

## RECOMMENDED ACTION MEMO

**Agency:** Department of Justice, Federal Bureau of Investigation  
**Topic:** State and Local Government Access to NICS for Ammunition Checks  
**Date:** November 2020

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**Recommendation:** Amend the NICS regulations to allow state, tribal, and local criminal justice agencies to use NICS for ammunition purchaser background checks if such background checks are required by state, tribal, or local law.

### I. Summary

#### **Description of recommended executive action**

A small number of states, including [New York](#) and [California](#), have enacted laws requiring gun dealers to run background checks on ammunition purchasers. The FBI has refused to allow the National Instant Background Check System (NICS) to be used for this purpose, based on a [regulation](#) that restricts use of NICS, even though NICS is the best source of information for these checks. However, studies indicate that background checks at the time of transaction would have largely eliminated retail sales of ammunition to prohibited individuals.<sup>1</sup>

Under this proposal, the FBI would amend the regulation implementing the Brady Act to allow state, tribal, and local law enforcement agencies to access NICS for ammunition purchaser background checks if a state or tribal law requires the background checks, and the entity using NICS for this purpose is a state, tribal, or local law enforcement agency, rather than a private entity (in other words only if a governmental entity acts as a point of contact for this purpose, so few, if any, additional funds are spent by the FBI for these searches).

#### **Overview of process and time to enactment**

The US Department of Justice (DOJ) originally promulgated regulations to implement NICS in 1998, and has since amended those regulations multiple times, most recently in 2014. The proposal described in this memo, recommending that the DOJ once again amend the NICS implementing regulations, would follow the same notice-and-comment rulemaking procedure as previously followed, pursuant to the Administrative Procedure Act (APA).<sup>2</sup> The DOJ should begin the process by issuing a Notice of Proposed Rulemaking (NPRM) to this effect within the first year of the next administration. The DOJ is then required to provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.<sup>3</sup>

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<sup>1</sup> *Id.* at 7.

<sup>2</sup> 5 U.S.C. § 553.

<sup>3</sup> Congressional Research Service, “An Overview of Federal Regulations and the Rulemaking Process,” January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

The Privacy Act of 1974 sets out requirements for government databases containing records that can be retrieved by personal identifying information.<sup>4</sup> It is not clear whether these procedural requirements would apply here. The DOJ's Office of Privacy and Civil Liberties ensures DOJ's compliance with the Privacy Act and is the entity best positioned to make that decision.

## **II. Current state**

### **The Gun Control Act**

Under the Gun Control Act of 1968 (GCA), as amended, a person is generally prohibited from acquiring or possessing firearms or ammunition if, among other things, the person has been convicted of certain crimes, or become subject to certain court orders related to domestic violence or adjudications regarding serious mental conditions. The federal standard of eligibility is the same for both firearms and ammunition.<sup>5</sup> The GCA also prohibits any person from selling or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person does not meet this standard of eligibility.<sup>6</sup>

### **The Brady Handgun Violence Prevention Act**

The Brady Handgun Violence Prevention Act (Brady Act), signed into law in 1993, provides for the creation of a background check system and mandates that federal firearms licensees (FFLs), including federally licensed firearms manufacturers, importers, and dealers, request criminal history background checks from this system on firearms transferees before transfers to those individuals.<sup>7</sup> The Brady Act also required the attorney general to “establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18....”<sup>8</sup> The Brady Act further specified the following.

- The Attorney General shall develop such computer software, design and obtain such telecommunications and computer hardware, and employ such personnel, as are necessary to establish and operate the system ....<sup>9</sup>
- The database could not be used to create a permanent registry of individuals banned from purchasing firearms.<sup>10</sup>
- “After 90 days’ notice to the public and an opportunity for hearing by interested parties,

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<sup>4</sup> Privacy Act of 1974, 5 U.S.C. § 552a (2020); Office of Mgmt. & Budget, Exec. Office of the President, “Federal Agency Responsibilities for Review, Reporting, and Publication Under the Privacy Act,” OMB Circular No. A-108, 2017, 15-17 [hereinafter “OMB Reporting Under the Privacy Act”].

<sup>5</sup> 18 U.S.C. § 922(g).

<sup>6</sup> 18 U.S.C. § 922(d).

<sup>7</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102 (1993) (hereafter the “Brady Act”).

<sup>8</sup> Brady Act § 103.

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system ....”<sup>11</sup>

Importantly, although the Brady Act only requires background checks for transfers of firearms, this background check requirement was written to be incorporated into Section 922 of Title 18, which expressly regulates ammunition in addition to firearms.<sup>12</sup> Section 922(g) makes it unlawful for members of certain groups (fugitives, felons, those who have been dishonorably discharged from the Armed Forces, etc.) “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or *ammunition*; or to receive any firearm or *ammunition* which has been shipped or transported in interstate or foreign commerce.”<sup>13</sup> And the Brady Act refers to Section 922(g) multiple times, specifically providing that firearm dealers must first request a NICS background check to ensure that receipt of a firearm would not violate section 922(g).<sup>14</sup>

The attorney general first promulgated a regulation in accordance with the Brady Act’s requirement in 1998.<sup>15</sup> The regulation, which is codified as 28 C.F.R. § 25.6, created NICS, and specified that FFLs were to “initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act.”<sup>16</sup>

However, the regulation also specifically allows the use of NICS for two additional purposes, which it conceded are “unrelated to NICS background checks required by the Brady Act.”<sup>17</sup> The first purpose is for “[p]roviding information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license...”<sup>18</sup> The regulation explicitly notes that such permits include “permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives.” The second purpose is for “[r]esponding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the [GCA] or the National Firearms Act (26 U.S.C. Chapter 53).”<sup>19</sup>

State and local agencies, FFLs, and individuals who violate the FBI’s regulations regarding NICS, including “using the system to perform a check for unauthorized purposes,” are subject to a fine up to \$10,000 and cancellation of NICS-inquiry privileges.<sup>20</sup>

### **Obama administration efforts**

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<sup>11</sup> *Id.*

<sup>12</sup> Brady Act § 102(a)(1).

<sup>13</sup> 18 U.S.C. § 922(g) (emphasis added).

<sup>14</sup> Brady Act § 102(b)(9).

<sup>15</sup> National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303 (October 30, 1998) (codified at 28 C.F.R. § 25.6).

<sup>16</sup> 28 C.F.R. § 25.6(a) (emphasis added).

<sup>17</sup> 28 C.F.R. § 25.6(j).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 28 C.F.R. § 25.11.

In 2014, the regulation was amended to expand access to NICS in two ways. First, the regulation was amended to allow tribal criminal justice agencies to use NICS in connection with firearms and explosives related permits. Second, the new regulation allows NICS to be accessed in connection with the disposition of firearms in the possession of criminal justice agencies. Neither of these changes were expressly contemplated in the text of the Brady Act.<sup>21</sup>

### **Trump administration efforts**

The Trump administration has not proposed any changes to the relevant regulation. Accordingly, the current regulation allows access to NICS for the following purposes:

- 1) providing information to federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm; carry a concealed firearm; or import, manufacture, deal in, or purchase explosives
- 2) responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53)
- 3) disposing of firearms in the possession of a federal, state, tribal, or local criminal justice agency<sup>22</sup>

The current regulation thus does not expressly allow federal, state, tribal, or local criminal justice agencies to run NICS checks for purposes outside of firearm transfers or one of the other exceptions listed above.

### **State access to NICS**

The procedures that FFLs use to comply with the background check requirement differs among the states, depending on whether a state government has designated an agency or agencies to serve as “points of contact” (POC) for NICS. In most states, FFLs initiate a background check by directly contacting the FBI, which then conducts the NICS check.<sup>23</sup> In states that have chosen to designate POCs, however, FFLs initiate a background check by contacting their state’s

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<sup>21</sup> National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047 (explaining introduction of amendment to authorize tribal criminal justice agencies to access NICS and to authorize criminal justice agencies to access NICS for purposes of disposing of firearms in their possession).

<sup>22</sup> National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047, 69,051 (November 20, 2014) (codified at 28 C.F.R. § 25.6(j)).

<sup>23</sup> 28 C.F.R. § 25.6.

POC,<sup>24</sup> which then accesses the NICS databases to run the background check.<sup>25</sup> “POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems.”<sup>26</sup> For example, if a buyer wants to purchase a handgun at a gun shop in Colorado, a POC state, the gun shop (the FFL) contacts the Colorado Bureau of Investigation (CBI), who then transmits a request for a background check to NICS and may search other databases; the CBI then relays the results back to the gun shop.<sup>27</sup>

Currently, 20 states have designated POCs. In the remaining 36 states/territories (including the District of Columbia and five US territories), FFLs contact the FBI directly for NICS background checks.<sup>28</sup>

### **State action on ammunition background checks**

As described below, two states—New York and California—have passed legislation requiring background checks before ammunition can be sold, though both have faced challenges in implementation.<sup>29</sup> Four states—Connecticut, Illinois, Massachusetts, and New Jersey—require individuals to obtain a license to purchase or possess at least some types of ammunition, and require license applicants to pass a background check in order to qualify for the license. The District of Columbia generally prohibits the possession of ammunition, unless the person is at a firearm safety class, or possesses a registration certificate for a firearm.

#### **New York**

In January 2013, New York’s state legislature passed the Secure Ammunition and Firearm Enforcement (SAFE) Act, requiring ammunition sellers to conduct background checks on potential purchasers.<sup>30</sup> However, Governor Cuomo suspended the requirement in 2015 due to the state’s purported inability to create a robust database to enable the checks. According to the memorandum of understanding signed by the governor and the Republican Senate majority

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<sup>24</sup> A “point of contact” or “POC” is as “a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check. A POC will be an agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order.” 28 C.F.R. § 25.2.

<sup>25</sup> US Department of Justice, Federal Bureau of Investigation, “NICS Participation Map,” accessed June 30, 2020, <https://www.fbi.gov/services/cjis/nics/about-nics>.

<sup>26</sup> 28 C.F.R. § 25.6(e).

<sup>27</sup> Colo. Rev. Stat. § 24-33.5-424(3)(a).

<sup>28</sup> The list of 20 POC states includes seven “partial POC” states, where FFLs contact the FBI for long gun purchases but the states act as POC states for handgun purchases (four states conducted handgun background checks and three states issued handgun permits used for handgun background checks). US Department of Justice, Federal Bureau of Investigation, “NICS Participation Map,” accessed August 18, 2020, <https://www.fbi.gov/services/cjis/nics/about-nics>.

<sup>29</sup> Giffords Law Center, “Ammunition Regulation,” accessed June 30, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/ammunition-regulation/>. Four states have passed laws requiring permits for the purchase of certain kinds of ammunition.

<sup>30</sup> NY Secure Ammunition and Firearm Enforcement (SAFE) Act, S. 2230, 2013 Leg., (N.Y. 2013).

leader, the database could not “be established and/or function in the manner originally intended” given “the lack of adequate technology.”<sup>31</sup> Notably, New York has not assigned a POC for the NICS.

## California

In 2016, California voters passed Proposition 63, which required ammunition sellers to obtain an “ammunition vendor license” from the California Department of Justice (Cal DOJ) and, beginning in 2019, to run background checks through the Cal DOJ records system before selling ammunition, and to record and report to the Cal DOJ any subsequent sales.<sup>32</sup> Cal DOJ acts as a POC for NICS background checks on firearm purchasers.<sup>33</sup> However, because ammunition sellers do not have the authority to initiate a NICS background check for the sale of ammunition, California’s law specifically refers ammunition sellers to the existing Cal DOJ Armed and Prohibited Persons System, which gathers information from a variety of sources, rather than referring them to NICS.<sup>34</sup>

## Connecticut, Illinois, Massachusetts, and New Jersey

Connecticut authorizes a state agency to issue “ammunition certificates,” and prohibits the sale or transfer of ammunition unless the transferee presents a firearms purchase, carry permit, or ammunition certificate. Ammunition certificates are issued by the state after a background check, and must be renewed every five years.<sup>35</sup> Illinois requires residents to obtain a valid Firearm Owner’s Identification (FOID) card before they can lawfully purchase or possess firearms or ammunition.<sup>36</sup> Massachusetts requires a firearm permit or license to purchase or possess ammunition, with different types of licenses entitling the holder to purchase and possess different kinds of ammunition.<sup>37</sup> New Jersey generally prohibits any person from acquiring any handgun ammunition unless the person presents a valid firearms purchaser identification card or a permit to purchase a handgun.<sup>38</sup> While the Connecticut law requires ammunition certificates specifically for ammunition purchases, the licenses in Illinois, Massachusetts, and New Jersey are also required for the purchase of firearms. Consequently, these three states are already allowed to access NICS to conduct background checks on

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<sup>31</sup> Thomas Kaplan, “Plan to Require Background Checks for Ammunition Sales is Suspended in New York,” *New York Times*, July 10, 2015, <https://www.nytimes.com/2015/07/11/nyregion/plan-to-require-background-checks-for-ammunition-sales-is-suspended-in-new-york.html>. In addition, Republican state senators claimed that the database could not be created because it would be too expensive. See, e.g., Former New York State Senator Catharine Young, “SAFE Act Ammunition Database Suspended,” news release, July 10, 2015, <https://www.nysenate.gov/newsroom/press-releases/catharine-young/safe-act-ammunition-database-suspended> (stating that establishing a database “would have cost the state up to \$100 million”).

<sup>32</sup> Cal. Penal Code §§ 30312; 30352; 30380-95.

<sup>33</sup> See Cal. Penal Code § 28220.

<sup>34</sup> Cal. Penal Code § 30370. See California Department of Justice, Office of the Attorney General, “Ammunition Purchase Authorization Program,” accessed July 1, 2020, <https://oag.ca.gov/firearms/apap>.

<sup>35</sup> Conn. Gen. Stat. §§ 29-38n – 29-38p.

<sup>36</sup> 430 Ill. Comp. Stat. 65/2(a)(2), (b) 65/4, 65/8.

<sup>37</sup> Mass. Gen. Laws ch. 140, §§ 129B, 129C, 131, 131A, 131E.

<sup>38</sup> N.J. Stat. Ann. § 2C:58-3.3.

applicants for these licenses.<sup>39</sup> Connecticut, however, relies on other databases in issuing ammunition certificates.

### **III. Proposed action**

#### **A. Substance of the proposed rulemaking**

To enable the use of the NICS background check system for ammunition sales, the DOJ should consider amending 28 C.F.R. § 25.6 to read:

“(a) FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act, and a proposed ammunition transfer as required by state, tribal, or local law, if the NICS background check is conducted by a POC. FFLs are strictly prohibited from initiating a NICS background check for any other purpose. The process of accessing NICS for the purpose of conducting a NICS background check is initiated by an FFL, who contacts the FBI NICS Operations Center (by telephone or electronic dial-up access), or a POC. FFLs in each state will be advised by the ATF whether they are required to initiate NICS background checks with the NICS Operations Center or a POC, and how they are to do so.

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

(1) providing information to federal, state, tribal, or local criminal justice agencies in connection with:

(i) the issuance of a firearm-related, ammunition-related, or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm or ammunition, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives

(ii) the state, tribal, or local criminal justice agency’s background check of a prospective ammunition purchaser or transferee, where such background check is required by state, tribal, or local law; ...”

Three features of this proposed language are worth noting. First, this language would authorize state, tribal, or local criminal justice agencies to access NICS for the purposes of background checks on prospective ammunition purchasers and transferees only if those background checks are required by state, tribal, or local laws. This provision would also ensure the privacy and security of the system by ensuring that criminal justice agencies who access NICS for this purpose are acting pursuant to state, tribal, or local laws.

Second, this language would authorize FFLs to initiate a NICS background check in connection with a proposed ammunition transfer only in limited circumstances. More specifically, the FFL may initiate a check in connection with the transfer of ammunition only if the NICS background

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<sup>39</sup> Similarly, in D.C., licensed dealers may generally transfer ammunition only to the registered owner of a firearm of the same caliber or gauge as the ammunition, or to a nonresident of the District who provides proof that the weapon is lawfully possessed and is of the same gauge or caliber as the ammunition to be purchased. D.C. Code Ann. §§ 7-2505.02, 7-2506.01.

check is required by state, tribal, or local law. In addition, the check must be conducted by a POC; in other words, the state must have designated a state or local agency to conduct the background check. This provision would ensure that the FBI is not involved in the process and these additional background checks will not impact the FBI's budget. This provision would also ensure the privacy and security of the system by ensuring that FFL's access to the NICS databases is dependent on POCs that already have access to those databases.

Finally, the proposed regulation would clarify the current regulation's provision which allows criminal justice agencies to use NICS in connection with the issuance of firearms-related permits. Arguably, that provision should already allow criminal justice agencies to use NICS when issuing permits to purchase ammunition, such as Connecticut's ammunition certificates, since these permits are "firearms-related." However, that is not how the FBI has interpreted its current regulation. The proposed regulation would resolve this ambiguity by explicitly authorizing the use of NICS for this purpose. This authority is a natural and logical extension of the current regulation, and would provide states flexibility in how they choose to ensure that ammunition purchasers are legally eligible to purchase ammunition.

#### B. Rulemaking process

In order to amend this regulation, the DOJ will have to put the new version of the rule through the notice-and-comment rulemaking process, as specified in the Administrative Procedure Act.<sup>40</sup>

First, an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then the agency must accept public comments on the proposed rule for a period of at least 30 days. Any comments received must be reviewed, and the DOJ must respond to significant comments, either by explaining why it is not adopting the recommended input, or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

For the FBI to amend the permitted uses for NICS, it may also be required to amend its System of Records Notice (SORN) regarding this information.<sup>41</sup> This may require publication of an updated SORN in the Federal Register. The DOJ's Office of Privacy and Civil Liberties is the entity that would most likely determine whether this is necessary.<sup>42</sup>

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<sup>40</sup> 5 U.S.C. § 553.

<sup>41</sup> See 28 C.F.R. § 16.96(p); Privacy Act of 1974; System of Records; 84 Fed. Reg. 54175 (Oct. 19, 2019) (amending the Privacy Act notice for NICS).

<sup>42</sup> U.S. Department of Justice, "Frequently Asked Questions," accessed October 26, 2020, <https://www.justice.gov/opcl/faq>.



#### **IV. Legal justification and vulnerabilities:**

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority, arbitrary or capricious agency action, violating a constitutional right, or not following rulemaking procedures.<sup>43</sup>

#### **The DOJ's Authority to promulgate the new regulation**

As described above, the DOJ's authority over the NICS regulations stems from the Brady Act's requirement that the attorney general create NICS and promulgate regulations to ensure the privacy and security of the information of the system.

In promulgating regulations required by statute, federal agencies often fill in the gaps between the statutory language and practicable regulations. After all, administering a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."<sup>44</sup> Thus, an agency may fill in any ambiguities as long as the agency's regulation is "based on a permissible construction of the statute" and does not contradict Congress's answer to the specific question at hand.<sup>45</sup> Moreover, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," although the measure of deference will vary depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."<sup>46</sup>

Pursuant to these principles, the Supreme Court has established a two-step process to analyze an agency's construction of a statute it administers. First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue."<sup>47</sup> If the intent of Congress is clear, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>48</sup> But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>49</sup> This is the second step in the analysis. Notably, in making the threshold determination—whether the statute is ambiguous—a court must look to the surrounding text and the overall statutory scheme to ensure that Congress has not expressed a particular intent on the question at issue.<sup>50</sup> For the second step, whether the agency's interpretation is permissible depends on whether it is a "reasonable interpretation" of the enacted text and is not "arbitrary or

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<sup>43</sup> 5 U.S.C. § 706.

<sup>44</sup> *Morton v. Ruiz*, 415 U.S. 199, 231, (1974); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>45</sup> *Chevron*, 467 U.S. at 843.

<sup>46</sup> *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

<sup>47</sup> *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (explaining that the ambiguity of statutory language is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

capricious.”<sup>51</sup>

### **Step One: Is the Brady Act “ambiguous” on the use of NICS in connection with ammunition sales?**

Here, the DOJ could argue that the Brady Act is silent or ambiguous on whether it allows NICS to be used in connection with ammunition sales: after all, it does not expressly limit the use of the NICS database to firearms sales alone. In other words, the language in the current regulation stating “FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act,” goes further than the statute’s language, which contained no such restriction expressly limiting the use of NICS to firearm transfers.<sup>52</sup> Instead, the act only asks the attorney general to “establish a national instant criminal background check system that any licensee may contact ... for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee” violates state or federal law, and to “prescribe regulations to ensure the privacy and security of the information of the system.”<sup>53</sup> The Brady Act also does not provide much detail regarding its requirement that the attorney general “prescribe regulations to ensure the privacy and security of the information” in NICS.

The current regulation has previously been amended to expand NICS access to additional entities (tribal criminal justice agencies) and for additional purposes (disposing of firearms in the possession of criminal justice agencies)—notwithstanding that neither of these expansions were expressly authorized by the text of the Brady Act<sup>54</sup>— which supports the argument that Congress granted the DOJ broad discretion in establishing how NICS would be used. What’s more, although Congress specifically prohibited the use of the database to create a registration system,<sup>55</sup> it did not specify any other restrictions on the use of the database. That Congress was explicit in barring certain uses, but did *not* restrict NICS’s use in connection with ammunition sales, may suggest that it did not intend to prohibit this use.<sup>56</sup>

### **Step Two: Is the proposed regulation a “reasonable” interpretation of the Brady Act?**

If the DOJ succeeds in establishing that the Brady Act is silent or ambiguous, it must next show that its new regulation is a “reasonable” interpretation of the statute, and not

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<sup>51</sup> *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

<sup>52</sup> Brady Act § 103(b) (stating that the background check system may be contacted “for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18”).

<sup>53</sup> Brady Act § 103(b).

<sup>54</sup> National Instant Criminal Background Check System Regulation, 79 Fed. Reg. 69,047 (explaining introduction of amendment to authorize tribal criminal justice agencies to access NICS and to authorize criminal justice agencies to access NICS for purposes of disposing of firearms in their possession).

<sup>55</sup> Brady Act § 103(j).

<sup>56</sup> See, e.g., *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (to express or include one thing implies the exclusion of the other).

“arbitrary and capricious.”<sup>57</sup> A regulation is arbitrary and capricious if the agency fails to demonstrate a “rational connection between the facts found and the choice made.”<sup>58</sup> In determining whether a regulation is arbitrary and capricious, courts may consider factors including whether “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>59</sup>

The overall statutory scheme provides some support for the theory that using NICS for ammunition sales is in line with—or at least does not contravene—legislative intent. Specifically, the Brady Act’s background check requirement was written to be incorporated into Section 922 of Title 18, which expressly regulates ammunition in addition to firearms, as described above.<sup>60</sup> Thus, the DOJ may argue that expanding the use of NICS to encompass ammunition background checks is consistent with the broader statutory scheme, which focused on prohibiting the possession of firearms *and* ammunition by certain groups.

The proposed regulation would not alter the privacy and security of the information in NICS. The proposed regulation would strictly limit access to NICS for ammunition purchaser background checks only when such a background check is required by state, tribal, or local law, and where a state, tribal, or local law enforcement agency conducts the check as a POC. Current regulation will continue to impose strict safeguards to ensure the privacy and security of the system.<sup>61</sup> Among other things, unauthorized use of NICS would continue to be subject to a fine up to \$10,000 and cancellation of NICS inquiry privileges.<sup>62</sup> Consequently, the new interpretation is entirely consistent with the Brady Act’s requirement that the regulations ensure the privacy and security of the system.

### **Constitutional challenges**

The new regulation would likely prompt *indirect* Second Amendment challenges. Specifically, to the extent that the regulation prompts states to enact their own laws requiring ammunition background checks (for purposes of accessing NICS under the amended regulation), Second Amendment challenges would likely target these state laws, not the federal regulation.<sup>63</sup>

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<sup>57</sup> *Mayo*, 562 U.S. at 53.

<sup>58</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>59</sup> *See id.*

<sup>60</sup> Brady Act § 102(a)(1).

<sup>61</sup> *See* 28 C.F.R. § 25.8.

<sup>62</sup> 28 C.F.R. § 25.11.

<sup>63</sup> Indeed, it is unlikely that merely making NICS available to states for ammunition background checks, as the proposed regulations does, would constitute a Second Amendment violation, given the absence of any successful Second Amendment challenges to the current regulation, which already makes NICS available to states for firearm background checks. (In fact, the most direct challenge to the Brady Act—an

As noted above, in 2016, California voters approved Proposition 63, a ballot measure that, among other things, required in-person sales and background checks for ammunition. In 2018, opponents of Prop. 63, including out-of-state ammunition sellers who wish to sell ammunition online to Californians without a background check, filed a lawsuit claiming that the new background check law violates the Second Amendment and the Dormant Commerce Clause. The district court agreed with the sellers that their businesses were disadvantaged and issued a preliminary injunction, blocking the law.<sup>64</sup> The case is now on appeal before the Ninth Circuit, which has stayed the district court's injunction, allowing ammunition background checks to continue in California.<sup>65</sup>

Those who wish to challenge the proposed regulation may seek to follow the reasoning in *Rhode*, arguing that administrative errors and delays in processing background checks in NICS constitute a Second Amendment violation.<sup>66</sup> (The Dormant Commerce Clause is a limit on state and local regulations, and not relevant to a federal law.) However, such challenges are unlikely to be successful, because the systemic administrative errors that formed the basis of the *Rhode* opinion do not seem to be applicable to NICS: "Californians purchasing firearms using the federal NICS background system fail background checks **at a much lower rate of approximately 1.1%.**"<sup>67</sup>

Further, at least one district court recently rejected a Second Amendment challenge to NICS, brought by a plaintiff who had been improperly flagged by NICS as a person prohibited from possessing a firearm.<sup>68</sup> The court explained that, although the error resulted in a delay before the plaintiff could purchase a firearm, that delay did not violate his constitutional rights because he was ultimately able to receive a firearm.<sup>69</sup> Given that the new regulation would simply expand the use of NICS, rather than create a new system, any Second Amendment challenges based on administrative issues arising from the use of NICS—i.e., errors or delays—would likely be resolved similarly.

### Procedural challenges

By following the notice-and-comment rulemaking process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence-reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement

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ultimately successful challenge to the Act's interim provisions requiring state sheriffs to perform the background checks—was based on the Tenth Amendment, not the Second. *See Printz v. United States*, 521 U.S. 898, 935 (1997).)

<sup>64</sup> *Rhode v. Becerra*, 445 F. Supp. 3d 902 (S.D. Cal. 2020).

<sup>65</sup> *Rhode v. Becerra*, 2020 U.S. App. LEXIS 15525 (9th Cir.).

<sup>66</sup> *Rhode*, 445 F. Supp. 3d 902, 923-26, 947-48 (holding that ammunition background check violated the Second Amendment by erroneously blocking over 16% of applicants from purchasing ammunition).

<sup>67</sup> *Id.* at \*923 (emphasis added).

<sup>68</sup> *Snyder v. United States*, No. 18-5504 RJB, 2019 WL 5592948, at \*1 (W.D. Wash. Oct. 30, 2019).

<sup>69</sup> *Id.*

with each phase of the process.<sup>70</sup>

In particular, the DOJ should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency “consider...the relevant matter presented” in comments.<sup>71</sup> The agency must address the concerns raised in all non-frivolous and significant comments.<sup>72</sup> The final rule must be the “logical outgrowth” of the proposed rule and the feedback elicited.<sup>73</sup>

### **Arbitrary or capricious challenge under the APA**

If there is a judicial challenge brought regarding a new regulation as being arbitrary or capricious, a court will invalidate the regulation if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>74</sup> The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency’s choice.<sup>75</sup> When an agency fails to consider important facts, or where its explanation is either unsupported or contradicted by the facts, the court has grounds to find the rule “arbitrary or capricious.”<sup>76</sup>

As the Supreme Court has explained, an agency “must consider varying interpretations and the wisdom of its policy on a continuing basis ... for example, in response to changed factual circumstances, or a change in administrations.”<sup>77</sup> The agency must still provide a “reasoned

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<sup>70</sup> See Louis J. Virelli III., “Deconstructing Arbitrary and Capricious Review,” *N.C.L. Rev.* 92 (2014): 721, 737-38, (describing “first” and “second” order inquiries into an agency’s decision making). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency’s change in policy because it provided rational reasons for the change).

<sup>71</sup> 5 U.S.C. § 553(c).

<sup>72</sup> *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency’s “statement of general purpose” inadequate because it did not provide the scientific evidence on which it was based, and the agency’s consideration of relevant information inadequate because it did not respond to each comment specifically).

<sup>73</sup> *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at \*20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the “logical outgrowth” of a proposed rule if “interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period.” A final rule “fails the logical outgrowth test” if “interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”) (internal quotation marks and citations omitted).

<sup>74</sup> 5 U.S.C. § 706(2)(A).

<sup>75</sup> See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>76</sup> *Id.* at 43.

<sup>77</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82, (2005); see also *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (“We find no basis in the Administrative

explanation for its action,” which would “ordinarily demand that it display awareness that it is changing position.”<sup>78</sup> But “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”<sup>79</sup> Thus, an agency need not provide a more detailed justification for the agency’s new policy, unless “its prior policy has engendered serious reliance interests that must be taken into account.”<sup>80</sup>

Therefore, to withstand a potential judicial challenge that the new regulation is an arbitrary and capricious action by the ATF, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making, and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy, based on sound evidence, empirical, or otherwise. Second, it should contain an acknowledgment of reliance interests, and address why those interests are outweighed by public safety factors.

Here, the Department of Justice has already established a course of action through its prior regulation and has continued to reinforce that course of action through further amendments to the regulation. (For example, in 2014, the regulation was amended to give tribal criminal justice agencies access to the NICS database, as noted above.) These amendments demonstrate that FBI decision-making regarding access to NICS is not static and inflexible, but rather has responded to the needs of state policymakers and criminal justice agencies that implement state laws. These changes indicate the new regulation would not threaten any existing reliance interests.<sup>81</sup>

In establishing that there is a “rational connection between the facts found and the choice made,” the DOJ may rely on the kind of data and reasoning put forth by proponents of California’s Proposition 63 in *Rhode v. Becerra*.<sup>82</sup> Namely, as Brady explained in its amicus brief before the Ninth Circuit in *Rhode*:

- Ammunition sales to prohibited persons contribute to crime. In California, in the two years immediately preceding the implementation of Proposition 63, police investigations recovered “nearly 1,000,000 rounds of illegally owned ammunition.”<sup>83</sup> One study found that ten retail outlets “sold over 10,000 rounds to individuals convicted of felonies and

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Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.”)

<sup>78</sup> *F.C.C. v. Fox*, 556 U.S. 502, 515–16 (2009).

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 516.

<sup>81</sup> This is because section 922(g) already barred the sale of ammunition to the same group of individuals that would be affected by the current regulation.

<sup>82</sup> *Rhode v. Becerra*, No. 18-CV-802-BEN (S.D. Cal. Apr. 23, 2020).

<sup>83</sup> California Department of Justice, Office of the Attorney General, “SB 140 Supplemental Report of the 2015-16 Budget Package, Armed Prohibited Persons System,” January 1, 2016, 22, <http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/sb-140-supp-budget-report.pdf>.

other illegal purchasers” in Los Angeles in only two months.<sup>84</sup>

- Ammunition sales to “prohibited persons” also contribute to crime because, as the legislature previously concluded in enacting the Gun Control Act of 1968, such persons are much more likely than others to engage in crime, including violence.<sup>85</sup> And the easier it is for prohibited persons to acquire ammunition, the graver these problems will be.<sup>86</sup>
- Studies indicate that, in the absence of a background check, prohibited persons make up about 3% of ammunition customers in ordinary retail channels.<sup>87</sup>
- Studies also indicate that background checks at the time of transaction would have largely eliminated retail sales of ammunition to prohibited individuals.<sup>88</sup> In California’s case, in seven months of operation, the ammunition background checks prevented 760 prohibited persons from buying ammunition from licensed vendors, and likely deterred many more from attempting to do so.<sup>89</sup>

In addition, the DOJ may be able to cite research showing the efficacy of background checks on firearm purchases in reducing gun violence to justify the expansion of background checks to ammunition purchases.<sup>90</sup>

Congress also clearly anticipated that states would have their own laws regulating firearms and ammunition and did not mean to preempt them. Federal law provides:

No provision of this chapter [the Gun Control Act (18 U.S.C. Chapter 44), which includes section 922’s background check requirement ] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.<sup>91</sup>

Federal law on these topics is therefore a “floor” and not a “ceiling.” Through this provision,

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<sup>84</sup> G.E. Tita, et al., “The Criminal Purchase of Firearm Ammunition,” *Injury Prevention* 12, no. 5 (October 2006): 308, 310, doi: 10.1136/ip.2006.013052 (noting that background check at time of transaction would have largely eliminated retail sales to these prohibited individuals).

<sup>85</sup> Gun Control Act of 1968, Pub. L. No. 90-618, § 101 (“[T]he purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence. . . .”); see also 1968 U.S.C.C.A.N. 2112, 2114 (explaining that categories of prohibited individuals “account for some 49 percent of the arrests for serious crimes in the United States”).

<sup>86</sup> Brief of Amicus Curiae Brady in Support of Appellant Xavier Becerra and Reversal, Emergency, *Rhode v. Becerra*, No. 20-55437, Dkt. No. 23 (9th Cir., Jun. 23, 2020).

<sup>87</sup> *Id.* at 11.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 4.

<sup>90</sup> See, e.g., Kara E. Rudolph, Elizabeth A. Stuart, Jon S. Vernick, and Daniel W. Webster, “Association Between Connecticut’s Permit-to-purchase Handgun Law and Homicides,” *American Journal of Public Health* 105, no. 8 (2015): e49–e54; see also Daniel Webster, Cassandra Kercher Crifasi, and Jon S. Vernick, “Effects of the Repeal of Missouri’s Handgun Purchaser Licensing Law on Homicides,” *Journal of Urban Health* 91, no. 2 (2014): 293–302.

<sup>91</sup> 18 U.S.C. § 927.

Congress intended to establish a policy of cooperation, rather than competition, among the different levels of government with respect to laws regulating guns and ammunition. Allowing states (and local governments that derive their authority from states) to use NICS for ammunition purchaser background checks is consistent with this policy.