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100 North Carson Street
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December 28, 2016

OPINION NO. 2016-12

CRIMES AGAINST PUBLIC HEALTH AND SAFETY: NRS 202.254, as amended by the Background Check Act, makes it a crime to engage in private sales or transfers of firearms (with certain exceptions) unless a federally licensed dealer conducts a federal background check on the potential buyer or transferee. Because the Act specifically directs the dealer to run checks directly through the FBI's NICS system, the Nevada Department of Public Safety has no authority to perform the private-party background checks required by the Act.

James M. Wright
Director
Nevada Department of Public Safety
555 Wright Way
Carson City, Nevada 89711-0525

Dear Director Wright:

By letter dated December 19, 2016, you requested a formal opinion from the Office of the Attorney General, under Nevada Revised Statute 228.150, on two questions:

QUESTIONS

First, does the Background Check Act ("Act") allow the Nevada "Point of Contact" program to perform background checks for private-party sales or transfers of

firearms conducted by federal firearms licensees? Second, if the Department is legally authorized to perform these checks, may it charge fees for doing so?

SUMMARY CONCLUSION TO QUESTIONS

The Act grants the Nevada Department of Public Safety (the “Department”) no authority to perform the private-party background checks required by the Act. Instead, it specifically and unambiguously directs the licensed dealers who act as intermediaries for such checks to “contact the National Instant Criminal Background Check System” administered by the FBI, and “not the Central Repository” administered by the Department.

However, the FBI, by letter dated December 14, 2016, has informed the Department that it will not allow intermediaries to run background checks directly through the FBI as required by the Act, but will only allow them to be “conducted as any other background check for firearms” in Nevada: “through the Nevada DPS as the POC.” Thus, the Act expressly requires what the FBI, at least at present, does not allow. Because the Act requires, under criminal penalty, what is currently impossible to perform in light of the FBI’s position, citizens may not be prosecuted for their inability to comply with the Act unless and until the FBI changes its public position and agrees to conduct the background checks consistent with the Act.

BACKGROUND

In November 2016, Nevada voters approved State Question No. 1, a ballot initiative that, with certain exceptions, criminalizes the private sale or transfer of firearms unless a federally licensed dealer conducts a federal background check on the potential buyer or transferee. Previously, unlike firearms purchases from licensed dealers, a background check was generally not required for sales or transfers by a private party. The provisions of the Act take effect on January 1, 2017, and largely amend NRS 202.254.

Federal law generally requires background checks for firearms sold by licensed dealers to help prevent their possession by “prohibited” individuals, such persons convicted of a felony or misdemeanor domestic violence. In particular, the Brady Handgun Violence Prevention Act of 1993 requires the FBI to check prospective purchasers from a licensed dealer against its National Instant Criminal Background Check System (“NICS”). In the mid-1990s, the FBI developed a program by which it outsourced this function to States that agreed to serve as a so-called “Point of Contact,” or “POC.” Nevada is one of twelve “Point of Contact” states; a role the State assumed in 1998.¹

¹ See <https://www.atf.gov/rules-and-regulations/permanent-brady-state-lists>.

Under this program, the Department—the Point of Contact for Nevada—conducts background checks using NICS (to which it has special law-enforcement access), as well as Nevada state records. The Nevada state records are housed in what is called the “Central Repository,”² and background checks run through Nevada as the Point of Contact are commonly referred to in shorthand as running a check through the “Central Repository.”³ Because background checks run through Nevada as the Point of Contact incorporate data from both NICS and Nevada’s own state records, the process as currently administered by the Department ensures that persons legally barred from firearms possession do not circumvent the bar simply because the FBI may lack records that Nevada possesses, like mental-health records, records of domestic violence, misdemeanor criminal records, arrest reports, and restraining orders. By having Nevada serve as the Point of Contact, a wider net is cast. The FBI recently suggested, for instance, that the lack of a Point of Contact program in South Carolina played a role in Dylann Roof acquiring a gun before murdering nine congregants at a church in Charleston, South Carolina.⁴

ANALYSIS

The Background Check Act does not attempt merely to extend to private party transfers the background check procedures already followed for sales from licensed firearm dealers. For individuals who purchase firearms from licensed dealers, background checks must run through the Department’s Central Repository. This requirement remains unaffected by the Act. But for transfers between private parties, the Act now affirmatively requires that the private parties use a licensed dealer as an intermediary who must “first conduct[] a background check on the buyer or transferee.”⁵ To conduct the required check in the manner specifically required by the Act, “the licensed dealer *must* contact the National Instant Criminal Background Check System, ... and *not* the Central Repository, to determine whether the buyer or transferee is eligible to purchase and possess firearms under state and federal law.”⁶ The Act is very specific that the only background check it authorizes for a private sale or transfer is directly through the FBI. Indeed, lest there be any doubt, the Act explicitly directs that licensed dealers

² NRS 179A.045 (defining “Central Repository”).

³ See, e.g., NRS 202.254(3)(a); see also December 19, 2016, DPS letter requesting Attorney General Opinion, at 1 (referring to the “State Point of Contract (POC) program housed in the Central Repository for Nevada Records (Central Repository)”).

⁴ Federal Bureau of Investigation, “Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase,” July 10, 2015, *available at* <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase> (last accessed Dec. 27, 2016).

⁵ NRS 202.254(1).

⁶ NRS 202.254 (3)(a) (emphases added).

not contact the Department's Central Repository to conduct such checks. Because the plain text of Section 5(3)(a) expressly forbids licensed dealers from contacting the Central Repository to conduct the private party background checks required by the Act, it necessarily forbids the Department from facilitating non-compliance with the Act by performing such checks through the Central Repository. And because the Department lacks authority to perform such background checks, it therefore cannot charge fees for doing them.

With your letter dated December 19, 2016, you included correspondence dated December 14, 2016, in which the Section Chief of the FBI's NICS Section informed the Department that the FBI will *not* perform NICS checks directly requested by Nevada firearms dealers as required by the Act. Explaining that "the recent passage of the Nevada legislation regarding background checks for private sales cannot dictate how federal resources are applied," the FBI stated that private-party background checks are the "responsibility of Nevada to be conducted as any other background check for firearms, through the Nevada DPS as the POC."⁷ The FBI added:

Nevada can provide a more comprehensive NICS check that is accomplished when a POC accesses state-held databases that are not available to the FBI. The Nevada DPS is also in a better position for understanding and applying state laws. It is for these reasons, the POC for the state of Nevada will be best suited to conduct the NICS checks for private sales as provided for in the recent legislation that was just passed, the Background Check Act, as opposed to the FBI conducting these checks.

The FBI's refusal to carry out the central function required by the Act effectuates an unconditional ban, at present, on all private firearm sales or transfers in Nevada. Criminal conviction, the only method by which the Act may be enforced according to its terms, is the ostensible penalty for selling or transferring a firearm in violation of this unintended ban. As a matter of due process, this makes the Act unenforceable as a criminal law. The Nevada Supreme Court long ago adopted the doctrine that the law does not require impossible acts.⁸ When a law imposes a requirement that cannot be performed, a party is relieved of compliance until the obstacle to performance is lifted.

⁷ Letter from Kimberly J. Del Greco to Ms. Julie Butler, Dec. 14, 2016.

⁸ *Tarsey v. Dunes Hotel, Inc.*, 75 Nev. 364, 367–68, 343 P.2d 910, 911 (1959) (holding that the "Legislature did not intend to require the performance of an impossible act" and excusing compliance with plain terms of statute) (quotations omitted); *S. End Min. Co. v. Tinney*, 22 Nev. 19, 29 35 P. 89, 91 (1894) (holding that "the law does not require impossibilities" and so declining to enforce certain mining law); *Eureka Min. & Smelting Co. v. Way*, 11 Nev. 171, 177–78 (1876) (observing that the "law does not require a vain

For instance, in *Tarsey v. Dunes Hotel*, a civil case in which criminal penalties were not even at issue, the Nevada Supreme Court relieved a party of an obligation under Nevada law to move for the disqualification of the judge at least 10 days before trial. In that case, the judge, *five* days before trial, had reassigned the case to a colleague whom the plaintiff found objectionable.⁹ The Court found that the 10-day procedure, despite its plain terms, could not be enforced against the movant, since doing so would “require the performance of an impossible act.”¹⁰ Enforcement, moreover, would “absolutely defeat the obvious intent” of the law’s framers—which was to *allow* disqualifications—and deprive a party of a right.¹¹

Here, similarly, while the Act imposes a duty on every Nevadan who seeks to privately sell or transfer a firearm, the Act has also created an obstacle—wholly beyond their control or that of the State itself—that currently prevents them from meeting that duty. As a consequence, a law that the voters clearly intended to impose mere conditions upon the private sale or transfer of a firearm now operates as a total ban, clearly at odds with the intent of the voters. When criminal penalties are threatened, the doctrine against requiring impossibilities is strengthened by due process and other constitutional guaranties.¹² It is manifestly unjust to criminally penalize someone for failing to perform an act that is impossible to perform. Despite its intent to merely regulate the transfer or sale of firearms between private parties, because it is impossible to perform the background checks as required by the Act, the Act now unconditionally prohibits such transactions under the threat of criminal prosecution for conduct that was formerly lawful and routine.¹³

and useless thing to be done *Lex non cogit ad impossibilia*” and applying the principle in interpreting the law); 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 3.3(c) at 291 (1986) (“[O]ne cannot be criminally liable for failing to do an act which he is physically incapable of performing”); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (“[W]e hold that Congress did not intend (surely could not have intended) for the zero discharge standard to apply when ... compliance with such a standard is factually impossible The law does not compel the doing of impossibilities”).

⁹ *Tarsey*, 75 Nev. at 367–68, 343 P.2d at 911.

¹⁰ *Id.*

¹¹ *Id.* at 367, 343 P.2d at 911.

¹² *Doe v. Snyder*, 101 F. Supp. 3d 722, 724 (E.D. Mich. 2015) (“Holding an individual criminally liable for failing to comply with a duty imposed by statute, with which it is legally impossible to comply, deprives that person of his due process rights.”); *Ashcraft v. State*, 215 S.W. 688, 689 (Ark. 1919) (“[N]o man could be judged a criminal and punished by a fine for the violation of a law which it would be physically impossible for him to obey.”).

The California Court of Appeal in a decision this month offers an illustration of the doctrine of impossibility, especially when criminal sanctions are threatened. A statute criminalized the manufacture of certain guns without a “microstamping” feature. When members of the firearms industry alleged that microstamping was, as a matter of existing technology, impossible,¹⁴ the Court reasoned that it “would be illogical to uphold a requirement that is currently impossible to accomplish,” since this would make the law “arbitrary or irrational.”¹⁵ The Court suggested that if microstamping was, in fact, impossible, the law would be invalid. Holding otherwise would essentially abolish an entire industry despite the law’s intent to merely regulate the industry.

Because the FBI will not perform the background checks required by the Act, enforcement of its criminal penalties will have the unintended consequence of punishing conduct that is widely and reasonably perceived by Nevadans to be lawful. This would create an unintended Catch-22. If there is any overarching principle of statutory interpretation in Nevada, it is that Nevada’s laws will not be read or applied to conflict with the drafters’ intent, or to require absurdities.¹⁶ According to its plain text, the Act preserves a preexisting right in Nevada to transfer or sell firearms between private parties. The Act’s background check requirement was intended to be a mere condition precedent to the sale or transfer of a firearm, not a complete ban on all private sales and transfers of firearms in Nevada.¹⁷ In fact, the proponents of the Act articulated this position in their “Rebuttal to Argument against Passage,” when they wrote: “Background checks are quick and easy ... over 90% of FBI background checks are completed on the spot.”

Because the Act expressly and centrally relies on this error and forbids the Department from being contacted to run background checks, it requires and criminalizes the impossible. Under longstanding legal principles, Nevadans are not required to

¹⁴ *Nat’l Shooting Sports Found., Inc. v. State*, No. F072310, 2016 WL 7010026, at *4 (Cal. Ct. App. Dec. 1, 2016) (selected for publication); *see also Broderick v. Rosner*, 294 U.S. 629, 639 (1935) (Brandeis, J.) (invalidating a statute, in part, because it “imposes a condition which, as here applied, is legally impossible of fulfillment”).

¹⁵ *Nat’l Shooting Sports Found.*, 2016 WL 7010026, at *4.

¹⁶ *Nevada Mining Ass’n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001); *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 451, 25 P.3d 175, 180 (2001); *NL Indus. Inc. v. Eisenman Chem. Co.*, 98 Nev. 253, 260, 645 P.2d 976, 981 (1982) (“We will not construe statutes in a manner which will bring about an unreasonable result, or a result contrary to the legislature’s purpose.”); *Hanley v. Sheet Metal Workers Int’l Ass’n*, 72 Nev. 52, 55, 293 P.2d 544, 545 (1956) (explaining that the Nevada Supreme Court will not “construe the statute ... to give to it an effect so absurdly unrealistic as to be of doubtful due process.”).

¹⁷ *See, e.g.*, Act § 2(5) (stating that the “background check process is quick and convenient”).

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perform the impossible, and are therefore excused from compliance with the Act's background check requirement unless and until the FBI changes its position set forth in its December 14, 2016, letter.¹⁸

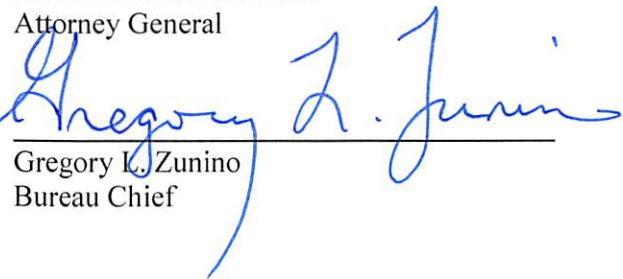
CONCLUSION

The text of State Question 1, amending NRS 202.254, does not authorize the Department to conduct, under Nevada's "Point of Contact" program, background checks for private-party transfers of firearms requested by federal firearms licensees. Consequently, the Department may not charge fees for such a purported service.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



Gregory L. Zunino
Bureau Chief

GLZ/JLC

¹⁸ Additional concerns about the Act include its strict-liability mental state, potentially vague terms, and its apparent allowance for selective prosecution. These and any other additional concerns about the constitutionality or validity of the Act are not addressed here, because of the limited scope of the Department's Attorney General Opinion request and because the conclusion that the law is unenforceable in light of the FBI's position moots, at least for now, such concerns.

Brian Sandoval
Governor



James M. Wright
Director

Jackie Muth
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Director's Office

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December 19, 2016

Adam P. Laxalt, Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

Re: Request for Opinion on the 2016 Initiative Petition # 1: *The Background Check Act*

Dear Attorney General Laxalt:

As a result of the passage of the Background Check Act, the Nevada Department of Public Safety, General Services Division, is requesting a formal opinion from your office regarding the legal authority of the State Point of Contact (POC) program housed in the Central Repository for Nevada Records (Central Repository) to perform and charge fees for background checks in conjunction with private party transfers of firearms.

The Background Check Initiative Petition (Question # 1 on Statewide Ballot, 2016)

On November 8, 2016, Nevada voters passed Initiative Petition Question # 1, The Background Check Act. The Background Check Act requires a Federal Bureau of Investigation (FBI) National Instant Criminal Background Checks System (NICS) check to be conducted by an FFL for the transfer of a firearm between private parties. Exceptions are allowed for law enforcement, antique firearms, immediate family members, administrators of estates or trusts, in cases of imminent harm or danger, for hunting or trapping, and for shooting competitions at gun ranges.

Section 5 of The Background Check Act amends NRS 202.254 to require the following:

- 1. Except as otherwise provided in section 6 of this act, an unlicensed person shall not sell or transfer a firearm to another unlicensed person unless a licensed dealer first conducts a background check on the buyer or transferee in compliance with this section.*
- 2. The seller or transferor and buyer or transferee shall appear jointly with the firearm and request that a licensed dealer conduct a background check on the buyer or transferee.*
- 3. A licensed dealer who agrees to conduct a background check pursuant to this section shall take possession of the firearm and comply with all requirements of federal and state law as though the licensed dealer were selling or transferring the firearm from his or her own inventory, except that:*

- a. *The licensed dealer must contact the National Instant Criminal Background Check System, as described in 18 U.S.C. 922(t), and not the Central Repository, to determine whether the buyer or transferee is eligible to purchase and possess firearms under state and federal law; and*
- b. *The seller or transferor may remove the firearm from the business premises while the background check is being conducted, provided that before the seller or transferor sells or transfers the firearm to the buyer or transferee, the seller or transferor and the buyer or transferee shall return to the licensed dealer who shall again take possession of the firearm prior to the completion of the sale or transfer.*
4. *A licensed dealer who agrees to conduct a background check pursuant to this section shall inform the seller or transferor and the buyer or transferee of the response from the National Instant Criminal Background Check System. If the response indicates that the buyer or transferee is ineligible to purchase or possess the firearm, the licensed dealer shall return the firearm to the seller or transferor and the seller or transferor shall not sell or transfer the firearm to the buyer or transferee.*
5. *A licensed dealer may charge a reasonable fee for conducting a background check and facilitating a firearm sale or transfer between unlicensed persons.*

(Emphasis added).

Since the passage of The Background Check Act, the FBI has drafted a letter indicating that it will not perform private party background checks for Nevadans and the POC now requests clarification on its legal authority.

Opinion Request

The Department of Public Safety is seeking an opinion from your office regarding the following.

1. Does The Background Check Act prohibit the POC program from having legal authority to perform background checks for private party transfers of firearms conducted by federal firearms licensees (FFLs)?
2. If legally authorized to perform background checks for private party transfers of firearms, does the POC program have legal authority to charge a fee for these background checks?

The Department respectfully requests an expedited response to this opinion request as the effective date of The Background Check Act is January 1, 2017.

Sincerely,



James M. Wright, Director
Nevada Department of Public Safety

JMW/jb

Attachments

cc: Jackie Muth, Deputy Director DPS
Julie Butler, Administrator, DPS GSD
Mindy McKay, Records Bureau Chief, DPS GSD

Clarksburg, WV 26306

December 14, 2016

Ms. Julie Butler
General Services Division Administrator
Nevada Department of Public Safety
Suite 100
333 West Nye Lane
Carson City, NV 89706

Dear Ms. Butler:

In accordance with the Brady Handgun Violence Prevention Act of 1993 (Brady Act), the U.S. Attorney General was charged with establishing a system, the National Instant Criminal Background Check System (NICS), in which Federal Firearms Licensees (FFL) must contact for a background check (NICS check) prior to transferring a firearm to a non-licensee to determine if the transferee is prohibited under state or federal law from receiving or possessing a firearm. The Brady Act required the U.S. Attorney General to establish the NICS on or before November 30, 1998.

Under Title 28, Code of Federal Regulations, Section 25.6(b) and (d), NICS checks may be conducted by either the FBI Criminal Justice Information Services (CJIS) Division's NICS Section or a local or state law enforcement agency serving as an intermediary between an FFL and the FBI. These intermediaries are referred to as Points of Contact (POC). In this capacity, the POC agrees to receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from receiving or possessing a firearm under state or federal law, and respond to FFLs with the results of a NICS background check. A POC is the agency with express or implied authority to perform POC duties pursuant to state statute, regulation, or executive order. Nevada FFLs are required to contact the state POC, the Nevada Department of Public Safety (DPS), for a background check prior to the transfer of any long gun or handgun to a non-licensee since the state of Nevada has opted to serve as a POC.

State and local authorities serving as POCs are likely to have readier access to more detailed information for processing background checks than the FBI, thus resulting in fewer system misses of disqualified persons and enhancing system responsiveness for non-disqualified persons. The POCs have access to more current criminal history records and more data sources (particularly regarding noncriminal disqualifiers such as mental hospital

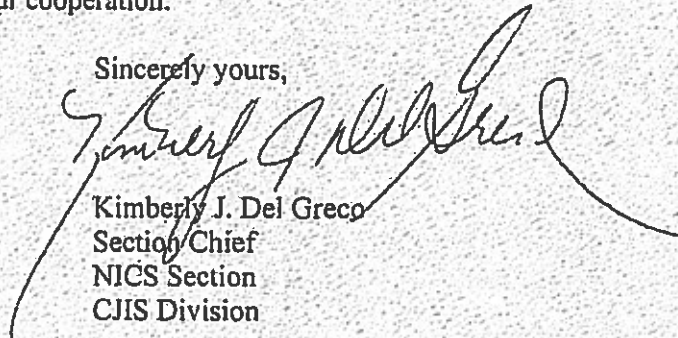
commitments) from their own state than does the FBI, and have a better understanding of their own state laws and disqualifying factors. Specifically, the POC for Nevada checks additional databases to include state protection orders, state warrants, state driver's licenses, parole and probation, and SCOPE (which is Clark County, Las Vegas area records). Also, most of Nevada's protection orders are not in the National Crime Information Center File, which is important to note since only the POC has access to these protection orders and if the FBI were processing background checks on private sales of firearms for Nevada, these protection orders would not be part of the NICS check.

The state of Nevada can provide a more comprehensive NICS check that is accomplished when a POC accesses state-held databases that are not available to the FBI. The Nevada DPS is also in a better position for understanding and applying state laws. It is for these reasons, the POC for the state of Nevada will be best suited to conduct the NICS checks for private sales as provided for in the recent legislation that was passed, the Background Check Act, as opposed to the FBI conducting these checks.

In conclusion, the recent passage of the Nevada legislation regarding background checks for private sales cannot dictate how federal resources are applied. The position of the NICS Section is that these background checks are the responsibility of the state of Nevada to be conducted as any other background check for firearms, through the Nevada DPS as the POC.

Thank you in advance for your cooperation.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kimberly J. Del Greco", written over a large, faint circular stamp or watermark.

Kimberly J. Del Greco
Section Chief
NICS Section
CJIS Division