

DELAYED NICS TRANSFERS & THE FALLACY OF THE “CHARLESTON LOOPHOLE”

Under federal law, before a federally licensed firearm retailer (FFL) may transfer a firearm to an individual, the retailer must conduct a background check through the Federal Bureau of Investigation’s (FBI) National Instant Criminal Background Check System (NICS) to determine if the individual is prohibited by law from receiving firearms.ⁱ

In a few cases, rather than an approval or denial, the background check results in a notification that the retailer must delay the transaction for three full business days before completing the transaction. This gives NICS more time to research the individual attempting to make the purchase.

Recently, anti-gun advocates have called for this three-day waiting period to be extended or for the transaction to be permanently delayed until the check is completed and approved. Data from the FBI show a very small number of firearms are transferred after three business days without a concluded check.

In 2019, 89.44 percent of checks resulted in an immediate determination, while the FFL was still on the phone with NICS. Just over 10 percent of all transactions were “delayed” meaning they were not immediately determined.ⁱⁱ And, 98 percent of the delayed transactions are resolved with the vast majority being resolved during the first three business days.

In the rare, but legal, occurrences where firearms are transferred after

- In 2019, 89.44% of the tens of millions NICS checks done annually are completed immediately, just over 10% of NICS checks are “delayed.”
- The vast majority (88%) of delayed NICS checks are resolved within three business days and 94% within 10 days.
- Only 0.7% of 2019 delayed NICS checks were never resolved.
- Only minuscule 0.01% of transferred firearms are referred to ATF for retrieval because the purchaser turned out to be a prohibited person.

the three business day period with no resolution from NICS, data on firearm traces conducted by law enforcement fail to show that these firearms are any more likely to end up in the hands of criminals than any other firearm. This is not surprising since Department of Justice data shows criminals rarely obtain their firearms from licensed retailers.ⁱⁱⁱ

THE BACKGROUND CHECK PROCESS

After the prospective buyer completes an ATF Form 4473, Firearms Transaction Record, which includes the name, descriptive information and background questions that identify whether the individual is a prohibited person, the FFL initiates a NICS background check by phone or online through the NICS E-Check system.

Three databases are searched as part of the check that contain criminal history records, data on protection orders, criminal warrants, immigration violators as well as information from local, state and federal agencies related to individuals prohibited from purchasing a firearm under state and/or federal law. Based on the background check, the FFL is

told to proceed, deny, or delay a transaction.^{iv}

Since its inception on November 30, 1998 through December 2019, NICS processed 333,004,066 checks.^v In 2019 alone, NICS processed 28,369,750 transactions, and denied 103,592, roughly 0.36 percent. Since its inception it has denied less than 1 percent of all transactions (0.5 percent).^{vi}

DELAY DETERMINATIONS

The 1993 Brady Act, which created NICS, allows, but does not require, an FFL to legally transfer the firearm if the transaction is not resolved within three business days. The three day count does not include the day the check was initiated, Saturdays, Sundays, or state holidays. The NICS Section continues to research for the needed information until the transaction is purged within 88 days.^{vii}

The delay allows the NICS Section several days to address issues such as incomplete criminal history records, which must be researched to determine whether the transaction may be completed, or must be denied. The research

continued →

process often involves NICS contacting local, state, tribal and/or federal court clerks and agencies for the missing information needed to make the determination.

KEY DELAY STATISTICS

While federal law prohibits an FFL from transferring a firearm for three full business days after a delay, individual FFLs establish their own policies about whether to complete the transfer after the three day period or whether to wait longer, such as for one week, 30 days, or to not complete the transfer without receiving a proceed from NICS.

If the FFL lawfully transfers a firearm after the three business days expires, and the NICS system later determines the transaction should have been denied, NICS notifies the FFL and contacts ATF to handle the

case as a firearm retrieval referral. In 2019, NICS forwarded 2,898 firearm retrieval referrals to ATF. This represents 0.01 percent of all NICS checks that year.

Only a mere 0.7 percent of all delayed transactions are never resolved after a nearly three month NICS investigation, according to FBI 2019 data. Data provided to the NSSF show that from October 15, 2013 through November 23, 2015, about 79 percent of delayed transactions are resolved within three business days, 88 percent are completed within five days and 94 percent are completed within 10 days.

Of the delays that go beyond three business days, 12 percent are eventually denied. This compares to a 54 percent denial rate for delays that are resolved within the three business day period.

EVIDENCE POINTS TO AN EFFECTIVE SYSTEM

Before lawmakers begin to design policies to extend the delay period or to impose additional regulations on licensed retailers, it is crucial to take into account that 98 percent of delayed transactions are resolved, the vast majority within the first three business days. Considering the lack of evidence that firearms transferred after a delay notification are actually more likely to be misused by criminals, there is no justification for adding new onerous restrictions on FFLs and law-abiding citizens acquiring firearms for self-defense and other lawful purposes.

The focus of policy makers should be on improving the quality and accuracy of data in the NICS system and increasing the speed and rate of immediate determinations.

- i The Brady Handgun Violence Prevention Act of 1993, Public Law 103-159, requires the Attorney General to establish the National Instant Criminal Background Check System. In 36 states, FFLs contact FBI-NICS to initiate the background checks. In 13 full "Point of Contact" states, the FFL contacts the state for the background check for both handguns and long guns, rather than the NICS Section. The state-run check searches the same federal databases as when NICS conducts the check. In 7 states, the NICS Section handles all long gun transactions, and the states conduct the required check for handguns and handgun permits. These are called "Partial Point of Contact [POC]" states. Additionally, 23 states have at least one ATF-Qualified alternative permit issued by local or state agencies that preclude the need for an otherwise required NICS check. However, NICS checks are required to obtain one of these permits.
- ii In the case of the other 9 percent of transactions, the retailers were informed that the transactions were "delayed" by a message stating, ". . .NTN ___ will be delayed while the NICS continues its research. If you do not receive a final response from

us, the Brady Law does not prohibit the transfer of the firearm on day/date." The date given is three full business days from the date of the check. For example, if the NICS check was initiated on Thursday, the soonest it could be transferred would be Wednesday of the following week. Business days means days when the state government was open. In this example, if Monday was a state holiday the soonest the firearm could be transferred is Thursday, a full calendar week later. NICS, "Fact Sheet," <https://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet>

- iii Caroline Wolf Harlow, Department of Justice, Bureau of Justice Statistics Special Report, "Firearm Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities," NCJ 189369, November 2001. <http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf>
- iv Prohibitions under federal law, 18 USC 922(g), include fugitives, drug addicts, illegal immigrants as well as a person that: is under indictment for or has been convicted of a crime punishable by more than one year in prison; has been disqualified

from the military under dishonorable conditions; who has renounced his or her U.S. citizenship; is subject to a restraining order for harassing, stalking or threatening an intimate partner or child of the intimate partner; has been convicted of domestic violence; or who has been adjudicated as a mental defective or has been committed to any mental institution.

- v Note: Not all of these checks represent a single firearm transaction. Checks are also run for permit applications and other reasons. <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>
- vi See Federal Denials for November 30, 1998-April 30, 2016 here: <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>
- vii NICS, "Reasons NICS Background Checks are Denied or Delayed," <https://www.fbi.gov/about-us/cjis/nics/appeals/nics-appeals-process/reasons-nics-background-checks-are-denied-or-delayed>

NSSF[®]
The Firearm Industry
Trade Association