

FATAL GAPS: HOW THE VIRGINIA TECH SHOOTING PROMPTED CHANGES IN STATE MENTAL HEALTH RECORDS REPORTING

EXECUTIVE SUMMARY

In 2007, 32 people were shot and killed and 17 others were wounded at Virginia Tech. The shooter was prohibited from possessing firearms due to a court judgment that he was a danger to himself and others, but his records were never submitted to the FBI's National Instant Criminal Background Check System ("NICS"). As a result, he was able to pass several background checks to purchase the guns he used in the shooting.

In the wake of this mass shooting, lawmakers took action to close the fatal gaps in state mental health records reporting that undermine the background check system and threaten the safety of Americans. This report documents ten years of progress, examines its key drivers, and underscores the vital importance of state and federal laws that govern and support mental health records reporting. Key findings include:

- In the past 10 years, 35 states have improved records reporting by passing new reporting laws, 16 states have improved existing laws, and 29 states have accessed federal funding.
- As a result, mental health records submitted by states have increased by nine times and gun sale denials have increased by 11 times.
- States with mental health reporting laws submitted more than twice as many records per capita as states without these laws.
- The states with the highest submission rates per capita had reporting laws and had received federal funding.

Notwithstanding this progress, it is likely that hundreds of thousands of prohibiting mental health records are missing from the background check system, potentially enabling prohibited people to purchase firearms illegally. To close these fatal gaps, the seven states that do not have mental health reporting laws should pass and implement strong laws. All 50 states need laws that require prompt submission of all prohibiting records and federal funding to support the submission process. States should regularly audit their submission processes to ensure no records are falling through the cracks.

INTRODUCTION

Screening gun buyers with a background check is the backbone of any comprehensive gun violence prevention strategy, and it works to keep firearms out of the hands of people who pose a danger of violence to themselves or others. Since its inception in 1994, the background check system has blocked over 3 million sales to people prohibited by federal or state law from possessing guns¹ — including convicted felons, domestic abusers, and people prohibited due to mental illness.*

The foundation of a background check is the FBI's National Instant Criminal Background Check System ("NICS") — the system that enables a quick determination on whether a prospective gun buyer is eligible to buy firearms. But a background check is only as good as the records in the NICS databases and the submission of those records largely falls to state courts and law enforcement agencies.

Any missing record is a tragedy waiting to happen.² Indeed, states' failures to submit records to NICS have enabled prohibited people to pass background checks and purchase firearms, to devastating effect. This problem has been especially acute with mental health records.

* A diagnosis of mental illness alone does not prohibit a person from gun possession. Rather, the federal prohibition applies to any person: involuntarily committed to a psychiatric facility; found by a court or other authority to be a danger to self or others due to mental illness; found guilty but mentally ill, not guilty by reason of insanity, or incompetent to stand trial; or appointed a guardian due to mental illness. 18 USC 922(g)(4), 27 CFR 478.11.

The Virginia Tech mass shooting called attention to fatal gaps in record submissions that undermine the background check system and threaten the safety of communities across the country.³ In response to the shooting, Congress passed the NICS Improvement Amendments Act of 2007 (the “NICS Improvement Act”), creating a system of financial incentives to encourage robust state reporting.⁴ States have since taken action by passing or strengthening record reporting laws, accessing federal funding to improve their systems, and doing the work of getting records into NICS.

Everytown for Gun Safety has long been a leader in this area, interviewing state officials in 50 states, authoring two reports on mental health records, **Fatal Gaps** and **Closing the Gaps**, and advocating in statehouses to improve state reporting.

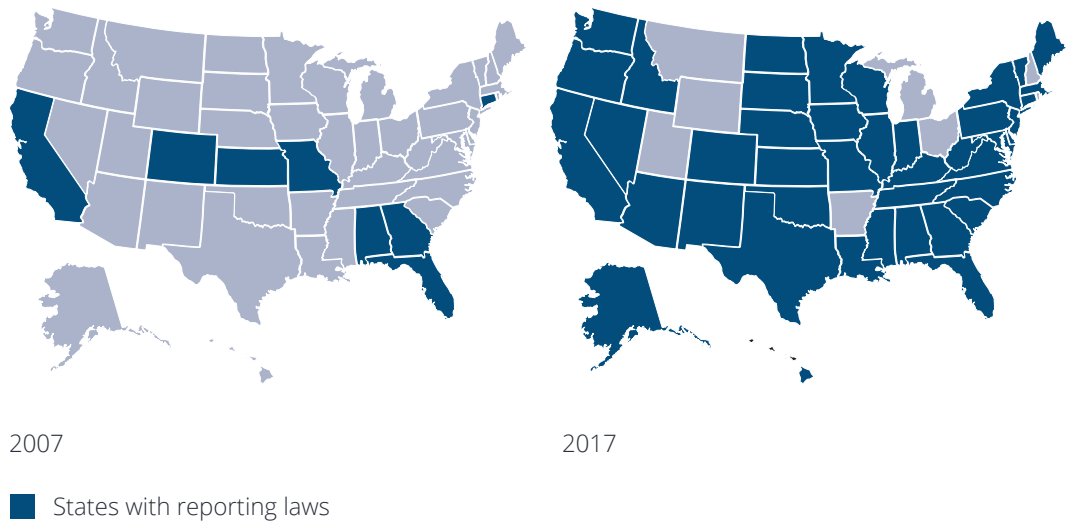
In this new report, Everytown for Gun Safety analyzed the NICS Indices database obtained from the FBI for the years 2008 to 2017, the earliest and latest years for which data were made available.⁵ The data show that significant progress has been made throughout the country, led by states that have strengthened their records reporting infrastructures through legislation and federal funding. As a result, the number of mental health records in NICS has drastically increased and more gun sales have been denied to people prohibited due to mental illness.

PROGRESS TOWARD A STRONGER BACKGROUND CHECK SYSTEM

More than ten years after the Virginia Tech shooting, progress in closing the gaps in state mental health records submissions is evident in several key areas: legislation passed, federal funding accessed, mental health records submitted, and gun sales denied to prohibited people.

States have adopted or fixed reporting laws: In 2007, only eight states had laws requiring or explicitly authorizing the reporting of prohibiting mental health records to NICS. Between 2007 and 2017, 35 states passed new reporting laws and, by the end of 2017, 43 states had reporting laws in place. In that same time period, 16 of those states have also amended and improved existing laws.

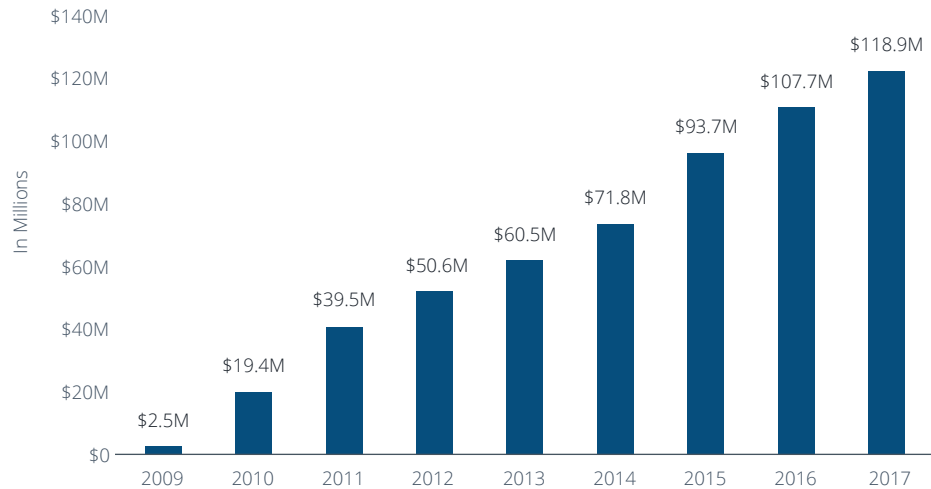
**IN THE LAST
10 YEARS,
35 STATES
PASSED MENTAL
HEALTH RECORDS
REPORTING LAWS**



States have used federal funding to strengthen the systems: The NICS Improvement Act made new federal funding available to states, known as the NICS Act Record Improvement Program (“NARIP”) funding, for upgrading their systems to submit NICS records. Only states that have begun the work of submitting their mental health records⁶ are eligible to apply for and receive NARIP funding. In 2009, the first year in which funding was made available, three states received federal NARIP funding. By the end of 2017, twenty-nine states had received this funding — and in total, the program has awarded nearly \$119 million since its inception.

**TWENTY-NINE STATES
HAVE RECEIVED A
TOTAL OF \$119 MILLION
IN FEDERAL NARIP
FUNDING TO IMPROVE
MENTAL HEALTH
RECORD REPORTING**

Cumulative Amount
Awarded to States between
2009 – 2017 (\$ dollars)

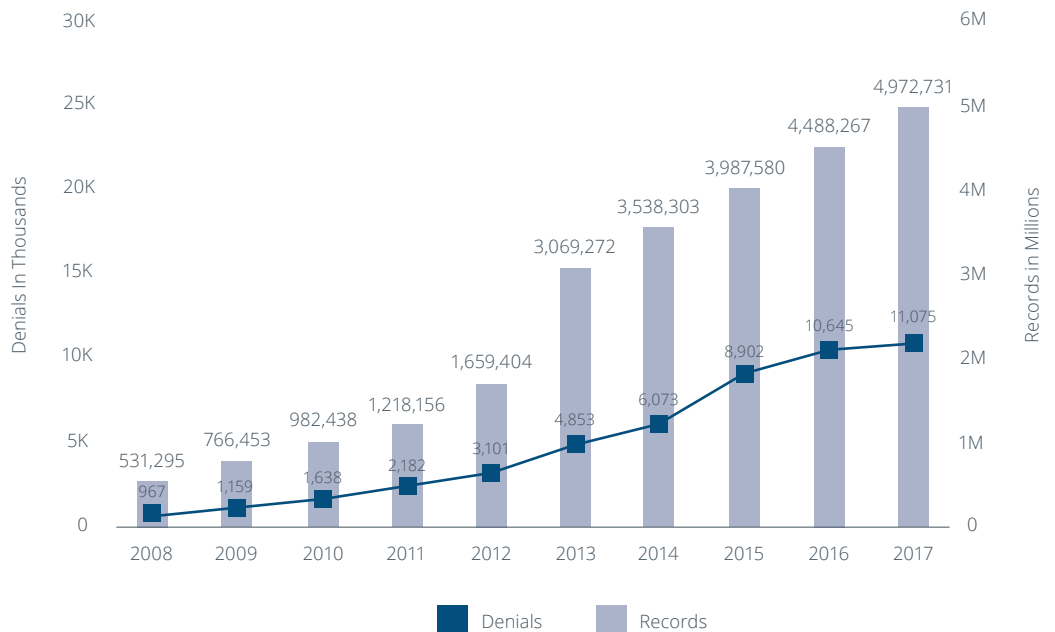


Mental health record reporting by the states has improved: Between December 2008 and December 2017, the first and latest year for which data are available, the number of state-submitted mental health records in NICS increased by more than nine times, from just over 531,000 to nearly 4,973,000. In 2008, there were 35 states (along with Washington, D.C.) with less than 100 records submitted. In 2017, only two states had submitted fewer than 100 mental health records.

More prohibited persons are blocked from buying guns: As the number of mental health records in NICS has increased, so has the number of firearm sale denials to individuals prohibited due to mental illness. Since 2008, the number of these denials has increased by 11 times, from approximately 960 annual denials to over 11,000 in 2017.

**TEN YEARS AFTER
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BY 11 TIMES**

Cumulative Number of
Prohibiting Mental Health
Records in NICS Indices
and Number of Mental Health
Gun Sale Denials (2008 – 2017)



REPORTING LAWS AND FEDERAL FUNDING ARE KEY TO CLOSING THE GAPS

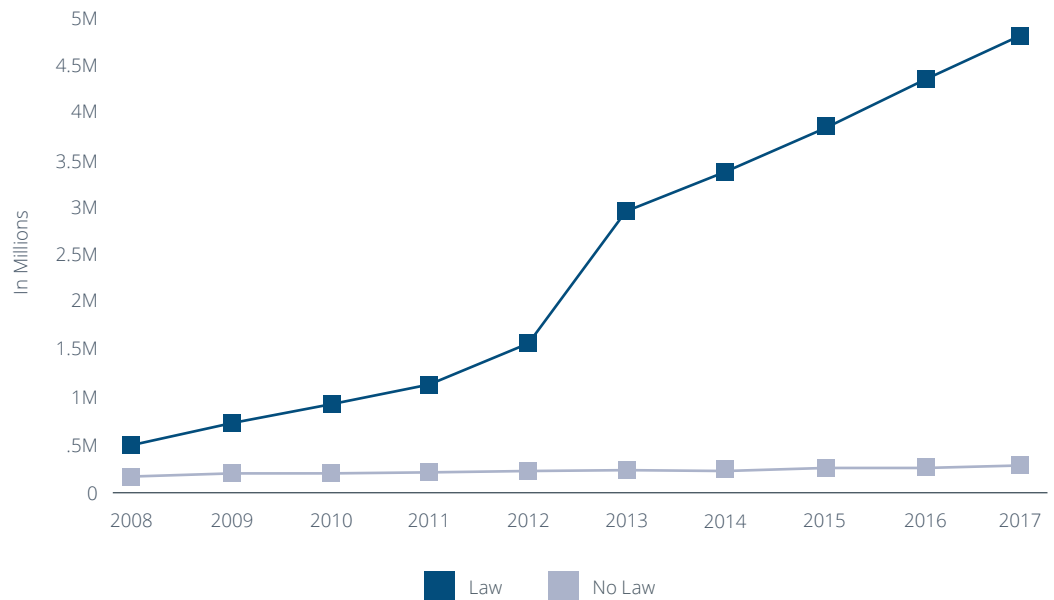
State reporting laws matter. The 43 states with laws requiring or explicitly authorizing reporting have dramatically improved their records submission, particularly in comparison to the seven states (along with D.C.) without reporting laws.

States that have reporting laws for mental health records have experienced a significant improvement in the number of records submitted.

- In the 43 states with reporting laws in place, the number of prohibiting mental health records in NICS **increased by 11 times** between 2008 and 2017.
- Over the same time period, mental health records in the seven states (along with D.C.) without reporting laws also increased, but at a drastically slower rate of only two times.
- In 2017, the 10 states with the *highest* record submission rates per capita⁷ all had a reporting law in place.

STATES WITH MENTAL HEALTH REPORTING LAWS HAVE EXPERIENCED A SIGNIFICANT IMPROVEMENT IN NUMBER OF RECORDS SUBMITTED COMPARED TO STATES WITHOUT THESE LAWS

Cumulative Number of Prohibiting Mental Health Records in NICS Indices, by States With and Without Reporting Laws (2008 – 2017)

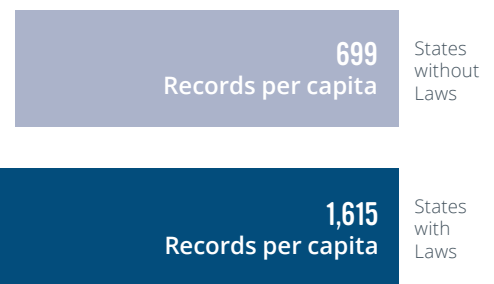


In the absence of reporting laws, seven states — Arkansas, Ohio, Michigan, Montana, New Hampshire, Utah, Wyoming — and D.C. are likely underreporting mental health records, with some states submitting only a handful every year. Compared to states with reporting laws, these seven states and D.C. are reporting records at a significantly lower rate.

- In fact, states with reporting laws have submitted more than twice as many records per capita than states without laws — 1,600 vs. 700 per 100,000 people, respectively. Importantly, a large portion of the records submitted by states without laws are submitted by Michigan and Ohio, both of which have agency policies in place in the absence of laws.
- Six of the seven states, along with D.C., are in the bottom half of record submission rate per capita and four of those states are in the bottom ten performing states.
- Two states — Montana and Wyoming — have submitted fewer than 100 mental health records, and Wyoming, has submitted fewer than 10 records since 2007.

STATES WITH MENTAL HEALTH REPORTING LAWS SUBMITTED MORE THAN TWICE AS MANY RECORDS PER CAPITA AS STATES WITHOUT THESE LAWS

Reporting Laws (2008 – 2017)
Mental Health Record Submission Rate as of 2017
(per 100,000 State Residents)



In addition to state laws, it is important to consider the impact of federal funding in improving reporting structures. By the end of 2017, 29 states with mental health reporting laws had received NARIP funding. And that funding made a difference: **The states with the highest submission rates per capita had reporting laws and had received NARIP funding.**

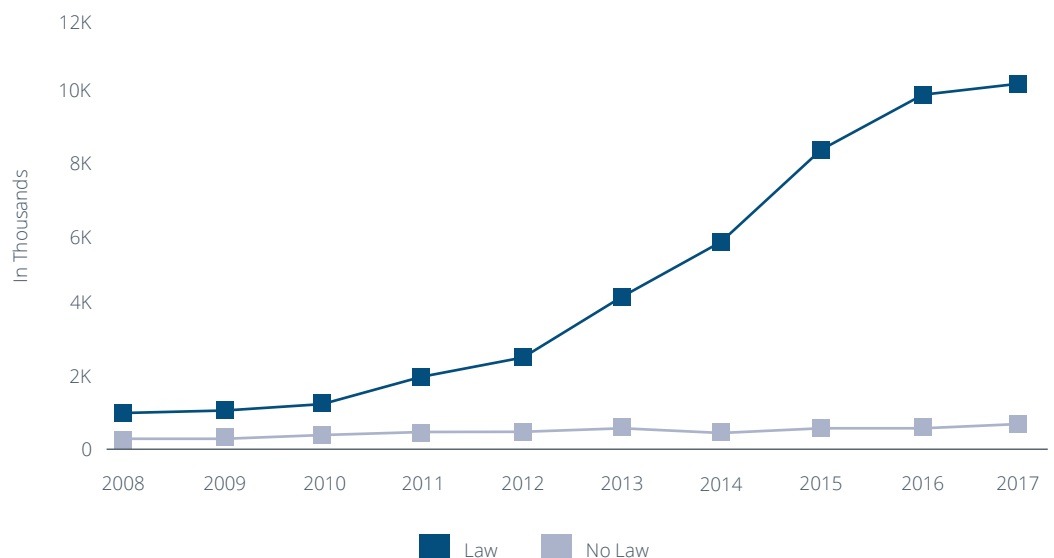
- Of the 10 states with the *highest* record submission rates per capita, eight had a reporting law in place and received NARIP funding.

States with more records in the system are better situated to prevent prohibited people from purchasing guns. As the number of mental health records in NICS has increased, so has the number of firearm sales denied to people prohibited by mental illness. The states that have the lowest submission rates are also experiencing the lowest denial rates.

- In the 43 states with reporting laws in place, the number of annual denials **was nearly 13 times higher in 2017 than in 2008**, increasing from 822 in 2008 to 10,281 in 2017.
- During the same time period, annual denials in the seven states and D.C. without reporting laws increased only five times, increasing from 145 to 794. Again, the majority of the denials in states without laws occurred in the two states with agency policies in place, Michigan and Ohio.

STATES WITH MENTAL HEALTH REPORTING LAWS BLOCK MORE GUN SALES TO PEOPLE PROHIBITED DUE TO MENTAL ILLNESS COMPARED TO STATES WITHOUT THESE LAWS

Number of Firearm Sale Denials to People Prohibited Due to Mental Illness, by States With and Without Reporting Laws (2008 – 2017)



The details of a reporting law matter. Not every state reporting law is as comprehensive as it could be. Evidence suggests that certain components of state reporting laws are associated with better records reporting outcomes.

- Of the 10 states with the *highest* record submission rates per capita, there are eight that **require reporting, rather than merely authorizing it**. These states provide clear statutory direction that records must be reported so that a change in political will or funding does not hold back progress.⁸

Notably, these laws also vary in whether they require reporting of prohibiting records created before their enactment date — or else whether the state is required only to send in records on a prospective basis, enabling many prohibited people to pass a background check and buy a gun. States can also strengthen their laws and, in turn, their reporting systems, by ensuring that records are reported both from courts and also from mental health facilities, as appropriate — and by explicitly setting a short reporting timeframe for required submission. Finally, if states fail to establish a qualifying relief from disabilities program that enables prohibited people to apply for the restoration of their rights when they no longer pose a danger, the state is not eligible for NARIP funding.

CONCLUSIONS AND RECOMMENDATIONS

Despite widespread progress in the improvement of reporting systems, there are likely hundreds of thousands of prohibiting mental health records that remain missing from NICS. Until these records are submitted, prohibited people, including those who are at very high risk of violence, will be able to purchase firearms without restriction.

To close these fatal gaps in NICS and help keep our communities safe:

- All 50 states need reporting laws. The seven states (along with D.C.) without mental health record reporting laws — Arkansas, Ohio, Michigan, Montana, New Hampshire, Utah, and Wyoming — need to pass and implement strong reporting laws.
- States with laws in place should apply for federal funding to support the submission process, and in turn, improve their records submissions.
- States should ensure that their reporting laws include provisions that 1) require reporting rather than merely authorizing it, 2) apply to prohibiting records that existed before the laws were enacted, 3) ensure that records from courts and health facilities are submitted, and 4) require all records to be submitted within a short, designated period of time following the prohibiting event.
- Submission processes should be audited regularly and updated accordingly by states to ensure no records are falling through the cracks.

RECORDS AND DENIALS BY STATE

There are many factors that affect the number of records a state has submitted to NICS, including state laws and funding streams, as well as differing mental health treatment rates, standards, and approaches that may impact how many people in a given state will be involuntarily committed, adjudicated as a danger to self or others, or otherwise prohibited by law. These factors vary significantly from state to state and make accurate and meaningful inter-state comparisons difficult. As a result, there exists no national benchmark or minimum requirement for the number of mental health records that should be submitted by each state.⁹

While precise state comparisons may not be possible, we can look at the number of records submitted by each state and analyze trends that exist within those states over time. This analysis helps illustrate that the top reporting states have a combination of strong state laws and have received federal funding, while the bottom performing states have neither.

Presented below is a summary of mental health records data and rate of records, adjusted by population, and gun sales denied due to mental health for each state for 2008 and 2017.

STATE	RECORDS 2008	RECORDS 2017	RECORDS RATE 2017 (PER 100K)	DENIALS 2008	DENIALS 2017
Alabama	155	5,306	109	32	125
Alaska	0	267	36	11	19
Arizona	1,496	30,741	438	43	196
Arkansas	733	3,757	125	23	128
California	223,635	821,905	2,079	42	314
Colorado	15,677	77,364	1,380	57	534
Connecticut	4,296	63,394	1,767	0	0
Delaware	0	16,359	1,701	1	88
District of Columbia	80	694	100	0	1
Florida	18,580	151,859	724	80	848
Georgia	3,257	11,063	106	42	202
Hawaii	1	7,593	532	0	0
Idaho	0	36,148	2,105	8	141
Illinois	1	47,555	371	0	1
Indiana	2	10,484	157	12	118
Iowa	49	49,089	1,561	4	147
Kansas	2,384	6,908	237	20	79
Kentucky	2	36,501	819	26	253
Louisiana	1	5,518	118	29	80
Maine	24	4,330	324	2	22
Maryland	23	20,012	331	5	49
Massachusetts	0	14,320	209	0	12
Michigan	79,756	147,941	1,485	46	277
Minnesota	0	60,537	1,086	8	159
Mississippi	1	14,893	499	17	244

STATE	RECORDS 2008	RECORDS 2017	RECORDS RATE 2017 (PER 100K)	DENIALS 2008	DENIALS 2017
Missouri	19,575	48,766	798	59	235
Montana	1	36	3	14	33
Nebraska	2	30,642	1,596	1	49
Nevada	0	7,141	238	0	66
New Hampshire	1	519	39	0	10
New Jersey	2	447,563	4,970	0	34
New Mexico	0	7,506	359	13	80
New York	5	544,398	2,743	15	512
North Carolina	1,256	399,320	3,887	45	1050
North Dakota	1	3,258	431	3	34
Ohio	15,990	56,390	484	57	252
Oklahoma	1	3,004	76	35	82
Oregon	1	27,075	654	0	102
Pennsylvania	0	831,886	6,496	0	1717
Rhode Island	0	444	42	0	7
South Carolina	7	85,807	1,708	30	492
South Dakota	0	1,047	120	7	27
Tennessee	33	40,186	598	0	225
Texas	7	284,549	1,005	87	704
Utah	38	10,211	329	1	73
Vermont	1	1,310	210	1	20
Virginia	105,782	292,025	3,448	15	488
Washington	38,428	124,483	1,681	54	259
West Virginia	0	49,249	2,712	14	345
Wisconsin	7	31,371	541	4	122
Wyoming	4	7	1	4	20

MENTAL HEALTH RECORDS SUBMISSION AND THE NATIONAL INSTANT BACKGROUND CHECK SYSTEM (NICS)

Central to the functions of the background check system is the National Instant Criminal Background Check System (NICS) — the system that allows federal and state law enforcement to quickly determine whether a prospective buyer is eligible to buy firearms.

A NICS background check involves a search of three separate databases: The National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Indices. Unlike NCIC and III, which predate the 1994 enactment of NICS and contain records used for criminal justice purposes broadly, NICS Indices were created simultaneously with NICS — and for the singular purpose of housing firearm-prohibiting records.

Importantly, NICS Indices are the sole repository for records that do not fit into the traditional criminal justice categories within the NCIC and III, but do indicate that an individual is prohibited from purchasing firearms. While states submit a small number of mental health records to these other databases,* the FBI has said that the vast majority of mental health records in NICS are contained in the NICS Indices. Prior to the enactment of NICS, mental health records were not generally included in federal databases — states effectively had submitted no records, and had no process for submitting them.

While this area continues to present a challenge because it has only been possible to submit mental health records for the past two decades, these records also present a unique opportunity for researchers. Unlike the other databases included in a NICS search, the NICS Indices contains only prohibiting records — and researchers can write reports, such as this one, analyzing states' relative record submission performance. On the contrary, it is far harder to analyze submission of prohibiting domestic violence records: Only a subset of domestic violence convictions and protection orders (submitted to III and NCIC, respectively) are prohibiting. Without any way to quantify those prohibiting records, it is harder to evaluate — and resolve — dangerous failures in state performance.

* Records may be in III if they involve a finding by a court of not guilty by reason of insanity, or guilty but mentally ill.

1. Karberg JC, Frandsen RJ, Durso JM, et al. *Background Checks for Firearm Transfers, 2015*. Bureau of Justice Statistics; 2017. Data for 2016 and 2017 were obtained by Everytown from the FBI directly. Though majority of the transactions and denials reported by FBI and BJS are associated with a firearm sale or transfer, a small number may be for concealed carry permits and other reasons not related to a sale or transfer.
2. The problem of missing records was recently brought to national attention by the mass shooting at Sutherland Springs, Texas in November 2017, where a shooter opened fire in a church, killing 26 people. Two years prior, the shooter was discharged from the U.S. Air Force after being court martialled for assaulting his wife and fracturing the skull of his infant stepson. This conviction prohibited him from possessing firearms under federal law; however, the Air Force failed to enter the record of the conviction into the federal database. As a result, the shooter was able to pass a background check and purchase the rifle used in the shooting from a licensed gun dealer. After the shooting, an Inspector General report revealed that the military had failed to tell the FBI about 31 percent of service members' criminal convictions between 2015 and 2016, and had not met reporting requirements for over 20 years. The Sutherland Springs shooting underscores the fact that, despite the progress being made in states that have improved mental health records reporting, further work is needed by states and federal agencies to close the gaps that exist in federal records reporting. The Air Force has since committed to evaluating all reportable offenses going back to 2002 and putting new procedures in place to make sure the proper requirements are being met.
3. Luo M. U.S. Rules made killer ineligible to purchase gun. *New York Times*. April 21, 2007. <https://nyti.ms/2IDLKHS>.
4. Note that the federal government cannot constitutionally require states to submit prohibiting records, and must instead incentivize submission by other means.
5. Everytown for Gun Safety received state records and denial data directly from the FBI via FOIA request. NARIP funding data was downloaded directly from the BJS website, available here: www.bjs.gov/index.cfm?ty=tp&tid=491. Everytown analyzed the state laws and policies governing reporting laws.
6. States must make estimates of the number of total mental health records to be submitted and must establish a qualifying relief from disabilities program that enables prohibited people to apply for the restoration of their rights when they no longer pose a danger.
7. While no national benchmark or minimum requirement for number of records submitted by each state exists (see more in the Records and Denials by State section), the record submission rate on the basis of the state population provides an opportunity to analyze any trends in the data.
8. Indeed, at the time of the original Fatal Gaps, officials in at least eight states said that a lack of political will stood in the way of passing new laws or reporting records.
9. United States Government Accountability Office, Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks; 2012.

Everytown for Gun Safety Support Fund seeks to improve our understanding of the causes of gun violence and the means to reduce it — by conducting groundbreaking original research, developing evidence-based policies, and communicating this knowledge to the American public. Learn more at www.EverytownResearch.org.

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