

Universal Background Checks – Key Facts to Consider

- So-called “universal background checks” on private party transactions impose heavy regulatory burdens on federally licensed retailers, add significant costs, pose logistical nightmares, lead to unacceptable delays in processing NICS checks, and open retailers to unprecedented liability exposure.
- The firearms industry supports fixing the current FBI background check system — Fix NICSSM (www.fixnics.org).

Under current federal law (the Brady Act), federally licensed firearms retailers must run a background check through the Federal Bureau of Investigation’s (FBI) - National Instant Criminal Background Check System (NICS)¹ on the buyer before transferring the firearm (new or used) to that individual. The retailer must conduct the NICS check regardless of whether the transfer takes place at the licensed premises or at a gun show. Our industry has long supported the current NICS background check system.

The Obama Administration, some members of Congress and gun-control organizations now advocate expanding the Brady Act to require background checks for every firearm transfer in the United States between private citizens, whether it is a father passing his shotgun down to his son, a grandfather giving his granddaughter a Christmas gift of her first rifle, two private collectors transferring a rare and valuable firearm from one collection to another or loaning a friend a rifle or shotgun for a hunting trip.

A nationwide survey of federally licensed firearms retailers conducted

by NSSF reveals that those who would be on the front line of implementing what is touted as “universal background checks” have serious concerns both about whether such proposals would work as well as the potential negative effects on their businesses. Asked whether they supported or opposed “universal background checks,” 85.7 percent of the responding firearms retailers said that they opposed them. To the question of whether they believed that such legislation would prevent criminals from obtaining firearms, a nearly unanimous 95.7 percent said no. Based on the experience of licensed firearms retailers in the few states that now require retailers to conduct background checks on the private transfer of firearms between individuals, we know requiring so-called “universal background checks” will impose on federally licensed retailers significant increased regulatory burdens, tremendous additional costs, logistical nightmares, unacceptably lengthy delays in processing NICS checks, unprecedented liability exposure and other additional unintended consequences.ⁱⁱ

Universal Background Checks Raise Serious Constitutional Questions

“Universal background checks” raise important constitutional questions involving States rights under the 10th Amendment and the limits of Congress’ Commerce Clause powers.

- **The Federal government cannot constitutionally compel state governments to perform background checks on private party transfers of firearms.** See *Printz v. United States*, 521 U.S. 898 (1997) (Brady Act violated 10th Amendment in that Congress may not require states to administer federal firearms laws.). Therefore, those checks would all be required to be conducted by federally licensed retailers. However, there are serious constitutional questions regarding whether Congress under its Commerce Clause powers can compel private businesses (licensed retailers) to perform a purely governmental function (background checks) unrelated to their licensed business (intra-state transfers between private parties)?

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Increased Cost to Businesses

Before any expansion of NICS checks is mandated, consider the following:

- **The universal background check is a pure cost to the retailer, most of which are small “mom-and-pop” businesses.** The retailer would lose a significant amount of money generating the legally required recordkeeping entries, maintaining those records for decades for law enforcement, and performing the



background check on a firearm they are not selling and for which they realize no profit. The market, and not the government, should set the fee for performing a “universal background check.” A market determined fee will allow the retailer to recoup their costs, in the same way the retailer’s regulatory compliance costs are factored into the price of the firearms they sell, and allow the retailer to realize a reasonable profit for their time and effort. Government established fee of \$10.00, or some other nominal fee, is woefully inadequate.

- **Licensed retailers would need to be free to decide not to conduct**

“universal background checks.”

However, California, for example, mandates that licensed retailers must perform this government function as a condition of their license, and then caps the amount they can charge.

- **Licensed retailers would be forced to use paid staff hours or to hire additional staff and pay for additional infrastructure to accommodate such transactions, including, but not limited to additional surveillance equipment, secure firearm storage, parking, IT infrastructure, and acquisition and distribution (A&D) records.** Staff conducting background checks on private party transfers will not be able to serve paying customers, many of whom will leave the store rather than wait, resulting in lost sales.

Liability Risks

- In addition to the cost of providing this government function, the liability a retailer has in such transactions (e.g., retaining additional ATF Forms 4473 subject to inspections for 20 years; maintaining A&D records for the life of the business) would require a significant increase in compliance efforts. **Any errors would be cited as violations by ATF against the retailer. A single violation of the Gun Control Act or ATF regulations is sufficient to revoke a retailer’s license.** Imagine losing your livelihood for a record-keeping error for a product you didn’t even sell.
- **Licensed retailers would be forced to handle firearms that they are**

not familiar with because they do not stock them. It would no longer be the case that every firearm they now acquire, whether new or used, is a firearm that they want to acquire.

- Used firearms may have been modified by their owners and may have missing markings, making proper firearm acquisition and disposition records difficult for retailers to achieve.
- **The licensed retailer would also be subject to product liability and other lawsuits if the transferred firearm is alleged to be defective.** Insurance coverage in those cases may not be available to the retailer since they did not sell the firearm. Imagine being sued over an accident involving a firearm you didn’t sell and having no insurance coverage.
- Federal law requires licensed retailers to provide a “secure gun storage or safety device,” typically a gun lock, when they transfer any



handgun. See 18 USC 922(z). **Who will pay for the cost of the gun lock?**

- Some states require a waiting period (CA, CT, IL, etc.) before a firearm can be transferred during which time **the licensed retailer must hold the firearm in inventory**

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PROMOTE

PROTECT

PRESERVE

and become legally responsible for the firearm while in their custody.

A party to the private transaction would assert a claim that the firearm was altered or damaged while in the retailer's exclusive custody and control.

- Similarly, if the firearm being transferred is in the retailer's possession, custody and control while a "delayed" NICS response is being resolved (up to three business daysⁱⁱⁱ), **the retailer would face additional liability over claims that the firearm was altered or damaged while in the retailer's possession.**
- **There are significant safety concerns presented by a massive influx of "private party" firearms entering a carefully controlled retail establishment.** For example, in California, persons have entered large retailers with a firearm and walked through the store, e.g., past the shoe department, to get to the sporting goods section in order to conduct a private party background check.

Logistical Nightmare

In addition:

- Logistical questions remain such as whether the use of state Point of Contact (POC) systems would be authorized for such transactions. For example, Connecticut, a POC state, requires retailers to contact NICS for a check with is legally impermissible.
- **In the event a buyer is denied based on the background check results, it is unclear how the transaction should be handled.** Would the retailer then be required to conduct a background check and have the seller complete a

Form 4473 in order to return their firearm to them?

- **What is a licensed retailer to do in the event of a "double denial" (both the private party buyer and seller are denied).** How would such a transaction be noted in the retailer's A&D record?
- In some states, consistent with the requirements of the Brady Act, ATF has qualified certain



firearms permit holders as exempt from the NICS background check requirement because a check was recently conducted on that individual when the permit was issued. **Would the same rules apply for private party transactions involving the holders of such permits?**

- Some states allow retailers to opt out of doing private party transaction checks. For example, in Pennsylvania, retailers may opt out and the County Sheriff performs the checks instead. Would this be allowed under a federal mandate? **And if all retailers opt out due to the high costs and compliance issues, would state and local law enforcement do the check?**
- **The FBI NICS center is already overwhelmed with over-the-counter retail transactions.** According to

the FBI, this winter's activity surge required the cancellation of all Christmas leave and the calling in of all employees who ever worked for NICS to help with the traffic. Despite these efforts, the NICS system experienced extensive and unprecedented delays during this time.

- The Department of Justice declined to pursue industry supported legislation to allow federal firearms licensees access to NICS to conduct employment screening checks on current or prospective employees because it would have resulted in a mere 2% increase in NICS checks, an amount DOJ said NICS could not absorb. **How can NICS be expected to handle a 14 to 22% increase, let alone a 40% increase?^{iv}**
- The same problem exists in Point of Contact states where the state facilities are also overwhelmed with retail transactions. **Adding a massive influx in transactions would further tax the systems to the point of potential collapse.**
- For residents of Washington, D.C. there is **only one firearm retailer in the District of Columbia to facilitate any and all private party transactions.** Residents of rural Alaska would face similar barriers as they may be **600 miles distance from the nearest retailer.**

The NSSF urges lawmakers to carefully consider these important questions when considering public policies such as requiring "universal background checks" for the transfer of firearms between private parties.

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Federally licensed firearms retailers depend on the FBI NICS system to ensure that they do not transfer firearms to prohibited persons. But the NICS system is only as good as the prohibiting records that are in the system. It is well documented that the FBI NICS databases are incomplete because many states have not provided all records that establish someone is prohibited from owning a firearm under current law, including mental health adjudications and involuntary commitments orders.

States must improve the NICS database by submitting any and all records establishing an individual is a prohibited person, such as mental health records showing someone is an “adjudicated mental defective” or involuntarily committed to a mental institute, as well as records

showing someone is the subject of a domestic violence protective order, a drug addict or subject to another prohibited category.

That is why the firearms industry is launching a campaign, Fix NICSSM (www.fixnics.org) to encourage states to report to NICS all records that establish someone is prohibited from owning a firearm under current law. Through a multi-state effort focused on bringing together coalitions in the states with the fewest submitted records, the industry is dedicating significant resources to helping states overcome the legal, technological, and intrastate coordination challenges preventing effective record sharing.

The firearms industry has a long record of supporting background checks. The NSSF supported background checks prior to the passage in 1993 of the Brady Act that created a background check system and NICS in 1998. The existing background check system

must be fixed, however, before Congress even considers whether to expand background checks, otherwise we’ll just have more incomplete and inaccurate checks. Including these missing records will help ensure more accurate and complete background checks.

Congress should condition federal grants to states on submitting prohibiting records. States that fail to provide records to NICS should face grant penalties, just as states that fail to meet certain drunk-driving law thresholds may lose federal highway funds.

The National Shooting Sports Foundation (NSSF) is the trade association for America’s firearms, ammunition, hunting and shooting sports industry. Our more than 8,000 members include thousands of federally licensed firearms retailers, most of which are small business owners.

ⁱ Under the Brady Act, 13 states perform the background checks on all firearms (Point of Contact or POC states) and 8 states do the background check for the transfer of handguns only (Partial POC states). The state-performed background checks use the same federal databases as the FBI-NICS background checks.

ⁱⁱ Creating the technology infrastructure within NICS to support such a system would also cost the American taxpayer a significant amount of money. Gun control groups claim that 40% of guns sold are not subject to a background check. This assertion is based on a 1990s telephone survey that said 60% of all firearm transactions go through licensed retailer with a check being performed, implying the other 40% do not involve a background check. The survey results make it clear that there are serious flaws in using a phone survey for this type of information gathering. For example, the same section said that 3% of respondents said they obtained guns through the mail, to which the authors said the respondents “may have misremembered or may have referred to a mail-order purchase arranged through an FFL.” When considering the fact that the survey also found that the average firearm in circulation in 1994 was acquired by its present owner in 1981 - more than a decade before the survey - it’s hard to take the self-reporting seriously. This 40% figure has been discredited by recent analysis which concluded the figure is actually 14-22% http://www.washingtonpost.com/blogs/fact-checker/post/update-obama-claim-on-background-checks-moved-from-verdict-pending-to-2-pinocchios/2013/01/25/59caeca6-672f-11e2-85f5-a8a9228e55e7_blog.html

ⁱⁱⁱ Brady Act provides that after three business days the licensed retailer may transfer a firearm if the delay has not been resolved. However, ATF encourages retailers to hold the firearm beyond three days until the delay is resolved.

^{iv} See footnote 2.



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