

**EXECUTIVE SUMMARY: THE REPORTING OF INFORMATION TO THE
NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS)
AND REVIEW OF ATF FORM 4473**

The National Instant Background Check System (NICS) is a computerized system designed to assist Federal Firearms Licensees (FFLs) in determining if a prospective purchaser is disqualified from possessing or receiving firearms. Mandated by the Brady Handgun Violence Prevention Act of 1993 (the Brady Act), the NICS is used by FFLs to trigger a search of records in the Interstate Identification Index (III), National Crime Information Center (NCIC), and NICS Indices to determine whether a prospective firearm transfer would violate state or federal laws.

NICS is operated by the Federal Bureau of Investigation's (FBI) NICS Section, which processes the background check and communicates to the FFL whether the transaction can proceed or should be denied. When a transaction has been denied, the file is forwarded to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for further review and action, including a determination of whether referral to the United States Attorney's Office for prosecution is appropriate, and—if the firearm has already been transferred to the prohibited person—retrieval of that firearm.

Since the passage of the NICS Improvement Amendments Act of 2007 (the NIAA), significant progress has been made to increase the number and completeness of records available to the NICS. The FBI's Criminal Justice Information Services (CJIS) Division continues to work with local, state, tribal, and federal partners to promote the submission of relevant information to the databases that NICS uses. Pursuant to Presidential Memorandum (78 Fed. Reg. 4297), federal agencies are required to certify annually that they are making all relevant records available to the NICS. The FBI works with federal agencies to help them identify and report relevant records, and these efforts have led to significant increases in the amount of information available to the NICS. Although federal agencies are required by law to share information with the NICS, local, state, and tribal information sharing is voluntary.

Following the tragedy in Sutherland Springs, Texas, the Attorney General directed the FBI and the ATF to conduct a number of activities to improve reporting of information to the NICS and to conduct a review of ATF Form 4473. This report addresses each of those directives in turn.

1. Work with the Department of Defense to identify and resolve any issues with the military's reporting of convictions and other information relevant to determining prohibited person status under 18 U.S.C. § 922(g).

The FBI has taken a number of additional steps to improve coordination and increase NICS' access to relevant Department of Defense (DoD) records. First, it has provided additional resources to the points of contact for the military branches to assist them in identifying prohibited persons. Each branch now submits records in multiple categories, including domestic violence records. Second, the FBI has continued to provide the DoD with statistics on its record reporting to help identify where information is missing or incomplete. Relatedly, the FBI coordinated with the military branches to identify and facilitate the submission of missing final disposition records through detailed reports, monthly teleconferences, and support of electronic submission technology. Finally, the FBI continues to provide assistance to the military branches

in interpreting the prohibitors and identifying relevant records. Collectively, these efforts have led to a significant increase in record submissions in recent months. In particular, as of January 31, 2018, the DoD and the military branches have more than quadrupled their submissions to the NICS Indices as compared with submissions made prior to this review.

- 2. Conduct a review to identify other federal entities that are not fully and accurately reporting information to the NICS. If any such entities are identified, a plan should be developed to ensure full and accurate reporting to the NICS going forward to the extent required under current law.**

The Brady Act and the NIAA require federal agencies to electronically submit to the NICS records demonstrating that a person is prohibited from owning firearms. These requirements were underscored by a Presidential Memorandum that requires federal agencies to review and improve their record-sharing practices and to certify that they are making all relevant records available to the NICS. 78 Fed. Reg. at 4298.

In support of this effort, the FBI works with federal agencies to maximize reporting of relevant records to the three databases that are searched during a background check: (1) III, which accesses criminal history records; (2) the NCIC, which contains information on wanted persons, protection orders, and other persons identified as relevant to NICS searches; and (3) the NICS Indices, which were created for the purpose of performing a NICS background check and contain records provided by local, state, and federal agencies concerning prohibited persons under federal law that may not be appropriate for submission to the NCIC or the III.

In response to the Attorney General's directive, the FBI has undertaken a number of steps to ensure the completeness of federal records in these databases:

- III: The FBI continues to conduct intensive outreach with the dozens of federal agencies that contribute criminal history records to the III and has asked each of them to conduct a self-audit of arrest and disposition records. The goal is to obtain all final criminal adjudications.
- NCIC: Although federal agencies generally submit relevant records to the NCIC, they often submit few or no records for particular categories, either because they do not possess them or another agency is responsible for submitting those records. Efforts to improve federal agency reporting are ongoing.
- NICS Indices: The FBI has focused its efforts on key federal agencies to increase submissions and to ensure the accuracy of these records. In the past ten years, the number of federal records in the NICS Indices rose from just over 4 million to over 8.9 million.

The FBI is committed to working with federal agencies to assist with making relevant records available to the NICS for the background check process.. Although federal agencies have made great strides in the last five years, there is room for improvement. Further progress might be aided by a letter from the Attorney General reminding federal agencies of their record-reporting obligations.

3. Conduct a review of the format, structure, and wording of ATF Form 4473 and recommend changes as necessary.

ATF Form 4473, Firearms Transaction Record, is the form completed by prospective firearms purchasers and used by FFLs to conduct a NICS background check. The current version of the ATF Form 4473 was updated and authorized by the Office of Management and Budget in October 2016 as part of the regular refresh cycle. In response to the Attorney General's directive, the ATF re-established and expanded the internal working group that steered the recent review and update. After soliciting views from the FBI, the DoD, and FFLs, a consensus emerged that questions related to military records might be clarified and simplified, although discussions with respect to specific revisions continue. Neither the FBI nor the DoD expressed the view that such revisions required urgent action outside the current refresh schedule. In addition, the FFL industry raised concerns regarding the economic impact of issuing a new ATF Form 4473 prior to the scheduled refresh in 2020.

In light of this feedback, the ATF recommends that it continue the scheduled 2020 refresh process for ATF Form 4473. To better inform this process, the ATF recommends the establishment of a formal working group among the ATF, the FBI, and the DoD to further refine and finalize proposed revisions to military record questions, and to explore other potential improvements to ATF Form 4473. The ATF proposes formally establishing the joint working group no later than March 1, 2018. In addition, pending the next refresh cycle, the ATF, in coordination with the FBI and the DoD, will issue additional information to FFLs and the general public on ATF Form 4473 regarding questions about military service-related prohibitors.

4. Prepare a report that addresses: (a) the number of current open investigations for making a false statement on the ATF Form 4473; (b) the number of investigations for making a false statement on the ATF Form 4473 for the past five years; (c) the prosecution referral and declination numbers for the current year, as well as the past five years for making a false statement on ATF Form 4473; and (d) the priority level assigned to investigations for making a false statement on ATF Form 4473.

When an individual is found to be prohibited during a NICS background check (contrary to the information provided on the ATF Form 4473), ATF and the NICS Program work closely together to determine whether investigation or referral to a United States Attorney's Office (USAO) for prosecution is warranted. Because the volume of denials each year is enormous, the Department lacks the resources to investigate and prosecute everyone who makes a false statement on the ATF Form 4473.¹ Instead, the Department's well-established review process filters out those cases that are most likely to lead to a successful prosecution and conviction and will have the greatest impact on public safety.

While the ATF and the USAOs have good reasons for focusing their resources on the most violent offenders, there may be a deterrence value in increased federal prosecution of cases

¹ For example, between 2013 and September 30, 2017, FBI made 510,416 referrals to the ATF, which does not include additional denials from states that run some or all of the background checks on behalf of the FBI.

involving false statements on an ATF Form 4473 (“lie and try” cases). Based on an assessment of the investigations it has conducted since implementation of the NICS, the ATF has preliminarily identified three potential areas of focus: denials involving individuals convicted of violent felonies,² denials involving individuals convicted of misdemeanor crimes of domestic violence or subject to protective orders, and denials involving fugitives where the underlying offense is a violent felony or misdemeanor crime of domestic violence.

5. Identify any additional measures that should be taken to prevent firearms from being obtained by prohibited persons, including identifying obstacles to state, local, and tribal entities sharing information with the NICS.

Recognizing that there are a number of obstacles to complete reporting of relevant NICS information, the FBI has always had a dedicated staff committed to the outreach, training and support of local, state, tribal and federal agency counterparts. In addition to their continuing efforts, the FBI will be creating and sending out NICS informational packets to partners, CJIS Systems Officers (CSOs), NICS POC state representatives, and state attorneys general contacts. The NICS Program also intends to work toward an informational conference with POCs, CSOs, and other federal agencies later this year.

In addition, the FBI has identified two primary areas of concern: (1) records of misdemeanor crimes of domestic violence (MCDV), and (2) final disposition reporting for criminal arrests. Improving reporting of these records by state, local, and tribal entities would assist NICS in making timely and accurate determinations.

MCDV: This prohibitor presents unique challenges because it is very difficult to determine whether potentially qualifying state misdemeanor convictions meet the federal statutory requirements for MCDVs. A NICS examiner must determine both whether the requisite personal relationship existed and whether the applicable offense statute contains the required element of force. Often that information is not documented in the available records or, because they are misdemeanors, the records have not been retained.

The Department of Justice administers grants that help states automate access to information concerning prohibited persons and transmit relevant records to the III, NCIC, and the NICS Indices. The FBI would like to work with the Department to determine how states could improve reporting by including MCDV-related initiatives in Department grant solicitations. In addition, the FBI intends to educate states on the importance of making MCDV information available to the NICS databases and on the availability of grant assistance to offset any related costs.

Final Dispositions: Another challenge is the availability of final disposition information relative to potentially prohibiting arrests. A NICS examiner cannot make a firearm eligibility decision based solely on an arrest, but rather requires information about the final adjudication and action relative to the arrest (*i.e.*, conviction, etc.). State, local, and tribal agencies contribute

² As defined in 18 U.S.C. § 924(e)(2)(B).

information—including arrest dispositions—to the FBI’s criminal history databases on a voluntary basis.

The FBI has undertaken multiple efforts to identify and support best practices, and will continue to prioritize efforts to increase the voluntary submission of disposition information. In addition, the FBI would like to explore whether there are additional ways to incentivize disposition reporting. Finally, the FBI would like to explore the issue of record retention at the state and local level. Often the NICS is unable to substantiate a possible firearms prohibitor because records have been destroyed. This work could begin by identifying the record retention requirements across the country and then establishing a dialogue to educate localities about the effect of limited record retention policies.

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The NICS is only as effective as the information entered into one of the databases upon which it relies. The ATF and the FBI remain committed to ensuring that the NICS is updated with all information necessary for it to perform its vital function of keeping firearms out of the hands of criminals and other prohibited persons.