate a “Pass” response to the FFL.

(f) An individual who is the subject of a denied transfer may also contest the accuracy or validity of a disqualifying record by bringing an action against the state or political subdivision responsible for providing the contested information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the contested information be corrected or that the firearm transfer be approved. Similarly, an individual who is the subject of a “Did Not Pass” response during an FHC may bring an action against the state or political subdivision responsible for providing the contested information, or responsible for providing the “Did Not Pass” response, or against the United States, as the case may be, for an order directing that the contested information be corrected or that the FHC be passed.

(g) An individual may provide written consent to the FBI to maintain information about the individual in a Voluntary Appeal File to be established by the FBI and checked by the NICS for the purpose of preventing future erroneous “Denied” or “Did Not Pass” responses or extended responses of “Delayed” or “Pending” by the NICS. Such file shall be used only by the NICS for prospective firearm transfers and FHCs. The FBI shall remove all information in the Voluntary Appeal File pertaining to an individual upon receipt of a written request by the individual. However, the FBI may retain such information contained in the Voluntary Appeal File as long as needed to pursue cases of identified misuse of the system. If the FBI finds a disqualifying record on the individual after the individual’s entry into the Voluntary Appeal File, the FBI may remove the individual’s information from the file.

#### **§ 25.11 [Amended]**

10. In § 25.11, revise paragraph (b)(1) to read as follows:

**§ 25.11 Prohibited Activities and Penalties**


\* \* \* \* \*

(b) \* \* \*

(1) State or local agencies', FFLs', or individuals' purposefully furnishing incorrect information to the system to obtain a "Proceed" or "Pass" response.

\* \* \* \* \*

November 29, 2024  
Date

  
\_\_\_\_\_  
Merrick B. Garland  
Attorney General