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DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

28 CFR Part 25

[Docket No. FBI 152: AG Order No.]

RIN 1110-AA27

National Instant Criminal Background Check System

AGENCY: Federal Bureau of Investigation (FBI), Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (the Department) proposes three amendments to part 25 of title 28 of the Code of Federal Regulations. These proposed changes are intended to promote public safety, to enhance the efficiency of the National Instant Criminal Background Check System (NICS) operations, and to resolve difficulties created by unforeseen processing conflicts within the system. The proposed amendments are for the following purposes: (1) to add tribal criminal justice agencies to those entities authorized to receive information in connection with the issuance of a firearm-related permit or license; (2) to authorize access for criminal justice agencies to the FBI-maintained NICS Index to permit background checks for the purpose of disposing of firearms in the possession of those agencies; and (3) to permit NICS to retain in a separate

database its Audit Log records relating to denied transactions beyond 10 years, rather than transferring them to a Federal Records Center for storage.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER]. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by Docket No. FBI 152, by either of the following methods:

- *Federal Regulations Web site:* You may review this regulation on <http://www.regulations.gov> and use the comment form for this regulation to submit your comments. You must include Docket No. FBI 152 in the subject box of your message.
- *Mail:* You may use the U.S. Postal Service or other commercial delivery services to submit written comments to Section Chief Paul Wysopal, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, NICS Section, Module A3, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306 or by facsimile to (304) 625-0550. To ensure proper handling, please reference Docket No. FBI 152 on your

correspondence. You may view an electronic version of this proposed rule at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Patricia Traxler, NICS Strategy and Systems Unit, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, NICS Section, Module A3, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306, telephone number (304) 625-7372.

SUPPLEMENTARY INFORMATION:

- I. Posting of Public Comments
- II. Background
- III. Regulatory Proposals

Proposal #1: Accessing Records in the System (28 CFR 25.6(j)(1))

Proposal #2: Accessing Records in the System (28 CFR 25.6(j)(3))

Proposal #3: Storage Location of NICS Audit Log records relating to denied transactions (28 CFR 25.9(b)(1)(i))

- IV. Regulatory Certifications

- I. **Posting of Public Comments**

Please note that all comments on the proposed rules are

considered part of the public record and are made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file but not posted online. Confidential business information identified and located as set forth above will not be placed in the agency's public docket file. If you wish to inspect the

agency's public docket file in person by appointment, please see the "For Additional Information" paragraph.

II. Background

The Brady Handgun Violence Prevention Act (Brady Act) of 1993, Public Law 103-159, mandated background checks pursuant to 18 U.S.C. 922(t)(1) and (3) for any firearm transfer from a federal firearms licensee (FFL) to any unlicensed person.

Access to the NICS Index for purposes unrelated to the Brady Act NICS background checks is currently limited by 28 CFR 25.6(j) to the following two purposes:

(1) Providing information to Federal, state, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives; or

(2) Responding to an inquiry from the ATF (Bureau of Alcohol, Tobacco, Firearms, and Explosives) in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53).

III. Regulatory Proposals

The Department is publishing three proposed changes to the NICS regulations for public comment. In addition, the

Department is amending the definitional provision in section 25.2 referring to ATF to reflect the transfer of that agency out of the Department of the Treasury with a new name pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296).

Proposal #1: Accessing Records in the System (28 CFR 25.6(j) (1))

The first proposal would amend 28 CFR 25.6(j)(1) to add tribal criminal justice agencies to those entities authorized to receive information in connection with the issuance of a firearm-related permit or license. Under the current regulation such information may be provided only "to Federal, state, or local criminal justice agencies." Tribal criminal justice agencies are part of the governing authority of "domestic dependent nations" recognized by the United States. The tribes have concurrent criminal jurisdiction within the borders of their respective reservations and may issue firearms-related permits and licenses. Given that state and local criminal justice agencies can access the NICS Index in the course of issuing a permit or license, tribal criminal justice agencies should also be permitted to conduct NICS background checks to support their issuance of firearms related permits and licenses.

Proposal #2: Accessing Records in the System (28 CFR 25.6(j) (3))

The second proposal would amend 28 CFR 25.6(j) to authorize access to the FBI-maintained NICS Index to permit background checks for the purpose of disposing of firearms in the possession of a criminal justice agency.

Under the current regulation, criminal justice agencies are not authorized to access the NICS in order to conduct background checks on individuals to whom they intend to transfer firearms in the agency's possession that have been recovered, confiscated, or seized. In order to ensure that the person to whom the firearm will be transferred is not prohibited from possessing a firearm, the Department proposes to amend 28 CFR 25.6(j) to authorize criminal justice agencies to access the NICS in order to conduct background checks on individuals to whom they intend to transfer possession of firearms in the agency's possession. To this end, the FBI sought and obtained the concurrence of the CJIS Division Advisory Policy Board (APB) (a body created pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2) to this proposed amendment of 28 CFR 25.6(j).

If a state is currently acting as a Point of Contact (POC) state as defined under 28 CFR 25.2, the checks for criminal justice agencies within such a state, for the purpose of returning stolen or confiscated firearms in the possession of criminal justice agencies, would also be conducted through the POC state as the firearm and firearm-related permit checks are

currently conducted. If the FBI currently conducts firearm background checks for the state, such checks may be conducted through the FBI.

Proposal #3. Storage Location of NICS Audit Log

Records Relating to Denied Transactions (28 CFR 25.9(b)(1)(i))

The Department is also proposing to amend 28 CFR 25.9(b)(1)(i) to authorize the NICS to retain records relating to denied transactions in a separate FBI database beyond 10 years, rather than transferring them to a Federal Records Center for storage. When the NICS was established, the Department planned for NICS records to be stored by the National Archives and Records Administration (NARA) in a Federal Records Center. In particular, the original regulation governing NICS, at 28 CFR 25.9(b)(1)(i), provided that records relating to denied transactions in the Audit Log would be transferred to a Federal Records Center after reaching ten years of age. But current technology allows NICS to readily retain such records on site, and the FBI has therefore determined that for NICS' own internal business operations, litigation and prosecution purposes, and proper administration of the system, NICS shall retain denied transaction records on site. As is currently the case, these records will be maintained in accordance with the applicable document retention requirements of NARA and the FBI. NICS business practices have changed dramatically since its

inception and, with some exceptions, its business records are no longer retained in hard copy format or, in special circumstances, are retained in hard copy only for short periods of time. As soon as practicable after receipt, NICS transfers its records to an appropriate electronic format (e.g., conversion to either pdf or tif files). These electronic formats permit the NICS to retain all of its operations records in readily accessible formats in an electronic database for the full retention period authorized by NARA and in conformance with the retention period of other CJIS Division records.

IV. Regulatory Certifications

Executive Order 12866 and 13563 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation.

The Department of Justice has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly, this rule has been reviewed by the Office of Management and Budget.

Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to

select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Department of Justice has assessed the costs and benefits of this rule and believes that the regulatory approach selected maximizes net benefits. The benefits of this proposed rule are enhanced access to the NICS for tribal criminal justice agencies that issue firearms-related licenses or permits. This access, while discretionary, will assist the tribes in evaluating any legal prohibitions or public safety risks associated with issuing a particular firearm permit or license. Similarly, state, tribal, and local criminal justice agencies in the possession of firearms will benefit by being able to ensure that persons to whom they transfer recovered, seized, or confiscated firearms are legally permitted to receive and possess those firearms. In both cases, such actions by criminal justice agencies will help to improve public safety by reducing the risk that firearms will be possessed and used by persons who are prohibited by law from doing so. Finally, the retention of denied transaction information at CJIS for the full period of

time authorized by law will enhance the efficiency and operational capability of the NICS.

The costs of this rule stem from staffing and funding required by state agencies or the NICS Section to conduct additional background checks for the disposition of firearms in the possession of criminal justice agencies, or in connection with the issuance of firearms-related licenses or permits by tribal criminal justice agencies. The full impact of the increase in background checks resulting from these changes cannot be projected due to uncertainty about the number of firearms that currently are in, or regularly come into, the possession of criminal justice agencies, and the number of such firearms that ultimately are appropriate for transfer to an unlicensed recipient. Similarly, the FBI cannot predict how often tribal criminal justice agencies are likely to access the NICS in connection with firearms license or permit decisions. Because these uses of the NICS are discretionary with state and tribal criminal justice agencies, the FBI is unable to estimate the extent to which the states will use these capabilities and, therefore, cannot estimate either the impact on the states or the NICS. The FBI invites public comments on both the costs and benefits of this proposed rule.

Executive Order 13132 – Federalism

This proposed regulation will not have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. While it provides that criminal justice agencies that are authorized users of the NICS with access to the National Crime Information Center (NCIC) will be authorized to conduct Disposition of Firearm background checks of the NICS Index, such background checks are not mandatory.

In drafting this proposed rule, the FBI consulted the FBI's CJIS Division APB, which consists of representatives from numerous federal, state, tribal, and local criminal justice agencies across the United States. It recommends general policy to the FBI Director regarding the philosophy, concept, and operational principles of the FBI's Integrated Automated Fingerprint Identification System, Law Enforcement Online, the NCIC, the NICS, Uniform Crime Reporting, and other systems and programs administered by the FBI's CJIS Division. In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this proposed regulation and, by approving it, certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule imposes no costs on businesses, organizations, or governmental jurisdictions (whether large or small).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no action was deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This proposed rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or have significant adverse effects on competition, employment, investment, productivity, innovation,

or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The collection of information contained in this notice of proposed rulemaking will be submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

If criminal justice agencies choose to conduct background checks through NICS for disposition of firearms in their possession, then they are required to complete a Firearms Disposition Transaction Record Form. Criminal justice agencies must also verify the identity of a person applying for the return of a firearm by examining an identification document presented by the prospective transferee. The Firearms Disposition Transaction Record Form will include certain mandatory descriptive information as well as optional information about the prospective transferee, such as the person's Social Security number and alien registration number. The estimated average burden associated with this collection is 25 minutes per respondent or record keeper, depending on individual circumstances. The Firearms Disposition Transaction Record Form must be retained for at least five years. If the transfer of a firearm is denied or cancelled by the NICS, or for

any reason the transfer is not completed (delayed or unresolved) after a NICS check is initiated, the criminal justice agency must retain the Firearms Disposition Transaction Record Form for at least five years. The estimated total annual recordkeeping burden associated with this requirement is unknown at this time due to the uncertainty of the number of firearms that are currently in the possession of criminal justice agencies. The FBI invites the public to comment on this proposed collection of information to help it

(i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments on the proposed information collection should be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Department of Justice and include the RIN for this proposed rule and the title of the collection. OMB encourages commenters to submit their comments via email to oir-submissions@omb.eop.gov, by fax to (202) 395-7285, or by physical mail to 725 17th Street, N.W. Room 10104. Washington, D.C. 20038.

List of Subjects in 28 CFR Part 25

Administrative practice and procedure, Computer technology, Courts, Firearms, Law enforcement, Penalties, Privacy, Reporting and recordkeeping requirements, Security measures, Telecommunications.

Authority and Issuance

Accordingly, part 25 of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 25—DEPARTMENT OF JUSTICE INFORMATION SYSTEMS

1. The authority citation for part 25 continues to read as follows:

Authority: Public Law 103-159, 107 Stat. 1536, 49 U.S.C. 30501-30505; Public Law 101-410, 104 Stat. 890, as amended by Public Law 104-134, 110 Stat. 1321.

2. In § 25.2, the paragraph containing the definition of "ATF" is revised to read as follows:

§ 25.2 Definitions.

* * * * *

ATF means the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

* * * * *

3. In § 25.6, paragraph (j) is revised to read as follows:

§ 25.6 Accessing records in the system.

* * * * *

(j) *Access to the NICS Index for purposes unrelated to NICS background checks required by the Brady Act.* Access to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of:

(1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;

(2) Responding to an inquiry from the ATF in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,

(3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

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3. In § 25.9, paragraph (b)(1)(i) is revised to read as follows:

§ 25.9 Retention and destruction of records in the system.

* * * * *


(b) * * *

(1) * * *

(i) NICS denied transaction records obtained or created in the course of the operation of the system will be retained in the Audit Log for ten years, after which time they will be transferred to an appropriate electronic database maintained by the FBI.

* * * * *

January 17, 2013
Date


Eric H. Holder, Jr.
Attorney General