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Document Title: State Progress in Record Reporting for Firearm-Related Background Checks: Unlawful Drug Users

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This is the sixth in a series of BJS grant-funded reports on firearm-related background checks. Under the Brady Handgun Violence Prevention Act, being an unlawful user or addicted to a controlled substance prohibits a person from receiving firearms. The report describes how firearm-related background checks relate to unlawful drug users and their records that prohibit purchasing or possessing firearms on various national and state systems. This report provides an overview of drug offenses and indicators that determine if a person is prohibited from purchasing or possessing a firearm. It also describes the challenges to identifying and providing relevant records, including strategies some states use to improve reporting.

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Unlawful Drug Users

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Introduction

Under the Brady Handgun Violence Prevention Act of 1993 (Brady Act) as codified at 18 U.S.C. § 922(g)(3), being an unlawful user of or addicted to a controlled substance prohibits a person from receiving firearms.¹ The National Instant Criminal Background Check System (NICS) Improvement Amendments Act (NIAA) of 2007 defines “unlawful drug use” records as those that identify a person unlawfully using or addicted to a controlled substance, as demonstrated by specified arrests, convictions, and adjudications that are not protected from disclosure to the Attorney General by federal or state law.²

These include the following criminal history records that are typically available through the Interstate Identification Index (III):³

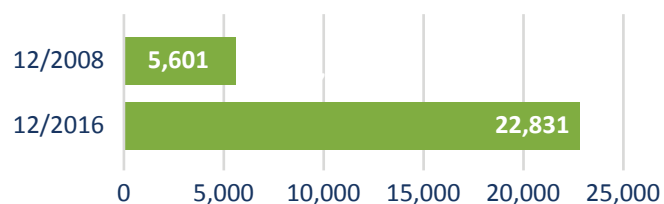
- Multiple arrests for use or possession of a controlled substance within the past 5 years if the most recent arrest occurred within the past year;
- Convictions for use or possession of a controlled substance within the past year (regardless of offense type)
- Certain convictions for possession of drug paraphernalia within the past year.

Unlawful drug use records may also be noncriminal history records, which can be made available through the NICS Index:

- Persons who test positive for use of a controlled substance within the past year
- Persons who admit to the use of a controlled substance within the past year.⁴

The NICS Index included nearly five times as many unlawful drug use entries in 2016 than it did in 2008, due to ongoing state and federal efforts to improve this category of records.

Unlawful Drug Use Records in the NICS Index



Note: Records were submitted by both state and federal agencies. Source: <https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view>

Many of these improvements are the result of funds awarded to states by the U.S. Department of Justice, Bureau of Justice Statistics (BJS) through the NICS Act Record Improvement Program (NARIP). This program administers the grant provisions of the NIAA that was signed into law on January 8, 2008, following the April 2007 shooting tragedy at Virginia Tech. The Virginia Tech shooter was able to purchase firearms from a Federal Firearms Licensee (FFL) because information about his prohibiting mental health history was not entered into the NICS Index. The NIAA is intended to address the gaps in information available to the NICS about prohibiting mental health adjudications, involuntary mental health commitments, and other prohibiting factors. BJS began awarding NARIP funds to states in 2009, and as of 2016 more than \$110 million in funding has been awarded to 27 states and one tribe.

While many of the records that are used to deny a firearms transfer based on unlawful drug use are available through III (i.e., arrests and convictions for controlled substance-related crimes) noncriminal records are often missing. This information includes records for positive drug screens and persons’ admission of substance abuse. As of December 31, 2016, 26 states had no unlawful drug use entries in the NICS Index, which is where prohibiting noncriminal records should be included so they are available nationally for firearms related background checks.⁵ Many other states had very few unlawful drug use records in the NICS Index.

1 The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. § 802.
 2 <https://www.gpo.gov/fdsys/pkg/PLAW-110publ180/pdf/PLAW-110publ180.pdf>
 3 <https://www.fbi.gov/services/cjis/nics/about-nics>
 4 <http://gao.gov/assets/600/592452.pdf>
 5 <https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view>

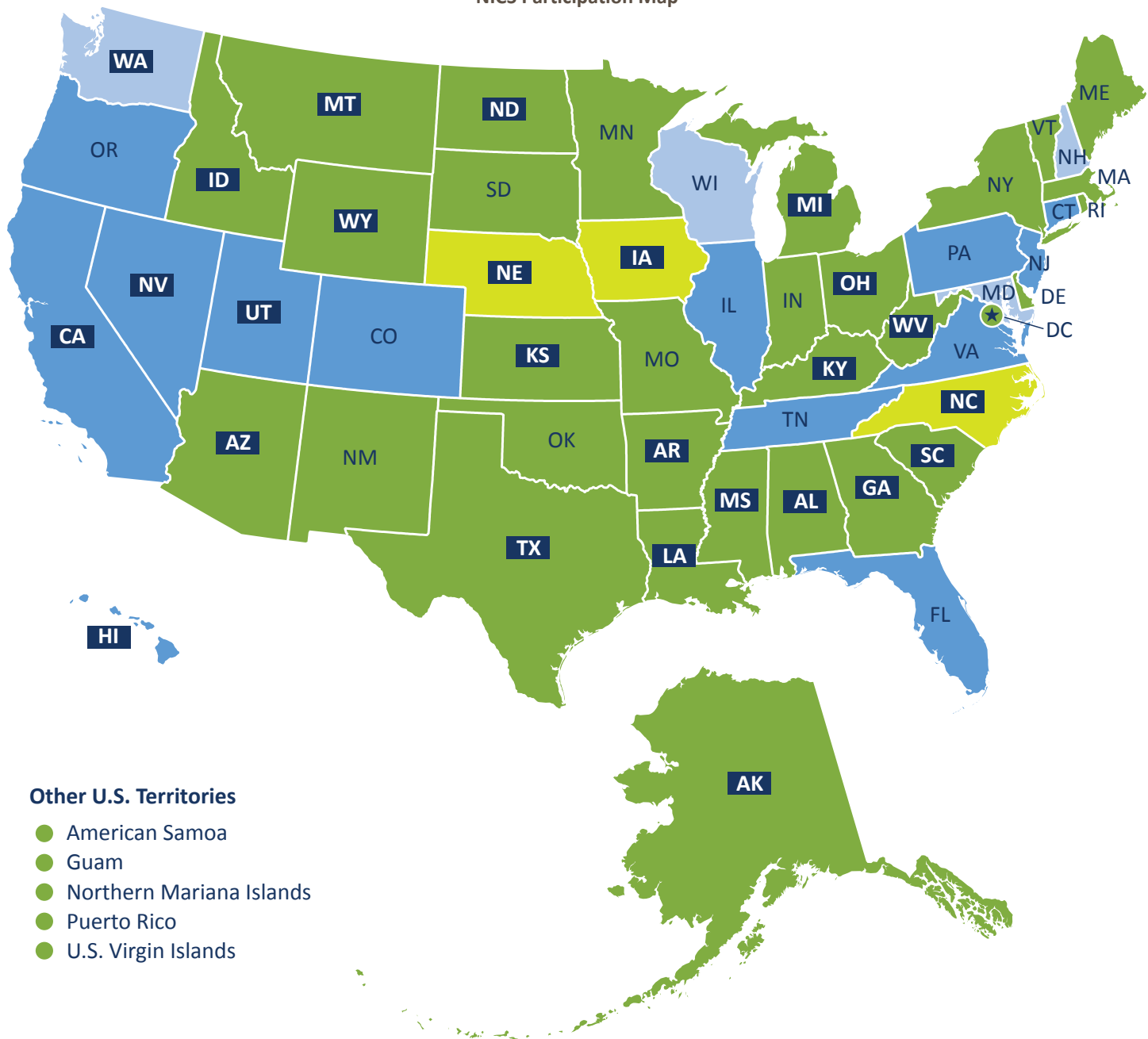
Background

The Brady Act, among other things, created the NICS. The NICS is the national system that enables FFLs to initiate a background check through the FBI or a state Point of Contact (POC). The FBI or POC will check available records to identify persons who may be prohibited from possessing or purchasing a firearm. The records may be included in the following databases.

- National Crime Information Center (NCIC) – An electronic database consisting of 21 files, 10 of which are queried for a NICS-related background check. These files help criminal justice professionals apprehend fugitives from justice, locate missing persons, recover stolen property, identify terrorists, and verify persons subject to protection orders.
- III – Administered by the FBI, and participated in by all states, the III is a fingerprint-supported automated criminal records exchange system that includes arrest and disposition information for individuals charged with felonies or misdemeanors. Information that may be available via III includes persons who are fugitives from justice, persons found not guilty by reason of insanity or adjudicated to be incompetent to stand trial, persons found guilty of misdemeanor crimes of domestic violence, and persons under indictment.
- NICS Index – The NICS Index contains biographic information contributed by local, state, tribal, and federal agencies pertaining to persons prohibited from receiving a firearm pursuant to state and/or federal law. While any disqualifying record may be entered into the NICS Index, it is not intended to duplicate information entered in NCIC or III. Instead, the database was designed to house disqualifying information not otherwise available at the national level.
- Department of Homeland Security’s U.S. Immigration and Customs Enforcement (ICE) – Relevant ICE databases are queried by the FBI NICS Section, and can be queried by POC states, for non-U.S. citizens attempting to receive firearms in the United States.

States acting as a POC also search additional databases containing state and local court and law enforcement records. Such records may render prospective gun purchasers disqualified under federal and/or state laws.

NICS Participation Map



Other U.S. Territories

- American Samoa
- Guam
- Northern Mariana Islands
- Puerto Rico
- U.S. Virgin Islands

Point of Contact (POC)

- 26** At Least One ATF-Qualified Alternate Permit — The permits are issued by local or state agencies.
- 13** Full POC State — Contact state/territory for all firearm background checks including permits
- 4** Partial POC — Contact state for handgun and FBI for long gun background checks
- 3** Partial POC — Contact state for handgun permit and FBI for long gun background checks
- 36** Non-POC — Contact FBI for all firearm background checks

Please refer to the latest Permanent Brady Permit Chart for specific permit details at www.atf.gov/rules-and-regulations/permanent-brady-permit-chart

Where are NICS Prohibiting Records Reported?

The following lists the firearm purchase-prohibiting categories identified in the Brady Act and shows the federal database in which those records are appropriately stored.

Prohibiting Record Type	Federal Database(s)	
Felony/Serious Misdemeanor Convictions	III: Should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Should be placed here if not available in III.
Fugitives from Justice ⁶	NCIC: Should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Should be placed here if not available in NCIC.
Unlawful Drug Use	III: Arrests and convictions for drug offenses should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Information such as admission of use and failed drug tests should be placed here.
Mental Health	III: Persons found not guilty by reason of insanity or adjudicated to be incompetent to stand trial should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Involuntary commitments to mental institutions for the purpose of treatment should be placed here as they would be otherwise unavailable for firearms background check searches. Persons found not guilty by reason of insanity or adjudicated to be mentally defective should most appropriately be placed here if they are otherwise unavailable through III.
Subjects of Domestic Violence Protection Orders	NCIC: Should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Should be placed here if not available in NCIC (as well as orders prohibited under state law).
Misdemeanor Crimes of Domestic Violence Convictions	III: Should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Should be placed here if not available in III or, if conviction is available in III, should also be placed here if qualifying relationship and/or force element is not available in III.
Indictments	III: Should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Should be placed here if not available in III.
Dishonorable Discharges	III: Should most appropriately be placed here so they are available for other criminal justice purposes.	NICS Index: Should be placed here if not available in III.
Illegal or Unlawful Aliens	NICS Index: Should be placed here as they would otherwise be unavailable for firearms background check searches.	
Renounced United States Citizenship	NICS Index: Should be placed here as they would otherwise be unavailable for firearms background check searches.	

⁶ To determine if someone is a fugitive from justice, NICS must establish that the prospective purchaser: 1) has fled the state; 2) has done so to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding (intent); and 3) is subject to a current or imminent criminal prosecution or testimonial obligation.

Challenges to Entering Noncriminal Justice Unlawful Drug Use Records in the NICS Index

Lack of Centralized Records Management Systems for Law Enforcement Agencies

Often the most critical information that can be used to determine illegal drug use or possession exists within incident reports generated by local law enforcement agencies. While the FBI encourages law enforcement to include details about persons found in possession of controlled substances in their arrest reports and requests that test results be included if a suspected controlled substance is confirmed by a field and/or laboratory test, many of these records are not routinely shared as a part of any statewide or national system.⁷ While this information is often readily available at the local agency through a records management system (RMS), FBI NICS Section examiners and POC state examiners may not have access to these systems. Because examiners typically do not have access to local RMS systems, it is vital that local agencies place disqualifying records in systems that are searched as a part of a NICS firearms background check.

Problem-solving Courts

Problem-solving courts are a widespread alternative to traditional models of adjudication. They are intended to address the underlying causes of crime (e.g., drug addiction, alcoholism, mental health problems) rather than simply responding to crimes once they have occurred. For instance, a person may be arrested multiple times for vagrancy due to suffering from an untreated mental illness. The goal of problem-solving courts is to address the root problem of a person's criminal behavior. These courts channel the persons into a program, typically for 12 or more months, during which they report often to the court and participate in a wide range of therapies designed to treat the underlying problem that instigated their case. These courts are designed to take cases prior to judgment (pre-plea) or following judgment (post-plea). In some problem-solving courts, a condition of the program is that the original case is dismissed or expunged upon successful completion of the program.

Drug Courts

All states now have drug courts in many or all jurisdictions.⁸ In many cases, individuals are allowed to participate in a drug court in exchange for having criminal charges dismissed upon successful conclusion of the drug court treatment program. One of the main conditions of drug court is to abstain from using any unlawful controlled substance for a set period of time. Drug court participants are routinely subject to drug testing to monitor and enforce compliance with this condition.

Many judges and drug court administrators have embraced research showing that relapse is a part of breaking the cycle of addiction. Consequently, a person will not necessarily be dismissed from a drug court program as a result of one or more positive drug tests. In these cases, there is a reluctance to include information about illegal drug use in the NICS Index. The fear is that one could deny a firearms transfer to a person who is in recovery and has successfully completed drug court, even after other legal barriers have been eliminated (e.g., expungement/sealing of the arrest for a controlled substance crime, dismissal of charges). Finally, the terms of participation in the program may bar the court from sharing this information for any purpose other than the program itself.

Drug courts are not only for individuals charged with drug crimes. Persons with substance abuse disorders who have committed property crimes such as burglary or theft are often assigned to drug court as their addiction plays an underlying role in why they are committing crimes. For instance, an offender charged with burglary or theft may have intended to trade stolen property for cash to buy drugs.

Mental Health Courts

According to the BJS report titled *Mental Health Problems of Prison and Jail Inmates*, "more than half of all prison and jail inmates have mental health problems."⁹ The same report reveals: 49% of inmates in local jails have both mental health and substance abuse problems, 19% have substance abuse

7 U. S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Law Enforcement Guide*.

8 <http://www.nij.gov/topics/courts/drug-courts/pages/welcome.aspx>

9 <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=789>

problems only, and 15% have mental health problems only. In an effort to defeat the cycle of persons with behavioral health disorders moving in and out of jails, many jurisdictions have implemented mental health courts. According to BJS, there were 337 mental health courts as of 2012.¹⁰ Since co-occurring disorders are so prevalent in the justice-involved population, participants in mental health courts are also commonly subject to random drug tests. Once again, there may be reluctance by court officials to enter illegal drug use records into the NICS Index as this is often viewed as being in conflict with the legal agreement between the court and the defendant regarding their participation in the mental health court program as such agreements usually include the possibility that charges could be dismissed or expunged upon successful completion.

Misunderstanding of the Health Insurance Portability and Accountability Act Privacy Rule and 42 Code of Federal Regulations Part 2

In the past, many court and criminal justice officials have expressed reluctance to share substance abuse information due to concerns about violating the provisions of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and 42 Code of Federal Regulations (C.F.R.) Part 2.¹¹ However, both of these regulations only apply to “covered entities.” The covered entities for HIPAA, which governs access to personal health information (PHI), are health plans, health information clearinghouses, healthcare providers and business associates (e.g., third party claims processors, medical transcriptionists).¹² The covered entities for 42 C.F.R. Part 2, which applies specifically to the confidentiality of substance abuse patient records, are federally assisted programs that identify themselves as providing substance abuse/mental health diagnosis, treatment, or referral for treatment. While it is common for correctional facilities to declare themselves as covered entities because they provide and/or contract for medical and behavioral health services, other criminal justice agencies do not meet the federal definition.

In 2010, the U.S. Department of Health and Human Services (HHS) provided guidance clarifying that law enforcement officials, courts, and community supervision personnel (probation and parole officers) are not covered entities under HIPAA or 42 C.F.R. Part 2.¹³ Thus, they may disclose PHI that they learn directly from a subject (or about a subject in the case of a drug test) without violating federal law. However, the guidance states that certain state laws may be more restrictive and override the federal guidance on sharing PHI. Additionally, criminal justice agencies may not *re-disclose* information obtained from a covered entity except in very rare circumstances where the subject of the PHI is a danger to himself or others.

While court and community supervision staff are not typically covered entities, treatment providers are if they receive federal funds or are otherwise considered federally assisted. In order for community supervision staff or the problem-solving court team to make use of the treatment and testing data gathered by treatment providers, many jurisdictions make use of a consent form signed by the probationer, parolee, or participant in the problem-solving court. This allows the drug treatment and testing data to be shared with community supervision staff and problem-solving court teams, but expressly prohibits the sharing of this information for any other purpose.¹⁴ This means that the results of drug tests administered by court or community supervision personnel may be submitted to the NICS Index while those administered by a treatment provider typically may not. While the recent federal discussion and clarification has helped, HIPAA is still a complex issue for many entities that would be responsible for submitting noncriminal data to the NICS Index.

Lack of Centralized Database for Failed Drug Tests

Failed drug tests are the most common type of noncriminal NICS Index entries for unlawful drug use.¹⁵ Drug testing can occur at many points during the criminal justice system including, but not limited to:

10 <http://www.bjs.gov/content/pub/pdf/cpsc12.pdf>
 11 https://www.bja.gov/Publications/CSG_CJMH_Info_Sharing.pdf
 12 <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity.html>
 13 https://www.bja.gov/Publications/CSG_CJMH_Info_Sharing.pdf
 14 <http://www.jhconnect.org/wp-content/uploads/2013/09/42-CFR-Part-2-final.pdf>
 15 <http://gao.gov/assets/600/592452.pdf>

- Released on recognizance processing
- Pre- or Post- booking into a detention facility by law enforcement
- Pre- or Post- arraignment on criminal charges
- Intake or release from a correctional facility
- While on pretrial release
- During post-conviction community supervision

In many cases, persons who have been in jail (or who have been released pending trial or on community supervision) may already have a disqualifying criminal history record in III. This could include information about drug-related arrests and convictions. In these cases, disqualifying information would already be available as a part of a NICS check. Conversely, there are circumstances where creating a NICS Index entry for unlawful drug use would be the only disqualifying record available during a firearm background check. For instance, a person could be arrested for a nondrug related misdemeanor charge. In this case, the arrest (and subsequent conviction, if applicable) would not necessarily result in a firearms denial. However, if the person tested positive while under community supervision and probation staff submitted this information to the NICS Index, this would cause a denial—as long as it was less than a year since the positive drug screen. Or, a person may be on pretrial release for a felony charge that has not gone to trial. While the indictment is a disqualifying record and should be made available through the NICS Index or III, the submission of an unlawful drug use record for a defendant that tests positive on a drug screen ensures that the individual is prevented from obtaining a firearm from an FFL.

Unfortunately, there are typically no centralized databases for pretrial and community supervision information within state or local jurisdictions. This means it is difficult to assess the extent to which noncriminal records (e.g., drug test records) could significantly impact the number of firearms denials if they were made available through the NICS Index. It also means there is no single source from which to submit unlawful substance use records to the NICS Index.

Offenders seeking to be released on bond or on their own recognizance may be interviewed to see if they qualify for diversion through drug court. An admission of drug abuse in this scenario—whether or not it is confirmed by a subsequent drug test—is an allowable entry in the NICS Index. These records automatically expire in 1 year from the date the subject admitted unlawfully using drugs.

State Laws Regarding Medical Marijuana and Recreational Marijuana Legalization

As of November 9, 2016, 26 states have legalized marijuana in some form – including seven states and the District of Columbia that now allow its recreational use.¹⁶ Other states have effectively decriminalized the possession of small amounts of marijuana. Despite these state-level policy changes, the Bureau of Alcohol, Tobacco and Firearms (ATF) maintains that federal law still prohibits the use of marijuana for any purpose even if it is sanctioned by state law.¹⁷ This creates several potential issues for states where legalization of marijuana has occurred:

- Should law enforcement officials be required to report individuals found in possession of marijuana to the NICS Index even if it does not constitute a criminal offense at the state level?
- Should information about individuals who admit to medical or recreational use of marijuana to court officials be placed in the NICS Index?
- Will states that have legalized marijuana continue drug testing for persons under community supervision? If so, should information about persons who test positive for marijuana be added to the NICS Index?

For some states (e.g., Arizona), the problem lies in a direct conflict between a state statute that explicitly prohibits the sharing of data about those licensed for use of medical marijuana with any other agency, state or federal. As more states consider marijuana legalization or decriminalization this issue will continue to be debated, and it is very likely there will continue to be questions and confusion by those who need to make regulatory and suitability determinations when federal and state laws conflict with each other.

¹⁶ <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>

¹⁷ <https://health.hawaii.gov/medicalmarijuanaregistry/files/2014/11/US-Dept-of-Justice-Firearms-Guidance-9-21-2011.pdf>

Promising Practices for Reporting Illegal Drug Use Records to the NICS Index

Connecticut

Many illegal drug use firearms disqualifiers may be established by a finding of guilt or responsibility for an offense involving the actual possession of a controlled substance. In 2010, Connecticut determined that many arrests for drug possession were not supported by fingerprints due to limitations in staffing and equipment and/or agency policies among local law enforcement. Since only those arrests supported by fingerprints can be included in the state’s computerized criminal history repository, subsequent dispositions in these cases were not available through III. To alleviate this problem, Connecticut received NCHIP funds to increase the number of unlawful drug use convictions available to the NICS Index. The project involved two components: 1) development of a court computer system to support the entry of unlawful drug use records in the NICS Index; and 2) manual entry of records into the NICS Index by contractors while the computer system was under development. The project resulted in more than 12,000 new records in the NICS Index with a standard duration of 1 year, and it provided the framework for future automation.

In the meantime, Connecticut reduced the penalty for simple marijuana possession. By the end of 2011, persons caught in possession of less than one-half ounce of marijuana were issued a ticket at the scene of the incident, with the option to plead “no contest” and pay a fine by mail in lieu of opening a criminal court case. If the respondent pays the ticket, no information is recorded in the criminal court computer system or the state criminal

history repository. However, since these records constitute an admission of unlawful drug use for NICS purposes, Connecticut enters these records into the NICS Index as well. Once again, the first step was to use contractors to manually enter qualifying records into the NICS Index until an automated exchange was developed.

The fine payments for the marijuana violations are recorded in a database for minor motor vehicle offenses and similar violations that may be resolved outside the courts. Beginning in 2014, Connecticut launched an electronic interface between the fine payment database, the state’s NCIC front-end system, and the NICS Index to automate the submission of these records. More than 3,500 illegal drug use records per year are entered in the NICS Index through this system.

Connecticut also implemented a new computer system for all criminal court dispositions in 2017 with significant assistance from NCHIP. The new system enables a local court clerk to record conviction information in other types of cases involving drugs, and when applicable, an illegal drug use record is immediately entered in the NICS Index through the NCIC front-end system. The new criminal disposition system also enables court contractors to analyze drug convictions to determine whether a permanent Connecticut firearms disqualification applies. If so, court personnel can enter a permanent state disqualification record in the NICS Index so the information is available for background checks with a Connecticut nexus.



District of Columbia

Since 1984, the Pretrial Services Agency (PSA) for the District of Columbia has used its own in-house laboratory to perform drug tests for pretrial defendants under PSA's supervision. They also test offenders under the supervision of the Court Services and Offender Supervision Agency, which includes persons on probation, parole, and supervised release, as well as respondents ordered into testing by the D.C. Superior Court Family Court. The lab performs drug tests on tens of thousands of samples each month, and the results are entered into the lab's electronic RMS.

Several years ago, PSA worked with the FBI NICS Section to create an electronic interface to submit information about clients who test positive for illegal drugs. When a positive drug screen is entered, basic information about the client is extracted and placed into a queue to be submitted to the NICS Index. Every 7 days, the queued results are automatically sent as a batch via a stored procedure to the FBI NICS Section. All records are automatically set to expire 1 year from the date when the failed drug test occurred, so no manual intervention is required during the creation or deletion of the NICS Index entry. PSA notes that occasionally they must respond to cases of mistaken identity when a name-based search hits on one of their illegal drug use records which involves investigation by staff. However, the program has been in place since November 2013, and this is a very infrequent occurrence. PSA credits their success in contributing unlawful drug use entries to their automated process.

Michigan

Each year the Michigan State Police (MSP), Firearms Records Unit, provides 10 to 12 Michigan Commission on Law Enforcement Standards (MCOLES)-certified classes to approximately 200 to 300 law enforcement members throughout the state of Michigan. The training—which is offered to local agencies at no charge— is an 8 hour course specifically focused on Michigan and federal firearms prohibitions.

As part of this training, the federal prohibition 18 U.S.C (g)(3) for controlled substance use is discussed in depth, including the process for entering individuals who are prohibited from possessing firearms into the NICS Index. Michigan allows medical marijuana, so part of the training focuses on the fact that known marijuana users' information should be placed in the NICS Index.¹⁸ This includes persons in possession of a medical marijuana patient or user's card. However, caregiver, manufacturer, and distributor cards are not automatically disqualifying. In these instances, the contributing agency must still prove marijuana use for a person to be prohibited from receiving a firearm. The Firearms Records Unit is available to support Michigan law enforcement members who have questions on firearms disqualifications and the entry of records into the NICS Index.

Prior to June 2016, Michigan had two methods for entering records into the NICS Index: 1) faxing a FBI form along with supporting documentation directly to the FBI NICS Section; or 2) submitting an electronic transaction using the state message switch and retaining the supporting documentation.

In the summer of 2016, MSP worked with the FBI NICS Section to test the new firearms prohibitor record submission that is now available to authorized Law Enforcement Enterprise Portal (LEEP) users. Since many officers routinely access LEEP as a part of their daily work, allowing them to electronically submit illegal drug use cases through the portal will make the process more convenient than the current faxing method. Michigan now encourages the use of the LEEP to submit disqualifying records along with supporting documentation to the NICS Index.

MSP's information technology team is also making enhancements to the Michigan Law Enforcement Information Network that is accessed by all criminal justice agencies in the state. The new screens under development will support the electronic submission of firearm's prohibitors to the NICS Index.



18 <https://www.law.cornell.edu/uscode/text/18/922>

Pennsylvania

The recent increase in the number of illegal drug use records forwarded to the NICS Index from Pennsylvania is a bi-product of the state's overall efforts to increase the number of records available for firearms background checks. Prior to their NICS Index submission project—which focused on all federal disqualifiers—Pennsylvania contributed approximately 50 to 100 illegal drug use records each year via paper reports. These were typically records that were revealed during routine investigations, but there was not an automated method to systematically identify them.

Prior to establishing the new system, misdemeanors often required manual research to determine the presence of a disqualifying factor. Today these records are electronically identified and made available to the NICS Index through an automated exchange, thus significantly decreasing the amount of time devoted to researching individual cases. Aside from the 1,000+ illegal drug use records made available through this project, Pennsylvania has contributed approximately 1,000,000 records to the NICS Index in other prohibited categories. Paper records are still submitted occasionally, for instance, admissions of illegal drug use and positive drug tests that are unavailable through the criminal history record must still be entered manually. However, the NICS Index submission project created a new entry path that is much more effective and efficient for most entries. Both pathways are crucial to submitting as many prohibiting records as the state can identify.

One of the reasons officials in Pennsylvania sought to implement these reforms was a perception that current (or former) residents purchasing firearms out-of-state could avoid denied transactions since much of the information regarding disqualifiers was not available nationally. For instance, the Pennsylvania State Police knew that many arrest records were missing from III due to poor fingerprint image quality. As a NICS POC state, in-state examiners could access multiple local databases to research potentially disqualifying records more thoroughly. However, these state databases are not accessible externally, which created a potential vulnerability, so Pennsylvania decided to close these gaps to enhance public safety.

From January 1, 2013, to April 19, 2017, the FBI reported that 1,213 out-of-state firearms purchases were denied based on Pennsylvania NICS Index entries. The offenses that were the basis for the denials included: robbery by assault and force, multiple drug delivery convictions, burglary, and several thefts by taking.



Conclusion

As noted above, there are several challenges in making illegal drug use records available for NICS checks.

- The lack of centralized RMSs for law enforcement agencies makes it difficult to report drug arrests and lab reports that may not be obtained for weeks or months after an arrest.
- Problem-solving courts often misunderstand which records are reportable to the NICS Index or may be reluctant to report illegal drug use as a violation to a person’s terms of supervision.
- Criminal justice agencies often misunderstand the provisions of the HIPAA Privacy Rule and 42 C.F.R. Part 2, thus making them afraid to report illegal drug use for fear of unlawfully disclosing PHI.
- Community supervision agencies often lack a centralized database to allow for streamlined reporting of failed drug tests.
- State officials often do not understand that state laws legalizing medical marijuana and/or recreational marijuana do not supersede federal statutes for reporting illegal drug use as defined by the federal government.

However, because of the increased awareness of the need to report drug use records to NCIC and the NICS Index, some progress has been made. The promising practices identified in this analysis can help serve as a roadmap for states seeking to continue improving their submission of NICS disqualifying records. While the strategies described in this bulletin are focused on illegal drug use submissions, they could be used to increase the availability of other disqualifiers, as well. Ongoing training is critical to make sure all stakeholders not only remain aware of the need for timely and accurate information, but also know how records should be submitted. Additionally, automation is critical to ensuring records availability and efforts like D.C. PSA’s—which promote the electronic exchange of information—provide long-term benefits for the purpose of improving firearms background checks and beyond.