



Office of the Inspector General  
U.S. Department of Justice



# **Audit of the Handling of Firearms Purchase Denials Through the National Instant Criminal Background Check System**

# **AUDIT OF THE HANDLING OF FIREARMS PURCHASE DENIALS THROUGH THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM**

## **EXECUTIVE SUMMARY**

The National Instant Criminal Background Check System (NICS) is used by Federal Firearms Licensees, importers, and manufacturers (collectively, “dealers”) to determine whether a prospective 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. Providing false information is a federal crime.

If a prospective purchaser answers “yes” to any questions, the sale must be denied. Otherwise, the dealer generally must request a NICS check from the Federal Bureau of Investigation (FBI) or their state point of contact. The transfer can occur only if the check does not identify prohibitive criteria, or if it takes more than 3 business days. If 3 business days pass without a determination that the transaction can be approved or must be denied, the dealer can either complete the sale (unless prohibited by local law) or wait for the check to be performed.

For approved transactions, identifying information about the purchaser and firearm is purged from NICS within 24 hours pursuant to federal law. For denied transactions, the FBI sends relevant information to ATF’s Denial Enforcement and NICS Intelligence (DENI) Branch for possible investigation. For a “delayed denial,” where a firearm transfer to a prohibited purchaser occurred because the check took more than 3 business days to complete, ATF is charged with recovering the firearm. Additionally, ATF consults with U.S. Attorneys’ Offices (USAO) to decide whether to refer for possible prosecution denial cases that it believes have prosecutorial merit.

The Department of Justice (DOJ) Office of the Inspector General (OIG) undertook this audit to examine (1) the effectiveness of the FBI’s quality control processes for NICS transactions, the impact of state reporting and recording on FBI NICS determinations, and the FBI’s referral of denied NICS transactions to ATF; (2) ATF’s initial screening and referral of denied transactions to its field offices for investigation, and ATF field offices’ investigation of denied transactions; and (3) the USAOs’ prosecution of crimes associated with denials.

### FBI Processing of NICS Requests

We found the FBI generally has an effective internal control system and quality control process. The FBI processed more than 51 million NICS transactions from 2008 to 2014, and approved or denied about 50 million of them (state authorities processed more than 68 million requests during the same period). The FBI denied 556,496 of these transactions. The FBI told us its quality control process results in an accuracy rate that ranges from 99.3 percent to 99.8 percent.

We judgmentally selected 447 denied transactions and found that only 1 transaction was incorrectly denied, resulting in a 99.8 percent accuracy rate.<sup>1</sup>

We also reviewed NICS requests that remained open at the FBI on the 88th calendar day without an approval or a denial because federal regulation requires that unresolved requests be purged from NICS prior to the 90th calendar day. Of the roughly 42 million transactions the FBI processed from fiscal year (FY) 2008 to FY 2013, the FBI purged slightly more than 1 percent due to lack of approval or denial within 90 days. We reviewed 384 of these transactions and determined the FBI appropriately followed its processes in 375 of them (97.7 percent) and committed errors in 9.

We also assessed instances where a delayed denial, an incorrect approval that was discovered within 24 hours, or other errors by the FBI may have resulted in a firearm transfer to a prohibited person. We identified 1,092 transaction records that were marked to indicate the FBI denied the transaction within 3 business days and also that ATF retrieval may be required. We judgmentally selected 306 out of the 1,092 transactions. For 241 of them, we determined the FBI appropriately followed its processes, or the errors did not affect operations. However, for 6 transactions, we found that while the FBI recorded denials internally within 3 days, the denial was not communicated to dealers until from 1 day to more than 7 months after the denial. Additionally, we found that 59 transactions were initially approved by the FBI but should have been denied. The FBI's quality control checks identified and corrected 57 of these errors as a part of its internal review process.

Although we found the overall FBI error rate was exceedingly low, even an isolated NICS process breakdown can have tragic consequences, as evidenced by the June 2015 fatal shooting at a Charleston, South Carolina church, where the NICS process, with timely and accurate data from local agencies, could have prevented the alleged shooter from purchasing the gun he allegedly used. A subsequent FBI Inspection Division (INSD) report attributed primary responsibility for the delay that allowed the firearm to be transferred to untimely responses and incomplete records at various state and local agencies that feed into NICS, a problem we identified more generally in our review. INSD's review also determined that a check of the National Data Exchange (N-DEX), an FBI-developed repository of unclassified criminal justice records, would have revealed a prohibiting incident report for the alleged shooter, leading INSD to recommend the FBI seek to identify and review additional database resources or stakeholders both internal and external to the FBI. FBI officials told us that its NICS Section would need law enforcement approval (by way of the Advisory Policy Board) and a regulation change (28 CFR Part 25) in order to access N-DEX to conduct firearm background checks.

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<sup>1</sup> Because the FBI must purge from NICS identifying information for approved transactions within 24 hours, we could not review past FBI approvals to determine if they were approved correctly.

We also found that a number of errors were not caught due to weaknesses in the FBI's system for following up on pending transactions. For example, the NICS system does not have a tracking process to ensure that external research requests are made in a timely manner for each open transaction, requested information is received and evaluated in a timely manner, and further research is conducted when needed. The FBI told us it intends to implement an automated feature in the new NICS system to send second requests for information to agencies that do not respond in the first instance, but it does not yet have an implementation date for this feature.

#### Information from State NICS Checks

From 2008 through 2014, states handled about 68 million of the more than 119 million NICS transactions. To help ensure the completeness of the NICS database, states are required to update it with supporting documents when a prospective purchaser attempts to buy a firearm and is approved, denied, or delayed. We reviewed a judgmental sample of 631 state processed transactions and determined that in 630 of them the states did not fully update the NICS database or inform the FBI of the transaction's outcome. These failures mean the NICS database is incomplete, and increases the risk that individuals found by states to be prohibited purchasers could be able to purchase firearms in the future.

#### ATF Handling of NICS Denials

We found ATF's controls generally have enabled it to appropriately process denials and refer them to the proper field division for investigation. We determined the ATF DENI Branch processed 99 percent of the 447 FBI referrals we reviewed in accordance with its policy. To assess ATF's firearm recoveries, we reviewed field divisions' retrieval efforts for 125 firearms needing recovery from our sampled transactions previously discussed. We determined ATF recovered 116 of those firearms, including all firearms inappropriately transferred due to FBI error, and that ATF made reasonable attempts to recover 8 of the 9 remaining firearms.

Our audit also revealed a group of NICS transactions the FBI denied but ATF believed should have been approved because of a disagreement regarding the definition of a "Fugitive from Justice," a category that disqualifies prospective gun purchasers. This disagreement was referred to the Department's Office of Legal Counsel (OLC) in 2008, and OLC provided informal advice in July 2008. In August 2010, the FBI requested formal reconsideration of that advice, but 6 years later OLC still has not rendered a decision. We believe this issue should be addressed as soon as possible. Of those transactions that were denied by the FBI in this category from November 1999 through May 2015, there were 49,448 instances in which ATF did not agree with the FBI's denial determination. ATF tracked these cases as FBI denials but, because ATF did not agree with that determination, ATF

did not attempt to recover the firearm in the 2,183 instances in which the firearm was transferred.<sup>2</sup>

### Prosecutions Related to NICS Denials

We found that the number of NICS denial prosecutions has dropped substantially since FY 2003, when 166 subjects were accepted for consideration of prosecution. Between FY 2008 and FY 2015, an 8 year period, ATF formally referred 509 NICS denial cases that included 558 subjects to USAOs for possible prosecution. The USAOs accepted for consideration of prosecution 254 subjects (or less than 32 subjects per year), declined to prosecute 272 subjects, and decisions for 32 were pending at the time of our review.<sup>3</sup>

We determined that, in general, USAOs most often prosecuted NICS denial cases when aggravated circumstances existed in addition to the prospective purchaser's false "no" answer to at least one question on the Form 4473. An Executive Office for U.S. Attorneys (EOUSA) official told us and the Department confirmed in response to a draft of this report that their decisions reflected the application of the principle of the Department's *Smart on Crime Initiative* that directs USAOs to prioritize prosecutions to focus on the most serious cases that implicate the most substantial federal interests.

After the school shooting in Sandy Hook, Connecticut, the White House issued a report in January 2013 titled "Now is the Time: The President's Plan to Protect our Children and our Communities by Reducing Gun Violence." One part of the multi-tiered plan, entitled "[m]aximize enforcement efforts to prevent gun violence and prosecute gun crime," stated that the Attorney General would ask U.S. Attorneys to consider whether additional efforts would be appropriate in areas such as the prosecution of felons who illegally seek to obtain a firearm, and persons who attempt to evade the NICS system by providing false information. When we asked what the Attorney General did in response to the President's plan, EOUSA explained that it provided U.S. Attorneys with two Presidential Memoranda, one on firearms tracing and one on improving records availability to NICS. However, these two memoranda addressed other parts of the "Now is the Time" plan and did not relate directly to the "maximize[ing] enforcement efforts" provision.

Thereafter, in response to a draft of this report, the Department stated that the Attorney General spoke with the U.S. Attorneys about the President's plan on the afternoon of January 16, 2013, the date the President announced his plan. In addition, the Department noted that two U.S. Attorneys testified before Congress in February 2013 that, while the Department would prosecute particularly egregious false "no" cases arising from NICS denials, it would prioritize prosecuting prohibited persons who actually obtained guns illegally as opposed to those who attempted to

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<sup>2</sup> The disagreement between ATF and FBI on the Fugitive from Justice category applies to one subset of that category, not the entire universe.

<sup>3</sup> It was later determined that one case was misidentified as a NICS case.

purchase a firearm by making false statements during the background process but were unsuccessful.<sup>4</sup> EOUSA also provided the OIG with a White House Fact Sheet stating that on January 6, 2016, Attorney General Lynch instructed U.S. Attorneys to “continue to focus their resources – as they have for the past several years under the Department’s Smart on Crime initiative – on the most impactful cases, including those targeting violent offenders, illegal firearms traffickers, and dangerous individuals who bypass the background check system to acquire weapons illegally.”

We found that the number of NICS cases arising from denials prosecuted annually by the Department has not changed significantly since the President’s plan was issued, declining slightly from 24 in FY 2013 to 15 in FY 2014 and 20 in FY 2015, though the numbers of such cases remain extremely low compared to the overall number of federal firearms prosecutions.<sup>5</sup> In response to a draft of this report, EOUSA provided the OIG with FY 2016 data reflecting that overall number of firearms cases filed were projected to rise 4.3 percent over the average from FY 2012 through FY 2015, and that the percentage of firearms defendants as a share of the overall number of federal defendants would rise from 13.9 percent to a projected 15.7 percent during the same period, all of which it indicated reflected the Department’s prioritization of firearms prosecutions generally. The Department further indicated that it believes that it has consistently and appropriately prioritized the most impactful firearms prosecutions, and that at present there is no reason for it to reconsider its approach to NICS false “no” cases.

This report provides six recommendations to help improve the NICS process throughout the Department and to better ensure that state points of contact appropriately and timely update NICS.

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<sup>4</sup> See Testimony of Timothy J. Heaphy, United States Attorney for the Western District of Virginia, before the Subcommittee on the Constitution, Civil Rights and Human Rights, Senate Judiciary Committee (February 12, 2013); see also Testimony of John F. Walsh, United States Attorney for the District of Colorado, before the Senate Judiciary Committee (February 27, 2013).

<sup>5</sup> In FY 2014, there were six subjects where a decision to consider prosecution was pending. In FY 2015, 19 decisions were pending.

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# AUDIT OF THE HANDLING OF FIREARMS PURCHASE DENIALS THROUGH THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM

## INTRODUCTION

The Gun Control Act of 1968, Public Law 90-618 (Gun Control Act) established regulations for buying and selling firearms and identified nine categories of persons prohibited from possessing firearms.<sup>6</sup> *The Brady Handgun Violence Prevention Act of 1993* (Brady Act) led to the creation in 1998 of the National Instant Criminal Background Check System (NICS) to help prevent prohibited firearm purchases by requiring background checks for individuals purchasing firearms from Federal Firearms Licensees, manufacturers, and importers (dealers). The Brady Act gave states the option of deciding whether to permit dealers to initiate background checks directly through the Federal Bureau of Investigation (FBI) or instead use a state-based NICS program where a designated state agency serves as the point of contact between dealers and the FBI.<sup>7</sup> The Brady Act also allows for 3 full business days to complete the background check, after which a dealer is legally permitted to transfer a firearm to a customer, if otherwise allowed by state law, even while the NICS background check continues.

### The FBI's Role in the NICS Process

The National Instant Criminal Background Check System is a multi-faceted process that begins for a prospective firearms purchase when a person provides a dealer with photo identification and a completed Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473, Firearms Transaction Record. This ATF application form includes a series of questions corresponding to the categories of persons prohibited from possessing firearms. If the person answers "yes" to any of these questions, the dealer is required to deny the sale. Otherwise, the dealer must initiate a NICS background check either through the FBI NICS call center, NICS E-Check system or, in designated states, through the state point of contact.

The FBI call center operators perform initial NICS background checks for NICS transactions in 30 states, 5 U.S. territories, the District of Columbia, as well

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<sup>6</sup> The nine categories of prohibited persons are: (1) persons under indictment for or convicted of a crime punishable by imprisonment for a term exceeding 1 year, (2) fugitives from justice, (3) unlawful users and/or addicts of any controlled substances, (4) persons adjudicated as mentally defective or who have been committed to any mental institution, (5) illegal aliens or aliens admitted to the United States under a nonimmigrant visa, (6) persons dishonorably discharged from the U.S. Armed Forces, (7) those who have renounced their U.S. citizenship, (8) subjects of a protective court order, and (9) persons convicted of a misdemeanor crime of domestic violence.

<sup>7</sup> For a map showing how each state participates, see Appendix 2.

as transactions involving long guns (rifles or shotguns) in seven additional states.<sup>8</sup> Transactions requiring additional screening, as well as those initiated by dealers through the online NICS E-Check system are sent to the FBI's Criminal Justice Information Services Division's (CJIS) NICS Section (NICS Section) located in Clarksburg, West Virginia.<sup>9</sup> The FBI's NICS Section operates and maintains the NICS database and assists dealers in identifying persons prohibited from possessing firearms. The NICS database includes the data contained in three separate indices: (1) the Interstate Identification Index, (2) the National Crime Information Center database, and (3) the NICS Index.<sup>10</sup> The NICS database also includes the results of inquiries with the U.S. Immigration and Customs Enforcement for all non-United States citizens. As of February 2016, the NICS Section had 511 employees on board with plans to increase staff to 609 by the end of fiscal year (FY) 2016.

In the 13 states where the state government has agreed to serve as the point of contact for NICS, and for transactions involving handguns in 7 additional states, dealers contact the state designated point of contact to request NICS background checks. For these point-of-contact transactions, the state designated agency is responsible for conducting all aspects of the background checks in accordance with state and federal laws, including querying the NICS database, approving or denying the transaction, updating the NICS records with the results, and recovering firearms improperly transferred.

In accordance with federal regulations and participation agreements between state points of contact and the FBI's CJIS, states are required to update the NICS database by uploading the documents supporting their decisions, to notify dealers and the NICS Section when firearm transfers are denied or delayed, and to maintain complete and accurate information in NICS. Compliance with these requirements makes this information readily available to facilitate future NICS queries. Neither federal regulations nor the CJIS agreements specify a timeframe for states to update the data in NICS. As noted above, in 13 states, the state serves as the point of contact for all firearms purchases; and in 7 other states the state serves as the point of contact for certain gun purchases but not others. Finally, in 36 states and territories, the FBI's NICS Section is the sole contact to

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<sup>8</sup> Call center operators are located in Fort Worth, Texas; Barbourville, Kentucky; and Wheeling, West Virginia. As of March 31, 2016, the Fort Worth, Texas, location was closed. NICS accepts calls 7 days a week, 17 hours a day (8 am to 1 am, Eastern Time) and is closed only on Christmas Day.

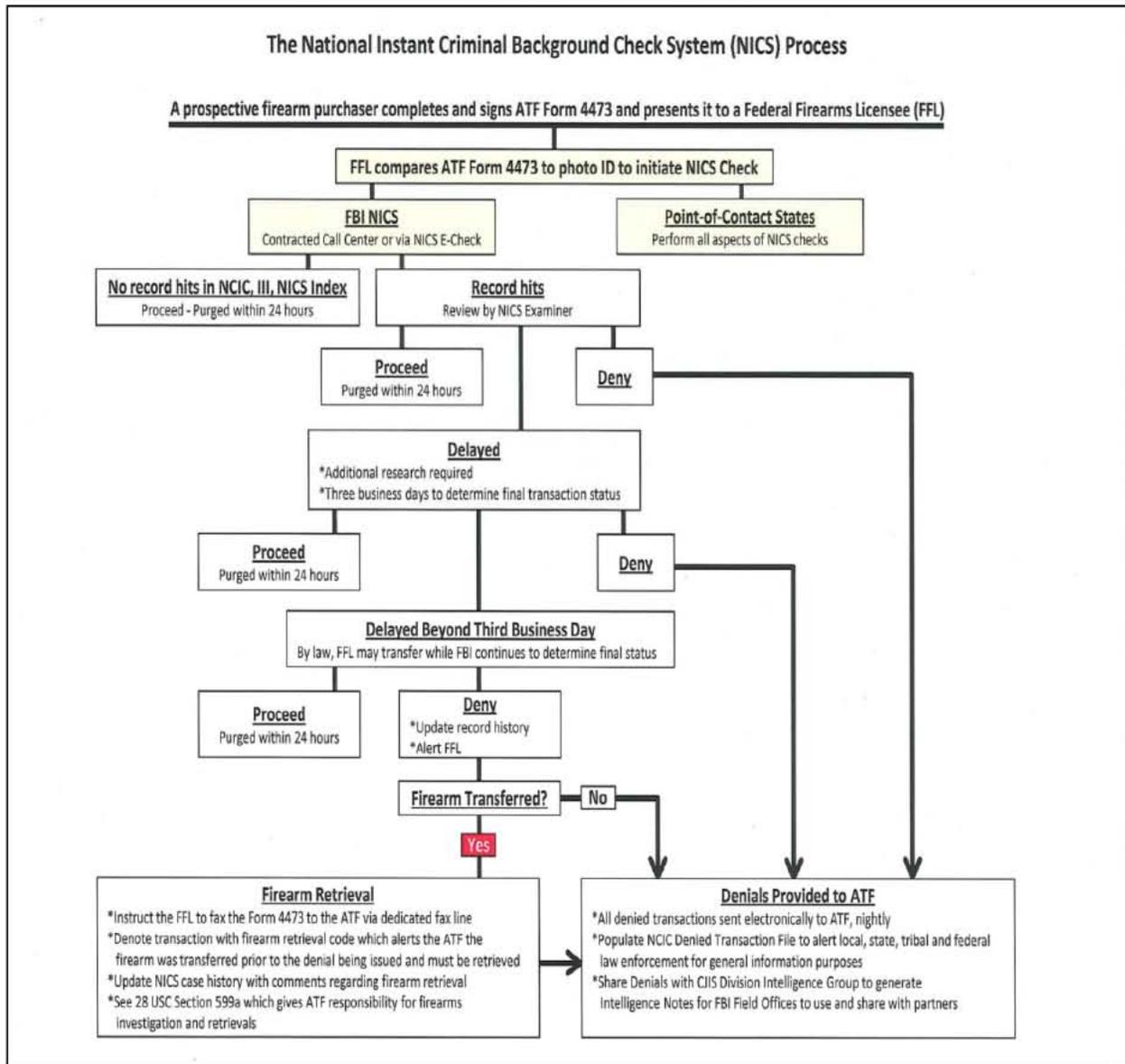
<sup>9</sup> The NICS E-Check system is an online version of NICS, in which dealers can view the status of the background check 24 hours a day, except during scheduled and unscheduled downtimes. The review of firearms transactions must be conducted and processed by NICS Legal Instrument Examiners and the results are provided electronically via E-Check.

<sup>10</sup> The Interstate Identification Index contains individual criminal history records. The National Crime Information Center database contains information on protective orders, active felony or misdemeanor warrants, and other files. The NICS Index contains information provided by federal, state, and local agencies on other prohibited persons such as illegal aliens, persons who renounced their citizenship, persons adjudicated mentally defective, persons dishonorably discharged from the military, and controlled substance abusers.

approve firearms purchases. Appendix 2 provides a map showing how each state and territory participates in NICS.

Whether the NICS background check is initiated through the FBI or state points of contact, the process for verifying customers' identity and histories are similar. This workflow process as represented from the federal perspective is depicted in Figure 1.

**Figure 1**  
**The Federal NICS Workflow Process**



Note: The workflow process for state points of contacts are not intended to be represented by this diagram, although they involve similar responsibilities.

Source: The FBI

## *The FBI's NICS Section*

Upon receiving a request for a background check, the NICS call center operator or NICS E-Check system queries NICS for possible matching records that would prohibit the purchaser from possessing a firearm. If no disqualifying information is found, NICS notifies the dealer that the firearm transfer is approved and may proceed.<sup>11</sup> The FBI NICS Section Chief told us that 72 percent of NICS checks result in an immediate approval to proceed. The remaining 28 percent are held for additional review because the initial NICS screening found potentially prohibitive records that may match the identity of the purchaser. For cases held for further review, the dealer is notified that the transaction is "delayed" and the transaction undergoes further scrutiny by an FBI NICS Section Legal Instrument Examiner (NICS Examiner).<sup>12</sup>

After 3 full business days without receiving a confirmed denial or approval of a NICS background check, dealers have the right to transfer the firearm to customers under the Brady Act, although individual state's laws may prohibit this. Regardless of whether the firearm may have been transferred to the customer, the NICS checks continue for a maximum of 88 days, after which they effectively terminate and transaction records are purged in accordance with federal regulations.<sup>13</sup> If the NICS check confirms that the customer is prohibited from purchasing firearms within 90 days, the NICS Examiner advises the dealer that the firearm transfer is denied.<sup>14</sup> The NICS Section transmits all the data collected in connection with the federally denied transactions to ATF for such additional review,

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<sup>11</sup> For all approved NICS transactions, identifying information about the purchaser and the firearm is purged from NICS within 24 hours in accordance with federal law. Records of denied transactions are not purged from the system. Purchaser identifying information must also be purged for open NICS transactions that are not approved or denied within 90 calendar days. For all purged records, NICS retains the original NICS transaction number and date of the initial NICS check for potential further inquiries, such as status queries, appeals, or ATF reviews of dealers.

<sup>12</sup> In point-of-contact states, the point of contact confirms any possible matching records and notifies the dealer that the transfer may proceed, is delayed pending further record analysis, or is denied (28 C.F.R. § 25.6(g)(2)).

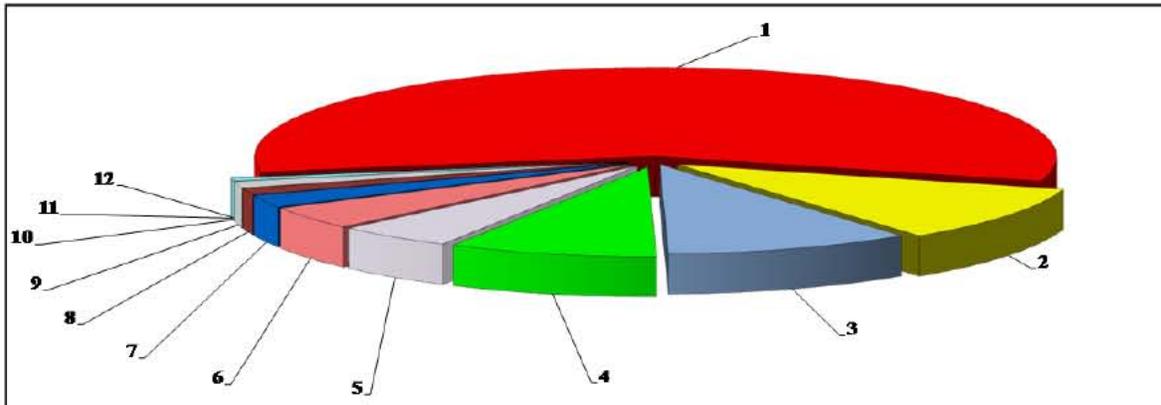
<sup>13</sup> Multiple factors may lead to transactions that are delayed for more than 3 business days, for example a NICS record may show the customer was arrested for possible commission of a crime, and therefore the NICS Examiner would need to conduct more research or wait for a response to a request for information from judicial or law enforcement agencies to determine whether the customer was convicted. Federal regulation 28 C.F.R. § 25.9(b)(1) requires that transaction records for NICS checks that remain open for 90 calendar days are purged from the system. The FBI purges transaction records on the 89<sup>th</sup> calendar day, except for transactions that are open because of an appeal or audit. Those transactions remain open until a decision is reached on the appeal. Even after the transaction records have been purged, the NICS Section will nevertheless continue to accept and record in the NICS databases, any information regarding the customer received from the courts or law enforcement for future NICS transaction checks.

<sup>14</sup> NICS transactions remain in an open status while NICS Examiners or state points of contact conduct additional research or wait for judicial or law enforcement agencies to provide additional information. We determined that from FY 2003 through May 2013, about 2 percent, or about 1.3 million records remained in an open or pending status until they were purged from NICS.

further processing, and firearms recoveries as ATF may determine to be appropriate.

As shown in Appendices 3 through 5, the FBI NICS Section reports that, during the over 16 years from November 30, 1998, through December 31, 2014, dealers initiated almost 202.5 million background checks – about 93.5 million through the FBI and about 109 million through state points of contact – and that almost 1.2 million FBI background checks were denied during this period. Table 1 below shows the reasons reported by the FBI for the denials.

**Table 1**  
**NICS Checks Denied by the FBI and the Reasons for the Denial**  
**(November 30, 1998, through December 31, 2014)**



Rank	Prohibited Category Description	Total	Percent of Total
1	Convicted of a crime punishable by imprisonment for a term exceeding one year or a misdemeanor punishable by a term of imprisonment of more than two years	654,036	56.06%
2	Fugitive from Justice	127,949	10.97%
3	Misdemeanor Crime of Domestic Violence Conviction	112,925	9.68%
4	Unlawful User/Addicted to a Controlled Substance	99,614	8.54%
5	*State Prohibitor <sup>a</sup>	57,217	4.90%
6	Protection/Restraining Order for Domestic Violence	47,870	4.10%
7	*Under Indictment/Information <sup>b</sup>	29,150	2.50%
8	Adjudicated Mental Health	16,669	1.43%
9	Illegal Unlawful Alien	14,526	1.25%
10	*Federally Denied Persons File <sup>c</sup>	5,770	0.49%
11	Dishonorable Discharge	887	0.08%
12	Renounced U.S. Citizenship	63	0.01%
	<b>Total Federal Denials</b>	<b>1,166,676</b>	<b>100.00%</b>

Note: Prohibited categories preceded by an asterisk are in addition to the nine categories of prohibited persons specified in the Gun Control Act of 1968.

<sup>a</sup> The NICS is authorized and required to maintain information on state-only prohibiting factors, which are recognized side-by-side with the federal prohibitors (18 U.S.C. §922(g)(n)), and 18 U.S.C. §922(t)(2). The statute requires NICS to take action related to firearm transfers only after ensuring that said transfer will not violate the federal statute or State law.

<sup>b</sup> "Under Indictment/Information" refers to 18 U.S.C.A. § 922(n), and is defined as any person who is under indictment for a crime punishable by imprisonment for a term exceeding 1 year who is, therefore, prohibited from shipping or transporting in interstate or foreign commerce any firearm or ammunition or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Pursuant to 18 U.S.C.A. § 921(a)(14), the term "indictment" also includes an information in any court under which a crime punishable by imprisonment for a term exceeding 1 year may be prosecuted. The difference between an indictment and information is that the former is handed down by a grand jury while the latter is issued by a prosecutor without going through a grand jury, typically based on a waiver by the defendant of the right to have a charge presented to a grand jury.

<sup>c</sup> The Federally Denied Person File was created internally by the NICS primarily to allow for those jurisdictions with restrictive legislation in the area of mental-health information to submit data on persons prohibited by 18 U.S.C. §922(g)(4) without specifically identifying them as such. It is not considered a separate prohibitor, but rather an alternate NICS Index sub-file to which a contributing entity may choose to submit 18 U.S.C. §922(g)(4) or other information.

Source: FBI NICS Section

### *The FBI's NICS Quality Control Process*

The FBI NICS Section has three significant levels of review in its quality control process to help ensure that transactions are processed appropriately and accurately. Two separate groups of reviewers are involved in those reviews: (1) the Management and Program Analysts of the NICS Section's Assessment Unit that perform two types of reviews, and (2) the Examiner Supervisors within the NICS Operations Unit who also review transactions.

The first level of review conducted by the Management and Program Analysts in the Assessment Unit involves the monthly selection of two separate statistical samples of: (1) NICS calls received and handled by the NICS call center operator, and (2) calls that are referred by call center operators to NICS Examiners for further research. The purpose of this first level of the quality control review process is to evaluate the results of the NICS check conducted by the call center operators and NICS Examiners, and report the results and any errors to their respective supervisors for review and discussion with the staff as appropriate.

The Assessment Unit Analysts also perform transaction-based reviews of all the NICS Examiners using a statistically-based sampling formula under which each examiner's transactions are monitored. Transactions of all categories are reviewed, including transactions that are approved (referred to as "proceeded"), denied, delayed within 3 business days, and open. The Analysts provide feedback to the NICS Examiners, their supervisors, and area managers to correct errors identified and identify ways to minimize future errors.<sup>15</sup> These reviews are annotated in the comments section of the transactions in NICS.

In addition, the Examiner Supervisors in the NICS Operations Unit randomly select one to two of each NICS Examiner's NICS transactions per week for evaluation, and 100 percent (minimum of 100 transactions) of the work of all NICS Examiners during their first month of employment. The purpose of this supervisory review is to ensure that the NICS Examiners reviewed the correct criminal history records, searched the appropriate databases for prior arrests, consulted with the NICS legal research team when necessary, and selected and entered the appropriate prohibitive categories and retrieval codes in the NICS database. For any discrepancies found, the supervisor provides feedback to the NICS Examiner. Once the discrepancy is resolved, the results of the supervisory review are documented in the comments section of the NICS record.

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<sup>15</sup> These same Assessment Unit Analysts select samples, conduct reviews, and provide similar feedback regarding the handling of appeals made by denied applicants.

The FBI tracks the accuracy rate of NICS transactions based on the results of its quality control process. From January 2008 through September 2013, the FBI determined the accuracy rate fell within a range of 99.34 percent to 99.79 percent.<sup>16</sup> As discussed in the FBI finding section of the report below, we evaluated the FBI process and internal controls over its handling of NICS background checks, and its referral of denied NICS transactions to ATF. We reviewed a selection of denied NICS transactions and confirmed that, with respect to such denials, the FBI's quality control review and the resulting discussions with NICS staff helps to minimize the number of subsequent incorrect decisions and pending NICS transactions.<sup>17</sup> While our audit results generally confirm the effectiveness of the FBI's NICS internal quality control process for conducting, assessing, and discovering errors in the NICS background check process with respect to denials and for referring denied NICS transactions to ATF, we make recommendations for further improvements as events such as the recent incident in Charleston, South Carolina, demonstrate that even a single firearm background check error can contribute to tragic results.

### **ATF's Role in the NICS Process**

After the FBI adjudicates transactions, it purges identifying purchaser information for approved transactions within 24 hours pursuant to federal law, and transmits all denials to ATF Denial Enforcement NICS Intelligence (DENI) Branch in Martinsburg, West Virginia.<sup>18</sup> The DENI Branch downloads these transaction files into ATF NICS Referral (ANR) system to be processed. DENI Branch staff then review any FBI comments associated with the denied transactions and verify criminal history data. They also may contact dealers to obtain copies of the application to purchase firearms (ATF Form 4473, Firearm Transfer Record). ATF DENI Branch staff also contacts judicial and law enforcement agencies to request copies of documentation to support or refute the FBI's decision to deny the firearm transfer, if necessary.

ATF has established a timeframe of 48 hours for reviewing delayed denials. Although ATF has not established a timeframe for reviewing standard denials, as described below, we found it generally processed those denials within a reasonable time span after the denials were received from the FBI's NICS Section.

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<sup>16</sup> For 2008 and 2009, the FBI tracked the quality assurance rates by calendar year. Beginning in 2010, the FBI calculated the rates by fiscal year.

<sup>17</sup> While the scope of our review of the quality controls encompassed the entire NICS process, our audit focused on analyzing the handling of transaction denials and prosecutions resulting from same.

<sup>18</sup> There are two kinds of denials. Standard denials are those that were denied before the end of the third full business day from the date of the initial NICS check, and means that a dealer could not legally transfer the weapon. Delayed denials are those that were denied more than 3 full business days after the date of the initial NICS check processing, and therefore after the 3-day period during which the dealer is required to suspend the transfer. The dealer may or may not have transferred the firearm in such cases.

Based on its review of the denied transaction file, the ATF DENI Branch may create investigative case records in ATF's investigative case management system, NForce, for those transactions that meet referral guidelines. The DENI Branch then transfers such cases to the ATF NICS Coordinator at the appropriate ATF field division.<sup>19</sup> The DENI Branch forwards to ATF field divisions only those denials that require either recovery of a firearm or investigation for possible violations of federal laws. In these cases, the DENI Branch also sends to the field division NICS Coordinators ATF Form 4473 obtained from the dealer and any documents obtained from judicial or law enforcement agencies to support the denial. By policy, the DENI Branch is required to forward delayed denials to the appropriate ATF field division's NICS Coordinator within 48 hours of receipt from the FBI, as ATF may need to move promptly to recover a firearm that was legally transferred at the end of the 3 day waiting period.<sup>20</sup> The ATF DENI Branch provided the OIG a report that showed from FY 2005 through 2013, it received 655,809 standard and delayed denials from the FBI's NICS Section and referred 54,161 (8 percent) of those denials to ATF field divisions for investigation and possible prosecution.

### *ATF Field Divisions*

NICS Coordinators in ATF field divisions review and forward the NForce cases to the appropriate ATF field office within that field division for follow up. ATF field office supervisors assign the NForce cases to special agents to investigate, summarize, and, if they believe appropriate, present to the U.S. Attorneys' Offices (USAO) for possible prosecution. ATF investigates all cases involving delayed denials; however, an ATF field office may close the investigation: (1) if ATF determines the customer is not a prohibited person, (2) after recovering the firearm, or (3) if the case does not meet the USAOs' prosecution guidelines.

Instances when ATF may determine that a denied customer was not prohibited may include, for example, a case where a customer was initially convicted of a felony, but the ATF DENI Branch or ATF field division found that the conviction had later been reduced to a misdemeanor or overturned. In those cases, ATF corrects the denied record in ANR and NForce, and forwards the supporting documents to the FBI NICS Section for input into the NICS database. The FBI then updates the NICS, notifies the dealer of the correction and forwards the supporting documents to applicable agencies to update the National Crime Information Center (NCIC), the Interstate Identification Index (III), and NICS Index records.

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<sup>19</sup> The NICS Coordinator is a collateral position held by a field division employee, responsible for receiving and distributing NICS referrals for investigation.

<sup>20</sup> As noted above, if a NICS check has not been approved or denied by the end of the third full business day from the date of the NICS check, the dealer is legally permitted (but not required) under the Brady Act to proceed with the firearm transfer, subject to any applicable state laws.

As previously explained, the Brady Act allows dealers (but does not require them) to transfer firearms to customers after 3-business days, unless such transfer is prohibited by state law.<sup>21</sup> As a result, where there has been a delayed denial, ATF policy requires the field office to investigate and generally recover firearms that were transferred prior to the denial. Such recoveries may involve:

- ATF identifying the whereabouts of the customer and retrieving the firearm;
- ATF notifying the prohibited person who then voluntarily returns the firearm to the dealer;
- the prohibited person transferring the firearm to a non-prohibited third party of his or her choosing, provided that the third party does not reside with the prohibited person and the third party agrees not to provide the prohibited person with access to the firearm; or
- in extenuating circumstances, ATF enlisting local law enforcement to assist in seizing the firearm from a prohibited person.<sup>22</sup>

### **United States Attorneys' Offices**

After investigating a particular NICS denial case that was referred to them by the DENI Branch, ATF field offices may determine that it is appropriate to refer the case to the local U.S. Attorneys' Office (USAO) for possible prosecution. Both ATF officials and Assistant U.S. Attorneys told us that ATF will typically discuss potential referrals with AUSAs before it formally refers them. Although a case may meet USAO guidelines for prosecution, the USAO may nevertheless decline to prosecute it for a variety of other reasons, including because the subject did not receive the firearm, the USAO believed the case could not be proved beyond a reasonable doubt, the USAO found that there were are no aggravating circumstances present, or the USAO has a backlog of other cases.

Prohibited persons who attempt to obtain or succeed in obtaining a firearm can be charged with intentionally lying about their prohibited status on ATF Form 4473 that they submit to the dealer at the time of the sale. These NICS cases can be prosecuted under either Title 18 U.S.C. Section 922(a)(6) or Section

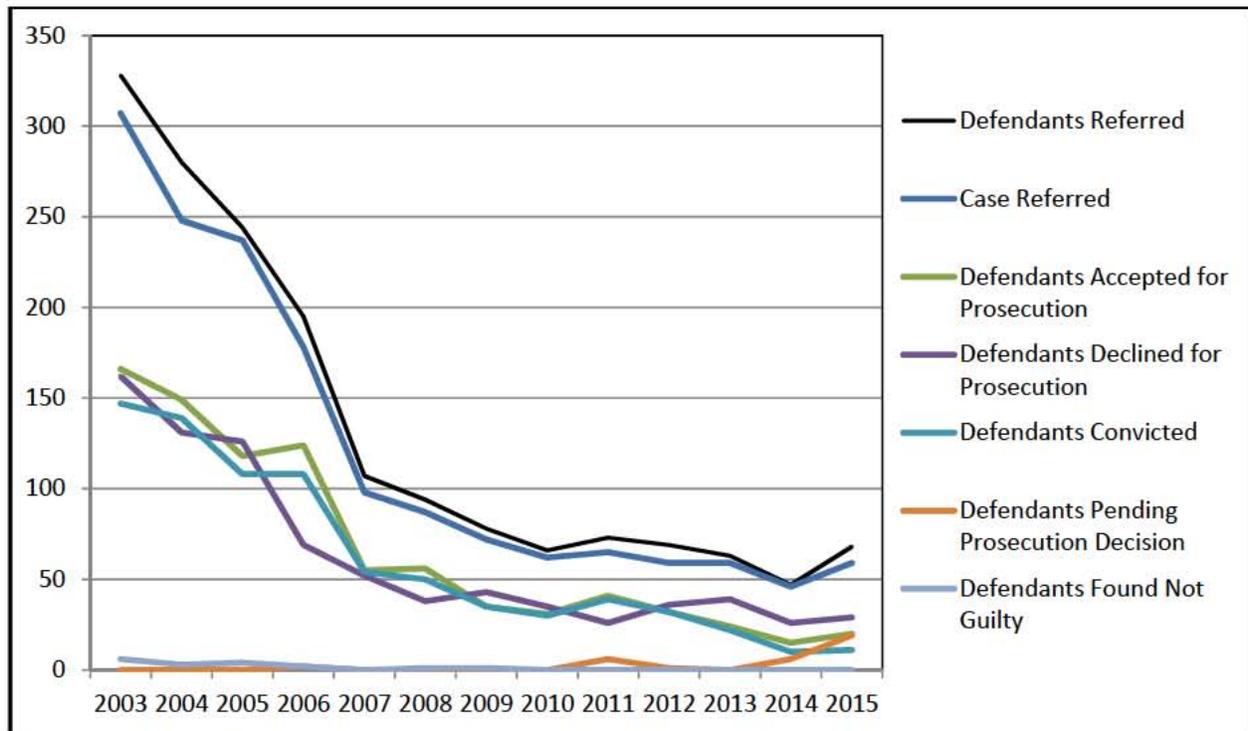
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<sup>21</sup> In addition to state law prohibitions, some dealers operating in major U.S. retail stores have a more stringent policy and will not transfer a firearm to a purchaser until the transfer has been affirmatively approved by the FBI or State point of contact, even if that takes more than 3 business days.

<sup>22</sup> ATF Order 3140.1 provides for these methods for recovery. In the instance of a transfer to a third party, the order requires that ATF verify that the third party is not prohibited, and that it witness the transfer.

924(a)(1)(A).<sup>23</sup> As shown in Figure 2, the number of referred cases and subjects referred for prosecution, convictions, and acceptance and declinations of prosecutions associated with denied NICS transactions have all generally declined substantially since FY 2003.

**Figure 2**  
**ATF and USAO Actions Associated with Denied NICS Transactions**



Source: ATF DENI Branch

<sup>23</sup> Title 18 U.S.C. § 922(a)(6) states:

It is unlawful for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

A violation of Section 922(a)(6) is punishable under Title 18, U.S.C. § 924(a)(2) by a fine, imprisonment for not more than 10 years, or both.

Title 18 U.S.C. § 924(a)(1)(A) states:

Whoever knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter shall be fined under this title, imprisoned not more than five years, or both.

## Audit Objectives and Scope

The objectives of this audit were to evaluate the effectiveness of processes associated with: (1) the FBI's quality controls for processing NICS transactions, the impact of state reporting and recording on FBI NICS determinations, and the FBI's referral of denied NICS transactions to ATF; (2) ATF's initial screening and referral of denied transactions to its field offices for investigation, and ATF field offices' investigation of denied transactions; and (3) the USAOs' prosecution of crimes associated with denials. This audit focused on judgmentally selected samples of denied NICS transactions conducted through the FBI from FY 2008 through 2012, investigations conducted by ATF from 2008 through 2013, and prosecutions from FY 2008 through FY 2015.<sup>24</sup>

## Prior Audits

In July 2004, the OIG issued Evaluation and Inspections Report I-2004-006, *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System*. The OIG reported at that time that there were significant delays in ATF's retrieval of firearms and that ATF's procedures for initiating and documenting retrievals were inadequate. In addition, the OIG found that ATF's former Brady Operations Branch, as a result of policy, was referring standard denial cases to ATF field offices that lacked prosecutorial merit, increasing the workload of already overburdened field investigators and delaying the investigation of prosecutable cases. Further, the OIG found that ATF contributed to the problem by not allocating sufficient resources to the Brady Operations Branch to enable it to fully execute its responsibilities, and that this resulted in extensive NICS case backlogs. Lastly, the OIG found that few NICS cases were prosecuted. The report stated that USAOs indicated that they had been unsuccessful in achieving convictions in many of these cases for a variety of reasons and, consequently, were unwilling to expend their limited resources on prosecuting most NICS cases.<sup>25</sup>

The OIG made 12 recommendations in its 2004 report. Subsequently, we reviewed ATF's actions to address the findings and recommendations in the report. Based on our discussion with ATF staff, review of updated policies and audit follow-up documentation, and testing of NICS transactions, we determined that appropriate corrective action was implemented in response to the issues identified in our prior report and closed those recommendations.

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<sup>24</sup> This was the most recent data available when our field work was initiated, though we have reported more recent information received from the components where possible. We were not able to review historical records of proceeded transactions because those records are purged within 24 hours.

<sup>25</sup> U.S. Department of Justice Office of the Inspector General. *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System*, Evaluation and Inspections Report I-2004-006 (July 2004) (See <http://www.justice.gov/oig/reports/ATF/e0406/final.pdf>).

In June 2014, the Government Accountability Office (GAO) issued audit report number GAO-14-553, *Enhancing Data Collection Could Improve Management of Investigations*. Specific to NICS, the GAO reported that ATF does not have readily available data to track and monitor how well field divisions initiate and resolve delayed denial investigations. GAO reported that ATF's NForce database did not have the capacity to track whether ATF field agents initiated delayed denial investigations. In addition, the GAO found that, because of NForce's limitations, ATF headquarters managers did not have information readily available to systematically monitor the outcomes of delayed denial investigations.

GAO recommended that ATF establish a mechanism to provide headquarters managers with readily available data to better monitor the timeliness and outcomes of delayed denial investigations. ATF modified its information system to allow managers to monitor and track delayed denial investigations. This modification enables the system to show the disposition of the firearm.

## **AUDIT FINDINGS**

### **THE FBI'S PROCESSING OF NICS REQUESTS**

We reviewed and evaluated the FBI controls over its handling of NICS background checks, and its referral of denied NICS transactions to ATF. From our review of three judgmentally selected samples from the roughly 32 million NICS firearms background checks processed by the FBI from FYs 2008 through 2012, we found the FBI generally has an effective internal quality control process for conducting, assessing, and discovering errors in the NICS background check process and for referring denied transactions to ATF. Specifically, we reviewed 447 out of 373,900 NICS transactions denied from FY 2008 through FY 2012, and determined that all but one was correctly denied. We also reviewed two judgmental selections of transactions indicating a higher risk for potentially inappropriate transfers to identify factors that may lead to errors. We first reviewed a selection of 306 transactions in which there were indications that a firearm may have been inappropriately transferred to a prohibited person. We found FBI errors in 65 (21 percent) of these cases, consisting of 59 transactions that were initially approved by the FBI, but should have been denied, and 6 other denials that were determined and recorded internally by the FBI within 3 days, but were not communicated to dealers in a timely manner. Most of these were identified by the FBI's quality control process as improper firearms transfers. Additionally, while only about 1 percent of the roughly 32 million transactions processed by the FBI from FY 2008 through FY 2012 were not adjudicated within 90 days, we tested a selection of 384 of these open transactions and determined that only 9 (about 2 percent) remained open longer than necessary due to FBI Examiner errors and delays.

Although the FBI caught most of the errors before a weapon was improperly transferred, even a single error can result in tragic consequences. ATF resolved each improper firearm transfer associated with those errors. However, for 631 denied and pending state point-of-contact transactions we tested, in only one case did the state points of contact update the data in NICS or inform the FBI regarding the outcome of the transactions. It is important for the FBI to ensure that NICS is updated by the states when individuals attempt to buy firearms and state points of contact determine they should be denied.

#### **The FBI's Overall Effectiveness in Processing Denied NICS Transactions**

From FY 2008 through FY 2012, the FBI NICS Section denied 373,900 firearm transfers, including 15,112 delayed denials. From these denied transactions we judgmentally selected 447 transactions for audit review. The

purpose of this review was to gauge the effectiveness of FBI's control system for processing transactions. To gauge a fair representation of the different types of transactions that the FBI processes, our selection included transactions representing each of the possible reasons the firearm transfers were denied (FBI denial code) and each of the reasons that the FBI believed that ATF may have needed to retrieve a firearm (ATF retrieval code).<sup>26</sup> With assistance from FBI NICS Assessment Unit Staff, we reviewed NICS records to determine whether NICS staff had properly evaluated criminal justice information and other records and correctly denied the firearm transfers. We concluded that all 447 firearms transfers were correctly denied, but 1 transaction remained in a denied status after subsequent review showed it should have been changed, and 29 transactions had immaterial coding errors.

- The one transaction was initially denied correctly in accordance with the FBI's internal procedures based on an indication of a disqualification. After further investigation, the information within the record did not support the disqualification. Our detailed review of the NICS file showed that subsequent to the initial denial, a NICS Index Team Examiner reviewed the NICS Index record supporting the denial and determined that the FBI never received any documents to prove the disqualifying level of physical violence and removed the disqualification flag from the transaction. As a result, an FBI official agreed that, based on the information we found in NICS, the transaction should not have remained in a denied status. The FBI official also told us that, based on records that were available at the time of the background check and on the FBI's internal procedures, a denial was the correct decision. However, after the NICS Index Team Examiner's review and removal of the disqualification, the FBI should have changed the status of the transaction from "denied" to "open" and should have informed the dealer of the correction. A change in the status to open would have allowed the dealer to transfer the firearm after 3 full business days. As a result of our audit, the status of the transaction has since been changed to "open," and the dealer was notified of the change in status.
- Twenty-nine (6.5 percent) of the 447 NICS transactions in our sample that were correctly denied by the FBI but contained either an incorrect code indicating the reason for the denial (16 of the 29 records) or an incorrect code indicating the reason ATF may have needed to retrieve a firearm (13 of the 29 records). Because the FBI NICS Section denied these transactions and ATF reviews all denied transactions, we consider these to be immaterial errors that had no significant effect on NICS operations. When we asked FBI NICS Section officials about these cases, they told us that the NICS computer system may not have allowed NICS Examiners to select certain codes at the time the transactions were denied. The computer system has since been updated with the correct codes. However, the NICS Assessment Unit staff

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<sup>26</sup> Because federal law requires the FBI to purge from NICS all identifying information about the purchaser and the firearm for approved transactions within 24 hours, it is not possible to review past approvals to determine whether they were approved correctly.

agreed that, at the time of our audit, these records contained incorrect codes and the Assessment Unit Staff corrected these records while we were on site.

## **The FBI's Handling of High Risk Transactions**

Our review of denied NICS checks indicated that the FBI was correctly denying transactions consistent with its procedures and interpretation of the law in the vast majority of cases. However, given the risk that a single error that allows an ineligible person to obtain a firearm presents, we further reviewed two groups of selected transactions where we determined that there was a heightened risk that a prohibited person would have been allowed to purchase a firearm. First, we reviewed a selection of 384 transactions out of 47,908 transactions initiated between September 15, 2013, and January 31, 2014, that remained in an open status for 88 days without an approval or denial from the FBI, and were therefore about to be purged from NICS. Although these purged transactions represent only a small percentage of the overall NICS transactions, they are examples of situations where firearms could have been transferred to potentially prohibited persons and never identified or retrieved. Second, we selected 306 out of 1,092 denied transactions initiated from FY 2008 through FY 2013 for which the transaction records indicated that the FBI had recorded a denial within 3 business days and that a related firearm nevertheless required retrieval for reasons we outline below. The presence of both codes indicated a higher risk that firearms may have been transferred to prohibited persons. The results of our review of these potential high risk situations are explained below.

### *Open NICS Transactions*

From FY 2003 through May 2013, about 1.3 million (2 percent) of almost 64 million background checks remained in an open or pending status for over 88 days at which time they were purged from NICS. In accordance with 28 C.F.R. § 25.9(b)(1)(iii), open transactions must be purged from NICS within 90 days from the date of the initial NICS check.<sup>27</sup> In practice, the FBI purges these records on the 89th calendar day to ensure it complies with the law.<sup>28</sup> After the records are purged, NICS retains the NICS transaction number and date of the initial background check in an audit log, but no information regarding the identity of the purchaser is maintained.<sup>29</sup>

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<sup>27</sup> According to 28 C.F.R. § 25.9(b)(2)(i), the FBI may retain the complete records to support audits, including information not yet destroyed after the 88<sup>th</sup> day.

<sup>28</sup> Records for transactions that are appealed are maintained until a decision is reached on the appeal, even if that is after the 88<sup>th</sup> calendar day.

<sup>29</sup> According to 28 C.F.R. § 25.9(b), the FBI maintains an automated NICS audit log of all incoming and outgoing transactions that pass through the system. The NICS audit log is used to assess system performance, assist users in resolving operational problems, support appeals by persons who were initially denied, or support audits of the use and performance of the system.

When a potential purchaser is found to have a criminal history, the FBI's NICS Examiner is required to research the applicant's arrest record by contacting the listed arresting agencies by telephone, facsimile, e-mail, or through agency approved websites. Each Examiner is responsible for researching the criminal records for the prospective purchaser for each of the transactions by reviewing the information received, determining if additional information is needed from the responding source or another source, and conducting additional research as appropriate. Currently, Examiners are not required to follow-up on research requests with unresponsive agencies. Based on a study in 2006, the NICS Assessment Unit determined that manually sending second notices to unresponsive agencies was ineffective due to the time spent processing the notices and the low response from unresponsive agencies. According to NICS management, eliminating the practice of sending second notices improved NICS efficiency in processing background checks within the 3 business days. Nevertheless, in recognition of the need to revisit unanswered requests, NICS officials told us that as of August 2016 it was in the process of implementing a new NICS system, which has the capacity for an automated feature to send second facsimile notices to unresponsive agencies, if those agencies have agreed to receive follow-up requests.

To test this process and assess the factors that may prevent the FBI from reaching a timely decision on transactions, we requested the FBI hold records for 92,450 NICS transactions (47,908 initiated through the FBI and 44,542 initiated through state points of contact) that were open on the 88th calendar day, from September 15, 2013, through October 14, 2013, and 3 months' of data from November 2013, December 2013, and January 2014. With assistance from FBI NICS Assessment Unit Staff, we tested a judgmental selection of 384 of the 47,908 open NICS transactions initiated through the FBI to determine whether the transactions remained open longer than necessary and whether the underlying firearm transfer should have been approved or denied. Our sample included NICS checks initiated by all dealers represented in the universe of open NICS records.

Our analysis identified 9 of the 384 transactions (about 2 percent) that remained open longer than necessary because of errors and delays caused by the FBI Examiners. With assistance from the NICS Assessment Unit Analysts and based on the information available at the time of our audit, we determined that three open transactions should have been approved because there was sufficient information in the case documentation to approve the transfers, but that they were not approved due to oversights on the part of the FBI Examiners.<sup>30</sup>

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<sup>30</sup> Subsequent to the initial determination, the FBI received new information that supported denial of one of the three transactions. The transaction was delayed to investigate an indication that the purchaser may be prohibited. The file contained sufficient information at the time of the purchase to explain that the purchaser's rights had been restored and that the transaction should have been approved within the first 3 days. After the 90-day period for additional research had expired, and after it had been determined that the transaction should have been approved, NICS received a different legal opinion regarding restoration of rights. Because of our audit, the transaction was held in an open status. As a result, NICS denied the transaction, and attempted to reach the dealer to determine if the firearm had been transferred, to no avail. The FBI referred the transaction to ATF to investigate or retrieve as necessary.

We found that adjudication for the remaining six open transactions was prolonged. Potential reasons for the delays were FBI NICS Examiners made an error in requesting information, did not request information, or did not evaluate received information. The NICS records did not indicate whether the firearms had been transferred in any of these six transactions.<sup>31</sup> The details of the six erroneously prolonged transactions are explained below.

- Four open transactions showed that the NICS Examiner failed to attempt to conduct additional research to determine whether the transfers should be approved or denied at the time of the Examiner's review. The NICS Examiner needed to contact the respective district or county clerk to determine the circumstances and dispositions of any arrests. After we brought these four to the FBI's attention, the FBI conducted external research and determined that three of the four should have been approved. As of August 2, 2016, the FBI still was waiting on responses for the fourth transaction.<sup>32</sup>
- For one open transaction, the NICS Examiner provided an incorrect date of arrest to the court when seeking information on the disposition of an arrest. Because law enforcement agencies and courts generally search their records using the date of arrest, it appears that this resulted in the court not finding information on the disposition of the arrest and the NICS record remained in an open status. The FBI followed up with correct information on this transaction and, as of August 2, 2016, still was awaiting a response.
- For one open transaction, the NICS Examiner requested and received additional documentation regarding the prospective purchaser, but because of other priorities, did not evaluate the documentation to determine whether the transaction should have been approved, denied, or remain in open status. After we raised this issue, the FBI performed additional research and followed up with appropriate authorities and determined that it could not obtain sufficient information to make a determination on this transaction. As a result, according to FBI officials, the transaction would not have been approved or denied, and it would have remained in open status in any event.

Our analysis showed that these errors were possible because the FBI's NICS Section does not have a tracking system to ensure that external research requests are made in a timely manner for each open transaction, that requested information is received and evaluated in a timely manner, and that further research is conducted when needed. As referenced above, we were told that the FBI's new

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<sup>31</sup> Licensed firearms dealers are not required by law to report back to NICS whether or not a firearm was actually transferred after a NICS check is made. Dealers can legally transfer a firearm after the 3<sup>rd</sup> business day from the date the transaction was initiated. Unless NICS denies the transaction during the open period (4<sup>th</sup> calendar day to the 90<sup>th</sup> calendar day), they do not need to know whether the firearm dealer transferred the firearm.

<sup>32</sup> We do not know if these firearms were actually transferred, as the FBI does not ask the dealers whether a firearm was transferred unless the transaction is ultimately denied.

NICS system has the capacity for an automated feature to send second facsimile requests for information to agencies that do not respond in the first instance, if those agencies have agreed to receive follow-up requests, but that there is not yet an implementation date for this feature. For the remaining 375 of 384 open transactions (about 98 percent), we determined that the FBI appropriately followed its processes. Specifically, we found that the NICS records did not contain enough information to indicate whether the transactions should have been adjudicated during the 90-day period. We did not contact courts, municipalities, or law enforcement agencies to determine the outcome of any arrests, or contact dealers to determine whether firearms had been transferred.

### *Firearms Transferred to Prohibited Persons*

From FY 2008 through FY 2013 the FBI denied 461,732 NICS transactions. We reviewed these and identified 1,092 denied transactions for which the transaction records indicated that the FBI had recorded a denial within 3 business days and that a related firearm required retrieval. The combined circumstances indicated a higher risk that firearms may have been transferred to prohibited persons before the 3-day waiting period expired.<sup>33</sup>

With assistance from FBI NICS Assessment Unit Staff, we reviewed a selection of 306 of these 1,092 cases in which firearms potentially may have been transferred inappropriately and found 65 significant errors (21 percent) by the FBI, 59 of which involved transactions that initially were incorrectly approved by the FBI and then denied within the 3 day period. The 65 significant errors broke down as follows:

- Fifty-nine were initially approved by FBI NICS Examiners or Call Center Representatives in error, but these transactions should have been denied. Prior to our audit, the FBI's quality control checks identified 57 (97 percent) of these errors as a part of its internal review process and updated the NICS records to denied status, with 54 of these identified and the denial communicated to the dealer within 2 days of the error. The quality control checks identified the three other erroneously approved transactions and communicated the corrected denials to the dealer between 6 and 19 business days after the request. In all 59 instances, firearms were transferred to prohibited persons prior to the errors being corrected, and prior to the denials being communicated to the dealer. The FBI referred the denied transactions to ATF to recover any firearms that were inappropriately

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<sup>33</sup> As demonstrated in our audit results, the potentially inappropriate transfers included NICS errors where the Examiners: (1) initially approved transactions that should have been denied, (2) did not timely inform dealers of denials, (3) did not know about error until the dealer contacted NICS, or (4) miscoded transactions incorrectly that indicated ATF needed to recover firearms. We found that, among other reasons, potentially inappropriate transfers also occurred where dealers transferred firearms: (1) with no records to support the FBI's verbal or written approvals, (2) prior to initiating the background checks, (3) because the FBI was unable to reach the dealers until after the 3-business day requirement, or (4) the applicants provided the dealer with valid gun permits.

transferred. ATF determined that in many instances, the firearm was recovered by the dealer before an ATF field division received the case for investigation and possible retrieval, so that only 16 firearms required recovery by ATF as a result of these 59 errors, and it recovered all of them. The specifics of the 59 errors follow:

- (1) Twenty-nine of the errors were discovered by the NICS Assessment Unit staff through its normal quality control review process within 2 business days of the error.<sup>34</sup>
  - (2) Twenty-two of the errors were discovered by NICS Examiners within 2 business days of the error.
  - (3) Six of the errors were discovered by a supervisory examiner or Regional Coordinator. Three of these errors were identified and communicated to the dealer within 2 days, and three errors were discovered between 6 and 19 business days after the error occurred.
  - (4) One error was not discovered until 27 business days after the error when the applicant returned a defective firearm and the dealer initiated a new NICS background check for the replacement firearm which was denied.
  - (5) One error was not discovered until 2 days after the firearm was transferred when the dealer contacted NICS because a transaction was denied after an approval only 2 days earlier for the same applicant.
- Six of the 306 transactions were denied within 3 business days by the NICS Examiners, but the NICS Examiners, through an apparent oversight, did not inform the dealers of the denials in a timely manner. Consequently, we found that the firearms were transferred by the dealer to prohibited persons after the third business day. Delays in informing the dealers ranged from as few as 1 day to one case involving a delay of more than 7 months after the FBI had internally determined that the transaction should be denied. These transactions were subsequently referred to ATF for further review and retrieval of the firearms.

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<sup>34</sup> Approved transactions are purged from NICS within 24 hours in accordance with federal law. However, even when transactions initially were approved, the error may have been caught in the first 24 hours before the transaction was purged, or thereafter and the transaction recreated. NICS retains denied transactions indefinitely.

**Table 2**

**Denied Transactions Where Examiners did not Timely Contact Dealers**

<b>NTN</b>	<b>Date Transaction Initiated</b>	<b>Date Denied by NICS</b>	<b>Date Dealer Transferred Firearm</b>	<b>Date NICS Reached Dealer</b>	<b>Number of Business Days (BD)/Calendar Days (CD) Elapsed from Denial to Contact</b>	<b>Firearm Recovered (Yes/No)</b>
143M7GF	12-14-07	12-18-07	12-21-07	01-28-08	33 BD/41 CD	Yes
166FLPK	05-14-08	05-15-08	05-20-08	06-06-08	16 BD/22 CD	Yes
1NFVN3N	11-11-10	11-12-10	11-18-10	11-19-10	6 BD/7 CD	Yes
1TRS870	06-30-11	07-03-11	07-07-11	07-11-11	6 BD/7 CD	Yes
1XFC1T5	11-28-11	12-01-11	12-02-11	12-02-11	1 BD/1 CD	Yes
26359L6	12-22-12	12-27-12	12-29-12	8-01-13	183 BD/217 CD	Yes

Source: NICS database

While it appears from our review that the FBI is able to promptly identify a substantial majority of its initial errors through its internal review process, we believe that, given the risks involved, the FBI must continue to strive for improvement both to reduce the number of errors at the outset and ensure that such errors are caught through the review process and communicated to firearms dealers in a timely fashion.

For the remaining 241 of 306 potentially inappropriate transactions, we determined that: (1) in 176 of the denied transactions there were dealer errors that could have resulted in the improper transfer of a firearm, but for which the FBI NICS Section took appropriate action and referred the transactions to ATF for further screening and any necessary firearm recoveries; (2) in 11 transactions there were miscoding errors by the FBI that incorrectly indicated that ATF needed to recover firearms when in fact no firearms were transferred and the transaction was correctly denied, and (3) 54 transactions for which we found no indication of errors in the documentation and for which we concluded the FBI followed its policies.<sup>35</sup>

*Factors Contributing to the Effectiveness and Efficiency of NICS Checks*

As previously discussed, we reviewed and tested the FBI NICS process for handling background checks and for referring denied NICS transactions to ATF and concluded that the FBI's system of internal controls helps minimize errors that occur during NICS background checks. However, we found that a relatively small volume of errors do occur and because these errors may not be caught until after a firearm has been transferred to a prohibited purchaser, even one or a small number of errors can have tragic consequences. We reviewed factors that might reduce errors and we identified two factors that have the potential to significantly affect

<sup>35</sup> For a description of some of the types of dealer and FBI errors, see footnote 34 above.

the outcome of NICS background checks. These factors are the datasets that the FBI includes in its NICS checks, and the ability to track the progress of external research to ensure that research requests are made in a timely manner, that requested information is received and evaluated in a timely manner, and that further research is conducted when needed. We discussed the need for a tracking system to aid in the external research in an earlier section regarding open NICS transactions. The NICS datasets are discussed in more detail below.

### FBI NICS Datasets

As identified previously, NICS primarily relies on data from three databases: (1) the Interstate Identification Index containing individual criminal history records; (2) National Crime Information Center records containing information on protective orders and active felony or misdemeanor warrants; and (3) the NICS Index containing information provided by federal, state, and local agencies on other prohibited persons such as illegal aliens, and persons who have renounced their citizenship, been adjudicated mentally defective, been dishonorably discharged from the military, or deemed controlled substance abusers.

During the course of our review, the FBI Inspection Division issued a report on NICS following the incident in Charleston, in which it discussed the National Data Exchange (N-DEX).<sup>36</sup> The N-DEX is an FBI-developed repository of unclassified criminal justice records, available to the criminal justice community in a secure online environment. N-DEX brings together federal, regional, state, local, and tribal justice agency data such as incident and case reports, arrest reports, traffic citations, and parole and probation information, and correlates relationships and resolves data from open and closed investigations to detect relationships between people, vehicles, property, locations, and crime characteristics. According to the FBI Inspection Division report, N-DEX contained data that would have revealed the prohibiting incident report for the alleged shooter in the Charleston shooting. However, the N-DEX database is not included as a NICS dataset. While the FBI Inspection Division report concluded that the NICS Examiner had performed as required in accordance with applicable policy and procedures, one of the FBI Inspection Division report's recommendations was that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI. FBI officials told us that as of August 2016, the NICS Section was unable to access N-DEX in order to conduct firearm background

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<sup>36</sup> On April 11, 2015, the alleged Charleston shooter attempted to purchase a firearm at a dealer in West Columbia, South Carolina. The firearm application was referred to a NICS Examiner as the suspect's arrest record showed an arrest for a felony drug charge. The arrest record, however, showed no conviction on the drug charge, so it was not by itself a basis to deny the firearm purchase. The Examiner delayed the application and sought additional details on the arrest. However, because the suspect's arrest record incorrectly showed the Lexington County Sheriff's Office as the arresting authority, the Examiner, after running down many leads with the local authorities, was unable to confirm the suspect's conviction or his admitted possession of a controlled substance within the 3 business day grace period that would have triggered a denial on the grounds that the suspect was an unlawful drug user or addict.

checks and, to do so, the FBI would need to obtain law enforcement approval (by way of the Advisory Policy Board) and a regulation change (28 CFR Part 25).

Given the potential consequences associated with missing even a single record that may be available in existing federal datasets, the FBI should expand NICS to include available and helpful datasets to improve the efficiency and effectiveness of NICS checks. As a result, we recommend that the FBI implement the FBI Inspection Division report's recommendation that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI, potentially including the N-DEX database.

### **Impact of State Reporting and Recording on FBI Determinations**

State points of contact who are responsible for NICS checks handle all aspects of the process, including approving or denying firearm transfer requests and updating the NICS records. Federal regulations require state points of contact to update NICS with their decisions, including documentation to support state approvals, denials, or delays of NICS transactions. When states fail to update NICS records, it increases the risk that firearms may be transferred in the future to prohibited persons because the results of NICS background check denials are used by examiners in future NICS checks. Federal regulations also require that when a state point of contact notifies a dealer that a firearm transfer is denied or delayed, it must also notify the FBI's NICS Section, which serves the same purpose. Participation agreements between state points of contact and the FBI's Criminal Justice Information Services (CJIS) Division also require points of contact to maintain complete and accurate information in NICS. However, neither the regulation nor CJIS agreement establishes time frames when states should have the supporting documents uploaded in the NICS database.

State points of contact denied 190,525 NICS transactions from FY 2008 through 2012. We previously discussed our request that the FBI hold records for NICS transactions, including 44,542 initiated through state points of contact, that were open on the 88th calendar day. With assistance from FBI NICS Assessment Unit Staff, we examined judgmentally selected samples of 381 of the 190,525 NICS transactions that were denied by state points of contact, and 250 of the 44,542 transactions initiated through state points of contact that were open on the 88th calendar day. We found that for 630 of those 631 state point of contact NICS records, the state had not updated the NICS records with information required for us to determine whether the transactions should have been approved, denied, remained in open status, or could have involved the inappropriate transfer of firearms.<sup>37</sup> Although NICS may have identified matching records in the Interstate Identification Index, National Crime Information Center, or NICS Index for many of the transactions, the state points of contact did not upload supporting information into NICS, and note the final decisions to reflect whether the transactions should

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<sup>37</sup> For the one NICS record that had been updated, we determined that the state point of contact properly denied the firearm transfer.

have been approved, denied, remained in open status, or could have resulted in an inappropriate firearm transfer. These incomplete records pose a risk that future firearms may be transferred to prohibited persons because future checks might not identify the information uncovered in prior checks, or do so in a timely fashion. Similarly, by not working to ensure that NICS is appropriately updated, the FBI may be preventing itself from properly evaluating and reporting accurate NICS transaction data, and limiting the abilities of stakeholders to make informed operational and budgetary decisions.<sup>38</sup> As a result, we recommend that the FBI consider implementing procedures to help ensure that states update NICS, including revisions to the regulation and CJIS system user agreements that establish a time frame for the states to update NICS.

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<sup>38</sup> We note that the January 2013 plan discussed elsewhere in this report titled “Now is the Time: The President’s Plan to Protect our Children and our Communities by Reducing Gun Violence,” which was released by the White House in the aftermath of the tragedy in Sandy Hook, Connecticut, includes improving incentives for states to share information with the background check system.

## **ATF HANDLING OF NICS DENIALS**

ATF generally has an appropriate system of controls for processing NICS denials that are referred by the FBI. ATF has improved its information system to allow managers to track denial investigations, and we found that it properly followed its guidelines in the referral of cases to the USAOs. We also found that ATF's DENI Branch handled 99 percent of denied transactions in our sample in accordance with ATF policy, including referrals to ATF field divisions for retrieval of firearms. We also determined that ATF field divisions recovered 93 percent of our sample of 125 firearms that required recovery. While ATF's handling of NICS processes was generally appropriate, we found that the DENI Branch can strengthen its quality control process by documenting in more detail its selection process and results of quality control reviews. Finally, we identified a group of approximately 50,000 transactions where ATF and the FBI have an ongoing dispute that should be resolved as to whether certain transactions involving the prohibited category "Fugitives from Justice" should be denied.

### **ATF DENI Branch Reviews of Denied Transactions**

The ATF DENI Branch researches and analyzes all NICS transaction denials that are referred to it by the FBI. The review determines whether there is a need to refer the case to ATF field divisions to recover any firearms that had been transferred to a prohibited purchaser while the background check was ongoing. The DENI Branch uses its referral guidelines for each individual judicial district to determine if the purchaser should be investigated for possible violations of federal criminal law.

We reviewed the same judgmentally selected sample of 447 denied FBI NICS transactions to determine whether, consistent with ATF policy, the ATF DENI Branch properly referred these cases to ATF field divisions for further investigation or firearm recovery as necessary. Of the 447 denied transactions we reviewed, we found that ATF handled 441 (99 percent) in accordance with its policy. We determined that six transactions were not handled in a manner consistent with ATF policy, including five that met ATF's guidelines based on individual district requirements for referral to a field division but were not referred, and one that was referred to a field office although it did not meet the guidelines for referral. As to these six transactions, we found:

- Five standard denials (meaning that they were denied within 3 business days) were not referred to ATF field divisions because the staff of the DENI Branch incorrectly determined the transactions did not meet the local ATF referral guidelines. ATF agreed with our assessment, but the DENI Branch Chief opined that three of the transactions should not have been referred because no action would have been taken by the field division as they involved decades old convictions. Whether or not that prediction was

accurate, the decision not to refer all five cases was not consistent with ATF's policies.<sup>39</sup>

- One denied transaction that did not meet the requirements for referral was nevertheless referred to an ATF field division for further review. As a result, the ATF field office initiated an investigation of this transaction that was not consistent with ATF guidelines.

The details for the 441 transactions in our sample that were handled by ATF consistent with its policies are described below:

- 315 transactions were not referred to ATF field divisions because they did not meet ATF field division referral guidelines.
- 71 transactions were referred to ATF field divisions for further action.
- Four transactions were not referred because ATF did not receive any information on background checks that were initiated through state designated agencies, which are responsible for following up on their denied transactions. Therefore, even though these transactions were within our sample, referring them was not ATF's responsibility.
- One denied transaction was miscoded by the FBI and therefore was not provided to the ATF DENI Branch for screening or possible follow up action.
- 50 transactions involved instances as discussed below in which ATF believed that the transaction should not have been denied by the FBI and, therefore, these transactions were not referred by the ATF DENI Branch to field divisions for further investigation even though firearms may have been transferred in 4 of the 50 transactions.

ATF maintains a list of NICS transactions that were denied by the FBI that ATF believes should have approved based on ATF's interpretation of Federal Firearms Regulations and the Gun Control Act.<sup>40</sup> As of May 26, 2015, the list contained 81,469 transactions. The majority of these transactions, 49,448 (61 percent), involved situations where ATF and the FBI disagree on whether certain transactions involving the prohibited category "Fugitives from Justice" should be denied. ATF tracked these cases as FBI denials but, because ATF did not agree with that determination, ATF did not attempt to recover the firearm in the 2,183 instances in which the firearm was transferred.<sup>41</sup> Specifically, ATF maintains

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<sup>39</sup> The facts surrounding a denial are unique for each transaction. In these cases, according to policy, ATF should have referred the cases for further investigation because the facts surrounding the denials met the local guidelines for referral.

<sup>40</sup> These transactions were denied during the period January 2006 (when ATF began keeping the list) through May 26, 2015.

<sup>41</sup> The disagreement between ATF and FBI on the Fugitive from Justice category applies to one subset of that category, not the entire universe. During that time period, ATF retrieved 4,042 firearms that were denied in the other Fugitive from Justice categories. The remaining 32,021 transactions involving FBI and ATF disagreements (39 percent) were spread out among the other prohibiting factors.

that an individual is not a fugitive from justice if they remain in the state where the warrant was issued. ATF considers only an attempted purchase in a state other than that issuing the warrant to properly implicate the applicant as a "fugitive" for Brady Act disqualification purposes. However, the FBI will deny transactions involving the purchase of a firearm outside the county or other local jurisdiction where the warrant was issued, even if the purchase is within the same state.<sup>42</sup> In 2008, the Office of Legal Policy, ATF, and the FBI asked DOJ's Office of Legal Counsel (OLC) to decide this issue, and in July 2008, OLC provided informal advice. In August 2010, the FBI requested formal reconsideration of that advice, but more than 6 years later no decision has been rendered so the dispute continues. We asked OLC officials if they could explain why no decision has been rendered since the request for reconsideration was posed in August 2010, and if they could tell us when we could anticipate the opinion will be issued. In July 2016, a Deputy Assistant Attorney General at OLC told us only that OLC's reconsideration of the issue was still in process and that he could not give an estimate as to when OLC will issue an opinion. Further, the FBI Inspection Division recommended after, but unrelated to the facts of the Charleston incident, that the NICS Section continue efforts with DOJ and FBI's Office of General Counsel to try to resolve this issue. We recommend that OLC issue an opinion as soon as possible to clarify the correct definition of the "Fugitive from Justice" category of persons prohibited from purchasing a firearm. Only then can ATF and the FBI be certain the law is being applied appropriately and as intended.

### *Quality Control Procedures*

We found that the ATF DENI Branch has generally appropriate quality control procedures in order to identify possible errors in its processing of NICS denials. The procedures include reviewing ATF Examiners' adherence to applicable referral guidelines. The procedures provide for re-evaluation of all denied transactions referred to an ATF field division, as well as all non-referred denials that are coded with the following prohibitor codes:

- G2 – Fugitive from Justice,
- G3 – Unlawful User/Addicted to Controlled Substance,
- G8 – Active Protection Order,
- G9 – Qualifying Misdemeanor Crime of Domestic Violence, and
- X1 – Insufficient Evidence of Prohibition.

ATF chose the prohibitor codes listed above to focus quality control reviews of cases not referred to field divisions on those transactions most at risk for mistakes. Specifically, we were told that Misdemeanor Crimes of Domestic Violence

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<sup>42</sup> As a result, in cases falling within the disputed category, the FBI will deny the transaction and make a referral to the ATF DENI branch, but the latter does not refer the case to the field divisions for investigation or possible referral to the USAO for consideration of prosecution.

and protection orders often meet the referral guidelines and these two criteria are among the top five reasons listed for denials. We were also told that prohibitions based on these particular convictions or orders can be difficult to determine. The other listed criteria tend to be the denials most likely to be processed incorrectly based on similar ambiguities in the circumstances of the individual cases.

In addition, a random percentage of all other denials are reviewed, but ATF does not have a documented process for selecting which ones to review. The DENI Branch Chief explained that in practice, during non-peak periods, its goal is to review 100 percent of the denials processed.<sup>43</sup> However, she said that resource constraints prevent the Branch from meeting this goal during peak review periods. As a result, during the peak periods, the DENI Branch attempts to review as many denials as possible. If the reviews identify a large number of errors by one individual, the reviewer may expand the review to 100 percent of the denials worked by that individual. However, ATF currently only has two analysts to conduct the quality review of all denials processed by the DENI Branch, and the Branch Chief stated that the number of denials processed far exceeds the number the Branch can review. To conduct a quality review of a denial, the analysts must manually access the denial record and review all the FBI notes, criminal history and other entries by the specialists. Since ATF processes more than 90,000 denial referrals a year, the Chief stated that it is impossible for 2 individuals to review every denial that did not result in a referral to a field division for further investigation.

Based on these procedures, the quality control review should have identified the one transaction in our sample that the DENI Branch incorrectly referred to the ATF field division, because the quality reviews include all denied transactions referred to an ATF field division. The quality control process should have also identified three of the five transactions that were not referred to ATF field divisions because they each met one of the identified prohibitor codes most likely to be processed incorrectly. However, we found that the DENI Branch records only the number of denials reviewed and the number of errors identified, and does not document the details of testing results, including the reasons particular errors were made. Consequently, the DENI Branch officials could not provide an explanation of why these transactions were not identified in the quality control process. The DENI Branch is in the process of modifying its information system so it can better document results, but the new system had not been fully implemented at the time of our review. We recommend ATF continue with the modification of its information system to document the results of its quality review so as to better identify trends in errors, and enable the Branch to follow up more effectively on erroneous transactions. We also recommend that the ATF DENI Branch revise its quality

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<sup>43</sup> The FBI NICS Section and, from it, ATF's DENI Branch observe an increase in transaction activity during major hunting seasons and year-end holidays. Each year, since the inception of the NICS, the day after Thanksgiving has been a day that the NICS Section processes a particularly high volume of firearm background checks.

control procedures to document in more detail how it selects for review those non-referred transactions that do not meet the specifically listed criteria.

### *Referral Guidelines*

The DENI Branch uses guidelines provided by ATF field division Special Agents-in-Charge (SACs) as referenced above in order to help determine which NICS denials should be referred to the field division for further investigation. ATF established these guidelines in 2004 in response to a recommendation from a previous OIG report.<sup>44</sup> In 2004, each ATF field division SAC provided to the DENI Branch guidelines for each judicial district located within their territories. The original guidelines were developed by each ATF field division based on consultation with local USAOs and with local ATF offices' feedback on the types of cases that are prosecuted by those offices.

At the four ATF field divisions we tested, ATF managers and NICS Coordinators told us that they meet periodically with local USAO managers to discuss referral guidelines. For example, in one field division, an Assistant Special Agent in Charge told us that while the USAOs are responsible for updating their own prosecution guidelines, the local ATF managers meet with USAO staff regularly to discuss priorities. In another division office, the local ATF managers said that they meet with the local USAO and that these discussions are considered in setting referral guideline thresholds.

ATF provided us with its referral guidelines established in 2004 for 84 of the 94 judicial districts.<sup>45</sup> We analyzed those ATF referral guidelines and determined that they vary greatly among the judicial districts. Some referral guidelines are identical for each judicial district within an ATF field division, but the majority of the referral guidelines are different for each district. We found that ATF referral guidelines typically limit which NICS denials are referred to the field divisions for further investigation. Typical restrictions include limiting referrals to persons who are: suspected terrorists, have multiple violent felony convictions, have a felony conviction within the last 5-10 years, or are known gang members.

We also analyzed the 84 referral guidelines to assess how many times the guidelines had been updated between 2004 and May 2015. We found that ATF referral guidelines for 38 of the federal judicial districts had not been updated during that 11-year period. ATF told us that it had confirmed with SACs in these

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<sup>44</sup> U.S. Department of Justice Office the Inspector General. *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System*, Evaluation and Inspections Report I-2004-006 (July 2004) (See <http://www.justice.gov/oig/reports/ATF/e0406/final.pdf>).

<sup>45</sup> For nine judicial districts, referral guidelines were not developed in 2004 because those districts included only point-of-contact states. Firearm sales were prohibited in the District of Columbia.

districts that changes were not needed during that time. Another 36 guidelines had been updated once; 9 had been updated twice; and 1 was updated four times.

Beginning in January 2013, the DENI Branch required ATF's SACs to annually update referral guidelines or confirm that no changes were necessary. In November 2014, the DENI Branch issued ATF Order 3140.1 requiring ATF field divisions to annually review the referral guidelines agreed upon with U.S. Attorneys to ensure that the DENI Branch would refer only cases to the field divisions that the USAO would seriously consider for prosecution. The order also required the SAC to annually certify for each U.S. Attorney's Office that the referral guidelines are current or submit notification of new referral guidelines. A DENI Branch manager told us that a field division can update its guidelines at any time. We confirmed that field divisions complied with ATF Order through 2015.

### **ATF Field Division Firearm Recoveries and Investigations**

Upon receipt of referrals of denials, ATF field divisions first seek to confirm that the subjects of referred transactions are prohibited persons. If the field division determines that the subjects are prohibited persons and local prosecutorial guidelines are met, the field divisions may refer the cases for prosecution. If the field division determines that a firearm was transferred to a prohibited person, the policy requires ATF field divisions to attempt to recover that firearm, or verify it is no longer in the possession of a prohibited person.

#### *ATF Referrals for Prosecution*

To assess controls of the NICS process in ATF field divisions, we interviewed ATF officials and reviewed investigative case files. From our sample of 447 NICS transactions denied by the FBI and referred to ATF, we found that the DENI Branch referred 72 transactions to the field divisions for further review. After reviewing and determining that 24 transactions were not prohibited, ATF found that 48 were associated with prohibited persons and referred them to ATF field divisions for further investigation and possible referral to the USAOs for consideration of prosecution. ATF officials told us that in addition to determining whether to refer a case for prosecution based on referral guidelines, an ATF field office will usually speak with an AUSA about a potential case and try to get agreement on the prosecutorial merit prior to a formal referral. ATF officials told us that ATF generally would not formally refer for prosecution a delayed denial where the subject was compliant in returning the firearm.

Our analysis showed that ATF field divisions did not refer 44 of the 48 prosecution eligible transactions to the USAOs because they were deemed by the field offices in consultation with their local USAO to not warrant prosecution. Of the four that met the prosecutorial guidelines and were formally referred for prosecution, only one was actually prosecuted. In the single case that was prosecuted, the subject was under indictment for a recent third-degree burglary

charge at the time of the prohibited purchase, and the firearm was never recovered.<sup>46</sup> AUSAs in the districts we visited told us that case files are reviewed on a case-by-case basis for aggravated circumstances or threats before a decision is made to prosecute.

We concluded that the field divisions acted in accordance with their policies in referring cases to the U.S. Attorneys' Offices, although the USAOs rarely accepted the cases for prosecution as further discussed below.

### *ATF Firearm Recoveries*

As previously explained, ATF is also responsible for recovering firearms transferred to prohibited applicants in NICS cases adjudicated by the FBI. Recovery of the firearm can include ATF retrieval, a third party transfer to a non-prohibited person, or a return of the firearm to the dealer. From our sample of 447 FBI denied transactions, we identified 39 delayed denials that resulted in firearms transferred to prohibited persons. Additionally, from our sample of 306 judgmentally selected transactions that may have resulted in firearms transferred to prohibited persons prior to the end of the 3-day waiting period, we identified 86 firearms requiring recovery. We reviewed all of these 125 transactions, and determined that ATF was able to recover 116, or 93 percent of the firearms. Of the remaining nine firearms that were not recovered, we found: (1) in five cases, the subjects could not be located, (2) in two cases, the subjects had already sold the firearms, (3) in one case, the matter was referred to local authorities after the subject was arrested by them on unrelated charges, and (4) in one case, the ATF office explained that due to competing priorities it did not have the resources to retrieve the firearm.

In response to the GAO's June 2014, audit report, number GAO-14-553, *Enhancing Data Collection Could Improve Management of Investigations*, ATF modified its information system to allow managers to monitor and track delayed denial investigations. This modification enables the system to show the disposition of the firearm. We determined that ATF recovered 93 percent of the firearm recoveries we reviewed, and made efforts to retrieve all but one firearm, for which ATF stated it had insufficient resources due to competing priorities, an issue which we did not evaluate in this audit.

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<sup>46</sup> The USAOs chose not to prosecute the three remaining referrals because one was compliant and returned the firearm, one was prosecuted on more serious drug charges that included higher penalties, and one was determined to not warrant prosecution for unspecified reasons. USAO prosecutions of referrals are discussed in more detail below.

## PROSECUTIONS RELATED TO NICS DENIALS

Each USAO has substantial discretion in deciding whether to prosecute criminal cases and usually requires that a potential NICS denial case involve aggravating circumstances. The USAOs accepted for consideration of prosecution cases involving 254 of the total 558 subjects referred by ATF resulting from NICS checks during the 8-year period from FY 2008 through FY 2015. We found that while the overall number of NICS denial prosecutions is extremely low, the number has dropped significantly since FY 2003, and that there was no significant change in the number of NICS cases pursued for prosecution the President's January 2013 plan to reduce gun violence.

We interviewed USAO officials regarding how they review cases referred by ATF field divisions for possible prosecution. We spoke with AUSAs in the Northern District of Georgia, Western District of Kentucky, Eastern District of Louisiana, and Northern District of Texas, which are located in the same cities as ATF field division offices we reviewed. We found that the AUSAs consult their district's prosecutorial guidelines for NICS cases to determine whether to bring charges. We also found that these guidelines are slightly different from the guidelines the ATF's DENI Branch uses to refer cases to ATF field division offices. ATF Order 3140.1 discussed previously demonstrates that that ATF is working to ensure its guidelines for referring cases to the field divisions reflect each judicial district's prosecutorial guidelines, which will help ensure that ATF refers cases that conform to those guidelines. AUSAs in all four districts told us that ATF agents typically discuss potential referrals with them by telephone and try to obtain USAO acceptance before ATF formally refers a case.

In addition, AUSAs in three of the four districts that we visited explained that there must be aggravating circumstances for their offices to accept a case for prosecution. The AUSAs we interviewed explained that case files are reviewed on a case-by-case basis and that they will typically only bring charges for a NICS violation if the firearm is linked to a violent crime or the subject is considered a significant threat.

The number of NICS prosecutions has dropped substantially since FY 2003, when 166 subjects were accepted for consideration of prosecution. Between FY 2008 and FY 2015, an 8-year period, ATF formally referred 509 NICS denial cases that included 558 subjects to USAOs for possible prosecution. The USAOs accepted for consideration of prosecution 254 subjects (or less than 32 subjects per year) and declined to prosecute 272 subjects. At the time of our review, decisions were pending for 32 subjects.<sup>47</sup> We reviewed case information for 266 of 404 cases that were referred to the USAOs through FY 2013. ATF reported the date it referred the cases to the USAO, the date the USAO accepted or declined

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<sup>47</sup> It was later determined that one case was misidentified as a NICS case.

prosecutions, and the reasons it received from the USAOs for why the cases were ultimately accepted for consideration of prosecution or declined.

Of the 266 cases ATF referred to the USAOs that we reviewed, 108 were accepted for consideration of prosecution, 151 were ultimately declined, 6 were awaiting a prosecution decision at the time of our review, and 1 was identified incorrectly as a NICS case.

Of the 151 cases declined, we found 89 reported reasons for declination that fell into the following categories:

**Table 3**  
**Most Often Reported Reasons for Declination**

<b>Reported Reason for Declination</b>	<b>Number of Cases Declined</b>
Did Not Meet USAO Prosecution Guidelines	31
Subject Charged by State Authorities <sup>48</sup>	29
Insufficient Evidence	12
Subject Determined no longer to be Prohibited	9
Subject was Cooperative and Returned Firearm	8

Source: Referral data provided by ATF

There were 37 other cases that included various reasons for declination. Examples include the USAO determined that the case generally lacked prosecutorial merit, lack of USAO resources, subject was convicted of more serious crimes, and subject entered a pre-trial diversion program. We also identified 25 cases where the USAO declined without providing additional explanation.

The USAOs considered 108 cases for prosecution. We determined that, in general, USAOs prosecuted NICS cases only when aggravated circumstances existed. Examples included defendants who were: (1) under indictment for felony aggravated battery, (2) had three felony convictions for injury to a child, (3) had three arrests for domestic violence, or (4) were trafficking firearms. For example, a USAO initially agreed to prosecute a prohibited person who received a firearm due to a delayed denial, because the subject's son was subsequently killed during the accidental discharge of the firearm. However, the USAO ultimately did not prosecute because the subject was a sympathetic defendant who had lost his child.

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<sup>48</sup> EOUSA officials told us that coordinating prosecution action with state authorities is both efficient and effective. If state authorities are prosecuting the prohibited person, then federal resources should not also be expended, except in aggravated circumstances, to pursue dual prosecution.

## Smart on Crime Initiative

In early 2013, the Department began a review to identify proposed reforms of the federal criminal justice system. As a result of the Department's review, it released the *Smart on Crime* initiative in August 2013.<sup>49</sup> The initiative proposed five principles intended to modernize the federal criminal justice system, one of which is that the Department prioritize prosecutions to focus on the most serious cases. During our review, an EOUSA official discussed the *Smart on Crime* initiative with us and explained her view that prosecuting NICS cases requires resources that many USAOs do not have. The EOUSA official told us USAOs generally hold the view that prosecuting subjects for false statements on a firearm application absent other aggravating circumstances may not be the best use of Department resources. The EOUSA official told us and the Department confirmed in response to a draft of this report that their decisions on these cases reflected the application of the principle of the Department's *Smart on Crime Initiative* as well as past prosecutive priorities that direct USAOs to prioritize prosecutions to focus on the most serious cases that implicate the most substantial federal interests. As displayed in Figure 2 of this report, cases arising from NICS denials referred and accepted for prosecution had declined significantly prior to the *Smart on Crime* initiative and appeared to have plateaued since the start of that initiative at an extremely low level relative to the overall number of federal firearms prosecutions. Consequently, it does not appear that the *Smart on Crime* initiative has significantly impacted the frequency of NICS prosecutions.

## The President's January 2013 Plan to Reduce Gun Violence

As referenced earlier, in January 2013, after the school shooting in Sandy Hook, Connecticut, the White House issued a report titled "Now is the Time: The President's Plan to Protect our Children and our Communities by Reducing Gun Violence". The plan included an initiative to maximize enforcement efforts to prevent gun violence and prosecute gun crime. To this end, the plan stated that the Attorney General would ask all U.S. Attorneys to consider whether supplemental efforts would be appropriate in their districts in areas such as prosecutions of persons who have been convicted of felonies and illegally seek to obtain firearms and persons who attempt to evade the background check system by providing false information.

When we asked what the Attorney General did in response to the President's plan, EOUSA explained that it provided all U.S. Attorneys with two Presidential Memoranda, one on firearms tracing and one on improving records availability to NICS. Specifically, the first memorandum directs all federal agencies to trace

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<sup>49</sup> U.S. Department of Justice, *Smart on Crime, Reforming the Criminal Justice System for the 21<sup>st</sup> Century*, August 2013. The OIG is conducting a number of related reviews, including a review of the Department's implementation of the principles regarding prosecution and sentencing reform under the Smart on Crime Initiative, and an audit of the Department's use of pre-trial diversion and drug court programs.

firearms recovered during the course of a federal investigation. The second memorandum addresses the ongoing effort to ensure that all relevant federal records are transmitted to NICS. The document also explains that EOUSA is involved with the process of transmitting relevant Legal Information Office Network System (LIONS) records to NICS and will continue to work on this issue to ensure that prohibited persons do not have access to firearms.<sup>50</sup> While important in their own right, these two memoranda addressed other parts of the “Now is the Time” plan and did not relate directly to the “maximize[ing] enforcement efforts” provision. Thereafter, in response to a draft of this report, the Department indicated that the Attorney General spoke with the U.S. Attorneys about the President’s plan on the afternoon of January 16, 2013, the same day that the President announced his plan. In addition, the Department advised us that, in February 2013, two U.S. Attorneys testified before Congress to explain the Department’s approach to these cases. The then-United States Attorney from the Western District of Virginia testified that, while the Department would prosecute particularly egregious cases arising from NICS denials, “[f]or the most part, however, the Department prioritizes prosecuting prohibited persons who actually *obtain* guns – people who have gotten around the background check system and acquired weapons illegally – rather than those who attempted to purchase a firearm through the background check system but were unsuccessful.”<sup>51</sup> EOUSA also provided a White House Fact Sheet stating that Attorney General Lynch had held a conference call with all U.S. Attorneys on January 6, 2016, and directed them to “continue to focus their resources – as they have for the past several years under the Department’s Smart on Crime initiative – on the most impactful cases, including those targeting violent offenders, illegal firearms traffickers, and dangerous individuals who bypass the background check system to acquire weapons illegally.” We found, as shown in Figure 2 on page 12, that while the numbers have remained extremely low, the number of NICS prosecutions has dropped significantly since FY 2003, and that there was no significant change in the number of cases accepted for consideration of prosecution by U.S. Attorneys’ Offices since the President’s plan was issued. As for the latter point, the number of defendants declined slightly from FY 2013 to FY 2014 from 24 in FY 2013 to 15 in FY 2014, and in FY 2015 the number of prosecutions increased to 20, but was still very limited and below the FY 2013 level.

Similarly, the percentage of cases referred by ATF that were accepted for consideration of prosecution also has decreased. USAOs accepted 80 percent of ATF field division referrals for consideration of prosecution in calendar years 2002 and 2003, 60 percent in FY 2008, and 38 percent in FY 2013. Moreover, the

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<sup>50</sup> The Legal Information Office Network System, known as LIONS, is the database that U.S. Attorneys’ Offices use to compile, maintain, and track the status of its criminal and civil cases.

<sup>51</sup> Testimony of Timothy J. Heaphy, United States Attorney for the Western District of Virginia, before the Subcommittee on the Constitution, Civil Rights and Human Rights, Senate Judiciary Committee (February 12, 2013) (emphasis in original); see also Testimony of John F. Walsh, United States Attorney for the District of Colorado, before the Senate Judiciary Committee (February 27, 2013).

numbers considered for prosecution, and actually prosecuted as discussed above, remain very low as compared to the overall number of NICS cases.

Although USAOs have not focused on NICS prosecutions, EOUSA highlighted other recent efforts that it believes are in accordance with the President's overall plan to reduce gun violence. Specifically, since February 24, 2013, EOUSA reported that it submitted 1,123,448 records into NICS from the USAOs' LIONS data. As a result, EOUSA stated that these records helped prevent the transfer of over 2,958 firearms to prohibited persons. In addition, it noted that there has been an increase of overall firearms prosecutions. EOUSA projected that there will be a total of nearly 9,100 firearms cases filed in FY 2016, a 4.3 percent increase over the average from FY 2012 through FY 2015. In addition, EOUSA projected that the percentage of firearms defendants as a share of the overall number of federal defendants will rise from an average of 13.9 percent to a projected 15.7 percent during the same period, all of which it indicated reflected the Department's prioritization of firearms prosecutions generally. In response to a draft of this report, the Department indicated that it believes that it has consistently and appropriately prioritized the most impactful firearms prosecutions, and that at present there is no reason for it to reconsider its approach to NICS denial cases.

## CONCLUSION AND RECOMMENDATIONS

We found that the FBI generally has an effective internal control system and quality control process that limits the number of incorrectly approved and denied firearms transfers that it processes. The process also includes what we found to be reasonable steps to approve or deny a firearm transfer within 3 business days, and to refer denied NICS transactions to ATF for further investigation, recovery of the firearm, and submission to USAOs for consideration of prosecution where appropriate. However, we believe that the FBI can improve its NICS process by strengthening controls to ensure that transactions are followed up on until a decision is communicated to the dealer or the transaction is purged from the system. Additionally, consistent with the finding of an FBI Inspection Division report, adjudication of NICS transactions could be better informed and errors prevented by using other datasets not currently included in NICS. Finally, we determined that the FBI should take steps to ensure that states update NICS with the outcome of transactions that they adjudicate. We provide the FBI with three recommendations to address these issues.

We determined that ATF's controls generally enabled it to appropriately process denials and refer them to the proper field division for investigation. However, we found ways in which ATF should strengthen controls over its quality control review sampling methodology to help ensure it is consistently applied. Further, while ATF is modifying its information system to better document results, this had not been implemented at the time of our review. We provide two recommendations to ATF to improve its quality control process.

We also identified a disagreement between ATF and FBI regarding the definition of the significant category of prohibited persons denominated "Fugitives from Justice." Although raised to DOJ's Office of Legal Counsel in 2008, no decision had been rendered for over 7 years at the time of our review. We recommend that OLC issue its opinion to clarify the correct definition of the "Fugitive from Justice" category in order to ensure that the FBI and ATF are applying the law appropriately and as intended.

Finally, we found that the USAOs generally look for aggravating circumstances before they will prosecute a NICS violation reflecting their interpretation of the Department's *Smart on Crime Initiative* that directs USAOs to prioritize prosecutions on the most serious cases in deciding whether to prosecute these cases. While the overall number of NICS prosecutions remained extremely low, we found that the significant decline in prosecution of NICS cases preceded the start of the *Smart on Crime* initiative and that, while the number of NICS cases dropped slightly, there has been no significant change in the number of NICS cases pursued for prosecution since the President's "Now is the Time" plan was issued.

We recommend that the FBI:

1. Develop a follow-up process to ensure research is initiated for all open firearms transactions, that information received from that research is reviewed and followed up on, as appropriate, and that transaction decisions are communicated to dealers in a timely manner.
2. Implement the FBI Inspection Division recommendation that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI.
3. Consider additional mechanisms to implement, and encourage state points of contact to update NICS records in a timely manner, including updating NICS regulations and CJIS system user agreements to create enforceable timeframes for updates, and coordinate with other FBI units and DOJ components to explore legislation or regulations providing for timely record updates to include criminal history, the NICS Index, and status updates, and to identify best practices.

We recommend that ATF:

4. Revise its quality control procedures to document in more detail the selection process for reviewing transactions, particularly for those non-referred transactions that do not meet the prohibited person codes that ATF has determined to be most at risk for mistakes.
5. Continue the modification of its information system to allow it to document and maintain the results of quality control reviews.

We recommend that OLC:

6. Resolve the long-standing disagreement between the FBI and ATF regarding the definition of the "Fugitive from Justice" category of persons that forms the basis for referrals to ensure that the law is being applied appropriately and as intended.

## STATEMENT ON INTERNAL CONTROLS

As required by the *Generally Accepted Government Auditing Standards (GAGAS)*, we tested, as appropriate, internal controls significant within the context of our audit objectives. A deficiency in an internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to timely prevent or detect: (1) impairments to the effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations. Our evaluation of the FBI's, ATF's, and USAOs' internal controls was not made for the purpose of providing assurance on its internal control structure as a whole. FBI, ATF, and USAO management are responsible for the establishment and maintenance of internal controls.

Through our audit testing, we did not identify any deficiencies in the FBI, ATF, and USAOs' internal controls that are significant within the context of the audit objectives and, based upon the audit work performed, that we believe would affect the FBI, ATF, and USAOs' abilities to effectively and efficiently operate, to correctly state financial and performance information, and to ensure compliance with laws and regulations.

Because we are not expressing an opinion on the FBI's, ATF's, or USAO's internal control structure as a whole, this statement is intended solely for the information and use of the FBI, ATF, and USAOs. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

## STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

As required by GAGAS, we tested the FBI's, ATF's, and USAOs' processes, controls, and records to obtain reasonable assurance that the FBI, ATF, and USAOs complied with federal laws and regulations, for which noncompliance, in our judgment, could have a material effect on the results of our audit. The FBI, ATF, and USAOs are responsible for ensuring compliance with applicable federal laws and regulations. In planning our audit, we identified the following laws and regulations that concerned the operations of the auditees and that were significant within the context of the audit objectives:

- Public Law 90-618 (*The Gun Control Act of 1968*)
- Public Law 103-159 (*Brady Act Handgun Violence Prevention Act*)
- Title 18, U.S.C. § 922 through § 931 (Rules and Regulations for buying and selling guns)
- 28 C.F.R. Part 25 (National Instant Criminal Background Check System Regulations)
- OMB Circular No. A-123

Our audit included examining, on a test basis, the FBI's, ATF's, and USAOs' compliance with the aforementioned laws and regulations that could have a material effect on these organizations' operations, through interviewing FBI, ATF, and USAO personnel, assessing internal control processes and procedures, and analyzing FBI, ATF, and USAO NICS data. Nothing came to our attention that caused us to believe that the FBI, ATF, and USAOs were not in compliance with the aforementioned laws and regulations.

### AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

Our audit objectives were to evaluate the effectiveness of processes associated with: (1) the FBI's referral of denied NICS transactions to ATF, (2) ATF's initial screening and referral of denied transactions to its field offices for investigation, (3) ATF field offices' investigation of denied transactions, and (4) the USAOs' prosecution of crimes associated with denials.

We conducted our 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 objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions on our audit objectives. Our audit concentrated on, but was not limited to, the period from FY 2008 through FY 2013. Our audit encompassed NICS background checks performed by the FBI, as well as the point-of-contact states.

We performed the following work at the FBI's NICS Section in Clarksburg, West Virginia; the ATF Denial Enforcement and NICS Intelligence (DENI) Branch in Martinsburg, West Virginia; and ATF field divisions and the USAOs in Atlanta, Georgia; Louisville, Kentucky; Dallas, Texas; and New Orleans, Louisiana:

- We reviewed the current applicable policies and procedures in place for accumulating, tracking, reviewing, referring, investigating, and prosecuting gun application violations of the Gun Control Act and Brady Act.
- We reviewed the Federal regulations and the participation agreement in place between state points of contact and the FBI's Criminal Justice Information Services for states to upload their supporting records into NICS and note the final decisions of their transactions, if applicable.
- We interviewed key staff and conducted walk-throughs of their respective control processes for receiving, reviewing, processing, referring, investigating, and prosecuting gun applications.
- We obtained information and statistics from the FBI, ATF, and USAOs on denials, open cases, referrals, and prosecutions.
- From a universe of 373,900 FBI denied firearm transfer requests reported in the FBI's NICS system for FY 2008 through FY 2012, we judgmentally selected 447 of the requests and reviewed supporting documentation to determine if the firearm application was properly denied and supported in accordance with the Gun Control Act. Because the sample was judgmentally selected to address specific possible concerns, the results of the sample testing cannot be projected to the total universe of all transactions.
- From a universe of 190,525 firearm transfer requests denied by state points of contact and reported in the FBI's NICS system for FY 2008 through FY

2012, we judgmentally selected 381 and reviewed supporting documentation to determine if the firearm application was properly denied and supported in accordance with the Gun Control Act. The results of our testing of this sample are not intended to be projected to the universe.

- From a list of 92,450 open NICS firearm transactions held that were neither denied nor approved by either the state points of contact or the FBI from September 15, 2013, through October 14, 2013, and 3 months' of data from November 2013, December 2013, and January 2014, we judgmentally selected 634 of the 92,450 open FBI NICS firearm transactions. We reviewed supporting documentation to determine whether the transactions should have been approved or denied, and whether persons who may have legally obtained firearms because the 3-business-day waiting period had expired were later found to be prohibited from possessing the firearms. The results of our testing of this sample are not intended to be projected to the universe.
- Through analysis of the 461,732 Federal denied firearm transfer requests reported in the FBI's NICS system for FY 2008 through FY 2013, we identified 1,092 NICS firearm transactions that indicated firearms may have been transferred to persons prohibited from possessing firearms even though the FBI had recorded a denial within 3 business days. We judgmentally selected 306 of the 1,092 firearm applications and reviewed supporting documentation to determine why the firearms were transferred in error, whether ATF retrieved any firearms that were transferred but for which the transfers were later denied (delayed denials), and whether the ATF DENI Branch referred firearm applicants for further investigation to ATF field divisions and possible prosecution in accordance with USAO criteria. The results of our testing of this sample are not intended to be projected to the universe.
- Using the judgmentally selected 447 of the 373,900 FBI denied firearm applications (standard and delayed denials) for FY 2008 through FY 2012, we reviewed supporting documentation to determine if ATF retrieved firearms that were transferred, but for which the transfers were later denied (delayed denials), and referred firearm applicants for further investigation to ATF field offices and possible prosecution in accordance with USAO criteria. The results of our testing of this sample are not intended to be projected to the universe.
- For those 72 applicants that were subsequently referred for further ATF investigation and possible prosecution by the USAOs, we reviewed supporting documentation and interviewed Assistant U.S. Attorneys responsible for prosecuting the NICS cases to determine the outcomes of the referrals. The results of our testing of this sample are not intended to be projected to the universe.

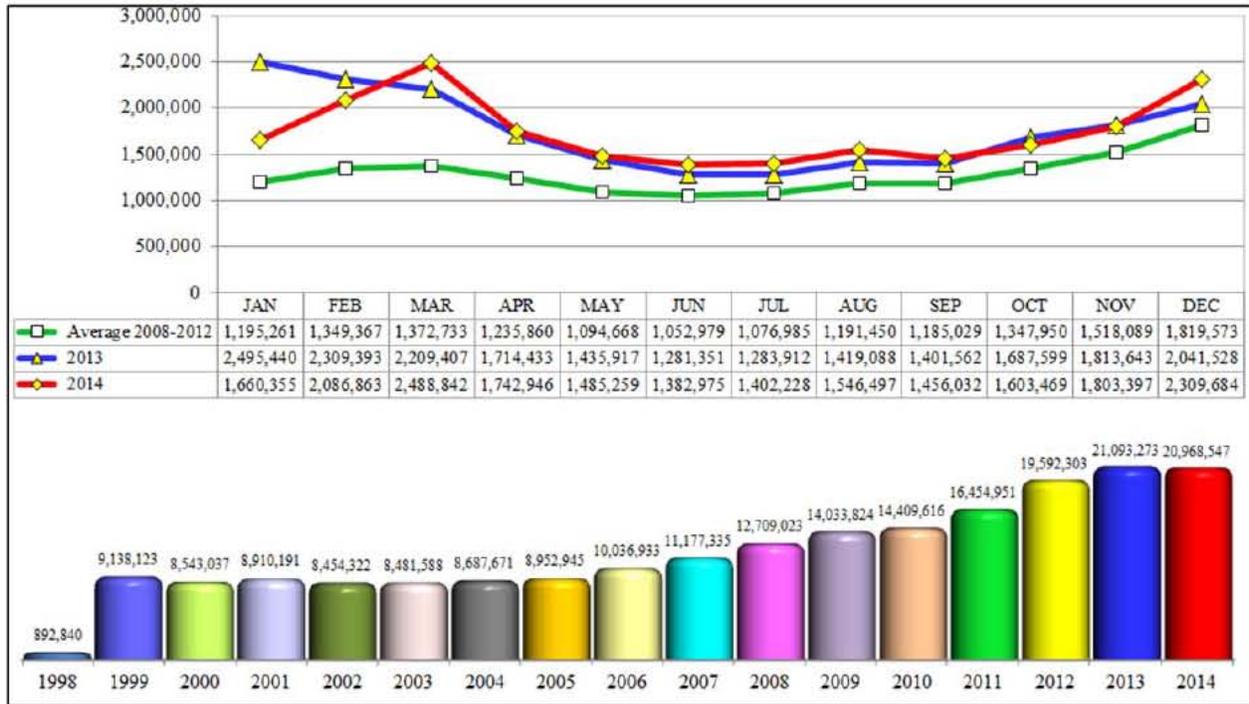
NICS PARTICIPATION MAP



Source: The FBI

## APPENDIX 3

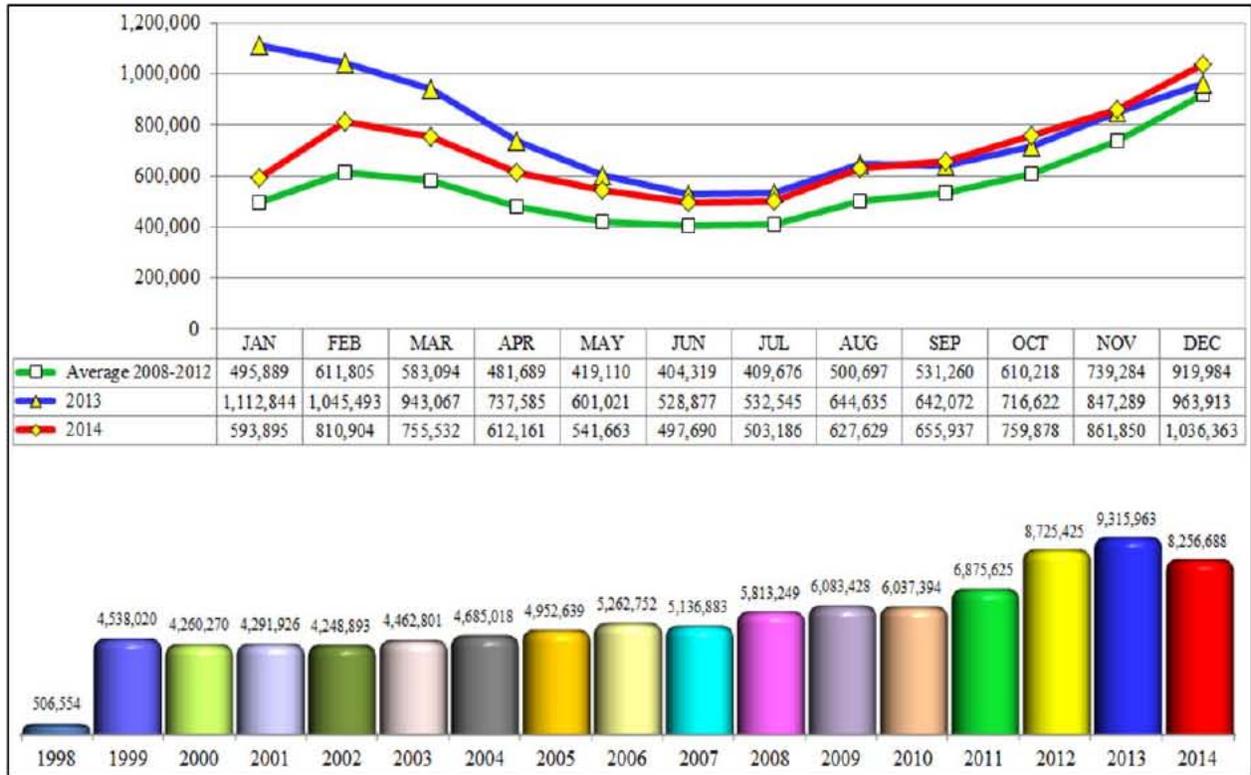
### TOTAL NICS CHECKS November 30, 1998 – December 31, 2014 Program-to-date 202,536,522



Source: The FBI

**APPENDIX 4**

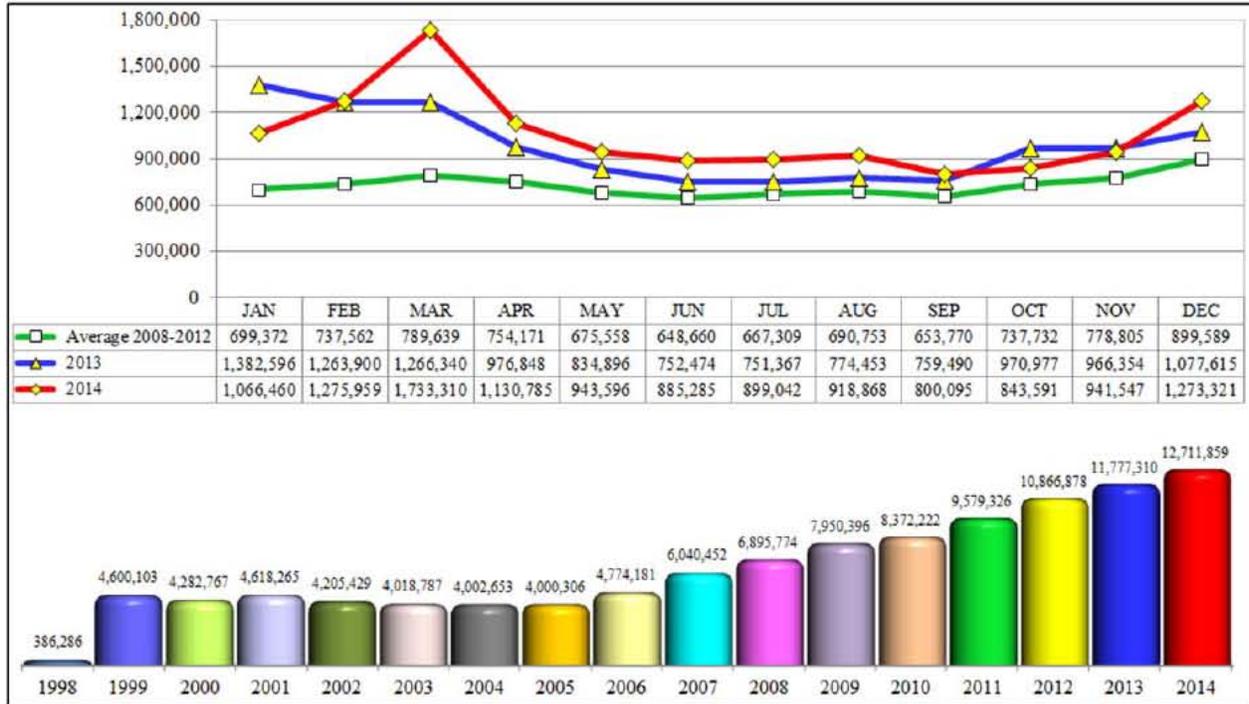
**TOTAL FEDERAL NICS CHECKS**  
**November 30, 1998 – December 31, 2014**  
**Program-to-date**  
**93,453,528**



Source: The FBI

## APPENDIX 5

### TOTAL STATE NICS CHECKS November 30, 1998 – December 31, 2014 Program-to-date 109,082,994



Source: The FBI

THE FBI'S RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Federal Bureau of Investigation

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Washington, D. C. 20535-0001

September 22, 2016

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 the Handling of Firearms Purchase Denials Through The National Instant Criminal Background Check System*

We are pleased that you found, related to NICS checks, "...the FBI generally has an effective internal control system and quality control process."

We agree that it is important to develop a process to ensure research of open firearms transactions as well as communication of dispositions to dealers is handled in a timely fashion. We also acknowledge the need for the review of additional databases for NICS use as well as the importance of conveying to states the need to update NICS records in a timely manner. In that regard, we concur with your three recommendations 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 that reads "James C. Langenberg". The signature is written in a cursive style with a long, sweeping underline.

James C. Langenberg  
Section Chief  
External Audit and Compliance Section  
Inspection Division

Enclosure

**The Federal Bureau of Investigation's Response to the  
Office of the Inspector General's Audit of the Handling of Firearms Purchase Denials  
Through the National Instant Criminal Background Check System**

**Report Recommendation #1:** Develop a follow-up process to ensure research is initiated for all open firearms transactions, that information received from that research is reviewed and followed up on, as appropriate, and that transaction decisions are communicated to dealers in a timely manner.

**FBI Response to Report Recommendation #1:** Concur. The NICS Section has plans to move in the recommended direction provided technology and resources are implemented and available.

To ensure research is initiated for all open firearm transactions, the FBI requested additional resources for the FBI Criminal Justice Information Services (CJIS) Division's NICS Section. This will allow the NICS Section to process background checks within the first 24 hours, provide thorough and continuous research, and to communicate decisions to the dealers in a timely manner.

**Report Recommendation #2:** Implement the FBI Inspection Division recommendation that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI.

**FBI Response to Report Recommendation #2:** Concur. The NICS Section supports the OIG recommendation and provides the following explanation below.

The NICS Section has identified two potential internal databases to obtain additional information which could assist in making transaction decisions. The internal databases are the National Data Exchange (N-DEX) and Sentinel. The NICS Section would need law enforcement approval (by the Advisory Policy Board) and a regulation change (Title 28, Code of Federal Regulations, Part 25) in order to access the N-DEX to conduct firearm background checks. The NICS Section is still exploring access to the Sentinel database. Additionally, the CJIS Division's Biometric Services Section has received contract staff to research and to update dispositions on criminal history records.

The NICS Section will continue to explore other state and federal Web sites that can be accessed to assist in the adjudication of NICS checks. The NICS Section may opt to explore this opportunity at a universal level through the Advisory Process. The NICS Section is also in the process of reconciling its state contact lists to ensure all applicable agencies/stakeholders are listed as possible resources for the NICS Section's employees. Through on-going liaison efforts, the NICS Section will continue to actively seek information and opportunities to gain resources and data in support of the NICS Section's mission.

**Report Recommendation #3:** Consider additional mechanisms to implement, and encourage state points of contact to update NICS records in a timely manner, including updating NICS

regulations and CJIS system user agreements to create enforceable timeframes for updates, and coordinate with other FBI units and DOJ components to explore legislation or regulations providing for timely record updates to include criminal history, the NICS Index, and status updates, and to identify best practices.

**FBI Response to Report Recommendation #3:** Concur. The NICS Section believes this recommendation by OIG will be most challenging to implement. The records maintained by the FBI are done in a shared environment with the local, state, tribal and federal law enforcement agencies. Shared management is defined as: the FBI along with local, state, tribal, and federal data providers and system users share responsibility for the operation and management of all systems administered by the FBI for the benefit of the criminal justice community.

The NICS Section will collaborate with additional entities within the CJIS Division to explore updating the agreements for the NICS Point-of-Contact (POC) states to include recommended timeframes to provide status updates. The NICS Section will work on an official document for state agencies, in particular, on providing information to the NICS Index and ensuring maintenance of records in a timely manner. The NICS Section will also review current agreements for federal agencies on providing information to the NICS Index and ensuring maintenance of records in a timely manner. The NICS Section will work with other FBI partners and the Department of Justice to explore legislation or regulation changes for timely record updates to include criminal history, the NICS Index, and POC status updates. Lastly, the NICS Section will collaborate with state and federal partner agencies through the Advisory Process to identify if there are prior published results in any of the areas for timely record updates that can be utilized to springboard the recommendation on identifying best practices.

ATF'S RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

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Washington, DC 20226

www.atf.gov

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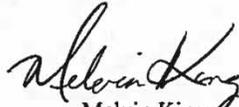
MEMORANDUM TO: Assistant Inspector General  
Audit Division  
Office of Inspector General

FROM: Assistant Director  
Office of Professional Responsibility and Security Operations  
Bureau of Alcohol, Tobacco, Firearms and Explosives

SUBJECT: Audit of the Handling of Firearms Purchase Denials through the  
National Instant Criminal Background Check System

This memorandum serves to transmit the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) response to the above-cited report. Attached is a summary of the corrective actions we are taking to satisfy the report's recommendations.

Should you have any questions or require further information, please contact Adam Pallotto, Chief of the Audit Liaison Branch, at (202) 648-8706.

  
Melvin King



U.S. Department of Justice

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

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Washington, DC 20226

www.atf.gov

September 19, 2016

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MEMORANDUM TO: Assistant Director  
(Office of Professional Responsibility and Security Operations)

FROM: Assistant Director  
(Office of Strategic Intelligence and Information)

SUBJECT: OIG Audit of the Handling of Firearms Purchase Denials through the  
National Instant Criminal Background Check System

This memorandum responds to the Office of Inspector General (OIG) report entitled *Audit of the Handling of Firearms Purchase Denials through the National Instant Criminal Background Check System*. We appreciate the opportunity to review and comment on the report. We recognize the importance of proper and timely processing of NICS referrals are continually working to further improve our procedures.

The report contains two recommendations aimed at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). We concur with both recommendations and, as described below, are in the process of implementing corrective actions to satisfy them.

Specifically, OIG recommends that ATF:

**Recommendation 4 (Resolved): Revise its quality control procedures to document in more detail the selection process for reviewing transactions, particularly for those non-referred transactions that do not meet the prohibited person codes that the ATF has determined to be most at risk for mistakes.**

ATF concurs with this recommendation. Assigned ATF personnel are already at work on revising their internal SOPs for Quality Assurance to reflect more detailed instructions on conducting these procedures. This addendum to the standing SOPs will concentrate not only on what mistakes are most commonly uncovered in the NICS system, but will also focus on non-referred transactions coding. These updated instructions should be published no later than the second quarter of FY 17.

Assistant Director  
(Office of Human Resources and Professional Development)

**OIG Recommendation 5 (Resolved): Continue the modification of its information system to allow it to document and maintain the results of quality control reviews.**

ATF concurs with this recommendation. We have assigned a dedicated in house IT Specialist to upgrade and modernize the ANR (ATF NICS Referral) database so that it is more user friendly, as well as allowing for more efficient and effective auditing and tracking internal to the system. Our hopes are that this database will be completely upgraded by the end of FY 17.

Should you have any questions regarding this memorandum, please contact Chief, Operational Intelligence Division.

  
James E. McDermond

## APPENDIX 8

### OLC'S RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

#### MEMORANDUM

TO: Ferris B. Polk, Regional Audit Manager, Office of the Inspector General  
FROM: Karl R. Thompson, Principal Deputy Assistant Attorney General   
DATE: September 26, 2016  
RE: Draft Audit Report regarding the National Instant Criminal Background Check System

On September 12, 2016, this Office received for its review a copy of a Draft Audit Report regarding the handling of firearms purchase denials through the National Instant Criminal Background Check ("NICS") System. The draft report includes a proposed recommendation that OLC complete as soon as possible its review of FBI's request for reconsideration of prior informal OLC advice regarding the NICS "Fugitive from Justice" prohibitor. We agree with this proposed recommendation. We anticipate completing our review of FBI's request within the next few months.

We appreciate the opportunity to review the report, and have no further comments.

## APPENDIX 9

### OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Office of the Inspector General (OIG) provided a draft of this audit report to the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Executive Office for United States Attorneys (EOUSA), and the Office of Legal Counsel (OLC). The FBI, ATF, and OLC provided formal responses, which are incorporated as Appendices 6, 7, and 8 of this final report. EOUSA provided technical comments, which are included as appropriate in the report, but did not provide a formal response. In response to our audit report, the FBI, ATF, and OLC agreed with our findings and recommendations and discussed actions to be implemented in response to our recommendations. Therefore, the status of the audit report is resolved. The following provides the OIG analysis of the responses and summary of actions necessary to close the report.

#### Recommendations for the FBI :

- 1. Develop a follow-up process to ensure research is initiated for all open firearms transactions, that information received from that research is reviewed and followed up on, as appropriate, and that transaction decisions are communicated to dealers in a timely manner.**

Resolved. The FBI concurred with the recommendation and said it plans to address the recommendation when technology and resources are implemented and available. The FBI stated that it requested additional resources for its Criminal Justice Information Services (CJIS) Division's NICS Section that will allow the NICS Section to process background checks within 24 hours, provide thorough and continuous research, and communicate decisions to dealers in a timely manner.

This recommendation can be closed when we receive documentation showing the FBI has developed and implemented a tracking process within the NICS system to ensure that external research requests are made in a timely manner for each open transaction, requested information is received and evaluated in a timely manner, that further research is conducted when needed, and transaction decisions are communicated to dealers in a timely manner.

**2. Implement the FBI Inspection Division recommendation that the NICS Section should seek to identify and review additional database resources or stakeholders both internal and external to the FBI.**

Resolved. The FBI concurred with this recommendation and said the NICS Section identified two internal databases that could assist NICS staff in making firearm background transaction decisions. The FBI listed the National Data Exchange (N-DEx) and Sentinel as the two databases and noted that the NICS Section would need law enforcement approval from the Advisory Policy Board and a revision to 28 U.S.C. Part 25 to access N-DEx for firearm background checks. The FBI also said that the NICS Section is still exploring access to the Sentinel database and will continue to explore other options to gain resources and data in support of its mission.

This recommendation can be closed when we receive documentation that the FBI has completed its efforts to identify and review additional database resources or stakeholders both internal and external to the FBI.

**3. Consider additional mechanisms to implement, and encourage state points of contact to update NICS records in a timely manner, including updating NICS regulations and CJIS system user agreements to create enforceable timeframes for updates, and coordinate with other FBI units and DOJ components to explore legislation or regulations providing for timely record updates to include criminal history, the NICS Index, and status updates, and to identify best practices.**

Resolved. The FBI concurred with this recommendation. The FBI stated that implementing the recommendation would be challenging because the records maintained by the FBI are in a shared environment with local, state, tribal, and federal law enforcement agencies. These systems are administered by the FBI for the benefit of the entire criminal justice community. The FBI said that the NICS Section will collaborate with additional entities within the CJIS Division to explore updating the agreements for the NICS point-of-contact states to include recommended timeframes to provide status updates. The FBI also stated that the NICS Section will work on an official document for state agencies, in particular, on providing information to the NICS Index and ensuring maintenance of records in a timely manner. The FBI stated the NICS Section will review current agreements for federal agencies on providing information to the NICS Index and ensuring maintenance of records in a timely manner, and work with other FBI partners and the Department to explore legislation or regulatory changes for timely record updates of criminal histories, the NICS Index, and state points of contact status updates. The FBI also said the NICS Section will collaborate with state and federal partner agencies to identify best practices from prior published results in any of the areas for timely record updates.

This recommendation can be closed when we receive documentation to show that the FBI has completed its consideration of additional mechanisms to

implement, and encourage state points of contact to update NICS records in a timely manner.

#### **Recommendations for ATF:**

- 4. Revise its quality control procedures to document in more detail the selection process for reviewing transactions, particularly for those non-referred transactions that do not meet the prohibited person codes that ATF has determined to be most at risk for mistakes.**

Resolved. ATF concurred with the recommendation. ATF stated that assigned ATF personnel are already at work on revising their internal standard operating procedures for Quality Assurance to reflect more detailed instructions on conducting these procedures. ATF further stated that this addendum to the standing standard operating procedures will concentrate not only on what mistakes are most commonly uncovered in the NICS system, but will also focus on non-referred transactions coding. ATF stated that these updated instructions should be published no later than the second quarter of FY 17.

This recommendation can be closed when we receive ATF's revised internal standard operating procedures for quality assurance. These procedures should include the detailed process for selecting transactions for review, particularly for those non-referred transactions that do not meet the prohibited person codes that ATF determined to be most at risk for mistakes.

- 5. Continue the modification of its information system to allow it to document and maintain the results of its quality control reviews.**

Resolved. ATF concurred with the recommendation. ATF stated that it assigned a dedicated in-house Information Technology Specialist to upgrade and modernize the ANR (ATF NICS Referral) database so that it is more user friendly, as well as allowing for more efficient and effective auditing and tracking internal to the system. ATF hopes are that this database will be completely upgraded by the end of FY 17.

This recommendation can be closed when we receive evidence that ATF's modification to its information system allows ATF to document and maintain results of its quality control reviews.

#### **Recommendation for OLC:**

- 6. Resolve the long-standing disagreement between the FBI and ATF regarding the definition of the "Fugitive from Justice" category of persons that forms the basis for referrals to ensure that the law is being applied appropriately and as intended.**

Resolved. OLC concurred with the recommendation. OLC stated that it anticipates completion of its review within the next few months.

This recommendation can be closed when we receive documentation that the disagreement between the FBI and ATF regarding the NICS "Fugitive from Justice" prohibitor has been resolved.

*The Department of Justice Office of the Inspector General (DOJ OIG) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department's operations. Information may be reported to the DOJ OIG's hotline at [www.justice.gov/oig/hotline](http://www.justice.gov/oig/hotline) or (800) 869-4499.*



Office of the Inspector General  
U.S. Department of Justice  
[www.justice.gov/oig](http://www.justice.gov/oig)