



Department of Justice

STATEMENT

OF

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BEFORE THE

**SUBCOMMITTEE ON CRIME AND TERRORISM
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

AT A HEARING ENTITLED

**“THE FIX GUN CHECKS ACT: BETTER STATE AND FEDERAL
COMPLIANCE, SMARTER ENFORCEMENT”**

PRESENTED

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**Statement for the Record of
David Cuthbertson
Assistant Director
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**Before the
Subcommittee on Crime and Terrorism
Committee on the Judiciary
United States Senate**

**“The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement”
November 15, 2011**

Good afternoon, Chairman Schumer, Ranking Member Kyl, and Members of the Committee. It is my privilege and pleasure to address you today regarding the role that record availability and completeness play in the operation of the National Instant Criminal Background Check System (NICS), and the continuing efforts of the FBI to increase the quality and quantity of information available to the NICS. I would like to also take this opportunity to share with you the number of accomplishments we have achieved with the resources we have available. We have meaningful efforts underway to ensure that the current system works as efficiently as possible to keep people as safe as possible.

The Firearms Background Check Process

The Brady Handgun Violence Prevention Act of 1993 (Brady Act) required the Attorney General to establish the National Instant Criminal Background Check System (NICS), which began operating on November 30, 1998. Through NICS background checks, Federal Firearms Licensees (FFLs) receive information regarding whether a prospective firearm transfer may proceed, or if it must be denied because the transfer would violate state or federal law. NICS checks are conducted over the telephone or via the internet, and a response is typically available within minutes.

When a NICS check is conducted, an individual’s name and descriptive information is searched against information maintained in three national databases managed by the FBI’s Criminal Justice Information Services (CJIS) Division: the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Index. In addition, in any transaction where the potential transferee claims non-U.S. citizenship, the NICS works with its partners at the Department of Homeland Security’s U.S. Immigration and Customs Enforcement to determine whether the transfer can proceed.

The III is the chief repository within the CJIS Division for the maintenance of criminal history records, currently housing over 60 million criminal histories. The III relies on submissions from state, local, tribal, and federal agencies across the United States.

The NCIC maintains a database of 19 different files, many of which contain information that may be relevant to the background check process. For example, the NCIC includes approximately 5 million records related to wanted persons and those against whom protection orders have been filed.

The NICS Index, on the other hand, is a database created specifically for the NICS. It contains records relating to the ten specific federal prohibitions on firearms receipt and

possession contained in the Gun Control Act that are not or cannot be housed in III or NCIC. Those categories include, e.g., persons who have been dishonorably discharged, persons who have renounced their U.S. citizenship, persons who are unlawful users of or addicted to controlled substances, and persons who have been committed to a mental institution. The NICS Index currently maintains over 7 million records, and starting next year it will be expanded to include records of persons who are prohibited from acquiring or possessing firearms by state law. In some cases state prohibitions mirror or overlap with federal prohibitions. In other cases, however, state law may be more restrictive, and may rely on records held at the state level that are not eligible to be included in III or NCIC. Having ready access to those records in the NICS Index will increase the likelihood that a NICS background check will identify those persons prohibited by state law from possessing or receiving firearms. Records contained in the NICS Index are voluntarily contributed by local, state, and federal agencies, and every record is prevalidated as demonstrating a prohibition before it is entered into the database. As a result, when a NICS background check matches with a record in the NICS Index it allows the transaction to be immediately denied.

Since it began operating in 1998 the FBI, along with the point-of-contact (POC) state partners that conduct firearms background checks, have processed more than 137 million background checks. In the vast majority of cases these checks have facilitated the timely and efficient transfer of firearms to law-abiding individuals. On more than 882,000 occasions, however, the background checks processed by the FBI have prevented a prohibited person from acquiring a gun. Some state POC partners do not report final transaction statuses to the NICS; therefore, it is undeterminable how many NICS background checks processed by state partners have resulted in denying prohibited persons the ability to obtain firearms.

As should be obvious, the NICS is critically dependent upon having access to reliable and complete records. When records are missing or incomplete the NICS has, by law, just three business days to fill in the gaps before the FFL is allowed – but not required -- to transfer the firearm. In some cases, the FBI fails to uncover an existing, applicable prohibitor during that time frame, or never uncovers it at all, because the records needed to establish the prohibitor are beyond its reach. When that happens, firearms can and do end up in the hands of persons who are not allowed to possess them. Our goal at the Department is to use every tool available to us to minimize that risk.

The NICS Improvement Amendments Act of 2007 (NIAA)

The fact that NICS in some cases lacks ready access to relevant prohibiting records was brought home following the tragic shootings on April 16, 2007, at Virginia Tech University in Blacksburg, Virginia. The Virginia Tech shooter was able to acquire firearms from an FFL despite a disqualifying mental adjudication because the records of his adjudication were never transmitted to the NICS Index. In response, Congress passed the NICS Improvement Amendments Act (NIAA). The NIAA, signed by the President on January 8, 2008, reinforced and enhanced the Attorney General's ability to acquire for the NICS information from federal agencies and departments demonstrating that a person falls within one of the ten categories of federal firearms prohibitions contained in the Gun Control Act. The NIAA also focused on non-federal records by authorizing incentives for states, tribes, and associated court systems to provide additional records to the NICS, and to ensure that state supported records in both NCIC and III are complete, accurate, and up to date. The NIAA required that the Attorney General provide annual reports to Congress concerning implementation of the NIAA.

Implementation of the NIAA

Shortly after the NIAA was enacted both the FBI and the Department of Justice began to invest the time and resources necessary to achieve its goals. Those initial efforts included:

- Sending correspondence to the Governors, Attorneys General, Chief Justices, and State Court Administrators in the states and territories to announce passage of the Act and summarize the provisions affecting these entities. The same correspondence was also sent to: the National Council of State Legislatures; the Council of State Governments; the American Legislative Exchange Council; the legislative leadership of each state; the National Center for State Courts; the National Association of State Mental Health Program Directors; the Justice Research and Statistics Association; the membership of SEARCH, the national consortium for justice information and statistics; NICS points of contact; and the membership of Nlets, the International Justice and Public Safety Network.
- Sending correspondence to the states and federal departments and agencies regarding the minimum criteria required to establish a qualifying relief from disability program under the Act, as is required of federal agencies that make qualifying mental health adjudications or commitments, and is a prerequisite to grant eligibility for states.
- Sending correspondence from the Deputy Attorney General to the Administrative Office of the United States Courts, Social Security Administration, and the Departments of Defense, Homeland Security, and Interior requesting that each organization identify a point-of-contact to work with the NICS Section to ensure that information on individuals prohibited from purchasing or possessing a firearm is available to the NICS.
- Sending correspondence from the FBI Director (or other FBI official) to all other federal agencies requesting that each organization identify a point-of-contact to work with the NICS Section to ensure that information on individuals prohibited from purchasing a firearm is available to the NICS.
- Conducting outreach to, and dialogue with, state and local law enforcement as well as the mental health community regarding regulations and protocols for protecting the privacy of information provided to the NICS Index concerning a person prohibited from shipping, transporting, receiving or possessing a firearm pursuant to 18 U.S.C. 922(g)(4).
- Publishing “questions and answers” regarding the NICS Improvement Amendments Act of 2007 on the Bureau of Justice Statistics website (<http://www.ojp.usdoj.gov/bjs/niaa.htm>).
- Coordinating and conducting meetings with affected federal agencies and departments.
- Making numerous presentations at association meetings and conferences involving affected parties including, among others, the FBI’s NICS User Conference, the SEARCH Membership meeting, National Crime Prevention and Privacy Compact Council meetings, American Psychological Association meeting and FBI Criminal Justice Information Services Advisory Policy Board meetings.

We have increased efforts recently, and the FBI and the Department have achieved the following:

- Held three regional NIAA meetings in fiscal year 2011 at which more than 10 states participated in meetings designed to provide them with a better understanding of NIAA grant requirements and other resources designed to maximize their record availability.
- Attended individual state meetings (Oregon and Oklahoma) to provide information intended to assist and enhance the development of their plans regarding the NIAA.
- Surveyed more than 90 federal departments and agencies regarding potentially relevant information in their possession. The results of those survey responses are now being used to further identify the universe of information held by federal agencies and enable the FBI to assist them in complying with the information sharing mandate of the NIAA.
- Awarded grants to 3 states in 2009, 8 states in 2010, and 14 states in 2011 to support NIAA activities, totaling nearly \$40 million.

Results

While significant implementation challenges remain, our reinvigorated efforts have achieved some notable successes in a variety of areas since enactment of the NIAA. To start, the sheer number of records available in the NICS Index is much larger than just a few years ago. Prior to the passage of the NIAA, approximately 5.1 million records (state and federal combined) were maintained in the NICS Index. Of these, approximately 500,000 were specific to the mental health category. As of October 31, 2011, the number of records maintained in the NICS Index had increased by 41 percent to over 7.2 million, and the number of mental health records had increased by 153 percent to over 1.3 million. But these macro numbers do not tell the whole story.

Criminal history dispositions

Largely as a result of aggressive outreach, over 766,000 criminal dispositions have been obtained by the FBI for use in updating to national criminal history records. In addition, over 142,000 dispositions were forwarded to state repositories to update corresponding state records. Having ready access to these dispositions will not only make the background check process more effective and efficient, it will also ensure that other users of III and the state databases have access to more complete and accurate records.

Enhanced electronic submissions

Through the combined efforts of the FBI and NIAA-partnering agencies, certain federal agencies have begun submitting records electronically to the NICS. Electronic submissions are more efficient and accurate than submissions on paper or disk, as was the prior practice. For example, the FBI is currently working with the Department of State to accomplish the submission of their information on an electronic basis. In addition, within the Department of Justice the Office of the Deputy Attorney General is spearheading an effort to develop a streamlined, department-wide approach to ensuring that all federal indictment, conviction, and arrest warrant information is promptly transmitted to NICS. By January 2012, all U.S. Attorney's Offices and the litigating components of Main Justice will be required to complete

and submit electronically to NICS a one-page summary of relevant information pertaining to all federal charges and convictions. A similar procedure is being developed for federal law enforcement to submit information regarding federal arrest warrants.

The FBI has also made the states aware of alternative means of accomplishing electronic submissions, including electronic mail, compact disk, and/or through the use of a NICS-only Originating Agency Identifier (ORI). These interim options are available to the states (and federal agencies) as they continue to work toward an optimal electronic submission process.

Additional developments in enhancing the submission of electronic records include:

- In March 2011, the Federal Court Services and Offenders Supervision Agency began electronically submitting federal drug-related prohibiting information to the NICS Index.
- In February 2011, the U.S. Coast Guard identified an additional category of federal prohibition held by their agency and, since the passage of the NIAA, has begun electronic submission of these records to the NICS Index.
- On January 20, 2011, the Drug Enforcement Administration (DEA) became the first federal agency to submit real-time online dispositions via the III. In addition, the DEA has submitted approximately 500,000 legacy dispositions to the FBI for update to III records.
- In July 2011, the Department of Agriculture began electronically submitting information pertaining to the federal prohibiting category of 'persons under indictments for a crime punishable by imprisonment for a term exceeding one year' to the NICS Index.
- In 2010, the FBI created and implemented a process to provide certain noncriminal justice agencies, such as mental health agencies, not eligible for NCIC Originating Agency Identifier (ORI) assignment with a NICS-only ORI. A NICS-only ORI provides such agencies with the ability to submit federal prohibiting information electronically to the NICS Index. The FBI provided this as an alternate means for agencies to electronically submit records to the NICS Index other than through the NCIC front-end.

Controlled substances

In July 2010, in response to the NIAA, the U.S. Army enacted a policy change that provides for the submission of fingerprints to the III on persons subject to the federal firearms prohibitor for illegal use of controlled substances.

Domestic violence

On December 14, 2009, the FBI implemented a process to post victim relationship information to III records. The relationship information is essential for the effective processing of records regarding the prohibiting misdemeanor crime of domestic violence.

State prohibitors

Effective April 2012, the NICS Index will be expanded to collect and maintain records of persons who are prohibited from the possession of firearms based on state law. The expanded NICS Index capability will enhance the level of firearm-prohibiting information made available

to NICS users during the NICS background check process. Participation by the states will be voluntary, as is state submission of information to any of the databases accessed by NICS.

Mental health records

In the wake of the tragic shootings at Virginia Tech, the Attorney General issued correspondence to federal agencies requesting they identify and contribute any information that would immediately identify individuals prohibited by federal law, particularly those persons with a prohibiting mental health history, from possessing or receiving firearms or explosives. The Attorney General also referred agency inquiries or concerns pertaining to relevant firearm-prohibiting information to the FBI. Corresponding guidance was provided to numerous federal agencies about the NICS program, determining if agency-held information is relevant to NICS' purposes, and accurately interpreting federal firearm-prohibiting criteria. Both the FBI and the ATF wrote letters to the state Attorneys General on these issues as well.

Since 2002, each successive year of operations has reported an increase in the number of prohibiting mental health submissions to the NICS Index, with the most notable increase, approximately 74 percent, occurring after the Virginia Tech tragedy in 2007. As of October 30, 2011, the number of records maintained in the NICS Index Mental Defective File totaled 1.3 million. A significant percentage of these records, however, are from a small number of states.

Continuing Challenges

The Department continues to educate our federal, state, and tribal partners about the NICS and the records relevant to the federal laws prohibiting the receipt or possession of a firearm. During the course of this outreach, several continuing challenges and obstacles have been reported. Among these challenges are limitations including the manpower to accomplish the added duties and responsibilities associated with the management and maintenance of information submitted to the NICS. Other issues identified include outdated information technology and the inability to submit records electronically. In certain instances, the requirement to implement a relief from mental health disabilities program that is a prerequisite to grant funding also presents obstacles, thereby hindering progress.

At the state level, a variety of legal and policy barriers appear to hinder the submission of robust mental health information to the NICS. For example, some states report that state privacy laws bar them from providing information to the NICS that would demonstrate a mental health prohibitor for one of its citizens. The FBI has compiled and disseminated a catalogue of state legislation that has been enacted by certain states to allow for the sharing of mental health information with the NICS. Whether such legislation is pursued, however, is up to the state.

Moreover, submission by the states to any of the databases accessed by NICS is voluntary. While the availability of grant funds under the umbrella of the NIAA is helping some states develop capabilities that will permit them to effectively and efficiently submit much-needed information to the NICS, the requirement that states create and operate a qualified relief from disabilities program in order to compete for a grant may act as a disincentive for some states from seeking those funds. Finally, the manpower to assume the duties and responsibilities associated with the management and maintenance of information and to assist with the auditing of such records has also been identified as a significant issue faced by states.

Conclusion

During the last three years, a great deal of progress has been made toward fully implementing the NIAA. Much work through intense outreach, training, and information sharing has enhanced state and federal awareness of the importance of making relevant information available to the NICS. The overall number of records submitted to the NICS Index since the passage of the NIAA has improved; however, the improvements are not spread equally across the board. Although deficits in funding may continue to be an issue across many state, local, tribal, and federal agencies, it is anticipated that through our Department's continued outreach and with the support from the federal government and the NIAA partnering agencies will help the local, state, tribal, and federal agencies move closer to the NIAA's goal of closing the gaps in the information available to the NICS.

I appreciate the opportunity to review some of the Department's recent work to improve the completeness and accuracy of the information made available to the NICS by local, state, tribal, and federal agencies. Through these efforts, we continue to ensure that persons prohibited from possessing firearms pursuant to state or federal law do not acquire them from an FFL, and that law abiding citizens are able to acquire them without undue delay. I would be happy to answer any questions that you may have.