

**DHS Did Not Consistently
Comply with National
Instant Criminal
Background Check System
Requirements**





OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

December 22, 2022

MEMORANDUM FOR: The Honorable Alejandro Mayorkas
Secretary
Department of Homeland Security

Admiral Linda L. Fagan
Commandant
United States Coast Guard

FROM: Joseph V. Cuffari, Ph.D. **JOSEPH V
CUFFARI**
Inspector General

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JOSEPH V CUFFARI
Date: 2022.12.21
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SUBJECT: *DHS Did Not Consistently Comply with National Instant
Criminal Background Check System Requirements*

Attached for your action is our final report, *DHS Did Not Consistently Comply with National Instant Criminal Background Check System Requirements*. We incorporated the formal comments provided by your offices.

The report contains four recommendations aimed at improving DHS' compliance with National Instant Criminal Background Check System requirements. Your offices concurred with all four recommendations. Based on information provided in your response to the draft report, we consider recommendations 1 through 4 open and resolved. Once your office has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendations. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions and of the disposition of any monetary amounts. Please send your response or closure request to OIGAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act of 1978, as amended*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Bruce Miller, Deputy Inspector General for Audits, at (202) 981-6000.

Attachment



DHS OIG HIGHLIGHTS

DHS Did Not Consistently Comply with National Instant Criminal Background Check System Requirements

December 22, 2022

Why We Did This Audit

The Federal Bureau of Investigation (FBI) in the Department of Justice (DOJ) uses the National Instant Criminal Background Check System (NICS) to prevent prohibited persons from obtaining firearms. We conducted this audit to determine if DHS is compliant with NICS requirements.

What We Recommend

We made four recommendations to improve DHS compliance with NICS requirements.

For Further Information:

Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

The Department of Homeland Security did not consistently comply with NICS requirements from July 2019 to June 2021. FBI NICS examiners rely on NICS data to determine whether a person is eligible to purchase a firearm. However, DHS components did not submit the data to DOJ, as the United States Code and Code of Federal Regulations require. In particular, the components did not consistently update missing information on dispositions, that is, information on the nature and outcome of criminal proceedings. The components also did not always respond promptly or sufficiently to FBI NICS inquiries. Specifically, DHS components took more than 3 days to respond or were unresponsive to 126 (59 percent) of 214 NICS inquiries. We attribute these issues to DHS not having a unified policy or plan to ensure the timely updating of dispositions or a mechanism to ensure prompt, sufficient responses to inquiries. If NICS examiners do not receive disposition data to deny or approve a firearm sale within 3 business days, licensed sellers may transfer firearms at their discretion. Therefore, DHS not sending disposition data to NICS and its delayed and insufficient responses to FBI inquiries create a risk of wrongful firearms transfers.

Additionally, as the *Fix NICS Act of 2018* requires, DHS submitted semiannual certifications to DOJ consistent with NICS, but at least two submitted certifications were inaccurate. This occurred because DHS has no oversight or policy to ensure compliance with NICS reporting requirements. As a result of DHS' inaccurate certifications, DOJ's semiannual report to Congress on *Fix NICS Act of 2018* compliance was also inaccurate.

DHS Response

DHS and Coast Guard concurred with all four recommendations. We consider them resolved and open.



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Abbreviations

ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
CBP	U.S. Customs and Border Protection
C.F.R.	Code of Federal Regulations
CGIS	Coast Guard Investigative Service
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FFL	Federal Firearms Licensee
FPS	Federal Protective Service
IAQ	Immigration Alien Query
ICE	U.S. Immigration and Customs Enforcement
III	Interstate Identification Index
NCIC	National Criminal Information Center
NICS	National Instant Criminal Background Check System
TSA	Transportation Security Administration
U.S.C.	United States Code
USCIS	U.S. Citizenship and Immigration Services



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Background

The Department of Justice (DOJ), Federal Bureau of Investigation (FBI) National Instant Criminal Background Check System (NICS) was designed to prevent prohibited persons from obtaining firearms. NICS became operational in 1998 after the *Brady Handgun Violence Prevention Act* (Brady Act), codified as 34 United States Code (U.S.C.) § 409, required background checks for persons purchasing a firearm from a Federal Firearms Licensee (FFL). A 2019 Congressional Research Service report described NICS as a “system of systems” used to determine firearms eligibility against 10 possible prohibiting categories.¹

Title 18 U.S.C. § 922(g)(1)-(9) and (n), defines the 10 prohibitions as follows:

1. Persons convicted of a crime punishable by imprisonment for more than 1 year;
2. Fugitives from justice;
3. Unlawful users of a controlled substance;
4. Persons adjudicated as mentally defective or who have been committed to a mental institution;
5. Illegal aliens and aliens² admitted on a non-immigrant visa;
6. Persons dishonorably discharged from the Armed Forces;
7. Persons who renounced their U.S. citizenship;
8. Persons subject to a domestic violence restraining order;
9. Persons convicted of a misdemeanor crime of domestic violence; and
10. Persons under indictment for a crime punishable by imprisonment for a term exceeding 1 year.

Five Department of Homeland Security operational components create prohibition records: U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), Federal Protective Service (FPS), United States Coast Guard (Coast Guard), and United States Secret Service (Secret Service).

The Transportation Security Administration (TSA) is a law enforcement component with arrest authority. However, it created no prohibiting records within the audit scope. Conversely, U.S. Citizenship and Immigration Services (USCIS) is not a law enforcement component but maintains prohibiting records from before the creation of DHS.

¹ Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation, R45970, October 2019.

² The term “illegal alien” or “alien” is being used because that is the terminology used by 18 U.S.C. § 922. These individuals are referred to as non-U.S. citizens elsewhere in the report.



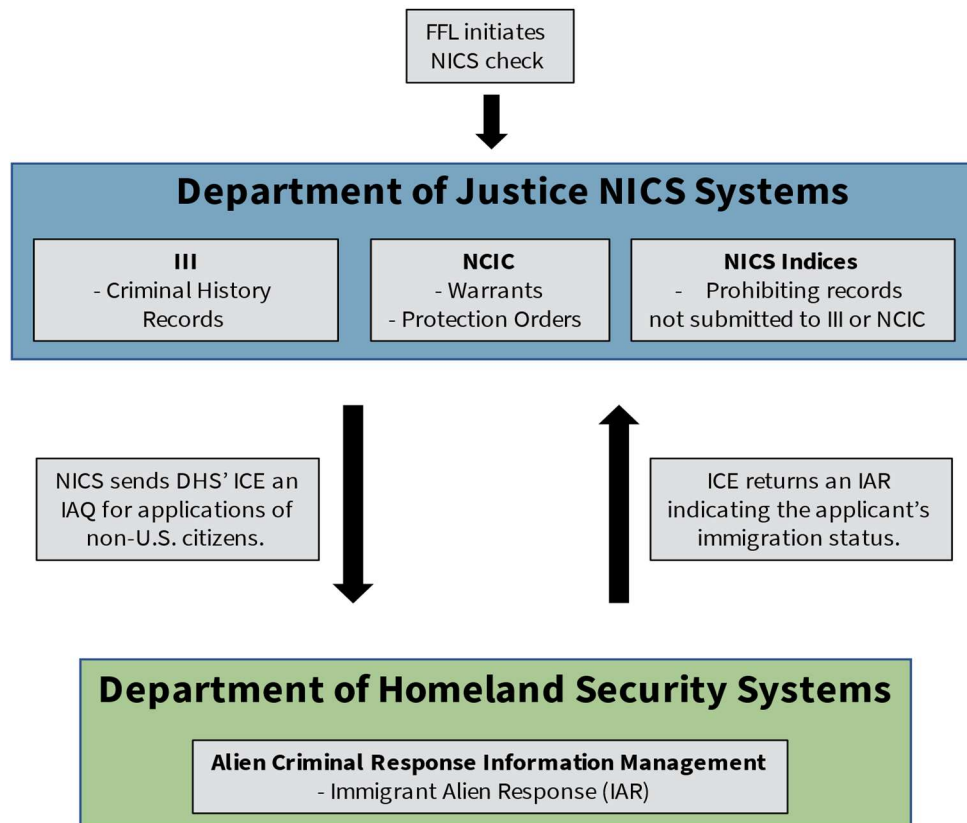
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FBI NICS examiners use three DOJ systems and one DHS system to determine whether a person is eligible to purchase a firearm. The three DOJ systems are the Interstate Identification Index (III), National Crime Information Center (NCIC), and the NICS Indices. Criminal history records for prohibitions 1, 2, 3, 4, 5, 6, 9, and 10 are in III. Law enforcement, including DHS, enters criminal records into NICS upon fingerprinting and arrest. NCIC includes warrants and protection orders used for prohibitions 2 and 8. The NICS Indices may contain information not stored in III or NCIC but relevant to determining eligibility to purchase a firearm. NICS Indices contain any Federal or state prohibition. DHS is the single largest contributor to III, NCIC, and the NICS Indices. For this report, we refer to records and information in III, NCIC, and the NICS Indices collectively as NICS data.

In addition to the three DOJ systems, NICS queries ICE to determine the status of non-U.S. citizens. When a non-U.S. citizen attempts to purchase a firearm, NICS sends an Immigrant Alien Query (IAQ) to ICE. ICE's Law Enforcement Support Center processes the IAQ and returns the person's immigration status in an Immigrant Alien Response. Figure 1 shows the databases NICS examiners use to determine firearms eligibility.

Figure 1. Databases Examiners Use to Determine Eligibility



Source: DHS Office of Inspector General analysis of NICS databases



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To buy a firearm through an FFL, a prospective purchaser must complete a DOJ Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) *Firearms Transaction Record* Form 4473. Using the form, the FFL submits the person's information to NICS. The transaction has three potential outcomes: proceed, denied, or delayed. A determination of proceed allows an FFL to release the firearm to the person. A determination of denied prevents an FFL from releasing the firearm. A transaction is delayed when a person's NICS data, such as a criminal history, is potentially prohibiting but incomplete.

A disposition is part of the criminal history information captured in NICS data that discloses the nature and outcome of criminal proceedings. Title 28 of the Code of Federal Regulations (C.F.R.) § 20.37 requires criminal justice agencies to submit a disposition within 120 days of resolution. Components submit FBI Form R-84, *Disposition Report* (Disposition Report), to update III dispositions.

While a transaction is delayed, the FBI NICS examiners contact court systems and law enforcement organizations, such as the arresting agency, searching for information to complete the record. If NICS examiners have not obtained the necessary information to deny or approve a delayed transaction within 3 business days, an FFL may release the firearm to the purchaser at the FFL's discretion. A delayed denial occurs when NICS examiners receive prohibiting information after the third day of a delayed transaction. In that instance, NICS examiners determine if the FFL transferred the firearm, then forward the information to ATF for retrieval, if necessary.

In 2019, the FBI referred 2,989 firearm retrievals to ATF. When NICS examiners do not receive the necessary information to complete a delayed transaction, it remains unresolved and in NICS for 88 days. After 88 days, the FBI purges the transaction data to comply with Federal law, which requires destruction no later than 90 days.³ In 2019, the FBI purged more than 200,000 unresolved transactions.⁴ Figure 2 shows the timeline FBI NICS examiners must follow.

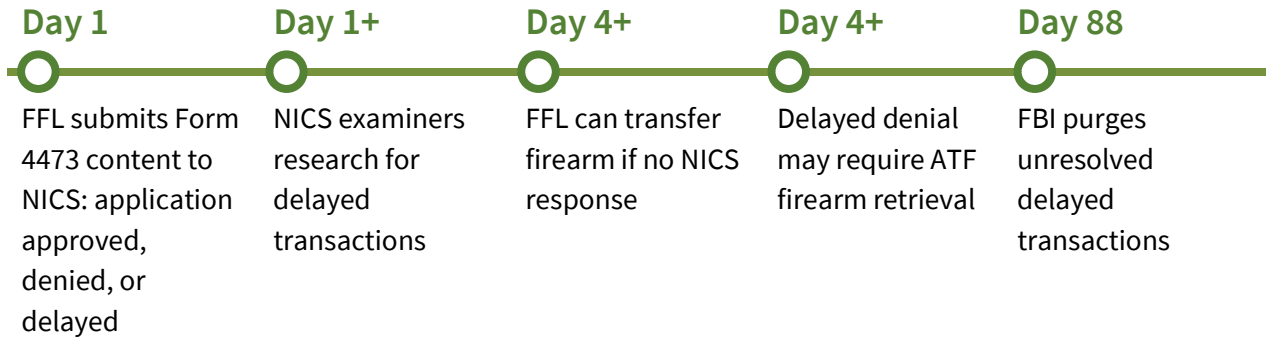
³ 28 C.F.R § 25.9(b)(1)(ii).

⁴ DOJ NICS 2019 Operations Report.
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Figure 2. NICS Process Timeline



Source: DHS OIG analysis of FBI NICS policies

In 2018, the Department of Defense Office of Inspector General issued a report⁵ emphasizing the importance of accurate and timely NICS information. The report detailed the U.S. Air Force’s failure to send a service member’s prohibiting criminal history information to DOJ. The missing information allowed the service member to legally purchase multiple firearms through an FFL. The firearms purchaser then used those firearms to carry out a mass shooting at First Baptist Church of Sutherland Springs, in Sutherland Springs, TX, killing 26 people.

In 2018, DHS OIG reviewed the Coast Guard’s NICS submissions⁶ to ensure service members with prohibiting criminal records were reported to DOJ, as required. DHS OIG determined that the Coast Guard did not enter 16 service members’ prohibiting information into NICS. In the report, DHS OIG recommended eight actions to improve the Coast Guard’s NICS compliance. One recommendation included performing a comprehensive review of criminal investigative databases to ensure the Coast Guard reported all prohibiting records to the FBI. The Coast Guard implemented recommended corrective actions. We resolved and closed all eight recommendations by August 30, 2021.

Also in 2018, Congress passed the *Fix NICS Act of 2018* (Fix NICS Act).⁷ The Fix NICS Act requires Federal agencies to submit a semiannual certification to the DOJ indicating their compliance with reporting requirements. The certification must include the agency’s:

⁵ *Report of Investigation into the United States Air Force’s Failure to submit Devin Kelley’s Criminal History Information to the Federal Bureau of Investigation*, DODIG-2019-030, December 2018.

⁶ *United States Coast Guard’s Reporting of Uniform Code of Military Justice Violations to the Federal Bureau of Investigations*, OIG-19-22, February 2019.

⁷ *Fix NICS Act of 2018*, Pub. L. No. 115-141, 132 Stat. 1132-38.



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- total number of records demonstrating a person fell within 1 of the 10 prohibited categories;
- total number of prohibiting records submitted to DOJ; and
- efforts to report complete, accurate records, monitor compliance, and correct reporting inaccuracies.

The Fix NICS Act also requires DOJ to issue a semiannual report to Congress containing the information in the Federal Departments' semiannual certifications.

We conducted this audit to determine if DHS is compliant with NICS requirements.

Results of Audit

DHS did not consistently comply with NICS requirements from July 2019 to June 2021. FBI NICS examiners rely on NICS data to determine whether a person is eligible to purchase a firearm. However, DHS components did not submit the data to DOJ, as the U.S.C. and C.F.R. require. In particular, the components did not consistently update missing information on dispositions, that is, information on the nature and outcome of criminal proceedings. The components also did not always respond promptly or sufficiently to FBI NICS inquiries. Specifically, DHS components took more than 3 days to respond or were unresponsive to 126 (59 percent) of 214 NICS inquiries. We attribute these issues to DHS not having a unified policy or plan to ensure timely updating of dispositions or a mechanism to ensure prompt, sufficient responses to inquiries. If NICS examiners do not receive disposition data to deny or approve a firearm sale within 3 days, licensed sellers may transfer firearms at their discretion. Therefore, DHS not sending disposition data to NICS and its delayed and insufficient responses to FBI inquiries create a risk of wrongful firearms transfers.

Additionally, as the Fix NICS Act requires, DHS submitted semiannual certifications to DOJ detailing the number of prohibiting records it submitted to NICS, but at least two submitted certifications were inaccurate. This occurred because DHS has no oversight or policy to ensure compliance with NICS-related reporting requirements. As a result of DHS' inaccurate certifications, DOJ's semiannual report to Congress on Fix NICS Act compliance was also inaccurate.

DHS Did Not Submit All Prohibiting Firearms Data to DOJ

The *Gun Control Act of 1968*, as the Brady Act amended, 18 U.S.C. § 922, imposes strict regulations prohibiting the sale of firearms and ammunition to



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persons prohibited under 10 categories. In addition, 34 U.S.C. § 40901(e)(1)(C) requires Federal Departments to submit information related to the 10 NICS prohibitions to DOJ no less than quarterly. Further, 28 C.F.R. § 20.37 assigns responsibility to each criminal justice agency contributing criminal history data to ensure it is complete, accurate, and current. Agencies should update dispositions within 120 days of resolution.

Through assessing internal controls across DHS to ensure NICS compliance, we determined DHS and its components did not consistently send dispositions to NICS data. We also met with the FBI to better understand NICS operations and the role of DHS and its components. FBI officials noted the importance of dispositions and complete criminal history records to FBI NICS examiners determining whether individuals are eligible to purchase firearms. FBI officials identified DHS' missing dispositions as a significant problem for their NICS examiners. The FBI also expressed concern that the Coast Guard was not submitting information on dishonorable discharges to NICS. By 2019, the FBI was sending its quarterly NICS missing disposition data to DHS components to inform them of the high numbers of missing dispositions in NICS. Additionally, DHS components did not always promptly or sufficiently respond to FBI NICS inquiries. FBI NICS relies on accurate and timely inquiry responses to determine firearms eligibility. If NICS does not receive disposition information to either deny or approve a delayed transaction within 3 business days, FFLs may transfer the gun at their discretion.

DHS Components Did Not Always Send Disposition Data to NICS

To validate the FBI's assertion of missing DHS disposition records, we obtained comprehensive data showing all charges attributed to DHS as of January 31, 2022. Our testing confirmed that, cumulatively, DHS has more than 6.4 million charges missing dispositions in NICS. The dates of those charges range from 1925 to 2022. Table 1 shows charges attributed to DHS that do not show final dispositions.



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Table 1. DHS Records Missing Dispositions, 1925 – January 31, 2022

DHS Component	Total Charges	Charges Missing Dispositions	Percent Charges Missing	Missing Dispositions		
				<5 years	5-10 years	>10 years
CBP	10,067,542	4,749,991	47%	1,820,587	1,084,595	1,844,809
Coast Guard	3,125	378	12%	241	25	112
DHS Headquarters	276	99	36%	66	26	7
FPS	1,807	708	39%	68	29	611
ICE	4,188,592	1,455,040	35%	465,252	235,128	754,660
Secret Service	150,780	22,041	15%	2,021	1,386	18,634
TSA	29	2	7%	1	1	0
USCIS ⁸	436,923	184,119	42%	1	4	184,114
Total	14,849,075	6,412,378		2,288,237	1,321,194	2,802,947

Source: DHS OIG analysis of FBI arrest data

DHS has more than 6.4 million incomplete NICS records, but not all charges will have a disposition because not all cases have been resolved in the court system. Although officials from CBP, ICE, and FPS said criminal cases usually end within 5 years, neither DOJ nor DHS has a set timeline for when a case will reach a disposition. Additionally, case outcomes vary and not all arrests or charges are prohibitions to purchasing a firearm.

We also found the Coast Guard did not always report dishonorable discharges. The *Gun Control Act of 1968* prohibits the sale or transfer of firearms to any person discharged from the Armed Forces under dishonorable conditions.⁹ As both a law enforcement organization and branch of the Armed Forces, the Coast Guard must report dishonorable discharges, plus other prohibitions.

To determine whether the Coast Guard complied with the Fix NICS Act, we checked whether records of dishonorable discharges in the Coast Guard Personnel Service Center were also in Coast Guard Investigative Service (CGIS) records reported to NICS. The Coast Guard did not capture two dishonorably discharged service members in CGIS records or report them to the NICS Indices. This occurred because the Coast Guard Personnel Service Center did not have a process to notify CGIS once it completed a dishonorable discharge. According to officials, CGIS enters records into NICS and was unaware of the two dishonorable discharges until the audit team asked about them. Upon notification, CGIS entered the two service members into NICS.

⁸ USCIS is not a law enforcement component with arrest authority. Charges attributed to USCIS after the creation of DHS were misattributed.

⁹ 18 U.S.C. § 922(g)(6).



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Across DHS, we found inconsistent and deficient practices for complying with 28 C.F.R. § 20.37, NICS requirements to update dispositions. In particular, we found:

- CBP has the highest number of missing dispositions. Within CBP, the U.S. Border Patrol apprehends the most persons. The Border Patrol handbook requires staff to include Form R-84 in a case file and for Border Patrol agents, prosecutors, or the courts to complete the dispositions once known. However, CBP transfers arrestees to ICE for immigration proceedings or other law enforcement agencies as necessary, and individuals are not in CBP custody when their cases conclude. When CBP transfers people to other law enforcement agencies for adjudication, those agencies do not always notify CBP of the disposition. Prosecutors and courts are not within CBP, and Border Patrol's policy requires no additional follow-up to ensure completion of dispositions attributed to CBP.
- ICE Enforcement and Removal Operations has no policy requiring agents to update dispositions in NICS. ICE Homeland Security Investigations has a written policy. However, an official said agents do not commonly update NICS data before closing cases.
- The Coast Guard has a process for updating NICS data, but no written policy.
- In about 2015, the Secret Service implemented a policy requiring agents to update NICS data before closing a case, but it has not addressed a disposition backlog of older cases.
- Once the FBI began sending its Disposition Reports, FPS tasked administrative personnel with reviewing and completing its missing dispositions. According to FBI data, FPS reduced its missing dispositions from 1,014 in 2018 to 708 in 2022. Although FPS reduced its number of missing dispositions, FPS has no policy requiring staff to update dispositions.

We attribute these inconsistent and deficient practices to DHS not having a unified policy or plan to ensure timely update of dispositions or a coordinated effort to address the significant backlog of missing dispositions. DHS needs a department-wide effort to update dispositions. For example, DHS needs a plan to address charges related to immigration offenses because CBP, ICE, and USCIS may all be involved, and no single component could easily address inquiries on immigration cases. CBP, ICE, and USCIS operated a NICS data improvement working group, but it disbanded during the COVID-19 pandemic.



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The focus of the working group was to modernize communication with FBI NICS; it did not focus on III or missing dispositions. Additionally, components cited challenges accessing information in legacy systems and paper files. Component officials also noted that staffing shortages leave them unable to promptly address missing dispositions.

NICS is an automated system designed to resolve firearms transactions almost instantaneously. Missing NICS data delays firearms transactions and causes NICS examiners to manually review and research case specifics. When NICS examiners do not have complete NICS data, they must extend the firearms transaction time. This prevents DOJ from effectively operating NICS. Without a unified DHS-wide approach to ensuring timely updates to NICS data, DHS cannot offer complete up-to-date criminal history data to DOJ to prevent ineligible individuals from purchasing firearms.

DHS Components Did Not Always Promptly or Sufficiently Respond to FBI NICS Inquiries

The Brady Act¹⁰ allows the FBI to secure prohibiting information directly from any agency and requires the agency to furnish electronic versions upon request when NICS data is missing disposition information. When FBI NICS examiners cannot see disposition information in NICS, they research the case further with the arresting agency. FBI NICS examiners rely on accurate and timely responses to determine firearms eligibility. If they do not receive disposition information to either proceed or deny a delayed transaction within 3 business days, FFLs may transfer a firearm at their discretion.

We reviewed 214 FBI NICS email inquiries to DHS components between August 2018 and January 2022. Of the 214 inquiries, FBI sent 126 to the three DHS components most directly involved in administering and enforcing the Immigration and Nationality Act — USCIS, ICE, and CBP — and 88 to the Coast Guard. We determined that these DHS components did not always respond promptly or sufficiently to FBI NICS inquiries to include potentially prohibiting information.

Between July 2019 and June 2022, the FBI sent 126 inquiries to USCIS, ICE, and CBP, and they (the “immigration components”) collectively responded to 37 in more than 3 days and did not respond to 31. According to the immigration components, USCIS’ research of paper files requires retrieval from the U.S. National Archives and Records Administration. Additionally, COVID-19 pandemic-related limitations adversely affected many immigration responses as DHS experienced delays obtaining files from the National Archives.

¹⁰ 34 U.S.C. § 40901(e)(1)(A)-(B).
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Because FBI NICS contacts DHS’ immigration components simultaneously, no single entity has ownership or responsibility to ensure the request is answered. Further, DHS has no tracking mechanism to ensure components reply to FBI NICS. For example, USCIS maintains alien files, or A-Files, with alien registration numbers assigned to non-U.S. citizens. A-Files became the official file for all immigration and naturalization records created or consolidated since April 1, 1944. Given its role in maintaining A-Files, USCIS researches and responds to most requests. However, when USCIS cannot find the required information, it defers to the arresting agency.

Between August 2018 and January 2022, FBI sent 88 inquiries to the Coast Guard. Of these, the Coast Guard responded late to 58, meaning it took more than 3 days for a response or the inquiry was not answered. Although CGIS is the Coast Guard entity responsible for updating NICS data, it was not included in, and was unaware of, FBI email inquiries until we requested an email search. Instead of communicating with CGIS, FBI NICS contacted the Coast Guard’s Judge Advocate General and Chief Counsel, Office of Military Justice, which did not inform CGIS of the FBI’s inquiry. As a result of our audit, the Coast Guard corrected the communication oversight and included CGIS in NICS email communications.

Cumulatively, these four DHS components took more than 3 days to respond or were unresponsive to 126 (59 percent) of the 214 inquiries. Table 2 shows Coast Guard’s and immigration components’ inquiry response rates.

Table 2. NICS Inquiry Response Rates, August 2018 to January 2022

Component(s)	Inquiries	Delayed and Non-Responses	Percentage
Immigration	126	68	54%
Coast Guard	88	58	66%

Source: DHS OIG analysis of DHS NICS email inquiries

In addition to their delayed and non-responses, USCIS, ICE, and CBP did not always give useable dispositions when responding to the FBI. When the components do not know the outcome of a case, they frequently update the disposition with administrative closure or “admin-close.” FBI officials stated that the FBI does not recognize “admin-close” as an acceptable disposition. DHS immigration components sent the FBI 43 Disposition Reports containing administrative closure. As with an unresponsive inquiry, “admin-close” transactions remain in delayed status allowing the gun to transfer after 3 business days at the FFL’s discretion. After 88 days in delayed status, the



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FBI purges unresolved transactions to comply with record retention requirements.

DHS components' delayed and insufficient responses to FBI NICS inquiries create a risk of wrongful firearms transfers. Without an agreement between DOJ and DHS on meaningful disposition terms and how to close out dispositions for which information is unavailable, DOJ and DHS cannot use NICS as intended to prevent ineligible individuals from purchasing firearms.

Components Sometimes Included Immigration Status in Their Responses, Benefiting the FBI

DHS components sometimes notified NICS examiners of the immigration status of prospective firearms purchasers when responding to FBI disposition inquiries. This DHS practice is beneficial to the FBI because 18 U.S.C. § 922(g)(5) and (7) prohibit illegal aliens, aliens admitted on a non-immigrant visa,¹¹ and persons who renounced their U.S. citizenship from purchasing firearms. Components sometimes noted a person's legal status, such as Lawful Permanent Resident or U.S. citizen, when returning a Disposition Report. In 18 responses to our sample of 126 inquiries to immigration components, DHS included the immigration status of the person. Of the 18 responses, immigration components noted the person's legal status, such as Lawful Permanent Resident, on the Disposition Report 15 times. For the other three, components notified the FBI via email of a person's illegal immigration status. Although a wrongful firearms transaction may have occurred, due to Federal law¹² requiring the FBI to purge firearms records, we could not determine whether the firearm was transferred to the prohibited person.

Despite the NICS inquiry for information related to immigration offenses, the FBI did not send IAQs for the three people without legal status. Therefore, DHS did not return an Immigration Alien Response when replying to FBI NICS. According to FBI NICS officials, researching immigration charges does not prompt an IAQ. The intent of FBI research is to eliminate non-immigration prohibitions 1, 3, and 9. Because NICS examiners do not look for immigration information related to prohibition 5, they do not request or consider the immigration status of the person in question. Nevertheless, DHS components sending all applicable prohibiting information is prudent and beneficial for the FBI. Informing NICS examiners of all prohibiting factors allows NICS examiners to consider all relevant information when determining a person's eligibility to purchase a firearm.

¹¹ The term "illegal alien" or "alien" is being used because that is the terminology used by 18 U.S.C. § 922, and these individuals are referred to as non-U.S. citizens elsewhere in the report.

¹² 28 C.F.R. § 25.9(b)(1)(ii).



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DHS Submitted Inaccurate Semiannual Certifications to DOJ

The Fix NICS Act requires DHS to submit a semiannual certification to DOJ detailing the number of records DHS submitted to NICS. The Brady Act also requires DHS, in the certification, to report on its efforts to ensure complete records and monitor NICS compliance.

To test DHS' semiannual reporting compliance, we reviewed four semiannual certifications from July 1, 2019, to June 30, 2021. DHS submitted at least two inaccurate semiannual certifications to DOJ. Specifically:

- Despite having applicable records, CBP did not claim prohibited records on its January through June 2020 certification.
- The Coast Guard did not report two dishonorable discharges for its January through June 2020 certification.
- The Coast Guard also did not report one unidentified dishonorable discharge that occurred during the January through June 2021 reporting period.
- ICE did not submit a January through June 2021 certification to DHS.
- The certifications DHS components sent to DHS did not add up to the numbers DHS claimed on its certification to DOJ for the January through June 2021 reporting period.

These issues occurred because DHS has no oversight or policy for complying with NICS-related reporting requirements and relies on components to identify and report relevant prohibiting records. CBP, ICE, the Coast Guard, and FPS are unclear on reporting requirements and sent inaccurate or incomplete certifications to DHS. DHS' inaccurate certifications led to DOJ inaccurately reporting to Congress on Federal agencies' compliance with the FIX NICS Act. Without accurate reporting, Congress cannot be fully informed.

Recommendations

Recommendation 1: We recommend the Office of the Secretary establish a DHS oversight entity to ensure National Instant Criminal Background Check System compliance in DHS, which should include:

- a. coordinating with the Attorney General to resolve open dispositions that no longer have available information and discontinue use of administrative closure dispositions; and
- b. developing a risk-based strategy for components to assess missing criminal history records and submit missing dispositions.



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Recommendation 2: We recommend the DHS Office of the Secretary establish a mechanism to track and ensure timely responses to NICS inquiries and develop and implement a process to include immigration status at the time of inquiry for immigration-related inquiries.

Recommendation 3: We recommend the United States Coast Guard, Assistant Commandant for Human Resources, establish a process for the Personnel Service Center to notify the Coast Guard Investigative Service of the completion of dishonorable discharges and that CGIS personnel enter them into NICS data.

Recommendation 4: We recommend the DHS Office of the Secretary coordinate with DOJ to better understand NICS semiannual reporting requirements and issue DHS NICS semiannual certification guidance to components.

DHS Comments and OIG Analysis

DHS' Director, Departmental Audit Liaison provided written comments in response to our draft of this report. We included a copy of this DHS management response in its entirety in Appendix B of this report.

In its management response, DHS concurred with all four report recommendations. Although DHS concurred with all recommendations, its management response highlighted several concerns regarding the underlying audit work.

First, DHS asserted that, by citing more than 6.4 million missing dispositions, OIG created a false impression of overstated noncompliance. We noted in the report the limitations of our data analysis and acknowledged that cases still progressing through the court system will not have a disposition. Although we view some missing dispositions as problematic (such as those dating back to before the creation of DHS), the basis for our finding is that DHS does not have consistent practices for updating NICS data. The high number of missing dispositions is the consequence of those inconsistent practices.

Second, according to DHS, the arrest data we obtained from the FBI and our analysis of that data do not appear accurate or verifiable. We tested and verified the data within the III to confirm the high number of missing dispositions across DHS. Although the data contains known misattributions, it is the system of record used for firearms determinations and components should coordinate a transfer with the proper law enforcement entity once it discovers a misattribution. For example, in November 2021, we met with officials from USCIS to better understand its missing dispositions. Before



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meeting with us, USCIS identified misattributions and coordinated with ICE and CBP to transfer those charges to the proper component.

Finally, according to DHS, the report does not acknowledge the nature of charges that are missing dispositions or the input of criminal justice agencies beyond DHS. Although DHS believes the nature of an immigration charge (civil or criminal) would prohibit the transfer of a firearm, such presumption is incorrect according to FBI NICS. The report does not acknowledge the input from agencies such as the U.S. Attorney's Office because its indictment and conviction information does not update the criminal history record in III. Additionally, records other agencies submit do not absolve DHS and its components from Title 28 C.F.R requirements.

DHS Response to Recommendation 1: Concur. The DHS Office of Strategy, Policy, and Plans, in conjunction with relevant components, will consider options and, once an option is selected, establish an oversight mechanism to ensure NICS compliance. As part of this effort, DHS will replace the use of "administrative closure dispositions" with another term/category that is mutually acceptable with the FBI. Estimated Completion Date: December 29, 2023.

OIG Analysis: We consider these actions responsive to the recommendation, which we consider resolved and open. We will close this recommendation when DHS submits documentation confirming it created a DHS oversight mechanism and replaced administrative closure dispositions.

DHS Response to Recommendation 2: Concur. Once an oversight entity has been established, DHS will create mechanisms to track and ensure that responses to NICS inquiries will be developed timely, as well as include immigration status for immigration-related inquiries. Specifically, individual DHS components will work to continue and expand sharing of immigration status at the time of inquiry. Estimated Completion Date: December 31, 2025.

OIG Analysis: We consider these actions responsive to the recommendation, which we consider resolved and open. However, we are concerned that DHS proposed an estimated completion date more than 3 years out. DHS Directive 077-01 (IV. Policy, F.) states that components generally implement corrective action on resolved findings and recommendations within 1 year of final report issuance or as agreed upon by the component and the OIG. We suggest DHS reconsider a revised estimated completion date to implement this recommendation sooner than proposed. We will close this recommendation when DHS submits documentation confirming a process and mechanism for ensuring timely responses to NICS email inquiries.



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DHS Response to Recommendation 3: Concur. The Coast Guard’s Director of Military Personnel will direct the Coast Guard Personnel Service Center to notify CGIS of any dishonorable discharges in the next scheduled update of the Coast Guard Manual, *Discipline and Conduct, COMDTINST M1600.2*, dated October 22, 2020. Estimated Completion Date: December 29, 2023.

OIG Analysis: We consider these actions responsive to the recommendation, which we consider resolved and open. We will close this recommendation when Coast Guard submits documentation confirming the Coast Guard Personnel Service Center’s requirement to notify CGIS of dishonorable discharges.

DHS Response to Recommendation 4: Concur. DHS Office of Strategy, Policy, and Plans, and appropriate operational components, will meet with DOJ to: (1) review certification guidance and reporting requirements; and (2) clarify the nature of administrative arrests to help DHS Office of Strategy, Policy, and Plans to develop, coordinate, and issue department-wide guidance to components, as appropriate. Estimated Completion Date: December 29, 2023.

OIG Analysis: We consider these actions responsive to the recommendation, which we consider resolved and open. We will close this recommendation when DHS submits documentation confirming it issued NICS reporting guidance to components.



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Appendix A: Objective, Scope, and Methodology

The Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

Our audit objective was to determine whether DHS was compliant with NICS requirements. To achieve our objective, we reviewed Federal laws, regulations, policy, and guidance applicable to NICS. We reviewed and analyzed prior audits and reports related to the audit objective.

We audited DHS and its components via email and video communication. We interviewed officials from DHS, CBP, ICE, Coast Guard, Secret Service, TSA, FPS, USCIS, Federal Law Enforcement Training Centers, Federal Emergency Management Agency, FBI, ATF, and the U.S. Attorney's Office. We gathered sufficient evidence to support our conclusions.

To determine NICS compliance, we tested and analyzed data from FBI, ATF, DHS, ICE, CBP, USCIS, and Coast Guard. The audit team could not separate data by prohibitions due to the complexity of FBI arrest data text fields and NICS determinations. Given the systemic reporting errors in DHS components' semiannual certifications, the audit team did not validate component certifications. After assessing the reliability of the data, we determined the data was sufficiently reliable for our audit purposes.

We assessed internal controls related to DHS compliance with the Fix NICS Act and identified deficiencies that we believe could affect DHS' and components' ability to comply with NICS requirements. The internal control deficiencies we found are discussed in the Audit Results section of this report. However, because our review was limited to these internal control components and underlying principles, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

We conducted this performance audit between August 2021 and August 2022 pursuant to the *Inspector General Act of 1978, as amended*, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objectives.



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Department of Homeland Security

Appendix B: DHS Comments to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528



November 23, 2022

MEMORANDUM FOR: Joseph V. Cuffari, Ph.D.
Inspector General

FROM: Jim H. Crumacker, CIA, CFE
Director
Departmental GAO-OIG Audit Liaison

JIM H CRUMPACKER
Digitally signed by JIM H CRUMPACKER
Date: 2022.11.23 12:00:41 -05'00'

SUBJECT: Management Response to Draft Report: “DHS Did Not Consistently Comply with National Instant Criminal Background Check System Requirements” (Project No. 21-050-AUD-DHS)

Thank you for the opportunity to comment on this draft report. The U.S. Department of Homeland Security (DHS or the Department) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

DHS leadership is pleased to note OIG’s recognition of the importance of the National Instant Criminal System (NICS), which was designed to prevent prohibited persons from obtaining firearms, and into which DHS Components send applicable prohibiting information, including immigration status. This enables the Federal Bureau of Investigation (FBI), and other NICS examiners, to consider all relevant information when determining a person’s eligibility to purchase a firearm. DHS remains committed to fully supporting NICS and providing the FBI with prohibiting information, including final disposition of criminal proceedings, where available.

However, leadership is concerned that the OIG draft report overstates the problem of DHS compliance with NICS requirements by creating the false impression that DHS remains non-compliant with respect to more 6.4 million arrests or charges. Specifically, the draft report states that “DHS components did not submit the data to DOJ [Department of Justice], as the United States Code and Code of Federal Regulations require” and that DHS Components not always responding promptly or sufficiently to FBI NICS inquiries “create a risk of wrongful firearms transfers.” Although the findings in this draft report rely on arrest data received from the FBI and the OIG’s analysis, this data does not appear accurate or verifiable. For example, in Table 1, OIG attributes 276 arrests to DHS Headquarters, 99 with missing dispositions. However, OIG acknowledged in discussions with Departmental program officials and subject matter experts that DHS Headquarters



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does not have independent arrest authority, and those arrests attributed to DHS Headquarters should probably be attributed to other DHS Components. Similarly, the draft report attributes nearly half a million arrests to U. S. Citizenship and Immigration Services, which is not a criminal justice agency and which does not have arrest authority.

Further, DHS disagrees with the OIG finding that a missing disposition constitutes non-compliance, as the draft report does not explain how many arrests or charges, if any, actually lack a reportable disposition. In addition, the draft report does not acknowledge the difference between administrative arrests for immigration violations (which do not require disposition reporting to prevent ineligible individuals from purchasing firearms) and criminal arrests (which do require such disposition reporting). The Department believes that the lack of dispositions for administrative arrests and certain criminal arrests relating to immigration violations such as those under 8 U.S.C. § 1325, "Improper entry by alien," automatically render the affected individuals ineligible to purchase a firearm, because those individuals are non-citizens unlawfully in the United States.

With respect to other criminal arrests and charges, it also does not appear that the OIG draft report assesses the extent to which other criminal justice agencies already report important milestones or dispositions of DHS criminal arrests or charges. Generally, DHS refers criminal arrests and charges for prosecution, and U.S. Attorneys' offices and U.S. courts, the criminal justice agencies that obtain the dispositions on such arrests and charges, are therefore able to report all indictments and convictions related to such arrests and charges. However, DHS can find no evidence in the draft report that the OIG assessed the extent to which dispositions were truly missing and/or unreportable.

The draft report contained four recommendations with which the Department concurs. Enclosed find our detailed response to each recommendation. DHS previously submitted technical comments addressing several accuracy, contextual and other issues under a separate cover for OIG's consideration.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions.

Enclosure



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Enclosure: Management Response to Recommendations Contained in 21-050-AUD-DHS

OIG recommended that the Secretary of Homeland Security:

Recommendation 1: Establish a DHS oversight entity to ensure National Instant Criminal Background Check System compliance in DHS, which should include:

- a. coordinating with the Attorney General to resolve open dispositions that no longer have available information and discontinue use of administrative closure dispositions; and
- b. developing a risk-based strategy for components to assess missing criminal history records and submit missing dispositions.

Response: Concur. The DHS Office of Strategy, Policy, and Plans (PLCY), in conjunction with relevant Components, will consider options and, once an option is selected, establish an oversight mechanism to ensure NICS compliance. As part of this effort, DHS will replace the use of “administrative closure dispositions” with another term/category that is mutually acceptable with the FBI. Estimated Completion Date (ECD): December 29, 2023.

Recommendation 2: Establish a mechanism to track and ensure timely responses to NICS inquiries and develop and implement a process to include immigration status at the time of inquiry for immigration-related inquiries.

Response: Concur. Once an oversight entity has been established, DHS will create mechanisms to track and ensure that responses to NICS inquiries will be developed timely, as well as include immigration status for immigration-related inquiries. Specifically, individual DHS Components will work to continue and expand sharing of immigration status at the time of inquiry. ECD: December 31, 2025.

OIG recommended that the United States Coast Guard Assistant Commandant for Human Resources:

Recommendation 3: Establish a process for the Personnel Service Center to notify the Coast Guard Investigative Service [CGIS] of the completion of dishonorable discharges and that CGIS personnel enter them into NICS data.

Response: Concur. The Coast Guard’s Director of Military Personnel will direct the Coast Guard Personnel Service Center to notify CGIS of any dishonorable discharges in the next scheduled update of the Coast Guard Manual, “Discipline and Conduct,



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COMDTINST M1600.2,” dated October 22, 2020.¹ ECD: December 29, 2023.

OIG recommended that the Secretary of Homeland Security:

Recommendation 4: Coordinate with DOJ to better understand NICS semiannual reporting requirements and issue DHS NICS semiannual certification guidance to components.

Response: Concur. DHS PLCY, and appropriate operational Components, will meet with DOJ to: (1) review certification guidance and reporting requirements; and (2) clarify the nature of administrative arrests in order to help DHS PLCY to develop, coordinate, and issue Department-wide guidance to Components, as appropriate. ECD: December 29, 2023.

¹ https://media.defense.gov/2020/Oct/27/2002524777/-1/-1/0/CIM_1600_2.PDF



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Appendix C: Report Distribution

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