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Office of the Attorney General
Washington, D.C. 20530

July 28, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

FROM: Kent Markus
Deputy Chief of Staff

Nick Gess
Director
Charles Simon
Deputy Director
Office of Intergovernmental Affairs

SUBJECT: Improving Record Accessibility.

PURPOSE: To provide the Attorney General with (1) a status report on Department efforts to improve record accessibility for purposes of national criminal history background checks, including Brady Act background checks, and (2) recommendations for Attorney General action.

TIMETABLE: The permanent Brady Act provisions become effective on November 30, 1998. The actions we propose in this memorandum will help maximize the efficacy of national background checks, including Brady background checks.

SYNOPSIS: The Department has made good progress in improving record accessibility for purposes of national criminal history background checks, including Brady Act background checks. Between 1993/1994 and 1997/1998, the percent of *all* records available through the FBI's Interstate Identification Index (III) increased from 50% to

59%. In the same time period, the percentage of records *accessible through III* which are complete with dispositions increased from 52% to 59%. In addition, BJS has calculated that, on average, 42 million (or 73 %) of the total number of criminal history records would be accessible if a handgun purchase background check were performed today pursuant to the permanent provisions of the Brady Act. Notwithstanding recent improvements, we propose additional steps which the Attorney General could take in order to improve, generally, the efficacy and integrity of state criminal history record systems and the National Instant Criminal Background Check System.

DISCUSSION:

This memorandum responds to your request for a report on the accessibility of criminal history records for purposes of federal computerized searches. This memorandum also provides a progress report on efforts being made to improve the efficacy of such searches, including for purposes of the National Instant Criminal Background Check System (NICS). We will focus primarily on state criminal history records, which are recognized as the most significant element of criminal history background checks. We will also propose certain additional steps which the Attorney General could take in order to improve, generally, the efficacy and integrity of state criminal history record systems and the NICS.

I. Records and their Accessibility

There are 57 million state and federal criminal history records in the United States today.[1] Fifty-four million of the

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[1] This figure includes each individual record in each state (as well as federal and foreign records) as of the end of 1997. As many convicted criminals have records in more than one state and/or more than one record in any given state, we may safely assume that the number of individuals with criminal records is

total number are state records. The remaining three million are federal and foreign records.[2]

A. <u>Accessible Records</u>

The FBI-maintained Interstate Identification Index (III), described in more detail below, indexes 31 million of the state records and all three million of the federal and foreign records. In sum, 34 million (or 59%) of the 57 million state and federal criminal history records are included in, or referenced by, III.[3] Twenty million (or 59%) of the III-accessible records include disposition information.[4]

Viewed over time, these numbers tell a better story than is suggested at first blush. Virtually all newly-created state criminal history records since 1993/1994 (together with dispositions) have been, or will shortly be, made accessible

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somewhat less than 57 million.

[2] These figures do not include (1) 5.3 million FBI-maintained, non-automated records of individuals born on or after January 1, 1929, but before January 1, 1956, and (2) 5.7 million such records of individuals born before January 1, 1929. Although not included in publicly-disclosed totals, the 5.3 million records (offender d.o.b. 1929-1956) *will be* accessed by a NICS check. The 5.7 million records (offender d.o.b. pre-1929) will not be accessed by a NICS check; because these offenders are, today, at least 79 years old, this memorandum treats their records as if they had been purged by the FBI.

[3] All figures cited in this memorandum relating to numbers of records are estimates based on data (1) collected in a recent BJS-sponsored survey of criminal history record systems or (2) provided by the FBI.

[4] The 20 million records which both are III-accessible <u>and</u> include disposition information represent 36% of the <u>total</u> records.

through III.[5] In addition, a number of the records created in the years immediately prior to 1993/1994 have been made accessible through III. As a result of these efforts, between 1993/1994 and 1997/1998, (1) the *number* of records available through III has increased by nine million[6], (2) the *percent* of all records available through III has increased from 50% to 59%, and (3) the percent of III-accessible records which are complete *with dispositions* has increased from 52% to 59%.

B. Non-Accessible Records

We know that approximately one-third of non-III records (seven million out of 23 million) are not automated (paper only), created prior to the implementation of automatic recordkeeping systems by the states. These are necessarily older records which, in many cases, will correspond with individuals who no longer pose the sort of threat against which a background check is designed to protect.

The remaining 16 million non-III records are also almost all older records (more than 5 years old) which also fall into one or both of the following categories: (1) records of less serious crimes (mostly misdemeanors) and (2) records which do not meet III's technical standards. Because these records are older and often less serious, they too will frequently correspond with relatively low-risk individuals.

We know that almost all of the non-III records are older because (as noted above) virtually all newly-created records since 1993/1994 are III-accessible. We know that prior to the establishment of III, when the FBI's exclusive means for tracking national criminal history information was through receipt of copies of actual records from submitting states, the FBI would

[5] A very limited number of records of non-III states may not have been acceptable to the FBI because of technical deficiencies.

[6] III-accessible records increased from 25 million to 34 million, or 36%, between 1993/1994 and 1997/1998.

not accept certain limited categories of misdemeanor records. We know that a substantial number of non-III records do not comply with III's technical standards, frequently because of a missing or illegible fingerprint.

Finally, we know that III-states have prioritized for national search capability those records which are most relevant to criminal history background checks, because (1) states have told us so in response to our queries and (2) states were encouraged to do so by the terms of criminal history record improvement grants which they have received in recent years.

C. Improving Accessibility

There are two principal ways to increase the percentage of total records which are III-accessible. First, add some or all of the 23 million non-III records to III. (There are a number of reasons, detailed in Section IV below, why this is not an attractive option.) Second, even without adding the non-III records to III, the percentage of total records which are III-accessible will consistently increase in coming years, as virtually all newly-created records continue to be added to III.

In addition, as states purge their state indices of older records which are not III-accessible (thereby reducing the total number of records), the percentage of total records which are III-accessible will further increase.[7] There are compelling reasons to conduct such purges: in many cases, older records will correspond with individuals who are no longer living or, if living, no longer pose the sort of threat against which a background check is designed to protect. By eliminating these records, the review of remaining records becomes more efficient, both substantively and economically.

[7] Indiana conducted a recent purge, which eliminated approximately 350,000 records from its master name index (and from the national total).

II. The Interstate Identification Index

The FBI-maintained Interstate Identification Index (III) is an ongoing state/federal criminal history record system. The III contains federal – and certain state – felony and misdemeanor arrest and conviction records, as well as index *pointers* to many further state records maintained by III-member states. States that belong to the III take responsibility for: (1) managing those of their records which are indexed in the III[8] and (2) providing this information to authorized users. In addition, in order to qualify for III-membership, states must agree to comply with certain technical and operational standards. For example, III-member states must agree to have a single source of fingerprint submissions. Eleven states have not yet become members of III.

The Department urges III-membership because direct state responsibility for recordkeeping ensures that state information is as current and accurate as possible. Notwithstanding the FBI's emphasis on state stewardship of records, the III does contain a substantial amount of criminal history information of non-III member states. The FBI collects this information from the non-III member states, updates the information to the extent it receives notification from such states, and provides the information to authorized users.[9]

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[8] Not all records of III-member states are indexed in the III; for the most part, these unlisted records can be accounted for as follows. Prior to states' III-membership, certain records were simply not submitted to the FBI or were submitted to, and rejected by, the FBI. The most common reasons for both failure to submit and rejection were: (1) the underlying crime did not qualify, as noted above, or (2) the record did not comply as to form (frequently because of a missing or illegible fingerprint).

[9] The FBI also serves this function with respect to certain records of III-member states which are actually maintained by the FBI (rather than being indexed by III). In large part, these records were submitted to the FBI by current III-member states before they became III-members.

III. The Brady Act and Record Accessibility

The efficacy of all national criminal history background checks depends on our continuing efforts to improve record accessibility. Of particular relevance, given the political climate and the imminence of the launch of the NICS, are Brady Act background checks. The Brady Act's permanent provisions require establishment of the NICS system by November 30, 1998.

A. The Brady Act's Permanent Provisions

Permanent Brady prohibits a gun dealer (with certain exceptions[10]) from selling a firearm until the dealer has contacted the NICS and either the sale has been approved or three business days have passed without an indication from the NICS that the prospective purchaser is prohibited from possessing a firearm. Once contacted, the NICS is expected to determine immediately whether the prospective firearm purchaser falls within one of the categories of persons prohibited from possessing a firearm under federal law or falls within a state law prohibition.

The federal categories are: (1) convicted felons; (2) fugitives from justice; (3) unlawful drug users; (4) adjudicated "mental defectives"; (5) illegal aliens; (6) military dishonorable dischargees; (7) persons who have renounced their citizenship; (8) persons subject to certain domestic violence restraining orders; and (9) persons convicted of misdemeanor crimes of domestic violence.

B. Tools Available to Establish the NICS

The FBI's Criminal Justice Information Services Division (CJIS) maintains and operates the FBI's National Crime Information Center (NCIC) and is in charge of establishing and operating the NICS. The NICS will access various files for

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[10] An important exception is that a gun dealer may sell a gun to a prospective purchaser who holds a state gun permit that meets certain requirements.

information on persons prohibited from possessing a firearm: (1) the III, (2) the NCIC Hot Files, which contain records of wanted persons, persons subject to domestic violence restraining orders, deported felons and foreign fugitives, and (3) the new NICS Index, which will contain information on the remaining categories of prohibited persons.

The check of criminal history records (specifically, state records) will be the most significant element of a Brady background check. The Brady Act, however, provides no authority for the Attorney General to require states to submit data.[11] Therefore, vast amounts of pertinent state data will be included in the national system only to the extent that states voluntarily provide it.

To encourage state participation and to improve availability of state records, Congress authorized over $200 million, primarily under the Brady Act, for the improvement of state criminal history records. BJS is actively using these funds to help states improve criminal history record systems.[12] One key goal is to ensure that the records contain information as to the final disposition of the case, i.e., whether the arrest resulted in a conviction. This final disposition information is critical to the NICS because, unless disposition information is contained

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[11] The Attorney General does have the authority to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate" federal law. Brady further requires federal agencies to furnish the requested information "notwithstanding any other law." This process is described in greater detail below.

[12] BJS' National Criminal History Improvement Program (NCHIP) has already distributed approximately $162 million directly to the states for improvements under the Brady Act and other authorizations. An additional $48 million was appropriated for NCHIP, and is expected to be distributed, in FY 1998.

in the NICS records, background checks cannot be done "instantly."[13]

C. Completeness of a Brady Background Check

Since the check of criminal history records will be the most significant element of a Brady background check, we begin there. As described below, the number of state criminal history records which will be accessed in a Brady background check depends on whether the gun dealer contacts a state "point of contact" (POC)[14] or the FBI to initiate a Brady background check.

Where the gun dealer contacts a state POC, the state POC will first access the state's independent criminal history data base and then, if the state search reveals no disqualifying information, the NICS. The NICS provides access, through III, to tens of millions of criminal history records from all 50 states and the District of Columbia. Meanwhile, each state's independent data base — a master name index — will reference virtually one hundred percent of the records in that state. A master name index contains references not only for those of the state's records which have been accepted by the FBI in III, but for the state's automated records (and even state manual records) which are not part of III, as well.[15]

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[13] Note, however, that Brady does provide for up to 3 days for a background check; in almost all circumstances, this will provide enough time for an analyst to locate disposition information, even if it is not in the NICS record.

[14] The FBI currently believes that approximately 29 states will serve as partial or full POCs, although this figure will almost certainly drop substantially if Congress mandates, as currently threatened, that the FBI or state POCs not (1) charge gun dealers a fee for conducting a background check and/or (2) retain records of approvals of firearm purchases for audit purposes.

[15] As explained in note 8, above, not all records of III-member states are indexed in the III.

By contrast, where the gun dealer contacts the FBI directly, the FBI will access — through NICS — only those state criminal history records available through III. Records which are maintained exclusively by states will not be available through III. This is perhaps the most important reason to encourage states to serve as POCs.

1. *Checking the Numbers — Criminal History Records*

What does all of this mean in numeric terms? Thirty-one million of the state records are automated, fingerprint-based and included in III. So, too, are three million federal and foreign records. Therefore, the FBI would access 34 million (or 59%) of the total 57 million records if it conducted a NICS check today.[16] (20 million of the records in III, or 59% of such records, include dispositions.)

Twenty-three million state records (or 41% of the total number of records) are not included in III and, therefore, would not be accessed by the FBI if it conducted a NICS check today. However, because 29 states are expected to serve as full or partial POCs for handgun sales, and will therefore have access to their own non-III state records (through their master name index searches) *in addition to* NICS, BJS has calculated that, on average, 42 million (or 73 %) of the total number of criminal history records would be accessible if a Brady background check were performed in connection with a proposed handgun purchase.[17] Note that, as described in Section I above, most of the records which are today accessible only through a state POC (that is, not

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[16] As disclosed in note 2, although not included in publicly-disclosed totals, an additional 5.3 million FBI-maintained, non-automated records (offender d.o.b. 1929-1956) *will be* accessed by a NICS check. Another 5.7 million such records (offender d.o.b. pre-1929) will not be accessed by a NICS check; this memorandum treats these records as if they had been purged by the FBI.

[17] This average would vary somewhat for long gun purchases, since long guns — unlike handguns — may be purchased outside of a purchaser's state of residence.

accessible through III) reflect older and, frequently, less serious crimes.[18]

It is important to emphasize that at its inception, the NICS, even without direct access to a substantial number of records, will be able to function effectively. The interim provisions of the Brady Act -- without the NICS, with the current incomplete criminal history records, and with virtually no information concerning other prohibited categories -- prevented 242,000 convicted felons and other prohibited persons from purchasing handguns between the effective date of the Brady Act and the end of 1997. And the NICS' functionality will continue to improve as the FBI adds data to the system on each of the prohibited categories.

2. *Checking the Numbers -- Other Prohibited Categories*

In addition to its focus on criminal history records, the FBI is pursuing efforts to improve record completeness with respect to other prohibited categories. The FBI has been gathering data on the other prohibited categories and expects to stock the new NICS Index next Monday (August 3, 1998). The FBI has entered into Memoranda of Understanding -- governing transmission of information to the NICS Index -- with each of the agencies listed below.

The FBI expects to receive information on August 3, 1998, regarding: (1) dishonorable dischargees from the Department of Defense and the Coast Guard (2,500 records; complete listing), (2) "mental defectives" from the Department of Veteran Affairs (200,000 records; will seek state data after November 30, 1998)[19], (3) illegal aliens from the Immigration and

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[18] Many of the less serious crimes would not be relevant to a Brady check, since -- with limited exceptions -- only felonies are disqualifiers.

[19] A recent BJS survey suggested that, under interim Brady, 15 states have been checking state databases which provide information on "mental defectives."

Naturalization Service (110,000 deportable alien records; expect to learn from INS in early August whether and when records on overstayed visas will be available), and (4) persons who have renounced their citizenship from the Department of State (700 active records; expecting 8,300 older records as well, as soon as the Department of State can make them available).[20]

For its NCIC Hot Files, the FBI is also obtaining information on (1) wanted persons (463,000 records entered primarily by state and local law enforcement; complete listing), (2) protection orders (47,000 records entered by approximately 15 states beginning one year ago, with all states expected to participate in the future)[21], (3) deported felons (9,000 records entered by the INS beginning two years ago; INS working to automate and complete up to an additional 160,000 records), (4) Secret Service protective orders (40 records; complete listing) and (5) foreign fugitives (900 records entered by Canadian and Interpol authorities; comprehensive listing).

IV. Options

Beyond the work already being done, there are several steps the Department might take to improve the general efficacy and integrity of state criminal history record systems and the NICS.[22] Still, there are few – if any – practical and efficient

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[20] You have decided previously not to seek drug treatment and positive drug test records from the Departments of Defense and Veterans' Affairs for inclusion in the NICS. However, the FBI expects to pursue state data on controlled substance abusers after November 30, 1998. In addition, the III already contains disqualifying drug felony and misdemeanor information.

[21] A significant number of additional states are expected to begin entering protection order records in the summer of 1999, when NCIC 2000 becomes operational.

[22] We are still working to develop recommended actions for the Attorney General to improve the efficacy of Brady background checks covering prohibited categories *other* than felonies.

steps to increase *immediately* the number or percentage of criminal history records accessible by the NICS. Listed below are certain options, with corresponding "pros", "cons" and recommendations.

A. Fund the Automation and III-conversion of Non-III Records

The Department could require that future year NCHIP or similar grants be used to fund the automation and III-conversion of the 23 million non-III records.

Pros: This step would insure substantially more complete coverage (not only for NICS, but for all national criminal background check purposes) of state and federal criminal history records.

Cons: As explained above, many of the 23 million records not currently accessible by the III represent older crimes. Seven million of these records are paper. Many are either not fingerprint-based or have illegible fingerprints. Many are likely to be misdemeanors which are not disqualifiers under Brady. It is therefore inefficient to expend resources on the III-conversion of records which will yield relatively little public safety benefit. As they have been in recent years, resources are more efficiently applied to insuring III-accessibility of (1) all newly-created records[23], (2) recently-created records

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Deferring this second step is driven by our desire to focus initially on state criminal history records, which are recognized as the most significant element of Brady background checks.

[23] The nine million records added to III between 1993/1994 and 1997/1998 represent more than 25% of the total number of records in III.

(within 5 years prior to the start date) and (3) dispositions of all III-records.

Recommendation: Against.

B. Induce More States to Serve as POCs for Brady Checks

The Attorney General could reinforce – through letters and/or phone calls – Director Freeh's message to states on the importance of serving as a POC. (Local SACs are personally delivering to all governors letters to this effect from Director Freeh. A sample of this letter is attached hereto.)

Pros: If each state were to serve as a POC for handgun and long gun sales, virtually one hundred percent of the records in that state, as well as all of the III, would be accessible in a Brady background check. In addition, state POCs are better equipped to interpret their own records and their own laws than is the FBI.

Cons: Increased state POC participation will increase the number of records accessed in a Brady background check, but will not improve the overall condition of state criminal history records.

Recommendation: For.

C-1. Create an Actual (or Effective) National Master Name Index

The FBI currently has the ability to query the master name index of every state, but does not plan to do so for the NICS. For purposes of the NICS, the FBI could access state master name indices in one of two ways. First, the FBI could request that each state provide to the FBI a copy of its master name index, in order to create a comprehensive National Master Name Index (made up of all the state versions) as a new file to be searched by the NICS if all other NICS searches yielded no disqualifying information. Second, the NICS could electronically query each separate state master name index, if all other NICS searches yielded no disqualifying information.

Pros: Creation of a National Master Name Index, or separate querying of each state version, would insure virtually complete NICS coverage of state and federal criminal history records. Such a search would include nearly all of the 23 million records which are non-III, but are referenced in individual state master name indices.

Cons: There are several reasons to oppose this proposal:

1. As explained above, many of the 23 million records not currently accessed by the NICS represent older crimes. Seven million of these records are paper. Many are either not fingerprint-based or have illegible fingerprints. Many are likely to be misdemeanors which are not disqualifiers under Brady. It is therefore inefficient to expend resources on creation of an index which will yield relatively little public safety benefit.[24]

2. Many states which have agreed to provide POCs (and some which may be considering it) will likely object strenuously to bearing the burden of analyzing the results of a NICS National

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[24] Inclusion of these additional records in the NICS would increase the "hit rate", causing a greater number of sales to be delayed. In many cases, these delays would be unwarranted. On average, they would also likely be longer than is currently expected because review of underlying non-automated records will be a labor intensive process.

Master Name Index search.[25] Indeed, certain states may opt not to provide a POC if this burden is imposed. (State POCs currently have the obligation to analyze search results only of their own master name index and, if necessary, the NICS — without the National Master Name Index feature.)

3. Inclusion in the NICS of state records which have no positive identification (such as fingerprints) would damage the credibility of federal criminal history background checks and represent a departure from the Department's longstanding policy.

4. Neither the proposed National Master Name Index nor a 50-state querying capacity could be established by November 30, 1998. Although the current NICS system would be compatible with a 50-state master name index query, time and resources would be necessary to prepare a new inquiry format. In addition, such a 50-state query would result in 50 separate electronic responses arriving in different time frames (ranging from a few seconds to, perhaps, an hour). Creation of a new National Master Name Index would involve even more technical complexity. The FBI would need to assume maintenance responsibilities for millions of new records, including the responsibility to

[25] Analyzing the results of a NICS National Master Name Index search will be particularly burdensome, because state master name indices — unlike the III — can contain multiple separate references for a single individual, all of which would require review before a state POC analyst (or, for that matter, an FBI analyst) could determine whether a prospective purchaser was prohibited from purchasing a gun.

periodically audit the records and synchronize them with updates received from the states.

Recommendation: Against.

C-2. Create an Actual (or Effective) National Master Name Index of Computerized Criminal History Records Only and Base Denials Only on Fingerprint-based Records

This is a more limited version of Option C-1. The basic structure would be the same: the FBI could create a new National Master Name Index, or could electronically query each separate state master name index, if all other NICS searches yielded no disqualifying information. The new feature would require that analysts, whether at the FBI or at a state POC, only be authorized to issue a denial if the record on which such denial was based: (1) was computerized and (2) indicated that it was fingerprint-based.

Pros: This structure would insure NICS coverage of 16 million (out of a total of 23 million) records which are not III-accessible. On average, these 16 million computerized, non-III records are likely to be the newer, and therefore more relevant, non-III records. That the search would only apply to computerized records would limit the burden both on the home state of a record which comes up in a National Master Name index search and, to a more limited extent, the POC or NICS analyst who must review the search results. That only those of the 16 million records which have positive identification could be the basis for a denial insures that the credibility of federal criminal history background checks would not be compromised.

Cons: This option would not meaningfully reduce the burden on the POC or NICS analyst who would need to review the expanded search results; therefore, POC objections would likely remain vigorous. Not only would the "hit rate" under this proposal be much higher than is currently envisioned — based on the addition of 16 million new records — but the POC or FBI analyst would still have to deal with multiple separate references for many individuals. In addition, this option would not reduce the issues of logistical and technical complexity associated with implementation.

Recommendation: FBI — Against.
IGA, OPD, BJS — Attorney General to direct interested components to evaluate feasibility.

D. Induce More States to Join III

In order to induce states to join III, the 1997 and 1998 NCHIP program announcements require that non-III states focus funds on activities necessary to participate in III. The Attorney General could send letters and/or make calls to the 11 non-III states stressing the importance of III participation. (Draft of letter attached.)

Pros: III membership is the best way to achieve accurate state record availability for the NICS. Records from non-III states *are* currently maintained and provided to authorized users by the FBI. Inevitably, however, these records are not as accurate as those maintained at the state level by a III member, since states are less likely to provide the FBI with dispositions than they are to update records which the states themselves maintain. In addition, because states must agree to comply with certain technical and operational standards in order to qualify for III-membership, there is an increased likelihood that III-member states will maintain their records carefully. Finally, joining III is a necessary first step towards full participation in key criminal history initiatives — such as IAFIS — which depend on an efficient and decentralized national criminal history record system.

Cons: III membership does not have an immediate, meaningful effect on the absolute number of records accessible through a NICS check, because the records of non-III states are currently maintained by the FBI; as described above, however, these records are less likely to include disposition information.

Recommendation: For.

RECOMMENDATION: That the Attorney General take the actions detailed in Section IV (B), (C-2) and (D).

APPROVE:____________________

DISAPPROVE:____________________

OTHER:____________________

<u>Concurring components</u>:
- OPD, IGA, BJS
- FBI (only concurs with respect to Section IV (B) and (D))

<u>Nonconcurring components:</u>
FBI (recommends against Section IV (C-2))

Attachments (2): Freeh Letter
Draft Letter from Attorney General

White House Briefing for Brady Extension Event
August 6, 1998

- At today's event with Jim and Sarah Brady and representatives from law enforcement, the President made two key announcements: (1) he urged Congress to extend the Brady waiting period <u>before</u> it expires on November 30, 1998; and (2) he strongly opposed efforts by certain members of Congress -- with the strong support of the gun lobby -- to sabotage final implementation of Brady's National Instant Background Check System. But before I touch on these two issues, let me first provide you with some background.

Brady Background

- **Just the Facts.** As you know, since the Brady Law went into effect on February 28, 1994, designated Chief Law Enforcement Officials from so-called Brady states have had up to 5 days to conduct background checks on all prospective handgun purchasers. During these 5 days, if law enforcement officials turned up any disqualifying information under state, local or federal laws, the transfer of a handgun could be stopped. Federal law (U.S.C. Title 18, Section 922 (g) or (n)) generally prohibits anyone from owning a firearms if they are: (1) convicted felons; (2) fugitives from justice; (3) unlawful drug users; (4) adjudicated "mental defectives"; (5) illegal aliens; (6) military dishonorable discharges; (7) persons who have renounced their citizenship; (8) person subject to domestic violence restraining orders; and (9) persons convicted of misdemeanor crimes of domestic violence.

- **Brady vs. Non-Brady States.** Initially, 32 states were subject to the Brady waiting period and background check. Since then, 9 additional states have implemented permit or background check systems that exempt them from Brady's requirements. Thus, 23 states continue to be subject to the Brady Law today.

- **Brady Sunset.** As of November 30, 1998, however, the 5-day waiting period will expire, and will be replaced by the National Instant Criminal Background Check System -- or the NICS, as it is commonly referred to. Additionally, at this time, **all** firearms -- not just handguns -- will be subject to background checks under the NICS. This will require 18 of the 27 non-Brady states to either do state background checks on long guns or refer these checks to the NICS.

- **The National Instant Criminal Background Check System (NICS).** Developed by the Justice and Treasury Departments over the past 5 years, the NICS is a computerized background check system designed to respond within a matter of seconds to most background check inquiries. Three main databases will be accessed by NICS for background check information: (1) the National Crime Information Center (or NCIC), which contains records on all fugitives, the Secret Service's Protective File, and the Deported Felons file; (2) the Interstate Identification Index (or Triple I), which contains automated criminal history records; and (3) a newly created NICS index, which contains information on drug users, mentally unstable persons, illegal aliens and others.

Here is how the system will generally work:

1. Initial Check. Federal gun dealers will be required to submit the name, date of birth, state of residence and other identifying information to the FBI's NICS Operation Center or an FBI-appointed point of contact. The FBI or state point of contact will make the NICS check and determines whether any matching record indicates that the purchaser is disqualified from possessing a firearm under state or federal law. Where a state point of contact initiates the check, state and local records will also be consulted.

2. Initial Response. If a matching record is found by the NICS, the gun dealer will be notified that the application is "denied." If no match is found, the gun dealer will be instructed to "proceed." And if additional record analysis is required, the gun dealer will be told that the application is "delayed. " In these circumstances, law enforcement can take up to 3 days to determine whether or not the prospective purchaser can legally purchase a firearm.

3. Fee-based System. To operate this system of checks, the Justice Department intends to charge gun dealers a user fee of about $15 -- as it currently does with chid care providers, school districts and others for whom it conducts checks.

- **Improved Access to Records.** One final and important note: since 1993, we have spent $200 million to help states improve the accessibility of criminal history records and to maximize the effectiveness of the NICS. As a result, 9 million of the most current and most important criminal history records required for the NICS have been automated during this period. In fact, the Bureau of Justice Statistics estimates that, on average, 42 million of the 57 million state and federal criminal history records in the U.S. -- or about 73% -- would be accessible if a handgun purchase background check were performed today. Nonetheless, we are continuing to work to automate even more records, to improve information sharing with states, and to include additional records of persons in other prohibited categories -- such as drugs users, stalkers, and the mentally unstable.

Making the Waiting Period Permanent

- With respect to the President's calling for an extension of the waiting period today, there are 2 important reasons for this: (1) to preserve a critical law enforcement tool; (2) to provide for a "cooling off" period prior to the sale of a handgun.

- **State and Local Law Enforcement Knows Best.** First and foremost, the President wants to preserve the ability of local law enforcement officials to check their records -- including those that have not been computerized -- before a handgun purchase goes through. While NICS will improve access to many records and shorten the time required to do a background check -- to mere seconds in most cases -- it will no longer require gun dealers to notify designated local law enforcement officials of proposed handgun purchases in their jurisdiction. New legislation is required to keep local law enforcement in the loop and to give them the time they need to act. This is especially important since certain records -- such as information on restraining orders for stalking or domestic violence misdemeanors -- will take more time to have included in the NICS and may be readily available locally.

- **"Cooling Off" for Handguns.** Additionally, the expiration of the current waiting period precludes the "cooling off" impact of the Brady Law. While current law only provides for a waiting period of "up to 5 days," the decentralized nature of the current system -- with background checks being conducted by some 5,400 law enforcement agencies -- ensures that prospective handgun purchasers can not necessarily expect to receive their handguns right away. Under NICS, however, the vast majority of handgun purchasers can expect to be approved or denied almost immediately. Thus, new legislation is required to provide for any type of waiting period after November 30th.

- **The Schumer-Durbin Bill.** The Brady extension bill recently introduced by Representative Schumer and Senator Durbin addresses both of these issues and is supported by the President. In brief, the Schumer-Durbin bill would:

  (1) Require a minimum 3-day waiting period for all handgun purchases, even if the NICS background check is completed well beforehand. This will give local law enforcement additional time to review other local records that may not be found in the NICS, as well as restore Brady's "cooling off" effect..

  (2) Add up to an additional two days to the waiting period if law enforcement officers need more time to clarify arrest records. Under the NICS, law enforcement will be allowed up to 3 days to complete a background check if more time is necessary to determine whether an arrest resulted in a conviction that disqualifies the prospective purchaser from owning a gun. The Schumer-Durbin bill extends this period to 5 days, giving law enforcement even more time to get the information it needs to make an accurate decision.

  (3) Require gun dealers to notify the local law enforcement official in the purchaser's place of residence prior to selling the gun. When the NICS takes effect, gun dealers will no longer have to forward the names and addresses of prospective gun purchasers to the existing network of 5,400 law enforcement officials that have already stopped tens of thousands of prohibited handgun purchases each year. The Schumer-Durbin bill requires gun dealers to keep these local law enforcement officials informed about local handgun purchases.

<u>Defending Brady from the Gun Lobby</u>

- Finally, the President expressed his strong opposition to an amendment that Senator Smith of New Hampshire has attached to the Justice Department's appropriations bill. This amendment -- inspired and promoted by the gun lobby -- would fundamentally undermine implementation of the NICS system that was originally promoted by the NRA.

In brief, the amendment would:

(1) Prohibit the FBI from charging gun dealers a fee for background checks even though the FBI currently charges school districts, day care providers, and many others for similar background checks. States and local law enforcement agencies also generally charge dealers for the costs of background checks they complete. Without these resources -- or about $15 per check and $80 million overall -- the FBI will either have to forego processing millions of background checks, or transfer resources from other crime fighting efforts.

(2) Require the FBI to immediately destroy certain records obtained from clean background checks, substantially undercutting the reliability of the background check process by making it impossible to catch fraudulent submissions. The FBI does intend to destroy such records, but after a reasonable period that allows them to audit their records to protect against fraud.

(3) Establish a federal right to sue if records are not immediately destroyed. Creating a federal cause of action with punitive damages for person aggrieved by the provisions of this amendment are -- pure and simple -- just another attempt to undermine the operation of the NICS.

STATE-BY-STATE IMPACT OF BRADY EXTENSION

<u>In the 23 Brady States</u>

- Twenty-three states are now required to comply with the Brady Law's five-day waiting period and background check. These states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, Wyoming

- **Brady II Impact:** If the Schumer-Durbin were to pass, gun dealers in these states would be subject to a minimum 3-day waiting period before the sale of a handgun, a NICS background check before the sale of all firearms (and which in certain instances could take as long as 5 days), and they would be required to notify the chief law enforcement official from a handgun purchaser's place of residence.

<u>In 9 of the Non-Brady States with Comprehensive Background Checks</u>

- Only 9 of the 27 Non-Brady states require background checks for <u>all</u> firearms purchasers. These include:

  California, with a 10-day waiting period and background check;
  Connecticut, with a permit to purchase system and 14-day waiting period;
  Florida, with an instant check on all firearms and a 3-day waiting period for handgun purchasers;
  Hawaii, with a permit system for all firearms;
  Illinois, with a Firearm Owners Identification Card required for all firearms;
  Massachusetts, with a Firearms Identification Card for all firearm purchasers;
  New Jersey, with a permit required for all firearms purchasers;
  Tennessee, with a permit system that will change to a state instant check on all firearms effective as of November 30, 1998; and
  Virginia, with an instant check on all firearms;

- **Brady II Impact:** All of these states would be exempt from the requirements of the Schumer-Durbin legislation

<u>In 18 of the Non-Brady States with Background Checks Only for Handguns</u>

- Fully 18 of the 27 states that are currently exempt from the Brady Law's requirements only conduct background check on handgun purchasers. These states are:

  Delaware, with an instant check on handgun purchases;
  Georgia, with an instant check on handgun purchases;
  Idaho, with an instant check on handgun purchases;
  Indiana, with a 7-day waiting period and background check for handguns -- but

which will switch to a state instant check on handguns as of November 30, 1998;

Iowa, with a permit to purchase for handguns;
Maryland, with a background check and 7-day waiting period for regulated firearms (handguns/assault weapons);
Michigan, with a permit to purchase for handguns;
Minnesota, with a permit to purchase for handguns and assault weapons (7-day waiting period);
Missouri, with a permit to purchase for handguns (7-day waiting period);
Nebraska, with a permit and/or state instant check on handguns (with up to 2 days to process the permit);
New Hampshire, with an instant check on handgun purchases;
New York, with permit to purchase for handguns (up to 6 months to process permit);
North Carolina, with a permit to purchase for handguns (up to days to process permit);
Oregon, with an instant check on handgun purchases;
Pennsylvania, with an instant check on handgun purchases;
Utah, with an instant check on handgun purchases;
Washington, with a five-day waiting period and background check for handgun purchases;
Wisconsin, with an instant check on handguns with waiting period.

- **Impact of Brady II:** Generally, gun dealers in these states would be exempt from the minimum 3-day waiting period in the Schumer-Durbin bill, and they would not be required to notify the chief law enforcement official from a handgun purchaser's place of residence. However, consistent with the current Brady Law, gun dealers in these states would need to conduct a NICS background check before the sale of all long guns, and under the Schumer-Durbin bill this process could take 2 more days (or a total of 5 days) in some instances.

Brady Event
Questions and Answers
August 6, 1998

Waiting Period on Handgun Sales

Q. Can you elaborate on why the President supports making permanent the Brady waiting period prior to the sale of a handgun?

A. Under the Brady Law, the National Instant Criminal Background Check System (NICS) will take effect on November 30, 1998. NICS will allow access to a fuller set of records than is now available, and law enforcement officials will use it to conduct checks of <u>all</u> prospective gun purchases -- not just handgun purchasers. We are pleased with the significant progress this Administration has made over the last 5 years to assist states in improving the accessibility of their criminal records once the NICS takes effect. These improved records will go a long way in helping to stop even more ineligible purchasers from buying firearms.

Once the NICS takes effect, the 5-day waiting period for handgun sales established in the Brady Law will sunset. And while NICS will allow access to a fuller set of records, a permanent waiting period will allow law enforcement officers to check additional, non-computerized records, as well as provide a cooling-off time for handgun purchases. We believe that local law enforcement officials know best who in their community can or can't legally own a gun, and that they are uniquely positioned to provide the last, best check before a handgun purchase goes through.

Q. Can you give us more detail on the Schumer/Durbin waiting period legislation?

A. Representative Schumer and Senator Durbin introduced legislation applying to all states to which the Brady Law now applies that will:

(1) <u>Require a minimum 3-day waiting period for all handgun purchases</u>. Under current law, Brady's automatic waiting period will expire when the "instant check" system goes into effect. Schumer/Durbin legislation establishes a minimum wait time, even if all NICS background check is completed well beforehand. The minimum wait period will give local law enforcement additional time to review other local records that may not be found in the NICS, helping to ensure that prohibited gun sales are not completed. It also will provide a cooling-off period for handgun purchasers.

(2) <u>Add up to an additional two days to the waiting period if law enforcement officers need more time to clarify arrest records</u>. Current law provides that when NICS takes effect, law enforcement officials will have three days to determine whether

an arrest, revealed by the "instant check" system, resulted in a conviction that disqualifies the prospective purchaser from owning a gun. The Schumer-Durbin bill will add another two days to this period, making sure law enforcement has enough time to get the information they need to make a final decision.

(3) Require gun dealers to notify the local law enforcement official in the purchaser's place of residence prior to selling the gun. Under current law, after November 30, 1998, guns dealers will no longer have to forward the names and addresses of prospective gun purchasers to designated local law enforcement officials -- only to the FBI or a NICS point of contact. The Schumer-Durbin bill requires gun dealers to keep notifying designated local law enforcement officials of handgun purchases.

Q. Why are certain states exempt from Brady? What states are these?

A. States may be exempted from the Brady Law if they have a qualifying alternative permit system or a state "instant check" system -- both of which require background checks. Currently, 27 states are exempt from Brady's requirements -- including 9 that were originally subject to the Brady Law, but which later enacted Brady-qualifying state systems.

The states exempt from Brady are: California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Tennessee, Utah, Virginia, Washington, and Wisconsin.

Q. Didn't the Supreme Court overturn Brady's requirements? Doesn't this decision affect your ability to impose a new waiting period?

A. Last year's Supreme Court decision left the majority of the Brady Handgun Control Act -- including the waiting period provision -- intact. The Supreme Court ruled that the Federal government cannot require local police departments to conduct background checks, but left intact the 5-day waiting period. In addition, nothing in the decision prohibits law enforcement from voluntarily enforcing the Brady Law checks. As we expected, after the Supreme Court's decision, the vast majority -- over 90% -- of the nation's law enforcement agencies continued to conduct background checks on handgun purchasers. They did this because it is a common sense and good law enforcement -- not because it was required. The Schumer-Durbin legislation is consistent with the Court's decision and does not require state and local law enforcement to do background checks.

Q. Isn't there a difference between the current waiting period and what you're proposing today? Why this change?

A. Currently, Brady allows up to 5 days to conduct a background check in states without permit systems. This provision will expire when NICS is implemented, leaving only a provision that enables law enforcement to hold up a handgun purchase for three days when a background check reveals a prior arrest. Under the Brady extension legislation proposed by Senator Durbin and Rep. Schumer, there will be an automatic 3-day waiting period, and law enforcement officers can take another two days if they need to clarify an arrest record. This minimum 3-day and expanded 5-day waiting period ensures that law enforcement will have the time it needs to check all available records, which also provides a cooling-off time for handgun purchases.

Q. How many and which states currently have their own waiting periods?

A. According to a 1996 Justice Department survey, 11 states have waiting periods pursuant to their own laws. These waiting periods vary in duration and may apply to different types of firearms. The states with waiting periods are: Alabama, California, Hawaii, Indiana, Iowa, Kentucky, New Jersey, Pennsylvania, Rhode Island, South Dakota, and Washington.

<u>Anti-Brady Senate Amendment</u>

Q. What are the Congressional efforts to "gut" Brady that the President referred to in his remarks?

A. A recent amendment to the Senate Commerce-Justice-State appropriations bill would undermine implementation of the NICS. The Administration strongly opposes this anti-Brady amendment. Specifically, the Senate amendment does the following three things:

1) <u>Prohibits the FBI from charging gun dealers a fee for background checks</u> even though the FBI currently charges school districts, day care providers, and many others for similar background checks. States and local law enforcement agencies generally charge dealers for the costs of background checks they complete. Without these resources, the FBI will either have to forego processing millions of background checks, or transfer resources and personnel from other crime fighting efforts.

(2) <u>Requires FBI to immediately destroy certain records obtained from clean background checks</u>, substantially undercutting the reliability of the background check process by making it impossible to catch fraudulent submissions. The FBI <u>does</u> intend to destroy such records, but after a reasonable period that allows them to audit their records to protect against fraud.

(3) <u>Establishes a federal right to sue if records are not immediately destroyed</u>. Creating a federal cause of action with punitive damages for any person aggrieved

by the provisions of this amendment is -- pure and simple -- just another attempt to undermine the operation of the NICS.

Billing Code 4410-02

DEPARTMENT OF JUSTICE

28 CFR Part 25

[AG ORDER No. 2172-98]

RIN 1105-AA51

National Instant Criminal Background Check System User Fee Regulation

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: The rule will provide for and establish a user fee to be assessed to Federal Firearms Licensees (FFLs) for the processing by the FBI of National Instant Criminal Background Check System (NICS) background checks. A NICS background check will determine whether information available to the system provides reasonable cause to believe that transfer of a firearm to an individual would violate state or federal law. In states in which the state government has not agreed to designate a Point of Contact (POC) to receive and process requests from FFLs for NICS background checks, FFLs will be required to contact, either by telephone or other electronic means, the NICS Operations Center at the FBI to initiate and process a NICS background check.

There are substantial costs associated with operating the FBI's NICS Operations Center. The $200 million authorized to be appropriated by the Brady Handgun Violence Prevention Act, Public

L. 103-159, section 106(b), was limited to the purpose of improving the criminal history record systems of the states. A small portion of those funds was made available to the FBI to help design the NICS. The funds are not available, however, to cover the FBI's annual operating cost for the NICS. Therefore, FFLs will be assessed a processing fee for each NICS background check processed by the FBI's NICS Operations Center. The purpose of the fee is to recover the full cost of providing this service to FFLs doing business in states where the FBI is contacted directly by the FFLs. This rulemaking sets forth the FBI's legal authority to charge a user fee for NICS background checks and the cost analysis to be used to calculate the fee.

DATES: Written comments must be received on or before September 2, 1998, or [Insert date 30 days after date of publication in the FEDERAL REGISTER], whichever is later.

ADDRESSES: All comments concerning this proposed rule should be mailed to: Mr. Emmet A. Rathbun, Unit Chief, Federal Bureau of Investigation, CJIS Division, Module C-3, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306-0147.

FOR FURTHER INFORMATION CONTACT: Mr. Emmet A. Rathbun, Unit Chief, telephone number (304) 625-2000.

SUPPLEMENTARY INFORMATION: On November 30, 1993, Public L. 103-159 (107 Stat. 1536) was enacted, amending the Gun Control Act of 1968 (GCA), as amended (18 U.S.C. Chapter 44). Title I of

Public L. 103-159, the "Brady Handgun Violence Prevention Act" (Brady Act) requires the Attorney General to establish by November 30, 1998, "a national instant criminal background check system that any [firearms] licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law." In order to provide this service directly to certain FFLs and to recover the associated costs, the FBI will assess FFLs a user fee in states where the FBI is contacted directly by the FFLs.

NICS Background Checks

The Brady Act provides that before a firearm may be transferred, FFLs must request a NICS background check on a prospective firearm purchaser who is not licensed under 18 U.S.C. 923. A Notice of Proposed Rulemaking establishing regulations to protect the security and privacy of the information in the NICS and describing the manner in which the system will function was published in the Federal Register on June 4, 1998, 63 FR 30430, "National Instant Criminal Background Check System Regulations." Generally, a NICS background check will consist of a search of the NICS Index (an FBI database containing information concerning certain individuals prohibited by law from possessing firearms), the National Crime Information Center (NCIC), and the Interstate

Identification Index (III), for matching records that may provide reason to believe that the transfer of a firearm to a prospective purchaser would violate Federal or state law.

The method by which an FFL will request background checks will depend upon the state where the FFL is conducting business. In states that agree to designate a POC, state or local law enforcement agencies will serve as POCs for the purpose of processing NICS checks. As POCs, these agencies will receive inquiries by FFLs, check state and local record systems for disqualifying records, initiate NICS background checks through electronic access to the NICS via the NCIC communications network, analyze any matching records, provide responses back to the FFL, and process appeals. The FBI will not charge the state agencies or the FFLs a fee for NICS background checks processed by state POCs. The comparatively minor cost to the FBI of providing automated record responses to POCs (who research and analyze the records) will be covered by funds appropriated to the FBI rather than by a NICS user fee. Charging FFLs a fee to recover the POC's cost of processing NICS background checks is at the discretion of the state.

Where the state will not be a POC, the FFLs will telephonically contact the NICS Operations Center, a unit run by the FBI. The FBI is also exploring a plan to make electronic dial-up access to the NICS Operations Center available to FFLs in the future. Inquiries made by telephone will be answered by a NICS Customer Service Representative. The NICS Operations Center will perform the NICS background check, analyze any matching records, provide a response back to the FFL, and process appeals. In order to interpret and evaluate matching records, the FBI will use personnel who are specially trained to analyze records in the NICS Index, NCIC, and III. FFLs who directly contact the NICS Operations Center to initiate a background check will be assessed a fee. This fee will allow the Federal Government to recover the full cost of processing these background checks conducted by the NICS Operations Center. Likewise, if electronic FFL access is made available in the future, a fee will be charged. This fee will be less than the telephonic access fee since a NICS Customer Service Representative will not be needed to take a telephone call.

Legislative Authority

The legislative authority for the fee is the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Public L. 101-515, 104 Stat. 2101, 2113, (Nov. 5, 1990) which, in relevant part, provides the FBI authority to establish, collect, and retain fees for processing name checks for non-criminal justice purposes. Authority is also provided by the Independent Offices Appropriation Act, 1952 (31 U.S.C. 9701), which generally requires that a benefit or service provided to or for any person by a federal agency be self-sustaining to the extent possible. Charges are to be fair, taking into consideration the costs to the Government, value to the recipient, public policy or interest served, and other relevant facts.

Cost Analysis

In accordance with the guidelines issued by the Department of Justice (DOJ) User Fee Program (Supplement, Department of Justice Budget Formulation and Execution Calls), and Office of Management and Budget (OMB) Circular Number A-25 (1993) relating to the assessment of fees for Federal Government services, the FBI is establishing the user fee for the processing of a NICS background check by the NICS Operations Center in order to recover the full cost of providing service to FFLs doing business in states where the FBI is contacted directly by the FFLs. The full cost includes both the direct and indirect costs associated with the FBI's provision of the background check service to FFLs.

Direct costs are those which are proximate and directly traceable to the unit of output for which the fee is charged. Direct costs for the NICS program include the personnel and non-personnel costs of FBI-employed NICS analysts and technical support. The personnel and non-personnel costs were calculated using the modular costing tools described in the FBI's Fiscal Year 1999 budget submission to the OMB. Additionally, any contractor-supported operator and billing functions are included within the FBI's direct costs.

Indirect costs are those costs that are more distant, general in nature, and not directly traceable to the product or service produced. The FBI has allocated a portion of its general management, administration, finance, and security functions as indirect costs to the NICS program. These costs were allocated based upon the ratio of positions in the NICS program to positions in all other Criminal Justice Information Services Division programs.

The costs to be recovered include, but are not limited to, an appropriate share of: (a) direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement, (b) physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, and travel, (c) management and supervisory costs, and (d) the costs of enforcement, collection, research, establishment of standards, and regulation.

Cost Figures

Because NICS is a service that has not been previously offered, cost figures are based on information currently available regarding firearm background checks, the number of states that are expected to serve as POCs, and ongoing contracting efforts. Upon the establishment of the system on

November 30, 1998, the FBI anticipates charging a fee of $14.00 per inquiry. The fee was determined by estimating the resources needed to satisfy the projected volume of background checks and related work, determining the direct and indirect costs of these resources, and working with the FBI's prime developmental contractor to cost the portion of services which will be furnished by an outside contractor.

ESTIMATED FISCAL YEAR 1999 NICS COSTS	
CATEGORY	**YEARLY TOTAL**
WAGES & OTHER COMPENSATION	$45,667,596
APPEALS	846,378
FURNITURE & SUPPLIES	2,303,491
TRAVEL & TRAINING	1,824,775
HARDWARE & SOFTWARE MAINTENANCE	690,816
MISCELLANEOUS	3,297,827
CONTRACTOR COSTS	37,002,514
TOTAL	$91,633,397

In order to estimate the number of NICS background checks that will be performed, the FBI used the firearms related inquiries of III for Fiscal Year 1997. These background checks were performed primarily for handgun sales as required under the Interim Provision of the Brady Act. For purposes of this calculation, the FBI estimates that it will perform handgun checks and/or long gun checks in approximately 34 non-POC states and territories. Using III inquiries in these states for firearms checks performed under the Interim Provision of the Brady Act, the FBI extrapolated the estimated number of total firearms (handguns and long guns) sold annually in these states to be 4,217,227. In addition, the FBI estimates there are 2,500,000 pawnshop redemptions per year that will require a background check. Therefore, the total number of inquiries per year is 6,717,227. Based on the cost of the estimated resources necessary to process 6,717,227 inquiries per year, the FBI estimates that its total annual costs will be $91,633,397. Therefore, the cost per inquiry, rounded to the nearest dollar, is $14.00. This transaction cost includes both the direct and indirect cost categories of the NICS, set forth in the chart above and described generally below. To be assured that these cost figures were accurately calculated, the FBI hired an independent accounting firm to review the FBI's fee analysis. The firm validated the FBI's methodology in developing this user fee.

The Wages and Other Compensation category includes NICS Customer Service Representatives' salaries and benefits and support staff's salaries and benefits. Based on the projected number of inquiries per year, the NICS Operations Center will require an estimated staff of 586. This staffing level is required in order to provide prompt service to FFLs seven days a week.

When an individual is denied the purchase of a firearm, the individual may appeal that decision. If an individual resides in a POC state, it is anticipated that the individual will appeal the denial to the state according to the state's appeals procedures. If the denial was given by the NICS Operations Center, the individual would appeal directly to the FBI. The estimated cost to the FBI of processing appeals is incorporated into the initial user fee; individuals who appeal a denial will not be charged a separate fee. The estimated appeals cost anticipates that, in the appeals process, individuals may need to submit a fingerprint card to verify their identity. Fingerprint cards submitted for appeals will be processed using the FBI's current procedure for handling first-person requests for one's own fingerprint-based record. The existing (and separate) fee of $18.00 for processing such submissions will be waived.

The Furniture and Supplies category is comprised of a combination of NICS staff and support staff requirements for these items. These costs are based upon the OMB's 1999 Cost Module, which sets a per-employee rate to be used for these calculations. An additional amount has been added for the purchase of telephone headsets for the NICS Customer Service Representatives.

The Travel & Training category includes costs for NICS personnel who need to travel to meet with FFLs and obtain feedback on the NICS. Specially trained NICS Representatives will need to report to various governmental agencies that have a direct interest in the NICS, including Congress. The Training category will allow NICS personnel to be trained on new NICS developments and techniques in order to improve service to the FFLs. Indirect travel and training expenses are also included in this category. These costs are also based upon the OMB's 1999 Cost Module, which sets a per-employee rate to be used for these calculations.

The Hardware and Software Maintenance category includes the maintenance on computer terminals and software that the NICS Representatives will need in order to perform this service for FFLs. Software license renewals and maintenance agreements are required for software products used on FBI computers. Because these software products are proprietary and specialized, licensing and maintenance contracts must be executed with the original developer. Contract hardware maintenance will be necessary for the efficient and continued operation of the NICS computers and peripheral equipment. This will include preventive and on-call hardware maintenance support for FBI computers and peripheral equipment. Without this preventive and on-call hardware maintenance, the NICS could experience disruptions in service.

The Miscellaneous category is composed of FBI employee background investigation contract costs, physical location costs (based on the standard Government Services Administration (GSA) rate for government office space), and depreciation.

The Contractor Cost category includes the cost of all contractor services provided to support the operation and maintenance of the NICS Operations Center, including, but not limited to, telecommunication, billing, and call center service costs. Such telephone-intensive functions are subject to workload variations that may be more economically managed using contractor support. The FBI therefore is engaging a private contractor with an appropriate number of Customer Service Representatives to answer phone calls from FFLs, forward information to NICS, and respond to FFLs with proceed or delay messages.

The NICS fee is being established in order for the Federal Government to recover the full cost of processing NICS background checks for FFLs doing business in states in which the FBI is contacted directly by the FFLs. This fee will not generate a profit. Evaluation of the NICS fee will be an ongoing process. The validity of this estimate will be evaluated during Fiscal Year 1999, and the results of this evaluation and any appropriate changes to the NICS fee will be published in the Federal Register no later than November 30, 1999. Subsequently, the NICS fee(s) will be periodically evaluated and adjusted as may be warranted.

The Director of the FBI may also clarify, supplement, or amend provisions related to these fees. The FBI Director shall provide appropriate notice to affected persons of any exercise of the foregoing authorities; notice relating to provisions of general applicability shall be published in the Federal Register.

Billing FFLs for NICS User Fees

It is general Federal policy that user charges will be collected in advance of, or simultaneously with, the rendering of services. However, strict adherence to this policy here would conflict with the Brady Act's mandate for "instant" checks, and the following procedures are accordingly established as an exception to this general policy. FFLs being serviced by the FBI will incur a non-refundable user fee charge for each requested NICS check immediately upon issuance by the FBI of the unique NICS Transaction Number (NTN) associated with the check. However, such FFLs will be afforded two payment options, real-time credit card charges by individual transaction or monthly invoicing.

Prior to initiating its first NICS check, an FFL will notify the FBI, via an enrollment process, as to which payment option it will use. Only a single payment option can be used. FFLs will be able to direct the FBI to change their payment option with a minimum of 30 days notice before the beginning of the changed billing period.

Under the real-time credit card payment option, the FFL's credit card will be billed for each NICS check at the time the FBI issues the associated NTN. A record of each NICS check, including the fee, transaction date, and NTN, will be provided on the FFL's monthly credit card bill. The FBI will accept the following major credit cards: VISA, Master Card, American Express, and Discover.

Under the invoicing payment option, a record will be compiled of all NICS checks initiated by the FFL during the billing period for which an NTN was issued, and the FFL will be invoiced for payment. The invoice will include a record of transactions including the date and time of each NICS check, the charge, and the NTN. Invoice billing periods will be on a calendar month basis. Payment will be due within 30 days of the invoice date. Invoices will be dated according to their mailing date, which will be approximately 15 days after the close of the subject billing period. The FFL will forward invoice payment (either in check form or via Electronic Funds Transfer (EFT)) to a "Lock Box" or other Automated Clearing House (ACH) depository identified by the FBI. Remittances must be drawn on a bank or other institution located in the United States and be payable in United States currency. A charge may be imposed if a check in payment of an invoice or any other matter is not honored by the bank or other financial institution on which it is drawn.

The FBI will discontinue service, i.e., providing NICS checks, to FFLs whose NICS financial accounts are not in good standing.

Waiver of Fee in Cases of Successful Appeal

Individuals who are denied the purchase of a firearm by the NICS Operations Center may appeal the denial by challenging the record upon which the denial is made. When the appeal is successful and less than 30 days has elapsed since the date of the initial NICS check, a "proceed" response and an NTN is forwarded to the FFL, which will allow the transfer of the firearm. If more than 30 days have elapsed before a denial is overturned, the FFL must perform a new NICS check before transferring the firearm. In such cases, the purchaser will be provided a written statement by the NICS Operations Center that will allow the FFL to request the new NICS check without charge.

Regulatory Flexibility Act (RFA)

In compliance with the Regulatory Flexibility Act, 5 U.S.C. 601-12, the FBI has evaluated the effects of this rule on small entities. A small firearm retailer is defined as having under $5.0 million in annual gross receipts as defined by 13 CFR 121.201. Firearm retailers are included in the Standard Industrial Class (SIC) Code 5941. Based on the evaluation under 605(b) of the RFA, the Department certifies that this action will not have a significant economic impact on a substantial number of small entities. While this proposed rule may generate up to $92 million annually in fees, these fees will not have a significant economic impact on businesses. The ultimate impact of the fee will likely be on firearm purchasers since FFLs are expected to recoup NICS user fees from the purchasers in the same way FFLs recoup the cost of fees today in connection with checks under the interim provision of the Brady Act.

The FBI will be sending a notice, including a letter describing NICS and a NICS brochure, to each FFL in the 34 states and territories that are currently expected to be serviced directly by the FBI. The FBI has also met with FFLs at regional firearm seminars conducted by the Bureau of Alcohol, Tobacco and Firearms to inform FFLs about NICS plans and to solicit comments needed to finalize these plans. These efforts were made by the FBI to also satisfy the "outreach" provisions of 5 U.S.C. 609. The obligation of FFLs to contact the NICS before transferring a firearm is imposed by Title I of the Brady Act. The fee charged for the NICS checks allows the Federal Government full recovery of costs to process NICS checks for FFLs doing business in states where the FBI is contacted directly by the FFLs. In addition, the user fee will be evaluated from time to time to account for any changes that may affect the fee.

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, § 1(b), Principles of Regulation. The DOJ has determined that this proposed rule is a "significant regulatory action" under Section 3(f) of Executive

Order 12866, Regulatory Planning and Review, and thus the proposed rule has been reviewed by the Office of Management and Budget.

Executive Order 12612

This regulation will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism applications to warrant the preparation of a Federal Assessment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2). This proposed rule will not result in an annual effect on the economy of $100,000,000 or more, a major increase in costs or prices, or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets. The cost to the FFLs is expected to be inconsequential, because the FFLs are likely to recoup the fees from firearm purchasers.

Paperwork Reduction Act of 1995

This proposed rule does not contain collection of information requirements and would not be subject to the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501-20).

Executive Order 12988-Civil Justice Reform

The proposed rule meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 28 C.F.R. Part 25

Administrative Practice and Procedure, Automatic Data Processing, Business and Industry, Courts, Credit, Firearms, Information, Law Enforcement Officers, Reporting and Recordkeeping Requirements, and Telecommunications.

Accordingly, Part 25 of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

Part 25 -- DEPARTMENT OF JUSTICE INFORMATION SYSTEMS

Subpart A - The National Instant Criminal Background Check System

1. The authority citation for Part 25 is revised to read as follows:

Authority: Pub. L. 103-159, 107 Stat. 1536; Pub. L.

101-515, 104 Stat. 2101, 2112; 31 U.S.C. 9701.

2. Section 25.12 is added to read as follows:

§25.12 User Fee Charge

(a) FFLs who directly contact the NICS Operations Center to request a NICS background check will be assessed a fee that represents the reasonable costs of the associated services.

(b) In cases where a denial of a firearm transaction has been overturned through an appeal and more than 30 days have passed since the initial NICS check, the purchaser will be provided a written statement that will allow the FFL to contact the NICS Operations Center and request that a new NICS check be performed without charge.

(c) The Director of the FBI may from time to time determine and establish the reasonable amount of the fee or fees to be assessed under this authority. The Director of the FBI may also clarify, supplement, or amend the provisions of this section. The Director of the FBI shall provide appropriate notice to affected persons of any exercise of the foregoing authorities; notice relating to provisions of general applicability shall be published in the Federal Register.

Dated: 8/12/98

Janet Reno

Janet Reno
Attorney General