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Evaluation and Inspections Division

Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System

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EXECUTIVE DIGEST

The Office of the Inspector General (OIG) reviewed the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) enforcement of violations of the Brady Handgun Violence Prevention Act of 1993 (Brady Act) (Public Law 103-159) that are identified through the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS). Specifically, we reviewed the extent to which the ATF investigated violations of the Brady Act referred by the FBI, whether the ATF retrieved firearms issued to prohibited persons in a timely manner, and the extent to which Brady Act violations were referred to and prosecuted by the U.S. Attorneys' offices (USAO).

The Gun Control Act of 1968 (GCA) (Public Law 90-618) established nine categories of persons prohibited from possessing firearms.[1] The Brady Act of 1993 created a 3-day waiting period before a purchaser can take possession of a firearm, and it established a background check system – the NICS – that firearms dealers were required to contact before the transfer of any firearm to ensure that a person receiving a firearm was not prohibited under the GCA from possessing firearms. The FBI implemented the NICS on November 30, 1998. To verify the eligibility of a prospective firearms purchaser, Federal Firearms Licensees (FFL) request a NICS check through either the FBI or a state point of contact (POC). During calendar years (CY) 2002 and 2003, the FBI processed 8.5 million NICS background checks and state POCs processed 8.2 million NICS background checks.

To conduct background checks on potential firearms purchasers, the FBI must rely on state criminal history records and records on other prohibited categories that are not totally complete and accessible. As a result, the FBI cannot always obtain complete background information within the 3-day waiting period. The law allows any FFL to transfer a firearm at the end of the 3-day waiting period regardless of whether the background check has been completed. Some prohibited persons thus

[1] These nine categories are: (1) those under indictment for or convicted of a crime punishable by imprisonment for a term exceeding one year; (2) fugitives from justice; (3) unlawful users and/or addicts of any controlled substances; (4) those adjudicated as mentally defective or who have been involuntarily committed to a mental institution or otherwise judged incompetent to handle their own affairs; (5) illegal aliens or aliens admitted to the United States under a nonimmigrant visa; (6) those dishonorably discharged from the U.S. Armed Forces; (7) those who have renounced their U.S. citizenship; (8) subjects of a protective order; and (9) those convicted of a misdemeanor crime of domestic violence.

receive firearms when the background check takes longer than three days to complete.

The FBI refers to the ATF the names of all prohibited persons who attempted to or succeeded in obtaining a firearm from an FFL. The ATF is responsible for promptly retrieving firearms transferred to persons found to be prohibited subsequent to the 3-day processing deadline and for investigating those referrals from the FBI that meet the USAOs' prosecutorial guidelines. During CYs 2002 and 2003, the FBI referred a total of 7,030 cases to the ATF in which persons that it identified as prohibited succeeded in obtaining firearms ("delayed denial" cases). The FBI also referred a total of 121,909 "standard denial" cases in which background checks were completed in time to prevent a prohibited person from obtaining a firearm.

At the ATF, the Brady Operations Branch reviews the FBI referrals and forwards those denials that require a firearm retrieval or that meet the USAOs' prosecutorial guidelines to the NICS coordinator in the appropriate ATF division office. Each NICS coordinator reviews the referrals and disseminates them to the appropriate field or satellite office for investigation.

RESULTS IN BRIEF

The ATF is responsible for retrieving firearms expeditiously from persons prohibited by the GCA from possessing firearms. We found that although the ATF normally has been able to retrieve the firearms eventually, the retrievals were not always timely. We also found that ATF special agents did not sufficiently document retrievals or provide assurance that a prohibited person no longer had access to the firearm.

Since 1998, the ATF has made progress in screening standard denial cases referred by the FBI. However, we found that the Brady Operations Branch and the ATF division offices were still referring standard denial cases to the ATF field offices that lacked prosecutorial merit, thereby increasing the workload of already overburdened field investigators and delaying the investigation of prosecutable cases. Cases without prosecutorial merit were being referred due to the lack of sufficient USAO prosecutorial guidelines, inadequate screening by some ATF divisions, inadequate communication, and insufficient training and guidance.

The Brady Operations Branch was using broad guidelines synthesized from jurisdiction-specific guidelines prepared by multiple USAOs. As a result, ATF division office personnel were required to perform additional screening using more specific individual USAO guidelines in order to

determine whether a case merited investigation. Further, we found that the ATF had not allocated sufficient resources to the Brady Operations Branch to enable it to fully execute its responsibilities. Insufficient staffing resulted in extensive NICS case backlogs, which delayed the referral process and affected the timeliness of investigations. Also, the ATF had not provided funds for technological modifications of its case tracking and referral system to improve the operational efficiency of the Brady Operations Branch.

Our review also found that few NICS cases are prosecuted. During CYs 2002 and 2003, only 154 (less than 1 percent) of the 120,000 persons who were denied during the NICS background check were prosecuted. Historically, USAOs have been unsuccessful in achieving convictions in many of these cases and consequently have been unwilling to expend their limited resources on prosecuting most NICS cases.

The ATF Does Not Always Make Timely Firearms Retrievals

We identified delays in retrieving firearms in 65 of the 188 cases (35 percent) we reviewed for which investigations were completed. In 28 of these 65 cases (43 percent), it took from four months to over a year to retrieve the firearm. We identified a number of reasons for these delays:

- The Brady Operations Branch did not have the technological capability to transfer the delayed denials directly to the field and satellite offices, and instead routed the denials through the division NICS coordinators. Not all NICS coordinators were timely in forwarding these denials to the field offices.

- Insufficient staffing at some ATF field and satellite offices made it difficult for special agents to investigate the large volume of labor-intensive NICS cases in addition to conducting other high-priority investigations, such as those involving firearms trafficking, explosives, and arsons. In addition, the large geographic territories some of the field offices cover make retrieving a firearm a time-consuming process.

- ATF special agents did not consider most of the prohibited persons who had obtained guns to be dangerous and therefore did not consider it a priority to retrieve the firearm promptly.

- The ATF had not established timeliness standards for retrieving firearms and did not track the retrieval process.

These delays increase the risk that prohibited persons may use the illegally obtained firearm to harm others or to otherwise commit a crime. In one of our sampled cases, for instance, the prohibited person fired the weapon at another person's car and was subsequently charged by local law enforcement with aggravated assault.

The ATF's Firearms Retrieval Procedures Are Inadequate

We noted deficiencies in the ATF field office procedures for initiating retrievals, documenting who took possession of firearms relinquished by prohibited persons, and verifying and documenting that third parties receiving the firearms were not themselves prohibited from possessing firearms.

Before sending an agent to retrieve a firearm, field offices in some cases sent a contact letter to the prohibited person requesting that the firearm be voluntarily surrendered. According to the ATF special agents we interviewed, these letters generally elicited a high response rate. However, we found that the effectiveness of these letters was diminished because the ATF field offices were not always timely in sending the contact letters, did not specify a time frame in the letter for the recipient to respond, and did not always take timely action if there was no response.

When delayed denials occur, the ATF allows prohibited persons to relinquish their firearms to FFLs or to third parties of their own choosing. In some instances, the ATF learns that state or local law enforcement agencies have seized a firearm it is attempting to retrieve. In these cases, we found that the ATF special agents handling retrievals did not always verify and document what became of the firearms. In more than half (55 percent) of the 101 cases in our sample in which the firearm was recovered, there was no documented evidence in the investigative case file of the recovery. As a result, there was no assurance that the prohibited person had relinquished control of the firearm.

In addition, of the 59 sampled cases involving third party transfers, only 24 cases (41 percent) contained evidence that the special agent had conducted a background check to verify that the third party was not prohibited. Failure to verify the prohibited status of the third party can result in the firearm being transferred from one prohibited person to another.

ATF Field Offices Receive Too Many Standard Denial Cases That Are Unlikely to Be Prosecuted

The case management system used by the Brady Operations Branch does not identify cases by USAO jurisdiction. Therefore, the Brady Operations Branch applied broad guidelines rather than guidelines specific to particular USAOs when screening cases for prosecutorial merit. The result is that too many standard denial cases without prosecutorial merit are referred to the divisions and field offices. The case management system also cannot route referrals directly to the field investigators, thereby delaying retrievals. If the case management system was modified to identify cases by USAO jurisdiction and allow direct referrals to the field offices, the Brady Operations Branch could screen standard denials using specific USAO guidelines and then refer cases with prosecutorial merit directly to the field investigators, bypassing the NICS coordinators. This would eliminate the need for NICS coordinators to perform additional screening and therefore should improve the timeliness of the referrals to the field offices.

Our review identified other reasons why the field offices were receiving an excessive number of standard denial referrals that were not likely to be prosecuted:

- The USAOs had not provided sufficient prosecutorial guidelines. We found that of the 25 USAOs included in our review, 8 had not provided written prosecutorial guidelines to the ATF. Of the 17 guidelines, 1 was not sufficiently specific to identify cases likely to result in successful prosecutions.

- Not all ATF division offices screened NICS cases before forwarding them to a field office. We found that the NICS coordinators at 6 (35 percent) of the 17 division offices that receive referrals from the Brady Operations Branch were not screening referrals for prosecutorial merit.[2] At these locations, the field offices had the burden of screening the cases.

- The NICS coordinators lacked training and written guidance. The ATF had not held a NICS coordinator training conference since 2000. That conference was attended by only 6 of the 17 current coordinators who regularly receive NICS referrals. Further, the

[2] Six divisions are in POC states and do not receive referrals from the Brady Operations Branch.

ATF had not provided the NICS coordinators with standardized written guidance on procedures for screening referrals.

- The Brady Operations Branch was unnecessarily forwarding alien cases to the division offices. The GCA generally prohibits illegal and nonimmigrant aliens from possessing firearms. The Brady Operations Branch routinely refers NICS cases involving denials for aliens to the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE). However, we found that the Brady Operations Branch also forwarded alien cases to the ATF division offices. The division and field offices often closed these cases without investigation because they did not involve other prohibiting factors. Our sample of 200 standard referrals included 22 alien cases, none of which contained any other prohibiting factors such as criminal records.

- ATF field personnel did not provide feedback to the Brady Operations Branch or the NICS coordinators on referrals that did not meet USAO prosecutorial guidelines. We found that the division office NICS coordinators did not forward to the field offices 36 to 95 percent of the standard denial referrals they received from the Brady Operations Branch. In addition, several of the field office group supervisors told us that they did not investigate the majority of the referrals they received from their NICS coordinators. In both these of situations, the field office group supervisors failed to communicate to the NICS coordinators and the NICS coordinators failed to communicate to the Brady Operations Branch that these types of cases lacked prosecutorial merit. In the absence of specific prosecutorial guidelines, it is particularly important for the field investigators to provide feedback to the NICS coordinators or the Brady Operations Branch on the categories of referrals not being investigated. The information could have been used to reduce the number of cases without prosecutorial merit that they refer to the field offices.

Some Denied Persons Are Subsequently Determined by the ATF Not to Be Prohibited

We found that 69 (35 percent) of the 197 delayed denials and 16 (8 percent) of the 200 standard denials that we sampled were applicants who subsequently were found not to be prohibited from possessing a firearm. This situation occurred for several reasons: (1) the subject's firearm rights had been restored under state law, (2) the subject's prohibition for a misdemeanor crime of domestic violence did not meet the federal criteria, or (3) a protective order had expired or was about to expire.

Erroneous denials in which a person is found not to be prohibited cannot always be prevented or detected easily. These denials are usually due to incomplete information in the states' automated criminal history records and require the ATF to review states' records to determine whether prohibiting factors exist.

Improvements Are Needed in the Brady Operations Branch

We found that the Brady Operations Branch does not have sufficient resources to execute its responsibilities effectively. Insufficient staffing resulted in extensive NICS case backlogs during peak seasons, which delayed the referral process and affected the timeliness of investigations of standard denials. As of December 2003, the Brady Operations Branch had a backlog of 9,230 NICS referrals. As of mid-June 2004, a backlog of 2,819 NICS referrals remained. Subsequent to our review, the ATF Brady Operations Branch Chief submitted a request to ATF headquarters for two contract employees to supplement the specialist staff. As of mid-June 2004, this request had not been funded.

We also found that insufficient funds were provided for upgrading computer hardware and software to improve the operational efficiency of the Brady Operations Branch. These upgrades would allow the Brady Operations Branch specialists to scan and automatically forward FFL and court documents to the division offices, enable Brady Operations Branch management to monitor the processing timeliness, allow specialists to document the qualifying criteria, enlarge the space for specialists to type their comments, and allow specialists to automatically identify instances in which the prohibited person either made or attempted multiple purchases. The Brady Operations Branch requested funds to upgrade its computer system but did not receive this funding.

Few NICS Cases Are Prosecuted

A June 28, 2001, memorandum from the Attorney General directed the U.S. Attorneys to "make it a priority to enforce the law against those persons who attempt to subvert the legitimate crime prevention objectives of the Brady Act and to incorporate this new focus into [their] comprehensive prosecutive efforts." During CYs 2002 and 2003, approximately 120,000 cases were referred by the FBI to the Brady Operations Branch. Of these cases, the ATF formally referred only 230 to the USAOs, and the USAOs accepted 185, or 80 percent for prosecution.[3] Of these cases, 154 were prosecuted.

We believe that the number of referrals and prosecutions is low because of the difficulty in obtaining convictions in NICS cases. These cases lack "jury appeal" for various reasons. The factors prohibiting someone from possessing a firearm may have been nonviolent or committed many years ago. The basis for the prohibition may have been noncriminal (e.g., a dishonorable discharge from the U.S. military). It is also difficult to prove that the prohibited person was aware of the prohibition and intentionally lied to the FFL. We were also told that in parts of the United States where hunting historically has been part of the regional culture, juries are reluctant to convict a person who attempted to purchase a hunting rifle.

RECOMMENDATIONS

Our recommendations focus on the need to centralize at the Brady Operations Branch the screening and referral of NICS cases that the ATF receives from the FBI examiners. Centralization would reduce delays in getting firearm retrieval cases to the ATF field investigators and make it more likely that only standard denial cases with prosecutorial merit are referred to them.

We recommend that:

1. The ATF should modify its NFORCE system to allow the Brady Operations Branch to refer delayed denials directly to the appropriate ATF field office.

2. The ATF should use non-agent personnel to handle the administrative tasks related to NICS cases.

[3] Field investigators informally refer cases to the U.S. Attorney in order to determine interest in prosecution. The number of information referrals is not tracked in NFORCE, ATF's cases management system.

3. The ATF should establish timeliness standards for firearm retrievals and develop a system for ATF field office management to monitor and report on compliance with these standards.

4. The ATF should revise its standard initial contact letter to include a response time frame and should direct its personnel to send the letters on a timely basis, to track responses to the letters, and to take timely action to retrieve the firearms when the letters are unsuccessful in eliciting a response.

5. The EOUSA should ensure that annually each USAO provide the ATF with specific prosecutorial guidelines for NICS cases.

6. The ATF should examine the feasibility of enabling Brady Operations Branch specialists to identify NICS cases by federal judicial district, thereby enabling the ATF to consolidate all its NICS referral screening at the Brady Operations Branch. In the interim, the ATF should require all division office NICS coordinators to screen NICS standard denial referrals and refer to the field offices only those cases that meet USAO prosecutorial guidelines.

7. The ATF should provide annual training to the NICS coordinators and develop a NICS coordinator handbook.

8. The ATF Brady Operations Branch should refer to the field offices only those alien cases that meet the USAO prosecutorial guidelines.

9. The ATF should require division office NICS coordinators and field office personnel to notify the Brady Operations Branch of those referrals that do not meet USAO guidelines.

10. The ATF should require division office NICS coordinators and field office personnel to notify the Brady Operations Branch and the FBI NICS Section of trends in inappropriate referrals of non-prohibited persons. Also, require that the field office personnel, via the division office NICS coordinators, provide to the FBI NICS Section the names of those individuals that the ATF determines not to be prohibited and documentation to support the reason for the person's non-prohibited status.

11. The ATF should ensure that the Brady Operations Branch is sufficiently staffed to minimize backlogs and sufficiently funded to implement necessary automated system modifications.

12. The FBI should distinguish delayed denials from standard denials on its daily electronic transfers of denial transactions to the ATF.

TABLE OF CONTENTS

INTRODUCTION **1**

Purpose 1

Background 1

Scope and Methodology of the OIG Review 14

RESULTS OF THE REVIEW **16**

The ATF Does Not Always Make Timely Firearms Retrievals 16
Recommendations 23

Firearms Retrieval Procedures Are Inadequate 24
Recommendation 29

ATF Field Offices Receive Too Many Standard Denial Cases
That Are Unlikely to Be Prosecuted 29
Recommendations 37

Some Denied Persons Are Subsequently Determined
by the ATF Not to Be Prohibited 38
Recommendation 42

Improvements Are Needed in Brady Operations Branch 42
Recommendations 46

Few NICS Cases Are Prosecuted 47

CONCLUSION **52**

APPENDIX I: States and Their Level of Participation in the NICS 54

APPENDIX II: Number of Standard Denials Either Closed by
the ATF Brady Operations Branch or Sent to the ATF Field Divisions
for Investigation (CY 2002 and CY 2003) 55

APPENDIX III: Number of NICS Cases Received by the ATF Field Divisions From the ATF Brady Operations Branch (CY 2002 and CY 2003) 56

APPENDIX IV: ATF Comments on the Draft Report 57

APPENDIX V: EOUSA Comments on the Draft Report 63

APPENDIX VI: FBI Comments on the Draft Report.....65

APPENDIX VII: OIG Analysis of ATF, EOUSA, and FBI Comments 67

INTRODUCTION

Purpose

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is responsible for ensuring that firearms remain out of the hands of persons prohibited by law from possessing firearms (prohibited persons) and for investigating criminal attempts to evade the requirements of the Brady Handgun Violence Prevention Act (Brady Act) of 1993 (Public Law 103-159).

The Office of the Inspector General (OIG) reviewed the ATF's enforcement of violations of the Brady Act identified through the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS). Specifically, we reviewed the extent to which the ATF investigated Brady Act violations referred to it by the FBI, whether the ATF timely retrieved firearms issued to prohibited persons, and the extent to which Brady Act violations were referred to and prosecuted by the U.S. Attorneys' offices (USAO).

Background

Legislative History of the NICS

The Gun Control Act of 1968 (GCA), Public Law 90-618, established rules and regulations for persons engaged in the business of buying and selling firearms.[4] The GCA also identified nine categories of persons prohibited from possessing firearms:

- Those under indictment for or convicted of a crime punishable by imprisonment for a term exceeding one year;
- Fugitives from justice;
- Unlawful users and/or addicts of any controlled substances (defined by convictions, multiple arrests, or drug test failures);

[4] Title 18, U.S.C. Chapter 44, Section 922.

- Those adjudicated as mentally defective or who have been involuntarily committed to a mental institution or otherwise judged incompetent to handle their own affairs;

- Illegal aliens or aliens admitted to the United States under a nonimmigrant visa;

- Those dishonorably discharged from the U.S. Armed Forces;

- Those who have renounced their U.S. citizenship;

- Subjects of a protective order (excluding ex parte orders); and

- Those convicted of a misdemeanor crime of domestic violence.

The Brady Act, enacted on November 30, 1993, created a 3-day waiting period before a purchaser can take possession of a firearm. It also established a background check system that firearms dealers were required to contact before the transfer of any firearm to ensure that the person receiving it was not prohibited under the GCA from possessing a firearm.[5] The NICS, developed by the FBI in coordination with the ATF and local and state law enforcement agencies, became operational on November 30, 1998.

The NICS Process

To purchase a firearm, a person must provide photo identification to the federal firearms licensee (FFL) and complete ATF Form 4473 (Firearm Transaction Record). This form requires the prospective buyer to provide biographical data and to check a "yes" or "no" box pertaining to each of the nine categories of prohibited persons. If the prospective buyer checks a "yes" box for any of the categories, the FFL must deny the sale. If the prospective buyer checks a "no" box for all of the categories, the FFL must request a background check through the NICS before transferring the firearm. To do this, the FFL calls either a state point of contact (POC) or the FBI.[6] Those contacting the FBI can either phone

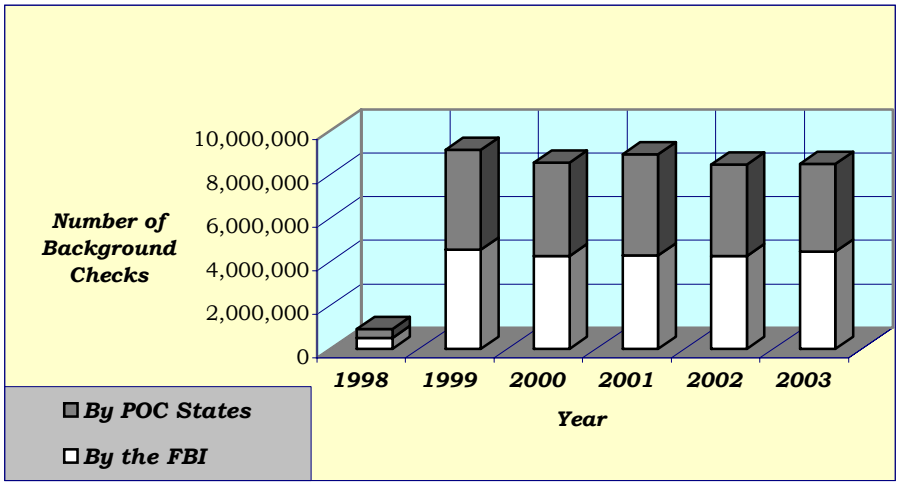
[5] The Brady Act applies only to federally licensed firearms importers, manufacturers, and dealers. The law does not apply to the transfer of firearms between two licensees, only between a licensee and a nonlicensee.

[6] Currently, 14 states have full POC authority, and 9 states have partial POC authority (i.e., the states perform background checks for handgun purchases and/or handgun permits; the FBI performs background checks for long gun purchases). In the

one of two FBI contracted call centers or conduct their own background check by accessing the NICS E-Check system via the Internet.[7]

During calendar year (CY) 2002, the NICS processed 8.5 million background checks (4.3 million by the FBI; 4.2 million by POC states). During CY 2003, the NICS processed 8.5 million background checks (4.5 million by the FBI; 4 million by the POC states). The number of background checks has remained relatively constant since the NICS was implemented in November 1998, as shown in Figure 1.

Figure 1: Number of NICS Background Checks Processed CY 1998-2003



Source: FBI NICS

When a name is submitted for a background check, the NICS searches three databases for disqualifying information:

remaining 27 states (plus Washington, D.C.; the Northern Mariana Islands; the U.S. Virgin Islands; Guam; and Puerto Rico), the FFLs deal directly with the FBI. See Appendix I for details.

[7] The FBI initiated the NICS E-Check system on August 19, 2002. The system functions similarly to the call center. The FFL can log onto the system and check the status of the background check 24 hours a day. As of December 31, 2003, a total of 3,252 FFLs were enrolled and actively using the NICS E-Check option, and a total of 72,890 transactions had been processed. Although this option is currently available only to FFLs who process their background checks through the FBI, the FBI is planning to extend this option to FFLs located in POC states.

- The Interstate Identification Index (III) for information on criminal history;

- The National Crime Information Center (NCIC) for information on protective orders, active felony or misdemeanor warrants, and immigration violations; and

- The NICS Index for information provided by federal, state, and local agencies on other prohibited categories (such as illegal aliens, persons who renounced their citizenship, persons adjudicated mentally defective, persons dishonorably discharged from the military, and controlled substance abusers).[8]

If the call center operator finds no matching records in any of the three databases, the operator advises the FFL to proceed with the firearms transfer. The call center operator provides the FFL with a NICS transaction number, which the FFL is required to record on ATF Form 4473. According to the FBI, in CY 2003, call center operators gave an immediate "proceed" response 74 percent of the time.

If a matching record is found, the operator transfers the call to the FBI's NICS Section for review and evaluation by a NICS examiner, who has access to detailed information on criminal records and other disqualifiers (which the call center operator does not). In CY 2003, call center operators transferred 26 percent of the calls to NICS examiners. The examiner determines whether the NICS record is complete, whether the record matches the prospective buyer, and whether the record indicates that the person is prohibited from possessing a firearm. If the data field "Country of Citizenship" contains anything other than "United States," the NICS automatically initiates an Immigration Alien Query (IAQ) through the Department of Homeland Security's Bureau of Immigration and Customs Enforcement's (ICE) databases. If the name match is not valid (i.e., the person purchasing the firearm is not the same person with the record) or if no prohibitive criteria exist, the NICS examiner gives the FFL permission to proceed. If prohibitive criteria exist, the NICS examiner advises the FFL

[8] Federal agencies authorized to provide information to the NICS include the Department of Defense, the Department of Homeland Security's Bureau of Immigration and Customs Enforcement, the Department of State, the U.S. Coast Guard, and the Department of Veterans Affairs.

to deny the firearm transaction. In CY 2003, NICS examiners provided the FFL with an immediate determination as to whether the person was prohibited for 18 percent of the 26 percent of the requests sent to the NICS Section.

If more research is needed to make a determination, the NICS examiner advises the FFL to delay the firearm transaction (additional research was required in 8 percent of the CY 2003 requests).[9] Once the research is completed, the NICS examiner relays the results to the FFL.

In CY 2002, the FBI denied 60,739 transactions (1.4 percent of the total transactions); in CY 2003, the FBI denied 61,170 transactions (1.4 percent of the total transactions). In over half of these denials, the person either had been convicted of or was under indictment for felonies or had been convicted of domestic violence crimes, as shown in Table 1.

Table 1: Reasons for NICS Denials
CY 2002 and CY 2003

	CY 2002		CY 2003	
Reason	**Total**	**Percent**	**Total**	**Percent**
Felony	25,814	42.5	23,636	38.6
Domestic Violence	10,811	17.8	10,523	17.2
Drug Addict	4,009	6.6	4,918	8.1
Fugitive	2,430	4.0	2,874	4.7
Mentally Ill	243	0.4	315	0.5
Other*	17,432	28.7	18,904	30.9
Total	**60,739**	**100.0**	**61,170**	**100.0**

Source: FBI NICS

* "Other" includes aliens, persons dishonorably discharged from the U.S. Armed Forces, persons who have renounced their citizenship, and persons who are prohibited by a state from possessing a firearm.

If the NICS examiner has not made a determination by the end of the third business day, the NICS examiner advises the FFL of its right under the Brady Act to allow the firearm transfer, a "default proceed."

[9] For example, the records may indicate that the individual was arrested for a particular crime, but not whether the individual was convicted. To determine this, the NICS examiner will need to contact the appropriate state. If the FBI has not made a determination after three business days, the FFL may, but is not required to, transfer the firearm.

This situation occurred with 73,500 background checks in CY 2002 (1.73 percent of the total processed) and with 84,520 background checks in CY 2003 (1.93 percent of the total processed).[10] The NICS examiner continues to research the case to determine whether any prohibitive criteria exist. If the person is subsequently found to be prohibited from possessing a firearm and the NICS examiner determines that the FFL transferred the firearm, the NICS examiner issues a "delayed denial."

FFLs transferred firearms to persons that the FBI identified as prohibited in 3,429 cases in CY 2002 and 3,601 cases in CY 2003. During these two years, over 60 percent of firearm transfers went to persons prohibited because they were convicted of or were under indictment for felonies or were convicted of misdemeanor crimes of domestic violence. See Table 2 for details.

Table 2: Firearm Retrieval Referrals – Reasons for Denials

	CY 2002		CY 2003	
Reason	**Number**	**Percent**	**Number**	**Percent**
Felony-Related	1,203	35.1	1,140	31.7
Domestic Violence	1,052	30.7	1,170	32.5
Fugitives	421	12.3	482	13.4
Drug Addicts	307	9.0	418	11.6
State Prohibitions	146	4.3	200	5.6
Protective Order	65	1.9	57	1.6
Aliens	43	1.2	113	3.1
Mentally Ill	14	0.4	8	0.2
Other*	5	0.1	4	0.1
Dishonorable Discharge	3	0.0	9	0.2
Renounced Citizenship	0	0.0	0	0.0
Unknown	170	5.0	0	0.0
Total	**3,429**	**100.0**	**3,601**	**100.0**

Source: FBI NICS

* "Other" includes disqualifiers identified during research that were not included in the existing databases (e.g., when the NICS examiner calls a locality, he or she may find out that there is an active warrant or an arrest exists that had not been entered into NCIC or III).

[10] According to the FBI, default proceeds occur primarily because many states either do not have automated criminal history records or their automated criminal history records do not show the disposition (e.g., convictions or acquittals) of felony arrests, and manual efforts to determine such information took longer than three business days.

The FBI refers all denials, including both delayed denials and standard denials (prohibited persons who attempted to purchase a firearm but were denied within three business days) to the ATF's Brady Operations Branch.

Department of Justice (DOJ) Components Involved in the NICS Process

The FBI

The FBI operates and maintains the NICS. According to its mission statement, the FBI's NICS Section is responsible for "aggressively reviewing and analyzing available records in accordance with the provisions of the Brady Handgun Violence Prevention Act of 1993 and regulations thereunder."

The NICS Section is one component within the FBI's Criminal Justice Information Services (CJIS) Division. The CJIS, located in Clarksburg, West Virginia, also includes program operations pertaining to NCIC, Uniform Crime Reporting, and fingerprint identification.

As of January 2004, the NICS Section consisted of 513 employees and was in the process of adding 35 employees. According to FBI officials, NICS staffing generally has remained stable since the NICS was implemented. NICS examiners are available to accept calls seven days a week, from 8 A.M. to 1 A.M., closing only on Christmas day.

The monthly workload has remained stable since the NICS was first implemented, peaking during September through December and declining during May through July. FBI NICS officials stated that they are able to predict the hourly volume of calls and therefore are able to ensure that the phone lines are adequately staffed during peak hours and to rotate their staff to other tasks during slow periods. The busiest day of the year for firearm sales typically is December 23, which in 2003 hit a new high with 54,000 NICS transactions.

The ATF Brady Operations Branch

The ATF's Brady Operations Branch in Martinsburg, West Virginia, reviews NICS denials received from the FBI and refers denials that require additional investigation to the appropriate ATF division office. The Brady Operations Branch also serves as a liaison with the FBI on

NICS issues, responds to firearms dealer inquiries regarding the NICS, and analyzes data from NICS denials to identify trends of illegal firearms trafficking and other crimes.

As of April 2004, the Brady Operations Branch consisted of 14 employees and 1 contractor, including 7 specialists who review FBI NICS referrals. Each specialist is responsible for the denials pertaining to specific ATF divisions.

The FBI electronically transmits both delayed denials and standard denials daily to the Brady Operations Branch. The Branch's specialists process delayed denials immediately and forward them to the field. To do this, a specialist electronically accesses the transaction screen to review the FBI notes on the denial; contacts the FFL for a copy of ATF Form 4473; and, if necessary, accesses various law enforcement databases to verify criminal history data. The specialist also contacts local law enforcement, court clerks, or others for copies of supporting documentation. The specialist then adds any applicable notes pertaining to the denial and saves the referral. This action automatically creates a case in NFORCE, the ATF's electronic case management system, and transfers it to the NICS coordinator at the appropriate ATF field division office. The specialist also faxes or mails to the appropriate NICS coordinator copies of documents obtained from the FFL or local criminal justice or other public agencies. Because delayed denials require that the ATF retrieve the firearm, all cases are forwarded to the field for immediate action.

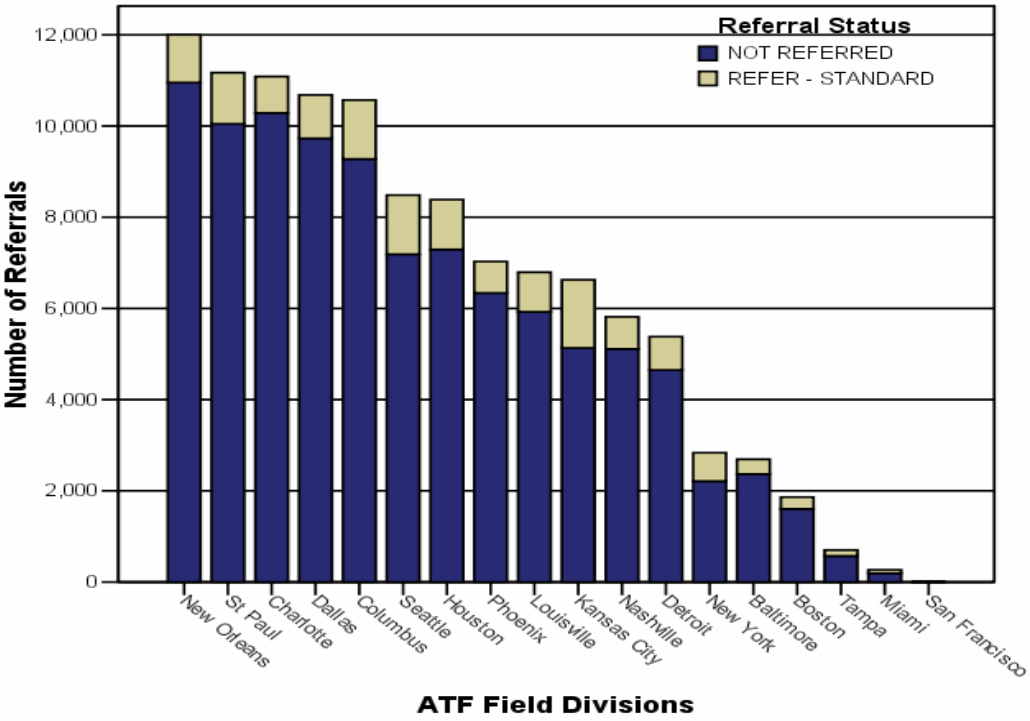
Standard denials are processed in the order received. In contrast to the delayed denials, only a small percentage of standard denials are forwarded to the field because of the large volume (approximately 60,000 a year) and limited investigative resources. As a result, the specialists forward only those cases that have prosecutorial merit.[11] These cases are processed and forwarded in a manner similar to the delayed denials.

During CY 2002, the Brady Operations Branch forwarded 7,897 (13.2 percent) of the 59,778 standard denials it processed to the field. During CY 2003, the Branch forwarded 5,606 (10.7 percent) of the 52,606 standard denials it processed to the field. The proportion of

[11] To determine prosecutorial merit, the Brady Operations Branch uses criteria the ATF field divisions obtain from the individual USAOs in their regions. In general, cases determined to have prosecutorial merit are those involving recent or multiple offenses, violent offenders, or patterns of escalating violence.

standard denial referrals forwarded to those not forwarded is shown in Figure 2.[12]

Figure 2: Number of Standard Denials Either Closed by the ATF Brady Operations Branch or Sent to the ATF Field Divisions for Investigation CY 2002 and CY 2003



Source: ATF Brady Operations Branch

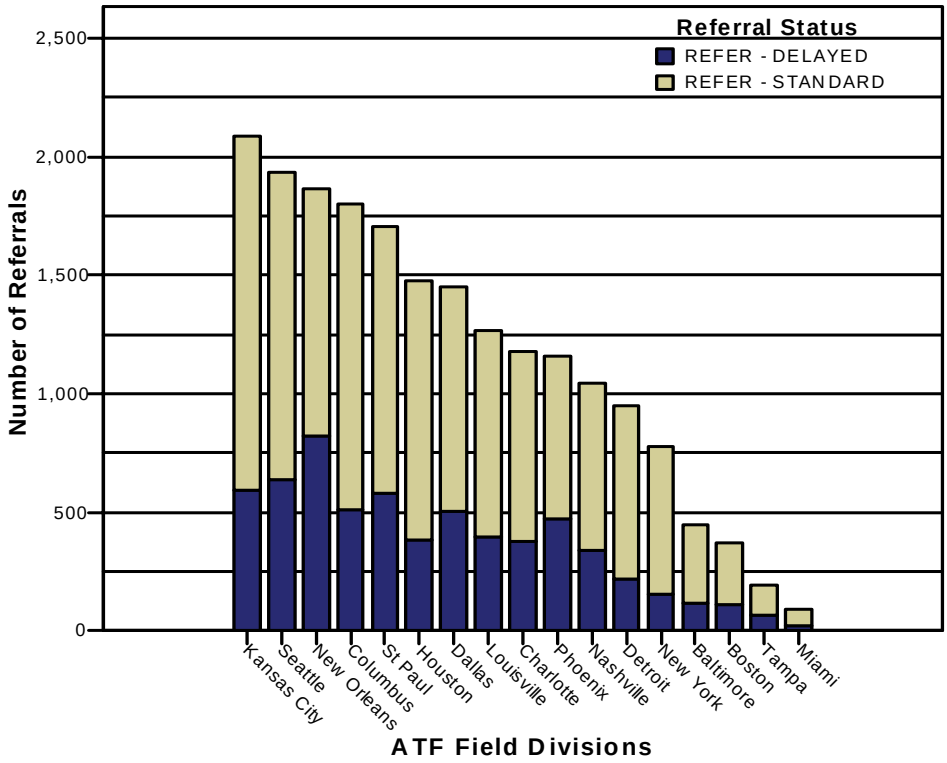
ATF Division Offices

During CYs 2002 and 2003, the Brady Operations Branch forwarded 6,286 delayed denial referrals and 13,503 standard denial

[12] The Brady Operations Branch usually receives only those denials processed by the FBI, not by POC states. Therefore, those ATF division offices encompassing states for which the FBI performs all NICS checks, such as the New Orleans division office, have a greater volume than those encompassing states for which the FBI performs only some of the NICS checks. For an unknown reason, during CY 2002 and 2003, the Brady Operations Branch received two denials from California (a POC state). See Appendix I for the level of participation by individual states. See Appendix II for details on the number of denials processed and referred to the division offices by the Brady Operations Branch.

referrals to 17 of its 23 division offices for further investigation. Figure 3 shows the number of each type of referral sent to each ATF division office.[13]

Figure 3: Number of NICS Cases Received by the ATF Field Divisions From the ATF Brady Operations Branch CY 2002 and CY 2003



Source: ATF Brady Operations Branch

Each ATF division office designates a NICS coordinator to process the referrals from the Brady Operations Branch. Eleven of the NICS coordinators (65 percent) at the 17 division offices that receive referrals

[13] Six of the ATF field divisions (Atlanta, Chicago, Los Angeles, Philadelphia, San Francisco, and Washington, D.C.) are not included in the chart. These divisions encompass only POC states and therefore received no NICS referrals from the Brady Operations Branch during our review period. Although Florida is categorized as a POC state, the FBI sometimes conducts NICS checks for pawnbrokers (In Florida, pawnbrokers are authorized, but not mandated to conduct a NICS background check at the time of the pawn). Therefore the ATF division offices in Miami and Tampa do receive some NICS referrals. See Appendix III for details on the number of referrals sent to each ATF division office.

are special agents.[14] All NICS coordinators have other duties; 12 of the 17 NICS coordinators told us that they spend less than 30 percent of their time on NICS activities.

Each NICS coordinator conducts further reviews of the referrals and disseminates them to the appropriate field or satellite office.[15] The extent of the additional review varies among the division offices. At some division offices, the NICS coordinator only identifies the appropriate field or satellite office and forwards the referral to that office. At other division offices, the NICS coordinator immediately forwards the delayed denials to the appropriate field or satellite office but further screens the standard denials to ascertain prosecutorial merit, using written or verbal USAO criteria or the NICS coordinator's knowledge of the types of cases that have been prosecuted by the USAOs.

ATF Field and Satellite Offices

When the division NICS coordinator determines that a referral requires a retrieval or merits investigation, the coordinator electronically transfers the referral to the resident agent in charge (RAC) or group supervisor at the appropriate field or satellite office, who then usually assigns the referral to a special agent for investigation.

For delayed denials, an ATF special agent at the field or satellite office is required to retrieve the firearm from the prohibited person. Although this action is termed a "retrieval," it is rare that the special agent physically retrieves the firearm. This action is only taken when the prohibited person is considered dangerous or when the prohibited person is uncooperative in disposing of the firearm. Other actions categorized by the ATF as retrievals include voluntary return of the firearm by the prohibited person to the FFL, abandonment of the firearm by the prohibited person, seizure by local law enforcement (which usually occurs when the prohibited person has committed a crime), or a third party transfer (in which a prohibited person is permitted to transfer the firearm to a third party of his or her choosing, provided that the third party does not reside with the prohibited person and agrees not to

[14] Of the remaining six coordinators, two are investigative analysts or assistants, two are intelligence research specialists, one is an inspector, and one is a secretary.

[15] The ATF has 194 investigative field offices or groups, 56 satellite offices, and 23 intelligence groups.

provide the prohibited person with access to the firearm). The ATF may refer these prohibited persons to USAOs for prosecution, depending on the circumstances of the cases.[16]

For standard denials, the ATF investigates only those cases that have prosecutorial merit. In those cases, the prohibited persons may be referred to USAOs for prosecution, depending on the outcome of the investigation.

The USAOs

The 94 USAOs prosecute criminal violations of federal laws. In NICS cases, prospective firearm purchasers are normally charged with intentionally lying on ATF Form 4473 by not indicating their prohibited status. NICS cases are generally prosecuted under two statutes: Title 18 U.S.C. 922(a)(6) and Title 18 U.S.C. 924(a)(1)(A). Title 18 U.S.C. 922(a)(6) states that it is unlawful:

> for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.[17]

Title 18 U.S.C. 924(a)(1)(A) states that whoever "knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for an license or exemption or relief from disability under the provisions or this chapter" shall be fined under this title, imprisoned not more than five years, or both.

[16] For example, cases involving old or nonviolent prohibiting factors or in which it is difficult to prove that the individual intentionally lied on the ATF Form 4473 are not likely to be referred for prosecution.

[17] According to Title 18 U.S.C. 924(a)(2), the penalty for violations of Title 18 U.S.C. 922(a)(6) is a fine, imprisonment of not more than ten years, or both.

Table 3 shows the number of referrals USAOs received under those two statutes, case filings (instances in which formal charges were filed), and case terminations (convictions, acquittals, or dismissals) during fiscal years (FY) 2002 and 2003. The referrals include ATF referrals of Brady Act cases identified through the NICS. According to the Executive Office for U.S. Attorneys (EOUSA), these referrals also include prosecutions of illegal gun traffickers and "straw purchasers" (individuals with clean records who purchase firearms for prohibited individuals). The EOUSA's case management system, the Legal Information Office Network System (LIONS), categorizes case data by federal statute and fiscal year, and therefore we were unable to obtain specific data related to NICS cases for CYs 2002 and 2003.

Table 3: Referrals, Case Filings, and Case Terminations Under Title 18 U.S.C. 922(a)(6) and Title 18 U.S.C. 924(a)(1)(A), By Defendant FY 2002 and FY 2003

	FY 2002	FY 2003	Totals
Referrals	922	1,059	1,981
Cases Filed	772	825	1,597
Cases Terminated	734	686	1,420

Source: Executive Office for U.S. Attorneys

The prosecutorial results of ATF investigations of NICS referrals initiated during CYs 2002 and 2003 are shown in Table 4. This table shows the number of defendants referred to the USAO, accepted by the USAO for prosecution, prosecuted, and found guilty.

Table 4: Prosecutorial Results of ATF NICS Cases Referred CY 2002 and CY 2003[18]

Category	CY 2002	CY 2003	Totals
Defendants Referred	141	89	230
Defendants Accepted	116	69	185
Defendants Prosecuted	91	63	154
Guilty Verdicts	90	63	153

Source: ATF

[18] "Defendants referred" represents those persons referred by the ATF to a USAO for prosecution. "Defendants accepted" represents persons whose cases were accepted by a USAO or who were indicted by a grand jury. "Defendants prosecuted" represents those defendants whose charges were not dismissed after indictment. "Guilty verdicts" represents those defendants who were found guilty, pled guilty, or pled nolo contendere (that is the defendant did not accept or deny responsibility for the charges but agreed to accept punishment).

Scope and Methodology of the OIG Review

We conducted our fieldwork from November 2003 through March 2004. Our review encompassed only those NICS background checks performed by the FBI, not by the POC states. At ATF headquarters, we interviewed officials from the Office of Firearms, Explosives, and Arson and the Office of Field Operations and obtained workload statistics on the ATF's field office operations.

In January 2004, we visited the FBI's NICS Section in Clarksburg, West Virginia. We toured the facility, obtained workload data, and interviewed relevant officials.

During January 2004, we also visited the ATF's Brady Operations Branch in Martinsburg, West Virginia. While on site, we interviewed the Branch Chief, the specialists and their supervisor, the information technology manager, and others. We also obtained workload statistics. In addition, we reviewed a random sample of 100 denial transactions forwarded to the ATF Brady Operations Branch by the FBI during CYs 2002 and 2003 to determine whether the FBI was referring denials to the ATF on a timely basis and whether the Brady Operations Branch specialists were processing denials on a timely basis, properly referring denials to ATF field offices in accordance with USAO criteria, and adequately documenting the basis for their decisions.

During February 2004, we visited ATF division offices and USAOs in New Orleans, Louisiana; Kansas City, Missouri; St. Paul, Minnesota; and Columbus, Ohio. At the ATF division offices, we interviewed the special agent in charge (SAC); the assistant special agents in charge (ASAC); the NICS coordinator; a group supervisor or RAC located in, or responsible for, each state within the division (we selected the field office with the largest volume of NICS referrals in that state); and other officials. At each division office, we reviewed a random sample of 50 standard denials and 50 delayed denials that had been forwarded to the division office by the Brady Operations Branch during CYs 2002 and 2003. For the standard denials, we reviewed whether the division or field office's decision to close the case or initiate an investigation was made in accordance with USAO guidelines and whether the investigation was opened and completed on a timely basis. For the delayed denials, we reviewed whether the investigation was opened and closed on a timely basis, the firearm was recovered from the prohibited person, the firearm was used in the commission of a crime prior to recovery, and the decision

to refer the case for prosecution was made in accordance with USAO guidelines. At the USAOs, we interviewed U.S. Attorneys (USA) and Assistant U.S. Attorneys (AUSA) responsible for prosecuting NICS cases.

During March 2004, we called the designated NICS coordinators assigned to the 19 ATF division offices that we did not visit to obtain information on procedures, training, and workloads.

We also obtained information and statistics from the EOUSA and the ATF on referrals and prosecutions of NICS cases.

RESULTS OF THE REVIEW

The ATF Does Not Always Make Timely Firearms Retrievals

When firearms are transferred to prohibited persons, it is important that the ATF retrieve these firearms expeditiously for public safety. We found, however, that although the ATF is generally successful in retrieving these firearms, the retrievals are not always timely.[19] As a result, there is an increased risk that these prohibited persons may use the illegally obtained firearms to harm others or to otherwise commit a crime.

Of the 188 delayed denial referrals in our sample for which investigations were completed, the ATF resolved 110 (59 percent) of the cases within a month and 158 (84 percent) within three months.[20] Results varied during the 1-month resolution period among the four divisions included in our sample: 74 percent in the Kansas City division, 61 percent in the Columbus division, 57 percent in the St. Paul division, and 43 percent in the New Orleans division.[21]

Because some cases can reasonably take longer than a month to resolve, we reviewed the investigative case files to determine whether any showed delays in case resolution. We defined delays as two weeks or more to initiate an investigation or two weeks of unexplained inactivity once the investigation had begun. Using these criteria, we determined

[19] The ATF retrieved the firearm in 97 percent of the cases in our sample that required a firearm retrieval.

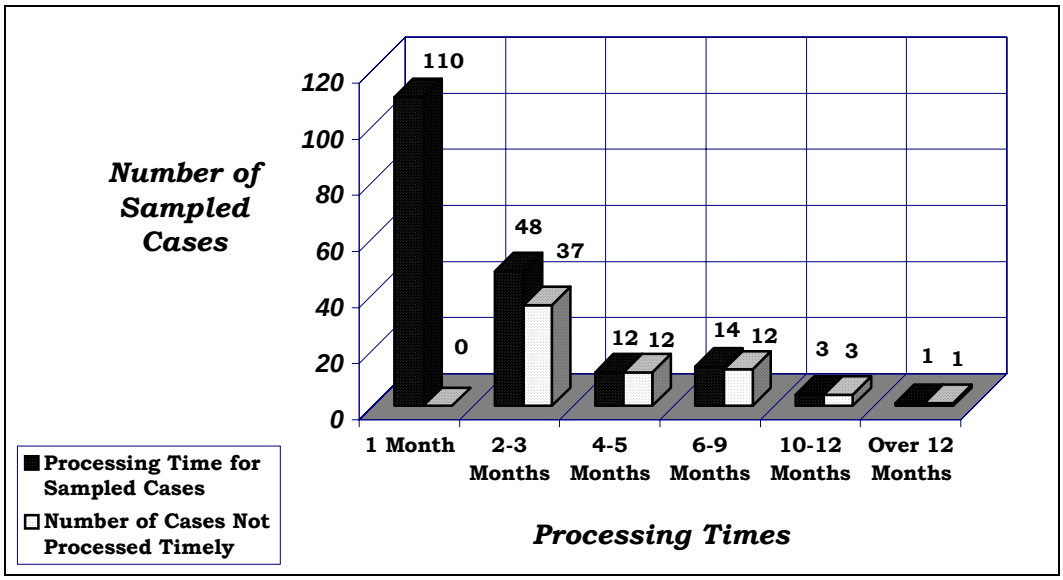
[20] We were usually unable to determine the date that the division NICS coordinator transferred the case to the field office. Therefore, we used the date the delayed denial was received by the division office as the start date. We considered resolution to occur when either the firearm was retrieved or the special agent determined that a retrieval was not required (i.e., the special agent determined that the individual was not prohibited or that the FFL did not transfer the firearm and therefore a retrieval was unnecessary). Also, our sample of 200 delayed denials included 9 cases that were in the process of being investigated and three cases that were denials based on a state, not federal, prohibition (in these cases the retrievals were conducted by the appropriate state). We did not include these 12 cases in the timeliness statistics.

[21] The ATF no longer has timeliness standards for firearm retrievals. The ATF special agents we spoke with generally thought that 30 days was a reasonable expectation for retrieval.

that delays occurred in 65 (35 percent) of the 188 cases. Of the four divisions in our sample, we determined that delays occurred in 49 percent of our New Orleans sample (24 cases), 37 percent of our St. Paul sample (17 cases), 30 percent of our Columbus sample (14 cases), and 21 percent of our Kansas City sample (10 cases).

Figure 4 shows the amount of time it took the ATF to resolve the 188 delayed denials and the number of cases in which delays occurred.

Figure 4: Processing Times and Timeliness
Sample of Delayed Denials



Source: OIG Sample

Cases in which delays occurred included the following examples:

- A case involving a person prohibited from possessing firearms due to a felony conviction for second degree battery was referred by the Brady Operations Branch to the appropriate division office on November 16, 2002, for a firearms retrieval. According to the case management log, the case was opened and closed on September 23, 2003, more than 10 months later. On that date, the ATF field office verified that the subject was a prohibited person and the subject was located and interviewed. The subject claimed that his firearm had been stolen from his vehicle in March or April 2003. He had not reported the theft to local authorities.

- A case involving a person prohibited from possessing a firearm due to a misdemeanor domestic violence conviction was referred by the Brady Operations Branch to the appropriate division office on November 28, 2002. The case was initially handled on a timely basis – during December the case agent verified that the subject was prohibited, sent a letter to the subject, and spoke with the subject by telephone. The subject agreed to transfer the firearm to a third party not yet identified. The subject was never heard from again. The case agent attempted to contact the subject by telephone in February and May 2003. A visit was not made to the subject's residence until December 2003 (the subject was not home), a year after the initial referral. As of February 2004, the firearm had not been retrieved. According to ATF division office officials, some of the delay can be attributed to the original case agent's assignment to military duty and the failure of the field office supervisor to reassign the agent's caseload to other agents on a timely basis.

- A case involving a person prohibited from possessing a firearm due to a misdemeanor domestic violence conviction was referred by the Brady Operations Branch to the appropriate division office on October 31, 2002, for a firearms retrieval. According to the case management log, the RAC e-mailed the case agent on December 19, 2002, inquiring about the apparent inactivity on the case. Two months later, on February 25, 2003, the case agent sent a letter to the subject. The special agent first spoke to the subject on April 2, 2003, four months after the case was received, to discuss the subject's disposal of the firearm.

- A case involving a person prohibited from possessing a firearm due to a felony conviction for vehicular manslaughter was referred by the Brady Operations Branch to the appropriate division office on August 3, 2002, for a firearms retrieval. According to the case management log, no action was taken until eight months later on April 14, 2003, when a database query was run to locate the subject's current residence. According to the management log, the delays were due to the agent's criminal caseload. The special agent visited the subject on June 3, 2003, and found that the subject possessed five other long guns, all of which were subsequently transferred to his daughter's possession.

Our review identified a number of reasons for these delays, as discussed below.

Delayed Denials Are Not Forwarded Directly to Field Offices

The Brady Operations Branch does not electronically transfer delayed denials directly to the appropriate ATF field or satellite office for investigation. Instead, it transfers the delayed denials to one of 17 ATF division offices, which in turn is supposed to immediately transfer them to the appropriate ATF field or satellite office. Not only does this process create an unnecessary step, but it also delays initiating a firearm retrieval when the NICS coordinator does not transfer these cases timely.

In addition, because carrying out NICS responsibilities is a part-time function for the NICS coordinators, they do not always access the system on a daily basis. As a result, it can be several days before a coordinator notices the delayed denial. In addition, unless the division has assigned a back-up coordinator, absences by the coordinator due to other assignments or annual or sick leave can result in additional delays. In fact, at one of the divisions we visited, the field offices attributed excessive delays in 14 of the 100 cases in our sample to delays on the part of the NICS coordinator in forwarding the cases to the field. Of these cases, five involved firearm retrievals. The amount of time it took to forward these cases to a field office ranged from 3 months to 13 months.

Delays in referring these denials to the field also diminish the sense of urgency among special agents. A group supervisor at one of the field offices that had not been receiving denial referrals timely stated that the attitude among his special agents was that if delayed denials were not a priority for the division office, why should they be a priority for the field offices.

We discussed with Brady Operations Branch officials the alternative of bypassing the division offices and referring the delayed denials directly to the field and satellite offices. The officials agreed that this would improve the timeliness of the process, but stated that NFORCE is technically unable to transfer these cases to the field offices. They further stated that a couple of years ago the ATF considered developing such a direct case system, but the project was dropped due to a lack of funding.

NICS Subjects Are Not Considered Dangerous

The special agents we spoke with generally commented that they do not consider the vast majority of NICS referral subjects a danger to the public because the prohibiting factors are often minor or based on incidents that occurred many years in the past. For example, one group supervisor cited a retrieval case in which the person was prohibited from owning a firearm because of a felony conviction for stealing four hubcaps from a car. In another example, a Brady Operations Branch specialist cited a case where the person was prohibited due to a 1941 felony conviction for stealing a pig. We also were told that "bad guys" generally do not purchase their firearms through legitimate dealers; instead, they have someone with a clean record purchase the firearm for them (known as a "straw purchase") through an FFL, buy a firearm on the black market, or purchase the firearm at a flea market or gun show from a non-FFL.[22] Because agents do not consider most NICS subjects dangerous, they do not consider it urgent to retrieve the firearms.

Some of the 500 NICS cases we reviewed supported this perception.[23] Of the 229 instances in our samples for which we could identify the date of the crime, 110 (48 percent) of the crimes had occurred at least 5 years previously (30 of these, or 13 percent, had occurred at least 20 years previously). These cases included a breaking and entering from 1958, a check forgery from 1959, a burglary from 1968, an attempted burglary from 1963, and a domestic violence case from 1964. Further, some of the prohibiting factors in our sample were for nonviolent crimes such as:

- Fugitive warrants for failure to pay a shoplifting fine, passing bad checks, or traffic violations, and

- Felony convictions for shoplifting, theft of public benefits, fraudulent use of a credit card, forgery, failure to pay child support, or sales tax evasion.

It is understandable that ATF special agents prioritize their workloads by focusing on subjects who are perceived as a greater danger to the community. However, each retrieval represents a person who illegally possesses a firearm. Because someone has committed only

[22] Only FFLs are required to perform NICS checks.

[23] This includes 400 NICS cases we reviewed at the four ATF division offices and 100 NICS cases we reviewed at the Brady Operations Branch.

nonviolent crimes in the past does not mean that he or she is not capable of using the illegally obtained firearm to commit a violent crime.

In fact, our sample includes a case in which a person who was prohibited from owning a firearm because of a nonviolent crime (possession of marijuana) subsequently used the 9mm pistol he had purchased to commit a violent crime. In this instance, an ATF field office special agent had initiated a timely investigation, but placed it on hold after a month because he could not locate the subject (the subject provided a fictitious address to the FFL). Eight months later, the local police department notified the special agent that the subject had been arrested for aggravated assault using the illegally obtained firearm.

Staffing and Geographic Constraints Exist

All 10 of the division office SACs and ASACs and 10 of the 13 field office RACs and group supervisors we interviewed stated that they had insufficient resources to investigate the volume of NICS referrals their offices received. This is particularly true at the satellite offices, often staffed by only one or two special agents. For example, the St. Paul SAC noted that the satellite office in Missoula, Montana, is staffed by one agent who currently has a backlog of about 30 NICS cases in addition to a substantial criminal caseload.

Because of resource limitations, ATF special agents often are pulled from processing NICS cases to work on arson, firearms trafficking, and explosion cases. To reduce NICS case backlogs, the field offices either periodically shut down all other operations for a month or more or detail special agents from the division offices or other field offices to help out.

NICS investigations are labor- and time-intensive. The special agent must first determine whether the person is actually prohibited from possessing a firearm and whether the firearm was transferred to the person. This requires examining criminal histories, obtaining court records, obtaining contact names and addresses, attempting to contact the person, confirming those instances in which the person either returned the firearm to the FFL or transferred the firearm to a third party, and on occasion contacting local law enforcement agencies to determine whether the person is a threat.

Along with staffing shortages, the large geographic territories covered by some of the ATF field offices contribute to the delays in

retrieving firearms. Some of the larger states contain few ATF field offices. The special agents generally retrieve more firearms in rural areas than in urban areas where ATF field offices are often located. When a field office territory covers hundreds of miles, a firearm retrieval can consume a special agent's entire day. Because of potential danger, two special agents are required to perform a retrieval. Because of these factors, special agents sometimes wait until they have multiple retrievals or other investigations to conduct in an area.

The lack of resources to investigate all NICS cases has been a continuing problem. An ATF policy memorandum dated December 5, 2000, stated, "Since the full implementation of the Brady Bill in November 1998, we have experienced a critical shortage of investigative resources necessary for meeting our NICS/Brady investigation and other statutory responsibilities." In November 2001, the Department of the Treasury's OIG report on the ATF's NICS program noted staffing deficiencies related to the large influx of NICS cases and recommended that the ATF develop case workload studies and staffing models to assess and respond to the NICS program's impact on field division resources.[24] Although the ATF agreed in its response to implement this recommendation, our review found that the problems detailed in the Treasury OIG report continue to exist.

One of the field offices in an ATF division we visited is using its investigative analyst, who is supervised by the RAC, to perform administrative tasks associated with a NICS investigation, such as sending initial contact letters to prohibited persons who obtained firearms and making the arrangements for third party transfers. Special agents are needed only when a firearm retrieval is required. According to the RAC, using an investigative analyst for these tasks has significantly reduced the NICS special agent workload in his field office.

Because of the shortage of support personnel in many field offices, using investigative analysts to work NICS cases usually is not feasible. In lieu of using support personnel to assist with NICS cases, special agents suggested hiring contractors, preferably retired ATF special agents or ex-law enforcement personnel, to perform these functions. We believe

[24] See *Protecting the Public: Bureau of Alcohol, Tobacco and Firearms Could Improve its National Instant Criminal Background Check System Program*, Department of the Treasury, Office of the Inspector General, OIG-02-004, November 1, 2001. The ATF was located within the Department of the Treasury until January 24, 2003, when the majority of the ATF was transferred to the DOJ.

this merits consideration, since requiring special agents to perform these primarily administrative duties is not an efficient use of resources.

No Timeliness Standards Exist

We found that the ATF does not have timeliness standards for firearm retrievals. When the NICS was first initiated, the ATF required its agents to initiate a delayed denial investigation and retrieve the firearm within five days of receiving the case. In fact, the ATF's procedural guidelines, "NFORCE and NICS/Brady Referrals," still refer to these as "5-day turn-around" cases. Some of the special agents in the field stated this standard was unreasonable. A June 17, 1999, ATF policy memorandum stated, "In responding to the delayed referrals the 5-day reporting requirement is no longer in effect." The memorandum did not establish different standards, instead stating, "Priority consideration should be given to referrals where a firearm has been transferred." The memorandum further stated, "Since the persons receiving the firearm in these instances maybe [sic] a prohibited person, it is imperative that investigations be initiated per established criteria in a timely manner."

Because the retrieval of firearms from prohibited persons is an ATF priority, we believe that the ATF should establish timeliness performance standards and track field office performance. Due to the lack of standards and timeliness monitoring, ATF management is unable to quickly identify and address delays in retrieving firearms.

ATF management disagreed that timeliness standards should be established for the completion of a case. Instead, subsequent to our review, they revised the written procedures to state, "It is imperative that delay denials be handled promptly and not be allowed to linger without investigative action." We do not believe that this general admonition is sufficient. In our opinion, the ATF should establish standards to ensure timely firearm retrievals.

RECOMMENDATIONS

Recommendation 1: The ATF should modify its NFORCE system to allow the Brady Operations Branch to refer delayed denials directly to the appropriate ATF field office.

Recommendation 2: The ATF should use non-agent personnel to handle the administrative tasks related to NICS cases.

Recommendation 3: The ATF should establish timeliness standards for firearm retrievals and develop a system for ATF field office management to monitor and report on compliance with these standards.

Firearms Retrieval Procedures Are Inadequate

The ATF's use of a contact letter requesting that a prohibited person voluntarily dispose of the firearm does not always result in timely retrievals because of delays in sending the letters and the lack of a time frame in which the recipient must respond. The ATF also fails to monitor responses and to take timely action when a prohibited person does not respond to the letter. In addition, the ATF does not adequately document all retrievals or, in the case of third party transfers, does not always document that the third party is not prohibited from possessing a firearm. As a result, there is not adequate verification that retrievals are performed in accordance with ATF procedures.

Deficiencies in the Use of Initial Contact Letters

In many cases, giving a prohibited person the opportunity to voluntary surrender an improperly transferred firearm before sending an agent to retrieve it is an efficient use of ATF resources. We noted, however, that ATF field offices did not always send contact letters on a timely basis, did not specify a time frame for the person to respond, and did not always take action timely if there was no response.

ATF policy allows a standardized "contact letter" for prohibited persons who inappropriately received firearms as a result of a NICS delayed denial. The contact letter advises the recipient that records indicate that he or she is prohibited from possessing a firearm and asks the person to contact the ATF field office regarding options for lawfully disposing of the firearm. The contact letter is not used if the investigation is likely to result in prosecution of the recipient of a firearm.

At the four ATF divisions we visited, we found a wide variance in the use of contact letters. Overall, in the 123 cases in our sample that required a firearm retrieval, 31 initial contact letters (25 percent of the

cases) were sent.[25] Of the four ATF divisions in our sample, special agents in the St. Paul division used initial contact letters most often (12 letters representing 40 percent of their required retrieval cases), and special agents in the Kansas City division used initial contact letters least often (2 letters representing 7 percent of their required retrieval cases).

The general consensus of the division and field office agents we interviewed was that contact letters were effective in retrieving firearms. In their opinion, most of the persons they contacted did not realize that they were prohibited from owning firearms and were cooperative when asked to dispose of the firearms. One group supervisor stated that when his office sent a contact letter, the prohibited person responded 90 percent of the time. Another group supervisor noted that one of the satellite offices had a 100 percent success rate with contact letters. In our sample, 16 of the 31 contact letters sent (52 percent) resulted in the person promptly disposing of the firearm.

Because of this successful response rate, sending contact letters can be an effective and efficient way for ATF to retrieve firearms. However, to be most effective, the ATF should send the letters promptly, specify a time frame for response, and take timely action if there is no response. We identified deficiencies in all of these areas.

We found cases with extensive delays between the time when the division office received the referral and when the initial contact letter was sent. Of the 29 initial contact letters in our sample for which we were able to determine the dates they were sent, 8 (28 percent) were sent a month or more after the case was received by the field. In four of these cases, the delays were slightly over a month; in the other four cases, the delays ranged from 48 days to 202 days. The latter cases are described in Table 5.

[25] Of our total sample of 200 delayed denials, only 123 required a firearm retrieval. Of the remaining 77 cases, 74 did not require a retrieval because ATF special agents subsequently determined upon further research either that the person was not prohibited from owning a firearm or that the FFL had not transferred the firearm. In some cases, the FFL will contact the person when the FFL is informed by the NICS examiner of the delayed denial, and the person will voluntarily return the firearm to the FFL. The remaining three cases were forwarded to the Columbus division office by the Brady Operations Branch "for investigative purposes only." According to a Brady Operations Branch specialist, the state of Ohio prohibits anyone with a drug conviction from possessing a firearm. Because these denials are based on state prohibitors, not federal prohibitors, the state of Ohio is responsible for the firearms retrieval, not the ATF.

Table 5: Examples of Delays in Sending Initial Contact Letters

Amount of Delay	Reason for Prohibition	Reason for Delays
48 days	Misdemeanor domestic violence conviction	Unable to determine
62 days	Felony conviction (possession of sawed-off shotgun)	Case was assigned to single-agent satellite office
185 days	Misdemeanor domestic violence conviction (beat pregnant wife)	Field office cited other investigative priorities as the reason for the delay
202 days	Felony indictment (criminal mischief)	Field office cited other investigative priorities as the reason for the delay

Source: OIG Sample

In addition, the ATF's standard contact letter does not specify a time frame within which the firearm's owner must contact the ATF. The letter states only that the recipient should contact the ATF "as soon as possible." Further, the ATF has no guidelines for how long the field should wait before following up. One group supervisor we spoke with had established his own policy, requiring that his agents take action to retrieve a firearm if the person did not respond within 48 hours. All the other field offices we contacted indicated that the individual case agent decided when to follow up. In addition, we found that in 7 of the 31 cases (23 percent), the field office sent a second letter.

To maximize the effectiveness of contact letters, the ATF needs to revise its letters to include a response time frame, improve its timeliness in sending the letters, monitor the response time, and take timely action when the letter is not effective in garnering a response.

Special Agents Do Not Always Document Third Party Transfers, Returns of Firearms to the FFL, and Seizures of Firearms by Local Law Enforcement

The ATF rarely seizes a firearm from a prohibited person.[26] In most instances, the prohibited person opts to transfer the firearm to a third party or return the firearm to the FFL. In some cases, the prohibited person voluntarily surrenders the firearm to local law

[26] This is only done if the prohibited person is perceived as dangerous or if the prohibited person refuses to dispose of the firearm.

enforcement officials, or local law enforcement officials seize the firearm. In our sample, of the 114 completed cases requiring a firearm retrieval, 59 (51 percent) involved third party transfers, 36 (32 percent) involved returns to the FFL, 12 (10 percent) involved seizures by either the ATF or local law enforcement agencies, and 4 (4 percent) involved abandonments.[27]

In cases in which the ATF does not seize the firearm, it is important for the ATF to document that the prohibited person no longer possesses the firearm and therefore that its retrieval actions were successful. The ATF does have written policies requiring documentation of third party transfers. According to a December 5, 2000, ATF policy memorandum, "Should the firearm be transferred to a 3rd person, the acknowledgement (Exhibit 3) signed by the original purchaser, the 3rd party AND the investigating agent must be executed and made a part of the investigative file." We were unable to find similar written requirements for documenting returns of firearms to the FFLs or for seizures by local law enforcement agencies.

We noted significant documentation deficiencies in our sample. For example:

- Of the 59 cases in which the subject transferred the firearm to a third party, there was no evidence in 25 of the investigative case files (42 percent) that a written acknowledgement form was obtained.

- Of the 36 cases in which the subject returned the firearm to the FFL, there was no documented evidence in 27 of the investigative case files (75 percent) of this return.

- Of the six cases in which the firearm was either seized by or surrendered to a local law enforcement agency, there was no documented evidence in three of the investigative case files (50 percent) of this transaction.

We found considerable disagreement among ATF field special agents as to whether documentation is required, particularly in third

[27] In the remaining three cases (3 percent), the ATF was unable to locate the prohibited person. In our sample of 200 delayed denial referrals, the 123 referrals that required a firearm retrieval included 9 cases in which the investigation had not been completed at the time of our review.

party transfers. Despite the requirements of the policy memorandum, some special agents told us that they believed that a verbal assurance from a third party was sufficient. We disagree. In addition to the intrinsic value of having such documentation, the documentation could be used as an evidentiary tool should the third party be prosecuted for violating the agreement by allowing the prohibited person to have access to the firearm.

ATF management agreed with our findings and, subsequent to our review, revised its written procedures to require that special agents document third party transfers, returns of firearms to the FFLs, and seizures of firearms by local law enforcement agencies.

Background Checks of Third Parties Are Not Always Conducted or Documented

According to a December 5, 2000, ATF policy memorandum, third party transfers "should be made to a non-prohibited individual." According to an ATF headquarters official, although the policy does not specifically require that the ATF agent conduct a background check of the individual to whom the firearm is transferred, the ATF expects the agent to conduct an independent check instead of relying solely on the word of the third party.

We found, however, that of the 59 cases in our sample in which there was a third party transfer, in only 24 cases (41 percent) did the investigative case file indicate that a background check had been performed on the person to whom the firearm was being transferred. For the four ATF division offices we visited, the percentage of cases for which there was documentation ranged from 7 percent (1 case out of 14) in the Columbus division to 58 percent (11 cases out of 19) in the St. Paul division.

ATF management agreed with our findings and, subsequent to our review, revised its written procedures to require the special agent to ensure that the third party is not a prohibited person.

RECOMMENDATION

Recommendation 4: The ATF should revise its standard initial contact letter to include a response time frame and should direct its personnel to send the letters on a timely basis, to track responses to the letters, and to take timely action to retrieve the firearms when the letters are unsuccessful in eliciting a response.

ATF Field Offices Receive Too Many Standard Denial Cases That Are Unlikely to Be Prosecuted

The ATF does not ensure that only those standard denial referrals that appear to have prosecutorial merit are referred to its field offices for investigation. This practice unnecessarily increases the workload of the special agents in the field.

By all accounts, the ATF considers the investigation of standard denials to be a low priority. All of the SACs, ASACs, RACs, and group supervisors we spoke with stated that, with the exception of firearm retrievals, NICS cases were not a priority. This field attitude reflects ATF headquarters policy. An ATF policy memorandum dated June 17, 1999, stated that NICS cases, "are not to be worked at the expense of higher priority investigative matters as determined by the respective Division management team. Because of our limited resources, [standard] referrals meeting the criteria set by ATF and respective U.S. Attorneys should be processed according to the severity of the disqualifying convictions, the presence of multiple attempts to purchase firearms, and the availability of division resources."

Field special agents also told us that NICS cases required extensive time and resources, but were rarely prosecuted. Special agents we interviewed called the cases "pointless and overwhelming" and a "drain on resources" and stated that they can "barely keep up" with the workload. One group supervisor stated that his agents "cringe" when assigned a NICS case. They also view these cases as detracting from more important cases, such as those involving firearms traffickers, gangs, arsons, and explosives. Although the special agents we spoke with acknowledged the need for firearm retrievals, they saw little purpose in investigating a standard case in which the NICS successfully prevented a prohibited person from purchasing a firearm.

We believe that the number of standard denials referred to field offices should be limited to cases that meet USAO prosecutorial guidelines. Our review found that ATF field offices are receiving too many standard denial referrals that are unlikely to be prosecuted according to USAO guidelines. This is adding unnecessary work to busy field investigators' caseloads and taking resources away from investigations of other crimes. The standard denial cases need to be better screened by both the Brady Operations Branch specialists and the division office NICS coordinators.

Over the years, the Brady Operations Branch has improved its screening process for standard denials it receives from the FBI. According to Brady Operations Branch management, the proportion of the standard denials it referred to the field has been reduced from a high of 40 to 50 percent, when the program was first initiated in 1999, to 22 percent in FY 2003 and 17 percent in FY 2004. Although the number of standard denials sent to the field offices has been reduced, our review identified improvements that could be made to further reduce the workload. These improvements are discussed in the following sections.

The USAOs Have Not Provided Sufficient Prosecutorial Guidelines

While USAO prosecutorial guidelines are a critical tool for the ATF to manage its NICS case workload, we found that not all USAOs provided written guidelines. The Brady Operations Branch uses the guidelines to screen the 60,000 referrals it receives annually, sending only those cases that meet the USAO guidelines to the ATF division offices for investigation. The Brady Operations Branch can only identify NICS referrals by ATF division, and therefore it uses broader composite USAO guidelines developed from the specific USAO guidelines available for that division. For example, if individual USAO guidelines within a particular division specify different ages of felony convictions, the Brady Operations Branch will apply the oldest age to all the NICS referrals within that division. The division NICS coordinators generally use the more specific USAO guidelines to further screen the referrals they receive from the Brady Operations Branch, thereby limiting the number of NICS cases referred to the ATF's field offices.

We found that the guidelines that the USAOs provided were not always current or sufficiently specific to be useful. We also found that some of the division offices had received guidelines from their respective USAOs and were using them to perform their own screening, but had not forwarded these guidelines to the Brady Operations Branch as requested.

Further, due to system limitations, Brady Operations Branch specialists are only able to identify NICS cases by federal judicial district, which greatly limits the extent of the screening that can be performed.

The ATF first instructed its division directors to obtain their respective USAO's guidelines via a policy memorandum dated June 17, 1999. At that time, only half of the USAOs responded in writing to the request. In 2003, the Brady Operations Branch made a similar request to the ATF division offices, and only half of the divisions responded. A January 29, 2003, memorandum from the Attorney General to all U.S. Attorneys, the ATF Acting Director, all ATF special agents in charge, and the EOUSA Director also stressed the importance of USAO prosecutorial guidelines for combating gun crimes. The memorandum stated, "To make the most of ATF's investigative resources, it is crucial that the U.S. Attorneys and ATF have a clear understanding of the guidelines for cases to be referred for Federal prosecution and cases that should be referred for state prosecution." The memorandum further directed the USAs and corresponding ATF special agents in charge to meet and confer on prosecutorial guidelines and criteria to ensure that they are fully coordinated on the investigation and prosecution of gun crimes.

However, as of April 2004, the Brady Operations Branch had been able to compile written criteria for only 7 of the ATF's 17 division offices that receive NICS referrals. The Brady Operations Branch chief stated that he was not sure whether the lack of responsiveness was due to the USAOs not responding or the division offices not following up.

In addition to reviewing the USAO guidelines used by the Brady Operations Branch, we obtained information on the available guidelines from the NICS coordinators and group supervisors or RACs at the four ATF division offices we visited (encompassing 25 of the 94 USAOs). Of these 25 USAOs, 8 had not provided guidelines to the ATF. Several of the ATF field office group supervisors told us that some of the USAOs are reluctant to provide written guidelines. One AUSA we spoke with stated that developing standard guidelines is not practical because of the range of gun crimes.

We believe that the USAOs should provide written guidelines to the ATF. The USAOs can add a qualifier to their guidelines stating that they will accept cases that do not meet the guidelines on a case-by-case basis, already a practice at those locations that have guidelines. In addition, standard guidelines are possible and are done by some USAOs that

develop guidelines based on analyses of the cases that they successfully prosecute.

To be useful to the ATF, the guidelines also need to be specific and realistic. Fourteen of the 17 guidelines we reviewed appeared to be sufficiently specific. These guidelines identified the prohibiting factors most likely to result in successful prosecutions and set parameters for these factors, specifying types of crimes, ages of convictions, and numbers or patterns of convictions.[28] One of the remaining three guidelines was overly broad because it merely listed all the prohibiting factors and stated that the USAO was interested in seeing *all* cases. Overly broad guidelines do not help the ATF screen cases. We were unable to assess the quality of two guidelines because they were not available at the division offices during our visit.

We also found that some guidelines were not realistic. For example, one NICS coordinator told us that he generally screens out any standard referrals in which a prohibited person attempted to purchase a long gun. He stated that the USAOs in the division's region will not accept these cases because they are in "hunting country," where these cases generally lack jury appeal.[29] Our discussions with representatives from one of the USAOs in the district confirmed this. However, we noted that none of the written prosecutorial guidelines included the qualifier that a prohibited person who purchased a long gun would normally not be prosecuted. In addition, because priorities change, it is important that the USAOs review and update their guidelines annually. We generally found that this was not occurring.

Brady Operations Branch specialists currently can distinguish each denial transaction only by ATF division office, not by federal judicial district. Brady Operations Branch management agreed that the capacity to screen by individual federal judicial district would help reduce the volume of referrals to the field offices because they would be able to screen for criteria specific to a particular USAO instead of using broader criteria. They stated that with additional funding, FFL identification numbers could be matched to a particular federal judicial district.

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[28] In general, the types of cases more likely to be prosecuted were those involving violent offenders, more recent crimes, career criminals, and patterns of escalating violence.

[29] "Jury appeal" refers to those cases that are more likely to result in a conviction.

Developing the technological capacity to enable the Brady Branch specialists to screen using individual USAO guidelines would eliminate the need for the NICS coordinators to perform additional screening. In the interim, more complete USAO guidelines would help the NICS coordinators better screen NICS referrals.

More Screening Needs to Be Done by the Division Offices

Although additional screening by NICS coordinators at the ATF division offices can reduce the flow of standard denial cases to the field offices, we found that not all NICS coordinators screen these cases. Six (35 percent) of the 17 division offices that receive referrals from the Brady Operations Branch are not screening referrals before forwarding them to the appropriate field or satellite office.[30]

Our sample of 50 standard denials selected from each of four division offices we visited showed a wide variation in the number referred to field and satellite offices. One (Columbus) performed no screening, and therefore forwarded 100 percent of the standard denials it received. Of the three division offices that screened the standard denials, New Orleans screened out 6 percent (forwarding 94 percent), Kansas City screened out 36 percent (forwarding 64 percent), and St. Paul screened out 84 percent (forwarding 16 percent).

One NICS coordinator stated that his field offices want to see all standard denials because they view them as having potential intelligence value. This argument is questionable because initial screening done by the Brady Operations Branch leaves the division offices with only a small fraction of the standard denials to review. In our opinion, NICS coordinators who do not further screen denial referrals are transferring the burden to the busy field offices.

NICS Coordinators Need Training and Written Guidance

The ATF could improve its screening of NICS cases by providing training and guidance to the NICS coordinators. During our telephone interviews with NICS coordinators, we found some of the coordinators were unfamiliar with the NICS program. For example, a NICS coordinator assigned to an ATF division with a large NICS workload had little understanding of the NICS process and mistakenly believed that the

[30] The ATF division offices in Boston, Charlotte, Columbus, Dallas, Miami, and Seattle do not screen referrals.

FBI, not the Brady Operations Branch, was sending her copies of court documents.

We found that few of the NICS coordinators received training on the NICS program. Only six of the current NICS coordinators had attended the last NICS training conference, which was held in 2000. The majority of the NICS coordinators we spoke with indicated that they would like to attend a NICS conference. According to the Chief of the Brady Operations Branch, the Branch used to host NICS coordinator conferences but had not done so for several years due to the lack of funding. In April 2004, the Chief informed us that a 1-week conference has been tentatively scheduled for the summer of 2004, pending funding approval. The conference is to be held at the Brady Operations Branch and is to include a site visit to the FBI NICS Section.

In addition, the ATF has not provided the NICS coordinators with written guidance, which would provide more consistency in screening cases.

Fewer Alien Cases Should Be Forwarded to the Division Offices

We found that the Brady Operations Branch unnecessarily forwarded to the ATF division offices standard denial referrals pertaining to aliens that did not meet USAO guidelines. Further, the ATF has not issued any guidance to its division and field offices on what actions to take in relation to these cases. As a result, some division and field offices close these cases upon receipt without taking action; others refer these cases to the local ICE office, unaware that the Brady Operations Branch has already made the referral.

Illegal aliens and aliens admitted to the United States under a nonimmigrant visa are prohibited from possessing firearms.[31] The Brady

[31] While illegal aliens and aliens admitted to the United States under a nonimmigrant visa are generally prohibited from possessing or purchasing firearms in the United States, there are some exceptions: (1) nonimmigrant aliens who possess a valid hunting license or permit lawfully issued by a U.S. state; (2) nonimmigrant aliens entering the United States for "sporting" purposes (e.g., to compete in a competitive shooting event or to display firearms at a trade show); (3) certain diplomats; (4) designated officials of foreign governments or distinguished foreign visitors; (5) foreign law enforcement officers entering the United States on official law enforcement business; and (6) persons who have received a waiver from the U.S. Attorney General. A nonimmigrant who falls into one of these categories must reside in the United States at least 90 days prior to purchasing a firearm from an FFL.

Operations Branch specialists forward to ICE all cases in which the person has indicated on ATF Form 4473 that he or she has a foreign place of birth. The following types of cases are also forwarded to the appropriate ATF division office:

- If the alien received a firearm, the case is treated similarly to a nonalien case and forwarded as a delayed denial for the purposes of retrieving the firearm.

- If the alien did not receive a firearm but has a prohibiting criminal record (e.g., is a convicted felon), the case is treated similarly to a non-alien case and forwarded for investigative purposes.

- If the alien does not have any other prohibiting factors, the specialist may forward the case for "informational purposes" if the alien is in the United States illegally or if ICE's records are inconclusive as to the alien's status.

The ATF has not provided procedural guidance to the field on how to handle these referrals. As a result, we found that NICS coordinators and field special agents were unclear on what actions to take on these cases. Two of the NICS coordinators we spoke with stated that they routinely close all cases that involve aliens as they receive them; the other 15 NICS coordinators stated that they refer these cases to the field for resolution. None of the field staff we spoke with were aware that the Brady Operations Branch routinely referred these cases to ICE. As a result, some of the division and field personnel also refer these cases to ICE.[32] In fact, based on our review it appears that the only action, if any, the field offices take in relation to these types of cases is to refer them to ICE.

None of the cases in our sample that pertained to the alien prohibition resulted in investigations. Of our sample of 200 standard referrals, 22 (11 percent) were denials due to the alien prohibition. In none of these 22 cases did the person have a criminal record or other prohibiting factors. None of these cases resulted in investigative action – 6 were closed immediately upon receipt by the NICS coordinator, while

[32] One NICS coordinator told us that she no longer refers these cases to the local ICE office because ICE officials at that office told her they were not interested.

the remaining 16 were forwarded to a field office where 14 were closed by a special agent without investigative action.[33]

In our opinion, the Brady Operations Branch should refer to the field only those alien cases that require a firearm retrieval or that meet USAO prosecutorial guidelines. If, however, the ATF determines that there is some useful purpose in referring these cases to the field, it needs to develop guidance to communicate its expectations about how the field offices are to respond.

Better Communication Needed Within the ATF

The volume of standard referrals being sent to the field could be greatly reduced with improved communication among the Brady Operations Branch, the ATF division offices, and the ATF field offices.

During our site visit, Brady Operations Branch specialists stated that they did not regularly receive feedback on the appropriateness of the standard denial referrals they sent to the field and therefore did not know whether they were screening effectively. Without knowing how successful their referrals are, the specialists are unable to modify their procedures. The only feedback mechanism the specialists currently have is to access NFORCE to look up what actions the field offices took in relation to specific referrals.

We found that some of the division office NICS coordinators were closing a substantial amount of the standard denial referrals as they received them from the Brady Operations Branch. At one of the division offices we visited, the NICS coordinator closed 42 of the 50 (84 percent) standard denial cases in our sample; at another division office, the NICS coordinator closed 18 of the 50 (36 percent) standard denial referrals in our sample. In addition, four other NICS coordinators we contacted by phone estimated that they close from 40 percent to 95 percent of the standard denial referrals they receive.

In our opinion, if the NICS coordinators are closing a large percentage of the standard denial referrals they receive, then these are inappropriate referrals from the Brady Operations Branch. To reduce the number of standard denial referrals being received, the NICS coordinators need to analyze their rationale for not referring the cases for investigation and provide feedback to the Brady Operations Branch. If

[33] The remaining two cases have not yet been closed; however the investigative files do not indicate that any investigative action has taken place.

the Brady Operations Branch specialists were aware of the types of cases actually being investigated by the field, they could close those types of cases instead of referring them to the division office.

The special agents in the field offices need to communicate similar information back to their NICS coordinators. Several of the group supervisors we spoke with stated that they closed out the majority of the referrals they received from their NICS coordinators. However, the group supervisors and RACs should ask the NICS coordinators to cease sending particular types of referrals to the field offices. It is not constructive, as is the current practice, for special agents to question the rationale for particular cases being sent to them by the NICS coordinator. Instead, they need to provide the NICS coordinator with specific guidance for screening cases.

RECOMMENDATIONS

Recommendation 5: The EOUSA should ensure that annually each USAO provide the ATF with specific prosecutorial guidelines for NICS cases.

Recommendation 6: The ATF should examine the feasibility of enabling Brady Operations Branch specialists to identify NICS cases by federal judicial district, thereby enabling the ATF to consolidate all its NICS referral screening at the Brady Operations Branch. In the interim, the ATF should require all division office NICS coordinators to screen NICS standard denial referrals and refer to the field offices only those cases that meet USAO prosecutorial guidelines.

Recommendation 7: The ATF should provide annual training to the NICS coordinators and develop a NICS coordinator handbook.

Recommendation 8: The ATF Brady Operations Branch should refer to the field offices only those alien cases that meet the USAO prosecutorial guidelines.

Recommendation 9: The ATF should require division office NICS coordinators and field office personnel to notify the Brady Operations Branch of those referrals that do not meet USAO guidelines.

Some Denied Persons Are Subsequently Determined by the ATF Not to Be Prohibited

After performing additional research, the ATF frequently determines that the denied individual is not prohibited from possessing a firearm. Generally this occurs because the FBI could not readily determine the individual's prohibited status due to inaccurate and incomplete automated state records.

We found that 69 of the 197 (35 percent) delayed denials and 16 of the 200 (8 percent) standard denials in our sample were applicants who should not have been prohibited from purchasing a firearm.[34] Special agents in each of the four divisions we visited stated that this was a common occurrence. Although the investigative files did not specify why the subjects in our sample were found not to be prohibited, our discussions with ATF personnel identified several reasons why this generally occurs: (1) the subject's firearm rights had been restored under state law, (2) the subject's prohibition for a misdemeanor crime of violence did not meet the federal criteria, or (3) a protective order had expired or was about to expire. These circumstances are discussed in detail in the following sections.

Firearm Rights Have Been Restored

Currently, when a federal crime is the prohibiting factor, the person's firearm rights can only be restored through a presidential pardon.[35] In relation to persons prohibited from possessing firearms due to a criminal conviction, the GCA states: "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has

[34] Although our sample included 200 delayed denials, 3 were referred to the state for retrieval action instead of to the ATF and therefore we did not include these cases in this analysis. See footnote 25 for additional details.

[35] Title 18 U.S.C. Section 925(c) states that an individual may apply to the Secretary of the Treasury for "relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation of firearms, and the Secretary many grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of such relief would not be contrary to the public interest." This function was delegated to the Director of the ATF. Congress has not authorized funding for this program since October 1992, and therefore the ATF no longer performs this function.

had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." [36]

All but two states have provisions for restoring firearm rights.[37] Firearm rights are restored automatically or through application. The conditions for restoration vary greatly among the states by age (juveniles versus adults), type of crime, and the time frame between release from prison or parole and restoration of rights. In some states, restoration rights specifically apply only to convicted felons, which may result in a paradoxical situation in which someone convicted of a misdemeanor crime of domestic violence is permanently barred from owning a firearm, while someone who kills his spouse has his firearm rights restored after serving his sentence.

Twenty-one states automatically restore firearm rights upon release from prison or completion of parole.[38] Forty-five states have provisions for restoring firearm rights through application.[39] A person, after a specified waiting period in which no additional crimes have been committed, can submit an application to the appropriate authority for restoration. Again, the conditions vary widely among the states.

Because these provisions affect the person's right to possess a firearm, it is important for FBI NICS examiners, Brady Operations Branch specialists, NICS coordinators, and ATF special agents to be familiar with them. Automatic restorations should readily be identified by FBI NICS examiners and Brady Operations specialists. Although we were unable to verify employee expertise in applicable state law, FBI NICS and Brady Operations Branch management assured us that their employees, who are assigned cases for particular states, have expertise

[36] 18 U.S.C. Section 921(a)(20).

[37] Statistics on states' restorations of rights provisions used in this section were extracted from the *Survey of State Procedures Related to Firearm Sales, Midyear 2002*, published by the DOJ's Bureau of Justice Statistics, October 15, 2003 (revised version) and from ATF P 5300.5 *State Laws and Published Ordinances – Firearms* (2003 – 24th Edition). The two states that do not have provisions for restoration rights are Alabama and Vermont.

[38] In six of these states, automatic restoration only applies to juveniles.

[39] In 21 of these states, restoration of firearm rights only occurs through pardons or expungements of records.

in the applicable state laws. Because it is difficult for FBI NICS management to ensure that the automatic restoration provisions are taken into account when determining whether to deny a firearm to a person, the ATF should report exceptions back to the FBI. Currently there is no mechanism to do so.

Restoration of rights through application is much more difficult for the FBI NICS examiner to ascertain. According to FBI NICS management, states are responsible for entering the names of persons whose rights have been restored into one of the criminal databases (III or NCIC). If this is properly done, the NICS check should identify not only the prohibiting factor, but also the restoration. However, considering the inaccessibility and incompleteness of some state criminal history records, it is unlikely that restoration information will be identified during the NICS check.[40]

Domestic Violence Criteria Were Not Met

Of the 85 cases in our sample closed by the ATF division, field, or satellite office because the person was determined not to be prohibited from possessing firearms, 27 (32 percent) had been denied under the prohibition for conviction of misdemeanor crimes of domestic violence.

For a misdemeanor crime of domestic violence to qualify as a federal prohibitor for firearms possession, certain criteria must be met, some of which are not readily apparent from the records included in the criminal databases. Before initiating an investigation or retrieving a firearm, the ATF special agent often needs to review court documents to determine whether all the prohibiting criteria are met. These criteria are:

- The offense must have an element of either using or attempting to use physical force or threatening the use of a deadly weapon;

- The defendant, at the time the crime was committed, must have had a relationship with the victim, specifically that of a spouse or ex-spouse, parent, or guardian; sharing a child in common;

[40] The problems of inaccessible and incomplete state criminal history records were noted by the General Accounting Office (GAO) in the following reports: *Gun Control: Implementation of the National Instant Criminal Background Check System*, GAO/GGD/AIMD-00-64 (February 2000); *Gun Control: Options for Improving the National Instant Criminal Background Check System*, GAO/GGD-00-56 (April 2000); *Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System*, GAO-02-720 (July 2002); and *National Criminal History Improvement Program: Federal Grants Have Contributed to Progress*, GAO-04-364 (February 2004).

cohabiting or having cohabited with the victim; or similarly situated to a spouse, parent, or guardian of the victim;

- The defendant must have been represented by counsel or knowingly and intelligently have waived the right to counsel at the time of his or her conviction;

- The defendant must have been entitled to a jury trial or knowingly and intelligently have waived the right to have the case tried by a jury; and

- The defendant must not have had the conviction expunged or set aside, or received a pardon or a restoration of firearm rights.[41]

To qualify under this prohibition, the person does not have to have been convicted specifically for a misdemeanor crime of domestic violence. According to Title 9, Section 1117 of the United States Attorneys' *Criminal Resource Manual*, this prohibition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery), if the offense is committed by one of the defined parties.

In some states, few crimes of domestic violence qualify as prohibiting factors. For example, most domestic violence cases in Louisiana do not meet the criteria because any misdemeanor for which the punishment is a fine of $1,000 or less or imprisonment for six months or less is tried without a jury.[42] Most domestic violence crimes are charged as either simple battery or aggravated assault, which fall below the level requiring a jury trial. The defendant also does not have the right to counsel. Therefore, under these criteria, a person with a domestic violence conviction in Louisiana is not prohibited from possessing a firearm.

In some cases, a person's prohibited status cannot be determined without a review of court records. In these cases, it is difficult for the FBI NICS examiner to obtain the information within the 3-day period. However, wherever possible the ATF should try to identify trends in inappropriate referrals and communicate these to FBI NICS in order to

[41] 18 U.S.C. Section 921.

[42] Louisiana Code of Criminal Procedures Article 779, Trial of Misdemeanors, Section A.

reduce the number of inappropriate denials. For example, if the ATF identifies that persons in a particular state are never prohibited because the legal process in that state does not meet the prohibitive criteria, the ATF needs to communicate this to the FBI NICS Section.

Protective Orders Have Expired

Being under an active protective order is one of the prohibiting factors for possessing a firearm. If a protective order has expired when the ATF begins its investigation, the ATF will not initiate a firearms retrieval or investigation because the person is no longer prohibited from possessing a firearm. This occurred in 7 of the 85 cases (8 percent) in our sample closed by the division, field, or satellite office. These cases could be screened more efficiently by the division office NICS coordinator or a contract or administrative employee instead of being assigned to a special agent.

RECOMMENDATION

Recommendation 10: The ATF should require division office NICS coordinators and field office personnel to notify the Brady Operations Branch and the FBI NICS Section of trends in inappropriate referrals of non-prohibited persons. Also, require that the field office personnel, via the division office NICS coordinators, provide to the FBI NICS Section the names of those individuals that the ATF determines not to be prohibited and documentation to support the reason for the person's non-prohibited status.

Improvements Are Needed in Brady Operations Branch

The ATF Brady Operations Branch periodically has extensive workload backlogs due to insufficient staffing and operational inefficiencies resulting from technological limitations.

The Brady Operations Branch has made significant progress in processing NICS referrals since its establishment in January 2000.[43] In October 2000, the FBI began forwarding denials to the Brady Operations Branch on a daily basis (prior to this, the denials were forwarded every two weeks). In August 2002, the ATF NICS Referral (ANR), the system

[43] This is the date when the first permanent staff was hired. Prior to this, field special agents were detailed on a rotating basis.

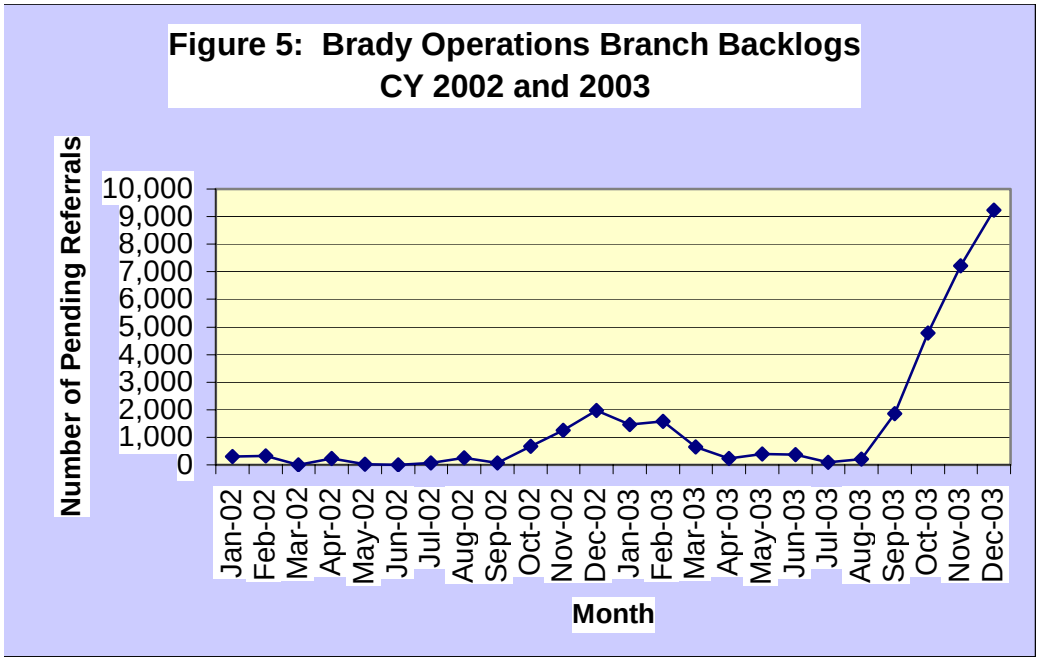
used by the ATF to receive referrals from the FBI, was integrated with the ATF's NFORCE system. This enabled ATF division office personnel to access a NICS denial file once the Brady Operations Branch specialist processed the denial. Prior to this, the Brady Operations Branch had to mail or fax the referral information to the division offices. These changes have made the referral process more timely and efficient.

However, funding constraints have hindered its continued progress. Part of the problem results from the Brady Operations Branch not having a separate budget and therefore having little control over its yearly funding. In the following sections, we discuss the impact these funding constraints have had on processing NICS referrals. We also discuss a technological modification needed to improve the referral process.

Additional Staffing Is Needed to Ensure Timely Processing

During our review, we noted excessive backlogs occurring at the Brady Operations Branch during the peak processing season (October through December). Brady Operations Branch specialists told us that it generally takes them four months to process the large volume of referrals received during this period. Although denials requiring firearms retrievals are processed and referred to the appropriate division offices on the same day as they are received, the standard denials are queued and processed by each specialist in the order received. As a result, the standard denials received by the Brady Operations Branch during the peak season may not be transferred to the field for investigation for three to four months. And because cases are processed in the order received, there is no priority processing of cases that merit prosecution, such as those in which the subject is considered a danger to the community.

At the time of our January 2004 site visit, the Brady Operations Branch was experiencing extensive workload backlogs as shown in Figure 5.



Source: ATF Brady Operations Branch

According to Brady Operations Branch management, the extensive current backlogs are due to an overall increase in workload (an additional 5,300 referrals from the prior year), the transfer of a high-producing specialist, and insufficient staff. Management stated that during this past peak season, FBI NICS was sending 300 to 400 referrals a day for processing to the seven Brady Operations Branch specialists. As of June 2004, substantial backlogs still existed. According to a Brady Operations Branch official, as of June 10, 2004, 2,819 standard denial referrals were still awaiting processing.

The specialists we interviewed concurred with management's assessment of the reasons for the backlogs. During interviews with each of the specialists, they stated that during this past peak season they were each receiving up to 90 referrals a day. In December 2003 and January 2004, their individual backlogs ranged from 700 to 2,000 cases. The specialists told us that generally they start falling behind on their workload in November and are not able to catch up until April or May. All of the specialists we spoke with agreed that additional permanent staff is needed to prevent backlogs, with the general consensus that at least two specialists are required.

Brady Operations Branch management agreed with the specialists' assessment that at least two additional specialists were needed. They noted that the number of specialists has decreased from nine when the

Brady Operations Branch was first established to seven. Further, there is a possibility of workload increases if any additional POC states decide to turn their operations over to FBI NICS because of dwindling state resources.[44]

When contacted in April 2004, the Brady Operations Branch Chief stated that they had put in a request for two contract employees to supplement the specialist staff. He also mentioned that an additional permanent specialist position had been approved. As of June 2004, the contractor positions had not yet been funded.

Computer System Limits Efficiency

Brady Operations Branch officials told us that funding during the past three years has not increased sufficiently to support technological modifications to improve efficiency. Primary among the needs is modifying the ANR computer system to include digital imaging, which would allow Brady Operations Branch specialists to scan documents, such as ATF Form 4473 and court records, into the system and send them electronically to ATF division offices. Currently, these documents are faxed or mailed by the Brady Operations Branch to the ATF division office NICS coordinators, who must in turn fax or mail these documents to the field offices. Other modifications would enable Brady Operations Branch management to monitor processing timeliness, require specialists to document the qualifying criteria, enlarge the space for specialists to type their comments, and allow the specialists to automatically identify instances in which the prohibited person either made or attempted to make multiple firearms purchases.

Brady Operations Branch officials told us that in 2003 they had submitted a request to ATF headquarters for $760,000 for 25 modifications to ANR. In April 2004, the Brady Operations Branch Chief told us that the funding request had been denied. When questioned about the funding request, an ATF headquarters official cited other funding priorities as the reason for the denial.

[44] The state of Indiana dropped out of the POC program in October 2003. During our review, FBI NICS and Brady Operations Branch managers stated that several other states were considering dropping out of the POC program due to funding issues.

The FBI Needs to Distinguish Delayed Denials from Standard Denials

Currently the FBI NICS Section's daily electronic transfer of denials to the Brady Operations Branch does not distinguish between delayed denials and standard denials. Because delayed denials have a higher priority – a prohibited person has received a firearm that needs to be retrieved – they need to be removed from the queue and immediately forwarded to the appropriate ATF division office for action.

The identification of the delayed denials is currently a manual process. Daily, the FBI NICS Section sends by facsimile an initial firearms retrieval notification for each denial in which the firearm has been transferred to a prohibited person. The Brady Operations Branch logs and files the facsimiles in the "pending" drawer to await the corresponding electronic submission. When the electronic transfer is received, the Brady Operations Branch specialist retrieves the faxes and pulls the denial out of the electronic queue for processing. The Brady Operations Branch also checks the fax log entries against the electronic submission to ensure that all the delayed denials appear on the electronic submission.

In our opinion, this is an unnecessarily cumbersome process for both the FBI NICS Section and the Brady Operations Branch. Delayed denials should be distinguished from standard denials on the daily electronic submission. According to Brady Operations Branch officials, the FBI NICS Section has agreed to implement this modification but has put it on the "back burner" because it is a low priority. In April 2004, we contacted the FBI NICS Section Chief about this issue. He also agreed that it appeared to be a beneficial modification. He later informed us that he had submitted a program change request for the modification, but that he was advised that, due to the existing backlog of requested computer enhancements, this would not be implemented until at least the end of CY 2005.

RECOMMENDATIONS

Recommendation 11: The ATF should ensure that the Brady Operations Branch is sufficiently staffed to minimize backlogs and sufficiently funded to implement necessary automated system modifications.

Recommendation 12: The FBI should distinguish delayed denials from standard denials on its daily electronic transfers of denial transactions to the ATF.

Few NICS Cases Are Prosecuted

Despite the large number of Brady Act violations identified by the FBI, these violations rarely have been prosecuted. Historically, the USAOs have been unsuccessful in achieving convictions in many of these types of cases. Consequently, they have been unwilling to prosecute most NICS cases.

A June 28, 2001, memorandum from the Attorney General directed the U.S. Attorneys to "make it a priority to enforce the law against those persons who attempt to subvert the legitimate crime prevention objectives of the Brady Act and to incorporate this new focus into [their] comprehensive prosecutive efforts." The memorandum further stated, "Persons who violate federal gun laws will find a determined adversary in this Administration, this Department, and in each United States Attorney. As the nation's prosecutors, you must send a clear message: gun crime means hard time."

We found that very few NICS cases are prosecuted. During CYs 2002 and 2003, the USAOs prosecuted only 154 (less than 1 percent) of the 120,000 persons who were found to be a prohibited person during the NICS background check. Of the 400 NICS cases in our sample, only 8 cases had been referred by the ATF to a USAO for prosecution (another 2 involved subjects who were already under arrest for other crimes and were being prosecuted by the state).[45]

During this period, the ATF formally referred a total of only 230 cases to the USAOs (185, or 80 percent were accepted for prosecution). These numbers reflect only formal referrals and not the number of informal referrals made by the ATF. Most of the ATF special agents at the 13 field offices we contacted stated that before preparing a formal referral, their office's practice was to first contact the USAO and

[45] Of these eight referrals, two persons were prosecuted and found guilty, one was prosecuted and found not guilty, three were declined, and two were pending at the time of our review. Two of the declined cases were subsequently accepted and prosecuted by the state.

determine whether the USAO was interested in accepting the case. These informal referrals were not quantified in NFORCE, but generally were documented in a management case log, which is part of the investigative case file.[46] Because the ATF does not formally track informal referrals, we were unable to determine the actual number of cases that the ATF field offices referred to the USAOs.

Although the number of prosecutions is low, we concluded that this has more to do with the nature of the cases than with the unwillingness of the USAOs to prosecute. In fact, the ATF special agents we spoke with (located in 13 different states) and SACs and ASACs (located in four divisions) consistently complimented their USAO's willingness to prosecute NICS cases. They consistently commented that it was difficult to find a "good" NICS case to refer to the USAO because these cases generally lacked jury appeal.

They said lack of jury appeal was the result of several factors:

- The NICS denial was based on an old conviction and the prohibited person has no record of subsequent criminal activity. Of the 229 cases in our samples where we could determine the dates of convictions, in 110 cases the prohibiting conviction occurred at least 5 years prior to the attempted firearms purchase (48 percent of the cases in which we could determine a date); in 30 of these cases, the prohibiting conviction occurred at least 20 years prior (13 percent of the cases in which we could determine a date).[47] The oldest crimes in our sample were a breaking-and-entering case from 1958, an attempted burglary case from 1963, and a misdemeanor crime of domestic violence case from 1964.

- The NICS denial was based on a felony conviction for a nonviolent crime. Nonviolent crimes in our sample included passing bad checks, failure to pay child support, sales tax evasion, shoplifting, theft of public benefits, and fraud. One of the Brady Operations Branch specialists told us that he once

[46] Of the 381 delayed and standard denial cases in our sample that had been completed, there were indications in 43 files (11 percent) that the case had informally been referred to the USAO, where it was declined.

[47] We were not always able to readily determine the age of the prohibiting conviction from the documentation provided to us. The 229 cases include cases from both our Brady Operations Branch sample (100 cases sampled) and our field office sample (400 cases sampled).

received a denial for a 1941 felony conviction for stealing a pig. A special agent at one of the field offices cited a 1969 felony for stealing four hubcaps from a car.

- It is not evident that the person was aware that he or she was prohibited from possessing a firearm. According to Section 1117 of the U.S. Attorneys' *Criminal Resource Manual*, one of the factors to be used in determining if a particular case merits federal prosecution is whether the potential defendant was "on notice" that his or her possession of a firearm was illegal.[48] Several ATF special agents stated that when they contact individuals, many said they did not realize they were prohibited from possessing a firearm. Some knew that they had been convicted of a crime, but did not realize that the charge was a felony. Others did not realize that they were subject to the prohibition of misdemeanor crimes of domestic violence because they actually were charged with another type of offense, such as assault or disorderly conduct.

- The person attempted to purchase a long gun, not a handgun. Several ATF special agents stated that it was difficult to prosecute long gun cases in those states where hunting is a popular sport. Agents said that jurors in these states often believe that a person should have the right to purchase a long gun for hunting purposes, and therefore they are less likely to convict prohibited persons who attempt to purchase long guns for lying to the FFL concerning their prohibited status.

- The person is prohibited for being a fugitive. Title 18 U.S.C. Section 921(a)(15) defines a fugitive from justice as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." FBI NICS denies a firearm to any person who has an outstanding warrant from another state under the federal prohibitor "fugitive from justice." However, to prosecute these types of cases, there would have to be evidence that the reason the person left the state was to avoid prosecution or giving testimony in a criminal proceeding. These conditions are difficult to prove. Even if there was evidence that the person left the state for these

[48] Other factors to consider are the date of the previous conviction, the circumstances under which the firearm was obtained, the existence of indicators of current potential for violence, available alternatives to federal prosecution, and whether false statements were made.

reasons, the case may not be prosecutable if the basis for the warrant is not considered to have prosecutorial merit, e.g., if the warrant is for crimes such as traffic violations or for shoplifting.

- The person is prohibited for noncriminal reasons. Absent any criminal record, persons who are prohibited because they are illegal or nonimmigrant aliens, have received dishonorable discharges from the military, have renounced their citizenship, or have been adjudicated mentally defective are generally not prosecuted.

Based on our review of 400 NICS investigative files, in all but one case we agreed with the ATF's assessment that the cases failed to meet USAO prosecutorial guidelines.[49] The eight cases in our sample that had been referred for prosecution represented more egregious cases. These included:

- A person who was denied a firearm because he was indicted for felony child abuse (the subject was also a felon who had been previously convicted on an arson charge). A search of the subject's premises resulted in the recovery of 11 firearms that the subject said he was "holding for a friend." When questioned, the subject stated that he "forgot he wasn't supposed to have firearms."

- A person with an active restraining order against him.

- A person who was denied as a felon because he was convicted under a federal charge for the unlawful making of a destructive device and under a state charge for attempted homicide and the use of a dangerous weapon. These charges stemmed from a 1989 incident where the subject tried to run over a sheriff's deputy and was found to have two sticks of dynamite in his truck. The subject was also arrested in 1995

[49] This case was a standard denial for a person prohibited on the basis of a conviction for misdemeanor crime of domestic violence. The case appeared to meet the USAO's prosecutorial guidelines because the crime was recent (four months prior to the attempted firearm purchase) and there appeared to be a pattern of violence (the person had been charged with felony charges of aggravated assault twice in the past two years). We brought this particular case to the ATF's attention and ATF agents agreed that the case appeared to meet the USAO's prosecutorial guidelines. Subsequent to our review, agents contacted the USAO, who later declined prosecution.

for kidnapping, rape, and assault (he was convicted of unlawful restraint).

- A person who purchased two handguns even though he had been convicted of a misdemeanor crime of domestic violence the preceding year.

- A person who was convicted of felony possession of marijuana with intent to deliver and who purchased a 9mm handgun one week after his conviction.

CONCLUSION

The ATF is responsible for ensuring that firearms remain out of the hands of prohibited persons and for investigating criminal attempts to evade the Brady Act's requirements. The FBI refers to the ATF the names of all prohibited persons who either attempted to or succeeded in obtaining a firearm from an FFL. The ATF's responsibilities are then twofold: to promptly retrieve those firearms that were transferred to persons subsequently found to be prohibited and to investigate those referrals that have prosecutorial merit.

Due to the risk to the public, it is imperative that the ATF quickly retrieve firearms possessed by prohibited persons. We found, however, that although the ATF is almost always able to retrieve these firearms, the retrievals are not always timely. We identified excessive delays in retrieving the firearms in 65 of the 188 cases (35 percent) we reviewed for which investigations were completed. In 28 of these 65 cases (43 percent), it took from four months to over a year to retrieve the firearm. At the four locations we visited, ATF field staff attributed these delays to the failure of one of the NICS coordinators to refer these cases to the field offices in a timely manner and to the lack of sufficient field special agents to deal with large volumes of labor-intensive NICS referrals, wide geographic territories, and other competing investigative priorities. In addition, although the ATF considers firearms retrievals to be a priority, it has not established performance standards for timeliness, and therefore ATF management is unable to determine whether the retrievals are being performed on a timely basis. We also found that the ATF special agents were not documenting sufficiently firearms recoveries involving transfers of the firearm to a third party, returns of the firearm to the FFL, or seizures of the firearm by local law enforcement. Further, they were not documenting that background checks were conducted to ensure that the third party was not prohibited from possessing a firearm.

In addition, although the ATF has made progress since the program was initiated in 1998 to limit the number of referrals sent to the field offices for investigation, the field offices still are receiving too many standard denial referrals that do not have prosecutorial merit. USAO prosecutorial guidelines are a critical tool used by the ATF to determine which NICS cases to investigate. However, we found that not all of the USAOs have provided sufficient prosecutorial guidelines to the ATF. We also found that the ability of the ATF to sufficiently screen the NICS

referrals, and therefore prioritize the NICS case workload, was hampered by the failure of some division office NICS coordinators to screen the referrals before forwarding the cases to a field office; the lack of training and written guidance for the NICS coordinators; the Brady Operations Branch's unnecessary forwarding of noncriminal alien cases to the division offices; and the overall lack of communication among the Brady Operations Branch specialists, the division office NICS coordinators, and field office special agents regarding the types of cases meriting investigation.

Funding constraints had hurt the effectiveness of the Brady Operations Branch's operations with staffing shortages resulting in large workload backlogs. Further, the Brady Operations Branch has been unable to implement systems modifications that would make the referral process more efficient. Specifically, the Brady Operations Branch does not have the technological capability to both distinguish NICS denials by federal judicial districts (and therefore specific USAO prosecutorial guidelines) and route the denials directly to the field offices. As a result, the NICS denials must be routed to the field offices through the division office NICS coordinators, who generally also perform further screening of the standard referrals using more specific USAO prosecutorial guidelines.

We also found that less than 1 percent of the individuals who committed Brady Act violations were prosecuted. However, most NICS cases do not meet prosecutorial guidelines due to the age of the prohibiting convictions, the nonviolent or noncriminal nature of many of the prohibiting factors, the difficulty in proving intent to deceive, the type of firearm involved, and other factors.

We made 12 recommendations to improve the operation of the ATF's investigations, retrieval, and prosecution of Brady Act violations. We believe that the ATF's and the Department's implementation of these changes will significantly improve the enforcement of Brady Act violations identified through the NICS.

APPENDIX I: STATES AND THEIR LEVEL OF PARTICIPATION IN NICS

FULL PARTICIPANTS (14): States that conduct their own NICS checks for all firearms purchases and for permits for handguns and long guns.

California	Hawaii	Pennsylvania
Colorado	Illinois	Tennessee
Connecticut	Nevada	Utah
Florida	New Jersey	Virginia
Georgia	Oregon	

Note: The FBI performs pre-pawn checks for Florida.

PARTIAL PARTICIPANTS (9):
States that conduct their own NICS checks for handgun permits, while the FBI conducts the NICS checks for long gun purchases.

Iowa	Nebraska	North Carolina
Michigan	New York	

States that conduct their own NICS checks for handgun purchases, while the FBI conducts the NICS checks for long gun purchases.

Maryland	Washington	Wisconsin
New Hampshire		

NONPARTICIPANTS (27 States; 4 Territories or Commonwealths; Washington D.C.): States where the FBI conducts all NICS checks on both handguns and long guns.

Alabama	Louisiana	Ohio
Alaska	Maine	Oklahoma
Arizona	Massachusetts	Rhode Island
Arkansas	Minnesota	South Carolina
Delaware	Mississippi	South Dakota
Idaho	Missouri	Texas
Indiana	Montana	Vermont
Kansas	New Mexico	West Virginia
Kentucky	North Dakota	Wyoming
Guam	Puerto Rico	Washington, D.C.
U.S. Virgin Islands	Northern Mariana Islands	

APPENDIX II: NUMBER OF STANDARD DENIALS EITHER CLOSED BY THE ATF BRADY OPERATIONS BRANCH OR SENT TO THE ATF FIELD DIVISIONS FOR INVESTIGATIONS (CY 2002 AND CY 2003)

ATF Field Division	Referral Status		
	Not Referred	Refer-Standard	Total Processed
New Orleans	10,953	1,047	12,000
St. Paul	10,049	1,122	11,171
Charlotte	10,286	800	11,086
Dallas	9,730	950	10,680
Columbus	9,276	1,292	10,568
Seattle	7,188	1,298	8,486
Houston	7,294	1,092	8,386
Phoenix	6,340	688	7,028
Louisville	5,924	869	6,793
Kansas City	5,134	1,493	6,627
Nashville	5,110	705	5,815
Detroit	4,648	734	5,382
New York	2,211	624	2,835
Baltimore	2,367	325	2,692
Boston	1,603	260	1,863
Tampa	571	131	702
Miami	195	73	268
San Francisco	2	0	2
Total	**98,881**	**13,503**	**112,384**

Source: Brady Operations Branch

APPENDIX III: NUMBER OF NICS CASES RECEIVED BY THE ATF FIELD DIVISIONS FROM THE ATF BRADY OPERATIONS BRANCH (CY 2002 AND CY 2003)

ATF Field Division	Referral Status		Total Cases Referred
	Refer-Delayed	Refer-Standard	
Kansas City	594	1,493	2,087
Seattle	635	1,298	1,933
New Orleans	820	1,047	1,867
Columbus	507	1,292	1,799
St. Paul	582	1,122	1,704
Houston	384	1,092	1,476
Dallas	503	950	1,453
Louisville	398	869	1,267
Charlotte	376	800	1,176
Phoenix	472	688	1,160
Nashville	336	705	1,041
Detroit	216	734	950
New York	153	624	777
Baltimore	118	325	443
Boston	110	260	370
Tampa	62	131	193
Miami	20	73	93
Total	**6,286**	**13,503**	**19,789**

Source: Brady Operations Branch

APPENDIX IV: ATF COMMENTS ON THE DRAFT REPORT

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of the Director

JUL - 9 2004

Washington, DC 20226

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MEMORANDUM TO: Assistant Inspector General for Evaluation and Inspections

FROM: Director

SUBJECT: Response to the Office of Inspector General's (OIG) Draft Report: Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified through the National Instant Criminal Background Check System, A-2004-001.

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) appreciates the opportunity to respond to the recommendations from the OIG's above-cited draft report. Although we were previously aware of and acting to improve many areas included in your findings, we welcome constructive criticism of our programs as this independent evaluation process typically helps us improve our ability to effectively plan and manage our resources efficiently.

As you know, ATF's move to the Department of Justice established an agency with a more focused mission that reaffirms the importance of preventing the criminal misuse of firearms and explosives. As part of the Department of Justice, we are becoming a stronger, more effective law enforcement and regulatory agency. One part of our mission is to vigorously enforce the Federal firearms laws, which includes National Instant Criminal Background Check System (NICS) referrals from the FBI.

We strongly believe that one of the principal activities of successful firearms enforcement efforts is the effective referral of firearms denials received from the FBI's NICS Operation Center. As such, ATF continues to assess our practices and procedures to ensure that we are constantly improving this complex process.

By way of example, ATF Order 3310.4C, Integrated Violence Reduction Strategy, which includes a section on the investigation of straw purchase and false statement violations resulting from NICS checks, is in the final stages of review prior to printing. Through these guidelines, ATF will provide additional guidance for the field on improving its NICS procedures and taking appropriate actions necessary to meet or exceed recommendations regarding documentation of NICS referrals.

Assistant Inspector General for Evaluation and Inspections

In general, ATF believes there is a need to increase its resources dedicated to firearms investigations and we have addressed this need in our FY 2006 budget submission.

Our responses to your recommendations are as follows:

1. Modify its case management system to allow the Brady Operations Branch to refer delayed denials directly to the appropriate ATF field office.

ATF does not concur with this recommendation.

ATF believes that decentralizing the process at the division office level would not improve the processing of NICS referrals. The special agent in charge (SAC) of each division office needs to be aware of the types and level of investigative activity being performed by assigned special agents. The SAC, in cooperation with U.S. Attorneys, needs to be able to analyze and prioritize the referrals based on individual law enforcement priorities. This can best be accomplished when the delayed denials, as well as standard denials, flow through the SAC office.

Alternatively, ATF believes that improving communications through the NICS Coordinators and Brady Operations Branch would better serve to improve the process. ATF intends to focus on this issue in future training.

2. Use non-agent personnel to handle the administrative tasks related to NICS cases.

ATF does not concur with this recommendation.

While ATF agrees with your assessment that some of the administrative tasks related to NICS cases could be, and in some cases currently are, handled by non-agent personnel, ATF believes that it would be very costly to employ and train additional contractors or other ATF personnel to assist with NICS cases, especially when the need does not appear to be crucial. First, the volume of referrals of delayed denials has been steadily reduced since the inception of NICS, and we expect this trend to continue. Therefore, we do not believe it is appropriate to dedicate contractor resources to an area with a declining workload. In addition, clearly established written referral guidelines, which come from, or are approved by, the U.S. Attorney's Office (USAO) would serve to further reduce the number of referrals to a level that could be managed by existing ATF special agents and field support personnel. This is an issue ATF continues to pursue with the USAOs throughout the country. Finally, ATF firmly believes that although investigative assistants and analysts can assist with the administrative tasks related to a NICS case, this is a limited role and only ATF special agents, who are trained professionals in firearms investigations can determine the type and immediacy of any action that should be taken in response to a particular referral.

Assistant Inspector General for Evaluation and Inspections

3. Establish timeliness standards for firearm retrievals and develop a system for ATF field office management to monitor and report on compliance with these standards.

ATF concurs with this recommendation, in part.

The monitoring of firearm retrievals is the direct responsibility of the field supervisors. The nature and complexity of NICS referrals dictates that they should be examined and investigated on a case-by-case basis. Depending on the nature of the referral, we are sometimes unable to meet a specific deadline on firearms retrievals. Therefore, a specific "timeliness standard" cannot be applied to all cases. In addition, special agents are not always afforded the luxury of making contact with the individuals on the first, second, or even third attempt. However, ATF agrees that general timeliness standards could be established. ATF is in the process of drafting instructions to the field that will mandate that an investigation be initiated within 30 days of receipt of the referral. The referral will also require that agents document in N-FORCE investigative activity at least once every 30 days until the case is recommended for prosecution, the firearm is recovered, or the case is closed.

4. Revise its standard initial contact letter to include a response timeframe and direct its personnel to send the letters on a timely basis, track responses to the letters, and take timely action to retrieve the firearms when the letters are unsuccessful in eliciting a response.

ATF concurs with this recommendation.

ATF will be issuing to all field offices a memorandum that will recommend all initial contact letters be sent certified and return receipt requested. The contact letter will also be amended to state that the recipient of the letter must contact ATF within 14 days of receiving the letter.

In addition, ATF Order 3310.4C, Integrated Violence Reduction Strategy, will direct agents to track cases within N-FORCE to ensure that actions are timely.

5. Examine the feasibility of enabling Brady Operations Branch specialists to identify NICS cases by Federal judicial district so that they can be screened using specific USAO guidelines. In the interim, require that all division office NICS coordinators screen standard denial referrals and refer to the field office only those cases that meet USAO prosecutorial guidelines.

ATF concurs with this recommendation.

ATF believes USAO guidelines are at the core of a successful NICS referral program. Since the beginning of the Brady Operations Branch NICS referrals system, ATF has

continually sought USAO guidelines in order to streamline the referral process. To date eight field divisions have provided tailored criteria from the USAO's; however, none are specific to particular judicial districts.

The Brady Operations Branch is currently involved in a pilot program with the Boston Field Division to have each of the USAO's provide specific NICS criteria so that the Branch can begin referring cases under specific guidelines by judicial district.

Under current ATF guidelines, NICS coordinators should already be screening standard denial referrals and referring to the field offices only those cases that meet USAO prosecutorial guidelines.

6. Provide annual training to the NICS coordinators and develop a NICS coordinator handbook.

ATF concurs with this recommendation.

In the past, ensuring that coordinators have the necessary training has been problematic because of a high turnover of personnel in that position. However, ATF's Brady Operations Branch has scheduled a conference with all NICS Coordinators in August 2004, and a NICS handbook will be provided at the conference.

7. Require that Brady Operations Branch refer to the field offices only those alien cases that meet the USAO prosecutorial guidelines.

ATF concurs with this recommendation.

ATF agrees that the Brady Operations Branch should refer only those alien cases that meet USAO prosecutorial guidelines; however, ATF has not been provided specific USAO guidelines applicable to alien cases. As a result, until ATF receives such guidance, the Brady Operations Branch will continue to refer to the field only those alien denials that result from both firearm and immigration violations. For example, if an alien's case fits the current referral guideline to be referred as a firearms case, the Brady Operations Branch forwards it to the respective division while also notifying Immigration and Customs Enforcement (ICE). However, if the denial of a transfer to an individual was based only on an immigration violation, a referral is prepared and forwarded only to ICE.

8. Require that division office NICS coordinators and field office personnel notify the Brady Operations Branch of referrals that did not meet USAO guidelines.

ATF concurs with this recommendation.

Should ATF receive previously mentioned guidelines from each USAO, the number of standard denials forwarded to field offices will be dramatically reduced. In the interim,

the Brady Operations Branch will work with the NICS coordinators to determine whether there are additional screening guidelines employed by the field divisions that can be introduced and utilized by the Brady Operations Branch. By ensuring that the field and the Brady Branch are using the same screening guidelines, we believe we can decrease the number of unnecessary referrals.

9. Require that division office NICS coordinators and field office personnel notify the Brady Operations Branch and the FBI NICS Section of trends of inappropriate referrals of non-prohibited persons. Also, require that field office personnel, via the division office NICS coordinators, provide to the FBI NICS Section the names of those individuals that the ATF determines not to be prohibited and documentation to support the reason for the person's non-prohibited status.

ATF concurs with this recommendation.

ATF developed and introduced N-Force to assist investigators in gathering, reporting, and accessing investigative case data with a goal of reducing the amount of time spent on administrative functions by special agents. This computer tracking system for investigations indicates that approximately 10 percent of the NICS referrals forwarded to the field by Brady Operations Branch are closed as "Not a Prohibited Person" as a result of subsequent investigation. The remaining 90 percent are cases involving confirmed prohibited persons.

Whenever "trends" are identified, ATF will report these to the Brady Operations Branch and FBI NICS Section. In the early stages of the Brady Law, the percentage of denials, which were later determined as not prohibited, was much larger than it is today because the process has evolved and improved.

ATF will establish a method by which the field can capture nonprohibited referrals and supply that information to the Brady Operations Branch who will in turn notify the FBI NICS Section.

10. Ensure that the Brady Operations Branch is, and continues to be sufficiently staffed to minimize backlogs and sufficiently funded to implement necessary automated system modifications.

ATF concurs with this recommendation.

ATF agrees that the Brady Operation Branch needs additional staffing as well as improvements to the ATF NICS Referral System. However, many operational areas within ATF are also in pressing need of personnel and resources. ATF must carefully allocate its resources in accordance with priorities established by the Department of Justice and ATF among the full array of activities. We will ensure that the Brady

Assistant Inspector General for Evaluation and Inspections

Operations Branch is sufficiently staffed to fulfill its mission. Toward this end, we are hiring two data entry contractors.

Conclusion:

ATF will employ a well-balanced strategy to ensure that NICS delayed and standard denials are acted upon in a timely fashion. Additionally, ATF will maximize the use of our available resources. ATF faces a number of emerging challenges in the years ahead, which dictate that ATF utilize innovative solutions and technology in its strategies to accomplish goals we have set. ATF will continue, in the years to come, to look for ways to improve our business practices.

If you have any questions regarding this response, please contact, Carol Campbell Audit Liaison, Office of Inspection, at (202) 927-8276.

Carl J. Truscott

APPENDIX V: EOUSA COMMENTS ON THE DRAFT REPORT

U.S. Department of Justice

Executive Office for United States Attorneys
Office of the Director

RFK Main Justice Building, Room 2616
950 Pennsylvania Avenue, NW
Washington, DC 20530

(202) 514-2121

JUL 15 2004

Paul A. Price
Assistant Inspector General
for Evaluation and Inspections
Office of the Inspector General
U.S. Department of Justice

Re: Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System (A-2004-001)

Dear Mr. Price:

This is in response to your recent memorandum which accompanied your draft report in the above-referenced matter.

Your draft report included one recommendation for the Executive Office for United States Attorneys (EOUSA):

> Ensure that annually each USAO provides the ATF with specific prosecutorial guidelines for NICS cases.

EOUSA concurs with the recommendation insofar as it seeks to ensure better communications between the U.S. Attorney's Offices (USAOs) and their counterpart ATF offices regarding the prosecution of NICS cases. In July 2001, EOUSA directed all USAOs to review and revise their respective NICS case guidelines in accordance with the Attorney General's directive of June 28, 2001, and the USAOs complied with this request. In light of the above recommendation, EOUSA will take steps to encourage each USAO to review these guidelines annually, to update the guidelines if necessary, and to ensure that any updated guidelines are provided to ATF.

Thank you for the opportunity to respond to your recommendation. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Mary Beth Buchanan

Mary Beth Buchanan
Director

APPENDIX VI: FBI COMMENTS ON THE DRAFT REPORT

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

July 2, 2004

Mr. Paul A. Price
Assistant Inspector General
for Evaluation and Inspections
Office of the Inspector General
Department of Justice
950 Pennsylvania Avenue, Northwest
Washington, D.C. 20530-0001

Dear Mr. Price:

Reference is made to your memorandum dated June 15, 2004, addressed to Carl J. Truscott, Director, Bureau of Alcohol, Tobacco, Firearms and Explosives; Mary Beth Buchanan, Director, Executive Office for U.S. Attorneys and Robert S. Mueller [sic], Director, Federal Bureau of Investigation.

In response to Recommendation 12, on page 47, of the Review of the Bureau of Alcohol, Tobacco, Firearms (ATF), and Explosives' Enforcement of Brady Act Violations Identified through the FBI-National Instant Criminal Background Check System [NICS] document A-2004-001, the FBI-NICS Section would like to make known that Program Change Request (PCR) number 2602 initiated on April 13, 2004, will allow for the marking of all transactions that require a firearm retrieval (referred to by ATF as delayed denials). The change to the FBI-NICS will allow the separation and daily transfer of two separate files to the ATF. One file will contain the standard denials. The second file will contain what FBI-NICS refers to as firearm retrievals or ATF calls delayed denials.

Firearm retrievals are transactions where the FBI-NICS Section has determined the subject purchasing the firearm to be prohibited after the third business day, but where the firearm transferred at some point between the third business day and when the determination was reached. These transactions are verified by the FBI-NICS Section's Firearm Retrieval Team who then notifies the Brady Operations Branch of the ATF.

Mr. Paul A. Price

This PCR has been prioritized with the other PCRs needed by the FBI-NICS Section. Its implementation would be September 2005, barring any congressionally mandated system changes between now and then. In the interim, the Firearm Retrieval Team can continue to provide the ATF Brady Operations with the list and/or information regarding these transactions.

Sincerely yours,

SC McCraw

Steven C. McCraw
Assistant Director
Inspection Division

2

APPENDIX VII: OIG ANALYSIS OF ATF, EOUSA, AND FBI COMMENTS

On June 16, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Executive Office for U.S. Attorneys (EOUSA), and the Federal Bureau of Investigation (FBI) with a request for written comments. The ATF, EOUSA, and FBI responded to us in separate memoranda dated July 9, July 15, and July 2, 2004, respectively. The ATF concurred with eight of the ten recommendations that required its action. The ATF did not concur with our recommendation to modify the NFORCE system to allow the Brady Operations Branch to refer delayed denials directly to the appropriate ATF field office, or our recommendation to use non-agent personnel to handle the administrative tasks related to NICS cases. The EOUSA and the FBI concurred with the recommendations (one each) that required their action. Our analysis of the components' comments follows.

RECOMMENDATIONS

Recommendation 1: The ATF should modify its NFORCE system to allow the Brady Operations Branch to refer delayed denials directly to the appropriate ATF field office.

Status: **Unresolved – Open.**

Summary of ATF Response. The ATF did not concur with this recommendation. The ATF stated that it did not believe that decentralizing the referral process would improve the processing of NICS referrals. In addition, the ATF stated that the special agents in charge (SAC) of its division offices need to be aware of the types and level of investigative activity being performed by assigned special agents and need to be able to analyze and prioritize the referrals based on individual law enforcement priorities.

OIG Analysis. We disagree with the ATF's rationale for not implementing this recommendation. At none of the four ATF division offices we visited did the SACs review, analyze, or prioritize the delayed denials. Instead, the NICS coordinators at the division offices received the delayed denials directly from the Brady Operations Branch and forwarded them, without additional review, to the appropriate field office for investigation and retrieval of the firearms. The resident agents in

charge or group supervisors at the field offices were the ones responsible for reviewing, analyzing, and prioritizing the NICS referrals. Therefore, in our opinion, sending the delayed denials to the division offices served no useful purpose. In fact, we found that the process actually caused delays in retrieving firearms in those instances when the division office NICS coordinator failed to forward the delayed denials to the field offices in a timely manner. Accordingly, we believe that having the Brady Operations Branch bypass the ATF division offices and send the delayed denials directly to the field office for firearm retrievals would improve the timeliness of the process. Please reconsider this response and let us know by September 10, 2004, whether the ATF will modify its NFORCE system.

Recommendation 2: The ATF should use non-agent personnel to handle the administrative tasks related to NICS cases.

Status: **Unresolved – Open.**

Summary of ATF Response. The ATF did not concur with this recommendation. While the ATF acknowledged the benefits of using non-agent personnel in this capacity, it stated that the cost of hiring and training non-agent personnel would outweigh the benefits. Specifically, the ATF stated that: 1) the volume of delayed denials has steadily declined since the implementation of the NICS, a trend that the ATF expects to continue; 2) clearly established written referral guidelines provided by the U.S. Attorneys' offices (USAO) would further reduce the number of referrals to a manageable level; and 3) the role of non-agent personnel would be limited and only ATF special agents would be able to determine the type and immediacy of actions to be taken in response to a particular referral.

OIG Analysis. We disagree with the ATF's rationale for not implementing the recommendation. First, according to data contained in the FBI's annual NICS operations reports, although the volume of delayed denials was declining after CY 2000, the number of delayed denials increased from 3,429 in CY 2002 to 3,601 in CY 2003. Our concern, however, is not with the overall number of delayed denials, but with the disproportionate number of delayed denials received by some of the ATF divisions, notably New Orleans, Seattle, St. Paul, and Kansas City. Even within those districts, a small handful of the field offices receive the majority of the retrievals. Our review found that these field offices often experienced extensive delays in conducting NICS investigations and in retrieving firearms from prohibited persons.

Special agents at these locations cited the volume of NICS referrals, the labor-intensive nature of NICS investigations, and other competing priorities as reasons for the extensive delays. The use of non-agent personnel at these locations to perform the largely administrative tasks associated with NICS investigations would allow the special agents to perform firearm retrievals more expeditiously.

Second, clearly established USAO prosecutorial guidelines would help reduce only the number of standard denial referrals, not delayed denial referrals. Because a standard denial only involves the prohibited person's *attempted* purchase of a firearm, ATF special agents initiate an investigation only if the prohibited person is likely to be prosecuted by the USAO. However, because delayed denials involve a prohibited person who has successfully obtained a firearm, ATF special agents must take action in all cases to retrieve the firearm regardless of whether the case is ultimately referred for prosecution. Therefore, the field offices' volume of delayed denial cases is not affected by the existence of or lack of USAO prosecutorial guidelines.

Third, we agree it would not be appropriate for non-agent personnel to determine the type and immediacy of actions to be taken in response to a particular referral. Instead, non-agent personnel could be used to perform the administrative tasks necessary to assist the special agent in making these determinations. These administrative tasks include researching state laws to determine the individual's prohibited status, obtaining court records, performing database searches to obtain the prohibited person's address, sending contact letters and arranging third party transfers of firearms at the request of the special agent, and confirming those instances in which the person either returned the firearm to the FFL or transferred the firearm to a third party.

In summary, we believe that the ATF's practice of requiring special agents to perform the extensive administrative tasks associated with NICS cases is not an efficient use of its resources and has, in some instances, delayed the retrieval of firearms from prohibited persons. Accordingly, we believe that using non-agent personnel to assist special agents at those field offices that receive a high volume of NICS cases would be a more efficient and effective use of the ATF's resources. Please reconsider this response and let us know by September 10, 2004, whether the ATF will use non-agent personnel to handle the administrative tasks related to NICS cases.

Recommendation 3: The ATF should establish timeliness standards for firearm retrievals and develop a system for ATF field office management to monitor and report on compliance with these standards.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF partially concurred with the recommendation. In its response, the ATF stated that while it agreed that general timeliness standards could be established, it did not believe that a uniform timeliness standard could be applied to each NICS case. The ATF stated that it is in the process of drafting instructions to the field mandating that an investigation be initiated within 30 days of receipt of the referral and that its special agents document in the ATF case management system (NFORCE) what investigative activity has occurred at least once every 30 days until the case is recommended for prosecution, the firearm is recovered, or the case is closed.

OIG Analysis. We agree with the ATF that it would not be feasible to expect all NICS investigations to adhere to a singular timeliness standard. However, we believe that the establishment and monitoring of timeliness standards are necessary to alert ATF field office management to delays in retrieving firearms and to enable management to take timely corrective action to address the delays. The ATF's proposed timeliness standards appear to be reasonable and meet the intent of the recommendation. In its response, the ATF did not address the second part of the recommendation regarding the reporting of instances of noncompliance by ATF field management. During our review, we found that the ATF division office SACs and ATF headquarters managers were generally unaware when specific field offices were experiencing excessive delays in retrieving firearms. Therefore, we believe that for oversight purposes, field management should regularly report on its compliance with the timeliness standards. We consider the recommendation resolved, but will keep it open until the ATF provides: 1) a copy of the instructions issued to its field offices pertaining to the timeliness standards and 2) documentation of the system by which ATF field office management will report on their office's compliance with the timeliness standards.

Recommendation 4: The ATF should revise its standard initial contact letter to include a response time frame and should direct its personnel to send the letters on a timely basis, to track responses to the letters, and to take timely action to retrieve the firearms when the letters are unsuccessful in eliciting a response.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and stated that it will: 1) issue a memorandum to all its field offices to send the contact letters by certified mail with a return receipt requested, 2) amend the contact letter to require the recipient to contact the ATF within 14 days of receiving the letter, and 3) issue an ATF order to direct the special agents to track cases in NFORCE to ensure that actions are timely.

OIG Analysis. We consider the recommendation resolved, but will keep it open until the ATF provides a copy of: 1) the memorandum issued to its field offices regarding the issuance of contact letters, 2) the amended contact letter, and 3) ATF Order 3310.4C.

Recommendation 5: The EOUSA should ensure that annually each USAO provide the ATF with specific prosecutorial guidelines for NICS cases.

Status: **Resolved – Open.**

Summary of EOUSA Response. The EOUSA concurred with the recommendation and stated that in July 2001 it directed all USAOs to review and revise their respective NICS case guidelines in accordance with the Attorney General's directive of June 28, 2001, and that the USAOs had complied with this request. Further, the EOUSA stated that it will take steps to encourage each USAO to review its prosecutorial guidelines annually, update the guidelines when necessary, and provide updated guidelines to the ATF.

OIG Analysis. Based on our review, the EOUSA's response that all USAOs had prepared NICS case guidelines is not accurate. We found that 8 of the 25 USAOs included in our review did not have written guidelines. Based on the EOUSA's response of encouraging each USAO to update such prosecutorial guidelines, we consider the recommendation resolved, but will keep it open until the EOUSA provides us with a copy of the prosecutorial guidelines prepared by each USAO.

Recommendation 6: The ATF should examine the feasibility of enabling Brady Operations Branch specialists to identify NICS cases by federal judicial district, thereby enabling the ATF to consolidate all its

NICS referral screening at the Brady Operations Branch. In the interim, the ATF should require all division office NICS coordinators to screen NICS standard denial referrals and refer to the field offices only those cases that meet USAO prosecutorial guidelines.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and stated that: 1) it had initiated a pilot project to have the Brady Operations Branch screen NICS cases from the Boston division office using specific federal judicial district standards and 2) under current ATF guidelines, all division office NICS coordinators should already be screening standard denial referrals and referring to the field offices only those cases that meet USAO prosecutorial guidelines.

OIG Analysis. With the initiation of its pilot project, the ATF appears to be taking appropriate steps to implement the first part of the recommendation. However, it is unclear from the ATF's response whether the second part of the recommendation has been adequately addressed. Although the ATF's response indicates that all division office NICS coordinators already should be screening standard denial cases and referring to the field offices only those cases that meet USAO prosecutorial guidelines, our review found that this was not being done at 6 of the 17 ATF division offices that received referrals from the Brady Operations Branch. We consider the recommendation resolved, but will keep it open until the ATF provides: 1) documentation showing the results of the pilot project and the ATF's decision on whether to expand the pilot project to encompass all ATF divisions and 2) documentation showing that the 6 ATF division offices that were not screening the NICS referrals are now doing so.

Recommendation 7: The ATF should provide annual training to the NICS coordinators and develop a NICS coordinator handbook.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and stated that the ATF's Brady Operations Branch has scheduled a NICS coordinator conference for August 2004 and has prepared a NICS handbook, which will be disseminated at the conference.

OIG Analysis. We consider the recommendation resolved, but will keep it open until the ATF provides: 1) the NICS coordinator conference agenda and list of conference participants and 2) a copy of the NICS handbook.

Recommendation 8: The ATF Brady Operations Branch should refer to the field offices only those alien cases that meet the USAO prosecutorial guidelines.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and stated that it would continue to refer to the field only those alien denials that result from both firearm violations (e.g., those that meet USAO prosecutorial guidelines). The ATF further stated that if the denial was based solely on an immigration violation, the referral would be forwarded only to the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) and not to the ATF field offices.

OIG Analysis. Although the ATF states that it does not refer to its field offices the names of individuals who were denied solely based on immigration violations, our review found that this was occurring. In our sample review of 200 standard referrals, we identified 22 such cases. Therefore, if it is the ATF's policy not to forward these types of cases to its field offices, apparently not all Brady Operations Branch specialists are complying with the policy. We consider the recommendation resolved, but will keep it open until the ATF provides documentation to show that this policy has been adequately communicated to the Brady Operations Branch specialists.

Recommendation 9: The ATF should require division office NICS coordinators and field office personnel to notify the Brady Operations Branch of referrals that do not meet USAO guidelines.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and stated it would ensure that the Brady Operations Branch and the ATF field divisions were using the same screening guidelines.

OIG Analysis. The ATF's response of ensuring that the Brady Operations Branch and the ATF field divisions are using the same screening guidelines only partially addresses the recommendation. The ATF also needs to instruct its division NICS coordinators and field office personnel to report any referrals they receive that do not meet the screening guidelines. This feedback will help alert Brady Operations Branch management to any problems occurring in the referral process. We consider the recommendation resolved, but will keep it open until the ATF provides documentation showing that it has established a mechanism for its field divisions to provide feedback to the Brady Operations Branch on receiving referrals that do not meet the screening guidelines.

Recommendation 10: The ATF should require division office NICS coordinators and field office personnel to notify the Brady Operations Branch and the FBI NICS Section of trends in inappropriate referrals of non-prohibited persons. Also, the ATF should require that the field office personnel, via the division office NICS coordinators, provide to the FBI NICS Section the names of those individuals that the ATF determines not to be prohibited and documentation to support the reason for the non-prohibited status.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and agreed to: 1) report trends in inappropriate referrals of non-prohibited persons to both the Brady Operations Branch and the FBI NICS Section and 2) establish a method by which the field can capture non-prohibited referrals and supply that information to the Brady Operations Branch, which in turn will notify the FBI NICS Section. In its response, the ATF also stated that its review of NFORCE data indicated that only 10 percent of the NICS referrals forwarded to the field by the Brady Operations Branch were closed as "Not a Prohibited Person" as a result of subsequent investigation and that the remaining 90 percent pertained to confirmed prohibited persons.

OIG Analysis. The ATF's statement that 90 percent of the NICS referrals forwarded to the field by the Brady Operations Branch pertained to confirmed prohibited persons is not accurate. NICS coordinators and field office managers process standard denials and delayed denials differently. A standard denial is first reviewed to determine whether the case meets USAO prosecutorial guidelines and therefore merits investigation. If the case does not meet USAO prosecutorial guidelines,

the second step, which is to determine whether the person is actually prohibited, will not be performed. Instead, the NICS coordinator or field office manager will close the case in NFORCE under the categories "No Potential," "Did Not Meet Federal/State Guidelines," or has "No Prosecutive Merit." In contrast, a delayed denial is first reviewed to determine whether the person is actually prohibited prior to initiating a firearms retrieval. Because of these different approaches, the ATF can identify only what percentage of the delayed denials pertain to confirmed prohibited persons and cannot do the same for standard denials. On the basis of our review, we believe that the percentage of persons subsequently found not to be prohibited is significantly higher than the 10 percent cited by the ATF. As indicated in the report, 69 of the 197 delayed denials we reviewed were closed because the person was determined not to be prohibited.

Regardless of this issue, the ATF concurred with the recommendation. We consider the recommendation resolved, but will keep it open until the ATF provides: 1) written policies or procedures requiring the NICS coordinators to report trends in inappropriate referrals of non-prohibited persons to both the Brady Operations Branch and the FBI NICS Section and 2) documentation of the established methodology for capturing non-prohibited referrals and supplying that information to the Brady Operations Branch and to the FBI NICS Section.

Recommendation 11: The ATF should ensure that the Brady Operations Branch is sufficiently staffed to minimize backlogs and sufficiently funded to implement necessary automated system modifications.

Status: **Resolved – Open.**

Summary of ATF Response. The ATF concurred with the recommendation and agreed that the Brady Operations Branch required additional staffing, as well as improvements to the ATF NICS. The ATF stated that many operational areas within the ATF are also in pressing need of personnel and resources and that it must carefully allocate its resources in accordance with Department and ATF priorities. The ATF agreed to ensure that the Brady Operations Branch was sufficiently staffed and stated that it is in the process of hiring two data entry contractors.

OIG Analysis. The ATF's addition of two contractors to the Brady Operations Branch's staffing should address the Branch's short-term staffing needs. However, some of our other recommendations to centralize the screening function at the Brady Operations Branch may increase the workload of the Branch and require additional staff, and therefore the ATF also needs to plan for the Branch's long-term staffing needs. In its response, the ATF did not specifically address what steps it was taking to ensure that the Brady Operations Branch is sufficiently funded to implement necessary automated system modifications. We believe that these modifications are essential to improving the efficiency and effectiveness of the NICS referral process and that the ATF should seek additional funding for these modifications. We consider the recommendation resolved, but will keep it open until the ATF provides: 1) documentation that the two contractors have been hired, along with a description of their duties, and 2) documentation of the efforts made by the ATF to obtain funding for the Brady Operation Branch's automated system modifications.

Recommendation 12: The FBI should distinguish delayed denials from standard denials on its daily electronic transfers of denial transactions to the ATF NICS Referral System.

Status: **Resolved – Open.**

Summary of FBI Response. The FBI concurred with the recommendation and stated that on April 13, 2004, it initiated a program change request to allow for the marking of those denial transactions requiring a firearm retrieval. This change will result in the daily transfer of two files to the ATF – one containing standard denials and one containing delayed denials. Because of other priorities, the FBI projected that the system change would not be implemented until September 2005.

OIG Analysis. We consider the recommendation resolved, but will keep it open until the FBI provides documentation that the required system change has been implemented.