



This document is scheduled to be published in the Federal Register on 11/20/2014 and available online at <http://federalregister.gov/a/2014-27386>, and on FDsys.gov

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

28 CFR Part 25

Docket No. FBI 152; AG Order No. 3477-2014

RIN 1110-AA27

National Instant Criminal Background Check System Regulation

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: Final rule.

SUMMARY: The United States Department of Justice ("the Department") is publishing this final rule to amend the regulations implementing the National Instant Criminal Background Check System ("NICS") pursuant to the Brady Handgun Violence Prevention Act ("Brady Act"). This final rule authorizes tribal criminal justice agencies to access the NICS Index for purposes of issuing firearm-related permits and licenses, authorizes criminal justice agencies to access the NICS Index for purposes of disposing of firearms in their possession, and updates the storage location of NICS Audit Log records relating to denied transactions.

DATES: This rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Sean Ragan, Federal Bureau of Investigation, National Instant Criminal Background Check System Section, Module A-3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0147, (304) 625-3500.

SUPPLEMENTARY INFORMATION: This rule finalizes the proposal in the **Federal Register** on January 28, 2013 (78 FR 5757). The Federal Bureau of Investigation ("FBI") accepted comments on the proposed rule from interested parties until March 29, 2013, and received 38 comments. With the exception of deleting the requirement for a form as explained below, the proposed rule is adopted as final.

Significant Comments or Changes:

On January 28, 2013, the Department published a notice of proposed rulemaking ("NPRM") that proposed three changes to the FBI's NICS regulations. The proposed changes were to authorize tribal criminal justice agencies to access the NICS Index for purposes of issuing firearm-related permits and licenses; authorize criminal justice agencies to access the NICS Index for purposes of disposing of firearms in their possession; and to update the storage location of NICS Audit Log records relating to denied transactions. The proposed changes balance the Brady Act's mandate that the Department protect legitimate privacy

interests of law-abiding firearm transferees (Pub. L. 103-159, section 103 (h)) and the Department's obligation to enforce the Brady Act (Id., section 103 (b)) and prevent prohibited persons from receiving firearms. Comments received for each of the three proposals are addressed below.

Proposal #1: Authorizing Tribal Criminal Justice Agencies to Access NICS Index Records (28 CFR 25.6(j)(1))

The Department proposed to extend to tribal criminal justice agencies authority to access the NICS Index. Some commenters were concerned that the proposal would undermine tribal sovereignty.

That is a misunderstanding of the rule. This rule does not, in any way, preempt tribal law. Rather, it extends to federally recognized tribes authorization to access the NICS Index and provides a tool to help tribes exercise their law enforcement responsibilities, including the regulation of firearms, within the territories they oversee. NICS access is wholly discretionary on the part of the tribes. This rule does not in any way mandate tribal government action. Because NICS access is wholly voluntary on the part of tribal governments, the rule does not impose compliance costs on those governments. This rule merely provides authorization for a tribal government to use the NICS in connection with the issuance of firearm-related permits should the tribal government choose to do so.

Tribal governments are responsible for law enforcement and the maintenance of good order within their Indian country. Some tribes have for years issued firearm permits authorizing persons in their territories to possess and to carry concealed firearms. If a tribe chooses to access NICS pursuant to this rule, it will improve that tribe's ability to prevent and reduce illegal gun possession in its jurisdiction.

One commenter expressed concern that storing tribal information in a national database would "take[] away" that tribe's sovereignty. The Department does not believe that to be the case. This rule does not address the ability of a tribe to submit information to the NICS. What the rule does address is the ability of the tribes to access the information stored in the NICS for issuing firearm permits and other authorized purposes. Tribal use of this authorized access is completely voluntary. The Federal Government in no way mandates tribal use of the NICS.

Proposal #2: Authorizing Law Enforcement Agencies to Conduct NICS Checks Before Transferring Firearms (28 CFR 25.6(j)(3))

The Department proposed to permit law enforcement agencies to conduct NICS checks before transferring to another person or persons a firearm. Comments regarding this proposal were generally favorable. Therefore, the Department is finalizing the proposal unchanged.

**Proposal #3: Storage Location of NICS Audit Log Records
Relating to Denied Transactions (28 CFR 25.9(b)(1)(i))**

The Department proposed a change to the storage location and storage agency for its Audit Log records relating to denied transactions retained for more than 10 years. Specifically, the Department proposed to retain those records on-site after the National Archives and Records Administration ("NARA") informed the FBI that it could not accept the records for storage. Retaining denied transaction records indefinitely is specifically authorized by the Brady Act, Pub. L. 103-159, section 103(i)(2) (codified at 18 U.S.C. 922(t) note)). The Department intends to retain Audit Log records of denied transactions on-site with the NICS Section given the unavailability of space to accommodate those records elsewhere. This change modifies the prior regulation only with regard to the storage location for denied transaction records older than 10 years. The change will not affect the extent to which denied transaction records may be disseminated or accessed.

The original determination of where to store denied transactions older than 10 years was made by the Department in conjunction with NARA. When NICS reached its 10th anniversary, NARA determined that it lacked the capacity to house the NICS denied transaction records. However, the FBI was directed by NARA to retain its NICS denied records for a period up to 110

years. This period is consistent with the retention period prescribed by NARA for the other records in the FBI's Criminal Justice Information Service ("CJIS") Division. Because the NICS business model obliges it to maintain all of its records in electronic format, it is a simple matter for the FBI to retain the NICS denied transaction records older than 10 years in an electronic format on-site for the period prescribed by NARA.

One commenter questioned the benefit of retaining its denied transaction records for more than 10 years on-site. On-site retention beyond 10 years will enhance NICS operations for those rare occasions when a person appeals a very old denied transaction. There is no statute of limitations for appealing denied transactions. Denied transaction record information is not provided to any firearms dealer or private third party. It is used to defend lawsuits, respond to appeals, respond to law enforcement queries, support criminal prosecutions, provide precautionary alerts to law enforcement, and provide information for NICS audits. On those occasions when the FBI must resort to archived denied transaction records, there will be no need for the FBI to make a separate request for the record, wait while warehouse personnel search for it, and, if it is located, wait for its receipt. By storing the records on-site, the FBI will maintain control over the record location, establish its own

retrieval priorities, and improve the efficiency of the search and retrieval process.

One commenter suggested that the Department should impose on itself a requirement to report annually to Congress the number of firearm transactions denied by the NICS Section, the reason(s) for the denials, and the number of transactions denied then later found to be in error in the year immediately preceding the report. The commenter further suggested that the report should be indexed by Federal judicial district and that it include the number of Federal prosecutions for any applicable violations of law as a result of the attempted purchase(s) of a firearm.

The Department already reports much of this information in other locations. For example, Federal prosecution information can be found on the Department's website for the Executive Office for United States Attorneys. Statistics regarding denied transactions are annually published by the NICS on the CJIS Division's website. Therefore, there is no need to duplicate this information in a new reporting requirement.

Finally, some commenters expressed concern that storing the denied records on-site by the FBI versus storage by NARA presented a risk of improper use by the FBI due to its law enforcement and national security missions. Specifically, one commenter feared that storage by the FBI could lead to an

erosion of the data's protection and adherence to "the rules" (not further identified) to the same degree as NARA. Other commenters feared this change could cause creation of arbitrary blacklists of innocent persons, otherwise erode the privacy of citizens, or result in an illegal registry.

These fears are unfounded as the only records retained will be those authorized to be retained by law and belonging to persons who were denied firearms transactions based on statutory criteria specified under 18 U.S.C. 922(g) or (n). Moreover, the security provided by the FBI for NICS data is comprehensive and robust. Those records are not publicly accessible and will be appropriately safeguarded and protected from unauthorized access or use. NICS system information is stored electronically in an FBI computer environment in a locked room within a secure facility. Access to the facility is restricted to authorized personnel who have identified themselves and their need for access to a system security officer. Additionally, access to NICS data by other duly authorized agencies is similarly restricted.

The only change in this proposal to store denial records by the FBI is one of agency location for the storage. It should be emphasized that the records concerned are those of denied transactions. The Brady Act, Pub. L. 103-159, section 103(i)(2), permits the Attorney General to create registries of

"persons [] prohibited by section 922(g) or (n) of title 18, United States Code or State law [] from receiving a firearm"; i.e., persons who have been denied a firearm. Even if NARA retained Audit Log records of NICS denied transaction records older than 10 years as originally envisioned, those records are of denied transactions. The FBI would retain ownership of those records and the right to access them. See 28 CFR part 25. Moreover, the history of the FBI operation of the NICS has demonstrated its commitment to the privacy and security of the information housed in the NICS. See, for example, 28 CFR 25.8 and 25.9(b)(3).

Cost/benefit Analysis

Several commenters requested that the Department perform a more detailed cost/benefit analysis. As explained in its NPRM, the Department lacks sufficient information to conduct a detailed verifiable cost/benefit analysis. For example, the Department knows neither how many of the more than 18,000 state, tribal, and local law enforcement agencies (LEAs) will take advantage of the new provisions nor the specific implementation cost for each agency. The Department estimates that the time required for an LEA to submit its NICS query should not exceed two to three minutes. That span includes the time needed to gather the minimum identifying information (name, sex, date of

birth, race, and state of residence), to enter it on the computer screen, and to press the submit key.

Even given the foregoing information, the Department cannot estimate the costs that will be imposed on Federal, state, tribal, and local LEAs by their use of the new access authority. This inability is caused by the uncertainty of how many LEAs will avail themselves of this new use of the NICS and the unknown number of the potential eligible firearms in the hands of LEAs. However, a range of expense potentially incurred by a LEA using this access authority can be estimated if one begins the analysis by using the mean hourly wages for either a clerical/administrative assistant or a law enforcement officer (Police and Sheriff's Patrol Officer) conducting the checks. The following figures are derived from the Bureau of Labor Statistics as of 2010 for administrative employees and 2012 for law enforcement officers. As noted, the FBI estimates that the entire process of conducting the NICS check should take no more than two to three minutes. The 2010 administrative mean hourly wage is \$16.66. The 2012 mean hourly wage for a law enforcement officer is \$27.78. The cost for a clerical NICS check should be between 56 and 83 cents. If a law enforcement officer conducts the check, then the cost should be between 93 cents and \$1.39. The FBI was unable to estimate how often any one of the

thousands of LEAs might choose to employ the access and which staff member will make the check is similarly unknown.

Beyond the personnel costs, the Department has determined that the LEAs should not incur any start-up or new capital expenses in order to use their new authority. The LEAs already have the computer and communications equipment necessary for them to access and query the National Crime Information Center ("NCIC") and the Interstate Identification Index (III) for their day-to-day law enforcement activities. These two FBI criminal history databases are part of the same information system used to conduct a NICS check. Moreover, the LEAs can conduct a NICS check from the same terminals that they use to query the NCIC and III.

General NICS Concerns

A few commenters expressed concerns about the NICS statutory and regulatory scheme as a whole. One commenter expressed concern generally regarding the intent of this rule and specifically that it would apply to hunting license applicants. That is not the case. Neither the current NICS regulations nor the changes to the NICS regulations made by this final rule permit NICS records to be used to process hunting licenses. Because this rulemaking makes three specific changes

to the NICS regulations, comments generally expressing favorable or unfavorable opinions about the NICS legal framework are outside the scope of this regulatory action and the Department does not address them herein.

Regulatory Certifications

Executive Order 12866 and 13563 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), The Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation.

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

Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs

and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Department of Justice believes that this rule has substantial operational benefits. One benefit of this rule is enhanced access to the NICS for tribal criminal justice agencies that issue firearm-related licenses or permits. This access, while discretionary, will assist the tribes in evaluating any legal prohibitions or public safety risks associated with issuing a particular firearm permit or license. Another benefit of this rule is that state, tribal, and local criminal justice agencies in the possession of firearms will be able to ensure that persons to whom they transfer recovered, seized, or confiscated firearms are legally permitted to receive and possess those firearms. In both cases, such actions by criminal justice agencies will help to improve public safety by reducing the risk that firearms will be obtained and used by persons who are prohibited by law from doing so. Finally, the retention of denied transaction information at CJIS will enhance the efficiency and operational capability of the NICS Section.

The costs of this rule stem from staffing and funding required by state, tribal, and local agencies and the NICS Section to conduct additional background checks for the disposition of firearms in the possession of law enforcement or criminal justice agencies, or in connection with the issuance of

firearm-related licenses or permits by tribal criminal justice agencies. The full impact of the increase in background checks resulting from these changes cannot be reliably projected due to uncertainty about the number of firearms that currently are in, or regularly come into, the possession of law enforcement, and the number of such firearms that ultimately are appropriate for transfer to an unlicensed recipient. Similarly, the FBI cannot predict how often tribal criminal justice agencies are likely to access the NICS in connection with firearms license or permit decisions. Because these uses of the NICS are discretionary with state, tribal, and local criminal justice agencies, the FBI is unable to estimate the extent to which the states will use these capabilities and, therefore, cannot provide reliable monetized estimates of the cost of this rule.

Executive Order 13132 – Federalism

This regulation will not have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. While it provides that LEAs that are authorized users of the NICS with access to the NCIC will be authorized to conduct Disposition of Firearm background checks of the NICS Index, such background checks are not mandatory.

In drafting this rule, the FBI consulted the FBI's CJIS Division Advisory Policy Board (APB). The APB is an advisory committee established pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2. It consists of representatives from numerous Federal, state, tribal, and local criminal justice agencies across the United States. It provides general policy recommendations to the FBI Director regarding the philosophy, concept, and operational principles of the FBI's Integrated Automated Fingerprint Identification System, Law Enforcement Online, the NCIC, the NICS, Uniform Crime Reporting, and other systems and programs administered by the FBI's CJIS Division. In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Analysis

The Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule imposes no costs on businesses, organizations, or governmental jurisdictions (whether large or small).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, tribal, and local governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no action was deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Paperwork Reduction Act of 1995

Information collection associated with this regulation has been approved by the OMB for review under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The OMB control number for this collection is 1110-0055.

In the NPRM, the Department solicited comments regarding the Paperwork Reduction Act. Specifically, it requested assistance to help it—

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

78 FR 5760 (Jan. 28, 2013).

Commenters offered several suggestions on modifying the proposed information collection by the Disposition of Firearms Form. Some commenters suggested eliminating the hard copy version of the form in favor of one electronically submitted.

One commenter suggested keeping the hard copy and expanding its function by increasing the amount of information required to be entered on it including details also found on the ATF Form 4473 and the circumstances of how the firearm was acquired by the LEA.

The modifications suggested for the proposed creation and use of a form are not necessary. The FBI decided not to create the form proposed because it would serve no function that could not be otherwise accomplished more efficiently. The form was intended to fulfill two functions. First, the form was intended to establish an audit trail the NICS Section could periodically review to ensure the system was not being misused. After some research, the FBI determined that there were alternate methods it could use to detect misuse and that the form was not necessary to accomplish compliance reviews. Second, the form was intended to ensure that law enforcement officers gathered and entered the minimum amount of data necessary to successfully initiate a firearm disposition check with the NICS. The FBI has determined this purpose can also be accomplished without publishing a form. The alternative is to post instructions on the FBI NICS website, complete with a list of the minimum data required to successfully initiate a NICS check.

Finally, there is no regulatory or statutory mandate for the form. In an effort to minimize the fiscal impact of this

change on state, tribal, and local law enforcement, the Department has determined a new form is not necessary and will abandon the publication of the form originally proposed.

List of Subjects in 28 CFR Part 25

Administrative practice and procedure, Computer technology, Courts, Firearms, Law enforcement officers, Penalties, Privacy, Reporting and recordkeeping requirements, Security measures, Telecommunications.

Authority and Issuance

Accordingly, part 25 of title 28 of the Code of Federal Regulations is amended as follows:

PART 25—DEPARTMENT OF JUSTICE INFORMATION SYSTEMS

1. The authority citation for part 25 continues to read as follows:

Authority: Pub. L. 103-159, 107 Stat. 1536.

2. In § 25.2, revise the definition of "ATF" to read as follows:

§ 25.2 Definitions.

* * * * *

ATF means the Bureau of Alcohol, Tobacco, Firearms and Explosives.

* * * * *

3. In § 25.6, revise paragraph (j) to read as follows:

§ 25.6 Accessing records in the system.

* * * * *

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

(1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;

(2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,

(3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

* * * * *

3. In § 25.9, revise paragraph (b) (1) (i) to read as follows:

§ 25.9 Retention and destruction of records in the system.

* * * * *

(b) * * *

(1) * * *

(i) NICS denied transaction records obtained or created in the course of the operation of the system will be retained in the Audit Log for 10 years, after which time they will be transferred to an appropriate FBI-maintained electronic database.

* * * * *

Dated: November 13, 2014.

Eric H. Holder, Jr.
Attorney General

[FR Doc. 2014-27386 Filed 11/19/2014 at 8:45 am; Publication Date: 11/20/2014]