

GOVERNMENT PROCEDURES AND OPERATIONS

GUN CONTROL

Background Checks and
Assault Weapons



LINDA M. SANDERS

SNOVA

Government Procedures and Operations



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Linda M. Sanders

Editor

Gun Control

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Preface

Gun control is one of the most controversial and emotional issues in many countries, with debate often focusing on whether restrictions on an individual's right to bear arms are a restriction on liberty and whether there is a correlation between guns and crime. Chapter 1 provides an overview of federal firearms background check procedures and an analysis of recent legislative action. Chapter 2 discusses assault weapons and examines options for dealing with these particularly dangerous weapons of war.

Chapter 1

Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation*

William J. Krouse

Abstract

The Federal Bureau of Investigation (FBI) administers a computer system of systems that is used to query federal, state, local, tribal, and territorial criminal history record information (CHRI) and other records to determine an individual's firearms transfer/receipt and possession eligibility. This FBI-administered system is the National Instant Criminal Background Check System (NICS). NICS, or parallel state systems, must be checked and the pending transfer approved by the FBI or state point of contact before a federally licensed gun dealer may transfer a firearm to any customer who is not also a federally licensed gun dealer. Current federal law does not require background checks for intrastate (same state), private-party firearms transactions between nondealers, though such checks are required under several state laws.

In the 116th Congress, the House of Representatives passed three bills that would expand federal firearms background check requirements and firearms transfer/receipt and possession ineligibility criteria related to domestic violence.

The Bipartisan Background Checks Act of 2019 (H.R. 8), a “universal” background check bill, would make nearly all intrastate,

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private-party firearms transactions subject to the recordkeeping and NICS background check requirements of the Gun Control Act of 1968 (GCA). For the past two decades, many gun control advocates have viewed the legal circumstances that allow individuals to transfer firearms intrastate among themselves without being subject to the licensing, recordkeeping, and background check requirements of the GCA as a “loophole” in the law, particularly within the context of gun shows. Gun rights supporters often oppose such measures, underscoring that it is already unlawful to knowingly transfer a firearm or ammunition to a prohibited person. In addition, some observers object to these circumstances being characterized as a loophole, in that the effects of the underlying provisions of current law are not unintended or inadvertent.

The Enhanced Background Checks Act of 2019 (H.R. 1112) would lengthen the amount of time firearms transactions could be delayed pending a completed NICS background check from three business days under current law to several weeks. The timeliness and accuracy of FBI-administered firearms background checks through NICS—particularly with regard to “delayed proceeds”—became a matter of controversy following the June 17, 2015, Charleston, SC, mass shooting at the Emanuel African Methodist Episcopal Church. The assailant in this incident had acquired a pistol following a three-business-day-delayed sale under current law and an unresolved background check. While it has never been definitely determined whether the assailant’s arrest record would have prohibited the firearms transfer, this incident prompted gun control advocates to label the three-business-day delayed transfer provision of current law as the “Charleston loophole.” Gun rights supporters counter that firearms background checks should be made more accurate and timely, so that otherwise eligible customers are not wrongly denied a firearms transfer, and ineligible persons are not allowed to acquire a firearm.

The Violence Against Women Reauthorization Act of 2019 (H.R. 1585) would expand federal firearms ineligibility provisions related to domestic violence to include former dating partners under court-ordered restraints or protective orders and persons convicted of misdemeanor stalking offenses. Gun control advocates see this proposal as closing off the “boyfriend loophole.” Gun rights supporters are wary about certain provisions of this proposal that would allow a court to issue a restraining order *ex parte*; that is, without the respondent/defendant having the opportunity for a hearing before a judge or magistrate.

This chapter provides an overview of federal firearms background check procedures, analysis of recent legislative action, discussion about possible issues for Congress, and related materials.

Introduction

The Federal Bureau of Investigation (FBI) administers a computer system of systems that is used to query federal, state, local, tribal, and territorial criminal history record information (CHRI) and other records to determine if an individual is eligible to receive and possess a firearm.¹ This FBI-administered system is the National Instant Criminal Background Check System (NICS). This system, or parallel state systems, must be checked and the transfer approved by an FBI NICS examiner or state point of contact (POC) before a federally licensed gun dealer may transfer a firearm to any customer who is not similarly licensed federally as a gun dealer.

Under current law, persons who buy and sell firearms repeatedly for profit and as a principal source of their livelihood must be licensed federally as gun dealers. Federally licensed gun dealers—otherwise known as federal firearms licensees (FFLs)—are permitted to engage in interstate and, by extension, intrastate (i.e., within a state) firearms commerce with certain restrictions. For example, they may not transfer a handgun to an unlicensed, out-of-state resident.

Conversely, persons who occasionally buy and sell firearms for personal use, or to enhance a personal collection, are not required to be licensed federally as a gun dealer. Those unlicensed persons, however, are prohibited generally from making interstate firearms transactions—that is, engaging in interstate firearms commerce—without engaging the services of a federally licensed gun dealer. On the other hand, current law does not require background checks for intrastate, private-party firearms transactions between nondealing, unlicensed persons, though such checks might be required under several state laws.² Nevertheless, it is unlawful for anybody, FFLs or private

¹ Under the Gun Control Act of 1968 (GCA), as amended, the term “state” includes the “District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).” The term “possession” includes the five current, permanently inhabited U.S. territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands). Hereinafter, the term “state and local” will be used to include the 50 states, the District of Columbia, and the five U.S. territories, as well as city, municipal, and county governments. See 18 U.S.C. §921(a)(2).

² For example, in Hawaii, Illinois, and Massachusetts, state law requires all firearms purchasers to obtain a permit to buy a firearm and the permitting process includes a background check that might be more thorough than a federal firearms background check. District of Columbia law and New Jersey state law require both a permit and point of sale background check through an FFL. Maryland and Pennsylvania require both a permit and point of sale background check through an FFL for handguns, but not for long guns. In 10 states (California, Colorado, Connecticut, Delaware, Nevada, New York, Oregon, Rhode Island,

parties, to transfer a firearm or ammunition to any person they have reasonable cause to believe is a prohibited person (e.g., a convicted felon, a fugitive from justice, or an unlawfully present alien).³

In the 116th Congress, the House of Representatives has passed three bills that would significantly expand the federal firearms background check requirements and the current prohibitions on the transfer or receipt and possession of firearms related to domestic violence. Those bills are the

- Bipartisan Background Checks Act of 2019 (H.R. 8), a bill to expand federal firearms recordkeeping and background check requirements to include private- party, intrastate firearms transfers;
- Enhanced Background Checks Act of 2019 (H.R. 1112), a bill to extend the amount of time allowed to delay a firearms transfer, pending a completed background check to determine an individual's eligibility; and
- Violence against Women Reauthorization Act of 2019 (H.R. 1585), a bill to expand firearms transfer or receipt and possession prohibitions to include dating partners with histories of domestic violence and stalking misdemeanors.

In addition, several multiple-casualty shootings have highlighted possibly systemic vulnerabilities in the NICS-related federal background check procedures, particularly with regard to making records on prohibited persons accessible to federal data systems queried as part of the federal background check process.⁴ This chapter provides an overview of federal firearms statutes

Vermont, and Washington), state law requires a point of sale background check be conducted through an FFL for all firearms (handguns and long guns), though Nevada has yet to implement its law. For more information, see Giffords Law Center to Prevent Gun Violence, *Universal Background Checks*, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/>.

³ 18 U.S.C. §922(d). Under 18 U.S.C. §924(a)(2), violations are punishable by a fine or up to 10 years imprisonment, or both.

⁴ High-profile, multiple-casualty shootings include the June 17, 2015, Charleston, SC, church shooting (9 killed/1 nonfatally wounded). Federal authorities were unable to complete the offender's background check, because of confusion over municipal- and county-level reporting of a drug-related arrest. He was later transferred a firearm after a three-business-day delayed proceed period under federal law had expired. With that pistol, he shot to death nine parishioners at a Bible school class. Another example includes the November 5, 2017, Sutherland Springs, TX, church shooting (26 killed/20 wounded). U.S. Air Force authorities failed to report or make accessible the offender's court martial conviction for a domestic violence offense, for which he was dismissed from the Air Force on a bad conduct discharge. A more recent example is the February 15, 2019, Aurora, IL, workplace shooting

related to firearms transactions in interstate and intrastate commerce, dealer licensing, receipt and possession eligibility, NICS background check procedures, analysis of recent legislative action, and discussion about possible issues for Congress.

Federal Firearms Statutes

Two major federal statutes regulate firearms commerce and possession in the United States. The Gun Control Act of 1968 (GCA; 18 U.S.C. §921 et seq.) regulates all modern (nonantique) firearms.⁵ In addition, the National Firearms Act, enacted in 1934 (NFA; 26 U.S.C. §5801 et seq.), regulates certain other firearms and devices that Congress deemed to be particularly dangerous because they were often the weapons of choice of gangsters in the 1930s.⁶ Such weapons include machine guns, short-barreled rifles and

(5 killed/7 nonfatally wounded (6 by gunfire)). In this case, Illinois state authorities issued the offender a firearms owner's identification card (FOID) in March 2014, after an automated search of criminal history records that were electronically accessible at both the state and federal level failed to show the offender's 1995 Mississippi domestic violence-related felony aggravated assault conviction. Soon thereafter, the offender applied for a concealed carry permit, and his felony conviction was discovered based on a fingerprint-based nationwide criminal history background check. The Illinois State Police sent the offender a letter informing him of his firearms ineligibility and subsequent FOID revocation, but he apparently never surrendered either his FOID or the firearm he bought with that document. Nearly five years passed between felony conviction discovery by state authorities and the shooting. Notwithstanding possible gaps in Illinois state law, the search for criminal history records nationwide—as required under current federal law—should have identified the offender as a prohibited person, resulting in the denial of an Illinois FOID and subsequent handgun purchase. It appears that Mississippi authorities had made the offender's fingerprint file accessible to the Interstate Fingerprint Identification System (IAFIS), but a corresponding arrest and conviction record had not been made accessible through the Interstate Identification Index (III). Both systems are managed by the Federal Bureau Investigation (FBI), but both of these criminal history record information (CHRI) systems are also dependent on state-level participation, management, and maintenance.

⁵ P.L. 90-618, October 22, 1968, 82 Stat. 1213. The GCA was preceded by the Federal Firearms Act of 1938. It too required anyone who engaged in the business of manufacturing, importing, shipping, and selling firearms in interstate commerce to be licensed federally and maintain records on such sales, including the names of unlicensed purchasers. However, as long as a person only engaged in intrastate firearms commerce, they were not required to be federally licensed. See P.L. 75-785, June 30, 1938, 52 Stat. 1250, codified at 15 U.S.C. §§901 to 910 (1964 ed.).

⁶ P.L. 73-474, June 26, 1934, 48 Stat. 1236. As Title II of the GCA, Congress amended and repassed the NFA, though the NFA remained codified as Chapter 53 of the Internal Revenue Code (26 U.S.C. §5801 et seq.), as it had been previously. The GCA, by comparison, was codified at Chapter 44 of the federal criminal code, Title 18 of the United States Code (18 U.S.C. §921 et seq.).

shotguns, suppressors (silencers), a catch-all class of concealable firearms classified as “any other weapon,” and destructive devices (e.g., grenades, rocket launchers, mortars, other big-bore weapons, and related ordnance).

Congress passed both the NFA and GCA to reduce violent crimes committed with firearms. More specifically, the purpose of the GCA is to assist federal, state, local, tribal, and territorial law enforcement in the ongoing effort to reduce crime and violence.⁷ It is not intended to place any undue or unnecessary federal restrictions or burdens on citizens in regard to lawful acquisition, possession, or use of firearms for hunting, trapshooting, target shooting, personal protection, or any other lawful activity.⁸

Many observers have long noted that the assassinations of President John F. Kennedy and his brother, Senator Robert F. Kennedy, and civil rights leader Martin Luther King provided the impetus to pass the GCA. Perhaps equally compelling were the August 1, 1966, University of Texas tower mass shooting⁹ and social unrest that accompanied the 1960s.¹⁰

Under the Attorney General’s delegation, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the principal agency that administers and enforces these statutes.¹¹ In addition, ATF administers several provisions of the Arms Export Control Act of 1976 (AECA) with regard to the importation of certain firearms, firearms parts, and ammunition that are also regulated under the GCA and NFA.¹²

⁷ Section 101 of P.L. 90-618, October 22, 1968, 82 Stat. 1213.

⁸ *Ibid.*

⁹ For example, within a week of the August 1, 1966, University of Texas, Austin, tower shooting, President Lyndon B. Johnson called on Congress to pass gun control legislation. See Gary M. Lavergne, *A Sniper in the Tower: The Charles Whitman Murders*, University of North Texas Press 1997, p. 268. See also James Alan Fox and Jack Levin, *Extreme Killing*, 2014, pp. 287-293.

¹⁰ Adam Winkler, *Gun Fight: The Battle over the Right to Bear Arms in America*, W.W. Norton & Company, 2013, pp. 231 and 249.

¹¹ ATF was originally established as a stand-alone bureau in the Department of the Treasury (Treasury) in 1972 by Treasury Department Order No. 120-1. As part of the Homeland Security Act, Congress transferred ATF’s enforcement and regulatory functions for firearms and explosives to the Department of Justice (DOJ) from Treasury, adding “explosives” to ATF’s title. See P.L. 107-296, 116 Stat. 2135, November 25, 2002, §1111 (effective January 24, 2003). The regulatory aspects of alcohol and tobacco commerce are the domain of the Tax and Trade Bureau (TTB), which encompasses former components of ATF that remained at Treasury, when other components of ATF described above were transferred to DOJ on January 24, 2003, under P.L. 107-296.

¹² Title II of P.L. 94-329, June 30, 1976, 90 Stat. 729, codified at 22 U.S.C. §2751 et al. ATF administers provisions of 22 U.S.C. §2778. Under AECA, the Departments of State and Commerce share responsibility for regulation of small arms exports under their respective International Trafficking in Arms Regulations (ITAR, 22 C.F.R. Parts 120-130) and Export Administration Regulations (EAR, 15 C.F.R. Parts 730-774). During the Obama

For the most part, however, the FBI maintains NICS and administers the background check provisions of the GCA.¹³ Nonetheless, as discussed below, ATF is charged with investigating whether denied persons made false statements in connection with a firearms transfer; when filling out federal firearms transaction forms. In addition, ATF is also charged with firearms retrieval actions, whenever delayed transactions and incomplete background checks possibly result in prohibited persons acquiring firearms.

Firearms and Ammunition Ineligibility

The GCA sets firearms eligibility age restrictions under certain circumstances, as well as prohibits various categories of persons from firearms receipt and possession, among other factors. For example, as enacted, the GCA prohibits federally licensed gun dealers (i.e., FFLs) from transferring:

- a long gun (shoulder-fired rifle or shotgun) or ammunition to anyone under 18 years of age; and
- a handgun or ammunition suitable for a handgun to anyone under 21 years of age.¹⁴

Administration, an export control reform initiative anticipated that responsibility for the export of most firearms (other than machineguns, small arms with barrel bores of greater than one-half inch in diameter, and high-capacity ammunition magazines) would be transferred from the purview of State to Commerce. The Department of Commerce has traditionally handled sporting shotgun exports as well as rifle scopes and other optics. The Department of State, with the Department of Defense, has traditionally regulated all other firearms that could be considered small arms.

The Trump Administration published proposed rules to implement further this phase of export control reform. See Department of State, “International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III,” 83 *Federal Register* 101, May 24, 2018; and Bureau of Industry and Security, Department of Congress, “Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML),” 38 *Federal Register* 24166, May 24, 2018. Senator Bob Menendez, however, invoked a provision of the AECA and placed a hold on the transfer of this regulatory authority over certain firearms from State to Commerce. Among other things, Senator Menendez voiced concern about the exportation of certain firearms-related technology, especially computer assisted design (CAD) files that could be posted on the internet and easily downloaded, and used with three-dimensional (3D) printers to produce firearms that would not be fully detectable to metal detectors and other controlled firearms parts (e.g., AR-15 lower receivers).

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

¹⁴ 18 U.S.C. §922(b)(1).

In 1994, Congress amended the GCA to prohibit anyone from transferring a handgun to a juvenile, or anyone under 18 years of age.¹⁵ Congress also made it unlawful for a juvenile to possess a handgun.¹⁶ Congress also provided exceptions to these juvenile transfer and possession prohibitions. Exceptions include temporary transfers in the course of employment in ranching or farming, in target practice, or hunting, all with the written consent of the parents or guardians and in accordance with federal and state laws; for self- or household-defense; or in other specified situations.¹⁷

Under the GCA, as amended, there are 10 categories of persons prohibited from receiving firearms. For 9 of those categories, those persons are also prohibited from possessing a firearm. More specifically, under 18 U.S.C. §922(g), there are nine categories of persons prohibited from shipping, transporting, receiving, or possessing a firearm or ammunition, which has been shipped or transported in interstate or foreign commerce:¹⁸

- 1) persons convicted in any court of a felony crime punishable by imprisonment for a term exceeding one year and state misdemeanors punishable by imprisonment for a term exceeding two years;
- 2) fugitives from justice;
- 3) unlawful users or addicts of any controlled substance;¹⁹
- 4) persons adjudicated as “a mental defective,”²⁰ found not guilty by reason of insanity, or committed to mental institutions;

¹⁵ See Subtitle B—Youth Handgun Safety, Section 110201 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, September 13, 1994, 108 Stat. 1796, 2014, codified at 18 U.S.C. §922(x)(1).

¹⁶ 18 U.S.C. §922(x)(2).

¹⁷ 18 U.S.C. §922(x)(3).

¹⁸ 18 U.S.C. §922(g).

¹⁹ “Controlled substances” as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802).

²⁰ Under 27 C.F.R. §478.11, the term “adjudicated as a mental defective” is defined to include a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to himself or others, or (2) lacks the mental capacity to manage his own affairs. This term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).

This definition was promulgated by an ATF final rule: *Federal Register*, vol. 62, no. 124, June 27, 1997, p. 34634.

- 5) unauthorized immigrants and nonimmigrant visa holders (with exceptions in the latter case);²¹
- 6) persons dishonorably discharged from the U.S. Armed Forces;
- 7) persons who have renounced their U.S. citizenship;
- 8) persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner;²² and
- 9) persons convicted of a misdemeanor crime of domestic violence.²³

Under 18 U.S.C. §922(n), there is a 10th class of persons prohibited from shipping or transporting firearms or ammunition, or from receiving (but not possessing) firearms or ammunition that had been shipped or transported in interstate or foreign commerce:

- 10) persons under indictment in any court of a crime punishable by imprisonment for a term exceeding one year.²⁴

It is unlawful for any person under any circumstances to sell or otherwise dispose of a firearm or ammunition to any of the prohibited persons enumerated above, if the transferor (seller, federally licensed or unlicensed) has reasonable cause to believe that the transferee (buyer/recipient) is prohibited from receiving those items.²⁵

²¹ Until 2011, ATF interpreted this provision to apply to any noncitizen whose immigration status was “nonimmigrant alien,” regardless of whether the alien had been required to obtain a visa prior to arrival at a U.S. port of entry. In 2011, ATF was informed by the DOJ Office of Legal Counsel (OLC) that its interpretation was too broad and that the prohibition “applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status.” See 2011 WL 6260326 (O.L.C.) (Oct. 28, 2011). As such, nonimmigrants who enter the country validly without a visa (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition; however, those individuals must meet a residency requirement, which requires them to demonstrate that they have “the intention of making a home” in the state where they wish to purchase the firearm. See 77 *Federal Register* 33625- 33634 (June 7, 2012).

²² See Subtitle D—Domestic Violence, Section 110401 of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, September 13, 1994, 108 Stat. 1796, 2014, codified at 18 U.S.C. §922(g)(8).

²³ See Section 658 of Omnibus Consolidated Appropriations Act, 1997, September 30, 1996, 110 Stat. 3009, 3009-3371, codified at 18 U.S.C. §922(g)(9).

²⁴ 18 U.S.C. §922(n).

²⁵ 18 U.S.C. §922(d).

Firearms Commerce as a Business

Under the GCA as enacted, persons who, or firms that, are “engaged in the business” of importing, manufacturing, or selling firearms must be federally licensed.²⁶ In 1986, Congress amended the GCA to define the term “engaged in the business.” For dealers it means:

a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.²⁷

ATF issues federal firearms licenses to firearms importers, manufacturers, dealers, pawnbrokers, and collectors.²⁸ As summarized by ATF in January 2016 guidance:

A person engaged in the business of dealing in firearms is a person who “devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”

Conducting business “with the principal objective of livelihood and profit” means that “the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”

²⁶ The term “engaged in the business” is defined at 18 U.S.C. §921(a)(21). The terms “persons” and “whoever” are defined to include any individual, corporation, company, association, firm, partnership, society, or joint stock company at 18 U.S.C. §921(a)(1).

²⁷ 18 U.S.C. §921(a)(1)(C).

²⁸ 18 U.S.C. §923. The Treasury and General Government Appropriations Act, 2000 (P.L. 106-58) requires that background checks be conducted when former firearms owners seek to reacquire a firearm that they sold to a pawnshop. Hence, pawnbrokers who hold firearms as collateral and remit those firearms at times back to their owners must be federally licensed gun dealers.

Federally licensed firearms collectors are allowed to engage in limited interstate transfers of “curios and relics,” whereas in nearly all cases an unlicensed person must engage the services of a federally licensed gun dealer to facilitate interstate firearms transfers to another unlicensed person. See 27 C.F.R. §478.11 for the definition of “curios or relics,” which generally include firearms that are 50 years old, of museum interest, or derive a substantial amount of their value from the fact that they are novel, rare, bizarre, or because they are associated with some historical figure, period, or event.

Consistent with this approach, federal law explicitly exempts persons “who make occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”²⁹

Under the GCA, only FFLs are allowed to transfer firearms commercially from one state to another, that is, to engage in *interstate* (or *foreign*) firearms commerce.³⁰ At the same time, it would be highly improbable for any firearms business to compete successfully in the U.S. civilian gun market by only selling firearms manufactured in the state in which it does business; that is, to engage exclusively in intrastate commerce. As a practical matter, any person who deals in firearms as a business, either in interstate or intrastate commerce, needs to be federally licensed firearms manufacturer, importer, or dealer.³¹

FFLs may transfer a long gun—a shoulder-fired rifle or shotgun—to unlicensed persons from another state as long as such transfers are legal in both states and they meet in person to make the transfer.³² However, FFLs may not transfer a handgun to any unlicensed resident of another state.³³ Since 1986 there have been no similar restrictions on the interstate transfer of ammunition, because Congress repealed those restrictions at the request of ATF.³⁴ Furthermore, a federal firearms license is not required to sell ammunition; however, such a license is required to either manufacture or import ammunition.

In addition, FFLs are required to maintain bound logs of firearms acquisitions and dispositions to and from their business inventories by date,

²⁹ U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Do I Need A License to Buy and Sell Firearms?* January 2016, p. 2, <https://www.atf.gov/file/100871/download>.

³⁰ See 18 U.S.C. §922(a)(1)(A). Violations are punishable by a fine and imprisonment of not more than five years under 18 U.S.C. §924(a)(1)(D). Also, under 18 U.S.C. §921(a)(2), the term “interstate or foreign commerce” is defined to include “commerce between any place in a State and any place outside a State, or with any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce within the same State but through any place outside of that State.”

³¹ David B. Kopel, “Background Checks for Firearms Sales and Loans: Law, History, and Policy,” *Harvard Journal on Legislation*, vol. 53, 2016, pp. 306-313.

³² See 18 U.S.C. §922(b)(3).

³³ *Ibid.* Violations are punishable by a fine and imprisonment of not more than five years under 18 U.S.C. §924(a)(1)(D).

³⁴ Section 103(a)(7) of Firearms Owners’ Protection Act, 1986, P.L. 99-308, May 19, 1986, 100 Stat. 449, 454, amended the GCA recordkeeping provisions at 18 U.S.C. 923(g) to exclude ammunition. See also, U.S. Congress, House Committee on the Judiciary, *Federal Firearms Law Reform Act of 1986*, 99th Cong., 2nd sess., March 14, 1986, S.Rept. 99-495, p. 17.

make, model, and serial number of individual firearms and transactions records for firearms sales to unlicensed, private persons.³⁵ ATF periodically inspects these FFLs to monitor their compliance with federal and state law.

Under current law, there are statutory prohibitions against ATF, or any other federal agency, maintaining a registry of firearms or firearms owners.³⁶ Nevertheless, the system of recordkeeping described above allows ATF agents to trace, potentially, the origins of a firearm from manufacturer or importer to a first retail sale and buyer. ATF agents assist other federal agencies, as well as state and local law enforcement, with criminal investigations.³⁷ The ATF also makes technical judgements about firearms, including the appropriateness of manufacturing and importing certain makes and models of firearms and firearms parts.

As described in greater detail below, since November 30, 1998, all FFLs are required to initiate a background check for both handguns and long guns on any prospective firearms purchaser who is otherwise unlicensed federally to engage in firearms commerce as a business.³⁸ The FBI facilitates these background checks nationwide through NICS. However, for some states, these FBI-facilitated background checks are routed to state or local authorities (points of contact, or POCs) for all firearms (handguns and long guns), or just for handgun transfers or permits for other states.

Private Party Transfers

For the most part, the GCA does not regulate firearms transactions between two unlicensed persons, who reside in the same state; that is, private-party, intrastate firearms transfers. Such transfers are not covered under current federal law as long as the parties are:

- not “engaged in the business” of dealing in firearms “as a regular course of trade or business with the principal objective of livelihood and profit”;
- residents of the same state, where the transfer is made;
- not prohibited from receiving or possessing firearms; and

³⁵ 18 U.S.C. §923(g).

³⁶ 18 U.S.C. §926(a)(3).

³⁷ 18 U.S.C. §923(g).

³⁸ 18 U.S.C. §922(t).

- the recipients are of age (at least 18 years old).³⁹

It follows, therefore, that private firearms transactions between persons who are not “engaged in the business” of firearms dealing and, thus, who are not required to be federally licensed, are not covered by the recordkeeping or the background check provisions of the GCA if those parties reside in the same state. The meaning of “state of residence” is not defined in the GCA, but ATF has defined the term to mean:

The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State. If an individual is on active duty as a Member of the Armed Forces, the individual’s State of residence is the State in which his or her permanent duty station is located. An alien who is legally in the United States shall be considered to be a resident of a State only if the alien is residing in the State and has resided in the State for a period of at least 90 days prior to the date of sale or delivery of a firearm.⁴⁰

However, these intrastate, private firearms transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances. As noted above, unlicensed persons are prohibited generally from engaging in interstate and intrastate firearms commerce as a business; however, they are permitted to change state residences and take their privately owned non-NFA firearms with them under federal law, but they must comply with the laws of their new state of residence.⁴¹

The GCA generally prohibits an unlicensed person from directly transferring any firearm—handgun or long gun—to any other unlicensed

³⁹ U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF Best Practices: Transfers of Firearms by Private Sellers*, ATF P 4300.21, January 2013, <https://www.atf.gov/firearms/docs/guide/atf-p-530021-best-practices-transfers-firearms-private-sellers/download>.

⁴⁰ 27 C.F.R. §478.11. Also, according to an opinion of the U.S. Attorney General on the Firearms Owners’ Protection Act, 1986 (P.L. 99-308), a person is generally considered to be the resident of the locale where he is “permanently or for substantial periods of time physically located.” See *Congressional Record*, vol. 114 (1968), p. 22,786, cited by David T. Hardy in “Firearms Owners’ Protection Act: A Historical and Legal Perspective,” *Cumberland Law Review*, vol. 17, no. 3, 1986-1987, p. 634.

⁴¹ U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Federal Firearms Regulations Reference Guide (2014)*, p. 198, <https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download>.

person who resides in another state.⁴² Similarly, it is unlawful for an unlicensed person to receive a firearm from any unlicensed person who resides in another state. On the other hand, the GCA does not prohibit an unlicensed person from transferring a firearm to an out-of-state FFL, who may be willing to serve as a proxy for an unlicensed person to transfer a firearm or firearms to another unlicensed person who resides in the state where the FFL is licensed federally to do business. The facilitating, out-of-state FFL, in turn, must treat that firearm as if it were part of his business inventory, triggering the recordkeeping and background check provisions of the GCA. Generally, the facilitating FFL will charge a fee for such transactions conducted on behalf of an unlicensed person, which would likely be passed on to the unlicensed buyer/transferee in most cases.⁴³

According to a 2015 survey, about one-in-five firearms transfers (22%) are conducted privately between unlicensed persons.⁴⁴ In addition, a 2016 survey of state and federal prisoners—conducted by the Department of Justice (DOJ), Bureau of Justice Statistics (BJS)—who possessed a firearm during the offense for which they were serving time suggested that

- more than half (56%) had either stolen the firearm (6%), found it at the scene of the crime (7%), or obtained it off the street or from the underground market (43%);
- most of the remainder (25%) had obtained the firearm from a family member or friend, or as a gift; and
- seven percent had purchased the firearm under their own name from a licensed firearm dealer, or FFL.⁴⁵

⁴² See 18 U.S.C. §922(a)(5). Violations are punishable by a fine and imprisonment of not more than five years under 18 U.S.C. §924(a)(1)(D).

⁴³ While FFLs have reportedly facilitated private-party, interstate firearms transfers for many years, as no provision of federal law prohibited such facilitated transfers, ATF did not officially provide written procedural guidance for such facilitated transfers until after the December 14, 2012, Newtown, CT, mass shooting. See U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *FFL Newsletter, Federal Firearms Licensee Information Service*, “Private Party Transfers,” vol. 2, September 2013, p. 1. This article announces ATF Procedure 2013-1, which was superseded by ATF Procedure 2017-1, “Recordkeeping and Background Check Procedure for Facilitation of Private Party Firearms Transfers,” July 28, 2017.

⁴⁴ Matthew Miller, Lisa Hepburn, and Deborah Azrael, “Firearm Acquisition Without Background Checks,” *Annals of Internal Medicine*, 2017, p. 233.

⁴⁵ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates*, 2016, NCJ 251776, January 2019, pp. 7-8.

Based on this survey data, private firearms sales at gun shows or any similar venue did not appear to be a significant source of guns carried by these offenders, while private transfers among family members, friends, and acquaintances did appear to account for a significant source of such firearms.⁴⁶

ATF Form 4473, Firearms Transaction Record

The ATF Form 4473 and bound log of firearms acquisitions and dispositions are the essential federal documents underlying the recordkeeping process mandated by the GCA. Both FFLs and prospective, federally unlicensed purchasers must truthfully and completely fill out, and sign, an ATF Form 4473. Prospective purchasers attest to three things:

- 1) they are not prohibited persons,
- 2) they are who they say they are, and
- 3) they are the actual buyers.

Straw purchases are a federal crime. It is illegal for anybody to pose as the actual buyer, when in fact he is buying the firearm for someone else. Making any materially false statement to an FFL is punishable by a fine and/or up to 10 years imprisonment.⁴⁷ There is also a lesser penalty for making any false statement or representation in any record (e.g., the Form 4473) that an FFL is required to maintain. Some straw purchases are also prosecuted under this provision. Violations are punishable by a fine and up to five years imprisonment.⁴⁸

For their part, FFLs must verify a prospective purchaser's name, date of birth, state residency, and other information by examining government-issued identification, which most often include a state-issued driver's license.

FFLs must also file completed Form 4473s in their records. If a purchased firearm from FFLs should be recovered at any crime scene, ATF can trace a firearm from its original manufacturer or importer to the first-time FFL retail seller and the first-time private buyer (by the make, model, and serial number of the firearm). Successful firearms traces have generated leads in criminal

⁴⁶ Ibid.

⁴⁷ 18 U.S.C. §§922(a)(6) and 924(a)(2).

⁴⁸ 18 U.S.C. §924(a)(1)(A).

investigations. In addition, aggregated firearms trace data provide criminal intelligence on illegal firearms trafficking patterns.

1993 Brady Act and Background Checks

After six years of debate, Congress passed the Brady Handgun Violence Prevention Act, 1993 (Brady Act).⁴⁹ Sponsors of the Brady Act initially proposed requiring a seven-day waiting period for handgun transfers. Instead, Congress amended the GCA with the Brady Act to require electronic background checks on any federally unlicensed individual seeking to acquire a firearm from an FFL. The Brady Act included both interim and permanent provisions.

Under the interim provisions, FFLs were required to contact local chief law enforcement officers (CLEOs) to determine the eligibility of prospective customers to be transferred a handgun.

CLEOs were given up to five business days to make such eligibility determinations.⁵⁰ From February 28, 1994, to November 29, 1998, under the interim provisions, 12.7 million firearms background checks (for handguns) were completed, resulting in 312,000 denials.⁵¹

The permanent provisions of the Brady Act became effective when the FBI activated the National Instant Criminal Background Check System (NICS) on November 30, 1998.⁵² Under these provisions, FFLs are required to initiate a background check through NICS on any prospective unlicensed customer, who seeks to acquire a firearm from them through a sale, trade, or redemption of firearms exchanged for collateral. Failure to conduct a NICS check is punishable by a fine of up to \$1,000 and one year imprisonment, or both.⁵³ FFLs may engage in firearms transfers among themselves without conducting background checks.

The Brady Act includes a provision that prohibits the establishment of a registration system of firearms, firearms owners, or firearms transactions or dispositions with NICS-generated records, except for records on NICS denials for persons who are prohibited from receiving or possessing firearms under

⁴⁹ P.L. 103-159, November 30, 1993, 107 Stat. 1536.

⁵⁰ 18 U.S.C. §922(s).

⁵¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearms, 2015—Statistical Tables*, November 2017, p. 5.

⁵² 18 U.S.C. §922(t).

⁵³ 18 U.S.C. §924(a)(5).

the GCA.⁵⁴ In addition, in the FY2012 Consolidated Appropriations Act, Congress included a permanent appropriations limitation that requires the FBI to destroy background check records within 24 hours on persons who are eligible to receive firearms.⁵⁵

From November 30, 1998, through 2018, the FBI NICS Section facilitated nearly 305 million firearms-related background checks transactions.⁵⁶ Corresponding data on individual background checks and denials under the permanent provisions of the Brady Act are given and discussed below for both the FBI and for point of contact states that have chosen to either fully or partially implement the Brady Act.

NICS Process under Federal Law

Building on the GCA firearms transaction recordkeeping process, the completed and signed ATF Form 4473 serves as the authorization for an FFL to initiate a check through NICS. The FFL submits a prospective firearms transferee's name, sex, race (or ethnicity), complete date of birth, and state of residence to the FBI through NICS.⁵⁷ Social security numbers and other numeric identifiers are optional, but the submission of these data could possibly increase the timeliness of the background check and reduce misidentifications.⁵⁸

NICS Responses

The NICS Section is to respond to an FFL or POC state official with a NICS Transaction Number (NTN) and one of four outcomes as follows, as described in greater detail below:

- 1) “proceed” with transfer or permit/license issuance, because a prohibiting record was not found;
- 2) “denied,” indicating a prohibiting record was found;

⁵⁴ See subsection 103(i) of P.L. 103-159, November 30, 1993, 107 Stat. 1536, 1542.

⁵⁵ Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, November 18, 2011, 125 Stat. 552, 632; 18 U.S.C. 922 note.

⁵⁶ U.S. Department of Justice, Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS) Section, 20th Anniversary, 2018 Operations Report*, May 14, 2019, p. 13.

⁵⁷ 28 C.F.R. §25.7(a).

⁵⁸ 28 C.F.R. §25.7(b).

- 3) “delayed proceed,” indicating that the system produced information that suggested the prospective purchaser could be prohibited; or
- 4) “canceled” for insufficient information provided.⁵⁹

In the case of a “proceed,” the background check record is purged from NICS within 24 hours;⁶⁰ “denied” requests are kept indefinitely. Under the third outcome, “delayed proceed,” a firearms transfer may be “delayed” for up to three business days while NICS examiners or state designees (i.e., POCs) attempt to ascertain whether the person is prohibited.

“Delayed proceeds” are often the result of partial, incomplete, and/or even ambiguous criminal history records. The FBI NICS Section often must contact state and local authorities to make final firearms eligibility determinations. Under federal law, at the end of the three-business-day period following a “delayed proceed,” FFLs may proceed with the transfer at their discretion if they have not heard from the NICS Section about those matters. The NICS Section, meanwhile, will continue to work the NICS adjudications for up to 30 days, at which point the background checks will drop out of the NICS examiner’s queue if unresolved. At 88 days, all pending background check records are purged from NICS, even when they remain unresolved. About two-thirds of FBI NICS Section-administered background checks are completed within hours, if not minutes. Nearly one-fifth are delayed, but are completed within the three-business-day delayed transfer period.

If the FBI ascertains that the person is not in a prohibited status at any time within this 88-day period, then the FBI contacts the FFL through NICS with a “proceed” response. If the person is subsequently found to be prohibited, the FBI also contacts the FFL to ascertain whether a firearms transfer had been completed following the three-business-day “delayed transfer” period. If so, the FBI makes a referral to ATF. In turn, ATF initiates a firearms retrieval process. Such circumstances are referred as a “delayed denial,” or more colloquially described as “lying and buying.”

By comparison, standard denials are known as “lying and trying,” under the supposition that most persons knew they were prohibited before they filled out the ATF Form 4473 and underwent a background check. ATF is also responsible for investigating standard denials based on FBI NICS Section

⁵⁹ SEARCH and National Center for State Courts, *State Progress in Record Reporting for Firearm-Related Background Checks: Fingerprint Processing Advances Improve Background Checks*, by Owen Greenspan and Richard Schaufliker, September 2016, p. 5.

⁶⁰ Consolidated and Further Continuing Appropriations Act, 2012, P.L. 112-55, November 18, 2011, 125 Stat. 552, 632; 18 U.S.C. §922 note.

referrals. As noted above, making any false statement to an FFL in connection with a firearms transfer is punishable under two GCA provisions.⁶¹

As part of the NICS process, under no circumstances are FFLs informed about the prohibiting factor upon which denials are based.⁶² However, denied persons may challenge the accuracy of the underlying record(s) upon which their denials are based.⁶³ They would initiate this process by requesting (usually in writing) the reason for their denial from the agency that initiated the NICS check (the FBI or POC). Under the Brady Act, the denying agency has five business days to respond to the request.⁶⁴ Upon receipt of the reason and underlying record for their denials, the denied persons may challenge the accuracy of that record. If the records are found to be inaccurate, the denying agency is legally obligated under the Brady Act to correct that record.⁶⁵ If the denials are overturned within 30 days, the transfers in question may proceed.⁶⁶ Otherwise, FFLs must initiate another background check through NICS on the previously denied prospective purchaser.⁶⁷

NICS-Queried Computer Systems and Files

The feasibility of establishing NICS was largely founded upon the interstate sharing of federal, state, local, tribal, and territorial criminal history record information (CHRI) electronically through FBI computer systems and wide area network (WAN).⁶⁸ Based on the prospective customer's name and other biographical descriptors, NICS queries four national data systems for records that could disqualify a customer from receiving and possessing a firearm under federal or state law. Those systems include the:

⁶¹ 18 U.S.C. §§922(a)(6) and 924(a)(1)(A).

⁶² U.S. Department of Justice, Federal Bureau of Investigation, "National Instant Criminal Background Check System Regulation," 63 *Federal Register* 58303-58312, October 30, 1998.

⁶³ 28 C.F.R. §25.10(c).

⁶⁴ Subsection 103(f) of P.L. 103-159, February 28, 1984, 107 Stat. 1536.

⁶⁵ Subsection 103(g) of P.L. 103-159.

⁶⁶ 28 C.F.R. §25.10(e).

⁶⁷ *Ibid.*

⁶⁸ A wide area network (WAN) is a "physical or logical network that provides data communications to a larger number of independent users than are usually served by a local area network (LAN) and that is usually spread over a larger geographic area than that of a LAN." Source: National Institutes of Standards and Technology, *Guide to Industrial Control Systems (ICS) Security*, NIST SP 800-82 Rev. 2 (API 1164), p. B-18, May 2015, <https://doi.org/10.6028/NIST.SP.800-82r2>.

- Interstate Identification Index (III) for records on persons convicted or under indictment for felonies and serious misdemeanors;
- National Crime Information Center (NCIC) for files on persons subject to civil protection orders and arrest warrants, immigration law violators, and known and suspected terrorists;
- NICS Indices for federal and state record files on persons prohibited from possessing firearms, which would not be included in either III or NCIC; and
- Immigration-related databases maintained by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) for non-U.S. citizens.⁶⁹

An internal FBI inspections report found that access to N-DEx could have helped reveal that the individual, who later shot and killed nine people in a Charleston, SC, church, had an arrest record that was possibly sufficient grounds to deny him a firearms transfer.⁷⁰ N-DEx is a repository of unclassified criminal justice files that can be shared, searched, and linked across jurisdictional boundaries.

For more information about these computer systems and files see Appendix B.

NICS Participation: POCs and Non-POCs

As shown in Figure 1, under the Brady Act, states may opt to conduct firearms-related background checks entirely or partially for themselves through state and local agencies serving as POCs, or they may opt to have such checks handled entirely by the FBI, through its NICS Section, which is part of the FBI's Criminal Justice Information Services (CJIS) Division.

- In 13 full POC states, an FFL initiates a firearms-related background check under the Brady Act by contacting a state or local agency serving as a POC for both long gun- and handgun-related transfers. These states are CA, CO, CT, FL, HI, IL, NJ, NV, OR, PA, TN, UT, and VA.

⁶⁹ U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations*, 2018, May 14, 2019, pp. 1-2.

⁷⁰ U.S. Department of Justice, Office of the Inspector General, *Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System*, Audit Division 16-32, September 2016, p. ii.

- In four partial POC states, an FFL initiates a firearms-related background check by contacting the state and local agencies serving as POCs for handgun transfers, and by contacting the NICS Section through a call center for long gun transfers. These states are MD, NH, WA, and WI.
- In three partial POC states, an FFL initiates a firearms-related background check under the Brady Act by contacting the state and local agencies serving as POCs for handgun permits, and contacts the NICS Section through a call center for long gun transfers. These states include IA, NC, and NE.
- In 36 jurisdictions (30 states, the District of Columbia, and the five U.S. territories), an FFL initiates a firearms-related background check by contacting the NICS Section through a call center for all firearms-related background checks, both long gun and handgun transfers. These thirty states are AK, AL, AR, AZ, DE, GA, ID, IN, KS, KY, LA, MA, ME, MI, MN, MO, MS, MT, ND, NM, NY, OH, OK, RI, SC, SD, TX, VT, WY, and WV. The five territories are AS, GU, MP, PR, and VI.



Source: U.S. Department of Justice, Federal Bureau of Investigation.

Figure 1. Point of Contact (POC) and Non-POC States.

- Twenty-five states are “Brady exempt,” meaning that certain valid, state-issued handgun and concealed carry weapons (CCW) permits may be presented to the FFL in lieu of a background check for firearms transfers through the NICS Section or state and local agencies serving as POCs. Those states are AK, AR, AZ, CA, GA, HI, IA, ID, KS, KY, LA, MI, MS, MT, NC, ND, NE, NV, OH, SC, SD, TX, UT, WV, and WY. For further information, see Appendix C.

NICS Transactions, November 30, 1998, through 2018

Figure 2 shows annual NICS transactions from November 30, 1998, through 2018 (20 years and one month). FBI transactions are shown on the base of the columns and the state and local POC transactions are shown on the top of the columns. Over this period, the FBI NICS Section and state and local agencies serving as POCs made 304.6 million NICS transactions. The NICS Section handled 128.6 million of these transactions (42.2% of all NICS transactions), whereas POCs initiated 176 million transactions (57.8% of all NICS transactions).

There is a one-to-one correspondence between FBI NICS transactions and individual background checks, and the 128.6 million FBI transactions—that is, background checks—resulted in 1.6 million denials (1.24%). Some of these FBI NICS Section-administered background checks were for firearms transactions involving multiple firearms; consequently, NICS transactions/background checks serve as an imperfect proxy for firearms sales.

Unlike FBI NICS background checks, some state background checks involved more than one background check transaction. In some states, for example, there may be permitting or licensing processes that could take several weeks and administrators would run multiple NICS queries on a single applicant. In other cases, a background check administrator might be unclear about an applicant’s first and last name and would run two NICS queries on the applicant, reversing both names as first and last names. More fundamentally, some states are running periodic NICS queries on concealed carry permit holders. These periodic rechecks are not considered individual background checks.

The FBI does not have the state data to report on how many state and local background checks correspond with those transactions. Nor does the FBI