

**Written Testimony of LCAV  
May 10, 2007 Domestic Policy Subcommittee of the  
Oversight and Government Reform Committee**

Legal Community Against Violence (“LCAV”) appreciates the opportunity to offer testimony to the Domestic Policy Subcommittee of the Oversight and Government Reform Committee on state compliance with the Gun Control Act of 1968, including states’ obligations under the Brady Handgun Violence Prevention Act of 1993 (the “Brady Act”) to report “prohibited purchasers” to the National Instant Check System. As requested by Subcommittee Chairman Dennis Kucinich in a letter dated May 1, 2007, LCAV will discuss state compliance with the Brady Act and more inclusive state law firearm restrictions in the following categories: individuals under mental health care or evaluation, individuals restrained by protective or restraining orders, and former juvenile offenders. In an effort to address these topics, LCAV’s written testimony will address the following specific issues: 1) the interaction between federal and state law on prohibited firearms purchaser provisions and enforcement of such provisions; 2) loopholes in the federal prohibited purchaser provisions and background check system; and 3) state laws enacted to address the identified loopholes in the federal prohibited purchaser provisions and background check system.

LCAV is a national public interest law center dedicated to preventing gun violence. Founded in 1993 in the aftermath of the assault weapon massacre at 101 California Street in San Francisco, LCAV is the country’s only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV serves governmental entities and nonprofit organizations nationwide, focusing on policy reform at the state and local levels. We conduct legal research, analyze existing and emerging policy strategies, review proposed legislation, generate model regulations and develop legal and analytical materials to help governmental entities and nonprofit organizations achieve their policy goals. Our website, [www.lcav.org](http://www.lcav.org), is the most comprehensive resource for information on U.S. firearms laws in either print or electronic form.

**I. Overview of Interaction Between Federal and State Law**

**A. Prohibited Purchaser Provisions**

Federal law establishes the baseline regarding the types of persons who are ineligible to purchase firearms. The federal Gun Control Act of 1968, codified at 18 U.S.C. § 922, prohibits the sale of firearms to certain individuals, including felons, illegal aliens, persons subject to domestic violence protective orders, and the mentally ill.<sup>1</sup> Some states

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<sup>1</sup> The complete list of prohibited purchasers under 18 U.S.C. § 922(b)(1), (d) includes any person who is underage; has been convicted of, or is under indictment for, a crime punishable by imprisonment for more than one year; is a fugitive from justice; is an unlawful user of or addicted to a controlled substance; has been adjudicated as a mental defective or committed to a mental institution; is an illegal alien; has been dishonorably discharged from the military; has renounced his or her U.S. citizenship; is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner, his or her child or a child of a partner; or has been convicted of a misdemeanor offense of domestic violence.

expand on federal law by applying broader standards to some or all of the federally prohibited purchaser categories. In addition, many states designate additional classes of prohibited purchasers not found in federal law. Examples of how states have expanded on federal law prohibited purchaser provisions is provided in section III below.

## **B. Enforcement of Prohibited Purchaser Provisions Via Background Checks**

The “Brady Act” requires federally licensed firearms dealers (“FFLs”) to perform background checks on prospective firearm purchasers to ensure that the prospective purchaser is not prohibited from purchasing a firearm under federal, state or local law.<sup>2</sup> Since 1998, the Brady Act has been implemented through the National Instant Criminal Background Check System (NICS).<sup>3</sup> Licensed dealers initiate a NICS check (typically by telephone or computer) after the prospective purchaser has provided a government-issued photo I.D. and completed a federal Firearms Transaction Record (also known as Form 4473).<sup>4</sup>

As with federal law prohibited purchaser provisions, states can and do expand on federal law requiring background checks. For example, states have the option of serving as a state POC and conducting their own background checks instead of having those checks performed by the FBI.<sup>5</sup> A state POC search includes the state’s independent criminal history database as well as the three federal databases accessed by the FBI during a NICS check.<sup>6</sup> According to the FBI, state POC background checks are more thorough than those performed by the FBI because of the access to independent state criminal history databases in addition to the databases maintained by NICS.<sup>7</sup> State databases typically include information that is unavailable to the FBI, including mental health records, outstanding felony warrants, domestic violence restraining orders and final disposition records (those showing whether an arrest resulted in an acquittal or a conviction).

In addition, some states have enacted licensing laws which require an individual to obtain a license or permit authorizing him or her to purchase and/or possess a firearm. Although licensing laws vary, they generally require that a license only be issued after the applicant passes a background check which, in some cases, is more thorough than the Brady

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<sup>2</sup> 18 U.S.C. § 922(s).

<sup>3</sup> As originally adopted, the Brady Act included interim as well as permanent provisions. The Act’s interim provisions, implemented on February 28, 1994, applied to handgun sales only. On November 30, 1998, the permanent provisions of the Brady Act went into effect, establishing the NICS system and extending the Act’s application to purchasers of long guns and persons who redeem a pawned firearm.

<sup>4</sup> 27 C.F.R. § 478.124.

<sup>5</sup> Bureau of Justice Statistics, U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales, 2005* 3-4 (Nov. 2006), at <http://www.ojp.gov/bjs/pub/pdf/ssprfs05.pdf>.

<sup>6</sup> *Id.* at 3-4. The three federal databases that comprise a NICS check are the National Crime Information Center (NCIC), which includes records regarding wanted persons (fugitives) and persons subject to protective/restraining orders; the Interstate Identification Index, which contains state criminal history records; and the NICS Index, which contains records of other persons prohibited under federal law from receiving or possessing firearms.

<sup>7</sup> Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations Report (November 30, 1998-December 31, 1999)* 5 (Mar. 2000), at <http://www.fbi.gov/hq/cjisd/nics/nic1year.pdf>.

background check required to purchase a firearm.<sup>8</sup> In addition, applicants may be required to provide proof of residency and fingerprints, and pass written and performance-based tests showing that the applicant knows how to safely load, fire and store a gun, and has knowledge of relevant firearms laws.

## **II. Loopholes in Federal Prohibited Purchaser Provisions and Background Check System**

### **A. Prohibited Purchaser Provisions**

There are numerous gaps in the federal laws that prohibit certain individuals from purchasing firearms. At the Subcommittee's request, LCAV's testimony will focus on loopholes with regard to prospective purchasers who have histories of mental illness, have perpetrated domestic violence, and who have been convicted of an offense in juvenile court.

*1. Persons with a History of Mental Illness:* Federal law prohibits any person from selling or otherwise transferring a firearm to any person who has been adjudicated as a mental defective or committed to a mental institution.<sup>9</sup> Federal regulations define "adjudication as a mental defective" to include a determination by a court, board, commission or other lawful authority that as a result of incompetency or a mental illness, condition or disease, a person is a danger to himself, herself or to others or lacks the ability to contract or manage his or her own affairs. It also includes a finding of insanity by a court in a criminal case, a finding of incompetence to stand trial, and a finding of not guilty by reason of lack of mental responsibility pursuant to the Uniform Code of Military Justice. "Commitment to a mental institution" is defined to include involuntary commitment to a mental institution.<sup>10</sup> These definitions do not reach individuals with a wide range of potentially dangerous mental illnesses. For example, a person who is voluntarily committed to a mental institution can lawfully purchase a firearm under federal law.

*2. Domestic Violence Offenders:* Federal provisions prohibiting firearms purchases by domestic violence offenders are similarly limited. Persons who have been convicted in any court of a "misdemeanor crime of domestic violence" and/or who are subject to certain domestic violence protection orders may not purchase firearms.<sup>11</sup> "Misdemeanor crime of domestic violence" is defined as an offense that is a federal, state or tribal law misdemeanor and has the use or attempted use of physical force or threatened use of a deadly weapon as an element.<sup>12</sup> In addition, the offender must be a current or former spouse, parent, or guardian of the victim; share a child in common with

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<sup>8</sup> For example, New Jersey requires that firearms purchaser permit applicants be "of good character and good repute in the community" and that the names and addresses of two personal references be included on the permit application. N.J. Rev. Stat. § 2C:58-3(c), (e).

<sup>9</sup> 18 U.S.C. § 922(d)(4).

<sup>10</sup> 27 C.F.R. § 478.11 provides the federal definitions of the terms "adjudicated as a mental defective" and "committed to a mental institution."

<sup>11</sup> 18 U.S.C. §§ 922(g)(8), (9), 27 C.F.R. § 478.11.

<sup>12</sup> 18 U.S.C. § 921(a)(33).

the victim; be a current or former cohabitant with the victim as a spouse, parent or guardian; or be similarly situated to a spouse, parent or guardian of the victim.<sup>13</sup>

Domestic violence protection orders disqualify a prospective purchaser only if issued after a hearing of which the subject received actual notice.<sup>14</sup> In addition, the order must protect an “intimate partner” of the defendant. This includes a current or former spouse, a child of the defendant or of the victim, a parent of a child in common with the defendant, or an individual with whom the defendant does or has cohabitated.<sup>15</sup> The order must also contain a finding that the person presents a credible threat to the victim and must restrain him or her from certain specified conduct.<sup>16</sup>

Both of the prohibitions against domestic violence perpetrators leave large gaps allowing violent individuals to obtain guns. For example, the protection order prohibition does not apply to persons with a dating relationship who have never lived together. In one study of temporary domestic violence protection orders, researchers found that the most common relationship between the petitioner and defendant was a dating relationship. The same study found that applications for protection orders were more likely to mention firearms when the parties had *not* lived together.<sup>17</sup>

3. *Juvenile Offenders:* Federal law prohibits firearm purchases by persons convicted or under indictment for a crime punishable by imprisonment for more than one year.<sup>18</sup> However, individuals who were convicted of offenses, even violent offenses, in juvenile court, are permitted under federal law to purchase firearms.

4. *Other Loopholes:* Gaps exist in other prohibited purchaser categories as well. For example, while persons with felony convictions are prohibited from purchasing firearms, persons convicted of violent misdemeanors (other than domestic violence misdemeanors) face no federal restrictions on firearms purchases. In addition, a person addicted to a controlled substance may not purchase a gun, but an individual who abuses alcohol and/or has been convicted of an alcohol-related offense is permitted to purchase a firearm. Likewise, there is no prohibition against persons who are known or suspected of terrorist activity from purchasing firearms.<sup>19</sup>

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<sup>13</sup> *Id.* Also note that a conviction requires that the offender was represented by counsel or waived the right to counsel and was tried by a jury or waived the right to a jury, if the offense entitled the offender to a jury trial.

<sup>14</sup> 18 U.S.C. § 922(g)(8).

<sup>15</sup> 18 U.S.C. §§ 922(g)(8), 921(a)(32).

<sup>16</sup> 18 U.S.C. § 922(g)(8).

<sup>17</sup> Katherine A. Vittes & Susan B. Sorenson, *Are Temporary Restraining Orders More Likely to be Issued When Applications Mention Firearms?*, 30 *Evaluation Review* 266, 271, 275 (June 2006).

<sup>18</sup> 18 U.S.C. § 922(d)(1).

<sup>19</sup> A bill introduced by Senator Lautenberg, S. 1237, would, among other things, prohibit firearms purchase and possession by, and transfer to, persons the Attorney General determines to be known or suspected of engaging in terrorism if the Attorney General also has a reasonable belief that the prospective purchaser may use a firearm in connection with terrorism. A companion bill, H.R. 2074, has been introduced in the House of Representatives.

## B. Enforcement of Prohibited Purchaser Provisions Via Background Checks

1. *Private Sale Loophole*: Perhaps the biggest loophole in enforcement of federal and state prohibited purchaser provisions is what is known as the “private sale loophole.”<sup>20</sup> The private sale loophole refers to the imposition of various federal law duties on federally licensed firearms dealers that do not apply to unlicensed sellers. Firearms dealers must, among other things: (1) perform background checks on prospective firearm purchasers; (2) maintain records of all gun sales; (3) make those records available to law enforcement for inspection; (4) report multiple sales; and (5) report the theft or loss of a firearm from the licensee’s inventory.<sup>21</sup>

The Gun Control Act of 1968 provides that persons “engaged in the business” of dealing in firearms must be licensed.<sup>22</sup> Although Congress did not originally define the term “engaged in the business,” it did so in 1986 as part of the McClure-Volkmer Act (also known as the "Firearms Owners' Protection Act"). That Act defined the term "engaged in the business," as applied to a firearms dealer, as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."<sup>23</sup>

Significantly, however, the term was defined to *exclude* a person who “makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”<sup>24</sup>

Consequently, unlicensed sellers may sell firearms without conducting background checks or documenting the transaction in any way. As a result, convicted felons, persons with a history of mental illness, domestic violence offenders, and other prohibited purchasers can easily buy guns from unlicensed sellers. In addition, because federal law does not require private sellers to inspect a buyer’s driver’s license or any other identification, there is no obligation for such sellers to confirm that a buyer is of legal age to purchase a firearm.

According to a 1999 report issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the current definition of "engaged in the business" often frustrates the prosecution of "unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons.”<sup>25</sup> A June 2000 ATF report found that unlicensed sellers were involved in about a fifth of the trafficking

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<sup>20</sup> Although the “private sale” loophole is frequently referred to as the “gun show” loophole (because of the particular problems associated with gun shows), it applies to all firearm sales by non-licensed sellers, regardless of where the sales occur.

<sup>21</sup> 18 U.S.C. §§ 922(t), 923(g).

<sup>22</sup> 18 U.S.C § 921(a)(21)(C).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> U.S. Department of Justice & Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Gun Shows: Brady Checks and Crime Gun Traces* 14 (Jan. 1999).

investigations and associated with nearly 23,000 diverted guns.<sup>26</sup> A national survey of firearm ownership conducted in 1994 determined that 60 percent of all firearm sales in the U.S. involved federally licensed dealers, while the remaining 40 percent of firearms were acquired from unlicensed sellers.<sup>27</sup>

2. *Lack of Access to State Records:* Lack of access to relevant state records also frustrates enforcement of prohibited purchaser provisions. Federal law does not and cannot require that states send relevant records to the FBI for inclusion in the NICS database.<sup>28</sup>

a. *Mental Health Records:* According to an FBI press release dated April 9, 2007, only 22 states voluntarily contribute some or all mental health records to NICS: Alabama, Arizona, Arkansas, California, Colorado, Florida, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Virginia, Washington and Wyoming.

FBI data indicate that a small fraction of the number of Americans who have been involuntarily committed to mental institutions has been reported to NICS. As of November 30, 1999, the FBI had received from all states a total of only 41 records of mentally ill persons.<sup>29</sup> Although the number of mental health records provided to NICS has increased – in 2003 there were more than 143,000<sup>30</sup> – mental illness remains significantly underreported. As a result of the FBI's lack of information about mentally ill persons, it cannot be assured that an FBI background check will find that a person is ineligible to possess a firearm due to mental illness.

Tragically, the Virginia Tech shooting illustrates the impact of the lack of access to state records. Although the Virginia Tech shooter purchased firearms through a licensed dealer and passed two background checks, LCAV's analysis of the facts as they have been reported, and the applicable law, indicates that Mr. Cho was, in fact, prohibited from purchasing a firearm under federal law.

A Virginia special justice declared Mr. Cho to be "an imminent danger" to himself as a result of mental illness, and directed him to seek outpatient treatment. Under federal regulations defining "adjudication as a mental defective" to include a "determination by a

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<sup>26</sup> Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearm Traffickers* xi (June 2000).

<sup>27</sup> Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997), at <http://www.ncjrs.org/pdffiles/165476.pdf>.

<sup>28</sup> State contribution to the NICS database is voluntary. See 28 C.F.R. 25.4. Note that *Printz v. U.S.*, 521 U.S. 898 (1997), stands for the proposition that the federal government may not mandate that state officials administer or enforce a federal regulatory program. Although this proposition has not been applied to a case directly involving the contribution of state records to NICS, it may limit the ability of the federal government to require that states do so.

<sup>29</sup> U.S. General Accounting Office, *Gun Control: Options for Improving the National Instant Criminal Background Check System* 8 (Apr. 2000), at <http://www.gao.gov/archive/2000/gg00056.pdf>.

<sup>30</sup> Bureau of Justice Statistics, U.S. Department of Justice, *Improving Criminal History Records for Background Checks* 2 (May 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/ichrbc.htm>.

court, board, commission or other lawful authority" that as a result of incompetency or a mental illness, condition or disease, the person is a "danger to himself or to others,"<sup>31</sup> Mr. Cho should have been precluded from purchasing a firearm because he had been adjudicated as a mental defective.

Virginia law is similar to federal law in that it prohibits a person from purchasing a firearm if he or she has been involuntarily committed to a mental health facility due to mental illness.<sup>32</sup> However, unlike federal law, Virginia does not prohibit firearm purchases for those who have been deemed to be a danger to themselves or others. Rather, Virginia law prohibits purchase of firearms by any person adjudicated legally incompetent, mentally incapacitated, or incapacitated.<sup>33</sup> These terms generally apply to an individual who is incapable of managing his or her own health or property.<sup>34</sup> Mr. Cho did not fall into this category and therefore was not prohibited from purchasing a firearm under state law.

Federal law should have barred Mr. Cho from purchasing a firearm, but the background check conducted by the state (Virginia is a POC state) did not reveal his adjudication as a mental defective. Virginia law only requires mental health records that would disqualify a purchaser under *state* law be sent to the state criminal history database.<sup>35</sup> It appears that, for this reason, the record of the proceeding deeming Mr. Cho to be an imminent danger to himself was not forwarded to the state database (or to NICS) and his status as a prohibited purchaser under federal law was not revealed during either of the two background checks he passed.<sup>36</sup>

b. *Domestic Violence Records:* Lack of access to state records is also a significant obstacle with regard to perpetrators of domestic violence. As of June 2003, the National Crime Information Center registry of protective orders contained only 781,574 entries, estimated to be less than 50% of the orders believed to qualify for entry into the system.<sup>37</sup>

3. *Default Proceeds:* Another dangerous loophole in enforcement of the prohibited purchaser provisions results from the so-called "default proceed" provision of

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<sup>31</sup> 27 C.F.R. § 478.11.

<sup>32</sup> Va. Code Ann. § 18.2-308.1:3.

<sup>33</sup> Va. Code Ann. § 18.2-308.1:2.

<sup>34</sup> *Id.* See Va. Code Ann. § 37.2-1000 et seq.

<sup>35</sup> Va. Code Ann. § 37.2-1014 requires the clerk of the circuit court to certify and forward to Virginia's Central Criminal Records Exchange a copy of any order adjudicating a person incapacitated (as defined by state law) and section 37.2-819 requires the clerk to certify and forward a copy of any order for involuntary admission to a mental health facility. Mr. Cho was not deemed incapacitated as defined by state law and his treatment was outpatient in nature.

<sup>36</sup> Note that Virginia Governor Timothy Kaine issued Executive Order 50 on April 30, 2007 directing all executive branch employees to consider outpatient treatment as "involuntary admission to a mental health facility" for purposes of VA. Code Ann. § 37.2-1014. The Order further directs law enforcement to include records of involuntary outpatient as well as inpatient care in the state database and forward such records to federal law enforcement.

<sup>37</sup> Julissa Jose, *Disarming Domestic Violence Abusers: States Should Close Legislative Loopholes That Enable Domestic Abusers to Purchase and Possess Firearms* 3 (Sept. 2003).

the Brady Act. Under the Brady Act, if a dealer has not been notified within three business days that the sale would violate federal or state laws, the sale may proceed by default.<sup>38</sup> This default provision allowed 3,849 prohibited purchasers to buy guns during the first year of operation (November 30, 1998 through November 30, 1999) of NICS.<sup>39</sup> Moreover, between November 1998 and September 2001, ATF received 10,945 referrals from the FBI requesting retrieval of firearms that had been sold to ineligible persons by default.<sup>40</sup> As a result, the FBI has recommended extending the maximum time allowed for conducting background checks to allow more research time to complete background checks and to reduce the number of prohibited purchasers who are able to purchase firearms by default.<sup>41</sup>

#### 4. Other Loopholes

a. *Destruction of Records:* Destruction of approved purchaser records creates another gap in enforcement of federal law. Until 2004, information on approved NICS background checks was retained by NICS for ninety days.<sup>42</sup> This information helped ATF deter fraud and detect dealers who might be providing false information about a prohibited person, by inspecting a dealer's records within the ninety-day period and verifying that the records matched the information earlier submitted to NICS.<sup>43</sup> If discrepancies were found, ATF could conduct a further investigation of the dealer to determine whether the dealer submitted false information to NICS.<sup>44</sup> In a recent review of trafficking investigations, ATF determined that corrupt dealers are a significant source of trafficked firearms.<sup>45</sup>

As of July 2004, approved purchaser information is no longer kept for ninety days but is instead destroyed within twenty-four hours of the official NICS response to the dealer.<sup>46</sup>

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<sup>38</sup> 18 U.S.C. § 922(t)(1). See also *Survey of State Procedures Related to Firearm Sales*, supra note 5 at 3.

<sup>39</sup> *NICS Operations Report*, supra note 7, at 11. In fact, the FBI has found that a purchaser whose NICS check takes longer than 24 hours to complete is 20 times more likely to be a prohibited purchaser than other applicants. *Id.* at 6.

<sup>40</sup> U.S. General Accounting Office, *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System* 17 (July 2002), at <http://www.gao.gov/new.items/d02720.pdf>.

<sup>41</sup> U.S. General Accounting Office, *Gun Control: Implementation of the National Instant Criminal Background Check System* 13 (Feb. 2000), at <http://www.gao.gov/archive/2000/g100064.pdf>. FBI investigations of prohibited purchasers who were allowed to buy firearms by default typically take 25 days to complete. *Id.*

<sup>42</sup> Office of the Inspector General, U.S. Department of Justice, *Inspections of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives, Evaluation & Inspection Report I-2004-005 x-xi* (July 2004), at <http://www.usdoj.gov/oig/reports/ATF/e0405/final.pdf> [hereinafter *Evaluation & Inspection Report*].

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

<sup>44</sup> *Id.*

<sup>45</sup> Violence Policy Center et al., *Comments On Regulations Proposed by the Federal Bureau of Investigation, Department of Justice Regarding Changes to Regulations Implementing the National Instant Criminal Background Check System* 10 (Sept. 4, 2001).

<sup>46</sup> The requirement that approved purchaser information be destroyed within twenty-four hours has been included in the appropriations bills funding the Department of Justice (which includes ATF and the FBI) every year since 2004. See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 617, 118 Stat. 3 (2004); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 615, 118 Stat. 2809, 2915

As a result, ATF inspectors are no longer able to compare the information on file with the dealer to the information the dealer submitted to NICS. The Department of Justice Inspector General noted that the shortened retention time makes it much easier for corrupt firearm dealers who are enabling prohibited persons to purchase firearms to avoid detection.<sup>47</sup> Federal law also specifically prohibits using NICS to create any system of registration of firearms or firearm owners.<sup>48</sup>

*b. Firearms Permit Exception:* Under the Brady Act, persons holding a state-issued permit to acquire or possess firearms (e.g., a concealed weapons permit) are permitted to purchase a firearm without undergoing a background check if the permit was issued: (1) within the previous five years in the state in which the transfer is to take place; and (2) after an authorized government official has conducted a background investigation to verify that possession of a firearm would not be unlawful.<sup>49</sup> This exemption could allow some prohibited persons to acquire firearms, in cases where a state permit holder falls into a prohibited category after issuance of the state permit. Under the federal exemption, no background check is required and the seller would have no way to learn that the prospective purchaser is prohibited from possessing firearms.

### **III. State Laws Addressing Loopholes in the Federal Prohibited Purchaser Provisions and Background Check System<sup>50</sup>**

#### **A. Prohibited Purchaser Provisions**

The federal categories of prohibited purchasers are the prevailing minimum for all states. A number of states have enacted laws that exceed these minimum standards, to close gaps in federal prohibited purchaser provisions. The following are examples of state law approaches to address these gaps.

*1. Persons with a History of Mental Illness:* The majority of states have laws that prohibit the transfer of firearms to persons who are mentally ill. While most states use definitions of mental illness similar to the Brady Act and its implementing regulations, several states have broadened the category of mentally ill persons who are prohibited from purchasing or possessing firearms.

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(2005); Science, State, Justice, Commerce, and Related Appropriations Act of 2006, Pub. L. No. 109-108, § 611, 119 Stat. 2290, 2336 (2005). Each of these acts contains additional provisions which restrict disclosure of data obtained by ATF via crime gun traces. The destruction of records and disclosure provisions are known as the “Tiahrt Amendment.” LCAV submitted written testimony to the Subcommittee on Commerce, Justice, Science, and Related Agencies of the House Appropriations Committee on April 26, 2007, requesting that the disclosure of data provisions not be included in ATF’s fiscal year 2008 appropriations legislation.

<sup>47</sup> *Inspection & Evaluation Report*, *supra* note 42, at x-xi; 51-54.

<sup>48</sup> 28 C.F.R. § 25.9(b)(3).

<sup>49</sup> 18 U.S.C. § 922(t)(3); 27 C.F.R. § 478.102(d). Permits issued after November 30, 1998 qualify as exempt only if the approval process included a NICS check. *Id.*

<sup>50</sup> Detailed information about state firearm laws is contained in LCAV’s 2006 report, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws*, available at [http://www.lcav.org/library/reports\\_analyses/regulating\\_guns.asp](http://www.lcav.org/library/reports_analyses/regulating_guns.asp).

For example, under federal law persons who are voluntarily committed to a mental hospital are not prohibited from possessing firearms.<sup>51</sup> Delaware,<sup>52</sup> Illinois,<sup>53</sup> Massachusetts,<sup>54</sup> Minnesota,<sup>55</sup> North Carolina<sup>56</sup> and Utah<sup>57</sup> have closed this gap by prohibiting purchase or possession of some or all firearms by persons who have been voluntarily or involuntarily committed to a mental hospital.

Several other states define more broadly than federal law those persons who are disqualified from possessing firearms due to mental illness. California law includes an extensive list of disqualifying factors relating to mental illness that are stronger than federal law, including: communicating a serious threat of violence to a licensed psychotherapist and being under a court-ordered conservatorship because of a grave disability resulting from a mental disorder.<sup>58</sup>

Hawaii prohibits possession by any person who is or has been diagnosed as having a significant behavioral, emotional, or mental disorder.<sup>59</sup> Indiana includes a prohibition on persons with “documented evidence” of a “propensity for violent or emotionally unstable conduct.”<sup>60</sup> Maryland law prohibits any person who is suffering from a mental disorder and has a history of violent behavior against others from possessing handguns or assault weapons.<sup>61</sup> In addition to prohibiting persons who have been patients of a mental institution within the past 5 years, Illinois also bars persons impaired by a mental condition “of such a nature that it poses a clear and present danger to the applicant, any other person or persons or the community,” and persons who are mentally retarded, from obtaining a Firearm Owner’s Identification (FOID) card.<sup>62</sup>

Mental health records are particularly sensitive to privacy issues and states can protect these records by including provisions that limit the use of such records to the determination of eligibility to purchase a firearm. For example, the California law

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<sup>51</sup> 27 C.F.R. § 478.11.

<sup>52</sup> Del. Code Ann., tit. 11, § 1448.

<sup>53</sup> 430 Ill. Comp. Stat. 65/8(e).

<sup>54</sup> Mass. Gen. Laws ch. 140, §§ 129B(1), 131(d).

<sup>55</sup> Minn. Stat. § 624.713, subd. 1(c), subd. 1(j)(4).

<sup>56</sup> N.C. Gen. Stat. § 14-404(c).

<sup>57</sup> Utah Code Ann. § 76-10-503(1)(b).

<sup>58</sup> Cal. Welf. & Inst. Code §§ 8100, 8105. A person who communicates to a licensed psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims is barred for six months from possessing a firearm. The prohibition applies only if the psychotherapist complies with a state law requiring him or her to notify local law enforcement of the threat. The person may, however, possess a firearm if a Superior Court finds that the person is likely to use a firearm in a safe and lawful manner. Cal. Welf. & Inst. Code § 8100(b).

<sup>59</sup> Haw. Rev. Stat. Ann. § 134-7.

<sup>60</sup> Ind. Code Ann. § 35-47-1-7.

<sup>61</sup> Md. Code Ann., Pub. Safety § 5-134(b).

<sup>62</sup> 430 Ill. Comp. Stat. 65/8(f), (g). In Illinois, no person may acquire or possess any firearm or ammunition without a valid FOID card. Upon request by the Illinois Department of State Police (DSP), applicants must sign a release waiving any right to confidentiality and requesting disclosure to the DSP of “limited mental health institution admission information” from another state, the District of Columbia or a foreign country. No mental health treatment records may be requested. The information must be destroyed within one year of receipt. 430 Ill. Comp. Stat. 65/4(a)(3).

requiring the state department of mental health to supply mental health records to the state department of justice provides that the records “shall not be furnished or made available to any person unless the [department of justice] determines that disclosure of any information in the records is necessary to carry out its duties with respect to applications for [firearms] permits...or to determine the eligibility of a person to acquire, carry, or possess a firearm.”<sup>63</sup>

2. *Domestic Violence Offenders:* Most states that have enacted laws barring persons who are subject to a restraining order from purchasing or possessing firearms use language similar to federal law (“subject to a court order issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate, restraining him or her from harassing, stalking or threatening an intimate partner or child of a partner”), but some states apply this prohibition beyond orders involving intimate partners or children of partners and/or include *ex parte* restraining orders. For example, in addition to subjects of intimate partner protection orders, California law prohibits persons subject to harassment orders (which require no intimate relationship between the parties) from possessing or receiving firearms while an order is in effect. California also prohibits firearm possession and purchase while an *ex parte* harassment or domestic violence protection order is in effect.<sup>64</sup>

In addition, several states prohibit domestic violence misdemeanants from purchasing firearms and some expand the prohibition by defining the qualifying offense more broadly than federal law. Illinois<sup>65</sup>, Indiana<sup>66</sup>, Iowa<sup>67</sup> and Minnesota<sup>68</sup> are among the states that expand on federal law by prohibiting firearms purchase by certain domestic violence misdemeanants.<sup>69</sup> For example, Illinois prohibits acquisition and possession of firearms or ammunition by persons who have been convicted of “domestic battery” or a similar offense after January 1, 1998.<sup>70</sup> The Illinois definition of “domestic battery,” knowingly or intentionally causing bodily harm to or making physical contact of an insulting or provoking nature with any family or household member,<sup>71</sup> appears broader than the federal standard for a disqualifying misdemeanor crime of domestic violence.

3. *Juvenile Offenders:* Federal law does not restrict purchases of firearms by persons with juvenile convictions. Twenty-seven states prohibit persons with certain juvenile convictions from purchasing firearms.<sup>72</sup>

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<sup>63</sup> Cal. Welfare and Institutions Code § 8104.

<sup>64</sup> Cal. Civ. Proc. Code §§ 527.6(k), 527.8(j), Cal. Fam. Code §§ 6218, 6389.

<sup>65</sup> 430 Ill. Comp. Stat. 65/8(l), (m), 720 Ill. Comp. Stat. 5/12-3.2.

<sup>66</sup> Ind. Code Ann. §§ 35-47-4-6, 35-42-2-1.3.

<sup>67</sup> Iowa Code §§ 724.15(1), 708.11. See Iowa Code Chapter 708.

<sup>68</sup> Minn. Stat. §§ 624.713(i), 609.2242, 609.221, 609.222, 609.223, 609.224, 609.2247, 609.749, subd. 8.

<sup>69</sup> LCAV identified these states in the course of a survey of domestic violence laws in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. We have not completed an exhaustive survey of state law on this topic.

<sup>70</sup> 430 Ill. Comp. Stat. 65/8(l), (m).

<sup>71</sup> 720 Ill. Comp. Stat. 5/12-3.2.

<sup>72</sup> States that prohibit persons with juvenile convictions from purchasing some or all firearms include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma,

4. *Other Categories of Prohibited Persons Under State Law:* Among the other categories of prohibited persons under state laws are prohibitions on misdemeanor offenders and persons who abuse alcohol. Twenty-six states prohibit possession of firearms by persons convicted of certain designated misdemeanors.<sup>73</sup> Twenty states prohibit persons who are alcohol abusers and/or offenders from purchasing firearms.<sup>74</sup>

## **B. Enforcement of Prohibited Purchaser Provisions and Background Check System**

Just as states have enacted laws to close loopholes in the prohibited purchaser provisions, states also have passed laws to close loopholes in the enforcement of these provisions via the background check system. Examples of state laws closing the private sale loophole, expanding access to state mental health records, and addressing default proceeds and other loopholes, are outlined below.

1. *Private Sale Loophole:* The most comprehensive approach to ensuring that sales are only made to eligible purchasers is through a requirement for universal background checks prior to all firearm transfers. Two states, California<sup>75</sup> and Rhode Island<sup>76</sup> require that, prior to any firearm transfer, a licensed dealer or law enforcement agency conduct a background check on every prospective firearm transferee. Maryland requires a background check on every prospective transferee of certain “regulated firearms” (defined as handguns and assault weapons),<sup>77</sup> and Connecticut<sup>78</sup> and Pennsylvania<sup>79</sup> require background checks on all prospective handgun purchasers. (In Pennsylvania, all handgun transfers must be processed through a licensed dealer.)

In Delaware, Nevada and Oregon, private sellers are not required to conduct background checks on purchasers (except, in Oregon, at gun shows), but they may request a background check of the purchaser. In Delaware, the seller may make a request to a licensed dealer, who must facilitate the transfer.<sup>80</sup> In Nevada<sup>81</sup> and Oregon<sup>82</sup>, the seller may make a request to the relevant state agency, which must process the request.

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Oregon, Pennsylvania, Utah, Virginia, Washington and Wisconsin. Bureau of Justice Statistics, U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales*, *supra* note 5, at 75.

<sup>73</sup> States that prohibit possession of some or all firearms by persons with certain misdemeanor convictions include: California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. *Id.*

<sup>74</sup> States that restrict access to firearms by alcohol abusers include: Alabama, Alaska, Delaware, Florida, Hawaii, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and West Virginia. *Id.*

<sup>75</sup> Cal. Penal Code §§ 12072(d), 12082.

<sup>76</sup> In Rhode Island, the background check requirement does not apply to persons licensed to carry a concealed handgun. R.I. Gen. Laws §§ 11-47-35, 11-47-35.2.

<sup>77</sup> Md. Code Ann., Pub. Safety §§ 5-124, 5-130(j).

<sup>78</sup> Conn. Gen. Stat. § 29-33(b), (c).

<sup>79</sup> 18 Pa. Cons. Stat. Ann. §§ 6111(c), 6111(f)(1), (2).

<sup>80</sup> Del. Code Ann. tit. 24, § 904A.

<sup>81</sup> Nev. Rev. Stat. § 202.254.

<sup>82</sup> Or. Rev. Stat. § 166.346.

Five states (Colorado, Connecticut, Illinois, New York and Oregon) require background checks on all transfers at gun shows. Colorado,<sup>83</sup> Connecticut,<sup>84</sup> New York<sup>85</sup> and Oregon<sup>86</sup> require that a licensed dealer or law enforcement agency perform a background check prior to any firearm transfer at a gun show. Illinois requires unlicensed sellers at gun shows to request the Department of State Police to conduct a background check on the prospective recipient of a firearm.<sup>87</sup>

2. *Limitations on Access to State Mental Health Records:* Although persons who have been adjudicated as mental defectives or involuntarily committed to mental institutions are prohibited by federal law from possessing firearms, the current status of the FBI databases makes it difficult to prevent such persons from obtaining firearms if they undergo only an FBI background check. As discussed above, that is because a great deal of information about mentally ill people is not reported to the FBI and the FBI does not currently have access to mental health records that are maintained by the states.

POC states can conduct more thorough background checks than those performed by the FBI because states can access their independent criminal history databases in addition to databases maintained by NICS.<sup>88</sup> Accordingly, the FBI is encouraging more states to serve as state POCs, and is also encouraging states that are unwilling to serve as POCs to provide more complete records to the NICS system.<sup>89</sup>

Currently, thirteen states serve as POC states for all firearm transfers.<sup>90</sup> Seven states (Iowa, Michigan, Nebraska, New Hampshire, North Carolina, Washington and Wisconsin) use a state or local POC for handgun background checks only, using the FBI for background checks on long gun transfers.<sup>91</sup> Maryland is a POC state for background checks on handgun and assault weapon purchases.<sup>92</sup> The remaining twenty-nine states and the District of Columbia process all background checks through the FBI.<sup>93</sup>

Several POC states search state mental health records as part of their background checks.<sup>94</sup> However, unless these states also require reporting of mental health

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<sup>83</sup> Colo. Rev. Stat. §§ 12-26.1-101 – 12-26.1-108.

<sup>84</sup> Conn. Gen. Stat. §§ 29-37g.

<sup>85</sup> N.Y. Gen. Bus. Law §§ 895 – 897; N.Y. Penal Law § 400.00.

<sup>86</sup> Or. Rev. Stat. §§ 166.432 – 166.441.

<sup>87</sup> 430 Ill. Comp. Stat. 65/3, 65/3.1.

<sup>88</sup> *NICS Operations Report*, *supra* note 7, at 5.

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

<sup>90</sup> POC states for all firearm transfers are: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah and Virginia. Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, *Permanent Brady State Lists* (July 28, 2005), at <http://www.atf.gov/firearms/bradylaw/072805bradystatelist.pdf>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> POC states that search state mental health records as part of their background checks include California, Connecticut, Hawaii, Illinois, Michigan, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia, Washington and Wisconsin. *Survey of State Procedures Related to Firearm Sales*, *supra* note 5, at 81, 84.

information, a search may not provide complete information. Federal law does not require that states send criminal and mental health records to the FBI for inclusion in the NICS database.<sup>95</sup> Some states have enacted laws requiring that all records relevant to the Brady Act be timely forwarded to the state POC database, if applicable, and to the NICS database.

States that require the reporting of mental health information to state and/or federal databases include Alabama, California, Colorado, Utah, and Virginia.

Alabama requires judges who enter final orders for involuntary commitment for inpatient treatment to the Department of Mental Health and Mental Retardation or a Veteran's Administration hospital, to forward such orders to the state's Criminal Justice Information Center. The Criminal Justice Information Center must enter the information into NICS.<sup>96</sup>

In California, courts must immediately report to the state Department of Justice when they adjudicate someone to be a danger to others as a result of a mental disorder or mental illness, a mentally disordered sex offender, not guilty of a crime by reason of insanity, or mentally incompetent to stand trial.<sup>97</sup> Mental health facilities must immediately report to the state Department of Justice whenever a person is taken into custody and determined to be a danger to him or herself or others or has been certified for intensive treatment.<sup>98</sup> Similarly, any court that places a person under a conservatorship because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism must report this information to the state Department of Justice.<sup>99</sup> Licensed psychotherapists also are required to report to local law enforcement the identity of a person who communicates a serious threat of physical violence against a reasonably identifiable victim or victims.<sup>100</sup>

In Colorado, court clerks are required to report periodically to NICS the name of each person determined by the court to be: incapacitated; committed to the custody of the Division of Alcohol and Drug Abuse in the Department of Human Services; ordered for involuntary certification for short-term treatment of mental illness; ordered for extended certification for treatment of mental illness; or ordered for long-term care and treatment for mental illness.<sup>101</sup>

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In addition, Ohio accesses information regarding involuntary commitments only for purposes of concealed handgun license applications. *Id.*

<sup>95</sup> According to an FBI press release dated April 9, 2007, the following 22 states voluntarily contribute mental health records to NICS: Alabama, Arizona, Arkansas, California, Colorado, Florida, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Virginia, Washington and Wyoming. *See also* page 6 and note 28, *supra*.

<sup>96</sup> Alabama's requirement applies only to commitment orders based on evidence that the person has a history of the inappropriate use of firearms or poses a threat to use firearms inappropriately. Ala. Code § 22-52-10.8.

<sup>97</sup> Cal. Welf. & Inst. Code §§ 8103(a)(2), (b)(2), (c)(2), (d)(2).

<sup>98</sup> *Id.*, §§ 8103(f)(2), (g)(2).

<sup>99</sup> *Id.* § 8103(e)(2).

<sup>100</sup> Cal. Welf. & Inst. Code § 8100(b), § 8105(c).

<sup>101</sup> Colo. Rev. Stat. §§ 13-5-142, 13-9-123.

In Virginia, court clerks are required to certify and forward a copy of all court orders requiring involuntary commitment of an individual, or containing a finding that an individual is incapacitated, to the Department of State Police. The Department of State Police is then authorized (but not required) to forward this information to the FBI for inclusion in the NICS database.<sup>102</sup> However, Virginia law only requires mental health records that would disqualify a purchaser under *state* law be sent to the state criminal history database.<sup>103</sup> Therefore, as discussed previously, in the Virginia Tech incident, the record of the proceeding deeming Mr. Cho to be an imminent danger to himself was not forwarded to the state database (or to NICS) and his status as a prohibited purchaser under federal law was not revealed during either of the two background checks he passed.<sup>104</sup>

Utah requires magistrates and court clerks to report all orders of civil involuntary commitment and judgments of “guilty and mentally ill” and “not guilty by reason of insanity” to the state’s Criminal Investigations and Technical Services Division of the Department of Public Safety, which maintains criminal records.<sup>105</sup>

3. *Default Proceeds*: The problem of default proceeds arises in cases where a background check cannot be completed within three business days due to incomplete information. Inadequate access to state records is one likely cause of an incomplete background check. The previous section discusses state law approaches to limitations on access to state records.

In addition to addressing the problem of default proceeds through improved access to state records, several states have taken measures to extend the time allowed for completion of a background check so that firearms cannot be transferred by default when a background check cannot be completed within three days. Examples of states that have taken action to prevent firearms from being transferred by default include: California, Colorado, Georgia, New Jersey, Washington and Wisconsin.

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<sup>102</sup> A 2002 Virginia Attorney General Opinion determined that the Department of State Police is authorized to provide mental health information to the FBI so long as the information is kept confidential and used only to determine a person’s eligibility to possess, purchase or transfer a firearm. Op. Att’y Gen. Va. 01-062 (Apr. 4, 2002).

<sup>103</sup> Va. Code Ann. § 37.2-1014 requires the clerk of the circuit court to certify and forward to Virginia’s Central Criminal Records Exchange a copy of any order adjudicating a person incapacitated (as defined by state law) and section 37.2-819 requires the clerk to certify and forward a copy of any order for involuntary admission to a mental health facility. Mr. Cho was not deemed incapacitated as defined by state law and his treatment was outpatient in nature.

<sup>104</sup> Note that Virginia Governor Timothy Kaine issued Executive Order 50 on April 30, 2007 directing all executive branch employees to consider outpatient treatment as “involuntary admission to a mental health facility” for purposes of VA. Code Ann. § 37.2-1014. The Order further directs law enforcement to include records of involuntary outpatient as well as inpatient care in the state database and forward such records to federal law enforcement.

<sup>105</sup> Utah Code Ann. § 53-10-208.1.

In California, all firearm transfers are subject to a 10-day waiting period.<sup>106</sup> If the background check information received is incomplete, preventing the background check from being approved or denied within the 10-day period, the California Department of Justice (DOJ) may notify the dealer of that fact.<sup>107</sup> The DOJ interprets this provision to allow (but not require) DOJ to notify the dealer to delay the transfer until the background check can be completed.

Colorado law permits the state to deny a prospective purchaser's application if the background check cannot be completed within the 3-day default period. Colorado provides that an application must be denied in cases in which there has been no final disposition or the final disposition is not noted in the NICS or state databases, where the applicant: (1) has been arrested for or charged with a crime that would prohibit him or her from purchasing, receiving, or possessing a firearm under state or federal law; or (2) is the subject of an indictment, an information, or a felony complaint alleging that the prospective transferee has committed a crime punishable by imprisonment for a term exceeding one year as defined in 18 U.S.C. § 921(a)(20).<sup>108</sup>

In Georgia, when a background check identifies the existence of a criminal record that is not immediately available to determine the eligibility of the applicant, the dealer may not transfer the firearm until he or she is advised by the state that the purchaser is not prohibited.<sup>109</sup>

In New Jersey, retail firearms dealers may not deliver a handgun to any person unless the person possesses a valid permit to purchase a handgun and at least seven days have elapsed since the date of application for the permit.<sup>110</sup> The time period to obtain the permit itself can be as long as 30 days (45 days for non-residents)<sup>111</sup> while the permit application is processed.<sup>112</sup>

Washington allows five days to complete a background check on prospective handgun purchasers. However, if records indicate that a prospective purchaser has an arrest for a potentially disqualifying offense, a hold may be placed on the transaction for up to 30 days, pending receipt of information on the disposition of the arrest. After 30 days, if the disposition still cannot be verified, the hold may be extended by a judicial order on a showing of good cause.<sup>113</sup>

In Wisconsin, if the background check indicates a felony charge without a recorded disposition, the state's 48-hour waiting period for handgun purchases is extended to the

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<sup>106</sup> Cal. Penal Code §§ 12071(b)(3)(A), 12072(c)(1), 12084(d)(7)(A).

<sup>107</sup> Cal. Penal Code § 12076(d)(4), (5).

<sup>108</sup> This provision has a sunset clause and will be automatically repealed July 1, 2010, unless renewed.

Colo. Rev. Stat. § 24-33.5-424(3)(b).

<sup>109</sup> Ga. Comp. R. & Regs. 140-2-.17(2).

<sup>110</sup> N.J. Rev. Stat. § 2C:58-2a(5)(a).

<sup>111</sup> N.J. Rev. Stat. § 2C:58-3f. Note that federally licensed dealers may not sell handguns to out-of-state residents. See 18 U.S.C. § 922.

<sup>112</sup> N.J. Stat. Ann. §§ 2C:58-2a(5)(a), 2C:58-3i, 2C:58-3f.

<sup>113</sup> Wash. Rev. Code Ann. § 9.41.090(3), (4).

end of the third complete working day commencing after the day on which the finding is made. The Department of Justice must notify the firearms dealer of the extension as soon as practicable. During the extended period, the Department of Justice is required to make every reasonable effort to determine the disposition of the charge and notify the firearms dealer of the results as soon as practicable.<sup>114</sup>

#### 4. Other Loopholes

a. *Destruction of Background Check Records:* Although most state laws are silent with respect to the retention of background check records,<sup>115</sup> ten states (Alabama, California, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania and Washington) require sellers to report firearm sales information identifying the purchaser and firearm purchased to law enforcement.

Connecticut<sup>116</sup> and Massachusetts<sup>117</sup> maintain records submitted by dealers of all firearm transactions. Massachusetts also retains sales records for all firearms reported by private sellers,<sup>118</sup> and Connecticut retains handgun sales records reported by private sellers.<sup>119</sup>

Alabama,<sup>120</sup> California,<sup>121</sup> Michigan,<sup>122</sup> New Jersey<sup>123</sup> and Washington<sup>124</sup> retain records of all handgun sales reported to state law enforcement by licensed dealers. In California, all firearm transfers must be conducted through licensed dealers, thereby ensuring that sales reporting requirements will include private sales. California retains reports of handgun sales.

Maryland retains records of transfers of “regulated firearms,” which are defined as handguns and assault weapons.<sup>125</sup> In New York, every licensed firearms dealer must keep a record of handgun, short-barreled rifle and shotgun, and assault weapon sales, copies of which are delivered to and retained by the New York State Police.<sup>126</sup> Pennsylvania maintains records of handgun sales and sales of rifles and shotguns with

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<sup>114</sup> Wis. Stat. §§ 175.35(2)(d), 175.35(2g)(c)4.c.

<sup>115</sup> Note that nine states are required by state law to purge background check records after a short time period. These states are: Delaware, Florida, Nebraska, New Hampshire, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin.

<sup>116</sup> Conn. Gen. Stat. §§ 29-33(e), 29-37a(b).

<sup>117</sup> Mass. Gen. Laws ch. 140, §§ 123, 128B.

<sup>118</sup> *Id.*

<sup>119</sup> Conn. Gen. Stat. § 29-33(e). In addition, Oregon statutes provide that the state *may* retain records of firearm transactions reported by dealers for up to five years. Or. Rev. Stat. §§ 166.412, 166.434.

<sup>120</sup> Ala. Code § 13A-11-79.

<sup>121</sup> Cal. Penal Code §§ 11105, 11106(c).

<sup>122</sup> In Michigan, sales that must be reported are those to concealed weapons license holders. Mich. Comp. Laws § 28.422a.

<sup>123</sup> N.J. Stat. § 2C:58-2e.

<sup>124</sup> Wash. Rev. Code Ann. § 9.41.110(9).

<sup>125</sup> Md. Code Ann., Pub. Safety §§ 5-101(p), 5-123(d), 5-124.

<sup>126</sup> N.Y. Penal Law §§ 265.00(3), 400.00(12).

specified dimensions.<sup>127</sup> Maryland and Pennsylvania also retain records of private transfers of the specified firearms.

These state statutes do not specify the length of time law enforcement must retain the records.

b. *Exemption for State Permit Holders:* ATF has identified 20 states that issue permits to acquire or possess firearms that qualify for the background check exemption provided at 18 U.S.C. § 922(t)(3).<sup>128</sup> Although some of the remaining states do not issue permits that qualify under federal law, others, such as California, have chosen not to request approval by ATF, even though permits issued by the state would qualify for an exemption.<sup>129</sup> In choosing not to seek this exemption, these states are ensuring that background checks will be conducted on all prospective purchasers as required under federal and state law.

### **C. Challenges to Enforcement of State Prohibited Purchaser Provisions and Background Check Procedures**

As detailed above, states have taken a variety of steps to close loopholes in federal prohibited purchaser provisions, and to strengthen their background check procedures to reduce the risk that prohibited persons will obtain access to firearms. However, these states still face obstacles to full and effective enforcement of their laws because states are limited to the data that is available through their state databases (in the case of POC states) and NICS. Out-of-state information is available only through NICS. If states do not send complete records to NICS, then out-of-state records will be unavailable to a requesting state or dealer. If an individual changes his or her state of residence and then applies to purchase a firearm, any disqualifying information from the prior state of residence cannot be discovered unless all records are reported to NICS.

## **IV. NICS Improvement Act (H.R. 297)**

A bill currently pending before the U.S. House of Representatives, the NICS Improvement Act (H.R. 297, McCarthy), would provide financial incentives for state officials to send all relevant records, including those pertaining to mental health, to the NICS system and to their own state databases, in a timely manner. The bill would also require federal agencies and departments regularly to submit relevant records to NICS, require the Attorney General to work with states to help improve their data systems, and require study and evaluation of the NICS system and reporting of best practices for record collection and transmittal.

If enacted into law, the provisions of H.R. 297 would fill some of the gaps identified above in enforcing federal and state prohibited purchaser provisions. It is likely that the

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<sup>127</sup> 18 Pa. Cons. Stat. Ann. § 6111(b)(1).

<sup>128</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice, “Permanent Brady Permit” Chart (July 17, 2006), at [http://www.atf.gov/firearms/bradylaw/permit\\_chart.htm](http://www.atf.gov/firearms/bradylaw/permit_chart.htm).

<sup>129</sup> Telephone interview with California Department of Justice, Firearms Division, (May 7, 2007).

bill would significantly increase submission of state records to NICS and state databases. Unfortunately, even if the bill became law, submission of records would remain voluntary and, likely, incomplete. The bill may have marginal effect on the default proceeds problem, and would have no effect on the private sale, destruction of records or firearms permit exception loopholes described above.