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Firearm Background Checks Under H.R. 8 and H.R. 1446

The 117th Congress is considering two bills (H.R. 8 and H.R. 1446) that would amend the background check provisions of the Gun Control Act of 1968 (GCA; 18 U.S.C. §§922-930). The House passed nearly identical bills in the 116th Congress.

Bipartisan Background Checks Act of 2021 (H.R. 8)

H.R. 8 would make nearly all intrastate, private-party firearms transactions subject to the recordkeeping and background check requirements of the Gun Control Act of 1968 (GCA). For a similar proposal, see S. 529. The House-passed bill in the 116th Congress was also H.R. 8.

Enhanced Background Checks Act of 2021 (H.R. 1446)

H.R. 1446 would lengthen the amount of time firearms transactions could be delayed pending the completion of a background check from three business days under current law to several weeks. The timeliness and accuracy of FBI-administered firearms background checks became a matter of controversy following the June 17, 2015, Charleston, SC, mass shooting at the Emanuel African Methodist Episcopal Church. The House-passed bill in the 116th Congress was H.R. 1112.

Gun Control Act of 1968

The GCA's stated purpose is to assist federal, state, and local law enforcement in the ongoing effort to reduce crime and violence. Congress stated, however, that the GCA's intent is not to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens in regard to the lawful acquisition, possession, or use of firearms for hunting, trapshooting, target shooting, personal protection, or any other lawful activity.

Firearms Licensing

The GCA requires all persons manufacturing, importing, or selling firearms as a business to be federally licensed. These licensees are known collectively as "federal firearms licensees," or FFLs. In general, only FFLs are authorized to engage in interstate firearms commerce. The act requires FFLs to maintain records on all commercial firearms transactions. Intrastate, private transfers between unlicensed persons "not engaged in the business" of dealing in firearms "for profit and the principal source of their livelihood" are not covered by the recordkeeping or the background check provisions of the GCA.

Under current law, unlicensed persons (non-FFLs) may transfer firearms among themselves intrastate, as long as they do not transfer a firearm knowingly to a prohibited person (e.g., a convicted felon or fugitive from justice), or a handgun to a juvenile (under 18 years of age).

Federal Firearms Ineligibility

The GCA generally prohibits any person from transferring a handgun or ammunition suitable for a handgun to a juvenile, and juveniles are prohibited from possessing a handgun or ammunition suitable for a handgun, although there are exceptions enumerated in this provision (18 U.S.C. §922(x)). The GCA prohibits FFLs from transferring a long gun (rifle or shotgun) or ammunition to anyone under 18 years of age; and a handgun or ammunition suitable for a handgun to anyone under 21 years of age (18 U.S.C. §922(b)(1)).

The GCA sets forth nine categories of persons prohibited from shipping, transporting, receiving, or possessing firearms or ammunition (18 U.S.C. §922(g)). For example, persons convicted of felony or domestic violence misdemeanor offenses are prohibited persons. Persons under felony indictment are prohibited from receiving, but not possessing firearms (18 U.S.C. §922(n)). Under current law, it is a felony for any person knowingly to transfer a firearm or ammunition to any prohibited persons, or if the transferor has reasonable cause to believe that the transferee is prohibited under any of the GCA's prohibiting categories (18 U.S.C. §922(d)).

Whenever an unlicensed person seeks to acquire a firearm from an FFL, both the FFL and prospective purchaser must complete and sign a Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473. On this form, the purchaser attests under penalty of law that he or she is not a prohibited person and that he or she is the "actual buyer." The FFL must also verify the purchaser's name, date of birth, and other information by examining government-issued identification (e.g., a driver's license).

Background Checks

Pursuant to the Brady Handgun Violence Prevention Act, 1993 (P.L. 103-159), the Federal Bureau of Investigation (FBI) activated the National Instant Criminal Background Checks System (NICS) in November 1998. NICS is a computer "system of systems" that queries other federal, state, local, tribal, and territorial criminal history and other public records that could indicate that an unlicensed, prospective customer is prohibited from acquiring a firearm under the GCA.

FFLs are required to initiate a background check through NICS on any prospective unlicensed customer who seeks to acquire a firearm from them through a sale, trade, or redemption of firearms exchanged for collateral (18 U.S.C. §922(t)). Under the Brady Act, states may opt to handle firearms eligibility determinations or allow the FBI to handle such determinations. States that have opted to handle those determinations themselves are known as Point

of Contact (POC) states. In response to a background check, the NICS is to respond to an FFL or POC state official with a NICS Transaction Number (NTN) and one of three outcomes:

1. “proceed” with transfer or permit/license issuance, because a prohibiting record was not found;
2. “denied,” indicating a prohibiting record was found; or
3. “delayed,” indicating that the system produced information that suggested there could be a prohibiting record, such as criminal charges without a final disposition.

In the case of a “proceed,” the background check record is purged from NICS within 24 hours; “denied” requests are kept in perpetuity. In the case of a “delayed” transaction, after three business days have passed, FFLs may proceed with the transaction at their discretion if they have not received a final eligibility determination from the NICS. During this time, NICS examiners, or state designees (POCs), may attempt to ascertain whether the person is prohibited. If they learn that a transferee is prohibited, a firearms retrieval referral will be issued to the ATF and state or local chief law enforcement officer. The NICS Section destroys unresolved checks at the 88-day mark.

NICS Transactions and Background Checks

From December 1998 to 2017, the FBI facilitated over 278.5 million NICS transactions. POC states and other state and local authorities accounted for 158 million of these transactions, which corresponded with 100 million background checks and 1.7 million denials (1.7%). (Some state and local background checks involve more than one transaction.) The FBI NICS Section handled 120.4 million transactions and an equal number of background checks and nearly 1.5 million denials (1.2%). The overall percentage of denials for those years was 1.5%. For 2018 and 2019, the FBI facilitated 26.2 and 28.4 million NICS transactions, respectively, bringing total NICS transactions to 333 million. For 2019, the FBI reported that its NICS Section processed 8.2 million checks, 103,592 of which resulted in a denial (1.27%). The FBI also reported that 207,421 checks were not resolved (2.5%), a percentage consistent with prior years. The FBI facilitated a record 39.7 million transactions in 2020, a 40% increase over 2019. About 18.2 million of the 2020 transactions were for state-issued firearms license or permit checks or rechecks. Nearly 55,000 were for private, intrastate sales.

NICS Determination Times and Appeals

Over the 21-year period (1999-2019), the FBI NICS Section handled 136.8 million of 333 million NICS transactions. On average, about two-thirds of these FBI-administered background checks were decided within hours, if not minutes. Nearly one-fifth were delayed, but were turned around within the three-business-day delayed transfer period. The FBI views these NICS checks as “immediate determinations.” During this time, about one-fifth of FBI denials were appealed, and over one-tenth of appealed denials were overturned. The leading reason for a denial being overturned on appeal was the applicant was

misidentified as a prohibited person. Much less is known about POC determination times and appeals.

Expanding Checks Under H.R. 8

Proposals to expand background checks have coalesced around two basic models. The “comprehensive” background check model would cover intrastate firearms transfers between unlicensed persons arranged at a “gun show” or “pursuant to advertisement, posting, display, or other listing on the Internet or other publication by the transferor of his intent to transfer, or the transferee of his intent to acquire, a firearm.” The “universal” background check model would capture private intrastate firearms transfers under a wider set of circumstances, arguably “requiring a background check for every firearm sale,” although it too includes exceptions.

H.R. 8 falls under the “universal” model. It would expand federal firearms recordkeeping and background check requirements to cover intrastate transactions made between unlicensed persons by routing such transactions through FFLs. H.R. 8 includes exceptions for transfers between immediate family members; as part of the administration of a deceased person’s estate or trust; among U.S. military, law enforcement members, or armed private security professionals in the course of official duties; transfers under the 1934 National Firearms Act, which already regulates certain firearms transfers more stringently; and temporary transfers under circumstances involving an imminent threat of bodily harm or death, and legitimate activities involving target shooting, hunting, trapping, or fishing. Violations of these provisions would be punishable by a fine and up to one year’s imprisonment. H.R. 8 would prohibit FFLs from transferring possession of, or title to, any firearm to any unlicensed person, unless the FFL provides notice of the proposed private firearm transfer prohibition under this bill. H.R. 8 would prohibit the establishment of a national registry and would not interfere with any state’s authority to enact laws regulating firearms transfers.

Lengthening the Delayed Sale Period Under H.R. 1446

H.R. 1446 would revise the GCA background check provision to lengthen the delayed sale period, which is three business days under current law. Under H.R. 1446, for background checks that do not result in a “proceed with transfer” or “transfer denied,” the FBI NICS Section and POC state officials would have 10 business days to place a hold on a firearms-related transaction. At the end of 10 business days, the prospective transferee could petition the Attorney General for a final firearms eligibility determination. If the FFL does not receive a final determination within 10 days of the date of the petition, he or she could proceed with the transfer. H.R. 1446 does not include a provision that was included in H.R. 1112 (116th Congress). Regarding one of the GCA’s nine prohibiting categories, it would have replaced the term “adjudicated as a mental defective” with “adjudicated with mental illness, severe developmental disability, or severe emotional instability” (at 18 U.S.C. §§922(g)(4) and (n)(4)).

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