

# **WHITE PAPER**

## **Access to Firearms in Washington State**



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# **2016 White Paper**

## **Access to Firearms in Washington**

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## I. INTRODUCTION

Citing the public health implications of gun-related violence, crime, fatalities, and injuries, earlier this year Governor Jay Inslee issued [Executive Order 16-02](#). Among other things, the Executive Order requested that the Attorney General survey statutes that prohibit some people from possessing firearms, examine how those statutes are implemented, and analyze, in particular, how those laws are enforced when someone who is not allowed to possess a firearm tries to buy one – or when someone else tries to purchase a weapon for that person. In addition, the Governor asked the Attorney General to update a 2007 Attorney General’s Office White Paper on background checks and access to firearms for those who had experienced a mental health commitment.

This report is the Attorney General’s response to the Governor’s Executive Order.

The Executive Order also issued directives to three other state agencies. It required the Department of Health (DOH) and Department of Social and Health Services (DSHS) to collect, review, and disseminate data on deaths and hospitalizations attributed to firearms, and recommend strategies to reduce fatalities and serious injuries. It directed DOH to work with others to implement the [Statewide Suicide Prevention Plan](#). Finally, the Executive Order instructed the Office of Financial Management (OFM) to analyze information sharing between state agencies, courts, local jurisdictions, law enforcement, and other entities to determine if it could be improved.

## II. BACKGROUND

In 2007, following a mass shooting at Virginia Tech, Washington Attorney General Rob McKenna convened an internal workgroup to compile and issue a [White Paper](#). The White Paper analyzed state and federal firearms prohibitions related to mental health commitments, as well as state and federal background checks. The 2007 White Paper recommended a number of steps to:

- Eliminate differences between state and federal law;
- Address areas of overlap or inefficiency; and
- Identify loopholes that precluded fulfillment of existing laws.

Washington’s firearms statutes and background check processes have improved since 2007. But work remains to be done.

Governor Inslee’s 2016 Executive Order was prompted by the prevalence of shooting deaths in Washington and across the country. Just since 2012, several mass shootings have occurred in our state:

- On May 30, 2012, at Café Racer in Seattle, four patrons were shot and killed. Half an hour later a fifth person was killed by the same shooter during a carjacking. The shooter then committed suicide. He had obtained his firearms legally.

- On June 5, 2014, a man with a history of psychosis and violent threats, but not prohibited from firearms access, killed a student at Seattle Pacific University and wounded two others before a student-safety monitor intervened and disarmed the shooter when he paused to reload.
- On October 24, 2014, a student at Marysville Pilchuck High School killed four classmates and himself with a handgun purchased by his father. The father was later sentenced to two years in federal prison for illegal possession of firearms. The father was ineligible to purchase the handgun due to a prior domestic violence restraining order, but lied about it on a background check form. The restraining order, issued by a tribal court, did not appear during the background check because it was never entered into the state database.
- On July 30, 2016, in Mukilteo, three young adults were killed and one seriously wounded by the 19-year-old former boyfriend of one of the victims. He was armed with an AR-15 high-capacity rifle legally purchased a week before the shooting.<sup>1</sup>
- On September 23, 2016, five people were shot to death at the Cascade Mall in Burlington. A court order prohibited the shooter from possessing firearms due to a history of assaults, domestic violence, suicide attempts, and drug overdoses. He used his father's rifle and a 25-round magazine.

While these incidents are deeply disturbing, mass shootings are just a fraction of the state's overall firearms deaths. Between 2012 and 2014, an average of 665 people per year died in Washington from firearms injuries, according to DOH. Approximately 80 percent of the firearms deaths were suicides.

Advances have been made since the Attorney General's 2007 White Paper, but there are additional steps we can take to keep firearms away from individuals who may be a danger to themselves or others, while protecting the constitutional rights of lawful gun owners. This White Paper examines the legal, policy, and practical issues surrounding access to firearms in our state, and presents a number of recommendations.

### **III. EXECUTIVE SUMMARY**

To improve public safety and reduce violent crime and suicide, both federal and state laws prohibit certain individuals from possessing firearms. Background checks facilitate timely, lawful transfer to eligible purchasers, while at the same time ensuring that firearms are not transferred to people who are not allowed to possess them.

This White Paper reviews the design and effectiveness of Washington's current background check system. It also examines other issues related to acquiring and possessing firearms, including:

- Prohibited persons attempting to buy firearms;

- Prohibited persons surrendering firearms already in their possession;
- Restoring firearms rights to persons previously prohibited; and
- Limiting children's access to firearms.

Washington's firearms background check system is fragmented. The system relies on 260 local law enforcement agencies to conduct checks on handgun purchases and concealed pistol license applications, while purchases of rifles and shotguns are checked exclusively through a federal database. The system involves complex and inconsistent processes for putting information into several databases.

Washington needs specific improvements in our background check process. We need to ensure that resources are in place for timely and complete input of data. We also need to ensure that processes and resources exist to restore and protect the rights of lawful gun owners when appropriate.

With regard to enforcement of current laws, there are safety, legal, and resource challenges associated with identifying and taking action against persons who inappropriately or unlawfully possess firearms. These challenges need to be resolved with specific and practical enforcement solutions. Similar challenges and solutions are needed to follow up on illegal attempts to purchase firearms by or for prohibited persons.

While there have been improvements in Washington's firearms statutes and background check process, gun violence continues at an alarming rate.

This White Paper makes findings and recommendations for administrative efforts and legislative changes to advance public safety in our state. At the same time, the White Paper discusses the importance of providing due process protections to individuals, as well as procedures for restoration of their rights to possess firearms when appropriate.

The White Paper:

- Provides an overview of the scope and effectiveness of the existing federal and state designations of individuals or categories of individuals prohibited from purchasing or possessing firearms, and recommends additional prohibitions as well as improved processes to ensure information is timely and completely entered into existing systems and communicated to those who need it;
- Looks at the current state of Washington's firearms background check process and recommends changes to eliminate redundancies and streamline the system;
- Analyzes the law and current practices surrounding prohibited persons surrendering firearms or attempting to purchase them, and recommends further analysis to determine if additional steps must be taken to increase the effectiveness of the current system; and
- Discusses and encourages measures to limit children's access to firearms.

#### **IV. FEDERAL AND STATE PROHIBITIONS ON POSSESSION OF FIREARMS**

In an attempt to improve public safety and reduce violent crime and suicide, both federal and state law prohibits certain categories of persons from legally possessing firearms.<sup>2</sup> Generally, sanctions exist for transferring a firearm to a person in a prohibited category. Similarly, there may be sanctions for prohibited persons who purchase, or attempt to purchase, firearms or who fail to surrender firearms in their possession.

At the federal level, the Gun Control Act details ten “prohibitors” restricting receipt of a firearm and possession.<sup>3</sup> The prohibitor most recently adopted at the federal level, in 1996, adds persons subject to domestic violence restraining orders or convicted of a misdemeanor crime of domestic violence.<sup>4</sup> The penalty for violation of the federal firearm possession statute is a fine and up to ten years imprisonment.<sup>5</sup>

The Washington Uniform Firearms Act<sup>6</sup> prohibits firearms possession in the case of:

- Felony convictions;
- Findings of not guilty by reason of insanity;
- Involuntary mental health commitments;
- Domestic violence crimes; and
- Restraining orders.<sup>7</sup>

In Washington, unlawful possession of a firearm is a class B or C felony, depending on the reason for the firearm restriction.<sup>8</sup> Federal and state laws prohibit “straw buyers” from acquiring firearms on behalf of other persons who may or may not be prohibited from possessing.<sup>9</sup>

Although federal law is more proscriptive than Washington law in certain areas, Congress did not preempt state law when it enacted the Gun Control Act.<sup>10</sup> State and federal law stand independently so long as there is no conflict between the two, or state law does not impede enforcement of federal law.<sup>11</sup> Washington state and federal firearms laws are not in conflict, as nothing in state law allows firearms access for individuals prohibited from possession under federal law. The Washington Legislature acknowledged differences between state and federal law in the Uniform Firearms Act, and directed law enforcement agencies to provide a warning that state and federal law differ.<sup>12</sup>

As was the case when the 2007 White Paper was written, differences between federal and state law can complicate the determination of an individual’s status regarding firearms access by law enforcement, potential gun buyers, gun owners, and firearms dealers. Existing federal and state prohibitions are compared in the Appendix. Some of the differences make sense, such as federal prohibitions covering persons who are largely in the federal province, including those dishonorably discharged from the military and those who have renounced U.S. citizenship. Similarly, there are practical reasons for state prohibitions crafted to reflect particular choices and address specific problems recognized by state policy makers. At the same time, challenges exist when federal prohibitions are

more expansive than, or differ significantly from, state law. This section discusses issues surrounding particular prohibitions or potential prohibitions.

#### **A. Persons Subject to Guardianships**

In the mental health category, federal regulations are more restrictive on firearms access than Washington law. Under federal law, this category includes a person determined by a court to lack “the mental capacity to contract or manage his own affairs.”<sup>13</sup> Under Washington law, a person who lacks capacity and for whom a payee is designated is typically subject to a guardianship order.<sup>14</sup> There is no blanket Washington statutory prohibition on firearms possession by such a person. A court may, however, craft a specific guardianship order to prohibit a particular ward from possessing firearms or direct the guardian to remove firearms from the ward’s possession. The current process under Washington law includes due process protections and is a solid, individualized process intended to prevent persons who pose a high risk to themselves or others from having access to firearms.

It should be noted, however, that there is currently no practice for entering such orders into the state or federal background check systems.

**Recommendation:** *Take steps to ensure that when a court enters a guardianship order prohibiting an individual ward from possessing firearms, the order is entered into the federal background check system.*

#### **B. Mental Health Detention and Evaluation**

In 2009, the Legislature added short-term involuntary commitment orders as a prohibitor to firearms possession in Washington. This change brought state law into alignment with federal law with regard to all types of involuntary commitments.

The federal prohibitor for “committed to a mental institution” does not encompass short-term mental health detentions for observation.<sup>15</sup> A number of states, however, have prohibited possession of a firearm temporarily or permanently when a person is detained for a short-term mental health evaluation or observation for civil commitment. For example, California imposes a five-year ban on possession for persons held for 72-hour mental health observation.<sup>16</sup> California’s ban has been found constitutional.<sup>17</sup> However, a similar statute in Maine was struck down for depriving persons of constitutional firearms rights without due process.<sup>18</sup>

In the 2015 session of the Washington Legislature, a bill was introduced to prohibit possession of firearms by persons detained for up to 72 hours for mental health evaluation, but not subsequently committed for involuntary treatment, if a firearm was a factor in the person’s detention.<sup>19</sup> The bill did not advance. The proposal provided that a prosecutor could file a motion with a superior court to make the person ineligible to possess. The motion could be granted following a hearing to determine if the person suffers from a mental disorder and if there is a substantial nexus between the detention and use, or threatened use, of a firearm.

**Recommendation:** *Adopt a narrowly crafted prohibition on the possession of a firearm on a temporary or permanent basis if a person is detained for civil commitment evaluation or observation and the use or threatened use of a firearm was a factor in the person's detention. The measure must include due process protections and procedures for restoration of rights as appropriate.*

### C. Other “Risk-Based” Prohibitions

Research indicates that federal and state prohibiting criteria can correlate poorly with the actual risk of firearms violence and suicide.<sup>20</sup> In response, some states have added risk-based prohibitors to firearms possession. The narrowly crafted prohibitions described above on possession of firearms by individuals detained for mental health observation or under a guardianship order are one such example. When combined with due process protections, risk-based prohibitors that focus on individuals, rather than categories, may help prevent firearms access by individuals who pose a high risk to themselves or others.

In 1999, Connecticut passed a law to allow firearms to be temporarily removed from an individual if there is probable cause to believe the person poses a significant risk of harm to themselves or others.<sup>21</sup> Indiana and California have since adopted similar laws and approximately a dozen states will consider risk-based firearms removal laws in their upcoming legislative sessions.<sup>22</sup>

Policies that deliberately incorporate risk-based factors for firearms violence and suicide can provide a comprehensive, evidence-based approach to gun violence prevention. These policies can expand firearms prohibitions to encompass the individuals that research shows are at heightened risk for committing gun violence. The policies can include mechanisms to allow for removal from or surrender of firearms by individuals who are at serious risk of harm to themselves or others. To protect constitutional rights the prohibitions must be combined with appropriate due process protections and should have appropriate procedures for restoration of rights.

**Recommendation:** *Adopt additional risk-based prohibitions focused on individuals who pose a high risk to themselves or others rather than categories of people without regard to risk. Any such measure must include due process protections and procedures to restore rights as appropriate.*

### D. Marijuana

Washington state has no statutory prohibition that connects firearms possession to use of controlled substances unless the use results in a serious offense charge or felony conviction. On the other hand, federal law prohibits firearms possession by a person who is an “unlawful user of or addicted to any controlled substance.”<sup>23</sup> Federal regulation defines this as: “A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.”<sup>24</sup> “Current use” means that “the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct,” with inferences of

current use drawn by convictions for possession in the past year, multiple arrests with the most recent in the past year, or a positive drug test within the past year.<sup>25</sup>

Under federal law, marijuana remains a “Schedule I” controlled substance.<sup>26</sup> The legalization of recreational and medical marijuana in Washington and other states poses a challenge for both potential gun buyers and the states. Form 4473,<sup>27</sup> issued by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), is completed by potential purchasers of firearms to initiate a background check. The form asks the purchaser to check “yes” or “no”: “Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?” In 2011, ATF issued an Open Letter to firearms dealers advising them that “any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.”<sup>28</sup> The letter advised that all persons using marijuana should answer “yes” to the question on Form 4473.

The Ninth Circuit Court of Appeals has ruled that the federal firearms prohibition for “unlawful users” of controlled substances does not run afoul of the Second Amendment to the U.S. Constitution.<sup>29</sup> More recently, the Ninth Circuit dismissed challenges by a Nevada woman barred from obtaining a firearm because she held a medical marijuana card issued under Nevada law. The Court held that under federal law and the 2011 ATF Open Letter, the federal ban on firearms possession is valid.<sup>30</sup>

Issuance of concealed pistol licenses by Washington state to persons who use marijuana, either recreationally or medicinally, is also an unsettled question. State law prohibits issuance of a concealed pistol license if the applicant is “prohibited from possessing a firearm under federal law.”<sup>31</sup> DOH administers a database to voluntarily register medicinal marijuana users, but due to confidentiality restrictions, the information cannot be used by law enforcement when deciding whether to issue a concealed pistol license.<sup>32</sup> Some law enforcement agencies may deny a concealed pistol license if they have actual knowledge of the applicant’s marijuana use, although in practice the agency is unlikely to know. It is also unclear whether the agency has a duty to inquire.

Further complicating the situation, it is also unclear whether the federal prohibition on possession of a firearm by “unlawful users” extends to the 1,600 Washington licensees who engage in the lawful business of marijuana production, processing, transportation, and retail. These licensees handle a high-value product on a largely cash basis (due to federal banking restrictions) and, therefore, may be armed for self-protection. Nothing in state law prohibits firearms possession by marijuana licensees.<sup>33</sup> Depending on the facts, lawful possession of marijuana for commercial purposes may or may not create an inference of “unlawful use” under federal law. The U.S. Department of Justice (DOJ) has emphasized a federal interest in “preventing violence and the use of firearms in the cultivation and distribution of marijuana.”<sup>34</sup> Nothing has altered DOJ’s authority to enforce federal law, regardless of state law.

At least one federal legislator, Senator Lisa Murkowski from Alaska, has requested that federal authorities revisit the rules on this subject.<sup>35</sup> It is likely that Congress would have to change federal law to remedy the issue.

Finally, there appears to be a similar disconnect between state and federal laws regarding persons who undergo chemical dependency treatment for use of controlled substances, but are not otherwise prohibited from firearms possession due to a felony charge or conviction. For example, under state law<sup>36</sup> involuntary chemical dependency treatment is not disqualifying, nor will it be under recent legislation that integrates mental health and substance use commitment schemes.<sup>37</sup> Even if state law did establish such a prohibition, reporting a record of drug and alcohol treatment, whether voluntary or involuntary, to state and federal firearms databases could pose legal issues under the strict confidentiality requirements of 42 C.F.R. Part 2.<sup>38</sup>

**Recommendation:** *Officials in Washington should appeal to Congress and the federal ATF to allow legal access to firearms for individuals whose use or possession of marijuana is legal under state law.*

## V. BACKGROUND CHECKS

Both federal and state law regulates the transfer of firearms. Under federal law, a dealer is designated a “federal firearms licensee” (FFL), and holds a license granted by the ATF. Under Washington law, a dealer is defined by statute as anyone engaged in the business of selling firearms who has, or is required to have, a federal firearms license.<sup>39</sup> A dealer's license is not required under state or federal law if the person makes only occasional sales, exchanges, or purchases of firearms to enhance a personal collection or as a hobby, or sells all or part of his or her personal collection of firearms.

Dealers must comply with both state and federal background check requirements before transferring firearms to persons who are not also dealers. Under federal law, an FFL cannot sell a firearm or ammunition to a person whom the dealer knows, or has reasonable cause to know, is federally prohibited from possessing a firearm.<sup>40</sup> The consequence for willful violations of the federal background check requirement is revocation of the federal firearms license (subject to a hearing) and imposition of a civil fine.<sup>41</sup> In addition, a knowing violation of the background check requirements can subject the FFL to criminal prosecution and up to ten years imprisonment.<sup>42</sup>

Under state law, it is a class C felony for a person to transfer a firearm to another person whom the transferor has reasonable cause to believe is ineligible to possess a firearm.<sup>43</sup> Initiative 594, passed by Washington voters in 2014, subjects most private transfers between individuals to a background check.<sup>44</sup> First-time, knowing violations of this requirement are a gross misdemeanor punishable by up to one year in jail and up to a \$5,000 fine.<sup>45</sup> In the first prosecution under this law, an Island County man was recently charged with illegally transferring a pistol allegedly used to commit a murder.<sup>46</sup>

Both federal and Washington law prohibits purchases by straw buyers.<sup>47</sup> ATF Form 4473 advises purchasers: “Are the actual transferee/buyer of the firearm(s) listed on this form?”

**Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**<sup>48</sup> According to one report, federal authorities rarely prosecute straw buyers and congressional attempts to strengthen federal laws against straw buyers have failed. States, however, are increasingly adopting laws to prohibit transfers to straw buyers.<sup>49</sup> In 2014, the U.S. Supreme Court held that a person who buys a gun on someone else’s behalf while falsely claiming that it is for himself, even if the actual buyer could have lawfully purchased the gun, commits a material misrepresentation punishable under the Gun Control Act.<sup>50</sup>

A National Instant Criminal Background Check System (NICS) check usually returns an immediate response. There is no federal waiting period. The dealer is notified that the transfer may proceed, may not proceed,<sup>51</sup> or is delayed pending further review of the applicant’s history. If a transfer is delayed for further review, but the dealer does not receive a response from NICS within three business days, the transfer may proceed at the dealer’s discretion.<sup>52</sup> These are known as “default approvals.”<sup>53</sup> If it is ultimately determined that a firearm has been transferred, but possession should have been denied, the case is referred to ATF, or in some states (excluding Washington) to local law enforcement or a statewide firearms unit, and that agency is responsible for retrieval of the firearm.<sup>54</sup> In 2015, nationally NICS referred 2,982 retrieval actions to the ATF.<sup>55</sup>

Under Washington law, a transfer cannot take place until the person receiving the firearm passes the background check, or “Ten business days have elapsed from the date the licensed dealer requested the background check.”<sup>56</sup>

#### **A. Washington’s Distinction Between Pistols and Long Guns**

In Washington, the process for conducting a background check for a potential purchaser differs with the type of firearm (pistol or long gun), and depends on whether the purchaser already has a concealed pistol license. NICS checks are initiated either by the dealer who contacts NICS directly or by a state “point of contact” agency designated by the state, or both. Washington is considered a “partial point of contact” state because 260 sheriffs and police departments request NICS background checks for pistols, but dealers perform the NICS background checks for long guns and pistol purchases for those with a concealed pistol license.

Local law enforcement agencies conduct required state background checks for pistol purchases in all instances.

According to the FBI, Washington is one of only seven states in the country with a decentralized configuration where state or local authorities are contacted for pistol and/or concealed pistol license applications, but long guns are checked exclusively through NICS.<sup>57</sup> This distinction means that applicants for pistol purchases and concealed pistol licenses are subject to checks of state databases. Long gun purchases are not.

Type of Firearm or License	Who Checks State and Local Databases?	Who Checks the Federal NICS Database?
Concealed pistol license	Local law enforcement	Local law enforcement
Handgun <i>with</i> concealed pistol license	Local law enforcement	Dealer
Handgun <i>without</i> concealed pistol license	Local law enforcement	Local law enforcement
Long gun (rifles, shotguns)	N/A	Dealer

Long gun purchases are handled exclusively between the dealer and NICS.<sup>58</sup> Firearms dealers contact NICS by phone or electronically (known as “e-check”) to determine whether a prospective purchaser is prohibited from possessing a firearm. Dealers also have the option of requesting a check on a person who attempts to pawn a firearm. This is done without the involvement of local or state authorities or any check of state or local records except to the extent those records have been submitted to NICS. Many disqualifying state records, including criminal and mental health records, are electronically submitted to NICS and should stop the transfer of a long gun to an ineligible person.

For a pistol sale or transfer, if the purchaser does not have a valid concealed pistol license, the dealer contacts one of Washington’s 260 local sheriffs or police departments to conduct the NICS check and a state background check. If the proposed pistol purchaser has a valid concealed pistol license, the dealer will conduct a NICS check, and the local law enforcement agency will conduct the required state background check. The state background check includes a check of the databases of the Washington State Patrol, DSHS, and local mental health agencies. All the firearms disqualifying categories can be checked in a single computerized search in NICS. This is not the case with the decentralized system used in the state background checks for concealed pistol licenses and pistol purchases.

The different processes for running background checks for obtaining a concealed pistol license, purchasing a pistol, and buying a long gun creates confusion for dealers, purchasers, gun owners, and law enforcement in Washington. Reliance on multiple local law enforcement agencies to conduct background checks creates the potential for inconsistent practices and may tax the resources of small local agencies. Reliance on

these inconsistent processes may result in different outcomes with regard to a particular firearms purchase or license application.

**Recommendation:** *Evaluate whether a separate check of state records for long gun purchases would provide an added level of public safety. If so, in addition to checks in the federal system, these checks should be performed for all firearms purchases, not just pistol and concealed pistol license applications. Conversely, because the state records checks add transactional costs and complications, they should no longer be required – and Washington should rely solely on the federal background check system – if they are not adding value.*

**Recommendation:** *Adopt a centralized firearms background check system allowing firearms dealers to go through a single state agency with access to all necessary state or federal records to perform background checks, rather than requiring dealers to contact different agencies for different transactions.*

## **B. Mental Health Records**

The 2007 White Paper led to several significant changes in Washington’s firearms statutes and background check processes related to mental health. In 2009, the Legislature amended Washington law to require courts to forward mental health commitment records to NICS and the Washington Department of Licensing (DOL) within three business days after a commitment order is issued.<sup>59</sup> The reporting happens daily in practice through a secure, online transmittal system developed by the Administrative Office of the Courts.<sup>60</sup> This was a significant improvement to our state’s background check system, streamlining and automating Washington’s submission of data to NICS. Administrative practices were also changed, including standardization of court forms and improved coordination between state agencies. As a result, Washington ranks among the top NICS reporting states per capita even though we receive no federal funding to pay for the reporting mechanisms.

By having the courts submit commitment orders directly to NICS, the Legislature removed the requirement for DSHS to enter information into the federal database. As described above, NICS is checked when an individual applies to purchase any firearm. However, as currently written, state law still requires law enforcement to consult DSHS records when they conduct a background check for a pistol transfer or a concealed pistol license. This redundant check may be an inefficient use of resources. DSHS records continue to be based on administrative data and the system is not automated (DSHS staff manually check whether an applicant is in the records). With timely entry into NICS by the courts, the DSHS check for pistol purchases and concealed pistol license applications may be redundant and therefore an inefficient use of state resources.

As mentioned above, involuntary mental health treatment orders are also sent to DOL by the courts. If DOL finds a match with its concealed pistol license records, notice to revoke that person’s license is sent to the local law enforcement agency that originally issued it.<sup>61</sup> Once DOL checks its database for the presence of a concealed pistol license,

the mental health record from the court is destroyed. By statute, DOL does not retain the mental health records as the information is already retained by NICS and DSHS.

**Recommendation:** *Evaluate whether there is timely and complete submission of mental health records to the federal background check system. If so, eliminate the DSHS mental health check for pistol transfers and concealed pistol license applications. If not, steps should be taken to ensure timely and complete submission to the federal system.*

### **C. The Department of Licensing’s Role in Washington’s Firearms System**

DOL has no regulatory role in Washington’s firearms system. Rather, DOL has a limited, record keeping role in firearms data collection and maintenance. DOL maintains three types of records issued by local law enforcement agencies: records of concealed pistol licenses, alien firearms licenses, and pistol transfer applications used when a pistol is transferred through a licensed firearms dealer. There is no mechanism to record any subsequent transfer in ownership that does not go through a dealer (whether that is through sale, gift, or theft.) For this reason, the pistol transfer information in DOL’s system does not alone constitute proof of ownership of a pistol. However, it has been viewed by law enforcement entities as showing “indicia” of potential ownership, and the starting point for further investigation.

DOL also does not determine whether to issue or revoke a concealed pistol license or alien firearms license. Nor does DOL have authority to determine whether a pistol transfer should proceed. This authority is held by local law enforcement. DOL does not maintain records of pistol ownership or a “registry” of firearms ownership.

The effectiveness of DOL’s system depends on the agency’s ability to keep up with the workload of inputting data, and the ability of the agency to communicate that information to those who need it.

**Recommendation:** *Determine the best way to ensure that the Washington Department of Licensing’s firearms system contains accurate and timely records of pistol transfer applications, alien firearms licenses, and concealed pistol licenses, and that the information is available to those who need it.*

## **VI. WASHINGTON’S RESTORATION LAW**

Under certain circumstances, it is appropriate to restore the right to possess firearms to an individual. The definition of who is eligible for restoration and the process for restoring firearms rights in Washington should be improved.

Congress enacted the Brady Handgun Violence Prevention Act in 1994. NICS was implemented in 1998. The Virginia Tech tragedy in 2007 mobilized support for improvements to NICS and policy makers sought ways to encourage states to submit records to NICS.<sup>62</sup> To this end, Congress enacted the NICS Improvement Amendments

Act of 2007 (NIAA).<sup>63</sup> The law incentivizes records submission by waiving state matching fund requirements for grants under the National Criminal History Improvement Program and grants to upgrade identification and automated reporting systems. The law also creates a sliding scale of penalties against Byrne criminal justice grants. In doing so, the NIAA also conditions access to grant funds for a state having a federally approvable process for individuals to obtain relief from mental health disabilities prohibitions, and a “reasonable estimate” of record completeness.

In October 2009, ATF denied Washington’s application for approval of a certified relief from disabilities program because several sections of the state’s firearms restoration statutes failed to meet criteria under the NIAA.<sup>64</sup> This continues to be the case. These deficiencies can be remedied through relatively simple changes to Washington law.

Conformance with NIAA standards will require the Legislature to modify some determinations about who may seek restoration of their possession rights from a court. For example, Washington law does not allow a person to obtain relief from a disabilities prohibition if the person was found not guilty by reason of insanity of a sex offense or class A felony.<sup>65</sup> According to ATF, this amounts to a permanent disqualification and is contrary to Section 105(a)(1) of the NIAA. On the other hand, another provision allowing individuals to seek restoration of their firearms rights in Washington courts if a mental health disability originated in another state was considered too permissive by ATF, running afoul of Section 102(a)(2) of the NIAA.<sup>66</sup> Other issues raised by ATF are more technical in nature but relatively easy to fix.

The consequence of ATF’s determination is two-fold. First, Washington law does not allow a complete restoration of firearms rights so that individuals can pass a federal NICS background check after receiving an order of mental health restoration by a state court. Second, Washington’s lack of a qualifying relief from disabilities program makes the state ineligible to apply for and receive federal records improvement grants under the NIAA. Twenty-four states received such funding since the inception of the program in 2009. In 2015, those grants totaled \$22.7 million.<sup>67</sup>

**Recommendation:** *Clarify and improve the process for restoring firearms rights to persons with a mental health prohibition. Specifically, amend Washington’s restoration statute, RCW 9.41.047, to meet federal standards for qualifying relief from a mental health disability.*

## **VII. FIREARMS SURRENDER BY PROHIBITED PERSONS**

Under Washington law, a prohibition from firearms possession can be imposed in a variety of contexts.<sup>68</sup> All persons convicted of any felony or domestic violence offense in a Washington court, or involuntarily committed for mental health treatment, lose the right to possess firearms or to hold a concealed pistol license.<sup>69</sup> By law, within three judicial days of the conviction or commitment, the court must forward to DOL a copy of the person’s driver’s license or identocard, or comparable information, along with the date of conviction or commitment.<sup>70</sup>

At sentencing, the prohibited person is advised orally and in writing of the restriction and trusted to abide by it or face additional criminal sanctions.<sup>71</sup> Due to potential risk to officers and a lack of resources, law enforcement agencies in Washington have not routinely taken on enforcement or supervision of firearm surrender requirements. Except in particular circumstances there appears to be little, if any, regular third-party verification that a prohibited person has surrendered his or her firearms.

In 2013, the Legislature took two significant steps toward actively involving law enforcement in the supervision of firearms prohibitions. First, a category of convicted persons designated as “felony firearm offenders” was created.<sup>72</sup> These are offenders who were either armed with a firearm “in the commission of the offense,” stole or possessed a stolen firearm, or participated in a drive-by shooting.<sup>73</sup> In a manner similar to sex or kidnapping offenders, felony firearm offenders must register with the applicable county sheriff’s office within 48 hours of imposition of sentence or release from custody. For a period of four years the person must update their registration annually or any time they change their address.<sup>74</sup> Failure to register as a felony firearm offender is a gross misdemeanor.<sup>75</sup>

In another significant development, the Legislature created a requirement that persons subject to protection orders for domestic violence, stalking, or harassment must surrender their firearms in certain cases.<sup>76</sup> These prohibited persons are issued an order to surrender and required to file a proof of surrender and receipt form with the court within five judicial days.<sup>77</sup> The Administrative Office of the Courts was directed to create applicable pattern forms to document compliance with these firearms surrender requirements.<sup>78</sup> Failure to provide the required proof of surrender is a misdemeanor.<sup>79</sup>

Limited early data raises questions about the implementation of this surrender requirement. For example, the Seattle City Council recently took up the issue of enforcing firearms surrender provisions because a review found that, in a three-month timeframe in 2015, of the 94 cases where a declaration of surrender (or non-surrender) was due to the court, only 12 respondents filed one.<sup>80</sup>

**Recommendation:** *Conduct a statewide evaluation to determine if additional steps need to be taken to ensure compliance with current proof of surrender and non-possession requirements. Once the effectiveness of the requirements has been determined, expand the RCW 9.41.804 provision for proof of surrender or non-possession to other categories of prohibited persons.*

## **VIII. ATTEMPTED FIREARMS PURCHASE BY PROHIBITED PERSONS**

Available figures raise questions about whether firearms prohibitions dissuade individuals prohibited from possession from attempting to purchase firearms. According to data collected by the FBI, nationally, more than 106,000 gun sales to prohibited people were denied in 2015 due to failed NICS background checks.<sup>81</sup> In 2013, over 1,500 Washington purchasers were denied due to a felony criminal history, and 1,400 more were turned away due to a domestic violence history or active protection orders.<sup>82</sup>

Very often, these attempts (sometimes dubbed “lie-and-try”) result in no follow-up law enforcement action. However, so long as knowledge of the prohibition can be proven, an attempted purchase by a prohibited person could constitute the Washington crime of Attempted Unlawful Possession of a Firearm in either the First or Second Degree. The difference in the degree of the crime would depend on the reason the person was prohibited from firearm possession. Attempted Unlawful Possession of a Firearm in the First Degree is a class C felony, and includes persons previously convicted or found not guilty by reason of insanity of any statutorily-defined “serious offense.”<sup>83</sup> Attempted Unlawful Possession of a Firearm in the Second Degree is a gross misdemeanor, and pertains to a list of other prohibited persons such as felons who were not convicted of “serious offenses,” misdemeanor domestic violence offenders, and persons who have been involuntarily committed for mental health treatment.<sup>84</sup>

In addition, knowingly making a false statement on the background check application constitutes False Swearing, a gross misdemeanor under state law. It is also a federal crime to lie on the federal background check form when attempting to purchase a firearm.<sup>85</sup> Thus, if notified of the failed purchase, law enforcement would have the ability to further investigate or arrest the attempted purchaser, but federal or state enforcement is rare.

Detection of unlawful attempts to purchase is complicated in Washington by the legal distinction between pistols and long guns, which entirely removes local law enforcement from the background check process for attempted purchases of long guns. Background checks for long gun purchases are conducted by the dealer. The dealer is informed that the person is prohibited from purchasing the long gun, but the dealer is not told the reason for the denial and is not required to report the denial to authorities.

A few states have adopted measures focused on unlawful purchase attempts. These states are reporting significant results. Oregon recently enacted a provision that permits the name of the purchaser and other information concerning a failed background check to be reported to the appropriate law enforcement agency.<sup>86</sup> This requirement was strengthened in 2016 by Executive Order of Governor Kate Brown.<sup>87</sup> The Order mandates that the attempted purchase information be communicated to local law enforcement officials in certain cases, including attempts to purchase by persons on criminal parole or probation, and attempts by persons on pretrial release in a criminal case.

Similarly, since 2014 Pennsylvania State Police are required to send denial information to the local enforcement entity closest to the purchaser’s location. That year, 367 attempted purchasers were convicted as a result of this coordinated effort.<sup>88</sup> These states also have created specific criminal offenses related to false statements made during attempts to purchase firearms.<sup>89</sup> The FBI is also partnering with the U.S. Digital Service to modernize its systems, including potential notification of local law enforcement when a prohibited person attempts to purchase a firearm.<sup>90</sup>

**Recommendation:** *Adopt a process to ensure that all purchase attempts denied as a result of a background check are shared with local law enforcement agencies for purposes of follow-up and potential enforcement. Federal authorities should be requested to contact state or local law enforcement when a denial occurs in the federal background check system.*

## **IX. FIREARMS ACCESS BY CHILDREN**

Unsafe firearms storage practices have been found to contribute to gun violence death and injury, particularly among vulnerable populations such as children. One published study found that over 1.69 million minors in the United States live in homes with loaded and unlocked firearms.<sup>91</sup> Another study determined that in “homes with children and firearms, 55% were reported to have 1 or more firearms in an unlocked place.”<sup>92</sup> In Washington, over 24,000 youth were determined to be living with loaded and unlocked firearms.<sup>93</sup> A study including a significant number of Washington residents concluded that the four “practices of keeping a gun locked, unloaded, storing ammunition locked, and in a separate location are each associated with a protective effect and suggest a feasible strategy to reduce these types of injuries in homes with children and teenagers where guns are stored.”<sup>94</sup>

In 2014, the Washington Supreme Court considered the question of imposing criminal liability in a Kitsap County case where an unsecured firearm was taken by a child from the home of his mother’s boyfriend.<sup>95</sup> The child took the pistol to his elementary school where it was discharged, wounding a classmate. While the juvenile was later convicted of Reckless Endangerment, prosecutors also charged the gun owner with felony assault with criminal negligence for causing bodily harm to another person with a weapon.<sup>96</sup> The court ultimately concluded that the crime could not be pursued because the gun owner lacked the necessary intent to cause the victim harm.

Twenty-eight states currently have laws designed to prevent children from accessing firearms.<sup>97</sup> Washington is not among them. These laws often criminalize the failure to secure a firearm if the owner has reason to know it could be accessed by a minor.<sup>98</sup> Recent research finds these laws are associated with substantial declines in rates of gun carrying among high school students, fewer reports of being threatened or injured with a weapon on school property, and decreased rates of school absences due to feeling unsafe.<sup>99</sup>

In both 2015 and 2016, Washington legislators introduced a bill that would create the new crime of Child Endangerment Due to Unsafe Storage of a Firearm. In neither instance did the bill come to a vote. Under the Washington proposal, which mirrors Florida’s law, a person is guilty of the crime if he or she stores or leaves a firearm in a location where they know, or reasonably should know, that a child under the age of 18 is likely to gain access, and the child either: causes personal injury or death with the firearm, in which case the offense is a gross misdemeanor; or causes the firearm to discharge, exhibits the firearm in a public place or in an angry, threatening, or careless manner, or uses the firearm in a crime, in which case the offense is a misdemeanor.<sup>100</sup>

**Recommendation:** *Adopt a criminal penalty for firearm owners who fail to secure a firearm, if the owners have reason to know the firearm could be accessed by a minor, and the firearm causes injury or death or otherwise endangers public safety.*

**Recommendation:** *Consider ways to incentivize the purchase or sale of gun safety equipment (such as lock boxes or trigger guards) for all firearm owners.*

**APPENDIX**  
**Comparison of Federal and State Firearms Prohibitions**

	<b>Federal Prohibitions</b>	<b>State Prohibitions</b>
1.	Conviction punished by greater than one year. 18 U.S.C. § 922(g)(1); 27 C.F.R. § 478.32(a)(1).	Felony conviction. RCW 9.41.040(1)(a) and (2)(a)(i).
2.	Fugitive from justice. 18 U.S.C. § 922(g)(2); 27 C.F.R. § 478.32(a)(2).	Outstanding warrants may enable a 30-day hold on pistol transfers, with subsequent extensions by court order. RCW 9.41.090(4)(d). State background check includes “wants and warrants.”
3.	Unlawful user or addicted to any controlled substance. 18 U.S.C. § 922(g)(3); 27 C.F.R. § 478.32(a)(3). *Temporary restriction for one year following unlawful use “event.”	Felony conviction for violation of the uniform controlled substances act. RCW 9.41.040(2)(a)(i).
4.	Adjudicated as a mental defective or committed to a mental institution. 18 U.S.C. § 922(g)(4); 27 C.F.R. § 478.32(a)(4).	Not guilty by reason of insanity findings; involuntary mental health commitments. RCW 9.41.040(1)(a), (2)(a)(i) and 2(a)(iii).
5.	Illegal or alien unlawfully present in the U.S. 18 U.S.C. § 922(g)(5); 27 C.F.R. § 478.32(a)(5)(i).	Class C felony for non-citizen to possess firearms if not a lawful permanent resident, has obtained an alien firearms license, or is otherwise not subject to the alien license requirements. RCW 9.41.171.
6.	Dishonorable discharge from the U.S. Armed Forces. 18 U.S.C. § 922(g)(6); 27 C.F.R. § 478.32(a)(6).	Not addressed by state law.
7.	Renounced U.S. Citizenship. 18 U.S.C. § 922(g)(7); 27 C.F.R. § 478.32(a)(7).	Not addressed by state law.
8.	Subject to a restraining order for harassing, stalking, or threatening an intimate partner. 18 U.S.C. § 922(g)(8)(A); 27 C.F.R. § 478.32(a)(8)(ii). *Temporary restriction so long as order remains in place.	Subject to various court orders. <i>See</i> RCW 9.41.040(2)(a)(ii).
9.	Convicted of a misdemeanor domestic violence crime. 18 U.S.C. § 922(g)(9); 27 C.F.R. § 478.32(a)(9).	Various domestic violence crimes. <i>See</i> RCW 9.41.040(2)(a)(i).
10.	Persons under indictment or information for a crime punishable by a year or more imprisonment. 18 U.S.C. § 922(n).	Persons free on bond or personal recognizance pending trial, appeal, or sentencing for a “serious offense.” RCW 9.41.040(2)(a)(v).

## END NOTES

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<sup>1</sup> In Washington, a person must be at least 18 years old to purchase a firearm. RCW 9.41.040(2)(iv).

<sup>2</sup> Constitutional questions regarding reasonable restrictions on firearm possession have long been settled. *Morris v. Blaker*, 118 Wn.2d 133, 144, 821 P.2d 482 (1992) (holding that the Wash. Const. art. I, § 24 right of possession by an individual is not absolute and is subject to reasonable regulation by the State under its police power); *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (“[N]othing in the [Court’s] opinion [regarding the Second Amendment] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

<sup>3</sup> The Gun Control Act is codified at 18 U.S.C. §§ 921-931 (*see also* 27 C.F.R. Part 478).

<sup>4</sup> 18 U.S.C. § 922(g)(8), (9).

<sup>5</sup> 18 U.S.C. § 924(a)(2).

<sup>6</sup> RCW 9.41.

<sup>7</sup> RCW 9.41.040(1), (2).

<sup>8</sup> RCW 9.41.040(1)(b), (2)(b); RCW 9A.20.021.

<sup>9</sup> 18 U.S.C. §§ 922(a)(6), 924(a)(1)(A); RCW 9.41.070(12), .090(6), .173(8).

<sup>10</sup> 18 U.S.C. § 927.

<sup>11</sup> *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>12</sup> For example, RCW 9.41.070(4) directs law enforcement agencies to provide the following warning on concealed pistol licenses: “CAUTION: Although state and local laws do not differ, federal law and state law on the possession of firearms differ. If you are prohibited by federal law from possessing a firearm, you may be prosecuted in federal court. A state license is not a defense to a federal prosecution.” Similar language is required for dealer deliveries (RCW 9.41.090(5)), and alien firearms permits (RCW 9.41.173(4)).

<sup>13</sup> 27 C.F.R. § 478.11 (definition of “adjudicated as a mental defective”). In response to a 2013 Presidential directive (<https://www.whitehouse.gov/the-press-office/2013/01/16/presidential-memorandum-improving-availability-relevant-executive-branch>) that federal agencies increase reporting of records for use in background checks, this year the Social Security Administration published a proposed rule (<https://www.federalregister.gov/documents/2016/05/05/2016-10424/implementation-of-the-nics-improvement-amendments-act-of-2007>) classifying certain recipients of disability benefits as prohibited and referring their names and identifying information to the background check system. Such persons must be over the age of 18, receive a federal disability benefit based on mental impairment (which includes autistic disorders), and a representative payee must receive their federal payments. The disability community, including the National Disability Council, has come out in strong opposition to the proposed rule. In its comments, the Council stated: “There is, simply put, no nexus between the inability to manage money and the ability to safely and responsibly own, possess or use a firearm.” <https://www.regulations.gov/document?D=SSA-2016-0011-3852>. The comment period on the proposed rule closed on July 5, 2016. It is unknown when the Social Security Administration will issue the final rule or what conditions it will ultimately contain.

<sup>14</sup> RCW 11.88.

<sup>15</sup> 27 C.F.R. § 478.11 (definition of “committed to a mental institution”) (“The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.”).

<sup>16</sup> Cal. Welf. & Inst. Code § 5150. Section 8103(f) of the same California code, in turn, provides that when a person is admitted to a mental health facility under Section 5150, the person may not own, possess or control a firearm for five years after release from the facility. Periods of detention for observation are not subject to a hearing; therefore no due process is available. A hearing is available after the detention to contest the firearm prohibition under a preponderance of the evidence standard. The state bears the burden of proof.

<sup>17</sup> *People v. Jason K.*, 188 Cal. App. 4th 1545 (2010), *cert. denied*, 564 U.S. 1009 (2011).

<sup>18</sup> *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012).

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- <sup>19</sup> S.B. 5643, 64th Leg., Reg. Sess. (Wash.2015), <http://lawfilesextra.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/5643.pdf>.
- <sup>20</sup> “The [existing] rules are both over- and under-inclusive, insofar as they prohibit guns from many people at very low risk of violence while failing to identify others who *are* at high risk.” Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut’s Risk-Based Gun Removal Law: Does it Prevent Suicides?* 3 (forthcoming in Law & Contemp. Probs., submitted Aug. 24, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2828847](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828847).
- <sup>21</sup> Conn. Gen. Stat. § 29-38C.
- <sup>22</sup> Dan Friedman, *Laws That Allow for Temporarily Removing Guns from High-Risk People Linked to a Reduction in Suicides*, The Trace, Sept. 8, 2016, <https://www.thetrace.org/2016/09/gun-violence-restraining-order-suicide-reduction-connecticut/>.
- <sup>23</sup> 18 U.S.C. § 922(g)(3).
- <sup>24</sup> 27 C.F.R. § 478.11 (definition of “unlawful user of or addicted to any controlled substance”).
- <sup>25</sup> *Id.* (definition of “current use”).
- <sup>26</sup> 18 U.S.C. § 812(c); Schedule I, (c)(10); 21 C.F.R. § 1308.11(d)(23).
- <sup>27</sup> This form can be found at <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.
- <sup>28</sup> Letter from Arthur Herbert, ATF, Assistant Director, Enforcement Programs and Services, to All Federal Firearms Licensees (Sept. 21, 2011), <https://www.atf.gov/file/60211/download>.
- <sup>29</sup> *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011).
- <sup>30</sup> *Wilson v. Lynch*, No. 14-15700, 2016 WL 4537376 (9th Cir. Aug. 31, 2016).
- <sup>31</sup> RCW 9.41.070(1)(a).
- <sup>32</sup> See RCW 69.51A.230(1)(d) (limiting disclosures to law enforcement authorities to those engaged in bona fide specific investigation of marijuana-related activity that is illegal under state law), .240; WAC 246-71.080.
- <sup>33</sup> *But see* RCW 9.41.300(1)(d) (prohibiting firearm possession in portions of an establishment designated by the state liquor control board as off-limits to persons under the age of 21).
- <sup>34</sup> Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep’t of Justice, to All United States Attorneys, *RE: Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), at 2, 4, <https://www.mpp.org/doj-memo-on-guidance-regarding-marijuana-enforcement/>.
- <sup>35</sup> DJ Summers, *Murkowski wants feds to address rules that prevent legal-marijuana users from buying guns*, Alaska Dispatch News, May 17, 2016, <https://www.adn.com/cannabis-north/article/murkowski-wants-feds-address-law-prevents-users-legal-marijuana-buying-guns/2016/04/04/>.
- <sup>36</sup> RCW 70.96A.
- <sup>37</sup> Engrossed Third Substitute H.B. 1713, 64th Leg., 1st Sp. Sess. (Wash. 2016), *enacted as* Laws of 2016, 64th Leg., ch. 29.
- <sup>38</sup> See Gerald E. DeLoss & Patricia A. Markus, *Clear and Present Danger: Gun Violence and Confidentiality of Behavioral Health Information in the Crosshairs* (Am. Health Lawyers Ass’n’s Physicians & Hosps. Law Inst., Feb. 3, 2015), [https://www.healthlawyers.org/Events/Programs/Materials/Documents/PHS15/gg\\_deloss\\_markus.pdf](https://www.healthlawyers.org/Events/Programs/Materials/Documents/PHS15/gg_deloss_markus.pdf).
- <sup>39</sup> RCW 9.41.010(4).
- <sup>40</sup> 18 U.S.C. § 922(d); 27 C.F.R. § 478.99.
- <sup>41</sup> 27 C.F.R. §§ 478.73, .74.
- <sup>42</sup> 18 U.S.C. § 924(a)(2).
- <sup>43</sup> RCW 9.41.080.
- <sup>44</sup> RCW 9.41.113.
- <sup>45</sup> RCW 9.41.115; RCW 9A.20.021(2).
- <sup>46</sup> Austin Jenkins, *Washington Murder Case Results In Gun Charge Under 2014 Background Check Law* (Nw. Pub. Radio, Oct. 17, 2016), <http://nwpr.org/post/washington-murder-case-results-gun-charge-under-2014-background-check-law>.
- <sup>47</sup> 18 U.S.C. §§ 922(a)(6), 924(a)(1)(A); RCW 9.41.070(12), .090(6), .173(8).
- <sup>48</sup> ATF Form 4473 question 11(a), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>. The instructions for question 11(a) also provide specific examples.

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<sup>49</sup> Alex Yablon, *Amid Dearth of Federal Action on Straw Buyers, States Forge Ahead on Their Own*, The Trace, Aug. 21, 2016, <https://www.thetrace.org/2015/08/straw-purchases-law-atf-gun/>.

<sup>50</sup> *Ambramski v. United States*, 134 S. Ct. 2259 (2014).

<sup>51</sup> NICS regulations provide several avenues for an individual to challenge the denial of a firearm transfer or seek the correction of erroneous information entered into NICS. 28 C.F.R. § 25.10. In 2015, nationally 106,556 denials came from NICS checks and 32,040 denials were appealed. Of those, 3,625 denials were overturned. *2015 NICS Operations Report* 12, 14, <https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf>.

<sup>52</sup> 18 U.S.C. § 922(t)(1).

<sup>53</sup> A tragic, and recent, example of a “default approval” appears to be the Emanuel AME church shooting in Charleston, S.C., in June 2015. Families of the nine victims claim that authorities mishandled drug possession records of alleged shooter Dylan Roof. In 2015, Roof was arrested, admitted to unlawfully possessing prescription drugs, and was charged but not convicted of possession of a controlled substance without a prescription. The NICS examiner never saw the police report, because the wrong arresting agency was listed on the records sheet. Had the examiner seen the correct police report, Roof’s purchase in April 2015 would have been denied. Instead, the three-day period to complete the background check under federal law elapsed, and the dealer elected to transfer the firearm without the completed background check. Families of the victims have filed wrongful death lawsuits against the federal government for the consequences of the alleged clerical error. According to news reports, FBI Director James Comey admitted to failures in performing the background check. Associated Press, *Charleston church shooting victims sue FBI over gun buy*, New York Post, July 1, 2016, <http://nypost.com/2016/07/01/charleston-church-shooting-victims-sue-fbi-over-gun-buy/>; Jennifer Berry Hawes, *Emmanuel victims’ families, survivors suing feds over background check error*, Post and Courier e-Edition, June 30, 2016, [http://www.postandcourier.com/archives/emanuel-victims-families-survivors-suing-feds-over-background-check-error/article\\_f4644c59-0535-556f-8a21-3face2eff5bc.html](http://www.postandcourier.com/archives/emanuel-victims-families-survivors-suing-feds-over-background-check-error/article_f4644c59-0535-556f-8a21-3face2eff5bc.html).

<sup>54</sup> Bureau of Justice Statistics Bulletin, *Background Checks for Firearm Transfers, 2005*, at 7 (Nov. 2006), <http://bjs.gov/content/pub/pdf/bcft05.pdf>.

<sup>55</sup> *2015 NICS Operations Report* 14, <https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf>.

<sup>56</sup> RCW 9.41.092. “[F]or sales and transfers of pistols if the purchaser or transferee does not have a valid permanent Washington driver’s license or state identification card or has not been a resident of the state for the previous consecutive ninety days, then the time period in this subsection shall be extended from ten business days to sixty days.” RCW 9.41.092(2).

<sup>57</sup> *2015 NICS Operations Report* 3 (Participation Map), <https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf>.

<sup>58</sup> In 1993, Congress passed the Brady Handgun Violence Prevention Act (the Brady Act). The Brady Act amended the Gun Control Act and provided a method for blocking transfers to prohibited persons. From 1994 to 1998, the “interim” provisions of the Act were put in place requiring dealers to request background checks of prospective purchasers conducted by the chief law enforcement officer of the jurisdiction where the licensee sold firearms. *See* 18 U.S.C. § 922(s). The “permanent” provisions of the Brady Act took effect in 1998 with the implementation of NICS. *See* 18 U.S.C. § 922(t). From the inception of the NICS to December 31, 2015, over 225 million transactions were processed through the system. *2015 NICS Operations Report*, at iii, <https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf>.

<sup>59</sup> RCW 9.41.047.

<sup>60</sup> Removing DSHS from the NICS reporting process also resolved any concern that such a transmission might run afoul of the federal Health Insurance Portability and Accountability Act (HIPAA). Courts, unlike DSHS, are not considered “covered entities” under the federal privacy law. Only recently, as part of federal efforts to address states’ concerns about submitting records, has the HIPAA rule been amended to create an exception for NICS submissions. *See* 81 Fed. Reg. 382 (Jan. 6, 2016) (amending 45 C.F.R. § 164.512(k)).

<sup>61</sup> Some concern has been expressed that concealed pistol license records do not include a current address and that, therefore, licensees should be required to notify local law enforcement when they move. In fact, local law enforcement have ready access to other databases which should have a current address (such as the driver’s license database), so it is not clear that this is actually a problem in practice.

<sup>62</sup> The Brady Act does not require states to submit information on prohibited persons to NICS. The *Report to the President on Issues Raised by the Virginia Tech Tragedy*, note 7 (June 13, 2007), [https://www.justice.gov/archive/opa/pr/2007/June/vt\\_report\\_061307.pdf](https://www.justice.gov/archive/opa/pr/2007/June/vt_report_061307.pdf). NICS rules provide that a

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“limited number” of authorized state and local agencies will voluntarily contribute records. 28 C.F.R. § 25.4. In addition, federalism principles enunciated in *Printz v. United States*, 521 U.S. 898 (1997), constrain mandatory participation, at least under Commerce Clause principles.

<sup>63</sup> Pub. L. No. 110-180 (Jan. 8, 2008).

<sup>64</sup> ATF Form 3210.12 (Denied) and Criteria List from Chad Yoder, ATF, Acting Chief, Firearms Program Division, to Christine Gregoire, Governor, State of Washington (Oct. 1, 2009) (on file with the Washington Office Of Attorney General).

<sup>65</sup> See RCW 9.41.040(4)(a).

<sup>66</sup> See RCW 9.41.047(3)(a).

<sup>67</sup> Becki Goggins (SEARCH) & Anne Gallegos (Nat’l Ctr. for State Courts), *State Progress in Record Reporting for Firearm-Related Background Checks: Mental Health Submissions* 5 (Feb. 2016), <https://www.ncjrs.gov/pdffiles1/bjs/grants/249793.pdf>.

<sup>68</sup> RCW 9.41.800.

<sup>69</sup> RCW 9.41.040.

<sup>70</sup> RCW 9.41.047(1)(b).

<sup>71</sup> RCW 9.41.047(1)(a).

<sup>72</sup> Substitute H.B. 1612, 63d Leg., Reg. Sess. (Wash. 2013), *enacted as* Laws of 2013, 63d Leg., Reg. Sess., ch. 183.

<sup>73</sup> RCW 9.41.010(8).

<sup>74</sup> RCW 9.41.330, .333.

<sup>75</sup> RCW 9.41.335(2).

<sup>76</sup> RCW 9.41.800 (1) and (2). Engrossed Substitute H.B. 1840, 63d Leg., Reg. Sess. (Wash. 2014), *enacted as* Laws of 2014, 63d Leg., Reg. Sess., ch. 111.

<sup>77</sup> RCW 9.41.804.

<sup>78</sup> RCW 9.41.802.

<sup>79</sup> RCW 9.41.810.

<sup>80</sup> Seattle.gov, Council Connection, *Health Board Approves Coordination of Firearm Surrender in Domestic Violence Situations* (post dated Mar. 17, 2016), <http://council.seattle.gov/2016/03/17/health-board-approves-coordination-of-firearm-surrender-in-domestic-violence-situations/> (last visited Oct. 25, 2016). Also in March 2016, the King County Board of Health similarly adopted a resolution calling on “Public Health–Seattle and King County to seek appropriate funding and convene a process of inter-jurisdictional collaboration” to improve compliance with the proof of surrender requirements. Resolution 16-04, at 3, [http://www.kingcounty.gov/depts/health/board-of-health/~media/depts/health/board-of-health/documents/resolutions/BOHResolution1604.ashx](http://www.kingcounty.gov/depts/health/board-of-health/~/media/depts/health/board-of-health/documents/resolutions/BOHResolution1604.ashx).

<sup>81</sup> *2015 NICS Operations Report* 12, <https://www.fbi.gov/file-repository/2015-nics-ops-report.pdf>.

<sup>82</sup> Joseph O’Sullivan, *Background check denials rise for would-be pistol buyers*, Seattle Times, Oct. 11, 2014, <http://www.seattletimes.com/seattle-news/background-check-denials-rise-for-would-be-pistol-buyers/>.

<sup>83</sup> RCW 9.41.040(1)(a) and (b); RCW 9A.28.020(3)(c).

<sup>84</sup> RCW 9.41.040(2)(a) and (b); RCW 9A.28.020(3)(d).

<sup>85</sup> 18 U.S.C. § 922(a)(6); Ronald J. Frandsen, *Enforcement of the Brady Act, 2010: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2010*, at 3 (Aug. 2012), <https://www.ncjrs.gov/pdffiles1/bjs/grants/239272.pdf>.

<sup>86</sup> Or. Rev. Stat. § 166.412(7).

<sup>87</sup> Exec. Order No. 16-12: *Enhancing Gun Safety in Oregon* (July 15, 2016), [https://drive.google.com/file/d/0BzMvBq\\_LbaUUeHJHUnh1dGZmVk0/view](https://drive.google.com/file/d/0BzMvBq_LbaUUeHJHUnh1dGZmVk0/view).

<sup>88</sup> Pennsylvania State Police, *2014 Firearms Annual Report* 7, [http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania\\_State\\_Police\\_2014\\_Firearms\\_Annual\\_Report.pdf](http://www.psp.pa.gov/firearms-information/Firearms%20Annual%20report/Pennsylvania_State_Police_2014_Firearms_Annual_Report.pdf).

<sup>89</sup> 18 Pa. Cons. Stat. § 6111(g)(4); Or. Rev. Stat. § 166.416.

<sup>90</sup> Press Release, White House, *FACT SHEET: New Executive Actions to Reduce Gun Violence and Make our Communities Safer* (Jan. 4, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our>.

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<sup>91</sup> Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System, 2002*, 116 *Pediatrics* e370 (Sept. 2005), <http://pediatrics.aappublications.org/content/116/3/e370>.

<sup>92</sup> Mark A. Schuster et al., *Firearm Storage Patterns in US Homes With Children*, 90 *Am. J. Pub. Health* 588, 590 (Apr. 2000), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446208/pdf/10754974.pdf>.

<sup>93</sup> Okoro et al. tbl. 2 *supra* note 88.

<sup>94</sup> David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293(6) *J. Am. Med. Ass'n* 707, in Abstract (Mar. 2005), [https://www.researchgate.net/publication/8030815\\_Gun\\_Storage\\_Practices\\_and\\_Risk\\_of\\_Youth\\_Suicide\\_and\\_Unintentional\\_Firearm\\_Injuries](https://www.researchgate.net/publication/8030815_Gun_Storage_Practices_and_Risk_of_Youth_Suicide_and_Unintentional_Firearm_Injuries).

<sup>95</sup> *State v. Bauer*, 180 Wn.2d 929, 329 P.3d 67 (2014).

<sup>96</sup> RCW 9A.36.031.

<sup>97</sup> Kaiser Family Found., *States with Firearm Laws Designed to Protect Children* (Timeframe: 2014), <http://kff.org/other/state-indicator/firearms-and-children-legislation/> (last visited Oct. 25, 2016).

<sup>98</sup> *See, e.g.*, Fla. Stat. § 790.174; Cal. Penal Code § 25100.

<sup>99</sup> D. Mark Anderson & Joseph J. Sabia, *Child Access Prevention Laws, Youth Gun Carrying, and School Shootings*, IZA Discussion Paper Series No. 9830 (Mar. 2016), <http://ftp.iza.org/dp9830.pdf>.

<sup>100</sup> House Judiciary Comm., Bill Analysis, H.B. 1747, at 2, 64th Leg. (Wash. 2016).