

United States Senate

April 2, 2020

The Honorable Christopher Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

The Honorable Regina Lombardo
Acting Director
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice
99 New York Avenue, NE
Washington, DC 20226

Dear Director Wray and Acting Director Lombardo,

We write to urge you to take appropriate steps to promote public safety and responsible firearm ownership in the wake of surging gun sales across the country.¹ According to recent news reports, gun shops and ammunition dealers have experienced a massive uptick in purchases, particularly from first-time buyers experiencing coronavirus-related anxiety.² We are concerned that this surge is overwhelming the National Instant Criminal Background System (NICS), and that federal firearms licensees (FFLs) need new guidance to effectively handle it.

All gun sales by FFLs require a background check through NICS or a state point of contact unless the buyer already has a qualifying permit.³ Most background checks are completed in a matter of minutes, but some take longer when NICS must contact state and local law enforcement to examine additional records.⁴ If a background check for a particular individual is not completed within three business days, FFLs may choose to transfer the gun(s) to that individual anyway in what is known as a “default proceed.”⁵ In 2018, more than 270,000 background checks were not completed within three business days, resulting in more than 4,800 gun transfers to individuals whose background checks ultimately revealed a gun-ownership prohibition.⁶ In particular, a 2016 report by the Government Accountability Office found that it

¹ See, e.g., Kurtis Lee and Anita Chabria, *As the coronavirus pandemic grows, gun sales are surging in many states*, L.A. TIMES (Mar. 16, 2020); <https://www.latimes.com/world-nation/story/2020-03-15/coronavirus-pandemic-gun-sales-surge-us-california>; Richard A. Oppel Jr., *For Some Buyers With Virus Fears, the Priority Isn't Toilet Paper. It's Guns.*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/coronavirus-gun-buyers.html>.

² *Id.*

³ See ABOUT NICS, <https://www.fbi.gov/services/cjis/nics/about-nics> (last visited Mar. 24, 2020).

⁴ See WILLIAM J. KROUSE, CONG. RESEARCH SERV., R45970, GUN CONTROL: NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS AND RELATED LEGISLATION 30-31 (2019).

⁵ Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536.

⁶ See WILLIAM J. KROUSE, CONG. RESEARCH SERV., R45970, GUN CONTROL: NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS AND RELATED LEGISLATION 31 (2019).

takes the Federal Bureau of Investigation (FBI) longer to complete background checks for domestic violence convictions than for other prohibiting criteria.⁷

Even absent a public health emergency, law enforcement does not always have enough time to accurately determine pre-sale whether someone is a prohibited buyer. The tragic 2015 shooting at Charleston's Mother Emanuel AME Church demonstrates this problem.⁸ After "a failure by local prosecutors to respond to a [NICS] request for more information about his case," the shooter "exploited the three-day waiting time that has allowed thousands of prohibited buyers to legally purchase firearms over the past decade."⁹

We fear that a drastic increase in gun sales in response to the coronavirus pandemic could overwhelm NICS and allow prohibited individuals to obtain firearms through "default proceeds." Local law enforcement agencies and courts across the country suddenly face staffing shortages and resource challenges that may prevent them from providing timely responses to NICS requests. We believe it is essential that your agencies issue guidance to FFLs about their ongoing responsibilities under the law and the tools with which they can safely operate their businesses during this unprecedented public health emergency.

To that end, we request that you immediately take the following steps to protect public safety:

1. **Default Proceeds Guidance to FFLs:** The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) should issue guidance alerting FFLs that background checks are likely to take longer than three business days for NICS to complete during the pandemic, especially in states where state employees are working remotely. Moreover, guidance should urge FFLs to wait for NICS to complete those background checks before transferring firearms, and remind FFLs of their obligations under 18 U.S.C. §§ 922(b), (d), and (x) not to transfer firearms to any person whom they know, or have reasonable cause to believe, is prohibited from possessing a firearm. Additionally, it is critical that FFLs continue to maintain all required records, including those related to inventory, sales, and transfer. We believe that this guidance is necessary to prevent "delayed denials," when prohibited purchasers buy guns through default proceed.
2. **Default Proceeds Data Collection:** The FBI should collate data on the number and percentage of background checks that have taken longer than three business days to complete in the past three months, broken down by week. Within one week of receipt of this letter, the FBI should provide Congress with this data and with a reasonable timeframe for NICS to complete background checks during the pandemic.
3. **Emergency Request for Records Retention:** Under current regulations, all incomplete background check records must be deleted from NICS within 90 days.¹⁰ Because the

⁷ See UNITED STATE GOVERNMENT ACCOUNTABILITY OFFICE, ANALYZING AVAILABLE DATA COULD HELP IMPROVE BACKGROUND CHECKS INVOLVING DOMESTIC VIOLENCE RECORDS (JULY 2016).

⁸ Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun*, *F.B.I. Says*, N.Y. TIMES (July 10, 2015), <https://www.nytimes.com/2015/07/11/us/background-check-flaw-let-dylann-roof-buy-gun-fbi-says.html>.

⁹ *Id.*

¹⁰ 28 C.F.R. § 25.9 (2014).

pandemic and recovery may last longer than 90 days, the FBI should issue an emergency directive to maintain all background-check information related to transactions with an “open” status for 90 days beyond the current state of emergency as the president proclaimed under the National Emergencies Act.¹¹

4. **Require a Search of N-DEx Database for All Background Checks:** The FBI’s Criminal Justice Information Services Division maintains the National Data Exchange (N-DEx) database, which maintains records not included in background checks such as incident and case reports.¹² The FBI should utilize this database and include a search of N-DEx records for investigations into NICS background checks that receive a “delayed” disposition. States should be encouraged to incorporate N-DEx records into their background check processes as well.
5. **Safe Storage Directive to FFLs:** With millions of Americans now working and learning from home, safe gun storage is of even greater importance to protecting families, neighbors, and children. ATF should issue guidance reminding FFLs of their legal obligation under 18 U.S.C. § 922(z) to provide a gun lock or a safe storage device with the transfer of any new handgun, as well as their responsibility under existing regulations to provide purchasers with written notification about federal prohibitions on juveniles accessing handguns. Guidance should also recommend that FFLs provide their customers — especially first-time gun buyers — with information about the risks and responsibilities of gun ownership and about safe storage practices.

We know that the FBI and ATF remain committed to protecting public safety during this pandemic, including by preventing an increase in unintentional shootings, firearm suicides, and other forms of gun violence. We appreciate your personal attention to these requests and look forward to your prompt reply. Please let us know how we can help you protect our nation during the challenging times ahead.

Sincerely,

/s/ Edward J. Markey
United States Senator

/s/ Richard Blumenthal
United States Senator

¹¹ See Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (Covid-19) Outbreak, Mar. 13, 2020, available at [whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/](https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/).

¹² In 2016, the Department of Justice’s Office of the Inspector General recommended that NICS regularly incorporate N-DEx records in its background checks. See OFFICE OF THE INSPECTOR GEN., DEP’T OF JUSTICE, AUDIT OF THE HANDLING OF FIREARMS PURCHASE DENIALS THROUGH THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (2016), <https://assets.documentcloud.org/documents/3717300/DOJ-IG-2016-NICS-Audit.pdf>.

/s/ Christopher S. Murphy
United States Senator

/s/ Kamala D. Harris
United States Senator

/s/ Robert Menendez
United States Senator

/s/ Sherrod Brown
United States Senator

/s/ Christopher A. Coons
United States Senator

/s/ Chris Van Hollen
United States Senator

/s/ Elizabeth Warren
United States Senator

/s/ Michael F. Bennet
United States Senator

/s/ Amy Klobuchar
United States Senator

/s/ Patty Murray
United States Senator

/s/ Thomas R. Carper
United States Senator

/s/ Kirsten Gillibrand
United States Senator

/s/ Mazie K. Hirono
United States Senator

/s/ Cory A. Booker
United States Senator