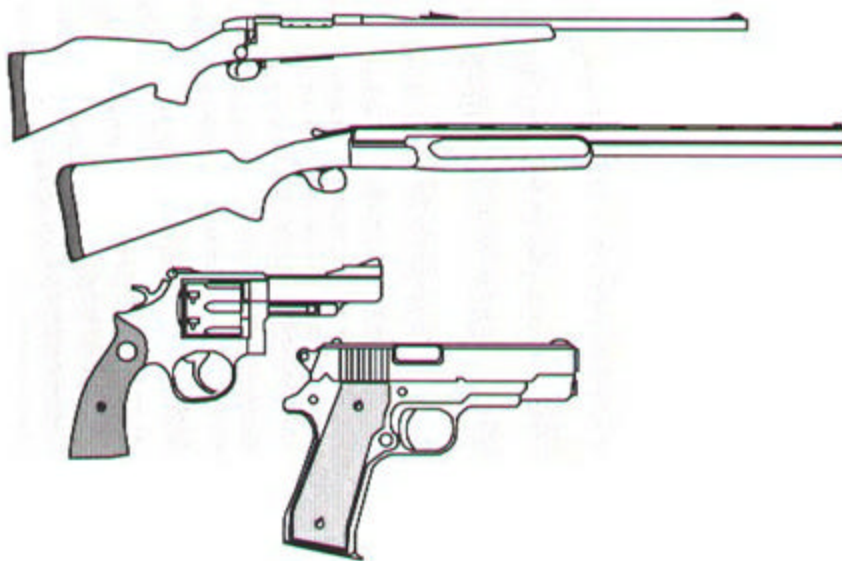




DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS



Implementation of the Brady Law



September 1999

IMPLEMENTATION OF THE BRADY LAW

EXECUTIVE SUMMARY

This report discusses the actions taken by the Bureau of Alcohol, Tobacco and Firearms (“ATF”) in the implementation of the permanent provisions of the Brady law that became effective on November 30, 1998. The Brady law requires Federal firearms licensees (“FFLs” or “licensees”), including pawnbrokers, to initiate a criminal background check through the National Instant Criminal Background Check System (“NICS”) prior to transferring a firearm to an unlicensed individual.

ATF implements the Brady law jointly with the Federal Bureau of Investigation (“FBI”).¹ ATF’s two primary responsibilities with regard to Brady law implementation are as follows:

- ATF regulates and inspects FFLs to ensure that they comply with the Brady law.
- ATF enforces the Brady law by investigating criminal violations of the Brady law and other Federal firearms laws committed by FFLs or individuals.

As discussed below, the Brady law has proven effective both in the goal of preventing FFLs from selling firearms to potentially dangerous individuals, and in providing law enforcement with valuable information about persons who unlawfully attempt to acquire firearms.

ATF Regulation of FFLs

To implement the permanent provisions of the Brady law, ATF issued regulations on October 29, 1998, governing FFL participation in NICS. The most important of these regulations requires FFLs to contact NICS prior to transferring any firearm to an unlicensed individual, though the method of contact will vary depending on the State in which the FFL is located. The regulations further provide for penalties – including civil fines and license suspension or revocation – for FFLs who knowingly fail to comply with their Brady obligations and unlawfully transfer firearms. FFLs who fail to comply with the requirements of the Brady law are also subject to criminal penalties under the Gun Control Act of 1968 (“GCA”).

In order to educate FFLs about the new Brady law requirements, ATF and the FBI conducted an extensive education and outreach effort through seminars, open letters, newsletters, and the Internet. ATF also conducted a training course for the FBI on aspects of Brady law enforcement that are especially within ATF’s expertise.

¹ The FBI administers the NICS system and conducts the background checks required under the Brady law.

The results of ATF's efforts with regard to FFLs are encouraging. Initial regulatory compliance activities indicate that most FFLs are complying with the Brady law by making NICS inquiries and keeping required records, resulting in thousands of prohibited persons being denied the opportunity to purchase a firearm from a licensed dealer. ATF has discovered compliance problems with a small number of FFLs and has taken steps to address these problems.

ATF Enforcement Efforts

As the lead agency for the enforcement of Federal firearms laws, it is ATF's responsibility to investigate criminal attempts to evade the Brady law's requirements and to ensure that firearms remain out of the hands of prohibited persons. In the Brady law context, ATF's enforcement efforts have focused on the following two areas:

1. Efforts aimed at prohibited persons who have obtained firearms from FFLs despite a NICS check.

During the first several months of NICS operation, it has become clear that although most NICS checks can be completed within the statutory period of three business days - indeed, the vast majority are completed within a few hours - there are a number of instances in which law enforcement authorities are unable to complete the NICS check within three business days. This usually occurs when the prospective buyer has a criminal history, but the criminal history records do not clearly reveal whether the individual is legally prohibited from receiving a firearm. If three business days pass without NICS being able to complete the check, the Brady law does not prevent the firearms dealer from transferring the firearm. Instances where NICS has advised the licensee that a transferee is prohibited *after* the firearm has already been transferred by the licensee are referred to as "delayed denials." In these cases, a prohibited person may be in possession of a firearm.

To respond to delayed denials, the FBI and ATF have jointly established an "instant referral" system, so that ATF will learn immediately of firearms transferred to prohibited persons. The names of approximately 2,000 purchasers identified as prohibited, who received firearms because their background checks could not be completed within three business days, have been referred to ATF by the FBI. The Treasury Department has directed that ATF make investigations of delayed denials ATF's highest NICS investigative priority and prepare a plan for the quickest possible recovery of firearms known to be transferred to prohibited persons. This effort is resource-intensive and has therefore been enhanced by the U.S. Customs Service, the Internal Revenue Service Criminal Investigative Division, and the U.S. Secret Service, which have each provided 20 special agents to assist ATF in investigating delayed denial cases, recovering weapons transferred to prohibited persons, and referring cases for prosecution.

2. Efforts related to attempted firearms purchases by prohibited persons.

NICS has created a new source of criminal investigative information about persons who unlawfully attempt to purchase firearms. To deal with the FBI referrals based on this information, ATF has developed a screening system to refer the most significant cases to the field for further investigation. The screening system places the highest priority on cases involving potential and active violent offenders. Criminal investigations are opened on individuals who pose the greatest threat to public safety. ATF also worked closely with United States Attorneys throughout the country in developing prosecution guidelines for GCA violations arising out of NICS referrals. As a result of this effort, ATF has opened over 1,000 criminal investigations, and 200 cases have been referred for prosecution. Information is not available concerning the number of corresponding state prosecutions that have occurred.

BACKGROUND

The Gun Control Act

The Gun Control Act (“GCA”), enacted in 1968, requires individuals who are engaged in the business of dealing in firearms to obtain a Federal license. These Federal firearms licensees are regulated by ATF and are required to maintain records of all acquisitions and dispositions of firearms.

The GCA also makes it unlawful for certain persons to possess firearms. These individuals are referred to as “prohibited persons,” and it is a felony for any person, including an FFL, to transfer a firearm to a person knowing or having reasonable cause to believe that the transferee is prohibited from receiving a firearm. There are nine categories of "prohibited persons":

- Persons under indictment for, or convicted of, a crime punishable by imprisonment for a term exceeding one year;
- Fugitives from justice;
- Persons who are unlawful users of, or addicted to, any controlled substance;
- Persons who have been adjudicated as mental defectives or have been committed to a mental institution;
- Illegal aliens, or aliens who were admitted to the United States under a nonimmigrant visa;
- Persons who have been dishonorably discharged from the Armed Forces;
- Persons who have renounced their United States citizenship;
- Persons subject to certain types of restraining orders; and
- Persons who have been convicted of a misdemeanor crime of domestic violence.

With limited exceptions, juveniles under eighteen years of age are also prohibited from possessing handguns under Federal law.²

² Additionally, it is unlawful for an FFL to transfer a handgun to anyone under the age of 21, or a long gun to anyone under the age of 18.

Pre-Brady Enforcement of the GCA Against Prohibited Persons

Between the enactment of the GCA and the enactment of the Brady law, Federal firearms law operated under the "honor system." Prior to purchasing a firearm from an FFL, an unlicensed gun buyer was required simply to complete an ATF Form 4473. Form 4473 required gun purchasers to provide their name, address, and date of birth, and answer a series of questions designed to ensure that they were not prohibited from receiving a firearm under Federal law. Gun purchasers were required to certify, under penalty of perjury, that the answers to these questions were correct. No system existed for confirming the truthfulness of information on the Form 4473. Consequently, a convicted felon could purchase a firearm from an FFL simply by lying on the Form 4473 about prior felony convictions. This scenario was referred to as a "lie and buy" violation, and detection of such violations was difficult. Prior to the Brady law, thousands of firearms were obtained in this manner each year.

Interim Brady: The First Phase of Brady Law Implementation

The Brady law was enacted on November 30, 1993, and was implemented in two stages: an interim stage and a permanent stage. The interim provisions of the Brady law went into effect on February 28, 1994. Under interim Brady, FFLs were generally required to submit a "Brady form" to a chief law enforcement officer for a background check on every prospective purchaser of a handgun. If no response was received within 5 business days, the FFL could proceed with the transfer. However, the requirements of interim Brady applied only to handgun transfers.

The Department of Justice's Bureau of Justice Statistics estimates that with the cooperation of approximately 5,400 chief law enforcement officers, 312,000 prohibited persons were prevented from purchasing firearms from FFLs during interim Brady. Examples of persons being stopped from purchasing firearms revealed how easy it had been for felons to avoid detection when purchasing a firearm under the pre-Brady "honor system." For example, in June of 1994, a person who had been convicted of reckless homicide was prevented from purchasing a handgun in Lexington, Kentucky, pursuant to an interim Brady background check. Prior to the enactment of the Brady law, that same convicted felon had purchased two handguns without detection by law enforcement officials.

The Establishment of Permanent Brady

The permanent provisions of the Brady law went into effect on November 30, 1998. The permanent Brady law charges the Attorney General with establishing a National Instant Criminal Background Check System ("NICS"). Pursuant to this requirement, the FBI's Criminal Justice Information Services ("CJIS") Division has established a NICS Operations Center in Clarksburg, West Virginia.

Unlike interim Brady, permanent Brady applies to all firearms, not simply handguns. FFLs are required to contact NICS before transferring any firearm to an unlicensed individual. NICS may then take up to three business days to notify the FFL whether receipt of a firearm by the prospective purchaser would be in violation of law. If the FFL does not get a “denied” response from NICS within three business days, the firearm may be transferred after the end of the three business days.

Procedurally, NICS operates one of two ways, depending on the State in which the FFL is located. In twenty-three States, FFLs contact NICS directly through the FBI. However, many States have agreed to act as "point of contact" ("POC") States. FFLs in POC States contact the State authorities for NICS checks, rather than the FBI. In States that have their own independent background check requirements, this permits State and Federal checks to be conducted simultaneously. Twenty-seven States serve as partial POCs (handgun checks only) or full POCs (handgun and long gun checks).

THE IMPLEMENTATION OF PERMANENT BRADY

ATF Regulation and Inspection of FFLs

The New ATF Brady Regulations

On October 29, 1998, ATF issued regulations to implement the requirements of permanent Brady.³ The major provisions of these regulations are as follows:

- **NICS Checks**: The new regulations generally require FFLs to contact NICS prior to transferring any firearm to an unlicensed individual. FFLs may contact NICS through the FBI or a State POC.
- **Revised Form 4473**: The new regulations eliminate interim Brady's "Brady form." However, purchasers of firearms from FFLs are still required to complete a revised Form 4473. The revised Form 4473 incorporates a new section for FFLs to record information received from NICS. Additionally, it solicits, on an optional basis, the social security number of the purchaser to help minimize the misidentification of firearms purchasers.

³ The FBI issued regulations establishing the methods of operation for NICS, including policies and procedures for ensuring the privacy and security of the system, and appeal procedures for individuals who are determined by NICS to be prohibited persons.

- Timing of NICS Checks: The regulations provide that the purchaser must complete and execute the Form 4473 prior to the licensee initiating a NICS check. A NICS check may be relied upon by a licensee only for use in a single transaction and for a period not to exceed 30 days.
- State Permit Exception: As required by the Brady law, the new regulations allow, under certain strict circumstances, for a firearms purchaser with a State-issued permit to qualify for an exemption from the requirement for a NICS check at the time of sale. The regulations provide that State permits will only qualify as exemptions under permanent Brady if the State conducts NICS checks on all permit applicants. Furthermore, a State permit would not constitute an exception under permanent Brady if State law allowed the issuance of permits to persons who had Federal firearms disabilities. In this way, the regulations ensure that individuals who acquire firearms pursuant to the permit alternative would be subject to the same type of background check as those individuals without permits.
- Recordkeeping Requirements: Before permanent Brady, FFLs were required to retain Forms 4473 on completed transfers for a period of at least 20 years. The new regulations specify that in situations where an FFL contacts NICS, but the transfer never occurs, the FFL must retain the Form 4473 for at least 5 years. This provides an “audit trail” to determine whether licensees have been misusing NICS.
- Penalties: The regulations implement the statute by providing that a firearms licensee who transfers a firearm and knowingly fails to comply with the requirements of the law, where compliance would have revealed that the transfer was unlawful, is subject to license suspension or revocation, and a civil fine of not more than \$5,000. Licensees who violate the provisions of the Brady law are also subject to criminal penalties under the GCA.

ATF Education and Outreach for FFLs

ATF cooperated with the FBI to ensure that FFLs were prepared to meet their obligations under permanent Brady on the date of its implementation. This effort had many components.

- FFL Seminars. ATF conducted over one hundred FFL seminars to discuss the new requirements of permanent Brady. The FBI participated in many of these seminars. In this way, ATF and the FBI were able to respond to the questions and concerns of FFLs, while educating them as to the requirements of the new law.

- Open Letters to FFLs. ATF sent letters to FFLs in all 50 States, the District of Columbia, and 5 territories, explaining how to comply with the permanent provisions of the Brady law.
- Educating FFLs. ATF notified licensees in its "FFL Newsletters" of various issues under the Brady law. ATF also drafted 68 "Questions and Answers" about the permanent provisions of the Brady law, which were posted on the ATF website for the benefit of Federal firearms licensees and the public.

ATF personnel also conducted a training course for analysts at the FBI's NICS Operations Center in Clarksburg, West Virginia. In determining whether a person is "convicted" within the meaning of the GCA, it is often necessary to evaluate State law.⁴ ATF has years of experience in interpreting State laws in making these determinations. Accordingly, the purpose of the course was to educate FBI personnel about how to determine whether a person has Federal firearms disabilities. The FBI was advised that ATF personnel are always available to assist in making a determination as to whether an individual was prohibited from receiving a firearm under Federal law.

The transition from interim Brady to permanent Brady was smooth. On November 30, 1998, FFLs across the country began contacting NICS or their State POC for background checks for all firearms transfers.

Ensuring Complete Enrollment

The FBI and ATF have coordinated efforts to ensure the registration of FFLs with NICS in States where licensees must contact the FBI for a NICS check prior to transferring a firearm to an unlicensed individual. As of November 30, 1998, there were approximately 36,147 FFLs enrolled with the FBI.⁵ This number did not include FFLs in POC States who contact their States rather than the FBI for NICS checks.

The FBI compared its list of registered FFLs with ATF's list of active FFLs in States where licensees contact the FBI, and provided ATF with a list of over 14,000 FFLs who had

⁴ The GCA, as amended by the Firearms Owners' Protection Act of 1986, provides that what constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of the GCA, unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

⁵ Currently, there are 48,837 dealers enrolled with the FBI.

not registered with NICS. ATF then mailed a survey to these FFLs to determine the reasons why they had failed to register. To date, ATF has analyzed 2,904 responses. Of these:

- 28% report that they have subsequently enrolled;
- 28% report that they do not transfer firearms to nonlicensees, and accordingly are not subject to the NICS check requirements;
- 21% report that they only do gunsmithing operations exempt from the requirement to initiate a NICS check;
- 12% report that they only transfer firearms to nonlicensees with valid permits that constitute alternatives to the requirement for a NICS check at the time of transfer;
- 6% report that they have gone out of business;
- 2% state that they were previously enrolled with the FBI;
- 2% report that they were not enrolling as they were planning to discontinue their business operations, and were not transferring any firearms;
- 2% report that they only make transfers under the National Firearms Act, which are exempt from the NICS requirements; and
- 1% report that they were not enrolled because they were unaware of the NICS requirements.⁶

Upon completion of the analysis of the survey responses, ATF will provide the FBI with the names of the FFLs who reported that they have subsequently enrolled with the FBI. In addition, ATF will take additional steps to verify information provided by licensees who report that they are not making sales to unlicensed individuals.

In some cases, the survey responses may indicate that an FFL is not in compliance with the requirements of permanent Brady; in these cases, the survey information is referred to the field. For instance, one response indicated that the FFL did not initiate NICS checks when transferring firearms to persons that the FFL knew. ATF conducted an inspection, and learned that the FFL had transferred only two long guns since the inception of permanent Brady. The

⁶ Some licensees gave more than one reason; accordingly, the percentages exceed 100%.

FFL had not initiated NICS checks on either of those transfers; however, neither of the transferees were found to be prohibited. The FFL was informed of the requirements of the Brady law.

Ensuring FFL Compliance With the Brady Background Check Requirement

To ensure that FFLs are complying with the Brady law, and not evading the NICS check requirement, ATF is including a review of NICS information in its audits of FFLs. The precise method of encompassing NICS information reviews in the audits is continuing to develop, as constraints on the methodology are imposed by FBI regulations regarding the retention and use of NICS information.

As of August 10, 1999, ATF had conducted 692 inspections of licensees under the permanent provisions of the Brady law. ATF coordinated with the FBI to verify the accuracy of NICS-related information in the licensees' records. These initial regulatory activities indicate that the majority of FFLs that were inspected are complying with the requirements of the Brady law. However, isolated violations have been uncovered in the course of compliance inspections. For example:

- One FFL was transferring long guns without first initiating a NICS check as required by law. The licensee was under the incorrect assumption that permanent Brady, like interim Brady, applied only to handguns.
- An FFL apparently allowed a prohibited individual to redeem a pawned firearm after receiving a "denied" response from NICS. The FFL falsely recorded that he had received an "approval" from NICS in his records. This information has been referred back out to the field for additional investigation.

Pilot Project Regarding NICS Compliance

Recently, ATF and the FBI began a special pilot project to improve the efficiency and quality of the audit's review of NICS information. Under this project, ATF is in direct contact with the FBI during the course of the inspection. This allows the ATF inspector to compare the dealer's recorded information directly with the FBI's NICS audit log.

ATF determined that these methods should be used in conjunction with an intensive inspection effort targeted towards specific FFLs. Some, but not all, of these FFLs were chosen based on factors including crime gun trace data, size of the licensee, and licensees' prior compliance history. The New Orleans greater metropolitan area was selected for an intensive inspection effort, which included verification of NICS compliance, during a two-week period. ATF discovered discrepancies in the records of 12 of the 17 licensees inspected in this project.

During the course of these targeted inspections, ATF discovered several instances of NICS-related GCA violations, ranging from a failure to retain required records to a small

number of transfers of firearms without a NICS check to a licensee who apparently falsified records to indicate a “proceed” response where NICS had provided a “delayed” response.

By coordinating with the FBI to compare licensee records with information in the NICS audit log, ATF inspectors were also able to discover a number of apparent violations of the FBI rules regarding use of NICS. For example, the employees of one FFL ran NICS checks on persons not intending to purchase a firearm. Another FFL apparently initiated multiple NICS checks on single transactions, especially if there was a delay in obtaining a response. One FFL was conducting a pre-approved NICS check for a \$15 fee, even though the person may not have been intending to purchase a firearm. In another case, the FFL’s son initiated a NICS check on himself; he had previously been arrested and wanted to see if he could clear a NICS check.

The results of this pilot project show the value of comparing information from licensees’ records with FBI information in the NICS audit log. ATF plans to expand this approach to additional areas of the country. Appropriate administrative and/or criminal action will be initiated upon completion. ATF will take appropriate action on all GCA violations, and information regarding NICS misuse will be referred to the FBI.

Exchange of Information With the FBI

In addition to focused inspection efforts, ATF relies on an ongoing exchange of information with the FBI to identify FFLs who may not be conducting NICS checks. For example, one exchange between ATF and the FBI disclosed an FFL who indicated that he had transferred firearms to prohibited persons due to the fact that he did not believe in the reliability of the NICS. The FBI referred this information to ATF, and ATF initiated a criminal investigation of the FFL. During the course of the investigation, the FFL surrendered his license to ATF and went out of business. The surrender of the FFL’s license does not eliminate the possibility of criminal prosecution.

To facilitate information exchange that results in enforcement action, ATF will assign an inspector to the FBI NICS Operation Center. This inspector will also provide expert advice on GCA issues and answer general GCA questions from FFLs and the public.

ATF Enforcement Efforts Aimed at Prohibited Persons Who Have Obtained Firearms Despite a NICS check - “Delayed Denials”

The most significant law enforcement issue related to the Brady law is the location and apprehension of prohibited persons known to have received firearms. As noted above, an FFL must wait up to three business days for a response from NICS prior to transferring a firearm. In the vast majority of cases, this period is sufficient for the FBI to obtain the information necessary to complete the required background check. However, in a small percentage of cases, the period allowed by law does not provide enough time for NICS to respond with

either a “proceed” or “denied” response.

For example, the NICS may locate a criminal history record which shows an arrest on felony charges, but does not show whether the individual was actually convicted of a felony. Sometimes, the FBI is unable to obtain the missing information within three business days. Usually, this delay occurs because the State or local law enforcement officials are unable to provide the disposition records within three business days. In these situations, the NICS Operations Center will advise the FFL that it is still in the process of reviewing this matter, and it cannot provide either a “proceed” or “denied” response for this transaction. NICS will advise the licensee that the Brady law allows the licensee to transfer the firearm after three business days have elapsed; however, NICS will continue its review of the matter for an additional two weeks, and will contact the licensee within that time if it discovers definitive information regarding the transaction.

If NICS discovers, after three business days have elapsed, that the purchaser is prohibited, the FBI will contact the FFL to determine whether or not the firearm has been transferred. If the firearm has been transferred, the case is referred to as a "delayed denial," and it results in an immediate FBI referral to ATF. ATF verifies that the person is indeed prohibited, and then takes appropriate action. ATF gives "delayed denial" referrals priority over the investigations of routine NICS denials. ATF is committed to retrieving all such firearms from prohibited persons.

As of August 31, 1999, over 2,000 “delayed denials” have been referred to ATF for investigation. Due to the public safety considerations, the FBI has implemented a system whereby immediate notification is made by facsimile transmission to both ATF and local police officials outside of the normal referral process.

All of these delayed denial transactions must be investigated. The FBI’s referral is generally based on a computerized records check. ATF generally does not take any enforcement action (such as seizing a firearm) based solely on a computerized records check, without taking additional steps to confirm the person’s prohibited status. This usually involves obtaining an authenticated copy of court records, as well as investigating to ensure that the person’s civil rights were not restored under State law.

Once prohibited status is confirmed, special agents take appropriate action. In some cases, where it is determined that prosecution is not appropriate, a special agent will interview the prohibited person, determine whether he or she is still in possession of the firearm, and offer the individual the opportunity to either abandon the firearm to a law enforcement agency or transfer it to a person who is not prohibited from possessing firearms. In other cases, seizure of the firearm may be appropriate. Often the individual’s possession of the firearm is in violation of State law but not Federal law. In such cases, ATF will refer the case to a State or local law enforcement agency for investigation. Finally, in those cases where ATF believes that criminal prosecution is warranted, ATF will take appropriate steps to build a case against

the prohibited person.

Dealing with the backlog of delayed denial referrals is resource-intensive. Therefore, the Treasury Department requested and recently approved an ATF plan to temporarily assign 60 special agents from other Treasury law enforcement bureaus (20 each from the Secret Service, Customs Service and Internal Revenue Service) to ATF for at least 60 days. The agents have received training in the law, regulations, and ATF policies concerning firearms retrievals. These agents are assisting ATF in investigating delayed denial cases, recovering weapons transferred to prohibited persons, and referring cases for prosecution.

A review of initial data from delayed denial investigations shows that in a number of these cases, the individual may not be prohibited under Federal law. There are a variety of reasons why a person with no Federal firearms disabilities has received a “denied” response from NICS. In some cases, the person is prohibited under State law, and thus NICS correctly denied the transaction. In other cases, the computerized records check accurately revealed that an individual was convicted of a felony; however, the database does not reveal that the individual subsequently received a restoration of civil rights under State law.⁷ Thus, many of these situations are unavoidable, given the fact that no computerized database will contain all the information necessary in order to make the complex determination as to whether an individual has Federal firearms disabilities.

As of August 31, 1999, ATF has ensured that firearms were retrieved (through seizure, abandonment or transfer of the firearm) from 300 prohibited persons. In 47 cases, ATF referred subjects to a local law enforcement agency for investigation. ATF has opened 34 criminal investigations arising out of “delayed denials” with the intention of referring them for prosecution. The following are examples of important Federal criminal investigations resulting from “delayed denial” referrals to ATF:

- Crips Gang Member Straw Purchase. ATF agents in Ohio investigated a prohibited person who obtained a firearm as a result of a “delayed denial.” ATF determined that the purchaser of the firearm was a member of a faction of the “Crips” gang who made this acquisition as a straw purchase for other gang members. The other gang members were also prohibited. The firearm was used *less than 24 hours* after its acquisition by the gang members to commit an armed robbery of a local restaurant. The purchaser and other gang members are being investigated for violations of Federal and/or State laws.

⁷ Federal law looks to the law of the convicting jurisdiction to determine if an individual is considered to have been “convicted.” Certain pardons, expungements of records, and restorations of civil rights may result in the restoration of an individual's firearms rights under Federal law. When an individual is denied a firearm pursuant to a NICS check, and seeks to prove that the denial is erroneous, the NICS allows an appeal.

- Pawnshop redemption. An individual in Maryland who had been convicted of second degree robbery and attempted rape placed a firearm in pawn with an FFL. He then returned to redeem the firearm, falsified the Form 4473, and obtained the firearm when NICS could not make a determination within three business days as to whether he was prohibited. This individual was also the subject of a protective order. The subject was subsequently arrested; a shotgun and ammunition, pistol magazines and numerous fictitious identifications were seized.

ATF Enforcement Efforts Related to Attempted Firearms Purchases By Prohibited Persons

Federal law enforcement efforts do not end with a "denied" response from NICS. Federal law authorizes ATF to investigate individuals who receive a "denied" response in order to determine if those individuals have violated Federal firearms laws. Such individuals could be involved in a variety of illegal activities, including lying on a Form 4473, which constitutes a felony even if the person does not successfully acquire a firearm.⁸ Therefore, information on all NICS denials is referred to ATF, which carefully screens this information to determine which cases merit Federal investigation.

Indeed, time is necessary to establish each element of a criminal case under 18 U.S.C. 922(a)(6). The following elements must be established prior to referring a case to the United States Attorney:

- That the accused *knowingly* made a false or fictitious oral or written statement;
 - ✓ For example, if the person answered "no" to the question on the Form 4473 about prior felony convictions, it must be established that the person is indeed a convicted felon, and knew that his answer was false.⁹

⁸ Pursuant to 18 U.S.C. § 922(a)(6), it is unlawful for any person to knowingly make a false or fictitious oral or written statement in connection with the acquisition or attempted acquisition of a firearm. However, the statement must be intended or likely to deceive the licensee with respect to any fact material to the lawfulness of the sale of the firearm under the GCA. Under section 924(a)(1)(A), it is unlawful to knowingly make any false statement or representation with respect to information kept in an FFL's required records.

⁹ As previously noted, not everyone who receives a "denial" from NICS has violated Federal law. In some cases further investigation establishes that the individual was not actually prohibited under Federal law. Certain pardons, expungements of records, and restorations of civil rights may result in the restoration of an individual's firearms rights under Federal law. Currently, the best way for improperly denied individuals to establish their status is to go through the FBI's NICS appeal process.

- ✓ It must also be established that the person documented in the court

records is in fact the same person who attempted to purchase the firearm.¹⁰

- That the statement regarded the acquisition or attempted acquisition of a firearm or ammunition; and
- That the statement was intended or likely to deceive the licensee with respect to a fact that was material to the lawfulness of the sale or other disposition of the firearm.

Between November 30, 1998 and July 31, 1999, the referral of “denied” transactions from the FBI has led ATF to open over 1,000 criminal investigations. Over 200 of these cases have been formally referred to United States Attorney Offices for prosecution. ATF believes that by investigating and making cases using criminal intelligence derived from NICS checks, serious violent offenders will be incarcerated and some will be deterred from further efforts to purchase firearms illegally in the unregulated market in firearms.

The following are examples of cases that were made as a result of NICS denial referrals to ATF:

- Probation violator. An individual who had been convicted of threatening a former United States President attempted to purchase a firearm from a pawnshop while still on probation in June of 1999. ATF cooperated with the United States Secret Service in investigating this case. A Federal arrest warrant was issued and the individual was apprehended for violation of 18 U.S.C. § 922(a)(6).
- Prior threat to the President. Based upon a NICS referral, ATF and United States Secret Service agents arrested a prohibited individual for violation of Federal firearms laws. The individual had been convicted of felony fraud. In 1992, he was arrested for making threats to the President of the United States.
- Domestic violence: multiple guns. ATF special agents in Maryland initiated a criminal investigation of a prohibited individual who had received a "denied" response from NICS. The individual had been convicted of a misdemeanor crime of domestic violence. ATF agents, assisted by State and local officers, executed a Federal search warrant at the residence of the prohibited person. The agents seized 36 firearms, including at least two machineguns.

¹⁰ There are a number of ways to do this, including obtaining the individual’s fingerprints, photographs or handwriting and comparing them to the physical evidence from the instant offense, or having a photo line-up done if it is believed that the FFL can make a positive identification.

- Two time convicted felon: multiple guns. ATF special agents in Maryland received an investigative lead as a result of a referral from the FBI of a prohibited individual who received a "denied" response from NICS. The individual had two prior convictions; one for assault and the second for battery. The agents seized 30 firearms and hundreds of rounds of ammunition.
- Pawnshop redemption. An individual with a felony conviction for multiple counts of aggravated assault attempted to retrieve a firearm he had placed in pawn with an FFL. The FFL required the individual to execute the Form 4473. Upon receiving a "denied" response from NICS, the FFL advised the individual that he could not return the firearm. The individual became abusive with the FFL and threatened him with bodily harm. The subject was arrested without incident by ATF special agents for violation of Federal firearms laws.
- Multiple prior convictions. In a coordinated effort in Florida between the Office of the United States Attorney and ATF special agents, 17 prohibited individuals were indicted for various violations of Federal firearms laws. All the indictments were based upon NICS referrals by the Florida Department of Law Enforcement (the State POC), where the prohibited individuals had falsified the Form 4473 in attempting to purchase firearms from a licensee. The list of prior convictions for these individuals is as follows: attempted homicide of a police officer, resisting an officer and carrying a concealed weapon, homicide, aggravated trafficking in cocaine, assault with intent to commit rape, assault with a dangerous weapon, attempted manslaughter with a handgun, burglary, assault and battery, attempted sexual assault, vehicular homicide, resisting an officer with violence, armed robbery, domestic violence, rape, fraud, dealing in stolen property, larceny, vehicular theft, weapons offenses, escape, possession of a firearm by a convicted felon, and murder. This does not include multiple convictions by each of the defendants.

CONCLUSION

The implementation of the permanent provisions of the Brady law has shown that NICS is an effective tool for preventing the sale of firearms by FFLs to prohibited persons. FFLs have generally been in compliance with the requirements of the law, and have prevented tens of thousands of prohibited persons from buying and/or redeeming firearms at gun stores and pawnbrokers. This includes some of the most dangerous criminals in our country--violent felons and gang members, as well as domestic violence offenders and persons threatening the life of the President.

While not every "denied" response from NICS results in a case that merits Federal prosecution, the Brady law has also proved to be a valuable source in ATF's investigation of armed career criminals, felons in possession of firearms, and others who violate Federal firearms laws. In cooperation with other Federal, State and local law enforcement agencies, ATF has been able to use this new tool in an effective manner to apprehend and prosecute those who violate Federal firearms laws.



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TREASURY RELEASES REPORT ON CRIMINAL BACKGROUND CHECK SYSTEM

The Treasury Department on Thursday released a Bureau of Alcohol, Tobacco and Firearms (ATF) report on the National Instant Criminal Background Check System (NICS), which is designed to prevent potentially dangerous criminals from buying firearms from licensed gun dealers. The system enables law enforcement to conduct pre-sale background checks on gun purchasers to determine whether a purchaser is prohibited from possessing a gun under Federal law prior to the sale.

The NICS report details actions taken by ATF as part of the permanent provisions of the Brady law that became effective on November 30, 1998. ATF regulates Federal firearm licensees (FFLs) who access NICS and has authority to enforce the Gun Control Act including the Brady law.

"The instant background check program is one of the ways we're working with State and local law enforcement agencies to keep guns out of the hands of potentially dangerous people," said Treasury Secretary Lawrence H. Summers.

In implementing the permanent provisions of the Brady law, last year ATF issued regulations governing Federal firearms licensees (FFLs) participation in NICS. The law currently requires FFLs including pawnbrokers, to initiate a criminal background check through NICS prior to selling or transferring any firearm to an unlicensed individual. ATF implemented the Brady law with the FBI. The FBI administers the NICS system and conducts the background checks required under the Brady law while ATF enforces the law.

"The Treasury and Justice Departments are working to stop illegal gun purchases," Treasury Under Secretary for Enforcement James E. Johnson said. "NICS is critical to ATF's enforcement efforts."

ATF Director John W. Magaw said, "NICS is working. It is closing a loophole that allowed prohibited persons to unlawfully acquire firearms from licensed dealers."

The report shows that FFLs have generally been in compliance with the

requirements of the law and have prevented prohibited persons from buying and/or redeeming firearms at gun stores and pawnbrokers.

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