



The Florida Senate

Interim Project Report 2004-128

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Committee on Criminal Justice

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REVIEW OF FDLE FIREARM PURCHASE PROGRAM

SUMMARY

This interim project was undertaken because Florida's Firearm Purchase Program is scheduled to be repealed effective June 1, 2004, unless it is reenacted by the Legislature. This report documents the benefits and costs of the Florida program and concludes by recommending that the program be retained. While the federal firearm pre-sale background check system has improved, there are still tangible public safety benefits to maintaining a separate state-operated program. These benefits include notification of local law enforcement when a sale is denied, notification of the local sheriff in the county where a firearm purchase is attempted when a background check reveals an active arrest warrant, FDLE's presence at gun shows to conduct instant background checks, and direct communication with and accountability to local courts, law enforcement, and government officials.

BACKGROUND

Section 790.065, F.S., which established the Firearm Purchase Program within the Florida Department of Law Enforcement (FDLE) is repealed effective June 1, 2004, unless it is reenacted by the Legislature.

The Firearm Purchase Program performs criminal record checks on potential firearm purchasers who are making the purchase from licensed firearm dealers in Florida.

Federal "Brady Law" Requirements and NICS

The Brady Act (the Federal Gun Control Act, 18 U.S.C. 922) required that a National Instant Criminal Background Check System (NICS) be established in November 1998, for the purpose of checking available records on persons who may be disqualified from purchasing firearms. Under the Brady provisions anyone purchasing a firearm from a licensed dealer or redeeming a pawned firearm must first undergo a

background check through either the FBI or the state in which the purchase is being made.

The FBI developed NICS which is a computerized background check system designed to quickly evaluate records and respond to inquiring federally licensed firearms dealers.

The Brady Act prohibits transfer of a firearm to a person who:

- is under indictment for, or has been convicted of, a crime punishable by imprisonment for more than one year,
- is a fugitive from justice,
- is an unlawful user of, or is addicted to, any controlled substance,
- has been adjudicated as a mental defective or committed to a mental institution,
- is an illegal alien or has been admitted to the United States under a nonimmigrant visa,
- was discharged from the U.S. Armed Forces under dishonorable conditions,
- has renounced U.S. citizenship,
- is subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child, or
- has been convicted in any court of a misdemeanor crime of domestic violence.

Additionally, the Act prohibits transfers of long guns to persons under 18 and most transfers of handguns to persons under 21 years of age. The restrictions listed above are the minimum restrictions adopted in most states, although many states have enacted additional prohibiting factors. *Background Checks for Firearm Transfers, 2002, Department of Justice Report, September 2003.*

As reflected in the table below, a NICS background check involves reviewing over 53 million records from

3 sources and 14 databases. NICS is now supporting over 8 million presale checks annually. *Department of Justice, Bureau of Justice Statistics Report, Improving Criminal History Background Checks, May 2003.*

Pre-Sale Firearms Background Checks Databases Used for NICS Checks and Record Holdings, 2003	
	Number of Records
Total Records Checked	53,151,637
Interstate Identification Index (III)	
Total	47,970,629
State Indexed III Records	28,927,627
FBI Maintained III Records	19,043,002
NICS Prohibited Persons Index	
Total	2,890,163
Denied Persons File	42,418
Illegal/Unlawful Aliens Records	2,683,910
Controlled Substance Abuse Records	166
Dishonorable Discharges	7,404
Citizenship Renounced	12,603
Mental Defective Records	143,662
National Crime Information Center (NCIC) Files	
Total	2,290,845
Wanted Persons	899,911
Foreign Fugitives	1,525
Deported Felons	94,422
Protection Order File	754,089
Convicted Persons on Supervised Release	260,559
National Sex Offender Registry	280,339

Source: *Department of Justice, Bureau of Justice Statistics Report, Improving Criminal History Background Checks, May 2003.*

The customary NICS operating hours are 8 A.M. to 1 A.M., 7 days a week, 364 days a year. There is no fee for the service performed by the FBI.

NICS provides full service to federal firearms licensees in 31 states and territories. Ten states are currently sharing responsibility with NICS by conducting background checks for handguns only, while the long-gun transfer checks are done by NICS. *FBI NICS Operations Report, May 2003.*

Fourteen states have agencies that act in a point of contact (POC) capacity, Florida being one of those states. Point of contact agencies conduct their own background checks for the licensees in their state. FDLE serves as Florida's point of contact agency.

Reasons for rejecting a firearm transfer during 2002 are set forth in the table below. The Department of Justice reports that the number of rejections by state and local agencies for reasons other than felony convictions increased 294 percent from the first year of the Brady Act to 2002, compared to a 119 percent increase in total rejections and a 48 percent increase in rejections for felony convictions. The department concluded that several factors, including greater access to records of disqualifying factors other than felony convictions, contributed to the increase.

Reasons for Rejection of Firearm Transfer Applications, 1998-2002		
	FBI	State and Local Agencies
Reasons for Rejection	2002	2002
Total	100%	100%
Felony		
Indictment/Conviction	42.5	51.8
Domestic Violence		
Misdemeanor		
Conviction	12.5	10.4
Restraining Order	5.3	3.5
State Law Prohibition	--	9.9
Fugitive	3.9	8.0
Mental Illness or		
Disability	0.4	1.4
Drug Addiction	6.6	1.3
Local Law Prohibition	--	0.9
Other*	28.7	12.8
-- Not available or not applicable.		
* Includes illegal aliens, juveniles, persons dishonorably discharged from the Armed Services, persons who have renounced their U.S. citizenship, and other unspecified persons.		

Source: *Background Checks for Firearm Transfers, 2002, Department of Justice Report, September 2003.*

It should be remembered that NICS is only as good as the records entered into the system, and the FBI rejects many records submitted by the states. Records are rejected for a variety of reasons including incomplete

disposition histories and smudged or illegible fingerprints.

FDLE is currently reviewing offender records to determine if they meet the criteria for non-approval of a firearm purchase, and therefore should be loaded into the NICS Prohibited Persons Index system. The Index is one of the databases searched by NICS during a background check, and is limited to federal firearm disqualifying information. A review of 150,000 convicted felons not eligible to purchase firearms has been completed and these records have been transmitted to the FBI. Approximately 660,000 records are still under review.

The National Criminal History Improvement Program (NCHIP) exists within the Department of Justice for the purpose of ensuring that accurate records are available for the NICS system, among other databases utilized to enhance public safety and security. In 2002, FDLE received an NCHIP grant in the amount of \$1,369,000 to aid in the collection and transmission of incomplete disposition records to the NICS system. Since 1995 NCHIP has provided nearly \$400 million to the states and will distribute another \$48 million during the fiscal year 2003. *FBI NICS Operations Report, May 2003.*

Additionally, FDLE reports that the FBI rejects up to 500 to 600 fingerprint cards monthly. Since the offender may have records that would prohibit them from purchasing a firearm, the records must be reviewed to see if they should go into the NICS system.

The Brady Law includes some “voluntary requirements” of the states. Although they are strictly voluntary, grant monies are withheld unless the state complies. For that reason FDLE considers those activities as mandatory. The activities include:

- responding to requests from NICS and other state firearm programs to retrieve Florida disposition information which may appear as incomplete on the face of the record. This must be completed within three working days or the sale proceeds.
- continue to review the 500 to 600 records rejected by NICS monthly.

- respond to information-seeking calls from the executive and legislative branches, as well as firearm dealers and purchasers. FDLE estimates approximately 21,000 such calls during the fiscal year 2002-2003.
- process and research appeals from non-approved firearm purchasers where the non-approval is based on a Florida record.

NICS implemented several enhancements as a result of customer requests, ongoing system audits, legislation, or directives from the Attorney General during 2001 and 2002. These systemic changes have resulted in a 91 percent “immediate determination” rate. This means that in 91 percent of the inquiries made by dealers to NICS, it can be determined during the inquiry whether the purchaser and the dealer can proceed with the transaction. *FBI NICS Operations Report, May 2003.* Those transactions that cannot immediately be approved or denied are delayed for further investigation. Under the Brady Act, this final determination must be made within 3 business days or the transaction may proceed.

When the transaction occurs because information was not gathered by NICS before the third business day, it is known as a “default proceed.” During 2002 approximately 1.73 percent of total FBI-processed transactions were “default proceeds.” *FBI NICS Operations Report, May 2003.*

If the NICS examiner obtains prohibitive information after the third business day, the dealer is contacted to determine if the firearm had been transferred. If that is the case, ATF (Bureau of Alcohol, Tobacco, Firearms and Explosives) is notified with a request for firearm retrieval. This situation potentially places ATF agents in harm’s way, and serves to illustrate the need for complete and accurate records. *FBI NICS Operations Report, May 2003.*

Of the 3,429 retrievals initiated in 2002, 1,203 were due to the unavailability of felony dispositions and 1,052 were because evidence of a misdemeanor crime of domestic violence was uncovered after the third business day. *FBI NICS Operations Report, May 2003.*

Appeals of denials of firearm transfers largely arise when a person denies being the individual named in a disqualifying record or disputes the disposition information contained in the record. During 2002 the NICS Appeals statistics were as follows:

YEAR	# of Denials Issued	# of Appeals Received	% of Denials Resulting in an Appeal	% of Appeals (Denials) Overturned
2002	60,739	10,398	17%	31%

Source: *FBI NICS Operations Report, May 2003.*

As of December 31, 2002, NICS had enrolled almost 2,400 federally licensed firearm dealers in the NICS E-check system. This system provides secured access by the dealer to unassisted background checks for firearm purchases via the Internet. Some of the advantages of the E-Check system are that it is available for use 24 hours a day, 7 days a week, it reduces NICS Call Center traffic, and dealers can print completed background checks for record keeping purposes. *FBI NICS Operations Report, May 2003.*

The FDLE Firearm Purchase Program (FPP)

The Firearm Purchase Program (FPP) within the Florida Department of Law Enforcement (FDLE) was created in 1989. The program became operational on February 1, 1991.

All federally licensed firearm dealers, manufacturers, or importers who sell firearms in Florida to persons who are not also federally licensed must:

- obtain a completed form which provides the purchaser's identification information and verify identification by inspecting a photo ID.
- collect a fee from the purchaser for processing the criminal history check of the purchaser. The current fee, set forth in Administrative Rule, is \$5.00. (*Rule 11C-6.009, F.A.C.*)
- contact FDLE by means of a toll-free telephone number to conduct a criminal history check in the Florida Crime Information Center and National Crime Information Center (FCIC/NCIC) systems and other databases available through the FBI.
- receive an approval number from FDLE and record the number on the consent form.

(s. 790.065(1), F.S.)

Florida law prohibits transfer of a firearm to a person who:

- has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to s. 790.23, F.S.,
- has been convicted of a misdemeanor crime of domestic violence,
- has had an adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless three years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred,
- has been indicted or has had an information filed against her or him for an offense that is a felony under state or federal law (pending disposition information that indicates the potential buyer is not prohibited),
- has had an injunction for protection against domestic violence entered against him or her under s. 741.30, F.S.,
- has had an injunction for protection against repeat violence entered against him or her under s. 784.046, F.S., or
- has been arrested for a dangerous crime as specified under s. 907.041(4)(a), F.S., or the crimes listed in s. 790.065(2)(c), F.S., (pending disposition information that indicates the potential buyer is not prohibited).

When a denial occurs, FDLE notifies ATF as well as local law enforcement. A potential buyer who is denied approval may appeal the decision administratively at FDLE.

The Firearm Purchase Program is operational and accessible via telephone 12 hours a day, 7 days a week, 363 days a year. During slower hours FPP members are assigned other related tasks. According to FDLE the total non-FPP work averages about 2 percent of staff time.

FDLE reports that the average duration of an inquiry phone call by a dealer is about two minutes. Staff can verify a two minute and 10 second call placed from a local firearm dealer in October 2003.

The Brady Act and rules promulgated thereunder provide that point of contact states such as Florida, are authorized to charge a fee for the required background check. Florida dealers collect a \$5 fee and forward it to FDLE. The fee was reduced December 1, 2000, from \$8 to the current \$5. FDLE reports that this fee raised approximately \$1,409,452 in fiscal year 2001-2002,

and \$1,333,614 in fiscal year 2003-2003. The salaries, benefits, and other costs associated with the Firearm Purchase Program, such as computers and supplies are covered by the fee.

METHODOLOGY

Staff gathered information from FDLE, licensed gun dealers, and other interested parties. Additionally, staff reviewed relevant information regarding the FBI's National Criminal Background Check System (NICS).

FINDINGS

Comparison of FPP and NICS

During the Firearm Purchase Program Reviews and subsequent reenactments in years past, the federal background check system (NICS) was the subject of criticism. This criticism was based on high profile situations like the 1999 Colorado case in which a restraining order (injunction) was not detected by the FBI during a federal background check, enabling a man to buy a gun and kill his three daughters. Because of this case Colorado moved swiftly to re-establish its own background checks.

It is fair to say that since that unfortunate case occurred, the federal system has improved substantially. Indeed there are few differences between the National Instant Criminal Background Check System (NICS) and Florida's Firearm Purchase Program (FPP).

A few of the differences warrant highlighting, however, as lawmakers decide whether to reenact the FPP. These differences are:

- when a purchase is denied, the FBI does not notify local law enforcement where the attempted purchase occurred; FDLE does.
- in the course of a background check, when an active arrest warrant is found, the local sheriff – where the purchase is attempted – is notified by FDLE; the FBI does not do this.
- FDLE is present at approximately 12 gun shows a year, throughout the state, to provide information and conduct instant background checks; the FBI does not offer this service.
- the FBI has the electronic NICS E-Check system whereby dealers may access the background checks via the Internet; FDLE does not currently provide this service, although it may become available depending on the dealer demand and feasibility of blending the technology with NICS through the FBI.

- the FBI retains information on approved purchasers for 3 months; FDLE destroys it within 48 hours of approval.
- there is no fee for the FBI background check; FDLE collects a \$5 fee which pays for the program.
- the FBI conducts further research on all charges that could be domestic in nature (i.e., assault, criminal mischief) by reviewing police reports or other local information that could reveal a domestic relationship between the parties involved; FDLE conducts further research only if there is an indication in the record of domestic violence or other family reference.
- FDLE does not deny “drug users” as the FBI does due to differing statutory bases for deniability.
- although there are differences between Florida's list of prohibiting factors and the Brady list, the Florida law would apply if Florida opts not to continue as a point of contact state, and relies on the NICS system, so long as those provisions remain in the Florida Statute. *18 U.S.C. 922(9)(b)*.

Transition from FPP to NICS

Should the Legislature decide not to reenact the Firearm Purchase Program, there are some issues that bear consideration.

As noted above, the provisions in Florida law that require non-approval of a firearm transaction such as

- pending court disposition
- withheld adjudication cases (until 3 years after the completion of the terms of the sentence)
- recognizing repeat violence injunctions as a particular category

do not appear in the Brady Act and therefore would not continue to be reasons for denial of a firearm purchase unless those particular provisions are reenacted. The Firearm Purchase Program could be discontinued while leaving the other substantive provisions of the Florida Statute in place.

It should also be noted that FDLE predicts it will take 453,000 hours of staff time to complete the on-going task of reviewing the remaining 660,000 offender records for possible inclusion in the NICS Index system. As was previously explained, this review is part of NCHIP, a federally-funded (grant money) program, the purpose of which is to ensure that accurate records exist for the NICS system.

Even if the Legislature opted not to reenact the FPP, this offender record review effort would likely need to

be completed for public safety reasons. The citizens of Florida would be looking to the FBI to conduct background checks for firearm purchases in our state, so it stands to reason that the FBI should be provided the most accurate and complete information possible. FDLE suggests that in order to accomplish the review, the FPP should be fully staffed until April 2005.

One administrative detail that would result if the FPP were not reenacted is that the federal firearm licensees in our state would have to be enrolled in the NICS system. This would entail notification of dealers that the FPP will cease to exist, providing ample time for the dealers to enroll with the FBI.

FDLE reports that it anticipates continuing the “voluntary requirements” mentioned previously, such as responding to requests for assistance from other

states and NICS, and responding to requests for Florida records for appeal of denial purposes. In order to complete these tasks, FDLE anticipates the need for retaining one supervisor and eight liaison positions in the FPP.

RECOMMENDATIONS

Staff recommends that the Firearm Purchase Program be continued under the purview of the Florida Department of Law Enforcement by reenacting s. 790.065, F.S.

This recommendation is based on the premise that public safety is enhanced when a local (statewide) program is accessible to and communicative with local law enforcement and the court system, and accountable to local government officials.