# FIREARM POLICY AREAS GUIDES

# I. BACKGROUND CHECKS

# A. Universal Background Checks

Though more than 90% of the American public supports background checks for all gun sales, a dangerous and deadly loophole in federal gun laws still exempts unlicensed sellers from having to perform any background check whatsoever before selling a firearm. With this loophole, guns easily find their way into the hands of illegal buyers and gun traffickers, dramatically increasing the likelihood of gun homicides and suicides.

# 1. Background

A dangerous gap in our federal gun laws lets people buy guns without passing a background check. Under current law, unlicensed sellers—people who sell guns online, at gun shows, or anywhere else without a federal dealer’s license—can transfer firearms without having to run any background check whatsoever.

Because of this loophole, domestic abusers, people with violent criminal records, and people prohibited for mental health reasons can easily buy guns from unlicensed sellers with no background check in most states. In fact, an estimated 22% of US gun owners acquired their most recent firearm without a background check—which translates to millions of Americans acquiring millions of guns, no questions asked, each year.

**a. When background checks are required and properly enforced, they can help keep guns out of dangerous hands.**

* Since the federal background check requirement was adopted in 1994, over 3 million people legally prohibited from possessing a gun have been stopped from purchasing a gun or denied a permit to purchase. More than 35% of these denials involved people convicted of felony offenses.
* Background check laws also help prevent guns from being diverted to the illegal gun market. States without universal background check laws export crime guns across state lines at a 30% higher rate than states that require background checks on all gun sales.

**b. However, in the absence of a comprehensive background check system, criminals and other prohibited persons routinely exploit the massive loopholes in our laws.**

* Around 80% of all firearms acquired for criminal purposes are obtained through transfers from unlicensed sellers, and 96% of inmates convicted of gun offenses who were already prohibited from possessing a firearm at the time of the offense obtained their firearm from an unlicensed seller.
* Individuals who commit crimes with firearms may intentionally seek to purchase guns from sellers who aren’t required to run background checks. Purchasers from Armslist.com, a major online firearms marketplace, were nearly seven times as likely to have a firearm-prohibiting criminal record than people attempting to buy guns from licensed dealers.

**c. Recent examples show that loopholes in our background check system can have dangerous and deadly consequences.**

* In 2019, a man fatally shot seven people and wounded 25 others in West Texas. The shooter previously failed a criminal background check when trying to purchase a gun, yet loopholes in our nation’s gun laws allowed him to bypass the background check system altogether and obtain the AR-style weapon used in his deadly attack from an unlicensed seller who wasn’t required to run a background check.
* In 2018, in Appleton, WI, a man who was prohibited from purchasing a gun because he was out on bond for a firearm-related felony domestic violence case purchased a firearm from an unlicensed seller on Armslist.com without a background check. The next day he used the gun to kill his wife.
* In 2016, a woman was killed, and their two children shot by an ex-boyfriend, who purchased the gun from an unlicensed seller without a background check. He was prohibited from purchasing a firearm due to a domestic violence restraining order and a pending domestic battery case.
* In 2014, a gunman in West Virginia killed four people, including his ex-girlfriend, with a gun he purchased from an online seller without a background check. He was prohibited from purchasing firearms due to multiple felony convictions.

**d. Background checks are easy, convenient, and impose almost no burden on law-abiding gun purchasers.**

* In at least 90% of cases, firearm background checks processed through the National Instant Criminal Background Check System (NICS) are resolved immediately. The average processing time for an electronic NICS-check is less than two minutes—107 seconds, to be precise.
* Contrary to gun-lobby claims, background checks rarely provide false-positive results. The FBI’s quality control evaluations suggest that background checks are accurate approximately 99.3 to 99.8% of the time.

For more than a decade, the vast majority of the American public has supported laws requiring background checks on all firearm purchases, with polling data consistently showing that more than 90% of both gun owners and non-gun owners support this policy. Strong support for background check laws has also been measured among NRA members, with at least 69% supporting comprehensive background checks.

Universal background checks are a necessary foundation for any policy that aims to keep firearms out of the hands of abusers and other prohibited people. However, other improvements should also be made in the existing background check system.

# 2. Summary of Federal Law

**Federal law imposes various duties on federally licensed firearms dealers. Firearms dealers must, among other things:**

* Perform background checks on prospective firearm purchasers.
* Maintain records of all gun sales.
* Make those records available to law enforcement for inspection.
* Report certain multiple sales.
* Report the theft or loss of a firearm from the licensee’s inventory. Federal law imposes none of these requirements on unlicensed sellers, however.

The Gun Control Act of 1968 provides that persons “engaged in the business” of dealing in firearms must be licensed. Although Congress did not originally define the term “engaged in the business,” it did so in 1986 as part of the McClure-Volkmer Act (also known as the Firearms Owners’ Protection Act). That act defined the term “engaged in the business,” as applied to a firearms dealer, as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”

Significantly, however, the term was defined to exclude a person who “makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.” According to a 1999 report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives, the current definition of “engaged in the business” often frustrates the prosecution of “unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons.”

# 3. Summary of State Law

**Twenty-two states and Washington DC have extended the background check requirement beyond federal law to at least some private sales.**

Thirteen states (California, Colorado, Connecticut, Delaware, Nevada , New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington) and the District of Columbia require universal background checks at the point of sale for all sales and transfers of all classes of firearms, whether they are purchased from a licensed dealer or an unlicensed seller.

Two more states, Maryland and Pennsylvania, require point of sale background checks for handguns but not for long guns, like rifles and shotguns.

Instead of a point of sale background check, three states (Hawaii, ***Illinois***, and Massachusetts) require all firearm purchasers to obtain a permit, issued after a background check, in order to buy any firearm. New Jersey requires firearm purchasers to both obtain a permit to purchase a firearm and, if the purchase is from an unlicensed seller, conduct the transaction through a federally-licensed firearms dealer. Four more states (Iowa, Michigan, Nebraska, and North Carolina) have this permit and background check requirement for the purchase of handguns, but not long guns. Illinois also requires a point of sale background check whenever a firearm is sold at a gun show.

## 4. State Laws Closing the Private Sale Loophole

#### Background Checks at the Point of Transfer

The most comprehensive approach to ensuring that guns are not sold to prohibited people requires a background check to be completed by a licensed dealer or law enforcement at the point that any firearm is sold or transferred to another owner. Processing these transfers through licensed dealers or law enforcement helps to ensure that a background check will be conducted prior to any transfer.

##### States that Require a Background Check at the Point of Transfer

#### *Illinois does not.*

#### State Permit Requirements for Private Purchasers

Some states impose background checks on private purchasers through a permitting or licensing system. In these states, a purchaser must obtain a permit that includes a background check in order to purchase a firearm. The permits may be valid for as short as 10 days or as long as 10 years.

While these requirements ensure that a background check has been conducted at some point prior to purchase, a person may fall within a prohibited category after the license or permit is issued but before the time the person attempts to purchase a firearm. **As a result, licensing laws do not necessarily prevent prohibited people from accessing firearms.** Some states that require purchasers to obtain a permit also require a background check at the point of sale to ensure that a purchaser has not fallen into a prohibited category after he or she obtained the permit.

The thirteen states that require private individuals to obtain a permit prior to the purchase of a firearm are listed below.

##### States that Require a Background Check to Purchase from Private Sellers through a Permit Requirement

***Illinois*** - 430 Ill. Comp. Stat. 65/1 – 65/15a, 720 Ill. Comp. Stat. 5/24-3(k). Since 2014, Illinois has required a seller to contact law enforcement and verify the validity of the purchaser’s permit (called a FOID Card) at the time of the sale.

**Gun Show Background Checks**

A loophole in federal law that does not require background checks on sales of guns by private or unlicensed individuals is often referred to as the “gun show loophole.” This is somewhat misleading, however, as sales of firearms by unlicensed individuals can occur anywhere, not just at gun shows. Unless a state has closed this loophole, unlicensed sellers are not required by federal law to conduct background checks on buyers, whether the sale occurs at a gun show or over the internet through a site like armslist.com. Currently, 22 states and the District of Columbia require background checks on sales of some or all types of firearms by private individuals, whether the sale occurs at a gun show or elsewhere.

# Key Legislative Elements

The features listed below are intended to provide a framework from which policy options may be considered. Any jurisdiction considering new legislation should consult with counsel.

* For all firearm transfers, private sellers are subject to similar requirements as licensed dealers, including background checks and record-keeping requirements.
* The most comprehensive policy option requires all firearm transfers to be conducted through licensed dealers, so that background checks will be completed on all purchasers (including purchases from unlicensed sellers), and sales records will be maintained (see California, Colorado, Delaware, District of Columbia, New York, Oregon, Vermont, and Washington).
* If the jurisdiction does not require that all firearm transfers be conducted through licensed dealers, private sellers should be required to:
	+ Conduct background checks through a central law enforcement agency that has access to federal and state databases of prohibited purchasers (Rhode Island requires private sellers to conduct background checks directly through law enforcement; Connecticut requires private sellers to conduct background checks through licensed dealers or law enforcement).
	+ Maintain records of all firearm transfers for a lengthy period (**Illinois** requires all sellers to retain sales records for 10 years).
	+ Report all transfers to state and local law enforcement (see Connecticut, Hawaii, Massachusetts).

# B. NICS & Reporting Procedures

# A critical component of the federal background check process, the databases that make up the National Instant Criminal Background Check System allow gun dealers to quickly ascertain whether a potential purchaser falls into a prohibited category before going through with a gun sale. While the information NICS provides is essential to making sure guns stay out of dangerous hands, states and federal agencies must do more to improve the process and ensure more thorough and effective background checks.

# 1. BACKGROUND

Keeping guns out of the hands of individuals with a high risk of committing violence—convicted felons, domestic abusers, and those experiencing a mental health crisis—is crucial to preventing deadly shootings. By strengthening our existing background checks system, we can keep more deadly weapons from falling into the wrong hands, preventing shootings before they happen and saving lives.

A set of databases maintained by the FBI, the **National Instant Criminal Background Check System (NICS)** is a crucial component in the fight against gun violence. NICS was created to implement the 1993 Brady Handgun Violence Prevention Act, which requires background checks for firearms sales and transfers conducted through a licensed dealer (though not when a sale is conducted by a seller who is unlicensed). Since the Brady Act took effect, background checks have stopped 3 million felons, abusers, and other dangerous people from obtaining a gun from a federally licensed dealer.

In 2017 alone, NICS stopped 181,000 prohibited people attempting to buy guns from licensed dealers. But far too many others are slipping through the cracks due to missing or incomplete background check records, often with deadly consequences. The FBI provides its own records of those who commit federal crimes, but the only way NICS receives records of state-level convictions, mental health adjudications, and other records is through voluntary submissions. As one would expect, some states do a far better job than others sharing this potentially lifesaving information.

Most NICS denials are due to felony or misdemeanor convictions. For example, between the end of 1998 and August 31, 2016, 735,527 felons and misdemeanants were denied after a NICS check. Unfortunately, data also shows that the records in NICS are incomplete, since states submit their records on a voluntary basis. **The FBI estimates that, on average, about 3,000 people pass a NICS background check each year despite being prohibited under state or federal law from purchasing a gun.** But this number could be even higher. It is essential that states improve the submission of records to NICS to maximize the effectiveness of background check laws, ensuring that felons and other dangerous people do not have easy access to deadly weapons.

2. STATE “POINTS OF CONTACT” CAN ACCESS ADDITIONAL INFORMATION

States have the option of requiring dealers to conduct background checks through state or local agencies, called “Points Of Contact,” instead of directly through the FBI. States that conduct their own background checks often search records and databases in addition to those that federal law requires to be searched. State databases typically include information that is incomplete in FBI databases, including outstanding felony warrants, mental health records, domestic violence restraining orders, and final disposition records (records that show whether an arrest resulted in an acquittal or a conviction). **Research has found that the practice of conducting firearm purchaser background checks through state or local agencies, as opposed to through the FBI, is associated with reduced firearm death rates, especially with respect to suicides.**5

3. REPORTING RECORDS IS VITAL TO THOROUGH BACKGROUND CHECKS

Federal law cannot require states to make information identifying people ineligible to possess firearms available to the federal or state agencies that perform background checks,6 and many states fail to voluntarily report the necessary records to the proper databases. As a result, the information that is searched during a background check is often incomplete. This problem applies to every category of person prohibited from possessing firearms, including:

* **Criminal History Records:** A survey in December 2010 found that out of all 50 states, only 12 reported that 80% or more of their felony charges had a final disposition recorded in their criminal history databases.7 Without a disposition record, it cannot immediately be determined whether a person who was arrested for a crime was ultimately convicted of that crime and became prohibited from possessing firearms.
* **Mental Health Records:**States have also inconsistently reported records identifying people whose mental health histories prevent them from legally possessing firearms.
* **Drug Abuse Records:** Federal law prohibits unlawful users and individuals addicted to illegal drugs from possessing firearms, and federal regulations define these terms to include any person found through a drug test within the preceding year to have used a controlled substance unlawfully.8 There are now hundreds of drug court programs across the country that require periodic drug testing, yet this positive test data is rarely available for firearm purchaser background checks.9 According to a November 2011 report by Mayors Against Illegal Guns, 44 states have submitted fewer than 10 records to the controlled substance file of a centralized nationwide database, and 33 states have not submitted any records at all.10
* **Domestic Violence Records:**Federal law prohibits firearm possession by individuals subject to a domestic violence protective order or who have been convicted of a domestic violence misdemeanor.11 Yet, states have had difficulty identifying and reporting individuals who fall within these categories.12

In light of these significant reporting deficiencies, the FBI has strongly encouraged states to provide more complete records.13

Federal departments and agencies like the Department of Defense also produce records regarding criminal convictions and mental health adjudications that affect a person’s eligibility to possess firearms. Historically, there have been significant gaps in reporting to NICS by federal departments and agencies which, in some cases, has led to tragedy.14

4. EFFICIENCY OF NICS CHECKS

**NICS background checks do not create a barrier to the legal sale or transfer of a gun.**In 2015, the NICS call centers processed background checks in an average of just over two minutes.15 Calls transferred to NICS Examiners for further investigation were handled in less than eight minutes on average, including wait and processing time. The fastest processing time for a background check is through the NICS E-Check System, which averages less than two minutes.16 The vast majority of background checks are executed during the time it takes for a commercial break.

# SUMMARY OF FEDERAL LAW

The Brady Act requires federally licensed firearms dealers to perform background checks on prospective firearms purchasers to ensure that the firearm transfer would not violate federal, state, or local law.17 Since 1998, the Brady Act has been implemented through the National Instant Criminal Background Check System (NICS).

**THE THREE NICS DATABASES**

NICS is comprised of three separate databases: the National Crime Information Center, the Interstate Identification Index, and the NICS Index. In addition, the Department of Homeland Security’s US Immigration and Customs Enforcement databases are searched during a NICS check.

The National Crime Information Center

The FBI has maintained the National Crime Information Center (NCIC) since 1967.18 Among other things, law enforcement uses NCIC to learn crucial information about a person or property they encounter. For example, when a police officer stops a vehicle, he or she may check NCIC to determine whether the occupant of the vehicle is currently wanted for a crime and if the vehicle has been stolen. In addition to these types of records, NCIC contains domestic violence protective orders, missing person reports, fugitive records, and many others.

A NICS check includes a search of NCIC records because some records in the database, such as fugitive and domestic violence protective orders, result in firearms prohibitions. During a background check, the NICS system accesses NCIC to determine whether there is a match with a prohibiting record.

The Interstate Identification Index

Law enforcement, employers, professional licensing agencies, and others use the Interstate Identification Index (III) to check criminal backgrounds—essentially, III is a catalogue of identifying information about individuals who have been arrested or indicted anywhere in the country for a serious crime.19 Serious crimes include all felonies and some misdemeanors. Misdemeanors that are deemed to be minor crimes, such as trespassing or loitering, are generally not included in the III. The FBI has maintained the III since 1983. NICS accesses III during a background check search to determine whether a person has committed a felony or misdemeanor that would result in a firearm prohibition.

The NICS Index

Unlike NCIC and III, the FBI maintains the NICS Index solely for firearms background checks. The NICS Index functions as a catchall database for records that do not fit within NCIC or III but do indicate that an individual is prohibited from purchasing firearms.20 For example, mental health records are typically found only in the NICS Index because they do not fall into the categories contained in NCIC or III. On April 16, 2012, the functionality of the NICS Index was expanded to include state-prohibiting records, thereby providing the NICS Section and state users with the ability to effectively and efficiently identify people prohibited from possessing guns by state, as well as federal, law through NICS, provided states have reported those records to the NICS Index.21

In addition, because federal law prohibits gun ownership by a person who is unlawfully in the United States, has been admitted to the US under a nonimmigrant visa, or has renounced citizenship, a NICS check includes a search of the Department of Homeland Security’s US Immigration and Customs Enforcement databases, which contain records regarding non-US citizens.

**HOW DOES A NICS CHECK WORK?**

**A Firearms Transaction Record, more commonly referred to as ATF Form 4473, is the first step in the background check process.** Federal law requires a completed form for every firearm transfer conducted by a dealer.22 A transfer generally includes sale, gift, lease, loan, or disposal of a firearm. Form 4473 records the transferee’s name, address, and identifying information such as height, weight, and date of birth, which are matched against records in NICS. The transferee must show a valid government-issued photo ID and the dealer must record the type of ID, its identification number, and its expiration date on the form.

As long as the transferee has adequately completed Form 4473, has not indicated on the form that he or she is a prohibited purchaser, has produced a valid ID, and the dealer has no reasonable cause to believe that the transferee is prohibited from possessing a firearm, **the next step is for the dealer to contact the FBI’s NICS Operation Center by phone or online via the E-Check System**.23

The dealer provides the Operation Center with the customer’s name and descriptive information as reported on Form 4473. In turn, the dealer must record the date of contact with NICS, the transaction number provided by NICS, and the response on Form 4473**.**Dealers must keep these forms for at least 20 years for completed transactions and for at least five years for incomplete transactions—dealers may discard the records after these time periods have passed. Note that these records are not centralized and are instead kept at the individual locations of the over 60,000 federally licensed dealers all across the United States. A gun lobby–backed appropriations rider prohibits the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the federal agency responsible for enforcing most federal gun laws, from consolidating or centralizing these records.24This rule is part of a larger gun lobby effort to hamstring ATF efforts to regulate the gun industry.

**Once the dealer has provided the identifying information, the system is searched to determine whether the purchaser matches any records in the three databases that make up NICS.** If no matches are found, the dealer is instructed to proceed with the transfer of the firearm. The NICS check is valid for a single transaction for up to 30 calendar days from the date NICS was initially contacted.[25](https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/#footnote_24_40669) Federal law requires ATF to destroy the record of the NICS search within 24 hours when a transferee passes a NICS check. This requirement is another element of the gun lobby’s effort to thwart oversight of the gun industry.26

If a match, also known as a “hit,” is found, a NICS examiner may conduct a more thorough search of the records. After an investigation, the examiner will instruct the dealer to take one of three actions:

* An **instruction to proceed** at this point means there was no disqualifying record in any of the three databases that make up NICS.
* An **instruction to deny** means there was a match with a record indicating the transferee is prohibited under federal or state law.
* An **instruction to delay** signifies that there was a match, but more research is needed to determine if the match is accurate and/or if the record indicates a firearm prohibition.

If the dealer has not been notified within three business days that the sale would violate federal or state laws, the sale may proceed by default.[27](https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/#footnote_26_40669) Many ineligible people obtain access to firearms because the FBI is not able to complete the background check within this time frame and federal law allows the sale to proceed by default.

**NICS IMPROVEMENT AMENDMENTS ACT OF 2007**

In January 2008, President Bush signed into law the NICS Improvement Amendments Act of 2007, which, among other things, provided financial rewards and penalties to encourage states to provide to NICS information relevant to whether a person is prohibited from purchasing or possessing firearms.28 The act also authorized the attorney general to make grants to the states for use in establishing and upgrading the states’ ability to report information to NICS and to perform background checks pursuant to the Brady Act.29

According to the Government Accountability Office, 15 states received NICS Act grants during at least one fiscal year from 2009 to 2011.30

The NIAA and the Fix NICS Act of 2018 also contained provisions laying out reporting requirements for federal agencies and departments. Under these laws, federal departments or agencies which have information about people prohibited from possessing firearms must submit records at least quarterly to the Attorney General for inclusion in NICS.31 Agencies must submit a semiannual certification to the Attorney General detailing whether they are in compliance with reporting requirements, the number of records they have for each category, and the number they have submitted, as well as an annual report on compliance.32

By 2018, the head of each federal department or agency must have established a plan to ensure “maximum coordination and automated reporting or making available of records” during a 4-year period.33 Each plan must have qualitative goals and quantitative measures, measures to ensure compliance, a needs assessment, and an estimated date by which the agency or department will be in full compliance with NICS requirements.

The Attorney General must publish a semiannual report that lists agencies that are not in compliance with requirements, for reasons ranging from failing to certify the submission of all necessary data to failure to submit a coordination plan, detailing the reasons the department or agency has been found to not be in compliance.34 This report must also contain summary information of the data submitted by each department or agency and the details of each department’s coordination plan.[35](https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/#footnote_34_40669)

The Attorney General can use funding earmarked for NICS to help improve compliance by federal departments or agencies by providing technical assistance.36 Political appointees to federal agencies and departments can also be rendered ineligible for bonus or overtime pay for their agency’s noncompliance with NICS reporting.37

The Department of Homeland Security in particular must report quarterly to NICS, specifying that it must also make a quarterly report of people who should be removed from NICS due to a change in citizenship or residency status (e.g., people who have become naturalized citizens or permanent residents during the latest reporting period.)38

The Attorney General is required to ensure that the information submitted to NICS is correct and confidential, and must remove incorrect or obsolete names in a timely manner.39

### HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT

In February 2016, the Health and Human Services Department issued a rule modifying the Health Insurance Portability and Accountability Act, or HIPPA, the federal law that protects the confidentiality of medical information. By expressly allowing certain state agencies to submit mental health records to NICS, the new rule clarifies that such submission does not violate federal privacy law. The rule protects the privacy of NICS mental health records by prohibiting the disclosure of any mental health data beyond the information that the individual is prohibited by law from purchasing a firearm.40

# SUMMARY OF STATE LAW

# STATE POINTS OF CONTACT

Background checks conducted by state or local authorities are more thorough than those performed by the FBI because states can access their own independent databases in addition to databases maintained by NICS. As noted above, states where state or local authorities conduct the background check are known as “point of contact” or “POC” states. Thirteen states use a state or local POC for all firearm transfers.41 Eight states use a state or local POC for handgun background checks only, using the FBI for background checks on long gun transfers.42 The remaining 29 states and the District of Columbia process all background checks through the FBI.43

Point of Contact States for All Firearms

***Illinois*** - 430 Ill. Comp. Stat. 65/3.1.

Point of Contact States for Handguns

The following states act as POC states for handguns only, because dealers must contact a state or local agency at the time of sale of a handgun. The state or local agency conducts the background check, including a search of NICS. In these states, dealers who are transferring long guns must contact the FBI directly for a NICS check. In Nebraska, a background check is not required at the point of sale of a firearm if the purchaser has already obtained a transferee permit, after a background check. The transferee permit qualifies the holder for an exemption from the federal background check requirement.

Maryland
New Hampshire
Washington
Wisconsin

Point of Contact States for Handguns via a Brady Exemption

The following states act as POC states for all handgun sales because state law requires every handgun purchaser to obtain a permit from a state or local agency prior to purchasing a handgun. Under federal law, the permit qualifies the holder for an exemption from the federal background check at the point of sale, in part because the state or local agency conducts a background check, including a search of NICS, before issuing the permit. Permit holders in these two partial POC states, like all holders of a permit that exempts the person from the federal background check requirement, may buy both handguns and long guns without a background check at the point of sale.

Iowa
Nebraska
North Carolina

**LAWS REQUIRING OR AUTHORIZING THE STATE TO ACT AS A POINT OF CONTACT**

Connecticut, ***Illinois***, and California have laws requiring the states to act as POCs. Colorado, and New Hampshire have laws explicitly authorizing the state to act as a POC, although the New Hampshire state agency has chosen to act as a POC for handgun sales only. Indiana’s law requires the state to act as a POC if federal funds are available to assist the state in participating in NICS. However, Indiana is not currently acting as a POC.

**LAWS DETAILING THE PROCEDURE FOR A BACKGROUND CHECK IN POC STATES**

Seventeen of the 21 POC states have laws explaining the procedure for the background check. These laws typically require the purchaser to fill out a firearm transfer application form (or an application for a Brady-exempt permit to purchase), present photo identification, and pay a fee. The dealer must then transmit the application to a state agency that conducts the background check. If the transfer is approved, the agency transmits an approval number to the dealer, who is prohibited from transferring the firearm until an approval number is received or the statutory time period has expired. Michigan, Nevada, New Hampshire, and New Jersey are the only POC states without laws that describe the procedure in this manner.

In California, dealers must obtain the purchaser’s name, date of birth, and driver’s license or identification number electronically from the magnetic strip on the license or ID card. When a purchaser or transferee seeks to obtain a handgun, he or she must present additional documentation indicating California residency.63 Virginia also requires all firearm purchasers to present additional documentation establishing residency.

**BACKGROUND CHECK LAWS IN NON-POC STATES**

States That Incorporate the Federal Requirement

Four states (Alabama, Delaware, Georgia, Indiana) that do not act as POCs nevertheless facilitate enforcement of the federal background check requirement through a state law that reiterates that requirement. Indiana law also spells out that the dealer and purchaser must use Form 4473, the purchaser must present documentation of Indiana residency, and the dealer must contact NICS directly. Indiana’s law appears to apply only to handguns, although federal law requires that a similar procedure be used for long guns as well.

Independent State Background Check Requirements at the Point of Sale

Minnesota and Rhode Island do not function as POCs, but they have their own independent background check requirements. In these states, the dealer must contact the FBI directly for the federally required background check, and must also contact a state or local agency for the background check required by the state. In Rhode Island, a firearm purchaser must fill out a state form, which the seller must forward to the local police authority. The local police authority must then conduct a background check on the purchaser. If the seller receives no disqualifying information from the local police authority within the state’s seven-day waiting period, state law allows him or her to transfer the firearm.[64](https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/#footnote_63_40669)

In Minnesota, if a person wishes to acquire a handgun or semiautomatic military-style assault weapon from a federally licensed dealer but does not have a state-issued “transferee permit” or a permit to carry a handgun, Minnesota law requires the dealer to file a report with the local police chief or sheriff, who then performs a background check.65 Since Minnesota is not a POC state and no Minnesota-issued permit qualifies the holder for a Brady exemption, the federal law requiring the dealer to contact the FBI directly for a NICS check also applies.

**THE SCOPE OF THE BACKGROUND CHECK SEARCH**

Certain states, such as Connecticut and Florida, require the agency conducting the background check to search any state or local records that are available. Other states are more specific about which records must be searched during a background check. Most state background check laws require a search of NICS and state criminal history records, as well as other records as described below.

Mental Health Records

Although persons who have been adjudicated as “mental defectives” or involuntarily committed to mental institutions are prohibited by federal law from possessing firearms, not all mental health records have been reported to NICS. As a result of the inadequacy of the states’ reporting of mental health records to NICS, seven states explicitly require a search of in-state mental health files as part of the background check process (California, Connecticut,66 Illinois, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Washington).

Three states (Hawaii, Minnesota, New Jersey) require the purchaser to authorize a search of mental health files as part of the background check process.

In Minnesota, the authorization also applies to certain alcohol and drug abuse records.

In Washington, a signed application to purchase a handgun constitutes “a waiver of confidentiality and written request that the department of social and health services, mental health institutions, and other health care facilities release, to an inquiring court or law enforcement agency, information relevant to the applicant’s eligibility to purchase a pistol.” This disclosure is mandatory.

Juvenile Court Records

As described in our summary on **Categories of Prohibited People**, a number of states prohibit firearm purchase or possession by individuals with certain juvenile convictions. In order to enforce these laws, Pennsylvania, Utah, and Wisconsin explicitly require a search of juvenile court records as part of a firearm purchaser background check. Colorado authorizes, but does not require, the disclosure of juvenile delinquency records for this purpose. Other states may include juvenile records in their definition of “criminal history records” or a similar term.70

Protective Order and Warrant Information

Federal law and the laws in certain states prohibit firearm purchase or possession by individuals subject to domestic violence protective orders or for whom warrants have been issued. Wisconsin’s law regarding the background check at the point of sale of a firearm and Massachusetts’ law regarding the background check it conducts before issuing a firearms license both explicitly require a search for protective order records. The laws in Minnesota and Massachusetts also mention a search for outstanding warrants. Other states may conduct similar searches, although the laws are not explicit.

# KEY LEGISLATIVE ELEMENTS

The features listed below are intended to provide a framework from which policy options may be considered. A jurisdiction considering new legislation should consult with counsel.

* State acts as a Point of Contact for all firearm transfers (13 states);if the state does not act as a Point of Contact for all firearm transfers, the state requires an independent background check, utilizing state’s independent records (Minnesota (handguns and assault weapons), Rhode Island).
* Background check process includes search of all relevant in-state criminal records, mental health records (seven states), juvenile delinquency records (Pennsylvania, Utah, Wisconsin), warrants (Massachusetts, Minnesota) and protective order information (Massachusetts, Wisconsin).
* An applicant seeking to purchase a firearm must authorize disclosure of relevant mental files (Hawaii, New Jersey), including files related to drug and alcohol abuse (Minnesota).
* Mental health information and information about drug and alcohol abuse is reported to federal and state databases of prohibited purchasers.71
* Criminal history information, including relevant juvenile delinquencies, warrants, and orders of protection, are reported to federal and state databases of prohibited purchasers.

**C. Background Check Procedures**

Background checks help ensure that dangerous people don’t access firearms. While federal law requires background checks for some sales, the law has deadly loopholes. The differences in how states address these background check loopholes have a meaningful impact on the effectiveness of background checks and the safety of Americans from gun violence.

**BACKGROUND**

Background checks identify individuals who are ineligible to purchase firearms and prevent those persons from obtaining them, making them a key element in preventing tragic and unnecessary gun deaths in the United States.1

Enacted in 1993, the Brady Act is a federal law that requires federally licensed firearms dealers (FFLs) to conduct background checks on potential firearm purchasers.2 In order to comply with the Brady Act, the FBI created the National Instant Criminal Background Check System (NICS), a centralized catalog of records comprising three separate national databases. Among other things, NICS contains information about individuals’ criminal and mental health histories and any civil orders entered against them that might affect their eligibility to purchase or possess a gun, such as domestic violence restraining orders.

Since February 28, 1994, when the federal background check requirement became effective, and 2015, over three million people have been denied a firearm transfer or permit through the FBI’s background check system. Of those denials, 61% were based on an individual’s status as a convicted felon (43%) or fugitive from justice (19%).3

# SUMMARY OF FEDERAL LAW

Despite the clear effectiveness of the background check system, federal law still has numerous weaknesses that allow dangerous individuals to slip through the cracks and obtain firearms.

**FEDERAL LAW LOOPHOLES**

Private Sale Exemption

The single largest gap in the federal background check requirement is that unlicensed, private sellers are not required to conduct background checks. This means that, unless state law requires a background check for these sales, convicted felons, domestic abusers, and other ineligible people can legally buy guns—even though they would fail a background check if purchasing from an FFL. Fortunately, 21 states have closed the federal loophole to require unlicensed sellers to conduct background checks on some or all firearms purchasers.

Default Proceeds and the Charleston Loophole

##### The Problem

##### In 2015, a disturbed young man shot and killed nine African-American worshipers at the Emanuel AME Church in Charleston, South Carolina. Although he should have failed a background check because of his history of unlawful controlled substance use, his background check was not processed within three days. Under federal law, if an FFL who has initiated a background check has not been notified within three business days that the sale would violate federal or state laws, the dealer may proceed with the sale by default.4 In this case, the dealer proceeded to transfer the gun after the three days elapsed. Approximately two months later, the shooter used that gun to murder the churchgoers.

##### Though 91% of NICS background checks provide an answer within minutes, about 9% of cases require further investigation and review by FBI and ATF agents.5 However, due to the federal “default proceed” rule, those agents only have three business days to conduct and finish their investigation.

**This “default proceed” provision allowed 4,864 prohibited purchasers to buy guns in 2017 before a background check cleared.**6Many default proceed cases require extra time and attention precisely because the firearm purchaser has a long record of dangerous red flags; according to data compiled by Mayors Against Illegal Guns, default proceed sales are eight times more likely to involve a prohibited purchaser than other background checks.7 In cases where a sale went through under the default proceed procedure and the ATF was ultimately able to complete a background check, the FBI has reported that nearly 25% of the individuals investigated were determined to be legally prohibited from purchasing or possessing a firearm.8

##### The Solution

The FBI has recommended extending the three-day period to allow agents more time to complete background check investigations and to reduce the number of prohibited purchasers who are able to purchase firearms by default.9According to FBI data, for 2,519 default-proceed transfers that resulted in a transfer to a prohibited person, an average of 25 business days elapsed between the initial NICS inquiry and the date the FBI determined that the purchase should have been denied.10 **A January 2013 poll found that 76.3% of Americans—including 67% of gun owners—support giving law enforcement up to five business days, if needed, to complete a background check for gun buyers.**11Recognizing the irresponsibility of the default proceed rule, some gun dealers, including Walmart, refuse to engage in default proceed transactions, making it a matter of policy to only sell firearms when the individual affirmatively passes a background check.12

Exemptions for Permit Holders

Federal law allows individuals who hold certain firearms-related permits issued by state or local governments (such as concealed weapons permits) to bypass the federally required background check. The permits must have been issued 1) within the previous five years in the state in which the transfer is to take place and 2) after an authorized government official has conducted a background investigation to verify that possession of a firearm would not be unlawful.13Permits issued after November 30, 1998 qualify as exempt only if the approval process included a NICS check.14 The ATF determines which permits in each state do or do not qualify for the exemption.15

If the state-issued permit qualifies for the exemption, the permit-holder is not required by federal law to undergo a background check before purchasing a gun. This exemption can allow a person to acquire a firearm even after he or she becomes prohibited from doing so—for example, due to violent criminal activity—if the state does not immediately revoke the permit when the person becomes prohibited.

#### Verifying Identification

####

**While each gun purchaser must present proof of identity when applying to purchase a firearm, federal law does not provide a mechanism for dealers to ensure that these identification documents are valid.**16This gap in the federal background check system allows prohibited individuals to purchase firearms without effective background checks using fake or forged identification documents.17 As a result, researchers have suggested that all dealers should be linked to state motor vehicle databases so that they can verify the validity of driver’s licenses offered by potential gun purchasers.18A national poll conducted for Mayors Against Illegal Guns in April 2008 found that 83% of Americans would support a law requiring gun sellers to install machines that can verify the validity of a gun buyer’s driver’s license.19

**SUMMARY OF STATE LAW**

What follows is a discussion of various state laws affecting the implementation of the federal background check requirement.

**STATES THAT ISSUE PERMITS THAT QUALIFY THE HOLDER FOR AN EXEMPTION FROM A NICS CHECK**

Pursuant to 18 U.S.C. § 922(t)(3), 25 states issue permits or licenses that exempt the holder from the federal background check requirement at the point of sale. For one of these permits to qualify as a background check alternative, it must have been issued within the last five years.20

***Illinois does not.***

**STATES ENFORCING INDEPENDENT BACKGROUND CHECK REQUIREMENTS AT THE POINT OF SALE**

Minnesota and Rhode Island have their own independent background check requirements.21 In these states, the dealer must contact the FBI directly for the federally required background check and must also contact a state or local agency for the background check required by the state. In Rhode Island, a firearm purchaser must fill out a state form, which the seller must forward to the local police authority. The local police authority must then conduct a background check on the purchaser. If the seller receives no disqualifying information from the local police authority within the state’s seven-day waiting period, state law allows him or her to transfer the firearm.22

In Minnesota, if a person wishes to acquire a handgun or semiautomatic military-style assault weapon from a federally licensed dealer but does not have a state-issued “transferee permit” or a permit to carry a handgun, Minnesota law requires the dealer to file a report with the local police chief or sheriff, who then performs a background check.23 The federal law requiring the dealer to contact the FBI directly for a NICS check also applies.

**STATES THAT REQUIRE BACKGROUND CHECKS PRIOR TO ISSUANCE OF A PERMIT TO PURCHASE**

**Massachusetts** requires a license for the purchase of any firearm, and requires dealers to verify the validity of a potential transferee’s license prior to transferring a firearm through electronic contact with a state database. Similarly, the District of Columbia requires firearm purchasers to first obtain a registration certificate, after an extensive background check.

**EXTENSIONS FOR BACKGROUND CHECKS UNDER STATE LAWS**

As noted above, under federal law, if an FFL has not been notified within three business days after initiating a background check that a sale would violate federal or state laws, the sale may proceed by default. These sales by default, known as “default proceeds,” allow many prohibited purchasers to buy guns, including the mass shooter who murdered nine people at a Bible study at Emanuel AME Church in Charleston, SC, in 2015. In response to this massacre, in 2016, Delaware passed a law prohibiting a dealer from transferring a firearm until a background check clears or 25 days has elapsed since the dealer requested the background check.24

Several states extend the time allowed for completion of a background check by (a) prohibiting dealers from transferring a firearm until a background check clears or after the expiration of a certain amount of time greater than three days; (b) requiring prospective purchasers or owners to obtain a license prior to purchase or ownership and providing the licensing authority extra time to issue the license, and/or (c) requiring mandatory waiting periods before the purchaser can take possession of firearms.

**State Laws Addressing the Problem of Default Proceeds aka “The Charleston Loophole”**

The following states prohibit a dealer from transferring a firearm to a purchaser until a background check clears or a certain period of time elapses, whichever occurs first. A state may also impose an additional waiting period or licensing requirement on the purchase of a firearm which also has the impact of extending the time during which a background check may be conducted. The time periods below refer to the period a dealer must wait prior to transferring a firearm if a background check has not yet cleared:

***Illinois does not.***

**Adding Time for a Background Check through Licensing and Registration Laws**

State laws that require a person to obtain a license or certificate before purchasing a firearm can provide law enforcement with longer periods of time to conduct a background check on the applicant.

**Illinois**, 30 days. 430 Ill. Comp. Stat. § 65/5.

**Adding Time for a Background Check through Waiting Period Laws**

States may also impose mandatory waiting periods before a purchaser may take possession of a firearm. These waiting periods also give state and federal agencies more time to process a background check.

**SCOPE OF A BACKGROUND CHECK SEARCH**

Certain states, such as Connecticut and Florida, require the agency conducting the background check to search any state or local records that are available.42Other states are more specific about which records must be searched during a background check. Most state background check laws require a search of NICS and state criminal history records, as well as other records as described below.

# KEY LEGISLATIVE ELEMENTS

The features listed below are intended to provide a framework from which policy options may be considered. A jurisdiction considering new legislation should consult with counsel.

* Universal background checks are required on all firearm purchasers.43
* If the state requires a permit or certificate for the purchase of a firearm, the permit or certificate does not exempt the holder from a background check at the point of sale.
* Transfer of any firearm is prohibited until the background check process has been completed.
* Background check process includes search of all relevant in-state criminal records, mental health records, juvenile delinquency records, warrants, and protective order information.44
* An applicant seeking to purchase a firearm must authorize disclosure of relevant mental health files, including files related to drug and alcohol abuse.
* Mental health information and information about drug and alcohol abuse is reported to federal and state databases of prohibited purchasers.45
* Criminal history information, including relevant juvenile delinquencies, warrants, and orders of protection, are reported to federal and state databases of prohibited purchasers.
* The fee for a background check is set at least at a level sufficient to cover administrative costs associated with the background check system.

**D. Mental Health Reporting**

Even in the wake of devastating tragedies such as the shooting at Virginia Tech in 2007, the system intended to limit access to firearms for individuals experiencing a mental health crisis still includes dangerous loopholes. With a more comprehensive system for reporting mental illnesses and conducting background checks, we can avoid putting guns in the hands of people who pose threats to themselves or others.

# BACKGROUND

Even though federal law prohibits the sale of firearms to certain individuals with a history of mental illness, history has shown that it’s still too easy for dangerous people experiencing a mental health crisis to obtain firearms. Currently, laws are in place that require licensed dealers (but not unlicensed sellers) to conduct a background check prior to the transfer of a firearm to screen out these and other prohibited purchasers.1

However, federal law cannot require states to make information identifying these people available to the federal or state agencies that perform background checks,2 and many states fail to voluntarily report the necessary records to the [**FBI’s National Instant Criminal Background Check System (NICS)**](https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/), especially with respect to people prohibited from possessing guns for mental health reasons. As a result, **some individuals known to be dangerous can pass background checks and obtain firearms.**

**THE AFTERMATH OF VIRGINIA TECH**

The most tragic incident involving a state’s failure to report mental health records occurred in April 2007, when Virginia Tech student Seung-Hui Cho shot and killed 32 people and injured 17 others before committing suicide on the college campus in Blacksburg, Virginia. Cho was, in fact, prohibited from purchasing a firearm under federal law because of a history of mental illness.3 However, the unstable gunman was able to purchase firearms through two licensed dealers after two background checks. While Virginia law at that time required that some mental health records be submitted to the databases used for background checks, it did not require reporting of all people prohibited from possessing firearms for mental health reasons.

**INCREASES IN STATE REPORTING**

Other mass shootings, including those in Tucson, AZ, on January 8, 2011, in Aurora, CO, on July 20, 2012, and in Newtown, CT, on December 14, 2012, have also resulted in renewed calls for better laws addressing guns and mental illness. Our nation’s leaders, including President Obama, have joined these calls,4and states have begun to respond.

* The number of mental health records in NICS increased by more than 700% between the Virginia Tech shooting and January 31, 2014.5
* As of January 31, 2014, there were over 3 million mental health records in NICS,6with over one million records added in 2013 alone.7

Since the Virginia Tech shooting, about half of the states have enacted laws authorizing and requiring the submission of mental health records to NICS, as described below. States that have enacted such laws have, in fact, subsequently submitted greater numbers of records. Of the states that had submitted the top 15 highest numbers of records as of May 2013, 14 (93%) had enacted such laws, while only two of the 15 poorest performing states (13%) had enacted such laws.8

**MUCH LEFT TO DO**

Despite the huge increase in the number of individuals identified in NICS, records of many individuals prohibited from possessing firearms because of their mental health histories are still missing from the database. The greatest gains in the numbers of state records submitted to NICS largely reflect the efforts of a small minority of states,9and as of November 2013, 12 states had still submitted fewer than 100 records each.10

**EFFECTIVENESS**

**When mental health information is submitted to NICS, it can be effective at preventing firearm transfers by licensed dealers to dangerous people.** In 2005, of the total number of prospective purchasers who were denied following an FBI background check, only 0.5% were denied for mental health reasons.11 By 2010, this number had risen to 1.8%.12Mental health records in the system blocked 316 gun sales in Virginia in 2013. This represents a 47% increase from 2010, before Virginia had increased its reporting of such records.13

In 2007, Connecticut began reporting people who were prohibited from possessing firearms because of a history of mental illness to the background check system. The number of violent crimes committed by these people then fell by half.14

**PRIVACY IS NOT THE PROBLEM**

Although some states have cited a concern for privacy as a reason that records have not been submitted to NICS, the mental health records submitted to NICS only identify the individuals through names, birth dates, and similar data, and include no clinical information.15 In addition, as described below, access to information in NICS is tightly controlled.

**SUMMARY OF FEDERAL LAW**

**FEDERAL LAW REGARDING MENTAL ILLNESS AND GUNS**

The Gun Control Act of 1968 prohibits any person from selling or otherwise transferring a firearm or ammunition to any person who has been “adjudicated as a mental defective” or “committed to any mental institution.”16According to federal regulations, a person has been “adjudicated as a mental defective” if a court, board, commission, or other lawful authority has determined that he or she, as a result of marked subnormal intelligence, mental illness, incompetency, condition, or disease meets one of the following criteria:

* Is a danger to himself, herself, or others;
* Lacks the mental capacity to contract or manage his or her own affairs.17

The term “adjudicated as a mental defective” is defined to explicitly include a finding of not guilty by reason of insanity or incompetence to stand trial.18

Federal regulations define a person as “committed to a mental institution” if a court, board, commission, or other lawful authority has formally committed him or her to a mental institution. The term is defined to include involuntary commitments, but does not include persons who are admitted to a mental institution voluntarily or for observation.19

States may prohibit additional categories of people from purchasing or possessing firearms on the basis of mental illness.

**THE FEDERAL BACKGROUND CHECK SYSTEM**

The Brady Handgun Violence Prevention Act (the “Brady Act”) requires licensed dealers to request a background check prior to transfer of a firearm.20 Background checks are performed through a search of NICS.21

NICS includes four federal databases. Two of these—the Interstate Identification Index (III) and the NICS Index—contain records that may identify a person as disqualified from possessing firearms on the basis of mental health or developmental disability.

The Interstate Identification Index includes mental health information that states have reported to the FBI as part of their criminal history records, such as findings of not guilty by reason of insanity or incompetence to stand trial. However, most state records that are in NICS and disqualify a person due to a mental health history or developmental disability exist in the NICS Index, not the III.

Federal law does not require states to submit information to NICS; participation is strictly voluntary.22However, **effective background checks on prospective firearm purchasers depend on the existence of complete, accurate information in the NICS database.** Therefore, to fully capture all records that would disqualify someone under federal law from purchasing or possessing firearms due to mental illness or developmental disability, state law should require that states report to NICS whenever a court, board, or other lawful authority:

* Determines that a person, as a result of marked subnormal intelligence, mental illness, incompetency, condition, or disease, is a danger to himself, herself, or others (even if that person is not involuntarily committed to a mental institution as a result).
* Determines that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease lacks the mental capacity to contract or manage his or her own affairs (depending on state law, this may include a finding that a person is “incapacitated” or disabled by mental illness or developmental disability, or it may result in the appointment of a guardian or conservator).
* Finds a person not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility in a criminal case.
* Finds a person guilty but insane in a criminal case.
* Finds a person incompetent to stand trial.
* Formally commits a person involuntarily to a mental institution or asylum for mental illness, developmental disability, or other reasons, such as drug use, including people committed for inpatient or outpatient treatment.23

**NICS IMPROVEMENT AMENDMENTS ACT OF 2007**

In January 2008, President Bush signed into law the NICS Improvement Amendments Act of 2007, which, among other things:

* Provided financial rewards and penalties to encourage states to provide to NICS information relevant to whether a person is prohibited from possessing firearms, including identifying information regarding people adjudicated as a mental defective or committed to mental institutions.24
* Authorized grants to assist states in establishing and upgrading their reporting and background check systems.25 In order to be eligible for the grants authorized by the Act, a state had to implement a “relief from disabilities” program that met the Act’s requirements.26

According to the Government Accountability Office, 15 states received NICS Act grants during at least one fiscal year from 2009–11.27

**FEDERAL AGENCY OBLIGATIONS**

As described in our policy summary on [**NICS and Reporting Procedures**](https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/nics-reporting-procedures/#federal), federal departments or agencies which have information about people prohibited from possessing firearms must submit records to the Attorney General for inclusion in NICS. This includes people who have become subject to the mental health prohibitor.28

In addition, every federal department or agency that makes any adjudication regarding a person’s mental health or imposes commitment to a mental institution must have a program that allows individuals to petition for “relief from the disabilities” imposed by this adjudication or commitment.29This relief process allows people who have become prohibited from possessing firearms to regain their firearms eligibility. When a person submits a petition for relief, the department or agency decides whether or not to restore the individual’s eligibility to purchase and possess guns. The department or agency must process an application for relief within 365 days.30 Decisions on relief petitions are subject to judicial review.31

Every federal department or agency that commits or adjudicates a person in a way that would disqualify the person from purchasing or possessing guns under federal law must provide both oral and written notice to the individual at the commencement of the process. This notice must inform the person that, if the agency adjudicates or commits the person in this way, the person will be prohibited from purchasing or possessing firearms. The notice must also inform the person about the federal penalties for unlawful possession of a firearm. Finally, the notice must inform the person about the availability of the relief from disabilities process noted above.32

**PRIVACY AND ACCESS TO RECORDS**

Federal and state privacy laws are frequently cited as reasons states do not provide complete mental health records to the FBI.33 However, federal regulations include requirements to ensure the privacy and security of mental health records that have been submitted to NICS. Access to data stored in NICS is limited to use in firearm purchaser background checks and other closely related law enforcement activities (such as the issuance of firearms-related permits and enforcement activities by ATF), and safeguards protect against unauthorized disclosures.34

Furthermore, the federal Health Insurance and Portability and Accountability Act of 1996 (HIPAA) and implementing regulations restrict disclosure of protected health information only by healthcare plans, providers, and clearinghouses.35 In addition, HIPAA and its regulations permit any disclosure made:

* When authorized by the patient.
* When required by law, including state law.
* For a law enforcement purpose in response to a relevant and specific request from a law enforcement official.
* To prevent or lessen a serious and imminent threat to the health and safety of a person or the public.36

In January 2016, the Department of Health and Human Services finalized an amendment to the HIPAA Privacy Rules to directly address mental health reporting to NICS. The new rule explicitly states that certain entities may report certain identifying information to NICS and state agencies that report to NICS.37

# SUMMARY OF STATE LAW

Forty-seven states have laws that require or authorize the reporting of some mentally ill people to the federal NICS database or a state database for use in firearm purchaser background checks. As described below, the categories of individuals who are reported vary, as do the specific procedures and requirements involved.

**REPORTING MENTAL HEALTH RECORDS TO FEDERAL AND STATE DATABASES**

States that Authorize or Require Reporting of Mental Health Records to NICS

Illinois: 405 Ill. Comp. Stat. 5/6-103.1, 5/6-103.2, 5/6-103.3; 430 Ill. Comp. Stat. 65/3.1, 65/4(a)(3), 65/8.1; 740 Ill. Comp. Stat. 110/12(b).

**States that Authorize or Require the Collection of Mental Health Records in an In-State Database Only**

***Illinois does not.***

**CATEGORIES OF MENTALLY ILL INDIVIDUALS TO BE REPORTED**

Most state mental health reporting laws are limited to individuals who have been subject to specified state mental health inpatient commitment procedures. However, as described below, a number of states have broader reporting requirements.

**States Identifying Individuals to be Reported by Reference to Federal and/or State Prohibited Categories**

About one-third of the states identify at least some of the individuals to be reported by reference to the federal and/or state prohibited categories or through incorporating language from the federal law. Four states (***Illinois***, Nebraska, New Jersey and Pennsylvania) explicitly include in their reporting laws all mentally ill individuals prohibited from firearm possession under federal or state law. Other states explicitly reference only the federal mental health prohibited categories and require the reporting of all individuals who fall within those categories.

**States Reporting Individuals Confined as Inpatients**

All the states mentioned in this summary include within the groups of people to be reported at least some people confined to mental institutions as inpatients, although the length of the required confinement varies. Most of these laws only involve people who have been subject to formal involuntary commitment processes, although Florida enacted a law in 2013 that requires reporting of a voluntarily committed person if a judge or magistrate has classified the person as a danger because the examining physician certified that a petition for involuntary commitment would have been filed if the person had not consented to treatment.86

**Involuntary Outpatient Mental Health Treatment**

The following states specifically mandate the reporting of certain individuals ordered to receive outpatient mental health treatment:

***Illinois***

**Guardianships for the Mentally Ill or Developmentally Disabled**

The following states specifically mandate the reporting of individuals appointed a guardian because they lack the capacity to manage their own affairs:89

***Illinois***

**Persons Found Insane in a Criminal Case**

About half of the states specifically authorize or require the reporting of all individuals found not guilty by reason of insanity in a criminal case or identify any person found guilty but insane in a criminal case as an individual to be reported. Additional states may report these individuals through their criminal history reporting laws.

**Persons Found Incompetent to Stand Trial**

About half the states specifically authorize or require the reporting of any person found incompetent to stand trial. Again, additional states may report these individuals through their criminal history reporting laws.

**PROCESS FOR REPORTING**

The reporting of people with relevant mental health histories for the purposes of firearm background checks is usually a two-step process, with certain exceptions as described below. Courts or mental health institutions usually report information to a centralized state agency, and the state agency may then forward the information to NICS and/or other law enforcement agencies that conduct background checks.

**States That Require Reporting to NICS either Directly or through a State Agency**

The following states have laws that make it mandatory for courts to provide mental health information to NICS directly or through a centralized state agency for the purpose of transmitting this information to NICS:

***Illinois***

**States Where Disclosure to NICS is Authorized, but not Required**

The following states’ laws explicitly authorize, but do not require, reporting to NICS:

***Illinois does not.***

**States that Collect Mental Health Records but do not Address Disclosure to NICS**

The following states’ laws acknowledge that they collect mental health records for use in firearm purchaser background checks, although these laws do not address disclosure to NICS:

***Illinois does not.***

Most of these states require courts to report mental health information to a centralized state agency in connection with firearm purchaser background checks.94

**States that Utilize Reports from Mental Health Facilities, Psychotherapists, Law Enforcement, or Schools**

The following states utilize reports from mental health facilities about individuals who have fallen into federal or state categories of prohibited firearm purchasers for firearm purchaser background checks:

***Illinois***

Illinois enacted a law in 2013 requiring reporting by any physician, clinical psychologist, qualified examiner, law enforcement official, or the primary administrator for any school who determines that a person presents a “clear and present danger” to self or others, including any person determined to demonstrate threatening physical or verbal behavior.97

**State Agencies Required to Enter into an MOU with the FBI**

Two states, ***Illinois*** and Connecticut, have enacted laws requiring certain state agencies to enter into a Memorandum of Understanding (“MOU”) with the FBI regarding submittal of information to NICS. In this context, MOUs are written agreements that set forth the responsibilities of the various agencies and ensure that the mental health information submitted to NICS will only be utilized for firearm-related background checks. In Connecticut, the state’s Department of Emergency Services and Public Protection, Department of Mental Health and Addiction Services, and Judicial Department were required to enter into an MOU with the FBI for the purpose of implementing NICS. Similarly, both the Illinois Department of State Police and the Department of Human Services were required to enter into an MOU with the FBI for this purpose.

**TIME PERIOD FOR REPORTING**

The following states’ laws require courts, agencies, or mental health officials to report mental health information within a specified time frame:

***Illinois*(seven days)**

**REPORTING INDIVIDUALS WHO PREVIOUSLY BECAME PROHIBITED**

As noted above, some states have only recently begun reporting people who are prohibited from possessing firearms because of mental illness. As a result, a large number of people are prohibited from possessing firearms because of a prior adjudication or commitment but have not been reported. A small number of states have undertaken the task of identifying these people from old court records in order to report them to NICS or other databases.

For example, in 2009, Texas enacted a law requiring courts to search through and submit 20 years’ worth of records by September 1, 2010,98making Texas a leader in the number of records submitted to NICS.99Similarly, Minnesota enacted a law in 2013 that requires courts to enter all persons civilly committed during the period from January 1, 1994, to September 28, 2010, into NICS by July 1, 2014.100 South Carolina also enacted a law in 2013 that requires courts to search back through a minimum of ten years’ worth of records to identify individuals to be reported.101

### STATES THAT REQUIRE FIREARM TRANSFEREES TO AUTHORIZE DISCLOSURE OF MENTAL HEALTH RECORDS

### A number of states require applicants for firearm licenses or persons seeking to purchase firearms to authorize disclosure of mental health information.

# KEY LEGISLATIVE ELEMENTS

The features listed below are intended to provide a framework from which policy options may be considered. A jurisdiction considering new legislation should consult with counsel.

* State law requires reporting anyone prohibited by federal or state law from purchasing or possessing a firearm due to mental illness (California, **Illinois**, Nebraska, New Jersey, and Pennsylvania).
* Complete reporting by states of anyone prohibited by federal law from purchasing or possessing a firearm due to mental illness includes any person:
	+ Determined by a court or other lawful authority to be a danger to self or others because of a mental disorder or defect.
	+ Determined by a court or other lawful authority to lack the mental capacity to contract or manage his or her own affairs because of a mental disorder or defect, including any person appointed a guardian on this basis (15 states).
	+ Formally committed involuntarily to a mental institution or asylum as an inpatient (Most states report at least some individuals) or outpatient (21 states).
	+ Found not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility in a criminal case.
	+ Found guilty but insane in a criminal case.
	+ Found incompetent to stand trial*.*
	+ Who falls within the categories of individuals prohibited under state law from possessing firearms (California, **Illinois,** Nebraska, New Jersey, Pennsylvania, Texas).
	+ Who has previously fallen into one of these categories (Texas has reported individuals who became prohibited as far back as September 1, 1989).
* Licensed psychotherapists (California, **Illinois,** New York), law enforcement officials and school administrators (**Illinois**) must report mentally ill individuals who demonstrate violent behavior; these people become prohibited from possessing firearms.
* Courts must ensure that information is reported to NICS and to an in-state agency (Tennessee and Washington), which is also charged with ensuring reporting to NICS (Connecticut**, Illinois**).
* Law enforcement agencies other than NICS that conduct firearm purchaser background checks or issue firearm purchaser licenses have access to any databases containing relevant mental health records (California, Colorado, **Illinois**).
* Mental health facilities must report individuals who are prohibited from possessing firearms for mental health reasons, if such individuals are not reported by courts (California, Delaware, **Illinois**).
* Mental health records are reported immediately upon an adjudication or commitment that renders a person prohibited from purchasing or possessing a firearm (Arkansas, California, Michigan).

**E. Interstate & Online Gun Sales**

In most states, dangerous people can purchase guns online, without a background check, from unlicensed sellers within the same state. Federal law provides important limitations on the sale and transfer of guns across state lines, but every state should close the deadly private sale loophole and require that all gun sales—including online purchases—are subject to a comprehensive background check.

# BACKGROUND

One of the most dangerous gaps in our country’s gun laws today is the background check loophole. Although federal law requires licensed gun dealers to perform background checks on prospective purchasers, it does not require unlicensed sellers to do so. Twenty-one states have enacted their own laws to close this loophole and require background checks for at least certain types of firearms, but a majority of states still do not require people to pass a background check to buy a gun, including an assault weapon, from an unlicensed seller.

The internet has made it increasingly easy for dangerous people to take advantage of the private sale loophole by arranging gun sales with unlicensed sellers in online chatrooms, social media sites, auctions, and classified ad platforms. **Predictably, the online market has become an attractive source of weapons for people who could not pass a background check at a gun store.**

* A recent large-scale survey found that 45% of gun owners who acquired a gun online in the past two years did so without any background check.1
* Nearly one in nine prospective gun buyers on Armslist.com (a major web platform for gun classifieds) would not have passed a background check.2
* In 2018 alone, there were 1.2 million ads on Armslist.com for firearm sales where no background check was required.3

Federal law does provide some important, straightforward limitations on the sale or transfer of guns across state lines, making it more difficult for a prohibited person in a state with strong guns laws to buy guns online from sellers in states with weaker gun laws. Importantly, federal law generally requires people to conduct interstate gun sales or transfers through licensed gun dealers, who are required to conduct background checks and maintain a record of the sale.

As discussed below, these limitations, along with federal and state background check laws, also govern whether gun sales ordered or arranged online are subject to background checks, sale records, and other requirements.

# SUMMARY OF FEDERAL LAW

# FEDERAL LAW ON INTERSTATE GUN SALES

# **Federal law governing the sale or transfer of guns across state lines differs depending on the type of firearm.**

# Handguns

Under federal law, anyone who does not have a federal gun dealer license, or other Federal Firearms License (FFL), is generally prohibited from acquiring a handgun directly from a seller or transferor who resides in a different state.4This means that people generally cannot obtain handguns out of state and then transport them into their state of residence, and cannot otherwise receive a handgun from an out-of-state seller or transferor without the assistance of a licensed dealer in their home state.

People may acquire handguns from out-of-state sellers or transferors if the sale or transfer of the weapon is conducted through a licensed dealer in the recipient’s state of residence.5In other words, a person in one state may buy a handgun online from a licensed or unlicensed seller in another state so long as the handgun is shipped to a licensed dealer in the purchaser’s home state who facilitates the sale. Usually, gun dealers will charge a small fee for providing this service, conducting a background check, and fulfilling other requirements.

One exception to this requirement is when a person inherits a handgun through a will or other inheritance after its owner’s death. In these cases, the person may receive the handgun directly without the involvement of an in-state gun dealer, as long as the person inheriting the handgun complies with any applicable gun laws in his or her own state regarding possession of the weapon.6 Another exception applies when a person obtains a handgun through a temporary loan or rental, like when visiting a firing range in another state, so long as the person uses the gun for lawful sporting purposes.7

**Long Guns**

Federal law places somewhat looser restrictions on the sale or transfer of long guns like rifles and shotguns across state lines. Under federal law, individuals can lawfully obtain a long gun from a seller or transferor in another state, provided that:

* Both parties meet in person to conduct the sale or transfer.
* The sale or transfer is conducted by, or through, a licensed dealer, pursuant to a background check and other requirements.
* The sale, delivery, and receipt of the long gun fully comply with state law in both parties’ states of residence.8

The same exceptions for out-of-state handgun transfers also apply to long guns, meaning that people can sell or transfer long guns through a dealer in the recipient’s state of residence, inherit a long gun from an out-of-state owner after the owner’s death, and temporarily receive a long gun through a loan or rental for lawful sporting purposes.9

**FEDERAL LAW ON ONLINE GUN SALES**

Federal law does not treat online gun sales differently from other gun sales—these sales are simply governed by the same laws governing other firearm transfers, including laws regarding interstate and “private party” gun sales. The applicable rules for an online gun sale therefore depend primarily on (1) whether the firearm is being shipped across state lines and (2) whether state and federal law require a background check for that gun sale.

**Interstate**

As described above, federal law generally prohibits anyone from selling or transferring a firearm directly to an unlicensed person in another state.10This means that in order to acquire a gun online from a seller located in another state, a buyer will generally have to have the firearm shipped to a licensed dealer to process the sale. If the buyer is acquiring a handgun, the gun will have to be shipped to a licensed dealer in the buyer’s state of residence; if the person is acquiring a long gun, the sale or transfer may be conducted by a dealer in either the buyer’s or seller’s state of residence.

**Same State**

Federal law requires licensed gun dealers to conduct in-person background checks on gun purchasers and to maintain records of their sales.11 If a person orders a firearm through a licensed gun dealer’s website—whether or not the dealer operates in the same state as the buyer—the dealer will generally be required to ship the firearm to its physical location or to another local gun dealer, who will then be responsible for handling the background check and sale record and delivering the gun to the buyer. However, a federally licenced dealer can ship a firearm directly to a person’s home if that person is exempt from the federal background check requirement, such as someone with a Brady exempt permit.

However, federal law does not extend these requirements to unlicensed sellers. This means that a person can acquire a gun online from an unlicensed seller who resides in the same state without any background check or sale record required, unless the buyer and seller reside in a state that has closed this dangerous loophole by requiring background checks on all gun sales. In some cases, the buyer could have the gun mailed directly to his or her door. (The US Postal Service, for instance, will mail unloaded long guns between individuals who are mailing the guns within the same state).13

# SUMMARY OF STATE LAW

Twenty states and Washington DC have at least partially closed the background check loophole, meaning that residents of these states are required to pass a background check and/or obtain a permit in order to buy at least some types of guns from unlicensed sellers, including people arranging gun sales online.

Some states also place additional requirements on the purchase of firearms from out-of-state sellers. For instance, California generally prohibits its residents from acquiring any type of firearm out of state without first having that firearm delivered to a licensed dealer located in California to process the sale, conduct the background check, and submit a sale record to state law enforcement.14(Federal law, by contrast, generally authorizes unlicensed buyers to acquire long guns out of state through a licensed dealer in either the buyer’s or seller’s state of residence).

# KEY LEGISLATIVE ELEMENTS

The strongest state laws in this area close gaps in federal law by generally requiring that all gun sales—including sales arranged or completed online—must be conducted through a licensed firearms dealer, pursuant to a background check and sale record. Alternatively, gun buyers should be required to physically appear in person to buy a firearm and to present a firearm purchase permit that was issued by law enforcement, pursuant to a background check.

States should also ensure that a state law enforcement agency receives a record of any gun sale, regardless of where the resident acquired the weapon.