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Report to the Chairman, Subcommittee
on Oversight of Government
Management, Restructuring, and the
District of Columbia, Committee on
Governmental Affairs, U.S. Senate

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GUN CONTROL

Potential Effects of Next-Day Destruction of NICS Background Check Records



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Abbreviations

ATF	Bureau of Alcohol, Tobacco and Firearms
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
NICS	National Instant Criminal Background Check System



United States General Accounting Office
Washington, DC 20548

July 10, 2002

The Honorable Richard J. Durbin
Chairman, Subcommittee on Oversight of Government
Management, Restructuring, and the District of Columbia
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report responds to your request for information about how the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) would be affected if records related to sales of firearms by licensed dealers were destroyed within 24 hours after the transfers were allowed to proceed.¹ Under the Brady Handgun Violence Prevention Act, licensed dealers generally are not to transfer firearms to an individual until a NICS search determines that the transfer will not violate applicable federal or state law.² For instance, persons prohibited by federal law from receiving a firearm include convicted felons, fugitives, unlawful drug users, and aliens illegally or unlawfully in the United States. However, if the background check is not completed within 3 business days, the dealer is not prohibited from transferring the firearm.

Under current NICS regulations, records of "allowed" firearms sales can be retained for up to 90 days in a computer database (i.e., the NICS audit log) after which the records must be destroyed.³ The audit log contains information related to each background check requested by a licensed firearms dealer, including the NICS response (e.g., proceed or denied) and the history of all activity related to the transaction. According to the NICS regulations, information on allowed firearms sales is used only for purposes related to ensuring the proper operation of the system or

¹We provided you preliminary information on this issue earlier this year. See U.S. General Accounting Office, *Preliminary Information on Proposal for Next-Day Destruction of Records Generated by the National Instant Criminal Background Check System*, [GAO-02-511R](#) (Washington, D.C.: Mar. 11, 2002).

²Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (1993).

³28 C.F.R. § 25.9(b)(1).

conducting audits of the use of the system. Operational uses include evaluating system performance, identifying and resolving operational problems, generating statistical reports, and supporting the appeals process. System audits, in general, are designed to (1) monitor internal employee performance and adherence to established procedures and (2) discover misuse, e.g., unauthorized checks, or avoidance of the system.

On July 6, 2001, the Department of Justice (DOJ) published proposed changes to the NICS regulations⁴ that would reduce the maximum retention period from 90 days to less than 1 day for records of allowed firearms sales.⁵ According to DOJ, the proposed changes balance the legitimate privacy interests of law-abiding firearms purchasers and the department's obligation to enforce federal laws to prevent prohibited persons from purchasing firearms. The proposed next-day destruction policy would not apply to firearms sales that are allowed to proceed by default. Rather, records related to these "unresolved" transactions could continue to be retained for up to 90 days. Appendix I contains additional information about retention of NICS records and DOJ's proposed changes to the current NICS regulations.

As agreed with your office, we studied the effects that next-day destruction of records would have on NICS operations and system audits. This report provides an overview of the extent to which the FBI's planned changes to NICS operations and routine system audits⁶ address the effects of the proposed next-day destruction policy. Also, in more detail, this report discusses the effects such a policy would have on (1) nonroutine system audits and related support to law enforcement agencies; (2) specific aspects of NICS operations, including the FBI's ability to initiate firearm-retrieval actions, the time needed to complete background checks, and the FBI's ability to respond to inquiries about completed checks; and

⁴66 Fed. Reg. 35,567 (2001) (proposed July 6, 2001).

⁵Generally, the proposed changes to the NICS regulations would require next-day destruction of records. More specifically, the proposed changes would require that records related to allowed firearms transfers be destroyed before the start of the next business day following the date on which a "proceed" message allowing the transfer was received by the licensed dealer that requested the NICS search. According to an FBI official, the term "business day" should be interpreted as the NICS operational day, which starts at 8:00 a.m. and runs until 1:00 a.m. NICS operates every day of the year except Thanksgiving and Christmas day.

⁶For this report, we define routine system audits as regularly scheduled audits conducted by the NICS Program Office's Internal Assessment Group.

(3) the ability of the Bureau of Alcohol, Tobacco and Firearms (ATF) to inspect gun dealer records.

Our work focused on NICS background checks conducted by the FBI—and not those conducted by a state agency—because states that conduct NICS checks generally have their own retention laws that may not be affected by a federal next-day destruction policy.⁷ However, such a policy would affect states that do not have their own retention laws. In performing our work, we interviewed officials from the FBI and ATF, and we reviewed documentation they provided us. We also reviewed applicable NICS regulations and policy guidance related to uses of the audit log. It is important to note that the proposed revisions to the current NICS regulations, as well as the FBI's current plans for operating under a next-day destruction policy, could change before the final regulations are published. Such changes could affect the information contained in this report. We performed our work from August 2001 to May 2002 in accordance with generally accepted government auditing standards. Our scope and methodology is discussed in greater detail in appendix II.

Results in Brief

While routine system audits may not be adversely affected by DOJ's proposed requirement for next-day destruction of records, other current uses of NICS records would be affected, with consequences for public safety and NICS operations. The FBI is considering certain actions to mitigate these effects but these actions would not cover all consequences.

The FBI has drafted plans that would address most potential effects of the proposed policy for next-day destruction of records. In developing these plans, the FBI reviewed each area of NICS operations and identified the changes needed in computer systems, work processes, policies, and procedures.⁸ According to NICS officials, under the FBI's plans, most areas of NICS operations would not be adversely affected. The FBI's plans also show that many routine audits currently conducted monthly or quarterly—such as audits of the accuracy of NICS examiners' decisions—would have

⁷Depending on the willingness of their state government to act as a NICS liaison, firearms dealers contact either the FBI or a designated state agency to initiate background checks on individuals purchasing firearms.

⁸In an earlier report, we provided a detailed overview of NICS operations. See U.S. General Accounting Office, *Gun Control: Implementation of the National Instant Criminal Background Check System*, [GAO/GGD/AIMD-00-64](#) (Washington, D.C.: Feb. 29, 2000).

to be conducted on a real-time (hourly or daily) basis by adding more staff and changing procedures. NICS officials told us, however, that the FBI would not lose any routine audit capabilities under the proposed policy for next-day destruction of records.

On the other hand, a next-day destruction policy would adversely affect certain nonroutine audits of the system. Specifically, under current DOJ policy, if a law enforcement agency has information that indicates that an individual is prohibited from purchasing firearms under federal law, the agency may request that the FBI check whether the name appears in NICS records of allowed transfers. If the FBI finds a record showing an allowed transfer to a “prohibited person” (e.g., a transfer to an alien who is illegally or unlawfully in the United States), that record indicates a potential violation of law, and the FBI may disclose the record to the appropriate law enforcement entity. These audits of the accuracy of responses given by NICS, and the additional (secondary) benefit of assisting law enforcement investigations, generally would not be possible under a next-day destruction policy.

Also, a next-day destruction policy would adversely affect some aspects of current NICS operations, which would have public safety implications and could lessen the efficacy of current operations. Regarding public safety, the FBI would lose certain abilities to initiate firearm-retrieval actions when new information reveals that individuals who were approved to purchase firearms should not have been. Specifically, during the first 6 months of the current 90-day retention policy, the FBI used retained records to initiate 235 firearm-retrieval actions, of which 228 (97 percent) could not have been initiated under the proposed next-day destruction policy.⁹ Also, a next-day destruction policy could lengthen the time needed to complete background checks and place additional burdens on law enforcement agencies, including state and local courts, because NICS examiners, while researching new transactions, may have to make repeat calls for information that otherwise would have been retained in audit log records. Furthermore, the FBI would be less able to respond to (1) gun dealer questions about completed transactions and (2) purchaser and congressional questions related to the NICS appeals process, because

⁹The 235 firearm-retrieval actions involved transactions in which the FBI initially gave gun dealers affirmative responses that the transfers could proceed but subsequently changed to denials. As discussed later in this report, the vast majority of all retrieval actions initiated by the FBI—including those related to transactions that are allowed to proceed by default—would not be affected by the proposed next-day destruction policy.

information on allowed firearms transfers may not be available at the time of inquiry. The FBI is considering actions that could partially mitigate the adverse effects of a next-day destruction policy on NICS operations.

Finally, ATF headquarters officials told us that a next-day destruction policy would not affect ATF's ability to inspect gun dealer records. However, our work indicates that the effect of such a policy on ATF inspections is unclear. For example, under the proposed next-day destruction policy, NICS records of allowed firearms transfers would no longer be available for a detailed comparison with dealer records of the purportedly same transactions. Officials at the five ATF field offices we contacted provided mixed views on the value of current comparisons of NICS records with gun dealer records. If the proposed next-day destruction policy is implemented, ATF plans to replace the detailed comparisons with a "recheck" procedure, under which ATF inspectors would request that the FBI rerun selected NICS checks based on information taken from gun dealer records.

On June 24, 2002, in commenting on a draft of this report, DOJ said that our primary concern regarding a possible inability to retrieve a relatively small number of erroneously transferred firearms was unfounded because (1) DOJ is considering an option to retain the federal firearms dealer's identification number for 90 days and (2) ATF has ample investigative avenues for retrieving firearms. We disagree; our analysis indicates that these may be only partial solutions.

FBI Plans Would Address Most Potential Effects of Next-Day Destruction of Records

To analyze and address the potential effects of the proposed requirement for next-day destruction of audit log records, the FBI reviewed all areas of NICS operations and has developed or is considering many operational and procedural changes. More specifically, the FBI has prepared a draft "concept of operations" document, which discusses the changes that would be needed in the NICS program. The document addresses applicable changes and modifications needed in computer systems and work processes, as well as policies and procedures. For example, the draft addresses computer system and procedural changes needed to purge NICS audit log records, work process changes needed to monitor examiner performance, and procedural changes needed to process appealed NICS transactions. According to NICS officials, under the FBI's draft plans, most areas of NICS operations would not be adversely affected.

The FBI also has reviewed the types of routine system audits conducted by the NICS Program Office's Internal Assessment Group to determine how

these audits would be affected by the proposed next-day destruction of audit log records.¹⁰ As a result of this review, the FBI plans to modify existing audit procedures, combine current audits for efficiency, and develop new audits. The FBI also determined that many of the audits would have to be conducted on a real-time (hourly or daily) basis, versus the current monthly or quarterly basis. Such audits include assessments of examiners' decisions to allow firearms transfers to proceed and analyses of the processing of appealed transactions. The FBI plans to add 10 staff members to conduct these real-time audits, which would bring the total number of audit staff to 19. According to NICS officials, by modifying audit procedures, changing audit schedules, and increasing the number of audit staff, the Internal Assessment Group will not lose any routine audit capabilities under the proposed next-day destruction of records.

Next-Day Destruction of Records Would Affect Nonroutine Audits and Related Support to Law Enforcement

While the NICS Internal Assessment Group may not lose routine audit capabilities under next-day destruction of records, such a policy would affect certain nonroutine audits of the system. Without these nonroutine audits, the FBI would be less able to assist law enforcement investigations. Specifically, if a law enforcement agency has information that indicates that an individual is prohibited from purchasing firearms under federal law, the agency may request that the FBI check whether the name appears in NICS records of allowed transfers. Under current processes, if the FBI finds a record showing an allowed transfer to a prohibited person (e.g., a transfer to an alien who is illegally or unlawfully in the United States), that record indicates a potential violation of law, and the FBI may disclose the record to the appropriate law enforcement entity responsible for investigating, prosecuting, or enforcing that law. An FBI official told us that performing such checks has been a longstanding practice used to audit the accuracy of responses given by NICS, with the additional (secondary) benefit of assisting law enforcement investigations.

Following the September 11 terrorist attacks, DOJ's Office of Legal Counsel issued a legal opinion that supported this longstanding FBI practice.¹¹ The October 1, 2001, legal opinion noted that checking names of

¹⁰In general, the Internal Assessment Group uses the audit log to obtain a list of transactions worked by each examiner, from which samples are selected for a review of compliance with NICS policies and procedures.

¹¹The legal opinion was conveyed in a memorandum from DOJ's Office of Legal Counsel to DOJ's Office of Legal Policy.

known prohibited persons against audit log records of allowed transfers provides a check on the accuracy of responses being given by the system and, thus, constitutes an examination and verification of the system's records and the accuracy with which they are being handled. In explaining the rationale for permitting the FBI to conduct such checks, the legal opinion also noted the following:

"We gather that although the checking of names the FBI has in mind will serve the purpose of auditing the NICS, the more immediate purpose is assisting the investigation of the September 11, 2001 terrorist attacks. Assisting criminal investigations generally is not one of the purposes for which the NICS regulations authorize the FBI to use audit log records. Nonetheless, we see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes for which the checking is carried out is the permitted purpose of auditing the use of the system. That the NICS has been using this method of auditing the system all along suggests to us that this method is more than simply a cover for using audit log records for a purpose other than those authorized by the NICS regulations."

According to an FBI official, on October 17, 2001, DOJ's Office of Legal Policy informed the FBI that DOJ was reviewing the legal opinion and instructed the FBI to refrain from accessing information in the NICS audit log for investigatory purposes pending the outcome of the review. The official told us that, in late-December 2001, the Office of Legal Policy notified the FBI that, consistent with the legal opinion, a search of information in the NICS audit log could be conducted with regard to known prohibited persons for auditing purposes. The FBI does not maintain data on how often law enforcement agencies request NICS checks on known prohibited persons, but the FBI official told us that such inquiries frequently occur. The official noted, however, that performing such checks generally would not be possible given next-day destruction of records.

Next-Day Destruction of Records Would Have Public Safety Implications

The proposed policy requiring next-day destruction of NICS records would lessen the FBI's ability to initiate firearm-retrieval actions involving transactions the FBI initially allowed to proceed but subsequently changed to denials.¹² Specifically, during the first 6 months of the current 90-day retention policy, the FBI used retained records to initiate 235 firearm-retrieval actions related to reversed transactions, of which 228 (97 percent) could not have been initiated under the proposed next-day destruction policy.¹³ Such a policy also would have affected other NICS transactions in which firearms could have been transferred but were not. Further, procedures designed to help NICS identify prohibited persons who may be in possession of firearms would be adversely affected by next-day destruction of records.

Retained Records Were Used to Initiate Firearm-Retrieval Actions

According to NICS officials, after the FBI informs a gun dealer that a firearm transfer may proceed, the FBI may receive information from a court, law enforcement agency, or other source that would prohibit the individual from possessing a firearm. In such cases, after a NICS examiner confirms the prohibiting factor, the audit log record showing the allowed firearm transfer is changed to a denial. Available records (retained under the current 90-day retention policy) are then used to (1) identify and contact the gun dealer to verify whether a firearm was actually transferred to the prohibited person and, if so, (2) notify the local police department—as determined by the purchaser's address—and ATF. In each of these instances, ATF guidance requires that ATF open an investigation and coordinate attempted retrieval of the firearm with state or local law enforcement to ensure public safety.

During the first 6 months of the current 90-day retention policy—July 3, 2001, through January 2, 2002—the FBI initiated 235 firearm-retrieval actions based on information received after NICS examiners initially

¹²Under federal law, persons are prohibited from receiving a firearm if they (1) have been convicted of, or are under indictment for, a felony; (2) are a fugitive from justice; (3) are unlawful drug users or are addicted to a controlled substance; (4) have been involuntarily committed to a mental institution or judged to be mentally defective; (5) are aliens illegally or unlawfully in the United States, or certain other aliens admitted under a nonimmigrant visa; (6) have been dishonorably discharged from the military; (7) have renounced their U.S. citizenship; (8) are under a domestic violence restraining order; or (9) have been convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. § 922(g) and 922(n).

¹³FBI data show that the FBI processed a total of about 2.6 million NICS transactions during this 6-month period.

allowed the transfers to proceed.¹⁴ FBI data on these 235 retrieval actions show that an average of 34 calendar days elapsed between the FBI's initial decision to allow the transfers to proceed and the date that the FBI reversed the transactions to denials. As table 1 shows, of the 235 transactions,

- 7 (3 percent) were reversed in less than 1 calendar day, the amount of time records would be maintained under the proposed next-day destruction of NICS records;
- 116 (49 percent) were reversed in 30 calendar days or less; and
- 192 (82 percent) were reversed in 60 calendar days or less.

Table 1: Number of Calendar Days Taken to Identify NICS Proceed Transactions That Should Have Been Denied (July 3, 2001 through Jan. 2, 2002)

Time to deny transaction	Transactions		Cumulative transactions	
	Number	Percent	Number	Percent
Less than 1 day	7	3%	7	3%
1 to 10 days	46	20	53	23
11 to 20 days	37	16	90	38
21 to 30 days	26	11	116	49
31 to 40 days	26	11	142	60
41 to 50 days	33	14	175	74
51 to 60 days	17	7	192	82
61 to 70 days	25	11	217	92
71 to 80 days ^a	18	8	235	100
Total	235	101%	-	-

Note: Percentages do not add to 100 due to rounding.

^aCurrently, NICS records of allowed firearms transfers are subject to a 90-day retention period. However, in order to maintain 10 full days of backup data without violating the 90-day retention period, NICS purges all "proceed" data from the on-line system after 80 days.

Source: GAO analysis of FBI data.

As shown in table 1, the FBI reversed 7 (3 percent) of the 235 transactions from proceeds to denials in less than 1 calendar day. Thus, firearm-retrieval actions related to these 7 transactions would not have been

¹⁴FBI data show that 43 (18 percent) of the 235 transactions that resulted in firearm-retrieval actions involved NICS examiner errors (e.g., failure to research a criminal history record). According to FBI officials, additional examiner training will be provided and other actions are planned to prevent such errors from occurring in the future.

affected if the proposed policy requiring next-day destruction of records had been in place. However, a large majority—228 (97 percent) of the 235 transactions—would have been affected by such a policy. More specifically, under the proposed next-day destruction policy, records related to the 228 transactions would have been destroyed before the FBI received the information that was used to reverse the transactions to denials. As a result, according to NICS officials, the FBI could not have initiated firearm-retrieval actions related to these 228 transactions.¹⁵ NICS officials provided the following examples:

- In September 2001, a man had his firearm purchase delayed while a NICS examiner researched several criminal history charges, all of which were found to be nondisqualifying misdemeanors. Finding no prohibiting record, the examiner advised the gun dealer that the transaction could proceed. The same individual attempted to purchase another firearm in October 2001 and was again delayed. The NICS examiner researching the second transaction found a protection order (a prohibiting record) in a criminal history database that had been issued in January 2001 but had not been posted to the database at the time the FBI allowed the first firearm transfer to proceed. The examiner denied the second transaction, and a firearm-retrieval action was initiated for the first transaction.
- In November 2001, a woman whose criminal history record showed an arrest for third-degree domestic battery had her firearm purchase delayed while a NICS examiner researched the charge. The examiner contacted a municipal court and a local police department to obtain additional information, including the relationship of the parties involved in the incident. The court responded that the woman was convicted but that the charge was not domestic-violence related. Because of this information, the examiner advised the gun dealer that the transaction could proceed. Three days later, the examiner received the police report on the incident, which showed that the assault was on the woman's husband. A firearm-retrieval action was initiated.

According to DOJ's Office of Legal Policy, the problem of erroneous firearms transfers stems from incomplete or inaccurate criminal history

¹⁵FBI data show that 90 (39 percent) of the 228 firearm-retrieval actions were initiated based on criminal history records showing felony indictments or convictions, 58 (25 percent) of the retrieval actions were related to domestic violence issues (misdemeanor convictions or restraining orders), and 28 (12 percent) involved wanted persons. The remaining 52 firearm-retrieval actions involved other prohibiting categories.

records and will diminish as the states improve their criminal record systems. The office noted that DOJ's National Criminal History Improvement Program will award \$39 million to the states in fiscal year 2002 to improve their record systems, and, for fiscal year 2003, the President's budget requests \$63 million for this purpose. The office also noted that the Attorney General has directed the Bureau of Justice Statistics to study and recommend ways to target these grants to improve the accuracy of criminal history records, as well as records relating to adjudicated mental incapacity and domestic violence.

While states are continuing to automate and otherwise improve the completeness and accessibility of their criminal history records, this process has been ongoing since the early 1990s and is still far from complete. For example, during fiscal years 1995 through 2001, the National Criminal History Improvement Program provided over \$350 million in grant funds to assist states to improve the quality and accessibility of their criminal history records. However, according to a recent Bureau of Justice Statistics report,¹⁶ as of July 2001, a total of about 64 million records were held in state criminal history repositories, of which an estimated 23 million (36 percent) were not accessible to the FBI for NICS checks.

According to DOJ's Office of Legal Policy, in the transition period while the states perfect their record systems, DOJ will try to ensure that firearms transferred erroneously can be properly retrieved. One option under consideration—as part of the proposed policy for next-day destruction of records—is to retain the firearms dealer's identification number for 90 days, as well as the NICS transaction number and the date of the transaction, which are kept indefinitely. Under this option, DOJ explained that (1) when a state agency or other external source provides information showing that a proceed was given in error, the FBI could use the NICS transaction number and date to trace the transaction to the firearms dealer and refer the transaction to ATF and (2) ATF could then use the dealer's record, which provides information on the purchaser, to retrieve the firearm.

Our work indicates, however, that DOJ's proposed option may be only a partial solution, because the FBI still may not have been able to initiate firearm-retrieval actions for about one-half of the 228 retrieval actions

¹⁶Department of Justice, Bureau of Justice Statistics, *Improving Criminal History Records for Background Checks*, NCJ-192928 (Washington, D.C.: Feb. 2002).

discussed above. NICS officials explained that when a state agency or other external source provides information showing that a transfer should be denied, the FBI uses this information to determine if the audit log contains prior records of allowed transfers for the same individual that also should have been denied. If so, the FBI will reverse the prior transactions to denials and initiate a retrieval action if firearms were transferred. NICS officials told us that DOJ's proposal to temporarily retain (for 90 days) the firearms dealer's identification number generally would not allow the FBI to link the prohibiting information from one transaction to a prior transaction that also should have been denied. Rather, the individual's name or other personal identifying information needs to be retained in the audit log to make such a link. To reiterate, FBI data show that—of the 228 firearm-retrieval actions initiated during the period July 3, 2001, through January 2, 2002—about one-half were related to prior transactions and were initiated using personal identifying information retained under the current 90-day retention policy. The FBI generally would not have been able to initiate these retrieval actions under DOJ's proposed option.

Next-Day Destruction of Records Would Have Affected Other Transactions

In addition to the 228 transactions that resulted in firearm-retrieval actions, a policy requiring next-day destruction of records would have affected other NICS transactions in which firearms could have been transferred but were not. More specifically, during the 6-month period, FBI data show that the FBI reversed an additional 179 transactions from proceeds to denials 1 or more days after the initial decision to allow the transfers to proceed. Thus, firearms could have been transferred to prohibited persons in each of these 179 transactions. However, using records retained under the current 90-day retention policy, the FBI contacted gun dealers and found that firearms were not transferred. NICS officials speculated that the primary reason why transfers did not occur was because the transactions may have been initially delayed and the prospective purchasers did not return to buy the firearms.

The 228 transactions that resulted in firearm-retrieval actions—as well as the 179 transactions that did not involve firearms transfers—were all “regular proceed” transactions in which the FBI gave gun dealers affirmative responses that the transfers could proceed. As mentioned previously, each of these transactions would have been affected by the proposed policy requiring next-day destruction of records. FBI officials

noted, however, that the vast majority of firearm-retrieval actions initiated by the FBI would not be affected by such a policy.¹⁷ The officials explained that retrieval actions generally involve “default proceed” transactions.¹⁸ Such transactions occur when the FBI cannot complete a NICS background check within 3 business days, after which gun dealers are legally allowed to transfer firearms without an affirmative response from the FBI as to the purchasers’ eligibility. Under the proposed changes to the NICS regulations, the FBI could retain data for up to 90 days on default proceed transactions that have not been resolved with affirmative proceed or denial responses. Thus, these transactions would not be affected by a policy requiring next-day destruction of records.

Retained Records Were Used to Research Previous Transaction and Identify Potential Firearm Retrievals

In addition to the firearm-retrieval actions discussed above, the FBI has developed procedures that use retained audit log records to identify prohibited persons who may be in possession of firearms. For example, under current procedures, when a NICS examiner receives a transaction to research, the examiner is to search audit log records to determine if research had previously been done on the individual through a prior background check. If the examiner’s search finds that an individual has multiple firearms transactions with different final statuses (e.g., both proceeds and denials), the examiner is to review each transaction to ensure that correct decisions were made. If the examiner determines that an individual had been legally allowed to purchase a firearm in the past but is currently prohibited from doing so, the examiner is to enter a comment in the audit log record to alert ATF that the currently prohibited person may be in possession of firearms from previous transactions initiated within the 90-day retention period. ATF officials told us that when ATF is notified of any past purchases by a prohibited person, this information is referred to the appropriate ATF field office for investigation.

The FBI does not maintain data on how often these procedures have identified prohibited persons in possession of firearms, but FBI officials

¹⁷FBI data show that, from November 30, 1998 (when NICS became operational), through December 31, 2001, the FBI initiated a total of approximately 13,000 firearm-retrieval actions.

¹⁸In an earlier report, we provided detailed information on NICS default proceed transactions. See U.S. General Accounting Office, *Gun Control: Options for Improving the National Instant Criminal Background Check System*, GAO/GGD-00-56 (Washington, D.C.: Apr. 12, 2000).

told us that it does occur. The officials noted that next-day destruction of records would lessen the effectiveness of these procedures in identifying the need for firearm-retrieval actions.

Next-Day Destruction of Records Could Lengthen Time Needed to Complete Background Checks

As mentioned previously, when a NICS examiner receives a transaction to research, the examiner is to search the audit log to determine if research had previously been done on the individual through a prior background check. If research had been done previously, the examiner can use this information in making a determination as to whether the firearm transaction should proceed or be denied. Under a next-day destruction of records policy, NICS examiners would lose the ability to reference previous audit log transactions for information that may assist in resolving current transactions.

NICS officials explained that audit log records have a comment field that includes the case history of all activity related to the respective transaction. For example, the comment field may include clarifications and verifications provided orally by outside law enforcement agencies, as well as information related to charges (arrest records) that cannot be formally posted to national criminal history databases.¹⁹ If the same individual attempts to purchase another firearm within the current 90-day retention period, the NICS examiner can access audit log records to resolve the second transaction.

Without records of allowed transfers, NICS examiners may have to make repeat calls to law enforcement agencies, including state and local courts, for the same information. This rework could lengthen the amount of time needed to complete NICS background checks and may result in cases in which the FBI is unable to complete such checks within 3 business days, after which the firearm transfer is allowed to proceed by default. Also, according to NICS officials, states may resist performing this rework if they know they provided the same records in the past, such as police reports and mental health information. The officials noted, however, the same problem applies under the current 90-day retention policy if, after 90 days, the same information is needed. FBI officials told us that the audit log assists NICS examiners in resolving current transactions many times

¹⁹For example, arrest records not supported by fingerprints are ineligible for posting to certain national criminal history databases.

each day, although the FBI does not maintain data on the extent to which this occurs.

The impact of losing information from previous NICS transactions may be partially mitigated by an FBI proposal to create a “voluntary appeals file,” which would allow lawful purchasers to request that NICS retain information to facilitate future NICS transactions. Under this proposal, individuals who have experienced erroneous delays or denials by the system will have the option of supplying the FBI with information—such as name, date of birth, Social Security number, other identifying numbers, and any documents—that may clarify their record. Such documents may include a governor’s pardon, restoration of rights document, or conviction dismissal. Individuals would have to agree to have information posted to the voluntary appeals file.

FBI officials did not know the extent to which individuals would actually volunteer information for the appeals file or whether individuals would be reluctant to do so based, for example, on concerns that such a file could be a registry of gun owners. However, based on its analysis of appealed transactions, the FBI plans to add 17 new staff members to maintain the voluntary appeals file.

Next-Day Destruction of Records Would Lessen the FBI’s Ability to Respond to Inquiries

Next-day destruction of records would lessen the FBI’s ability to respond to gun dealer, purchaser, and congressional inquiries related to the outcomes of background checks. According to NICS officials, licensed gun dealers sometimes call NICS to obtain or confirm proceed or denial decisions after the initial notifications. For example, a gun dealer’s employee may have forgotten to record the NICS response on the firearms transaction form (ATF form 4473) or may have noted the response on a piece of paper that was inadvertently thrown away. NICS officials told us that such calls primarily come from major retail corporations that do a large volume of firearms sales, have a high turnover of personnel, hire seasonal employees, or have people filling in for gun department employees for short periods of time. The FBI does not maintain data on the number of such inquiries received from gun dealers, but NICS officials estimated that about three to five calls are received each week. Generally, the FBI also would not be able to respond to purchaser and congressional inquiries related to proceeded transactions. NICS officials explained that such inquiries usually are related to the NICS appeals process. For example, a purchaser may contact NICS to determine why a proceeded transaction was initially delayed. If the proposal for next-day destruction

of records is implemented, the FBI plans to respond to such inquiries with generic letters, simply stating that no information is available.

Effect of a Next-Day Destruction Policy on ATF Inspections of Gun Dealer Records is Unclear

According to ATF headquarters officials, although ATF will need to adjust procedures related to checking for abuses of NICS if a next-day destruction policy is adopted, such a policy would not affect ATF's ability to inspect gun dealer records. However, our work indicates that the effect of such a policy on ATF inspections is unclear.

Under current procedures, ATF inspectors are to use a worksheet to record the total number of NICS background checks a firearms dealer's records show were conducted in the 3 months prior to the date of the inspection, as well as the total number of responses (proceed, denied, and delayed) provided by NICS during this time.²⁰ Also, on the worksheet, ATF inspectors are to record—for a sample of transactions—the date the firearms dealer contacted NICS; the NICS transaction number; the transferee's name, sex, race, date of birth, and state of residence; the type of transaction (e.g., transfer of a handgun or long gun); and the final response provided by NICS. The completed worksheet then is to be forwarded to FBI staff, who are to compare the worksheet data to the NICS audit log. Discrepancies are to be noted and returned to ATF.

According to ATF and FBI officials, discrepancies in personal identifying information could indicate misuse of the system. For example, discrepancies could indicate that a firearms dealer submitted inaccurate or false information to NICS for the purpose of avoiding a background check on the person to whom the gun was transferred. Also, discrepancies could indicate that a firearms dealer used NICS for unauthorized purposes, such as running checks on individuals not intending to purchase firearms. Current NICS regulations note that it is essential to retain information on approved firearms transfers temporarily to allow for the possibility of discovering such abuses. The regulations further state that, at a minimum, allowing for the possibility of audits should have a deterrent effect on certain firearms dealers who might otherwise consider abusing the system. The ATF worksheet review procedure will no longer be used if the proposal for next-day destruction of records is implemented.

²⁰Licensed dealers are required to retain records of firearms transactions for at least 20 years after the date of sale or transfer.

According to ATF headquarters officials, no ATF field office has found any NICS violations specifically involving the falsification of purchaser names through the worksheet review procedure. Officials at the five ATF field offices we contacted (Birmingham, Buffalo, San Antonio, Detroit, and Fresno) also told us they had not detected any misuse of NICS or identified other significant discrepancies through the worksheet reviews.²¹ The officials noted that the vast majority of discrepancies identified during reviews occur because of clerical errors made by firearms dealers or ATF inspectors, such as dealer errors in recording purchaser information onto firearms transaction records or inspector errors in copying this information onto worksheets.²² The officials provided mixed views on the value of the worksheet reviews. Three of the five officials told us that the reviews are useful for monitoring firearms dealers' use of NICS and for deterring some firearms dealers from misusing the system. According to these three officials, without NICS records of allowed firearms transfers, (1) it would be more difficult to identify potential misuse of the system and (2) much, if not all, of the deterrent value of the worksheet reviews would be lost. Officials from the other two field offices told us that the current worksheet reviews do not yield useful information. The two officials also noted that the reviews have little deterrent value because firearms dealers are not aware that their records are being compared with NICS data. However, ATF headquarters officials told us they believe firearms dealers are aware of ATF's procedures for conducting inspections of their records.

According to ATF headquarters officials, under the proposed next-day destruction policy, the worksheet review procedure would be replaced by a NICS "recheck" procedure, under which ATF inspectors would request that the FBI rerun selected NICS checks based on information taken from gun dealer records. The officials noted that such rechecks would allow ATF to detect potential misuse of NICS and would serve as a deterrent. At the time of our review, ATF was still in the process of developing plans for requesting rechecks. Nonetheless, rerunning background checks would not allow a detailed comparison of information in NICS records with gun dealer records and, thus, may not be conducive to identifying or deterring

²¹Our methodology for selecting ATF field offices to contact is presented in appendix II.

²²According to ATF headquarters officials, another possible reason for discrepancies identified during worksheet reviews is that FBI examiners could incorrectly enter information from ATF worksheets into their computer systems.

some types of potential system misuse, such as using NICS for unauthorized purposes.

Also, the proposed revisions to the NICS regulations would allow the FBI to extract information from NICS to create, upon prior written request from ATF, individual firearms dealers audit logs that contain not more than 30 days worth of transactions. The individual audit logs would contain the NICS transaction number and the date of inquiry for allowed transactions, and all information on denied or unresolved transactions. ATF could then determine if a firearms dealer had requested more or fewer background checks than its records indicated, which may reveal possible misuse of the system. ATF also could determine if a dealer sold a firearm to someone the NICS record showed should have been denied.

Agency Comments

On June 4, 2002, we provided a draft of this report for comment to DOJ and the Department of the Treasury. In its written comments, DOJ emphasized that the statutory authority for retaining records of approved firearms transactions extends only to the limited purpose of auditing the system to ensure its privacy, accuracy, and proper performance. DOJ explained that although information obtained from the audit log of approved transfers pursuant to a system audit may be used incidentally for investigative or other functions, such secondary use cannot replace auditing as the sole permissible purpose for accessing information in the audit log of approved transfers. These comments are consistent with the information that we are reporting.

DOJ also said that our primary concern regarding a possible inability to retrieve a relatively small number of erroneously transferred firearms was unfounded for two reasons. First, DOJ reiterated that it was considering an option to retain the firearms dealer's identification number for 90 days. Second, DOJ noted that after the FBI has made a referral for ATF to retrieve a firearm erroneously transferred to a prohibited person, ATF has ample investigative avenues (beyond the audit log) to determine whether the prohibited person has other firearms that are illegally possessed. Thus, according to DOJ, contrary to the conclusion of our report, all erroneously transferred firearms could be retrieved.

We disagree. Our analysis indicates that DOJ's option and ATF's investigative avenues are only partial solutions. As indicated previously, FBI data show that—of the 228 firearm-retrieval actions initiated during the period July 3, 2001, through January 2, 2002—about one-half were initiated using the purchasers' personal identifying information retained

under the current 90-day retention policy. The FBI generally would not have been able to initiate these retrieval actions under DOJ's proposed option of retaining the dealer's identification number but not retaining personal identifying information about the respective purchaser.

Further, we recognize that ATF has various investigative avenues to determine if a prohibited person is in possession of firearms. For instance, in the course of an investigation, ATF can question the individual and examine gun dealer records. However, in many cases, absent an FBI referral, ATF would have no reason or basis for opening an investigation. Further, expecting ATF agents to probe for illegally possessed firearms would not be as effective as the FBI using retainable records to notify ATF that firearms definitely have been transferred to prohibited persons.

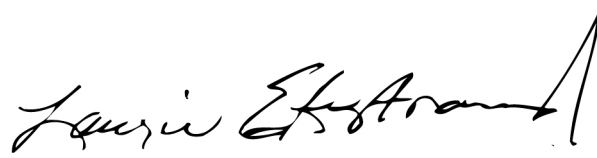
The full text of DOJ's comments is reprinted in appendix III.

The Department of the Treasury and the FBI provided technical comments and clarifications, which have been incorporated in this report where appropriate.

As arranged with your office, unless you publicly announce this report's contents earlier, we plan no further distribution until 30 days after the date of this report. We will then send copies to the relevant congressional committees, the Attorney General, the FBI Director, and the ATF Director. We will also make copies available to other interested parties upon request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

Please contact me at (202) 512-8777, or Danny Burton at (214) 777-5600, if you or your staff have any questions. Other key contributors to this report were Philip Caramia, Eric Erdman, Geoffrey Hamilton, Jan Montgomery, and Linda Kay Willard.

Sincerely yours,

A handwritten signature in black ink that reads "Laurie Ekstrand". The signature is written in a cursive style with a large, prominent final stroke that extends upwards and to the right.

Laurie E. Ekstrand
Director, Justice Issues

Appendix I: Retention of National Instant Criminal Background Check Records

This appendix provides an overview of the history of retention periods related to National Instant Criminal Background Check System (NICS) records. The appendix also summarizes the current Department of Justice (DOJ) notice of proposed rulemaking, which, among other things, would require next-day destruction of NICS records related to allowed firearms transfers.

History of NICS Records Retention Periods

The Brady Handgun Violence Prevention Act (Brady Act) required the Attorney General to establish a national instant criminal background check system to be contacted by licensed firearms dealers for information as to whether the transfer of a firearm would violate federal or state law.¹ In June 1998, DOJ published the initial notice of proposed rulemaking that outlined policies and procedures for implementing NICS.² The proposed rule provided that the Federal Bureau of Investigation (FBI) would maintain information on allowed firearms transfers in NICS for 18 months, after which time the information would be destroyed. Based on comments objecting to the proposed 18-month retention period, DOJ reexamined the time period needed to perform audits of NICS.

As a result, the final NICS regulations³ (effective Nov. 30, 1998) provided that information on allowed firearms transfers may be retained for no more than 6 months.⁴ According to the final rule, in light of the statutory requirement that records of allowed transfers be destroyed, and the countervailing statutory requirement to provide for system privacy and security, the general retention period for records of allowed transfers in the NICS audit log should be the minimum reasonable period for performing audits on the system, but in no event more than 6 months. The final rule also provided that such records may be retained for a longer period if necessary to pursue identified cases of misuse of the system. Further, the rule noted that the FBI shall work toward reducing the retention period to the shortest practicable period of time less than 6 months that would allow for basic security audits of NICS.

¹The Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536 (1993), amended the Gun Control Act of 1968, Public Law 90-618, 82 Stat. 1213 (1968).

²63 Fed. Reg. 30,430 (1998) (proposed June 4, 1998).

³63 Fed. Reg. 58,303 (1998).

⁴NICS regulations are found at 28 C.F.R. Part 25.

On March 3, 1999, DOJ issued proposed changes to the NICS regulations that would reduce the maximum retention period from 6 months to 90 days.⁵ In making this proposal, DOJ noted that there was (1) no formula to determine with precision what retention period would be the minimum necessary to allow adequate audits of NICS and (2) no historical data regarding the use of NICS that could be analyzed because NICS was a new system. According to the proposal, DOJ recognized the need for a sufficient period of system activity to be audited, as well as time to administer the audits. DOJ concluded that 90 days was the shortest practicable period of time for retaining records of allowed transfers that would permit the performance of basic security audits of NICS. DOJ cautioned, however, that the shorter the retention period, the less likely it would be that random audits would uncover or deter system misuse. This proposal also (1) clarified that only the FBI has direct access to the NICS audit log and (2) authorized the FBI to extract and provide information from the audit log to the Bureau of Alcohol, Tobacco and Firearms (ATF) for use in inspections of firearms dealers' records, under certain conditions.⁶

In January 2001, DOJ published the final rule amending the NICS regulations that reduced the maximum retention period for records of allowed firearms transfer from 6 months to 90 days.⁷ According to the final rule, many of the comments on the proposed rule asserted that the Brady Act required immediate destruction of records related to lawful transactions and that retention of this information constituted an illegal firearms registry. DOJ noted that (1) the Brady Act required the Attorney General to establish an adequate system of oversight and review of NICS and (2) the FBI consequently proposed the retention of records of approved transactions in an audit log for a limited period of time to satisfy the Brady Act's requirement of ensuring the privacy and security of NICS and the proper operation of the system. DOJ also noted that although the Brady Act mandates the destruction of all personally identified information in NICS associated with approved firearms transactions (other than the NICS transaction number and the date the number was assigned),

⁵64 Fed. Reg. 10,262 (1999) (proposed March 3, 1999).

⁶The FBI's authority to provide ATF with audit log information went into effect on July 3, 2001. However, in its July 6, 2001, notice of proposed rulemaking, DOJ noted that, during the public comment period, the FBI will not exercise its discretionary authority to provide this information to ATF, except as specifically authorized by the Attorney General.

⁷66 Fed. Reg. 6,470 (2001).

the statute does not specify a period of time within which records of approvals must be destroyed. Further, DOJ noted that the temporarily retained information on approved firearms transfers is used only for purposes related to discovering misuse or avoidance of the system and the proper operation of the system. The final rule also provides that NICS will not be used to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited from receiving a firearm under federal or state law.

The final rule reducing the maximum retention period to 90 days was originally scheduled to take effect on March 5, 2001. However, DOJ postponed the effective date twice, and set a revised date of July 3, 2001. According to DOJ, these postponements were prompted by the department's need to conduct a review of the rule and record in light of the department's original commitment that it would "work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." Based on this review, DOJ took two related steps. First, DOJ determined that the final rule implementing the 90-day retention period would take effect on July 3, 2001. Second, on July 6, 2001, DOJ published a new notice of proposed rulemaking to propose further changes in the NICS regulations, including a proposal for prompt destruction of records of allowed transactions. These proposed changes are discussed later in this appendix.

The temporary retention of NICS records has withstood a legal challenge. Specifically, in November 1998, the National Rifle Association of America, Inc., filed a suit against the U.S. Attorney General challenging the temporary retention of audit log data. The association argued that the Brady Act required immediate destruction of personal information related to firearms transactions. DOJ asserted that temporary retention of audit log data for at most 6 months was necessary to audit NICS to ensure its accuracy and privacy. In January 1999, a U.S. district court dismissed the complaint, finding that nothing in the Brady Act required immediate destruction and that the Attorney General's construction of the Brady Act was reasonable. In July 2000, a U.S. court of appeals affirmed the district court's dismissal, finding that the Brady Act did not prohibit temporary retention of information about lawful firearms transactions and that the Attorney General had reasonably interpreted the Brady Act to permit the

retention of such information for audit purposes.⁸ In May 2001, the Supreme Court declined to hear the National Rifle Association's appeal from the U.S. Court of Appeals for the District of Columbia.

DOJ's Current Notice of Proposed Rulemaking

On July 6, 2001, DOJ published a notice of proposed rulemaking⁹ that contained five proposals to make additional changes in the current NICS regulations. According to DOJ, the proposed changes balance the legitimate privacy interests of law-abiding firearms purchasers and the department's obligation to enforce the Brady Act to prevent prohibited persons from purchasing firearms. The five proposals are summarized below, generally using language contained in the notice of proposed rulemaking. At the time of our review, DOJ had not published a final rule related to this notice.

Proposal Number 1: Prompt Destruction of Records of Allowed Transactions

According to the notice of proposed rulemaking, the first proposal would amend current NICS regulations to provide for a general rule requiring prompt destruction of information in the NICS audit log pertaining to allowed transfers, coupled with specific statutory authority to retain information in certain situations in order to ensure the security and integrity of the system. This proposal also would revise and reorganize existing provisions in current NICS regulations for greater clarity.

This proposal would require the destruction of all information in the audit log relating to the lawful purchaser or the transfer (other than the NICS transaction number and the date of inquiry) on all allowed transactions prior to the start of the next business day following the date on which the "proceed" message was received by the initiator of the NICS check.¹⁰ However, when requested in writing by ATF for inspection purposes, this proposal would authorize the FBI to retain certain identifier information, such as the firearms dealer identifier issued by ATF (see proposal number 2 below). Proposal number 1 makes no change in the existing provisions of the NICS rules pertaining to the retention of records of transactions where the transfer was denied because the putative purchaser is

⁸*National Rifle Association of America, Inc. v. Reno*, 216 F.3d 122, (D.C. Cir. 2000), cert. denied 533 U.S. 928 (2001).

⁹66 Fed. Reg. 35,567 (2001) (proposed July 6, 2001).

¹⁰According to an FBI official, the term "business day" should be interpreted as the NICS operational day, which starts at 8:00 a.m. and runs until 1:00 a.m.

prohibited by state or federal law from purchasing a firearm. There also is no change in the existing provision authorizing the FBI to retain and use information pertaining to allowed transfers as long as needed to pursue cases of identified misuse of the system.

By keeping all records until the start of the next business day, the NICS Operations Center would be able to compile statistics on the operation of the system, such as the number of calls per state per day, the percentage of checks run on long guns versus handguns, and other statistical information that does not include personally identifiable information on lawful purchasers. By destroying personally identifiable information on allowed transfers before the start of the next business day, the NICS Operations Center would have the hours between the close of one business day and the start of the next business day to run internal audits, amass statistical data, accomplish destruction of the necessary records, and carry out other system maintenance with minimal disturbance to the system.

Proposal Number 2: Individual Firearms Dealers Audit Logs

Under federal law, firearms dealers are required, prior to transferring a firearm to an unlicensed individual, to examine a valid identification document of the potential purchaser, contact NICS, receive and record from NICS a unique NICS transaction number, and either receive an indication that the transaction may proceed or wait until 3 business days have passed without receiving a determination from NICS that the transfer is denied.¹¹ In addition, federal law outlines firearms dealers' record keeping requirements and the authority for ATF to review dealer records.¹² Specifically, federal law provides for ATF inspection or examination, not more than once in any 12-month period, of the inventory and records of a licensed dealer to ensure compliance with federal record keeping requirements.

This proposal would allow the FBI to extract information from NICS to create, upon prior written request from ATF in connection with its inspections of firearms dealers' records, individual firearms dealer audit logs that contain not more than 30 days worth of allowed transactions from an identified dealer. Such individual audit logs would contain, with respect to allowed transfers, the NICS transaction number and the date of

¹¹18 U.S.C. 922(t).

¹²18 U.S.C. 923(g)(1).

inquiry. All information on denied transactions or unresolved transactions will also be included in the individual audit log. The proposal seeks to meet the law enforcement needs of ATF and the FBI by providing to ATF, prior to an inspection of an identified firearms dealer, information necessary to ensure that the dealer is complying with federal requirements to conduct a NICS check prior to transferring a firearm to an unlicensed person. Under this proposal, ATF would be required to destroy all information on allowed transfers within a set period of time (90 days) after the date of creation of the individual firearms dealer audit log. NICS would also be required to delete other identifier information, such as the firearms dealer identifier, from the system within 90 days of the date of the transaction.

Proposal Number 3: New Definition of “Unresolved” Transaction

According to the notice of proposed rulemaking, this proposal would provide a new definition in NICS regulations pertaining to “unresolved” transactions, for two reasons. First, in those states in which NICS performs background checks for firearms dealers,¹³ if the NICS examiner cannot determine within 3 business days whether the proposed firearm transfer would violate state or federal law, the transaction is designated informally as a “default proceed.” Under federal law, the firearms dealer is not prohibited from transferring the firearm if NICS has not responded with a denial notification within 3 business days.¹⁴ Despite the fact that 3 business days have elapsed, it is the practice of NICS examiners to continue research on such transactions for 21 days to determine whether the transaction is an actual “proceed” (allowed) or “denied.” Under proposal number 1 above, the system may be required to purge information concerning “default proceeds” after 3 business days. DOJ does not intend this result. NICS should retain information on transactions that have not been definitively resolved after 3 business days.

This proposal would create a new internal classification system for transactions that are “unresolved,” meaning the NICS examiner could not

¹³ Depending on the willingness of their state government to act as a NICS liaison, firearms dealers contact either the FBI or a designated state agency to initiate background checks on individuals purchasing firearms. At the time of our review, the FBI conducted all background checks in 25 states, the District of Columbia, and 4 U.S. territories, while a state agency conducted all checks in 15 states. In the remaining 10 states, both the FBI and a state agency conducted background checks, depending on the type of firearm being purchased (e.g., handgun or long gun).

¹⁴ 18 U.S.C. 922(t)(1)(B)(ii).

verify that a “hit” in the database is or is not a disqualifier under state or federal law. This classification will allow NICS to maintain such unresolved transactions until either (1) a final determination on the transaction is reached, resulting in the transaction being changed to a “proceed” (prompt destruction) or a “denied” (permanent retention) status, or (2) the expiration of the retention period for unresolved transactions. DOJ proposes a retention period of no more than 90 days, consistent with the retention period under the final rule that took effect on July 3, 2001. In cases of unresolved transactions, the NICS examiner would continue to respond to a firearms dealer in the same manner as is current practice for “default proceeds.” This change does not affect the manner or form in which response information is relayed by the NICS examiner to the firearms dealer.

Second, in “point-of-contact” states, a state agency is responsible for performing background checks for potential gun purchasers, including contacting NICS as part of that background check. When a state agency contacts NICS as part of a background check it initiates, NICS presently records that transaction as an “implied proceed” unless and until the state transmits to the system the ultimate determination for that transaction (either “proceed” or “denied”). Once again, under a prompt destruction alternative, these transactions records could be removed from NICS before a final determination is made. In order to have the most accurate record of denials in the system, this proposal would classify all state-initiated transactions as “unresolved” until the state transmits the final determination to NICS. In cases of “proceed” or allowed transfers, NICS would be required to destroy such records within the time frame discussed in proposal number 1 above. Again, records of unresolved transactions would be deleted from the system within 90 days. The new category of “unresolved” would not affect a firearms dealer’s ability to transfer or not transfer a firearm after 3 business days but would allow NICS to keep accurate records of the precise status of NICS transactions.

**Proposal Number 4:
Require Point-of-Contact
States to Transmit State
Determinations to NICS**

According to the notice of proposed rulemaking, under current NICS regulations, point-of-contact states are encouraged, but not required, to provide NICS with the results of background checks indicating that a firearm transfer is denied. Most point-of-contact states do not transmit this information to NICS. This means that a potential purchaser could be prohibited under state or federal law (based upon information available to a state from records available to that state only), yet NICS would not have access to that determination. If the prohibited purchaser then traveled to

another state and again attempted to purchase a firearm, NICS would be unable to stop the prohibited purchase.¹⁵

This proposal would condition participation as a point-of-contact state on transmission of state determination information to NICS as soon as it is available, so that NICS will have accurate records of all prohibited persons. Because state laws vary on how quickly the background check must be completed, the proposed rule does not specify a particular length of time for transmittal, but instead requires the transmittal “upon communication of the determination to the firearms dealer or the expiration of any applicable state waiting period.” Until NICS receives the determination information, it will identify the transaction as unresolved. Determination information from point-of-contact states would still be subject to the rules governing record retention. NICS may not retain information on allowed transfers that originate in a point-of-contact state for a longer period of time than it may keep information about a NICS-originated allowed transaction.

**Proposal Number 5:
Voluntary Appeals File**

According to the notice of proposed rulemaking, this proposal addresses those situations in which a lawful firearms purchaser might desire to have personal information retained in NICS to avoid confusion or delays in future purchases. Because NICS must destroy all identifying information on allowed transactions after not more than 90 days (or before the start of the next business day under proposal number 1 above), if a potential purchaser is delayed or denied a firearm and then successfully appeals the decision, NICS would not be able to retain a record of the appeal and supporting documents. This means that if a lawful purchaser has a similar name and date of birth as a convicted felon, he or she may be delayed, or denied a purchase, until NICS can determine that the lawful purchaser is not the felon. Often, this is done through submission of fingerprints. However, under the existing retention rules, once that purchase is determined to be allowed, NICS cannot retain the information identifying the person as a lawful purchaser for more than 90 days and must destroy all identifying information relating to the person and the transfer—even if retention is requested by the lawful purchaser. Both the NICS Operations Center and individual purchasers have requested creation of a mechanism

¹⁵According to ATF officials, it is unlawful for a firearms dealer to sell a handgun to an out-of-state resident. The officials noted that a firearms dealer may sell a long gun to an out-of-state resident provided the sale does not violate the state law in the purchaser’s state or the dealer’s state.

by which NICS can keep, upon request of the purchaser, such clarifying information in a separate computer file within NICS.

This proposal would allow the creation of a Voluntary Appeals File for the purpose of allowing lawful purchasers to request that NICS retain such information to facilitate future NICS transactions. Under this proposal, potential firearms transferees experiencing erroneous delays or denials by the system will have the option to supply the FBI with information—such as name, date of birth, Social Security number, any other identifying numbers, and any documents—that may clarify their records or prove their identity. NICS would be required to destroy any records submitted to the Voluntary Appeals File upon written request from the individual. Such information could be retained and used by the FBI as long as needed to pursue cases of identified misuse of the system.

Appendix II: Objectives, Scope, and Methodology

Objectives

Senator Richard J. Durbin, Chairman, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Senate Committee on Governmental Affairs, requested that we provide information about how the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) would be affected if records related to sales of firearms by licensed dealers were destroyed within 24 hours after the transfers were allowed to proceed. Under the Brady Handgun Violence Prevention Act, licensed dealers generally are not to transfer firearms to an individual until a NICS search determines that the transfer will not violate applicable federal or state law. For instance, persons prohibited by federal law from receiving a firearm include convicted felons, fugitives, unlawful drug users, and aliens illegally or unlawfully in the United States. However, if the background check is not completed within 3 business days, the sale is allowed to proceed by default.

Under current NICS regulations, records of allowed firearms sales can be retained for up to 90 days in a computer database (i.e., the NICS audit log), after which the records must be destroyed. The audit log contains information related to each background check requested by a licensed firearms dealer, including the NICS response (e.g., proceed or denied) and the history of all activity related to the transaction. According to the NICS regulations, information on allowed firearms sales is used only for purposes related to ensuring the proper operation of the system or conducting audits of the use of the system. On July 6, 2001, the Department of Justice (DOJ) published proposed changes to the NICS regulations that would reduce the maximum retention period from 90 days to less than 1 day for records of allowed firearms sales.¹

As agreed with the requester, we studied the effects that next-day destruction of records would have on NICS operations and system audits. Our work provides an overview of the extent to which the FBI's planned changes to NICS operations and routine system audits address the effects of the proposed next-day destruction policy. Also, in more detail, our work provides information on the effects such a policy would have on (1)

¹Generally, the proposed changes to the NICS regulations would require next-day destruction of records. More specifically, the proposed changes would require that records related to allowed firearms transfers be destroyed before the start of the next business day following the date on which a "proceed" message allowing the transfer was received by the licensed dealer that requested the NICS search. The NICS business day starts at 8:00 a.m. and runs until 1:00 a.m.

nonroutine system audits and related support to law enforcement agencies; (2) specific aspects of NICS operations, including the FBI's ability to initiate firearm-retrieval actions, the time needed to complete background checks, and the FBI's ability to respond to inquiries about completed checks; and (3) the ability of the Bureau of Alcohol, Tobacco and Firearms (ATF) to inspect gun dealer records.

Scope and Methodology of our Work

Generally, in performing our work, we met and had various telephone discussions with officials from the FBI's NICS Program Office and the Criminal Justice Information Services Division in Clarksburg, West Virginia. During our visit to the program office, we interviewed applicable managers and reviewed relevant documents related to NICS operations, system audits, and current uses of the audit log. Also, we reviewed applicable federal regulations (e.g., NICS regulations and related Privacy Act Notices), DOJ and FBI policies and procedures, and DOJ's current proposed changes to the NICS regulations.² Further, we interviewed officials from ATF headquarters and five field offices, and we reviewed documentation they provided us. We relied on testimonial and documentary evidence—such as agency statistics—provided by FBI and ATF officials. We did not fully assess the reliability or accuracy of the data provided to us. However, we did discuss the sources of data with agency officials, and we worked with them to resolve any inconsistencies. Our work focused on how the proposal for next-day destruction of records would affect NICS background checks conducted by the FBI—and not those conducted by a state agency.³ States that conduct NICS checks generally have their own retention laws that may not be affected by a federal next-day destruction policy. However, such a policy would affect states that do not have their own retention laws.

To obtain information on the extent to which the FBI's planned changes to NICS operations and routine system audits address the effects of the proposed next-day destruction policy, we interviewed FBI officials and

²DOJ's current notice of proposed rulemaking related to NICS is summarized in appendix I.

³Depending on the willingness of their state government to act as a NICS liaison, firearms dealers contact either the FBI or a designated state agency to initiate background checks on individuals purchasing firearms. At the time of our review, the FBI conducted all background checks in 25 states, the District of Columbia, and 4 U.S. territories, while a state agency conducted all checks in 15 states. In the remaining 10 states, both the FBI and a state agency conducted background checks, depending on the type of firearm being purchased (e.g., handgun or long gun).

reviewed relevant documents related to current NICS operations, including NICS operating procedures, operations reports, and audit reports. We also reviewed the FBI's revised draft NICS concept of operations document, which addresses operational changes needed to support a next-day destruction policy. Further, we interviewed officials from the NICS Program Office's Internal Assessment Group and reviewed relevant documents to determine (1) how the audit log is currently used to support routine system audits, (2) the results of current system audits, (3) how these audits would be affected by a next-day destruction policy, and (4) the FBI's proposed plan for conducting routine audits under such a policy.

To obtain information on the effects the proposed next-day destruction policy would have on nonroutine system audits and related support to law enforcement agencies, we interviewed FBI officials and reviewed an October 1, 2001, DOJ legal opinion on checking the names of prohibited persons against NICS audit log records of allowed firearms transfers.

Regarding NICS operations, we studied the effects the proposed next-day destruction policy would have on the FBI's ability to initiate firearm-retrieval actions, and the related public safety implications. Specifically, we focused on (1) identifying the number of NICS transactions that the FBI initially allowed to proceed but later determined should have been denied, (2) determining how many of these transactions resulted in the FBI initiating firearm retrieval actions, and (3) determining how many of the retrieval actions could not have been initiated under the proposed next-day destruction policy. Related to these transactions, we obtained data on how the FBI became aware of information that resulted in proceeded transactions being changed to denials, as well as data on prohibiting offenses related to the retrieval actions. We focused on retrieval actions that the FBI initiated during the first 6 months of the current 90-day retention policy—July 3, 2001, through January 2, 2002. We also reviewed FBI procedures that are designed to identify prohibited persons who may be in possession of firearms.

To obtain information on the effects a next-day destruction policy would have on other aspects of NICS operations, we focused on current operations that would be adversely affected (i.e., the time needed to complete background checks and the FBI's ability to respond to inquiries), while obtaining more general information on capabilities that would require operational changes but would not be adversely affected. In addition to interviews with FBI officials, the primary source of this information was the FBI's draft NICS concept of operations document. In

some cases, we had to rely on FBI officials to provide estimates and anecdotal information related to the effects of a next-day destruction policy on NICS operations, because data on the frequency and the specific outcomes of current operations that would be adversely affected generally were not comprehensive or readily available.

To obtain information on the effects of a next-day destruction policy on the ability of ATF to inspect firearms dealers, we interviewed officials from the NICS Program Office and ATF headquarters, reviewed current inspection procedures, and obtained information on proposed changes to the procedures. We also interviewed officials from 5 ATF field offices to (1) determine if they had detected any misuse of NICS during their inspections, (2) obtain their views on the usefulness of current inspections, and (3) obtain their views on the effects of a next-day destruction policy on ATF inspections. The 5 ATF field offices were selected using a two-stage process. First, we identified the 5 ATF field divisions—out of a total of 23 divisions—that conducted the highest number of inspections of federal firearms dealers during fiscal year 2001 (Nashville, Boston, Houston, Detroit, and San Francisco). Within each of these divisions, we selected the field office that conducted the highest number of inspections during fiscal year 2001 (Birmingham, Buffalo, San Antonio, Detroit, and Fresno).

It is important to note that the proposed revisions to the current NICS regulations, as well as the FBI's current plans for operating under a next-day destruction policy, could change before the final regulations are published. Such changes could affect the information contained in this report.

Appendix III: Comments from the Department of Justice



U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

June 24, 2002

Ms. Laurie Eckstrand
Director of Justice Issues
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Re: GAO Review of the National Instant Criminal Background Check System Audit Log

Dear Ms. Eckstrand:

Thank you for the opportunity to review the final draft of the General Accounting Office ("GAO") report entitled "Gun Control: Potential Effects of Next-Day Destruction of NICS Background Check Records, GAO-02-653." This letter constitutes the formal comments of the Department of Justice, and I request that it be included with that report.

The report makes a number of observations concerning the use of the NICS Audit Log of Approved Transfers for, among other purposes, response to investigative or congressional requests for information. We note that, under governing regulations "[i]nformation in the NICS Audit Log pertaining to allowed transfers may be accessed only by the FBI for the purpose of conducting audits of the use and performance of the NICS." 28 C.F.R. 25.9(b)(2). This regulation effectuates the twin commands of the Brady Act that the FBI "destroy all records of the system" relating to approved transactions, 18 U.S.C. 922(t)(2)(C) and that the Attorney General "ensure the privacy and security" of the system, 18 U.S.C. 922 (Statutory Note).

Accordingly, statutory authority for retaining records of approved transactions extends only to the limited purpose of auditing the system to ensure its privacy, security, and proper performance. See, e.g., *NRA v. Ashcroft*, 216 F.3d 122, 137-38 (2000) (noting that maintenance of the Audit Log is limited "to the minimum reasonable period for performing audits on the system"). Although information obtained from the Audit Log of Approved Transfers pursuant to a system audit may be used incidentally for investigative or other functions, such secondary use cannot replace auditing as the sole permissible purpose for accessing information in the Audit Log of Approved Transfers.

Although most of the issues raised in draft report were anticipated by the Notice of Proposed Rulemaking, National Instant Criminal Background Check System, 66 Fed. Reg. 35567 (July 6, 2001), or will be addressed in the final rule, I will discuss here the GAO's primary concern that,

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under the proposed rule, the FBI would be unable to initiate firearms retrievals in cases where a transaction had been erroneously approved. In a small number of cases (240 out of 2.5 million checks, or .0096 percent), the state or local reporting agency will clear the NICS to approve a transaction, only to notify the NICS more than 24 hours later that its prior communication was in error.

As I wrote to you on May 14, 2002, this problem stems from incomplete or inaccurate state criminal history records and will diminish as the states improve their criminal record systems. To that end, the Department's National Criminal History Improvement Program (NCHIP) has awarded nearly \$40 million in FY 01 and will award \$39 million in FY02 to the states to improve their record systems. For FY03, the President's budget requests \$63 million for this purpose. The Attorney General has directed the Bureau of Justice Statistics to study and recommend ways to target these grants to improve the accuracy of state criminal history records, as well as records relating to adjudicated mental incapacity and domestic violence.

Nevertheless, in the transitional period while the states perfect their record systems, the Department seeks to ensure that firearms transferred erroneously are properly retrieved. One option under consideration is, for each transaction, to retain the Federal Firearms Licensee number for 90 days as well as the NICS Transaction Number ("NTN") and date of the transaction, which are kept indefinitely. When a state agency provides information showing that a proceed was given in error, the FBI can use the NTN and date to trace the transaction to the licensee and refer the transaction to the Bureau of Alcohol, Tobacco and Firearms ("ATF") to initiate a firearm retrieval. The licensee is required to retain ATF Form 4473, Firearms Transaction Record, which provides information on the purchaser and transaction that ATF would use to retrieve the firearm. This option, and others under consideration, would both effectuate the Brady Act's requirement that the FBI "destroy all records of the system" relating to personally identifiable consumer information of approved transfers and facilitate ATF follow-up to ensure effective enforcement of the Gun Control Act.

Your report acknowledges that this option, if adopted, would enable the FBI to identify and, where appropriate, to refer erroneous transfers to the ATF to initiate a firearm retrieval. However, your report asserts that this option is only a partial solution because it would not allow the FBI to "determine if the audit log contains prior records of allowed transfers for the same individual that also should have been denied." Draft Report at 11 (emphasis added). We note, however, that once the FBI has referred for retrieval an erroneous firearm transfer to a prohibited person, ATF is not limited in its investigation to that particular transaction and has ample investigative avenues (beyond the audit log) to determine whether the prohibited person has other firearms which he illegally possesses. Keep in mind that the ATF not only retrieves erroneously transferred firearms, but also enforces the federal ban on possession of any firearms by prohibited persons. Thus, contrary to the conclusion of your report, under the option described above, the ATF would be able to undertake

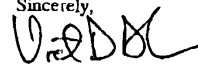
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retrieval of all firearms erroneously transferred to the prohibited person and, indeed, other firearms that he illegally possesses.

The Department continues its efforts to finalize the rule and fulfill its original commitment to "work toward reducing the retention period to the shortest practicable period of time less than six months that will allow basic security audits of the NICS." 63 Fed. Reg. 58304 (Oct. 30, 1998). We appreciate the GAO's comments in this process and thank the Congress for its support in our continuing efforts to improve the NICS to effectuate fully the requirements of the Brady Act.

Sincerely,



Viet D. Dinh
Assistant Attorney General

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