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MEMO

To: Senator Richard Sears and Representative Maxine Grad
From: Deputy Commissioner Christopher Herrick
Subject: ACT 94 Report from Department of Public Safety
Date: December 17, 2018
cc:

Introduction

Act 94, passed and signed into law in 2018, directed the Department of Public Safety, the Executive Director of the Department of Sheriffs and State's Attorneys, and the Vermont Association of Chiefs of Police to report to the House and Senate Committees on Judiciary on the feasibility of establishing an alternative method for conducting background checks on private firearms sales. Specifically, this report must analyze the costs and efficiencies of obtaining background checks from a law enforcement agency instead of a federally licensed firearms dealer. In order to prepare this report, it is essential to address whether Vermont law enforcement agencies can facilitate the transfer of a private firearm in the same manner as a federally licensed firearms dealer and comply with all requirements of State and federal law governing the sale of firearms by a licensed dealer. *See* 13 V.S.A. § 4019. Based on current federal and State law, Vermont law enforcement agencies are unable to perform background checks "in the same manner as the licensed dealer would if selling the firearm from his or her own inventory." 13 V.S.A. § 4019(c)(1). As more fully explained below, due to Vermont's inaccessibility to the National Instant Background Check System (NICS) or the ability to obtain information contained in the NICS by other means, background checks conducted by Vermont law enforcement agencies would be incomplete, thereby failing to adequately ensure prohibited person are prevented from possessing firearms.

Federal Law Firearms Transfers/Sales

The Gun Control Act of 1968 requires any person, corporation or company engaged in the business of manufacturing or importation of firearms, or selling of firearms at wholesale or retail, to obtain a federal firearms license. 18 U.S.C. § 923(a). The Brady Act requires federally licensed firearms dealers (FFLs) to conduct a background check prior to the transfer of any firearm, and the Act established a national instant criminal background check system, identified above as NICS, as a mechanism for FFLs to obtain the required background checks. *See* P.L. 103-159, 107 STAT. 1536 (Nov. 30, 1993); 18 U.S.C. § 922(t). The NICS background check searches applicable database

systems to confirm whether the transferee is prohibited from possessing a firearm under federal or state law.¹ Access to the NICS database system is severely restricted. *See* 28 C.F.R. § 25.1 *et seq.* Only FFLs may initiate a NICS background check and only in connection with a proposed firearms transfer. 28 C.F.R. § 25.6(a). The process for accessing the NICS database is by the FFL contacting the FBI NICS Operation Center.

FFL Initiated Background Checks for Firearms Transfers

As noted above, Act 94 required analysis on how private (certain person-to-person) sales might undergo background checks without the participation of a federal licensed firearm dealer (FFL). Currently, Vermont FFLs initiate a NICS background check by contacting the Federal Bureau of Investigation (FBI) NICS Operation Center. Upon receipt of such a request, the FBI NICS Operation Center conducts a search of the relevant databases including NICS Index, NCIC, III, for any records “demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. § 922 or state law.” 28 C.F.R. 25.6(c).

Based upon the consolidated NICS search results, the Center sends the FFL a NICS response approving, denying or delaying approval of the transfer pending further review, also referred to as an adjudication. FFLs must maintain records of the NICS determination. It is important to note FFLs do not have access to the NICS database systems; the FBI conducts the actual search, evaluation and adjudication of the proposed firearms sale. As noted above, the Center’s adjudication includes analysis of federal and state prohibitors (including those noted in 18 U.S.C. §922 and 13 V.S.A. § 4017).

There is no prohibition on FFLs facilitating person-to-person sales through existing procedure outlined above. In fact, the facilitation of private firearms transfer by FFLs is encouraged by the FBI NICS Operation Center.² Such facilitation would include the same application material, submission guidelines, and documentation management and retention. Appended to this document is an open letter from the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATFE) concerning FFLs ready ability to enhance public safety by facilitating transfers of firearms between private individuals through their businesses. It is also worth noting that during 2107 Vermont based FFLs submitted 48 person-to-person sales to the FBI NICS section for analysis and adjudication and have submitted 90 during 2018 (as of October 31). It is important to reiterate that the FFLs obtain background checks by

¹ Federal law prohibits an individual from possessing a firearm if the person:

- (1) has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) is a fugitive from justice;
- (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (4) has been adjudicated as a mental defective or who has been committed to a mental institution;
- (5) is an alien— (A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- (6) has been discharged from the Armed Forces under dishonorable conditions;
- (7) is a United States citizen who has renounced their U.S. citizenship;
- (8) is subject to a court order that— (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
- (9) has been convicted in any court of a misdemeanor crime of domestic violence.

18 U.S.C. § 922(g).

² See Federal Guide: *Facilitating Private Sales: A Federal Firearms Licensee Guide*
<https://www.atf.gov/file/110076/download>

submitting an inquiry to the FBI NICS Operation Center, who in turn access the relevant NICS databases and provide the FFL with an adjudication; FFLs are not permitted to access the relevant NICS database system.

Analysis

The question posed by Act 94 is whether it is feasible for Vermont law enforcement agencies to provide an alternative method to perform background checks for private firearms transfers. As provided by FBI Office of General Counsel (OGC) staff, no authority exists for Vermont law enforcement agencies to access the NICS database system, in part because Vermont is not a “Point of Contact” state as defined by regulation, nor is there authority for Vermont law enforcement agencies to act as an FFL and request a NICS background checks for private firearms transfers.³ This lack of authority restricts Vermont’s access to information sources including, national criminal history databases, mental health adjudications, and military records. Thus, NICS backgrounds checks must be conducted by the FBI NICS Operation Center upon request of a Vermont FFL.

Given this restriction, any state level analysis would only include state level records to include Vermont-only criminal history records and any other access provided by the Judiciary for mental health requirements. Of note, under Vermont law, the courts must report relevant 922(g)(4) mental health adjudications to the NICS system. *See* 13 V.S.A. § 4824. Such reports include the name of the person subject to the order, and reports made in accordance with this section are confidential and may not be used “for any purpose other than submission to the National Instant Criminal Background Check System.” *See* 13 V.S.A. §4824(c). Given this statutory guidance, it appears unlikely, Vermont law enforcement agencies would be able to acquire mental health adjudications for the purpose of evaluating whether a transferee is prohibited from possessing a firearm under 18 U.S.C § 922(g)(4).

The impediments identified above prevent Vermont law enforcement agencies from completing a thorough or meaningful background check because they would not have access to the NICS database. Thus any such check would not include non-Vermont criminal history records, non-Vermont (and possibly Vermont) mental health records, and military service records. As such, these checks would be cursory at best and not provide adequate assurance that the transferee is authorized to receive a firearm in accordance with federal and State law. Authorization for limited background checks could result in Vermont serving as a pass-through state for individuals trying to avoid federal restrictions on firearm purchases by exploiting vulnerabilities in this cursory check.

During discussions with federal partners, additional outreach to Vermont FFLs was suggested to advise them of their ability to complete these person-to-person checks and to emphasize the associated benefits to public safety. The Department of Alcohol, Tobacco and Firearms will be performing outreach to FFLs in Vermont to help them understand the important role they can serve with respect to the integrity of gun sales in Vermont.

Given the above factors, the Department of Public Safety cannot recommend that law enforcement serve as an alternative to FFLs to facilitate person-to-person firearms transfers until such time as the federal law and regulations are expanded to allow law enforcement to have access to NICS (either through the FBI or a state POC) in the same manner and under the same obligations as an FFL. Under the current statutory and regulatory scheme, background check performed by state law enforcement would be incomplete. Incomplete background checks will give rise to public safety concerns based on the inability to assure potential transferees are legally authorized to possess firearms, as well as subject law enforcement agencies to potential liability within the public sphere for facilitating an ultimately unauthorized transfer.

³ States that are designated as “Point of Contact” (POC) state serve as the intermediary between the FFL and federal databases checked by NICS. 28 C.F.R. § 25.2. That is, a POC state takes on all of the duties and responsibilities performed by the FBI in non-POC states. These duties include, among others, receiving the NICS background check requests from FFLs, checking state or local record systems, performing NICS inquiries, determining whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and responding to FFLs with the results of a NICS background check. *Id.* For Vermont to become a POC would be a significant undertaking and would require significant funding, which is beyond the scope of this report. It is also far from clear that Vermont law enforcement could perform the function of a FFL in requesting a NICS background check. The regulations suggest that only FFLs may initiate a NICS background check. *See* 28 C.F.R. § 25.6

