

March 24, 2020

Attorney General William P. Barr
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Director Christopher A. Wray
Federal Bureau of Investigation
935 Pennsylvania Avenue N.W.
Washington, D.C. 20535-0001

Acting Director Regina Lombardo
Bureau of Alcohol, Tobacco, Firearms & Explosives
99 New York Avenue N.E.
Washington, D.C. 20226

Re: Request for Action to Avoid Breakdown in NICS Background Check System

Dear General Barr, Director Wray, and Acting Director Lombardo:

As you no doubt are aware, the FBI's National Instant Criminal Background Check System ("NICS") has been experiencing a dramatic increase in volume in recent days, largely due to firearm purchases stimulated by concern about the COVID-19 virus. According to [The Washington Examiner](#), the National Shooting Sports Foundation ("NSSF") recently reported that "NICS staff experienced over a 300% increase compared to this same time period in 2019." Gun Owners of America ("GOA") recently heard from an FFL of a NICS check that took 22 hours to receive a disposition. There have reportedly been similar experiences across the country.¹

Of course, having spikes in NICS volumes is not an unprecedented situation. Indeed, NICS has experienced significant increases in background checks numerous times in the past, such as during Black Friday shopping, holiday periods, and in other times of political uncertainty, such as after calls for more gun control laws, and before elections.

Currently, the COVID-19 pandemic is revealing and exacerbating the underlying constitutional infringements with the NICS system. If state or federal governments do not remain open, then Americans will be denied their Second Amendment-protected right to purchase firearms. The long-term solution is for Congress to repeal this law. But in the short-term, the federal government is faced with a choice: ignore the Brady Transfer Date, thus intimidating gun stores into denying Americans their rights, or reallocate resources so that Americans will not be denied their rightfully purchased firearms.

¹ See A. Hawkins, "[Coronavirus Gun Sale Surge Overwhelms State, Federal Background Check Systems](#)," *Breitbart* (Mar. 23, 2020).

Hence, for three different reasons, unless you take action, COVID-19 could exacerbate problems with the NICS system and create particularly dangerous problems for many Americans.

First, NSSF reports that “[w]hile much of the NICS System is automated and yields an immediate ‘proceed’ or ‘deny’ determination, transactions that result in a delayed status require the work of NICS examiners to investigate whether the transaction should be approved or not. With daily volumes roughly double that of last year, the NICS team is increasingly unable to respond within three business days, creating a backlog in the delayed checks.” *Id.* The current national demand for firearms may be unprecedented.

However, it has been widely reported that, even in normal demand situations, the FBI already does not investigate all delayed NICS responses within three business days. For example, [ABC News](#) reported “delayed denials” occurred 4,170 times in 2016, causing agents to need to recover firearms that had been properly transferred after three business days. In fact, it has been reported that “the FBI did not complete over 1.1 million background checks from 2014 through July 2019.” *Id.*

Accordingly, GOA is concerned that Americans do not have “instant” access to firearms, in most cases, during this time in which Americans are demonstrating that they highly value their Second Amendment-protected rights.

While GOA understands that higher volumes of NICS checks may lead to an increased number of “delayed” investigations that cannot be completed within the statutory time limit of three business days, that alone does not justify any change to the system to delay those gun purchases. Rather, FBI can simply assign additional personnel to the task, or can wait and work through the backlog after things return to normal and recover any “denied” transfers that may have occurred. Indeed, that is what the statute requires.

Although it is possible that this interpretation **may result** in a few purchasers temporarily not being verified as eligible to possess firearms, the alternative of shutting down the system in certain states most certainly **will result** in denying access to firearms by those who need them.

Second, the FBI now appears to be changing the rules as to how the NICS system normally operates. The FBI has posted to its NICS website the following troubling statement:

We are aware that states may be considering options to protect the health and safety of their employees, which may include a reduction in office availability or even closure to some offices. **Should a state choose to limit days of operation by completely closing state offices one or more days a week or even indefinitely, this could potentially impact the Brady Transfer Date (BTD) by changing the time in which an FFL can legally transfer a firearm in a delayed status.** The NICS Section urges FFLs to be cognizant of the impact this may have to your day-to-

day operations, and also to stress the importance of adhering to the BTD that is provided to you at the time a transaction is put into a Delay status. The Brady Act does not federally prohibit an FFL from transferring a firearm after the third business day expires, even if the NICS Section has been unable to provide a proceed response, pursuant to 18 U.S.C. § 922(t)(1). [Emphasis added.]²

NSSF suggests that the FBI's rationale is as follows: "The three business day time frame does not begin until relevant state offices are open for business ... when state offices are closed it does not constitute a 'business day' for purposes of calculating the 'three business days' period before an FFL may transfer a firearm to a non-licensee as mandated by the Brady Act."³ This interpretation appears to be based on a strained reading of the text of 18 U.S.C. § 922(t)(1)(B), which states that an FFL has the option to transfer a firearm to a person when either (i) the NICS system approves the transfer, or (ii) "3 business days (**meaning a day on which State offices are open**)⁴ have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section." Emphasis added.

The statutory language — "a day on which State offices are open" — has commonly been understood to mean to exclude weekends and holidays — days on which state offices are traditionally not open for business. This language simply cannot be understood to include a situation where a state chooses to shutter its offices for an extended period of time, as some states are reportedly contemplating in response to COVID-19. Were it otherwise, then a state would be left free (even in "normal" times) to disable completely the functioning of the NICS system in that state, by first becoming a Point of Contact ("POC") state, and then refusing to act as a POC by declining to run NICS checks for FFLs. Indeed, the "three business day" period would never even start to run, since an FFL would not be able to contact the NICS system to start a check. Surely, that is not what the Brady Act allows or even contemplates.

Indeed, FBI regulations are clear in requiring POC states to carry out their duties in order to maintain their status as such. 28 CFR § 25.2 states that:

A POC **will receive** NICS background check requests from FFLs, **check** state or local record systems, **perform** NICS inquiries, **determine** whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, **and respond** to FFLs with the results of a NICS background check. [Emphasis added.]

² <https://www.nicsezcheckfbi.gov/>

³ See *The Washington Examiner*, *supra*.

⁴ We assume the qualification "a day on which State offices are open" only applies to "point-of-contact" states, where state officials are involved in the NICS process. For other states, a licensee deals directly with the FBI's NICS system, with no need to involve "state offices." If you intend to apply your new interpretation to non-POC states, please advise us of that decision.

Likewise, 28 CFR § 25.6 states that:

FFLs **will** contact the POC [and] [u]pon receiving a request for a background check from an FFL, a POC **will** ... [t]ransmit the request for a background check via the NCIC interface to the NICS [and] **will** ... [n]otify the FFL that the transfer may proceed, is delayed pending further record analysis, or is denied. [Emphasis added.]

Thus, both federal law and FBI regulations clearly envision a non-discretionary duty that, if a state agrees to act as a POC to NICS, the state **“will” perform** the functions necessary to permit FFLs to contact and obtain results of NICS checks.

Accordingly, Gun Owners of America asks your office to rescind the posting on the NICS website, and to adopt the interpretation that, with respect to federal law,⁵ the three business day period begins to run when an FFL attempts to contact a POC state for a NICS check, and can be extended only by ordinary weekends and holidays, and not by a state decision to temporarily shutter its POC offices for some indeterminate period of time.

Third, exacerbating this situation, ATF has recently begun a campaign to use letters to eliminate the 18 U.S.C. § 922(t)(3) exemption for holders of concealed carry permits. ATF appears to be making a concerted effort to target all currently exempted states for unlawful elimination from the § 922(t)(3) exception. Gun Owners of America recently filed suit against ATF to stop this unlawful practice. *See Gun Owners of America, Inc. et al. v. U.S. Justice Department et al.*, 1:20-cv-10639 (E.D.M.I.), Complaint for Declaratory and Injunctive Relief (Mar. 9, 2020).⁶ The result of this misguided ATF campaign is to force more and more firearm sales into the NICS system, that would otherwise have been exempted by the simple showing of a concealed carry permit. While these ATF letters are still in force, it makes it all the more necessary for the NICS system to function properly — and instantly — as Congress intended.

Accordingly, GOA requests that the Justice Department revoke the ATF letters that were sent to Alabama,⁷ Minnesota,⁸ and Michigan,⁹ preventing holders of concealed carry permits from purchasing firearms utilizing the statutory NICS waiver for permit holders, at least until the current litigation is resolved and while the COVID-19 crisis continues. This is not a radical

⁵ Of course, there may be additional state requirements that a state level background check be performed before an FFL can transfer a firearm. *See, e.g.*, Fl. Stat. 790.065.

⁶ <https://gunowners.org/wp-content/uploads/2020/03/Complaint-in-120-cv-10639-TLL-PTM-Gun-Owners-of-America-Inc.-et-al-v.-U.S.-Justice-Department-et-al.pdf>.

⁷ [“Public Safety Advisory to All Alabama Federal Firearms Licensees,”](#) U.S. Department of Justice (July 22, 2019).

⁸ [“Open Letter to All Minnesota Federal Firearms Licensees,”](#) U.S. Department of Justice (Oct. 23, 2019).

⁹ [“Public Safety Advisory to All Michigan Federal Firearms Licensees,”](#) U.S. Department of Justice (Mar. 3, 2020).

change, as it would simply revert to the status quo of a few short months ago. Importantly, it would also decrease the burden on the NICS system, and allow persons in these three states with concealed carry permits (who have already had submitted to extensive background checks) to purchase firearms unimpeded by bureaucratic delay.

Conclusion

Gun Owners of America has always believed that the NICS federal background check system is unconstitutional because it infringes the Second Amendment rights of Americans. Of course, the infringement caused by an operational NICS system is far less dangerous than the elimination of the right to acquire arms from dealers resulting from a crippled NICS system, or a rogue state's refusal to act in a diligent manner as a POC. GOA is committed to preserving and protecting the Second Amendment rights of Americans, in both good times and bad.

In times of uncertainty, the right to keep and bear arms is more important than ever. The Second Amendment cannot simply be put on hold because of COVID-19, any more than can the First or Fourth Amendments. Accordingly, we would urge you to take the appropriate steps to ensure that Americans can acquire firearms during this time of need, unimpeded by delay due to state or federal government inability or unwillingness to process NICS checks in a timely fashion.

Sincerely yours,

A handwritten signature in black ink that reads "Erich Pratt". The signature is written in a cursive, flowing style.

Erich Pratt
Senior Vice President