



Audit of Selected Aspects of the Federal Bureau of Investigation's National Instant Criminal Background Check System



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EXECUTIVE SUMMARY

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Objective

The objectives for this audit were to determine: (1) the circumstances under which the transfer of a firearm to a purchaser who did not meet the purchaser's home state legal age requirement occurred in Colorado during 2019, and how to mitigate the risks associated with prohibited firearm sales to out-of-state purchasers; and (2) whether the Federal Bureau of Investigation (FBI) appropriately evaluates Point of Contact (POC) state compliance with firearms background checks.

Results in Brief

Under federal law, Federal Firearms Licensees (FFLs) are responsible for ensuring that firearms transfers meet the legal age requirements of both the purchaser's state of residence and the state in which the sale occurs. In April 2019, an FFL in Colorado transferred a firearm to an 18-year old resident of Florida, apparently without first verifying the age eligibility of the purchaser's state of residence, which was 21 years of age for the type of firearm purchased. Subsequently, the purchaser allegedly made threats against Colorado schools, resulting in a manhunt, the lockdown and closure of hundreds of schools, and ultimately ending in the death of the purchaser by an apparently self-inflicted gunshot wound.

Our audit found that the National Instant Criminal Background Check System (NICS) does not automatically verify out-of-state purchasers' eligibility for firearms purchases under the age requirement of their state-of-residence. As a result, if an FFL errs in assessing compliance with this age requirement, a firearm may be transferred in violation of federal law to an out-of-state purchaser that the purchaser was prohibited from buying by their home state. We believe that improving the NICS age verification process could mitigate the risk of future improper firearm transfers.

Our audit separately determined that the FBI's periodic audits of POC state compliance with firearms background checks are sufficient for their purpose.

Recommendations

Our report contains one recommendation for the FBI to strengthen controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure basic age eligibility. We requested a response from the FBI and offered ATF a chance to respond to our draft audit report. Those responses can be found in Appendices 4 and 5, respectively. Our analysis of their response is included in Appendix 6.

Audit Results

Depending on the willingness of state governments to act as a liaison for the NICS, FFLs contact either the FBI or a designated state POC to initiate background checks on individuals purchasing firearms. The FBI periodically audits the POC state agencies to determine compliance with NICS requirements. In addition, the NICS has an appeals process for purchasers who believe they were inappropriately denied.

Based in part on a request from Colorado Congressional Representatives, we reviewed an April 2019 transfer of a firearm to an out-of-state resident. We also reviewed the FBI's audits of POC state background checks.

Firearm Transfer in Colorado

An 18-year-old Florida resident purchased a firearm in Colorado during April 2019. Florida law requires that purchasers of firearms must be 21 years of age. It appears that the FFL did not verify whether the purchaser met the age requirement for Florida, as required by federal law. The NICS relies solely on FFLs to verify age

eligibility for both states for out-of-state sales. If an FFL makes an error in determining state age requirements, the NICS does not have an automatic check to identify the error.

FBI's Evaluation of POC States

We reviewed FBI NICS audits of POC states to ensure that those audits properly assess compliance with requirements for the states' completion of background checks. We found that FBI NICS audits adequately tested requirements for POC states as set forth in applicable laws, regulations, rules, policies, and procedures. We also

determined that the FBI had an effective process for audit recommendation implementation and corrective action.

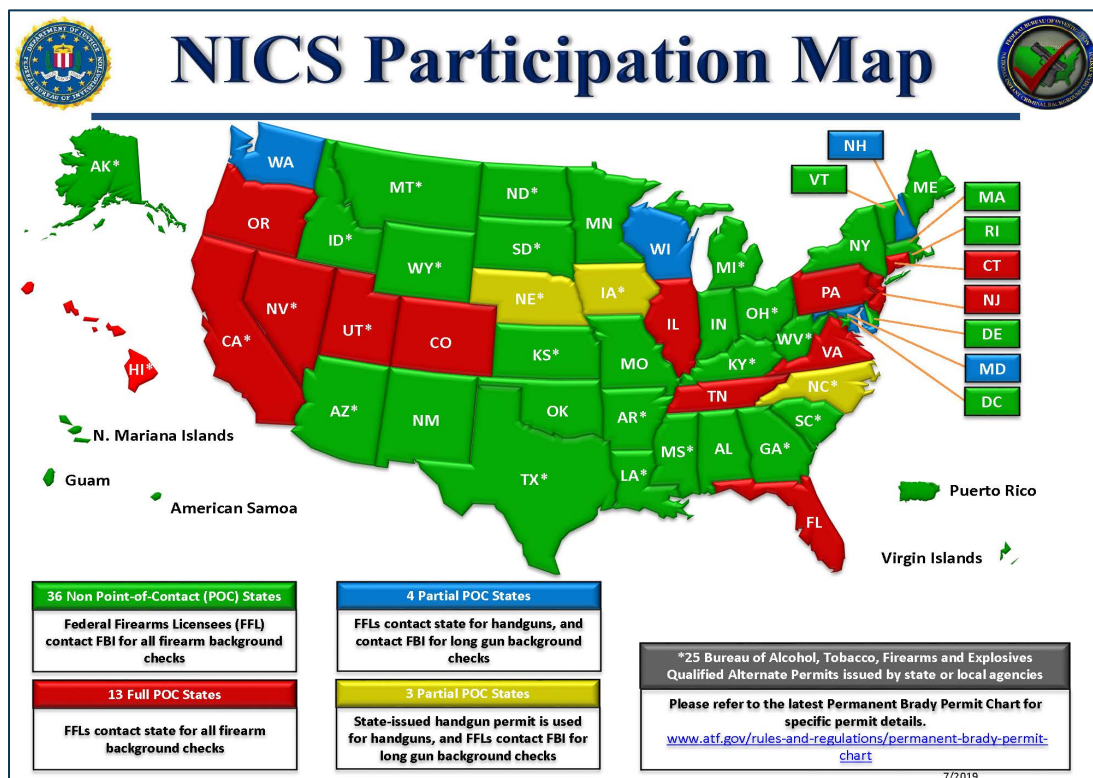
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Introduction

The National Instant Criminal Background Check System (NICS) is used by Federal Firearms Licensees, among others, to determine whether a prospective firearms purchaser is legally prohibited from doing so. The process begins when the person provides a dealer with photo identification and a completed Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473. The form asks questions corresponding to the categories of persons prohibited by federal law from possessing firearms. If a prospective purchaser answers “yes” to any questions, the sale must be denied.¹ Otherwise, the FFL contacts either the Federal Bureau of Investigation (FBI) or a designated state Point of Contact (POC) to initiate a NICS background check on the purchaser. As depicted in the following exhibit, of the 56 states, territories, and District of Columbia, there are 36 non-POC states, 13 full POC states, and 7 partial POC states, which are defined on the next page.

Exhibit 1: NICS Participation Map



^a In its response to the draft report, as shown on page 27 of this final report, ATF states that Florida is not a “Full POC State” because of an exception related to pawn redemption.

Source: FBI

Where the state government has not elected to serve as a POC, the FFLs initiate a NICS background check by contacting the FBI for the NICS check. The FBI conducts the NICS check and determines whether the sale

¹ This is a unilateral denial by the Federal Firearm Licensee in accordance with Federal law, and the search of NICS is not authorized in these situations.

would violate state or federal law. Where the state government has agreed to serve as the POC for the system, the FFLs contact the state POC for firearm transfers. A full POC state is responsible for conducting all required background checks, within the state, in accordance with state and federal laws.

This includes conducting the NICS check and updating NICS with the final results. Additionally, some POC states coordinate the recovery of firearms improperly transferred with the ATF.²

Congressional Request

In July 2019, five Members of Congress from Colorado, a POC state, requested that the Office of the Inspector General (OIG) review the successful purchase of a shotgun in Colorado by an 18-year-old resident of Florida in April 2019, even though Florida law required that an individual be 21 years or older to purchase any firearm, and federal law prohibits the transfer of firearms to individuals who do not meet their home state's age requirement. In addition, the Members of Congress asked that the OIG examine what can be done to prevent legally prohibited sales to out-of-state residents in the future.

The Colorado Congressional Representatives also requested a review of the FBI's audits of POC state background checks on behalf of the NICS. The Members from Congress noted a lack of publicly available information about the effectiveness of POC state background checks and referred to a 2018 Government Accountability Office report that found the denial rate for POC state background checks was approximately one-third the denial rate for FBI checks.³ The FBI conducts POC state audits to evaluate whether POC states are properly complying with the NICS's requirements. However, these FBI audits are not published because the FBI considers the reports sensitive.

Under federal law, individuals are prohibited from buying a long gun when they are below the age of 18, and a handgun when they are below the age of 21. Also, individuals may not purchase a rifle or shotgun outside their state of residence unless the sale, delivery, and receipt fully comply with the legal conditions in both the state of sale and the buyer's state of residence.⁴ As a POC state, the Colorado Bureau of Investigation (CBI) is responsible for completing background checks for all firearm transfers in the state.

Office of the Inspector General Audit Approach

Our audit objectives were to determine: (1) how the firearm transfer occurred in Colorado during 2019 and what can be done to mitigate the risk of improper sales to out-of-state residents and (2) if the FBI appropriately evaluates POC state compliance with firearms background checks.

² Some POC states are partial contact states. These states agreed to serve as a POC for handgun sales but not for long gun sales. The FFLs contact the designated state POC for handgun transfers and the NICS directly for long gun transfers.

³ Few Individuals Denied Firearms Purchases Are Prosecuted and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Should Assess Use of Warning Notices in Lieu of Prosecutions, GAO, Law Enforcement Report 18-440 (September 2018).

⁴ 18 U.S.C. § 922(b)(3).

Audit Results

We determined that the automated NICS background check does not include verification that an out-of-state purchaser meets the age requirements in the purchaser's state of residence, as required by federal law. It further appears that, in April 2019, the Colorado FFL that made the transfer to the 18-year-old Florida resident also did not verify the individual's age eligibility under Florida law. To mitigate the risk of recurrence, we recommend the FBI strengthen controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser in both the purchaser's state of residence and the state of sale to ensure basic age eligibility.

Congressional members also requested that we determine if the FBI appropriately evaluates POC state compliance with firearms background checks. We therefore assessed the FBI's periodic audits of POC state compliance and concluded that these audits are appropriate and sufficient for their purpose.

Firearm Transfer in Colorado in April 2019

The following is a chronology of events leading up to the April 2019 transfer of a firearm. By way of background, in 2011, ATF issued a Federal Firearms License to a seller of firearms in Colorado (the FFL). On June 21, 2016, the FFL was burglarized and at least 31 firearms were stolen. The ATF subsequently inspected the FFL for the first time and found that the FFL's records for the acquisition and disposition of firearms were unreliable, which called into question the number of firearms actually stolen. In a September 20, 2016 inspection report, the ATF identified a total of 15 violations, including that the FFL:

- had errors on all 1,125 ATF Form 4473s generated during the inspection period of June 21, 2015, through June 20, 2016;⁵
- did not ensure complete records for 146 acquisitions and 646 dispositions; and
- improperly transferred a firearm to a purchaser who was not a resident of Colorado and failed to comply with legal conditions to purchase a firearm in both Colorado and the purchaser's state of residence, which was Illinois.

In September 2016, the ATF conducted a warning conference with the FFL during which the inspection violations and necessary corrective actions were discussed.⁶ In a September 28, 2016, letter to the FFL, the ATF warned the FFL to anticipate future inspections in the interest of ensuring compliance. The September 20, 2016, ATF inspection report, noted that, regarding the improper transfer of a firearm in Colorado to the

⁵ The ATF Form 4473 is completed by the purchaser of a firearm and is then certified by an FFL. The form contains the purchaser's identifying information, an affidavit stating that the purchaser is eligible under federal law, responses to questions about sale prohibitors, and details of the firearm to be sold.

⁶ A warning conference is an administrative action the ATF can take based on violations found during a compliance inspection. The ATF requires the FFL to meet with ATF officials at an ATF office to discuss the violations, corrective actions, and the potential for revocation of the FFL's license.

Illinois resident as described above, the FFL said at the warning conference that in the future purchaser eligibility in both Colorado and the state of residence would be verified.

With the foregoing background about the FFL, on April 15, 2019, an 18-year-old resident of Florida approached the FFL to purchase a 12-gauge shotgun. The Florida resident completed an ATF Form 4473 disclosing that the purchaser was a Florida resident. A copy of a blank Form 4473 can be found in Appendix 3 to this report. The FFL contacted the CBI and requested a background check. The FFL did not separately assess the purchaser's eligibility under Florida law. The CBI performed a background check through the NICS and provided electronic notification to the FFL that the transaction was approved. The electronic approval notification stated only that the transaction was approved and contained no information regarding the basis of the approval.⁷ The FFL then sold the firearm to the Florida resident.

The next day, April 16, 2019, hundreds of Colorado schools instituted lockouts and closures because of a perceived threat from the purchaser, whom law enforcement officials alleged at a press conference was "infatuated" with a 1999 massacre at Columbine High School in Colorado and had made threats towards schools in the Denver area.⁸ An extensive search for the purchaser ensued, ending on April 17, 2019, when the purchaser was found dead from an apparent self-inflicted gunshot wound. The FFL who sold the shotgun stated that the purchaser had passed the required criminal background check. However, as noted above, the federal Gun Control Act states that individuals are prohibited from buying a rifle or shotgun outside of their state of residence unless "the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States," and although Colorado allows the sale of a long gun for individuals ages 18 and older, Florida law requires that an individual be age 21 or older to purchase a firearm.⁹ The sale of the firearm by the FFL to the Florida purchaser thus appears to have violated the federal Gun Control Act.¹⁰

Despite the purchaser's apparent ineligibility under Florida law, neither the NICS nor the CBI denied the Florida resident's firearms purchase because the system of controls over such sales does not assess whether there are any applicable state law age limitations.¹¹ Rather, the NICS system relies on FFLs to

⁷ A basis of approval is not provided in a response to an FFL. The FFL only would receive a "proceed" response on an approval.

⁸ On April 20, 1999, two Columbine High School students opened fire inside their school killing 13 and wounding 23 others before killing themselves.

⁹ 18 U.S.C. § 922(b)(3) and Florida Statutes, Title XLVI, Chapter 790.065 (2019)

¹⁰ A lawsuit filed in 2018 by the National Rifle Association of America, Inc. (NRA) sought to enjoin the State of Florida from enforcing its law to prohibit NRA members between the ages of 18 and 21 from purchasing firearms. The NRA asserted that the Act's "age-based ban" violates the Second and Fourteenth Amendments of the U.S. Constitution. Both parties to the lawsuit filed Motions of Summary Judgment on September 3, 2020. On June 24, 2021, the Court issued an opinion in which it rejected the NRA's constitutional challenge to the statute, granted summary judgment in favor of defendant Rick Swearingen, Commissioner of the Florida Department of Law Enforcement, and dismissed the NRA's claims with prejudice. *NRA v. Swearingen*, No. 4:18-cv-00137 (N.D. Fla. June 24, 2021). On July 7, 2021, the NRA filed an appeal.

¹¹ The NICS Section would not have provided a final status to Colorado as they are a full-POC State which utilizes NICS to conduct their background checks; however, they conduct their own research and determine the final status. NICS does not assess whether there are any applicable state law age limitations; however, if the federal age requirement is not met

Continued

understand and apply the laws of both the state of sale and the home state of the purchaser. To this end, the instructions to FFLs on ATF Form 4473 state, "In determining the lawfulness of the sale or delivery of a rifle or shotgun to a resident of another State, the transferor/seller is presumed to know the applicable State laws and published ordinances in both the transferor's/seller's State and the transferee's/buyer's State."¹² The instructions further provide that the FFL "should NOT contact NICS and must stop the transaction if there is reasonable cause to believe that the transferee/buyer is prohibited from receiving or possessing a firearm... "¹³ For the April 2019 Colorado transaction, it appears that the FFL did not ensure the Florida resident was eligible to purchase a firearm in both Colorado and Florida.

The initial NICS check for all transactions addresses 10 federal "prohibitors" listed in Appendix 2, including any applicable state law restrictions that pertain directly to these 10 federal prohibitors. This initial NICS check also confirms that the purchaser meets the federal minimum purchase age of 18 for long guns and 21 for handguns, but because none of the 10 federal prohibitors pertains to age, the NICS does not check any additional state law age restrictions that may be higher than the federal minimum age requirements.¹⁴ Instead, as described above, the NICS presumes that the FFL has determined, using state legal information posted by the ATF on its website, whether the relevant state age requirements have been met.¹⁵ After the Florida purchaser was found deceased, the FBI assessed the extent to which the NICS contributed to completion of the transaction, and it identified no failures in the processing of the NICS background check. The ATF also subsequently investigated the transaction, but its report did not determine whether the sale was improper because, according to an ATF official, ATF has not issued guidance to the firearm industry regarding the Florida law that imposes the relevant age requirement for purchasing a firearm. We did not review the ATF's position on this matter as part of this audit.

In 2019, the ATF conducted another full scope compliance inspection on the FFL. The inspection focused on sales from June 11, 2018, through June 10, 2019. For sales during the inspection period, the ATF reported that the number of violations decreased from the prior inspection and there were no missing firearms, no prohibited transfers of firearms, no significant NICS violations, and no violations where there was an immediate public safety concern. Although the April 2019 sale in question was included in the inspection, the ATF previously did not determine whether it was prohibited. The ATF inspection did determine that the FFL failed to retain proper documentation for 83 of 812 firearm transfers (10.2 percent) made from June 11, 2018, through June 10, 2019.¹⁶ The ATF decided not to revoke the FFL's license because the exact findings were not repeated from the previous inspection, the number of exceptions had decreased, and the FFL had

based on the date of birth only, NICS would have provided an error message. In this scenario, a NICS Transaction Number is not generated; therefore, the transaction would neither be denied nor cancelled.

¹² ATF Form 4473 is a Firearms Transaction Record. A potential purchaser of a firearm completes the form with personal information, and the FFL uses the information on the form to determine whether a purchaser is prohibited by Federal or State law from receiving a firearm.

¹³ Ibid.

¹⁴ 18 U.S.C. § 922(b)(1).

¹⁵ In the case of the April 2019 sale to the Florida resident, the CBI informed us that it reviewed its background check for the sale and found that its examiner met the CBI's lawful obligation to establish that the purchaser did not violate the federal prohibitors.

¹⁶ The 83 transfers without proper documentation were transfers for which the FFL could not provide an ATF Form 4473 such as that provided for the April 2019 sale in question.

made “vast improvement.” Instead of revoking the FFL’s license, in September 2019 the ATF held a second warning conference with the FFL during which the FFL explained how the violations from this most-recent inspection had been remedied. An ATF official told us that holding such a warning conference is consistent with how ATF generally handles similar circumstances with its FFLs.¹⁷

Given the circumstances described above, we believe the FBI can strengthen controls over the sale of firearms to out-of-state purchasers, to ensure compliance with state law, through changes to the NICS to check all relevant state age requirements, including compliance with both state-of-residence and state-of-sale age requirements. In a circumstance such as the Colorado sale to the Florida resident, the current system of controls relies solely on FFLs to understand and ensure compliance with the law in both the state of sale and the home state of the buyer. As a result, if an FFL initially errs in assessing compliance with state legal requirements, as was the case with the Colorado transaction, the NICS has no means to identify and correct the error when conducting the subsequent background check.

We asked Criminal Justice Information Services (CJIS) officials if they are able to modify the NICS to automatically check the age requirement for an applicant’s state of residence and state of sale. Those officials told us that several factors would require consideration before such a modification could be made. These factors include:

- Additional research and testing to determine how extensive the system change would be and the impact on POC states.
- Research of regulations and statutes and coordination with ATF to determine an acceptable course of action.
- A determination of additional data collection required for the background check, which may necessitate a regulatory change.
- An effort by the FBI NICS Section to initially collect and continuously update state age requirements, which the CJIS officials said will likely require Office of Management and Budget approval.

We believe the April 2019 sale in Colorado demonstrates that there currently exists a significant risk of noncompliance with federal and state law under the current system of controls for firearms sales, and that there may be an opportunity for improvements to the NICS system to mitigate that risk. We therefore recommend that the FBI update the NICS background check to verify that an out-of-state firearm purchaser meets the legal age requirements of both the purchaser’s state of residence and the state of purchase to ensure basic age eligibility. Strengthening the NICS controls to include state legal age requirements checks will reduce the risk of improper transfers of firearms to purchasers who do not satisfy the age requirements

¹⁷ As of the time of this report, the OIG is conducting an audit of ATF’s criminal investigation referrals and revocation of licenses for FFLs. The preliminary objectives are to assess ATF’s: (1) risk-based approach for managing FFL inspections, (2) procedures and practices for managing and processing FFL criminal referral and disciplinary actions, and (3) processing of FFL revocations.

of their home states by eliminating the need to rely solely on FFLs to ensure compliance with age requirements.

FBI's Evaluation of POC States

The OIG's examination of the FBI's audits of POC state background checks on behalf of the NICS tested the FBI's performance in four areas: (1) audit selection, frequency, and quality; (2) corrective action on audit recommendations; (3) POC state compliance with NICS policy; and (4) oversight of delayed denials.

Audit Selection, Frequency, and Quality

CJIS policy is to audit each POC state every 3 years. We assessed CJIS's completed and planned audit cycles for Fiscal Years (FY) 2014 through 2022. We found that CJIS conducted audits of all POC state agencies every 3 years in accordance with its audit cycle policy. An alternative approach to scheduling POC state audits would be to schedule the audits based on perceived risks among the POC states. However, we believe the 3-year audit cycle provides adequate oversight and mitigates potential risks associated with CJIS not using a risk-based method to select states to audit.

We reviewed the FBI's NICS audits of the Florida Department of Law Enforcement and the CBI. We reviewed these states' audits because those two states were associated with the April 2019 sale discussed previously. The two audits were conducted during FY 2018, prior to the previously discussed sale. The next scheduled audits for both states were to occur in FY 2021. For those audits, the FBI provided to us its guides for performing the review, the support for its findings, and evidence of the corrective actions taken to address the audit findings. We reviewed these documents and determined that, in accordance with FBI requirements, the audits adequately tested requirements for POC states as set forth in applicable laws, regulations, rules, policies, and procedures. We concluded that the FBI appropriately evaluated POC state compliance with firearms background checks and proper use of the background check system. We based this conclusion on our review of the two audits we selected.

Audit Recommendation Implementation and Corrective Action

CJIS officials told us that all audited POC states have responded to its audit recommendations with appropriate corrective actions. We reviewed the system for accomplishing corrective action, which begins when CJIS issues a draft report to a POC state along with a request for a response to any recommendations. The POC state provides a response specifying the planned and completed corrective actions for each recommendation. CJIS analyzes the response and then issues a final audit report reflecting both the audit findings and corrective actions. For final reports where the corrective action has not been completed, a Compliance Evaluation Subcommittee, made up of federal, state, local, and tribal criminal justice representatives, evaluates corrective action on the audit findings. The Subcommittee makes specific recommendations to an Advisory Policy Board concerning sanctions that should be imposed on POC states that are not in compliance.¹⁸ The Subcommittee also determines when all necessary corrective actions have been completed. If an agency is unable to implement a satisfactory corrective action plan, the resolution process is escalated to a higher body within the state government until the audit finding has been corrected.

¹⁸ The Advisory Policy Board is responsible for reviewing appropriate policy, technical, and operational issues related to CJIS Division programs. After its review, the Board makes recommendations to the Director of the FBI.

Within each POC state, this resolution process could be resolved by the Governor or state Attorney General. We concluded that this system for accomplishing needed corrective action is designed to ensure that POC states efficiently implement the CJIS NICS audit recommendations.

To test the CJIS corrective action system, we reviewed the corrective actions for the CJIS Audit Unit's September 2018 final NICS audit report on the CBI. We found that as of December 2019, the CBI had completed the CJIS audit's recommended corrective actions.¹⁹ To further test the CJIS corrective action system, we reviewed the corrective actions for 21 additional NICS audits. We found that, as of June 2019, appropriate recommended corrective actions were in progress but not yet fully completed for 1 report; 6 reports did not have findings of non-compliance and thus corrective action was not necessary; and corrective actions for the remaining 14 reports had been implemented. In December 2019, the Compliance Evaluation Subcommittee held a meeting and concluded that corrective actions for the remaining 14 reports were fully completed.

POC State Compliance with NICS Policy

The FBI identified several actions it regularly takes to ensure POC states' on-going and future compliance with NICS policy. FBI officials told us and we confirmed that they:

- work closely with agencies to assist in answering any compliance concerns;
- frequently receive and respond to follow-up calls and emails from agencies months and years after an audit and provide assistance;
- frequently refer agencies and contributing agencies to subject matter experts within the FBI to assist with system, procedural, and training concerns;
- assist all states and federal agencies with any NICS-related questions, as well as hosting a NICS User Conference in 2018; and
- host multiple on-site and teleconference training sessions with agencies throughout each year.

The FBI officials also told us and we confirmed that they work closely with the ATF to address any overlapping concerns. This can include both the FBI and ATF coordinating on selected FBI NICS audits, exchanging information on states' findings, and taking any actions within each agency's purview to address compliance.²⁰

¹⁹ None of the recommended corrective actions that were implemented during this time period pertained to actions taken by CBI during the April 2019 sale.

²⁰ Other actions can include following-up with the ATF regarding legal and policy interpretations identified during an audit and the FBI and ATF coordinating to revoke a state's alternate permit status. Alternate permits qualify as alternatives to the background check requirements. For example, in Arizona, a concealed weapons permit qualifies as an alternative to the background check requirements of the Brady Act.

As discussed in the previous subsection, the FBI reports POC findings and recommendations to the Compliance Evaluation Subcommittee consisting of federal, state, local, and tribal criminal justice representatives for review.

Oversight of Denied Transactions

When a POC state issues a denial to an FFL, it is required to also transmit the denial message to the FBI. The FBI maintains but does not follow-up with the POC about the denial message.²¹ For the period 2011 through 2019, the FBI's audits of the 20 full or partial POC states identified 2 instances of denial notices not being correctly reported to the FBI. These findings appeared in a 2011 audit of Maryland and a 2017 audit of Connecticut. Maryland was subsequently audited in 2014 and 2017 with no recurrence of the finding. Connecticut was scheduled to have a subsequent audit in FY 2020, but it was postponed because of the COVID-19 pandemic. It was rescheduled for August 2021. Connecticut implemented the recommended corrective action based on that 2017 audit and has subsequently submitted NICS Denial Notifications to the FBI.

FBI officials told us that, for POC state audits conducted from 2011 through 2019, the FBI determined that 10 full and 3 partial POC states complied with federal and state denial criteria.²² During the same period, the officials said that three full and four partial POC states had at least one finding related to failing to apply criteria.²³

To verify these assertions, we judgmentally selected seven states, and reviewed three audit reports for each. We found that for these seven states, the FBI provided accurate results to the states.²⁴

²¹ Prospective firearms buyers may be denied a purchase based on either a state or federal prohibition on the sale of a firearm to that buyer. The NICS has an appeals process for purchasers who believe they were inappropriately denied.

²² The full POC states were California, Florida, Hawaii, Illinois, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, and Virginia. The partial POC states were Maryland, New Hampshire, and Wisconsin.

²³ The full POC states were Colorado, Connecticut, and Nevada. The partial POC states were Iowa, Nebraska, North Carolina, and Washington.

²⁴ Our audit also sought to determine the answers to several other questions that were included in the Congressional request: (1) which POC states have a high number of sales to prohibited persons; (2) how frequently sales to prohibited persons occur; (3) what the NICS audits have determined regarding POC state actions after a delayed denial; and (4) how many illegal firearms have been transferred in delayed denials, and of those, how many have been removed from prohibited possessors. However, an FBI official told us that the FBI does not have access to this information. We contacted the ATF to determine if it had this information. ATF officials told us that the ATF does not maintain the data and that to obtain it we would need to contact each of the 20 full and partial POC states for this information, which we did not undertake to do.

Conclusion and Recommendation

We found that in April 2019, an 18-year-old Florida resident purchased a firearm in Colorado even though she did not meet the age requirements for her state of residence, as required by federal law, for state-imposed age restrictions. This occurred because the FFL did not verify that the purchaser met the age requirement for Florida, the state of residence. For state-imposed age restrictions, NICS and state POCs rely solely on FFLs to verify whether an individual meets eligibility requirements for both the state of sale and the state of residence for out-of-state purchases. If an FFL makes an error in determining age requirements, the NICS does not have an automatic check to identify the error. We believe that improving the NICS system so that it automatically verifies an out-of-state purchaser's eligibility under both the state-of-sale and the state-of-residence age requirements would reduce the risk of improper firearms sales under federal law.

We further determined that the FBI audits of POC states to ensure compliance with background checks were completed according to FBI policy and that the FBI had an effective process for audit recommendation implementation and corrective action.

We recommend that the FBI:

1. Strengthen controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure basic age eligibility.

APPENDIX 1: Objectives, Scope, and Methodology

Objectives

The objectives of this audit were to determine: (1) how the transfer of a firearm to an out-of-state purchaser who did not meet the age eligibility requirement in her state of residency occurred in Colorado during 2019 and what can be done to mitigate the risk of improper sales to out-of-state purchasers; and (2) if the Federal Bureau of Investigation (FBI) appropriately evaluates Point of Contact (POC) state compliance with firearms background checks.

Scope and Methodology

The scope of the audit covers the period Fiscal Year (FY) 2017 through October 2020, which was the conclusion of our field work. To achieve our audit objectives, we reviewed documentation and interviewed FBI officials regarding an April 2019 transfer in Colorado. We performed limited work with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to understand its role regarding the transfer. Specifically, we interviewed ATF officials, reviewed its inspection guide, a report of investigation, and ATF inspection reports for the FFL involved. We obtained the universe of audits completed by the Criminal Justice Information Services (CJIS) Center, Audit Unit, from October 1, 2016, through December 31, 2019. We judgmentally selected the audit files for the Florida Department of Law Enforcement and the Colorado Bureau of Investigation from this universe. The audit files included the guide for performing the review, support for findings, and the corrective actions to address the findings. We reviewed these two files to determine if the CJIS Audit Unit adequately tested requirements for POC states as set forth in applicable laws, regulations, rules, policies, and procedures. In addition, CJIS provided us 21 audit reports issued from FY 2011 through FY 2019, as well as the Advisory Policy Board, Compliance Evaluation Subcommittee reports. We used these reports to test the CJIS corrective action process. CJIS also provided a list of audits completed by the audit unit from FYs 2014 through 2019 and a schedule of audits to be conducted by the audit unit for FYs 2020 through 2022. We reviewed the list of completed audits and the schedule to verify CJIS's triennial audit cycle. We also interviewed the whistleblower and CJIS Audit Staff to gather information regarding the NICS appeals process and POC state NICS audits.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Internal Controls

In this audit, we performed testing of internal controls significant within the context of our audit objectives. We did not evaluate the internal controls of the FBI to provide assurance on its internal control structure as a whole. FBI's management is responsible for the establishment and maintenance of internal controls in

accordance with the NICS Policy Reference Guides. Because we do not express an opinion on the FBI's internal control structure as a whole, we offer this statement solely for the information and use of the FBI.²⁵

In planning and performing our audit, we identified the following internal control components and underlying internal control principles as significant to the audit objectives:

Internal Control Components & Principles Significant to the Audit Objectives	
Control Environment Principles	
	The oversight body should oversee the entity's internal control system.
Control Activity Principles	
	Management should design control activities to achieve objectives and respond to risks.
	Management should design the entity's information system and related control activities to achieve objectives and respond to risks.
	Management should implement control activities through policies.
Information & Communication Principles	
	Management should use quality information to achieve the entity's objectives.
	Management should internally communicate the necessary quality information to achieve the entity's objectives.
	Management should externally communicate the necessary quality information to achieve the entity's objectives.
Monitoring Principles	
	Management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.
	Management should remediate identified internal control deficiencies on a timely basis.

We assessed the design, implementation, and operating effectiveness of these internal controls and identified a deficiency that we believe could affect the FBI's ability to effectively perform background checks of firearm purchasers to ensure compliance with laws and regulations. The internal control deficiency we found is discussed in the Audit Results section of this report. However, because our review was limited to these internal control components and underlying principles, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

Compliance with Laws and Regulations

In this audit we also tested, as appropriate, given our audit objectives and scope, selected transactions, records, procedures, and practices, to obtain reasonable assurance that FBI's management complied with federal laws and regulations for which non-compliance, in our judgment, could have a material effect on the

²⁵ This restriction is not intended to limit the distribution of this report, which is a matter of public record.

results of our audit. Our audit included examining, on a test basis, the FBI's compliance with the following laws and regulations that could have a material effect on the FBI's operations:

- NICS Policy Reference Guides
- Gun Control Act, 18 U.S.C. § 922

This testing included interviewing the whistleblower and FBI personnel and reviewing supporting documents. However, nothing came to our attention that caused us to believe that the FBI was not in compliance with the aforementioned regulation and laws.

Sample-based Testing

We performed sample-based testing to select samples to determine if the FBI appropriately evaluates POC state compliance with firearms background checks. This non-statistical sample design did not allow projection of the test results to the universe from which we selected the samples.

Computer-Processed Data

During our audit, we obtained information from the CJIS Audit Unit's Audit Information Management database. We did not test the reliability of the system as a whole; therefore, any findings identified involving information from systems were verified with documentation from other sources.

APPENDIX 2: Federal Prohibitors

The Gun Control Act (GCA), codified at 18 U.S.C. § 922(g), makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms or ammunition, to include any person:

- convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;
- who is a fugitive from justice;
- who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802);
- who has been adjudicated as a mental defective or has been committed to any mental institution;
- who is an illegal alien;
- who has been discharged from the Armed Forces under dishonorable conditions;
- who has renounced his or her United States citizenship;
- who is subject to a court order restraining the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner; or
- who has been convicted of a misdemeanor crime of domestic violence.

The GCA at 18 U.S.C. § 922(n) also makes it unlawful for any person under indictment for a crime punishable by imprisonment for a term exceeding 1 year to ship, transport, or receive firearms or ammunition.

Further, the GCA at 18 U.S.C. § 922(d) makes it unlawful to sell or otherwise dispose of firearms or ammunition to any person who is prohibited from shipping, transporting, receiving, or possessing firearms or ammunition.

APPENDIX 3: ATF Form 4473, Firearms Transaction Record

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0020

Firearms Transaction Record

WARNING: The information you provide will be used to determine whether you are prohibited by Federal or State law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a \$250,000 fine. Any person who exports a firearm without a proper authorization from either the Department of Commerce or the Department of State, as applicable, is subject to a fine of not more than \$1,000,000 and up to 20 years imprisonment.						Transferor's/Seller's Transaction Serial Number (if any)		
Read the Notices, Instructions, and Definitions on this form. Prepare in original only at the licensed premises (including business temporarily conducted from a qualifying gun show or event in the same State in which the premises is located) unless the transaction qualifies under 18 U.S.C. 922(c). All entries must be handwritten in ink unless completed under ATF Rul. 2016-2. PLEASE PRINT.								
Section A - Must Be Completed By Transferor/Seller Before Transferee/Buyer Completes Section B								
1. Manufacturer and Importer (if any) (If the manufacturer and importer are different, include both.)		2. Model (if designated)		3. Serial Number		4. Type	5. Caliber or Gauge	
1.								
2.								
3.								
6. Total Number of Firearms to be Transferred (Please spell total number e.g., one, two, etc. Do not use numerals.)				7. Check if any part of this transaction is a pawn redemption. <input type="checkbox"/>				
				Record Line Number(s) From Question 1:				
				8. Check if this transaction is to facilitate a private party transfer. <input type="checkbox"/>				
Section B - Must Be Completed Personally By Transferee/Buyer								
9. Transferee's/Buyer's Full Name (If legal name contains an initial only, record the initial followed by "IO" in quotes. If no middle initial or name, record "NMN").								
Last Name (including suffix, e.g., Jr, Sr, II, III)		First Name			Middle Name			
10. Current State of Residence and Address (U.S. postal abbreviations are acceptable. Cannot be a post office box.)								
Number and Street Address		City		State	ZIP Code	County/Parish/Borough		
11. Place of Birth U.S. City and State		-OR- Foreign Country	12. Height Ft. _____ In. _____	13. Weight (lbs.)	14. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Non-Binary	15. Birth Date Month _____ Day _____ Year _____		
16. Social Security Number (optional, but will help prevent misidentification)				17. Unique Personal Identification Number (UPIN) or Appeals Management Database Identification (AMD ID) (if applicable)				
18a. Ethnicity <input type="checkbox"/> Hispanic or Latino <input type="checkbox"/> Not Hispanic or Latino		18b. Race (Select one or more race in 18.b. Both 18.a. and 18.b. must be answered.) <input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Black or African American <input type="checkbox"/> White <input type="checkbox"/> Asian <input type="checkbox"/> Native Hawaiian or Other Pacific Islander						
19. Country of Citizenship: (Check/List more than one, if applicable. Nationals of the United States may check U.S.A.) <input type="checkbox"/> United States of America (U.S.A) <input type="checkbox"/> Other Country/Countries (Specify):								
20. If you are an alien, record your U.S.-issued alien or admission number (AR#, USCIS#, or I94#):								
21. Answer the following questions by checking or marking either the "yes" or "no" box to the right of the questions:							Yes	No
a. Are you the actual transferee/buyer of the firearm(s) listed on this form and any continuation sheet(s) (ATF Form 5300.9A)? Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer the firearm(s) to you. Exception: If you are only picking up a repaired firearm(s) for another person, you are not required to answer 21.a. and may proceed to question 21.b.							<input type="checkbox"/>	<input type="checkbox"/>
b. Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year, or are you a current member of the military who has been charged with violation(s) of the Uniform Code of Military Justice and whose charge(s) have been referred to a general court-martial?							<input type="checkbox"/>	<input type="checkbox"/>
c. Have you ever been convicted in any court, including a military court, of a felony, or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation?							<input type="checkbox"/>	<input type="checkbox"/>
d. Are you a fugitive from justice?							<input type="checkbox"/>	<input type="checkbox"/>
e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance? Warning: The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.							<input type="checkbox"/>	<input type="checkbox"/>

Previous Editions Are Obsolete

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STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5300.9)
Revised May 2020

ATF Form 4473 (5300.9)
Revised May 2020

29. ☐ No NICS check is required because the transferee/buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS.

Issuing State and Permit Type	Date of Issuance (if any)	Expiration Date (if any)	Permit Number (if any)
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Section D - Must Be Completed Personally By Transferee/Buyer

If the transfer of the firearm(s) takes place on a different day from the date that the transferee/buyer signed Section B, the transferee/buyer must complete Section D immediately prior to the transfer of the firearm(s).

I certify that all of my responses in Section B of this form are still true, correct, and complete.

30. Transferee's/Buyer's Signature	31. Recertification Date Month Day Year
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Section E - Must Be Completed By Transferor/Seller

32. For Use by Licensee	33. Trade/corporate name and address of transferor/seller and Federal Firearm License Number (must contain at least first three and last five digits X-XX-XXXXX; hand stamp may be used)
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The Individual Transferring The Firearm(s) Must Complete Questions 34-36.

For Denied/Cancelled Transactions, The Individual Who Completed Section C Must Complete Questions 34-35.

I certify that: (1) I have read and understand the Notices, Instructions, and Definitions on this ATF Form 4473; (2) the information recorded in Sections A, C and E is true, correct, and complete; and (3) this entire transaction record has been completed at the licensed business premises ("licensed premises" includes business temporarily conducted from a qualifying gun show or event in the same State in which the licensed premises is located) unless this transaction has met the requirements of 18 U.S.C. 922(c). Unless this transaction has been denied or cancelled by NICS or State agency, I further certify on the basis of — (1) the transferee's/buyer's responses in Section B (and Section D, if applicable); (2) the verification of the identification recorded in question 26 (and the re-verification at the time of transfer, if Section D was completed); and (3) State or local law applicable to the firearms business — it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section B.

34. Transferor's/Seller's Name (please print)	35. Transferor's/Seller's Signature	36. Date Transferred Month Day Year
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REMINDER - By the Close of Business Complete ATF Form 3310.4 for Multiple Sales of Handguns Within 5 Consecutive Business Days

NOTICES, INSTRUCTIONS, AND DEFINITIONS

Purpose of the Form: The information and certification on this form are designed so that a person licensed under 18 U.S.C. 923 may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section B, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The transferor/seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the transferor/seller must be familiar with the provisions of 18 U.S.C. 921-931 and the regulations in 27 CFR Parts 478 and 479. In determining the lawfulness of the sale or delivery of a rifle or shotgun to a resident of another State, the transferor/seller is presumed to know the applicable State laws and published ordinances in both the transferor's/seller's State and the transferee's/buyer's State. (See State Laws and Published Ordinances -Firearms (ATF Electronic Publication 5300.5) on <https://www.atf.gov/>.)

Generally, ATF Form 4473 must be completed at the licensed business premises when a firearm is transferred over-the-counter. Federal law, 18 U.S.C. 922(c), allows a licensed importer, manufacturer, or dealer to sell a firearm to a nonlicensee who does not appear in person at the licensee's business premises only if the transferee/buyer meets certain requirements. These requirements are set forth in section 922(c), 27 CFR 478.96(b), and ATF Procedure 2013-2 (or subsequent update).

After the transferor/seller has completed the firearms transaction, he/she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his/her permanent records. Such Forms 4473 must be retained for at least 20 years and after that period may be submitted to ATF. Filing may be chronological (by date of disposition), alphabetical (by name of purchaser), or numerical (by transaction serial number), as long as all of the transferor's/seller's completed Forms 4473 are filed in the same manner.

FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not completed after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his/her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

If the transferor/seller or the transferee/buyer discovers that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and the transferor/seller or the transferee/buyer wishes to correct the omission(s) or error(s), photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. The transferor/seller should only make changes to Sections A, C, and E. The transferee/buyer should only make changes to Sections B and D. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of the transferor's/seller's permanent records.

Section A

Questions 1-6. Firearm(s) Description: These blocks must be completed with the firearm(s) information. All firearms manufactured after 1968 by Federal firearms licensees should be marked with a serial number. Should you acquire a firearm that is legally not marked with a serial number (i.e. pre-1968); you may answer question 3 with "NSN" (No Serial Number), "N/A" or "None."

If more than three firearms are involved in a transaction, please provide the information required by Section A, Questions 1-5, on ATF Form 5300.9A, Firearms Transaction Record Continuation Sheet. The completed Form 5300.9A must be attached to this ATF Form 4473.

Types of firearms include, but are not limited to: pistol, revolver, rifle, shotgun, receiver, frame, and firearms that are neither handguns nor long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell (pistol grip firearm) or NFA firearms (machinegun, silencer, short-barreled shotgun, short-barreled rifle, destructive device, or "any other weapon").

Additional firearms purchases by the same transferee/buyer may not be added to the form after the transferor/seller has signed and dated it. A transferee/buyer who wishes to acquire additional firearms after the transferor/seller has signed and dated the form must complete a new ATF Form 4473 and undergo a new NICS check.

Question 8. Private Party Transfer: Check this box if the licensee is facilitating the sale or transfer of a firearm between private unlicensed individuals in accordance with ATF Procedure 2017-1. This will assist the licensee by documenting which transaction records correspond with private party transfers, and why there may be no corresponding A&D entries when the transfer did not proceed because it was denied, delayed, or cancelled.

Section B

The transferee/buyer must personally complete Section B of this form and certify (sign and date) that the answers are true, correct, and complete. However, if the transferee/buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, excluding the transferor/seller. Two persons (other than the transferor/seller) must then sign as witnesses to the transferee's/buyer's answers and signature/certification in question 22.

When the transferee/buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the business must complete Section B of the form with his/her personal information, sign Section B, and attach a written statement, executed under penalties of perjury, stating: (A) the firearm is being acquired for the use of and will be the property of that business entity; and (B) the name and address of that business entity.

Question 9. Transferee's/Buyers Full Name: If the transferee's/buyer's name is illegible, the transferor/seller must print the transferee's/buyer's name above the name written by the transferee/buyer.

Question 10. Current Residence Address: A rural route (RR) may be accepted provided the transferee/buyer lives in a State or locality where it is considered a legal residence address.

If the transferee/buyer is a member of the Armed Forces on active duty, his/her State of residence is the State in which his/her permanent duty station is located. If the service member is acquiring a firearm in a State where his/her permanent duty station is located, but resides in a different State, the transferee/buyer must list both his/her permanent duty station address and residence address. If the transferee/buyer has two States of residence, the transferee/buyer should list his/her current residence address (e.g., if the transferee/buyer is purchasing a firearm while staying at his/her weekend home in State X, list the address in State X).

Question 14. Sex: Individuals with neither male nor female on their identification document(s) should check Non-Binary.

Question 17. Unique Personal Identification Number (UPIN) or Appeals Management Database Identification (AMD ID): For transferees/buyers approved to have information maintained about them in the FBI NICS Voluntary Appeal File, NICS will provide them with a UPIN, which the transferee/buyer should record in question 17. The AMD ID is a number that will be provided to an appellant on certain types of overturned appeals and should also be recorded in question 17. The transferor/seller should provide the UPIN/AMD ID when conducting background checks through the NICS or the State POC.

Questions 18.a. and 18.b. Ethnicity and Race: Federal regulations (27 CFR 478.124(c)(1)) require licensees to obtain the race of the transferee/buyer. This information helps the FBI and/or State POC make or rule out potential matches during the background check process and can assist with criminal investigations.

Ethnicity refers to a person's heritage. Persons of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race, are considered Hispanic or Latino.

Race - one or more of the following responses must be selected: (1) American Indian or Alaska Native - A person having origins in any of the original peoples of North and South America (including Central America), and who maintains a tribal

affiliation or community attachment; (2) Asian - A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam; (3) Black or African American - A person having origins in any of the Black racial groups of Africa; (4) Native Hawaiian or Other Pacific Islander - A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands; and/or (5) White - A person having origins in any of the original peoples of Europe, the Middle East, or North Africa. Select the closest representation for any other race or ethnicity that does not fall within those indicated.

Question 20. U.S.-issued Alien Number or Admission Number: U.S.-issued alien and admission numbers may be found on the following U.S. Department of Homeland Security documents: Legal Resident Card or Employment Authorization Card (AR# or USCIS#); Arrival/Departure Record, Form I94, or Form 797A (I94#). Additional information can be obtained from www.cbp.gov. If you are a U.S. citizen or U.S. national, the response to this question should be left blank.

Question 21.a. Actual Transferee/Buyer: For purposes of this form, a person is the actual transferee/buyer if he/she is purchasing the firearm for him/herself or otherwise acquiring the firearm for him/herself (e.g., redeeming the firearm from pawn, retrieving it from consignment, firearm raffle winner). A person is also the actual transferee/buyer if he/she is legitimately purchasing the firearm as a bona fide gift for a third party. A gift is not bona fide if another person offered or gave the person completing this form money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm.

EXAMPLES: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith (who may or may not be prohibited). Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "no" to question 21.a. The licensee may not transfer the firearm to Mr. Jones. However, if Mr. Brown buys the firearm with his own money to give to Mr. Black as a gift (with no service or tangible thing of value provided by Mr. Black), Mr. Brown is the actual transferee/buyer of the firearm and should answer "yes" to question 21.a. However, the transferor/seller may not transfer a firearm to any person he/she knows or has reasonable cause to believe is prohibited under 18 U.S.C. 922(g), (h), (n), or (x).

Questions 21.b. - 21.i. Prohibited Persons: Generally, 18 U.S.C. 922(g) prohibits the shipment, transportation, receipt, or possession in or affecting interstate commerce of a firearm by one who: has been convicted of a felony in any Federal, including a general court-martial, State or local court, or any other crime, punishable by imprisonment for a term exceeding one year; is a fugitive from justice; is an unlawful user of, or addicted to, marijuana or any depressant, stimulant, or narcotic drug, or any other controlled substance; has been adjudicated as a mental defective or has been committed to a mental institution; has been discharged from the Armed Forces under dishonorable conditions; is subject to certain restraining orders; convicted of a misdemeanor crime of domestic violence under Federal, including a general court-martial, State or Tribal law; has renounced his/her U.S. citizenship; is an alien illegally in the United States or an alien admitted to the United States under a nonimmigrant visa. Furthermore, section 922(n) prohibits the shipment, transportation, or receipt in or affecting interstate commerce of a firearm by one who is under indictment or information for a felony in any Federal, including a general court-martial, State or local court, or any other crime, punishable by imprisonment for a term exceeding one year. An information is a formal accusation of a crime verified by a prosecutor.

A member of the Armed Forces must answer "yes" to 21.b. if charged with an offense that is referred to a general court-martial. A current or former member of the Armed Forces must answer "yes" to 21.c. if convicted under a general court-martial.

Discharged "under dishonorable conditions" means separation from the Armed Forces resulting from a dishonorable discharge or dismissal adjudged by a general court-martial. That term does not include any other discharge or separation.

EXCEPTION: A person is not prohibited from receiving or possessing a firearm if that person: (1) has been convicted of any Federal or State offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices; (2) has been convicted of a State misdemeanor punishable by imprisonment of two years or less; or (3) following conviction of a felony or other crime for which the judge could have imprisoned the person for more than one year, or a misdemeanor crime of domestic violence, has received a pardon, an expungement or set aside of the conviction, or has lost and regained civil

rights (the right to vote, sit on a jury, and hold public office) in the jurisdiction in which the conviction occurred, AND the law of the convicting jurisdiction does not prohibit the person from receiving or possessing firearms. Person subject to any of these exceptions, or who received relief from disabilities under 18 U.S.C. 925(c), should answer "no" to the applicable question.

Question 21.d. Fugitive from Justice: Any person who has fled from any State to avoid prosecution for a felony or a misdemeanor; or any person who leaves the State to avoid giving testimony in any criminal proceeding. The term also includes any person who knows that misdemeanor or felony charges are pending against such person and who leaves the State of prosecution.

Question 21.f. Adjudicated as a Mental Defective: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs. This term shall include: (1) a finding of insanity by a court in a criminal case; and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility.

Committed to a Mental Institution: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

EXCEPTION: Under the NICS Improvement Amendments Act of 2007, a person who has been adjudicated as a mental defective or committed to a mental institution in a State proceeding is not prohibited by the adjudication or commitment if the person has been granted relief by the adjudicating/committing State pursuant to a qualifying mental health relief from disabilities program. Also, a person who has been adjudicated as a mental defective or committed to a mental institution by a department or agency of Federal Government is not prohibited by the adjudication or commitment if either: (a) the person's adjudication or commitment was set aside or expunged by the adjudicating/committing agency; (b) the person has been fully released or discharged from all mandatory treatment, supervision, or monitoring by the agency; (c) the person was found by the agency to no longer suffer from the mental health condition that served as the basis of the initial adjudication/commitment; (d) the adjudication or commitment, respectively, is based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority, and the person has not been adjudicated as a mental defective consistent with section 922(g)(4) of title 18, United States Code; or (e) the person was granted relief from the adjudicating/committing agency pursuant to a qualified mental health relief from disabilities program. This exception to an adjudication or commitment by a Federal department or agency does not apply to any person who was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice. Persons who fall within one of the above exceptions should answer "no" to question 21.f.

Question 21.h. Qualifying Restraining Orders: Under 18 U.S.C. 922, firearms may not be sold to or received by persons subject to a court order that: (A) was issued after a hearing which the person received actual notice of and had an opportunity to participate in; (B) restrains such person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. An "intimate partner" of a person is: the spouse or former spouse of the person, the parent of a child of the person, or an individual who cohabitates or has cohabitated with the person.

Question 21.i. Misdemeanor Crime of Domestic Violence: A Federal, including a general court-martial, State, local, or tribal offense that is a misdemeanor under Federal, State, or tribal law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with, or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to

a spouse, parent, or guardian of the victim. The term includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon (e.g., assault and battery), if the offense is committed by one of the defined parties. (See Exception to 21.b. - 21.1.) A person who has been convicted of a misdemeanor crime of domestic violence also is not prohibited unless: (1) the person was represented by a lawyer or gave up the right to a lawyer; or (2) if the person was entitled to a jury, was tried by a jury, or gave up the right to a jury trial. Persons subject to this exception should answer "no" to 21.i.

A current or former member of the military who has been convicted of a violation of the Uniform Code of Military Justice that included, as an element, the use of force against a person as identified in the instructions under question 21.i. must answer "yes" to this question. This may include a qualifying offense that was referred to a special or general court-martial.

Question 21.l. Immigration Status: An alien admitted to the United States under a nonimmigrant visa includes, among others, persons visiting the United States temporarily for business or pleasure, persons studying in the United States who maintain a residence abroad, and certain temporary foreign workers. These aliens must answer "yes" to this question and provide the additional documentation as required under question 26.d. to establish they are excepted from the nonimmigrant alien prohibition. Permanent resident aliens and aliens legally admitted to the United States pursuant to either the Visa Waiver Program or to regulations otherwise exempting them from visa requirements may answer "no" to this question, leave 21.l.2 blank and are not required to submit the additional documentation under question 26.d.

Question 22. Transferee/Buyer Certification: Under 18 U.S.C. 922(a)(1), it is unlawful for a person to engage in the business of dealing in firearms without a license. A person is engaged in the business of dealing in firearms if he/she devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. A license is not required of a person who only makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his/her personal collection of firearms.

Section C

Question 24. Category of Firearm(s): "Other" refers to frames, receivers, and other firearms that are neither handguns nor long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell, or National Firearms Act (NFA) firearms, including silencers.

If a frame or receiver can only be made into a long gun (rifle or shotgun), it is still a frame or receiver, not a handgun or long gun. All frames and receivers are "firearms" by definition, and subject to the same GCA limitations. See Section 921(a)(3)(B). Section 922(b)(1) makes it unlawful for a licensee to sell any firearm other than a shotgun or rifle to any person under the age of 21. Since a frame or receiver for a firearm, to include one that can only be made into a long gun, is a "firearm other than a shotgun or rifle," it cannot be transferred to anyone under the age of 21, nor can these firearms be transferred to anyone who is not a resident of the State where the transfer is to take place. Also, note that multiple sales forms are not required for frames or receivers of any firearms, or pistol grip shotguns, since they are not "pistols or revolvers" under Section 923(g)(3)(A).

Question 25. Qualifying Gun Show or Event: As defined in 27 CFR 478.100, a gun show or event is a function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms in the community.

Question 26.a. Identification: Before a licensee may sell or deliver a firearm to a nonlicensee, the licensee must establish the identity, place of residence, and age of the transferee/buyer. The transferee/buyer must provide a valid government-issued photo identification document to the transferor/seller that contains the transferee's/buyer's name, residence address, and date of birth. A driver's license or an identification card issued by a State is acceptable. Social Security cards are not acceptable because no address, date of birth, or photograph is shown on the cards.

Identification documents such as a driver's license or identification card issued with binary, non-binary, or no sex designation may be used as an identification document. A combination of government-issued documents may be provided. See instructions for question 26.b. Supplemental Documentation.

If the transferee/buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his/her permanent duty station is located, but he/she has a driver's license from another State, the transferor/seller must list the transferee's/buyer's military identification card in response to question 26.a., in addition to PCS orders as indicated in 26.c.

Question 26.b. Supplemental Documentation: Licensees may accept a combination of valid government-issued documents to satisfy the identification document requirements of the law. The required valid government-issued photo identification document bearing the name, photograph, and date of birth of transferee/buyer may be supplemented by another valid, government-issued document showing the transferee's/buyer's residence address. This supplemental documentation must be recorded in question 26.b., with the issuing authority and type of identification presented. For example, if the transferee/buyer has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license (showing his name, date of birth, and photograph) issued by State Y and another government-issued document (such as a tax document) from State X showing his residence address. A valid electronic document from a government website may be used as supplemental documentation provided it contains the transferee's/buyer's name and current residence address.

Question 26.c. Official Military Orders Establishing Permanent Change of Station (PCS): Licensees may accept electronic PCS orders to establish residency.

Question 26.d. Exceptions to the Nonimmigrant Alien Prohibition: An alien admitted to the United States under a nonimmigrant visa is not prohibited from purchasing, receiving, or possessing a firearm if the alien: (1) is in possession of a hunting license or permit lawfully issued by the Federal Government, a State or local government, or an Indian tribe federally recognized by the Bureau of Indian Affairs, which is valid and unexpired; (2) was admitted to the United States for lawful hunting or sporting purposes; (3) has received a waiver from the prohibition from the Attorney General of the United States; (4) is an official representative of a foreign government who is accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; (5) is an official representative of a foreign government who is en route to or from another country to which that alien is accredited; (6) is an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or (7) is a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

Question 27. NICS Background Checks: 18 U.S.C. 922(t) requires that prior to transferring any firearm to an unlicensed person, a licensed importer, manufacturer, or dealer must first contact the National Instant Criminal Background Check System (NICS). NICS will advise the licensee whether the system finds any information that the purchaser is prohibited by law from possessing or receiving a firearm. For purposes of this form, contacts to NICS include State agencies designated as points-of-contact (or POCs) to conduct NICS checks for the Federal Government.

The licensee should NOT contact NICS and must stop the transaction if there is reasonable cause to believe that the transferee/buyer is prohibited from receiving or possessing a firearm, including if: the transferee/buyer answered "no" to question 21.a.; the transferee/buyer answered "yes" to any question in 21.b. - 21.k.; the transferee/buyer answered "yes" to question 21.l.1., and answered "no" to question 21.l.2.; or the transferee/buyer cannot provide the documentation required by questions 26.a, b, c, or d. **Warning:** Any person who transfers a firearm to any person he/she knows or has reasonable cause to believe is prohibited from receiving or possessing a firearm violates the law, 18 U.S.C. 922(d), even if the transferor/seller has complied with the Federal background check requirements.

NICS Responses: If NICS provides a "proceed" response, the transaction may proceed. If NICS provides a "denied" or "cancelled" (and does not immediately provide a new transaction number) response, the transferor/seller is prohibited from transferring the firearm to the transferee/buyer. If NICS provides a "delayed" response, the transferor/seller is prohibited from transferring the firearm unless 3 business days have elapsed and, before the transfer, NICS or the State has not advised the transferor/seller that the transferee's/buyer's receipt or possession of the firearm would be in violation of law. (See 27 CFR 478.102(a) for an example of how to calculate 3 business days.) If NICS provides a "delayed" response, NICS also will provide a Missing Disposition Information (MDI) date that calculates the 3 business days and reflects when the firearm(s) can be transferred under Federal law. States may not provide an MDI date. Some States may not provide a transaction number for denials. However, if a firearm is transferred within the three business day period, a transaction number is required. State law may impose a waiting period or other requirements on transferring firearms.

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At the time that NICS is contacted, the licensee must record in question 27.a. - 27.c.: the date of contact, the NICS (or State) transaction number, and the initial response provided by NICS or the State. The licensee may record the date the firearms may be transferred to the transferee/buyer (also known as the Missing Disposition Information (MDI) date) in 27.c. that NICS provides for delayed transactions (States may not provide this date). If the licensee receives any subsequent response(s) before transferring the firearm, the licensee must record in question 27.d. any response later provided by NICS or the State, or that no response was provided within 3 business days. If the licensee receives a response from NICS or the State after the firearm has been transferred, he/she must record this information in question 27.e. If the transaction was denied and later overturned, in addition to checking the "Proceed" in 27.d. and entering the date, the licensee must also check "Overturned" and, if provided, attach the overturn certificate issued by NICS or the State POC to this ATF Form 4473. If more than 30 days have elapsed and a new NICS check is required, record the new transaction number, date of contact and the response provided by NICS or the State on this Form 4473 in questions 27.a.-27.c. **Note:** States acting as points of contact for NICS checks may use terms other than "proceed," "delayed," "cancelled," or "denied." In such cases, the licensee should check the box that corresponds to the State's response.

Questions 28 and 29. NICS Exceptions: A NICS check is not required if the transfer qualifies for any of the exceptions in 27 CFR 478.102(d). Generally these include: (a) transfers of National Firearms Act firearms to an individual who has undergone a background check during the NFA approval process; (b) transfers where the transferee/buyer has presented the licensee with a permit or license that allows the transferee/buyer to possess, acquire, or carry a firearm, and the permit has been recognized by ATF as a valid alternative to the NICS check requirement; or (c) transfers certified by ATF as exempt because compliance with the NICS check requirements is impracticable. If the transfer qualifies for one of these exceptions, the licensee must obtain the documentation required by 27 CFR 478.131. A firearm must not be transferred to any transferee/buyer who fails to provide such documentation.

A NICS check must be conducted if an NFA firearm has been approved for transfer to a trust, or to a legal entity such as a corporation, and no background check was conducted as part of the NFA approval process on the individual who will receive the firearm. Individuals who have undergone a background check during the NFA application process are listed on the approved NFA transfer form.

Section D

Questions 30 and 31. Transfer on a Different Day and Recertification: If the transfer takes place on a different day from the date that the transferee/buyer signed Section B, the licensee must again check the photo identification of the transferee/buyer at the time of transfer.

Section E

Question 32. For Use by Licensee: This item is for the licensee's use in recording any information he/she finds necessary to conduct business or any additional information received from NICS that is not recorded in Questions 27.a. - 27.e.

Privacy Act Information

Solicitation of this information is authorized under 18 U.S.C. 923(g) and 922(b)(5). Disclosure of this information by the transferee/buyer is mandatory for the transfer of a firearm. Disclosure of the individual's Social Security number is voluntary. The number may be used to verify the transferee's/buyer's identity.

For information about the routine uses of this form see System of Records Notice Justice/ATF-008, Regulatory Enforcement Records System (68 FR 163558, January 24, 2003).

Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine the eligibility of the transferee to receive and possess firearms under Federal law. The information is subject to inspection by ATF officers and is required by 18 U.S.C. 922 and 923.

The estimated average burden associated with this collection is 30 minutes per respondent or recordkeeper, depending on individual circumstances. Comments about the accuracy of this burden estimate and suggestions for reducing it should be directed to Reports Management Office, IT Coordination Staff, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, DC 20226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Confidentiality is not assured.

ATF Form 4473 (5300.9)
Revised May 2020

APPENDIX 4: The Federal Bureau of Investigation's Response to the Draft Audit Report



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

May 25, 2021

The Honorable Michael E. Horowitz
Inspector General
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Horowitz:

The Federal Bureau of Investigation (FBI) appreciates the opportunity to review and respond to your office's report entitled, *Audit of Selected Aspects of the Federal Bureau of Investigation's National Instant Criminal Background Check System*.

We agree it is important to strengthen controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state-of sale to ensure basic age eligibility. In that regard, we concur with your recommendation for the FBI.

Should you have any questions, feel free to contact me. We greatly appreciate the professionalism of your audit staff throughout this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Seiler", is positioned above the typed name of the signatory.

Thomas G. Seiler
Section Chief
External Audit and Compliance Section
Inspection Division

FBI DOJ-OIG SAFBINICS 000003

**The Federal Bureau of Investigation's (FBI) Response to the Office of the Inspector General's
Audit of Selected Aspects of the Federal Bureau of Investigation's National Instant Criminal
Background Check System**

Recommendation #1: The OIG recommends the FBI strengthen controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure basic age eligibility.

FBI Response to Recommendation #1: The FBI agrees to consider the recommendation from the Audit of Selected Aspects of the FBI's NICS report. As stated in the report, there are several factors that require research, analysis, and collaboration prior to a system modification; such as, coordination with the Point of Contact states to determine how extensive the system change would be for them, coordination with the Bureau of Alcohol, Tobacco, Firearms and Explosives, and a regulatory review for additional data collection. The FBI will begin the exploration of the necessary prerequisites of this recommendation on August 1, 2021 and estimates a completion by March 31, 2022.

FBI DOJ-OIG SAFBINICS 000004

APPENDIX 5: The Bureau of Alcohol, Tobacco, Firearms and Explosives' Response to the Draft Audit Report



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of Chief Counsel

June 14, 2021

MEMORANDUM TO: Assistant Inspector General for Audit Jason R. Malmstrom

FROM: Deputy Chief Counsel

SUBJECT: Response to Draft Audit Report – Audit of Selected Aspects of the
Federal Bureau of Investigation's National Instant Criminal Background
System

The Department of Justice, Office of the Inspector General, recently provided the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) with a draft "Audit of Selected Aspects of the Federal Bureau of Investigation's National Instant Criminal Background Check System" (NICS). As stated in the draft report, the first objective of the audit was to determine the circumstances under which the transfer of a firearm to a purchaser "who did not meet the purchaser's home state legal age requirement" occurred in Colorado during 2019, and how to mitigate the risks associated with prohibited firearm sales to out-of-state purchasers. In discussing the firearm transfer in Colorado in April 2019, the report states, "Florida law requires an individual be age 21 or older to purchase a firearm."¹ The report concluded that an 18-year-old Florida resident was able to purchase a firearm in Colorado even though she did not meet the age requirements for her state of residence as required by federal law.² As a result, the report recommends updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure basic age eligibility.³

The draft report, while taking no position on the matter as part of the audit, notes that ATF's investigation did not determine whether the sale by the Colorado FFL was improper because ATF has not issued guidance to the firearms industry regarding the Florida law that imposes the relevant age requirement for purchasing a firearm. While ATF does publish ATF Publication 5300.5, *State Laws and Published Ordinances*, to assist FFLs in complying with federal, state, and local laws when deciding whether to make an over-the-counter sale of a shotgun or rifle to an out-of-state resident, that publication also notes that, where appropriate, FFLs should contact state or local authorities before making that decision. The scope and effect of the age restriction

¹ Draft report, page 4.

² Draft report, page 10.

³ Draft report, page 10.

Assistant Inspector General for Audit

contained in Florida Statute 790.065(13), a statute enacted in 1989 to require Federally licensed firearms manufacturers, importers, and dealers in Florida contact the Florida Department of Law Enforcement prior to the sale or transfer of a firearm to an unlicensed person, is an example of a statute, the application of which, is appropriately directed to the Florida Attorney General.

Imposition of Age Restrictions on the Sale of Firearms Under the Gun Control Act

Federal law clearly places the responsibility for determining if the purchaser of a firearm is of appropriate age on the FFL making the sale. This is true whether the age restriction is imposed directly by federal law, as provided in 18 U.S.C. § 922(b)(1), or through the application of a state, county, or local law, as provided in 18 U.S.C. §§ 922(b)(2) and (3).

As noted in the report, 18 U.S.C. § 922(b)(1) makes it unlawful for an FFL to sell or deliver any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than 18 years of age, and if the firearm is other than a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than 21 years of age. While an FFL violates the law where the FFL transfers a firearm to an individual who does not meet the age restrictions in § 922(b)(1), age is not among the “prohibitors” set forth in 18 U.S.C. §§ 922(g) and (n).⁴

FFLs are also prohibited from selling or delivering any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in the state in which the licensee’s place of business is located, with limited exceptions. One such exception is set forth in 18 U.S.C. § 922(b)(3)(A), which states that § 922(b)(3) shall not apply to:

the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee’s place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), . . .

As originally enacted in 1968, the exception applied only to the sale or delivery of a rifle or shotgun to a resident of a state contiguous to the licensee’s state of business, and only if the purchaser’s state of residence permitted such sales and the sale fully complied with the legal

⁴ The lack of a Federal “prohibitor” in circumstances where an individual is not of sufficient age to purchase a firearm from an FFL has implications for the conducting of background checks pursuant to the Brady Handgun Violence Prevention Act. As provided in 18 U.S.C. § 922(t)(2), “if receipt of a firearm would not violate subsection (g) or (n) or State law” the system shall assign a unique identification number to the transfer. Under the language of the statute, therefore, a unique identification number shall be issued if the transferee is not prohibited from receiving a firearm under § 922(g) or (n) or state law, *even if* the transfer would violate § 922(b)(3). As with many other aspects of firearms sales and dispositions, the law relies upon FFLs to ensure that the sale of a firearm is to a person of sufficient age.

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conditions of sale in both such contiguous states.⁵ Thus, the 1968 version of § 922(b)(3) essentially required states to “opt in” to its residents purchasing rifles and shotguns in contiguous states. In addition, by limiting sales to contiguous states, an FFL making such a sale would have a limited number of state laws to master. However, in 1986, Congress amended § 922(b)(3) to eliminate the contiguous state restriction, as well as the requirement for enabling state legislation in the purchaser’s home state, opting instead to place directly on the FFL the burden and responsibility for ensuring the sale of a rifle or shotgun to an out-of-state resident complies with the conditions of sale in both locations. By including a presumption that FFLs who make over-the-counter sales to out-of-state residents have knowledge of the applicable state laws and published ordinances in both states, not just as to age to purchase, but *all* conditions of sale, delivery, and receipt, Congress clearly cautioned FFLs to carefully scrutinize such sales at the risk of possible prosecution.

State Laws and Published Ordinances

As previously noted, ATF P 5300.5 is a compilation of state and local laws relating to firearms sales, delivery, and receipt.⁶ The publication contains the following notation:

This material is not intended to provide legal advice and should be used only for informational purposes. It is possible that a state may have passed a more recent law(s) or issued interpretations or regulations that have yet to be published and are not included in this publication. If you have any questions regarding state, county or local laws, please contact your state's Attorney General.

Because a state or locality would be responsible for determining if a particular sale complied with the conditions of sale under its laws, where a possible violation of § 922(b)(3) has occurred, like an FFL, ATF would look to the state or locality for guidance as to whether the FFL failed to comply with state or local law, especially where a statute or ordinance is subject to multiple interpretations.

Florida Statute § 790.065

On February 14, 2018, the deadliest high school shooting in the United States took place at Marjory Stoneman Douglas High School in Parkland, Florida, killing 17 people and injuring 17 more. On February 21, 2018, Florida Senate Bill 7026, the “Marjory Stoneman Douglas High School Public Safety Act” (Act) was introduced seeking to, among other things, prohibit persons adjudicated mentally defective or committed to a mental institution from owning or possessing a firearm until certain relief is granted; set age limits for the purchase of a firearm; and prohibit specified acts relating to the sale and possession of bump-fire stocks. On March 9, 2018, the Governor signed the Act into law.

⁵ See Public Law 90-618.

⁶ <https://www.atf.gov/firearms/state-laws-and-published-ordinances-firearms-34th-edition>.

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The Act added new provisions to Florida law (such as the addition of § 790.401 “The Risk Protection Order Act”), and amended other provision of Florida law. Among the amendments made by the Act was the inclusion of a new paragraph in Florida Statute § 790.065, entitled “Sale and delivery of firearms.” As renumbered, § 790.065(13) states:

A person younger than 21 years of age may not purchase a firearm. The sale or transfer of a firearm to a person younger than 21 years of age may not be made or facilitated by a licensed importer, licensed manufacturer, or licensed dealer. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The prohibitions of this subsection do not apply to the purchase of a rifle or shotgun by a law enforcement officer or correctional officer, as those terms are defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9), or a servicemember as defined in s. 250.01.

The report, while correctly quoting the first sentence of § 790.065(13), fails to provide the context in which that sentence appears. Initially it should be noted that § 790.065 is, first and foremost, the Florida statute that establishes the responsibilities of FFLs and the Florida Department of Law Enforcement (FDLE) in relation to the conducting of background checks for the sale or delivery of a firearm from a licensee’s inventory at the licensed premises to an unlicensed person. As noted in the report, Florida is a NICS Point-of-Contact (POC) state.⁷ Florida law requires an FFL contact FDLE prior to selling a firearm from the licensee’s inventory and premises. Recognizing that it would be problematic if FFLs in other states were required to conduct background checks through FDLE as a condition to selling or delivering a rifle or shotgun to a Florida resident, § 790.065(1)(c) states “[t]his subsection does not apply to the purchase, trade, or transfer of a rifle or shotgun by a resident of this state when the resident makes such purchase, trade, or transfer from a licensed importer, licensed manufacturer, or licensed dealer in another state.” Given that, prior to amendment pursuant to the Act, the remainder of § 790.065 addressed the manner of processing of a firearm sale pursuant to a background check conducted by FDLE upon request of a Florida FFL, the statute could reasonably be interpreted to apply only to transactions involving FFLs, and only FFLs operating in the State of Florida.

The Act’s language amending § 790.065 calls into question whether the Florida legislature actually intended: 1) to prohibit any person younger than 21 from purchasing a firearm from any source; 2) to prohibit any person younger than 21 from purchasing a firearm only from an FFL within or outside Florida; or 3) to prohibit any person under 21 from purchasing a firearm from a

⁷ The chart included in the report is not entirely accurate as related to background checks conducted in the State of Florida. The chart designates Florida as a “Full POC State” stating “FFLs contact state for all firearm background checks.” See Draft report, page 1. While FFLs must contact FDLE to conduct a background check on any sale or delivery from the licensee’s inventory, Florida does not consider the redemption of a firearm from pawn within the pawn redemption period to be a sale or delivery from inventory, therefore, an FFL may conduct a background check through the FBI when the firearm transfer is a pawn redemption. See <https://www.fdle.state.fl.us/FPP/FAQs1.aspx>. While FDLE will conduct a background check upon request of an FFL for a pawn redemption, many FFLs use the FBI to conduct background checks on pawn redemptions to avoid the fee assessed by FDLE on each background check.

Assistant Inspector General for Audit

Florida FFL through FDLE's denying the transfer as part of a background check. While Florida may well intend to assert the broadest reading of § 790.065(13) to limit the purchase of firearms by Florida residents under 21, the language of the statute is not so obvious as to defeat all other possible interpretations.

When the application of a state law to firearms sales or transfers is at issue, ATF will ordinarily contact the Attorney General in that state to seek clarification. In this case, however, the National Rifle Association filed suit against the Florida Attorney General and FDLE in the United States District Court for the Northern District of Florida, Case No. 4:18cv137, on the same day the Act was signed, challenging the age restrictions imposed by the Act. The case, which may ultimately provide some direction as to the scope and application of § 790.065(13), remains pending and in active litigation.

Given that there are a variety of ways to read the relevant Florida statute, that no guidance is forthcoming from the Florida Attorney General, and that the statute is the subject of ongoing litigation, ATF does not believe it would be appropriate – or even possible after any hearing on the matter – to hold the Colorado FFL responsible for a *willful* violation of the Gun Control Act for the sale at issue.

Conclusion

In amending § 922(b)(3) Congress stated its intent to allow persons to purchase rifles and shotguns in states other than their state of residence, and did so by advising FFLs that they would be held accountable should the FFL sell a rifle or shotgun to an out-of-state resident that does not comply with the sale, delivery, and receipt laws of both the state of transfer, and the purchaser's home state. Congress placed this responsibility on the FFL with an understanding that the complexity of state firearms laws vary widely, and the regulation of firearms sales is continually evolving in states and localities. Although the report points to § 790.065, and suggests that improper firearms sales to persons under 21 could be resolved by "updating" the NICS database, § 790.065 actually demonstrates that, along with denying the sale of firearms to persons whose purchase runs afoul of Florida law, it would also result in NICS issuing denials on the transfer of firearms that do *not* violate Florida law - a result not intended or supported by the Gun Control Act.



Pamela J. Hicks

APPENDIX 6: Office of the Inspector General Analysis and Summary of Actions Necessary to Close the Report

The OIG provided a draft of this audit report to the FBI. The FBI's response is incorporated as Appendix 4. In response to our draft audit report, the FBI concurred with our recommendation and discussed the actions it will implement in response to our findings. As a result, the audit report is resolved.

The OIG also provided a draft of this audit report to ATF because of the references to ATF throughout the report due to ATF's role in enforcing federal firearms laws. ATF's response is incorporated as Appendix 5. In its response, ATF stated that the scope and effect of the age restriction in Florida Statute § 790.065(13) is an issue appropriately directed to the Florida Attorney General. Florida Statute § 790.065(13), enacted as part of the Marjory Stoneman Douglas High School Public Safety Act, § 10, 2018 Fla. Sess. Law Serv. Ch. 2018-3 (C.S.S.B. 7026) (West) (the Act), states in pertinent part: "A person younger than 21 years of age may not purchase a firearm."²⁶ ATF further states that the report fails to provide the context in which the above-noted sentence appears and that, read in context, the statute could reasonably be interpreted to have a more narrow application than the broad prohibition on purchases of firearms by any person younger than 21 that the plain language suggests, such as to apply only to transactions involving FFLs, and only FFLs operating in the State of Florida. ATF states that: (1) there are a variety of ways to read the Florida statute; (2) there is no guidance forthcoming from the Florida Attorney General; and (3) the statute is the subject of ongoing federal litigation brought by the National Rifle Association (NRA). ATF concludes, therefore, that it would not be appropriate or possible until after any hearing in the aforementioned litigation for ATF to hold the Colorado FFL responsible for a willful violation of the federal Gun Control Act for the sale at issue in this report.²⁷ ATF further concludes that our recommendation—that FBI update the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure

²⁶ In full, the provision is as follows: "A person younger than 21 years of age may not purchase a firearm. The sale or transfer of a firearm to a person younger than 21 years of age may not be made or facilitated by a licensed importer, licensed manufacturer, or licensed dealer. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The prohibitions of this subsection do not apply to the purchase of a rifle or shotgun by a law enforcement officer or correctional officer, as those terms are defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9), or a servicemember as defined in s. 250.01." Florida Statute 780.065(13).

²⁷ On June 24, 2021, subsequent to ATF's June 15, 2021, response, the federal district court in the *Swearingen* matter, the litigation involving the NRA, issued an opinion in which it rejected the NRA's constitutional challenge to Florida Statute 790.065(13), granted summary judgment in favor of defendant Rick Swearingen, Commissioner of the Florida Department of Law Enforcement, and dismissed the NRA's claims with prejudice. The Court upheld the Florida statute, which it described as "a total ban on the purchase of any firearm from any source" for most 18-to-20-year-old Florida residents (with limited exceptions, as stated in subsection (13), for law enforcement officers, correctional officers, and servicemembers), in part because the Court concluded that, due to longstanding restrictions on purchase of firearms by 18 to 20 year-olds, the Second Amendment did not apply to such purchases. On July 7, 2021, the NRA filed an appeal of the decision. The OIG offered ATF the opportunity to amend its June 15, 2021, response in view of its reliance on the ongoing federal litigation as a reason for its uncertainty about the proper interpretation of the statute. ATF declined to amend its response, but in communications with the OIG about the opinion, ATF maintained that, to the extent the district court opinion suggests that the Florida Attorney General's position is that § 790.065(13) constitutes a ban on the purchase of firearms by 18-to-20-year-olds from any source, the opinion does not address whether that restriction is applicable to persons or licensees outside the State of Florida, nor does it change the uncertainty as to the application of the statute at the time of the transaction in Colorado in April 2019.

basic age eligibility—would result in NICS issuing denials on the transfer of firearms that do not violate Florida law, which is a result not intended or supported by the Gun Control Act.

We disagree with the premises underlying ATF's response. ATF's response sought to cast doubt on the scope and meaning of the prohibition in Florida Statute § 790.065(13). However, we did not undertake this audit to review ATF's actions in investigating the Colorado transaction or to make a finding about whether this transaction violated the federal Gun Control Act because it failed to fully comply with the conditions of sale under Florida law. Rather, we focused on the Colorado transaction because it demonstrates a control weakness in the process for verifying, through FBI's NICS, out-of-state purchasers' eligibility for firearms purchases, and we believe that weakness can and should be addressed. In the Colorado transaction, the FFL did not verify that the purchaser met the age requirement of the purchaser's state of residence, Florida. NICS and state POCs rely solely on FFLs to verify whether an individual meets the eligibility requirements for both the state of sale and the state of residence for out-of-state purchases. If an FFL makes an error in determining the state of residence age requirement in such a scenario, or if an FFL fails to verify this requirement altogether, NICS does not have an automatic check to identify the error and simply returns a result to the NICS inquiry without regard for this federal Gun Control Act requirement. Thus, the Colorado transaction demonstrates the need for our recommended improvement to the NICS background check process, which we believe would reduce the risk of improper firearms sales under federal law. FBI agrees with that recommendation.

Regarding ATF's legal analysis, it is not for the OIG to opine, as a matter of law, on either Florida's Marjory Stoneman Douglas High School Public Safety Act or the scope of ATF's enforcement policy, nor were the ATF's enforcement policies the focus of this audit. However, ATF's response raises significant questions about its interpretation of the plain language of Florida Statute § 790.065(13), which flatly states that "[a] person younger than 21 years of age may not purchase a firearm." These concerns are greatly heightened by the legislative history of the Act, which makes clear that it was the Florida legislature's intent to raise the age from 18 to 21 years for all firearm purchases as part of its approach to comprehensively address the crisis of gun violence, including on school campuses. Additionally, although the NRA has since appealed the decision, the federal district court in *Swearingen* upheld the constitutionality of Florida Statute § 790.065(13), which it described as, for virtually all 18-to-20-year-olds, "a total ban on the purchase of any firearm from any source." We are also concerned that the ATF appears to have adopted in its response to our report a position that would essentially require a federal court, or a state court or regulatory body, to confirm the enforceability of an enacted state statute before the ATF will give that statute force and effect under the federal Gun Control Act. We believe such an approach is untenable. If ATF is inclined to the non-enforcement of the federal Gun Control Act, either with respect to this Florida law or in other instances when the ATF is unsure how to interpret a state law whose application is key to determining whether a violation of federal law has occurred, ATF should seek advice from the Department's Office of Legal Counsel concerning the interpretation of the state law and the effect of any interpretive questions on the ATF's proper enforcement posture under the federal Gun Control Act.

Lastly, we do not agree with or understand ATF's assertion that our recommendation would result in NICS issuing denials on the transfer of firearms that do not violate Florida law. Florida law requires that virtually all purchasers of any firearm be 21 years old. To the extent limited exceptions to this age requirement exist (i.e., for law enforcement officers, correctional officers, and servicemembers), those exceptions would need to be accurately reflected in any modification to NICS such that the NICS requirements mirror eligibility requirements. The result of such a modification, responsibly implemented, would be that those who are

ineligible to purchase firearms—and only those who are ineligible—would be properly denied through NICS because they fail to meet the age requirements in their state of residence.

The following provides the OIG analysis of the response and summary of actions necessary to close the report.

Recommendation for the FBI:

- 1. Strengthen controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure basic age eligibility.**

Resolved. The FBI concurred with our recommendation. In its response, the FBI stated it agrees to consider the recommendation. The FBI believes, as stated in the report, there are several factors that require research, analysis, and collaboration prior to a system modification; such as, coordination with the Point of Contact states to determine how extensive the system change would be for them, coordination with the Bureau of Alcohol, Tobacco, Firearms and Explosives, and a regulatory review for additional data collection. The FBI stated that it will begin the exploration of the necessary prerequisites of this recommendation on August 1, 2021, and estimates a completion by March 31, 2022.

This recommendation can be closed when we receive documentation that the FBI has strengthened its controls over the sale of firearms to out-of-state purchasers by updating the NICS background check to verify age requirements of an out-of-state firearm purchaser's state of residence and state of sale to ensure basic age eligibility.