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Firearms Background Checks Under H.R. 8 and H.R. 1112

On February 13, 2019, the House Committee on the Judiciary ordered reported two bills (H.R. 8 and H.R. 1112) that would amend the federal firearms background check provisions in the Gun Control Act of 1968 (GCA; 18 U.S.C. §922 et seq.).

Bipartisan Background Checks Act of 2019 (H.R. 8)

H.R. 8 would make *intrastate*, private firearms transactions subject to the GCA recordkeeping and background check requirements by prohibiting unlicensed persons from transferring a firearm to any other unlicensed person, unless a federally licensed firearms dealer takes possession of such firearm and facilitates such a transaction by running a background check on the unlicensed prospective transferee (buyer). Under current law, unlicensed persons are generally prohibited from making interstate firearms transfers between one another. H.R. 8 would essentially extend this interstate prohibition to *intrastate* (same state) firearms transactions. For a similar proposal, see the Background Check Expansion Act (S. 42).

Enhanced Background Checks Act (H.R. 1112)

H.R. 1112 would extend the delayed transfer period from 3 business days to 10 business days when a background check yields information that suggests that an unlicensed prospective transferee might be prohibited from receiving or possessing firearms. After 10 business days, the transferee could petition the Attorney General to complete the eligibility determination. Under H.R. 1112, the federally licensed gun dealer could proceed with the transfer at his or her discretion if he or she had not received a final eligibility determination within 10 business days of the petition.

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. Observers have long noted that the assassinations of President John F. Kennedy and his brother, Senator Robert F. Kennedy, and civil rights leader Martin Luther King provided the impetus to pass the GCA. 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.

Federal 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 Eligibility

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)). It is a felony for any person 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 an ATF 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)). Through NICS the FBI has facilitated 278 million background check transactions from December 1998 through 2017. Under the Brady Act, states may opt to handle firearms eligibility determinations themselves 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. From 1999 to 2015, the overall NICS denial rate was 1.5%. The POC denial rate was 1.8%; and the FBI NICS denial rate was 1.2%.

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.

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. 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 chief law enforcement officer.

NICS Determination Times

Over the 19-year period (1999-2017), on average, about two-thirds of NICS checks handled entirely by the FBI have been decided within hours, if not minutes. Nearly one-fifth are delayed, but are turned around within the three-business-day delayed transfer period. The FBI views these NICS checks as “immediate determinations.” Much less is known about determination times in POC states, particularly in those states that require firearms waiting periods and/or permitting.

NICS Appeals

Over the 17-year period (1999-2015), the FBI NICS Section processed 278,552 appeals of mostly FBI NICS denials, or roughly one-fifth of denials. Of those appeals, 54,024 denials were overturned, or roughly one-fifth of appeals handled by the FBI NICS Section. According to the FBI, the leading reason for a denial being overturned on appeal was the prospective customer was misidentified as a prohibited person. The Bureau of Justice Statistics has attempted to collect data on POC-handled appeals in the past, but has indicated that it will no longer attempt to collect such data.

Expanding Background Checks Under H.R. 8

Proponents of gun control view the fact that unlicensed persons are allowed to engage in intrastate firearms transfers—without being subject to the GCA recordkeeping and background check requirements—as a “loophole” in the law, particularly within the context of gun shows. Expanding background checks have coalesced around two proposals. The “comprehensive” background check proposal would cover 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 proposal 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 would fall under the “universal” category. 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; U.S. military, law enforcement members, or armed private security professionals in the course of official duties; and temporary transfers under circumstances involving an imminent threat of bodily harm or death, and legitimate activities involving target shooting, hunting, trapping, or fishing.

H.R. 8 would also prohibit any implementing regulations that would (1) require FFLs to facilitate private firearms transactions; (2) require unlicensed sellers or buyers to maintain any records with regard to FFL-facilitated background checks; or (3) place a cap on the fee FFLs may charge for facilitating a private firearms transfer. 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 extend a provision of current law that prohibits the Department of Justice from charging a fee for a firearms-related background check under the GCA to FFL-facilitated background checks.

Lengthening the Delayed Sale Period Under H.R. 1112

H.R. 1112 would revise the GCA background check provision to lengthen the delayed sale period, which is three business days under current law. Under H.R. 1112, 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.

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