

the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

#### List of Subjects

21 CFR Part 522

Animal drugs.

21 CFR Part 556

Animal drugs, Foods.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 522 and 556 are amended as follows:

#### PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. Section 522.315 is amended by revising paragraphs (a) and (d) to read as follows:

##### § 522.315 Ceftiofur crystalline free acid.

(a) *Specifications*—(1) Each milliliter (mL) of suspension contains 100 milligrams (mg) ceftiofur equivalents (CE).

(2) Each mL of suspension contains 200 mg CE.

\* \* \* \* \*

(d) *Conditions of use*—(1) *Swine*. The formulation described in paragraph (a)(1) of this section is used as follows:

(i) *Amount*. 5.0 mg CE per kilogram (kg) of body weight by intramuscular injection in the postauricular region of the neck.

(ii) *Indications for use*. For the treatment of swine respiratory disease (SRD) associated with *Actinobacillus pleuropneumoniae*, *Pasteurella multocida*, *Haemophilus parasuis*, and *Streptococcus suis*.

(iii) *Limitations*. Federal law restricts this drug to use by or on the order of a licensed veterinarian. Following label use as a single treatment, a 14-day preslaughter withdrawal period is required.

(2) *Cattle*. The formulation described in paragraph (a)(2) of this section is used as follows:

(i) *Amount*. 6.6 mg CE per kg of body weight by a single, subcutaneous

injection in the middle third of the posterior aspect of the ear.

(ii) *Indications for use*. For the treatment of bovine respiratory disease (BRD), shipping fever, pneumonia associated with *Mannheimia haemolytica*, *Pasteurella multocida*, and *Haemophilus somnus*. For the control of respiratory disease in cattle at high risk of developing BRD associated with *M. haemolytica*, *P. multocida*, and *H. somnus*.

(iii) *Limitations*. Federal law restricts this drug to use by or on the order of a licensed veterinarian. A withdrawal period has not been established in preruminating calves. Do not use in calves to be processed for veal.

#### PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

■ 3. The authority citation for 21 CFR part 556 continues to read as follows:

**Authority:** 21 U.S.C. 342, 360b, 371.

■ 4. Section 556.113 is amended in paragraph (b)(1) by removing "Swine, poultry," and by adding in its place "Poultry"; by redesignating paragraph (b)(2) as paragraph (b)(3); by adding new paragraph (b)(2); and by revising newly redesignated paragraph (b)(3) to read as follows:

##### § 556.113 Ceftiofur.

\* \* \* \* \*

(b) \* \* \*

(2) *Swine*. The tolerances for desfuroylceftiofur (marker residue) are:

(i) *Kidney (target tissue)*. 0.25 parts per million (ppm).

(ii) *Liver*. 3 ppm.

(iii) *Muscle*. 2 ppm.

(3) *Cattle*. The tolerances for desfuroylceftiofur (marker residue) are:

(i) *Kidney (target tissue)*. 8 ppm.

(ii) *Liver*. 2 ppm.

(iii) *Muscle*. 1 ppm.

(iv) *Injection site muscle*. 166 ppm.

(v) *Milk*. 0.1 ppm.

Dated: July 13, 2004.

**Stephen F. Sundlof,**

*Director, Center for Veterinary Medicine.*

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**BILLING CODE 4160-01-S**

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

#### 28 CFR Part 25

[FBI 108F; AG Order No. 2727-2004]

RIN 1110-AA07

#### National Instant Criminal Background Check System Regulation

**AGENCY:** Federal Bureau of Investigation, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The United States Department of Justice ("the Department") is publishing a final rule amending the regulations implementing the National Instant Criminal Background Check System ("NICS") pursuant to the Brady Handgun Violence Prevention Act ("Brady Act").

**EFFECTIVE DATES:** The effective date for the final rule is July 20, 2004.

**FOR FURTHER INFORMATION CONTACT:** Eugene Donaldson, Federal Bureau of Investigation, National Instant Criminal Background Check System (NICS) Section, Module A-3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0147, (304) 625-3500.

**SUPPLEMENTARY INFORMATION:** This notice finalizes the rule proposed in the **Federal Register** on July 6, 2001 (66 FR 35567). The Federal Bureau of Investigation ("FBI") accepted comments on the proposed rule from interested parties until October 22, 2001, and 1,164 comments were received. With the exception of certain changes explained below, the proposed rule is adopted as final.

*Significant Comments or Changes:*  
The Department on July 6, 2001, published a notice of five proposals for changes in the regulations governing the NICS. The changes relate to the amount of time that the NICS retains information about approved firearm transfers in the system's chronological log of background check transactions ("Audit Log") and the manner in which that information may be used to audit the use and performance of the NICS. The proposed changes sought to balance the Brady Act's mandate that the Department protect legitimate privacy interests of law-abiding firearm transferees and the Department's obligation to enforce the Brady Act and prevent prohibited persons from receiving firearms.

The comments about each of the five proposals are addressed below.

### 1. Proposal #1: Prompt Destruction of Records of Allowed Transactions (§ 25.9(b)(1), (2) and (3))

The majority of the comments received addressed the proposal that would require information relating to allowed firearm transfers, other than the NICS Transaction Number (NTN) and the date the number was assigned, to be destroyed before the beginning of the next day of NICS operations. The NICS regulations currently require destruction of this information within 90 days of the system allowing a transaction. 28 CFR 25.9(b)(1).

Since the closing of the comment period, Congress passed, and the President signed into law, a requirement that addresses the time within which the NICS is required to destroy certain information in the records of allowed transactions. Section 617 of Pub. L. No. 108-199, the Consolidated Appropriations Act, 2004 (or "Omnibus"), requires the NICS to destroy "any identifying information submitted by or on behalf of any person who has been determined not to be prohibited from possessing or receiving a firearm no more than 24 hours after the system advises a Federal firearms licensee that possession or receipt of a firearm by the prospective transferee would not violate subsection (g) or (n) of section 922 of title 18, United States Code, or State law." Section 617 of the Omnibus bill becomes effective on July 21, 2004, 180 days after January 23, 2004, the date the Omnibus bill was signed into law.

For this reason, proposal #1 has been superseded by a legislative enactment setting a limit on how long the NICS may retain certain information on allowed transactions. The final rule has been revised to conform to the 24-hour record retention provision in the Omnibus bill. However, because many of the comments on proposal #1 raised questions about the effect of the shortened retention period on the operation of the NICS, we discuss those comments below to explain how the NICS will operate under the Omnibus provision and continue to enforce relevant Federal laws effectively.

Commenters questioned whether the FBI could audit system performance adequately when the retention period for most information relating to approved transfers is less than 24 hours. The FBI uses information currently retained in the Audit Log to ensure quality performance from the NICS employees and the operators at the contract Call Centers who take transferee information from Federal Firearms Licensees ("FFLs"). The FBI's

procedure for these audits under the existing regulations is to review a sample of decisions ("proceed," "denied," and "open") made by NICS employees and of entries by Call Center operators of transferee information. If an erroneous decision to allow a firearm transfer is detected during the audit, the FBI seeks to rectify the mistake by referring the case to the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") for retrieval of the firearm. In addition, retraining may be given to the employees involved or all employees relating to the issues raised by the error to prevent similar mistakes.

Under the Omnibus 24-hour destruction provision, this same auditing function will be performed soon after the transaction is processed by the NICS. This change, from the current review process (which in some instances may be performed as late as 75 days after an initial decision was made) to a process where reviews are performed within 24 hours after an FFL is advised of a "proceed" response ("real time" audits), can be done without any change in the number of transactions audited and the level of confidence underlying the audits. The FBI has determined that, after the proposed change, it can audit the same percentage of employee "proceed" decisions and Call Center entries as it currently reviews. Furthermore, the FBI has determined that, under the new audit procedures, it can attain the same confidence level in the audit results that is achieved under the current post-decision review of proceed records retained for 90 calendar days. The FBI will perform these reviews to accommodate all hours and days of operation. These reviews will include audits of the procedures through which the NICS ensures that aliens who are illegally or unlawfully in the United States or who are non-immigrant aliens do not receive firearms as prohibited by the Gun Control Act. See 18 U.S.C. 922(g)(5). The Department is working toward providing the necessary staffing resources for these "real time" reviews and will coordinate with the FBI to ensure adequate resources for this function.

The Department believes that these "real time" quality assurance audits, performed either before or within a few hours (less than 24 hours, at the outermost) after eligibility decisions are communicated to the FFL, will ensure that the reliability and accuracy of the NICS is maintained. Contemporaneous reviews may prevent a firearm from being erroneously transferred to a prohibited individual. Reviews performed within 24 hours of advising

an FFL of a proceed response will, in cases of erroneous proceed decisions discovered by the audit, permit immediate referral of any firearm retrievals to ATF. In addition, the institution of any corrective training promptly after the error will prevent the repetition of errors that might occur where reviews are conducted much later, as they are under the current 90-day retention policy.

One comment observed that because the NICS has cases in which it cannot make a determination within three business days as to whether a potential transferee is disqualified, it cannot both make a determination and evaluate the accuracy of the determination within one business day. These cases, however, are not covered by the Omnibus 24-hour destruction provision. The NICS cannot in some cases reach a final determination within three business days because relevant information is missing from the automated record system and must be obtained from other sources. As discussed below, the final rule defines these cases as "open" responses and allows the NICS to retain information about them until a "proceed" determination is reached or for not more than 90 days, so that if records are returned to the NICS within that time showing that the transfer should have been denied, the case can be referred for a firearm retrieval. When there are no missing records, employees are able to make their determinations quite quickly, usually within a matter of minutes. Reviewing these determinations within 24 hours after they are made is both feasible and preferable to the current system of review.

The FBI also uses information on approved transactions to audit the data processing algorithm that matches system records to the transferee information submitted for the NICS check. These audits will be unaffected by the Omnibus provision because, in 2001, the FBI began performing the algorithm audits daily.

Some commenters contended that the new proposed retention period is inconsistent with the Department's earlier comment that 90 days was "the shortest practicable period of time for retaining records of allowed transfers that would permit the performance of basic security audits of the NICS." 64 FR 10264. That statement, however, pertains to the process of post-decision reviews currently in effect and not the real-time auditing process that will be implemented under the Omnibus provision.

The current NICS audit process, based on post-decision reviews, is similar to

the FBI's audit procedures for its National Crime Information Center ("NCIC"). In auditing the NCIC, the FBI reviews historical data periodically to ensure that law enforcement agencies are accessing the NCIC only for authorized purposes. NCIC users are typically subject to such audits once every three years. There is greater need to audit the NICS promptly, however, because NICS employees are constantly interpreting records, applying state and federal law, and deciding whether persons are eligible to possess or receive a firearm. Five years of operating the NICS have given the FBI sufficient experience in managing the system to implement the real-time quality reviews that will begin once the Omnibus 24-hour destruction requirement becomes effective.

One comment suggested that the new retention period will hamper the ability of the NICS to develop and analyze statistical information about the system's use and performance. The FBI has determined that, although under the new period it may not have as much flexibility in doing so, it will be able to continue to develop needed statistical data about the system's performance under the new retention period by making statistical data runs on a daily basis (before the beginning of the next day of NICS operations) instead of doing so on a weekly or monthly basis.

Another comment questioned the FBI's legal authority to retain more complex statistical data. The Department interprets the provision of the Brady Act requiring the destruction of "all records of the system relating to the person or the transfer," 18 U.S.C. 922(t)(2)(C), as referring only to records that contain specific information about individual transfers. In addition, as discussed below, the Omnibus provision requires the destruction of "any identifying information submitted by or on behalf of" an approved purchaser. The Department believes, therefore, that the NICS may develop and retain information about the system's performance that does not contain such identifying information. Examples include but are not limited to the gross number of checks processed, the numbers of checks performed for handgun and long gun transfers, and the numbers for the different types of system responses given to FFLs (in the aggregate and by individual FFLs).

The Department interprets section 617 of the Omnibus bill as being consistent with this reading of the Brady Act. Therefore, when the provision becomes effective, the FBI will continue to retain for not more than 90 days non-identifying data associated with

transactions such as the FFL number, as well as the NTN and date (which are retained indefinitely), for all transactions in the NICS Audit Log. In addition, when asking an agency for information in connection with a NICS check, the NICS will provide the NTN, which the agency can reference in any response to the NICS. By retaining the FFL and NTN numbers for up to 90 days, the FBI will be able to trace the transaction back to the FFL if prohibiting information is provided by an agency more than 24 hours after the NICS issued a *Aproceed@* response. FFLs are required to record the NTN on the Firearms Transaction Record (ATF Form 4473) and must keep those forms for 20 years if the firearm is transferred. 27 CFR 478.129(b). As a result, the FBI will retain the ability to refer the case to ATF for the retrieval of the erroneously transferred firearm and any other firearms illegally possessed by the prohibited person. This practice will ensure that firearm retrievals can continue under the language in the Omnibus bill.

This continued retention of the FFL number is possible because the Department believes that the text of the Omnibus provision only requires the destruction within 24 hours of "identifying information submitted by or on behalf of" the approved purchaser. The statute is most naturally read to equate "identifying information" with information identifying the prospective transferee, rather than information that identifies anyone or anything. The FFL number does not identify the prospective transferee. Additionally, the phrase "identifying information submitted by or on behalf of" a transferee is best read to encompass information in the NICS records provided by the transferee—either directly ("submitted by [the transferee]"), or indirectly through a surrogate, such as the FFL ("submitted on behalf of [the transferee]"). Even though an FFL must submit its FFL number to the NICS before any firearm transfer may be authorized, this number is most naturally characterized not to constitute information "submitted by or on behalf of" a transferee because the transferee plays no role in providing it to the NICS.

To be clear, the Omnibus provision's 24-hour record destruction requirement applies only to transactions in which the NICS has affirmatively determined that possession or receipt of a firearm by the purchaser would not violate 18 U.S.C. 922(g) or (n) or state law and has so "advised" the FFL, *i.e.* has provided the FFL with a "proceed" response. Section 617 is not applicable to

"denied" or "open" transactions. In the case of denied transactions, records are retained indefinitely. Furthermore, as discussed below, the FBI will also continue to be able to retain for up to not more than 90 days (as it does under current law) information on "open" transactions—*i.e.*, where the NICS has not yet provided a "proceed" or "deny" response because it has not received definitive information about the status of a prospective gun buyer's record (*e.g.*, a missing arrest disposition). If prohibiting information is received within 90 days, continued retention of such records will allow the FBI to change an open transaction to a "denied" response and refer the case to ATF for a firearm retrieval if the firearm has been transferred by the FFL (as allowed under the Brady Act when the FFL has not received within three business days a response on whether the transfer is lawful).

Some commenters were concerned that the proposed rule could interfere with the retention of information about proceed transactions by Point of Contact states ("POCs"). Under the existing NICS regulations, 28 CFR 25.9(d), POCs are required to destroy information about allowed transfers that are not part of "a record system created and maintained pursuant to independent state law regarding firearm transactions." *See also* 63 FR 58311. The FBI has advised POCs that if they do not have such state authority they must observe the same retention period for allowed transfers as the FBI under § 25.9(b). Thus, POCs that do not have the specified state authority will be required to reduce their retention period to conform to the new period that the FBI will observe, pursuant to the Omnibus provision, upon the effective date of this rule. However, POCs that have state authority to retain this information may continue to do so, and such authority is not affected by this regulatory change.

Some commenters suggested that reducing the retention period to less than 24 hours will prevent the identification of unlawful firearm transactions involving straw purchases or the use of false identification. A "straw purchase" occurs when the actual purchaser of a firearm uses another person, the "straw purchaser," to execute the paperwork necessary to purchase a firearm from an FFL. The straw purchaser violates the law by making a false statement with respect to information required to be kept in the FFL's records. Straw purchases are most often detected by the NICS when an FFL informs a NICS examiner that one person is buying a firearm for another

person, such as a friend or family member who recently has been denied. The transactions usually occur on the same operational day and frequently only minutes apart. Under the current regulation (§ 25.9(b)(2)), when such transactions are identified, the proceed information is maintained by the NICS and referred to ATF for investigation where doing so is necessary to pursue an identified case of "misuse of the system."

The requirement to destroy information about allowed transfers within 24 hours after the FFL has been notified of the approval will not interfere with these cases continuing to come to the attention of the NICS. To conform to the requirement of section 617 of the Omnibus, however, § 25.9(b)(2) has been revised in the final rule to provide that information in the NICS Audit Log, including information not yet destroyed under the 24-hour destruction requirement, that indicates, either on its face or in conjunction with other information, a violation or potential violation of law or regulation may be shared by the FBI with appropriate authorities responsible for investigating, prosecuting, or enforcing such law or regulation. This change is consistent with Routine Use C in the NICS Privacy Act Notice, which provides that: If, during the course of any activity or operation of the system authorized by the regulations governing the system (28 CFR, part 25, subpart A), any record is found by the system which indicates, either on its face or in conjunction with other information, a violation or potential violation of law (whether criminal or civil) and/or regulation, the pertinent record may be disclosed to the appropriate agency/organization/task force (whether Federal, State, local, joint, or tribal) and/or to the appropriate foreign or international agency/organization charged with the responsibility of investigating, prosecuting, and/or enforcing such law or regulation \* \* \* 63 FR 65226-27 (Nov. 25, 1998). This provision in the final rule will continue to allow the FBI and ATF to pursue cases of suspected straw purchases, as well as other potential violations of law or regulation, that come to the FBI's attention while operating the system. Where a potential straw purchase comes to the attention of the FBI while processing a NICS check within 24 hours after a dealer is advised of a proceed determination, this provision in the regulation will authorize the FBI to provide records of the approved transfer to ATF before the identifying information in records in the NICS

Audit Log must be destroyed as required by the Omnibus provision.

In addition, the NICS does not destroy records of denials. A NICS employee verifies the potential straw purchase case by referring back to an earlier "denied" response, not an earlier "proceed" response. For that reason, information about allowed transfers in the Audit Log is not used to track lawful transferees to see whether they might be engaged in a straw purchase. Straw purchases by persons with last names different from the ones of persons that later receive the firearm would not be detectable by a review of the Audit Log, regardless of whether the information contained therein is kept for one day or 90 days.

The change required by the Omnibus provision does not affect the ability of law enforcement to detect or prosecute the use of false identification by prospective firearm purchasers. The NICS runs the name and identifying information that the FFL sends to the system based on the identification documents presented by the buyer. The FFL is responsible for examining the identification documents, and the NICS has no means by which it can validate the identification presented. Thus, the change in the retention period of information about allowed transfers has no relevance to the system's ability (or inability) to validate a buyer's identification. One comment suggested that a purchaser using a false identity could be detected by reviewing the Audit Log for a pattern of purchases that could trigger an investigation to uncover possible gun trafficking. The Department's position since the NICS began operating is that such use of the Audit Log is not authorized by the Brady Act and the NICS regulations, both of which prohibit the use of the NICS to establish a system of firearm registration relating to lawful gun purchases; the Audit Log, therefore, is not used to track purchases by lawful gun buyers, even though doing so could potentially identify purchase patterns suggesting possible cases of gun trafficking.

One comment observed that the proposed change would prevent the NICS from referring a "proceed" transaction for a firearm retrieval when a disqualifying record is subsequently entered into the system. The comment indicated that this would allow a prohibited buyer to "beat the clock" and buy a firearm after he or she becomes disqualified but before his or her disqualifying record is entered into the system. The NICS, however, does not currently have a process for automatically comparing new criminal

history or other disqualifying information received by the FBI against proceed transactions in the Audit Log. As noted above, under the final rule the system will list as "open" the cases in which the system has hit on a potentially disqualifying record but has not obtained definitive information on whether the person is disqualified. Examples of such cases include transactions where a record is found of an arrest for a disqualifying offense without information about the final disposition or where a record is found of a conviction of a violent misdemeanor without information on whether there is a domestic relationship that would make the offense a disqualifying misdemeanor crime of domestic violence. Records on these open transactions will be kept for not more than 90 days to allow for referral of the case for firearm retrieval in the event disqualifying information is received within that time.

Many commenters argued that the Brady Act and the Firearms Owners' Protection Act require immediate destruction of NICS records upon communicating the proceed decision to the FFL, and that any retention of information on approved transfers violates the provisions of federal law prohibiting the establishment of a federal firearms registry. The United States Court of Appeals for the District of Columbia Circuit rejected this argument in *National Rifle Ass'n of America, Inc. v. Reno*, 216 F.3d 122 (D.C. Cir. 2000), cert. denied sub nom. *National Rifle Ass'n of America, Inc. v. Ashcroft*, 533 U.S. 928 (2001). That decision affirmed the Attorney General's discretion to allow the NICS to keep information about allowed firearm transfers for a limited period of time for the limited purpose of conducting audits of the use and performance of the system. See *National Rifle Ass'n of America, Inc. v. Reno*, 216 F.3d at 137-38, quoting 66 FR 58304 (Oct. 30, 1998). Such discretion perforce extends to the changes effected by this rule, which requires much more prompt destruction of the information than do the regulations it amends. Moreover, by specifying in section 617 of the Omnibus bill the requirement for destroying certain information in records of allowed transfers not more than 24 hours after an FFL is advised of the determination, Congress has specifically authorized retaining these records for up to 24 hours.

Several comments questioned whether records of allowed transfers would be kept beyond the beginning of the next day of NICS operations in computer system backup tapes. The

NICS currently maintains complete backups of the last ten calendar days of all data. The Omnibus provision provides no exception to the requirement for the destruction of the identifying information about allowed transactions within 24 hours of advising the FFL of the "proceed" response. The FBI will therefore revise its backup procedures for NICS data to ensure that the relevant data is destroyed within the 24-hour time frame.

Finally, the Department has determined that the regulations should more clearly distinguish between the final rule's use of the term "NICS business day" and the term "business day" as used elsewhere in the regulations. The term "business day" is defined as "a 24-hour day (beginning at 12:01 a.m.) on which state offices are open in the state in which the proposed firearm transaction is to take place." Ordinarily, this excludes weekends and all holidays on which state offices are closed. In contrast, the FBI NICS Section operates every day of the year during the hours of 8 a.m. to 1 a.m. eastern time, with the exception of Christmas Day. Therefore, in § 25.9(b)(1)(iii), the final rule substitutes the term "NICS operational day" for the term "NICS business day." "NICS operational day" is defined to mean "the period during which the FBI NICS Operations Center has its daily regular business hours." In conjunction with this change, the term "NICS Operations Center regular business hours" has been removed from the regulations. This term was defined as 9 a.m. to 2 a.m. eastern time. Shortly after the FBI NICS Operations Center began operating, however, it established business hours of 8 a.m. to 1 a.m. eastern time. The definition of "NICS Operations Center regular business hours" is being removed so that an amendment to the rule is not required in the event of future changes in those hours. The FBI NICS Section will keep POCS and FFLs informed of any changes in its daily regular business hours.

## **2. Proposal #2: Individual FFL Audit Logs (§ 25.9(b)(4))**

The Department proposed to create Individual FFL Audit Logs upon prior written request from ATF for use in connection with ATF's inspections of FFL records. With the exception of denied transactions, the Individual FFL Audit Logs may contain only non-identifying information for each transaction. All information concerning denied transactions may be included in the Individual FFL Audit Logs. The FBI will create Individual FFL Audit Logs for the transactions processed by the

FBI's NICS Operations Center. The Department expects the POC states to work with the FBI and ATF to ensure that such Logs will also be available to ATF for use in its inspections of FFLs in the POC states. The final rule provides: "The FBI will provide POC states the means to provide to the FBI information that will allow the FBI to generate Individual FFL Audit Logs in connection with ATF inspections of FFLs in POC states. POC states that elect not to have the FBI generate Individual FFL Audit Logs for FFLs in their states must develop a means by which the POC will provide such Logs to ATF."

In the final rule, the Department has dropped the requirement that ATF destroy all records of allowed transfers and open transactions within 90 days of the date on which the Individual FFL Audit Log was created. The Department concluded that the proposed rule's requirement that ATF destroy this information and certify its destruction is not required by law and would create an unnecessary administrative burden. In addition, to give ATF the flexibility to obtain information covering a longer period of transactions for use in its inspections of FFLs, the final rule allows the Individual FFL Audit Logs to contain up to 60 days, as opposed to the proposed 30 days, worth of allowed and open transfer records originating from the inspected FFL.

Several comments on this proposal suggested that giving ATF only the NTN and date of inquiry on allowed transfers limits the utility of these logs in ATF inspections of FFLs. The Department notes that the Individual FFL Audit Logs will allow ATF to review dealer records in several ways that will deter FFL misuse of the NICS. First, by comparing the NTN issued by the NICS to the NTN recorded on the ATF Form 4473, ATF can deter FFLs from falsifying NTNs to conceal the fact that they did not request a NICS check on a transfer and detect any FFLs who have made such falsifications. Second, by comparing the number of NICS checks requested by an FFL during the 60-day period to the number of Forms 4473 that the FFL has for the same period, ATF will be able to ensure that for every NICS check there is a corresponding Form 4473. When there are more NICS checks than there are Forms 4473, ATF will determine whether the FFL was running unauthorized NICS checks unrelated to firearm transfers. When there are fewer NICS checks than there are Forms 4473, ATF can investigate whether the FFL was transferring firearms without the required NICS check. In addition to using the 60 days of data in the Individual FFL Audit logs

to detect these discrepancies, ATF can use statistical data that the FBI develops covering a longer period of time on the gross number of checks by the FFL and the gross number of responses by type given by the system ("proceed," "denied," or "open"). Since all checks must have a corresponding Form 4473, if such forms are missing, then possible NICS checks for improper purposes may be detected. These reviews by ATF will deter dealers from avoiding NICS checks or running unauthorized NICS checks and violating the right to privacy of persons subject to such checks.

Other comments indicated that limiting the information about allowed transfers in the Individual FFL Audit Logs will prevent ATF from discovering certain types of dealer misuse of the NICS. As noted above, this information will continue to allow ATF to check for fictitious NTNs and discrepancies between the number of checks and the number of Forms 4473. It is true, however, that when the 24-hour destruction requirement in the Omnibus bill is implemented, ATF inspectors will no longer be able to compare the information on the 4473 on proceeded firearm transactions with the information sent to the NICS to determine if an FFL sent the system different information to avoid the background check on the actual buyer. To date, however, ATF has not found such activity to be a problem. ATF believes that, in any event, it will be able to deter FFLs from deliberately sending the NICS information different from what is on the Form 4473 by conducting, as part of its inspections, NICS rechecks on a sample of proceeded transactions to see if the NICS would give the same "proceed" response as of the date of the original transaction. The FBI has also developed a new tool, the NTN validator, which ATF will use to detect fabricated NTNs.

To be sure, the fact that the FBI and ATF were able to conduct comparisons of identifying information from the Form 4473 that was submitted to the NICS may have had some deterrent effect on dealers who would consider abusing the system. The FBI and ATF, however, will create a similar deterrent. As mentioned above, ATF has the authority to run NICS rechecks to see if the NICS returns a "denied" response on a transfer the Form 4473 shows as being allowed. The recheck determines whether the person was prohibited based on records showing the person's status at the time of the original check. The NICS regulations grant ATF authority to conduct NICS rechecks as part of its inspection process under 28 CFR 25.6(j)(2), which permits ATF

access to the NICS Index for civil and criminal law enforcement purposes under the Gun Control Act. ATF is also authorized to receive information from other databases checked by the NICS, including the NCIC, the Interstate Identification Index ("III"), and Bureau of Immigration and Customs Enforcement, Department of Homeland Security, databases. Any inconsistency between a proceed on a Form 4473 and a denied response on a recheck would suggest that the dealer had sent the NICS identifying information that differs from that which appears on the Form 4473. Upon the discovery of such a discrepancy, ATF can do a larger sample of rechecks to ascertain if there is a pattern of abuse or initiate an investigation of the FFL if warranted by the facts. Moreover, the rechecks can be done over a much longer period of time than the 60 days of transactions it was anticipated that ATF would review using the information saved and shared under the 90-day retention rule. Using the recheck approach to auditing FFL records of NICS checks increases the probability of irregularities being discovered because ATF can go back a year or more in its recheck sample. The Department has concluded that this recheck process will provide a deterrent to dealers who might consider submitting false information to the NICS, because sanctions for such misuse include suspension of NICS privileges and criminal prosecutions. In addition, under the new rule, the FBI will continue to be able to identify cases in which FFLs, after receiving a denial on a particular purchaser's identifying information, initiate one or more subsequent checks with slight variations of a name, date of birth, or social security number. These cases usually occur shortly after the initial denial or delay and are verified by referring back to the initial denied or open transaction. Finally, traditional law enforcement methods, such as undercover investigations finding cases of dealers submitting false information to the NICS, can lead to prosecutions or license revocations that will deter dealers from engaging in such illegal conduct.

Other comments argued that the Brady Act does not allow the FBI to retain information about the FFL identification number ("FFL identifier") or to transfer any information on allowed transfers or open transactions to ATF. The comments asserted that the FBI can only keep the NTN and date (without the associated FFL identifier) and may only share that information with ATF when there is a bona fide

criminal investigation. As noted above, the Department's authority to retain information on allowed transfers, including the FFL identifier number, in the Audit Log for a limited time was upheld in *National Rifle Ass'n of America, Inc. v. Reno*, 216 F.3d 122 (D.C. Cir. 2000), *cert. denied sub nom. National Rifle Ass'n of America, Inc. v. Ashcroft*, 533 U.S. 928 (2001). Also, for the reasons specified above, the Department believes that the record-destruction requirement in the Omnibus bill only applies to the identifying information submitted by or on behalf of the prospective purchaser. Sharing FFL identifiers with ATF in connection with its inspections of FFLs facilitates authorized audits of FFLs' use of the NICS.

### **3. Proposal #3: New Definition of "Open" Transaction (§ 25.2)**

Initially, the purpose of this proposal was to create a separate category of transactions called "unresolved." In the final rule, however, the name of the category is changed from "unresolved" to "open." "Open" transactions are those non-canceled transactions where the FFL has not yet been notified of the final determination. In such cases, additional information is needed before the NICS examiner can verify whether a "hit" in the database demonstrates that the prospective purchaser is disqualified from receiving a firearm under state or federal law. Under the final rule, the NICS will be able to maintain records of open transactions until either (1) a final determination on the transaction is reached and has been communicated to the FFL resulting in the transaction status being changed to a "proceed" (24-hour destruction) or a "denied" (indefinite retention) status, or (2) 90 days elapse from the date of inquiry.

Currently, approximately 74 percent of all transactions are completed immediately and approximately 92 percent are completed while the FFL is still on the telephone with the FBI NICS Section. Therefore, open transactions represent a very small percentage of all calls to the NICS. Creating an "open" category clarifies that the NICS can retain, as discussed above, the identifying information on such transactions beyond the 24-hour retention period for "proceed" transactions so that employees can complete research and analysis necessary to achieve an accurate determination. If the transaction's status is changed to "denied" within 90 days, the NICS would be able to refer the matter to ATF for a possible firearm

retrieval and retain the transaction information indefinitely.

Several commenters raised the concern that the creation of a new "open" category would change the statutory mandate in the Brady Act that allows an FFL to transfer a firearm if the NICS has not determined, within three business days, that the transaction is prohibited by law. However, the new category of "open" would not affect an FFL's ability to transfer or withhold a firearm after three business days, but would simply allow the NICS to keep accurate records of the precise status of NICS transactions. With this new category of "open" transactions, the NICS will more accurately reflect the status of all transactions in the system, track changes in their status, and update its records accordingly.

The definition of "Delay" has been amended to clarify that it means the response given to the FFL indicating that the transaction is in an "Open" status and that more research is required prior to a NICS "Proceed" or "Denied" response.

Finally, several comments stated that the open category would be unnecessary if the record systems checked by the NICS had complete information. The Department agrees that all levels of government must continue to improve the completeness of disposition information in the criminal history record system so that such information can be available to the NICS without the need for further research. As record completeness improves, the number of open transactions should decrease. The Department is addressing the problem of missing dispositions by making the closing of such gaps a priority use of the funding available to the states under the National Criminal History Improvement Program ("NCHIP"). It is expected, however, that achieving improved completeness will take additional time, and that there will continue to be a need for the NICS to have an "open" category for the foreseeable future.

### **4. Proposal #4: Require POC States to Transmit State Determinations to the NICS (§ 25.6(h))**

Under current § 25.6(h), POC states are encouraged, but not required, to transmit to the FBI determinations that a background check indicates a firearm transfer is denied. Unfortunately, most POC states currently do not transmit this information to the NICS. In order to provide the NICS with complete information about POC transactions, the Notice of Proposed Rulemaking contemplated that POC states would be required to transmit all determination information on all POC

determinations—approved, open, and denied—as soon as it is available.

A number of POC states and interest groups commented that a requirement to transmit information about all determinations would overly and unduly burden the POC states and the NICS. In addition, they stated that POC denial information is the most valuable and necessary for the NICS to collect. The 24-hour destruction requirement in the Omnibus, however, makes it just as important that the NICS have notice of when a POC transaction is open, because otherwise it will have to assume the transaction has been approved and destroy the transaction information within 24 hours of the initial check. This result will mean that the NICS may not have information about the transaction even though the POC has not finished its review of or made a final determination concerning the open transaction. In turn, this would cause certain inefficiencies in the completion of POC checks, in some cases requiring the POC to run an open transaction a second time where the information about the initial check has been destroyed because the FBI is forced to assume the transaction has been proceeded.

In light of these comments and the requirement of the Omnibus provision, the Department has changed the final rule to provide that POC states must transmit electronic NICS transaction determination messages to the FBI for the following transactions: (1) Open transactions that are not resolved before the end of the operational day on which the check is requested; (2) denied transactions; (3) transactions reported to NICS as open and later changed to proceed; and (4) denied transactions that have been overturned. The FBI will provide POCs with an electronic message capability to transmit this information.

These electronic messages shall be provided to the NICS immediately upon communication of the POC determination to the FFL. For open transactions, the electronic messages shall be communicated no later than the end of the operational day on which the check was initiated. The FBI will assume that POC transactions that are not identified as denied or open have received a proceed response and will accordingly destroy certain information from those NICS records within 24 hours.

The FBI has already provided and will continue to provide the POCs guidance and support on the system requirements for providing the NICS the required information about transaction status. In addition, the 2004 Program

Announcement for the National Criminal History Improvement Program (NCHIP), available on the website of the Bureau of Justice Statistics, provides that NCHIP funds are available to POC states “to implement programming or operational changes in records management necessary to comply” with new NICS requirements for POC participation resulting from the Omnibus bill.

Receiving information about POC denials will enable the FBI to refer all denials, not just those made by the FBI NICS Operations Center, to ATF for investigation. Receiving notification of open POC transactions will allow the FBI to retain information about the POC transaction for up to 90 days, or until the transaction’s status is changed to proceed before the expiration of 90 days, in the same way the FBI will retain information about open transactions handled by the FBI NICS Section.

Several commenters were concerned that the new POC requirement might interfere with state record-retention rules. These issues are addressed by the current requirement in the NICS regulations regarding record retention by POC states. Specifically, 28 CFR 25.9(d) states:

(d) The following records of state and local law enforcement units serving as POCs will be subject to the Brady Act’s requirements for destruction:

(1) All inquiry and response messages (regardless of media) relating to the initiation and result of a check of the NICS that allows a transfer that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions; and

(2) All other records relating to the person or the transfer created as a result of a NICS check that are not part of a record system created and maintained pursuant to independent state law regarding firearms transactions.

The Department gave the following explanation of this section in the **Federal Register** when the initial NICS regulations were published on October 30, 1998: “Sections 25.9(d)(1) and (2) of the final rule were revised to make it clear that the referenced state records of allowed transfers would not be subject to the Brady Act record destruction requirement if they are part of a record system created and maintained pursuant to independent state law regarding firearms transfers. The reason for this clarification is to avoid interfering with state regulation of firearms. If a state is performing a gun eligibility check under state law, and state law requires or allows the retention of the records of

those checks, the state’s retention of records of the concurrent performance of a NICS check would not add any more information about gun ownership than the state already retains under its own law.” 63 FR 58304. The Department does not believe that the Omnibus 24-hour record destruction provision affects this part of the NICS regulation. The Omnibus provision simply reduces the record retention time for records subject to the Brady Act’s record destruction requirement; it does not expand the records that are subject to the destruction requirement.

As noted above, however, POC states that do not have a state law regarding firearms transactions that requires or allows the retention of the records of gun eligibility checks must comply with the same record destruction schedule observed by the FBI. Therefore, to ensure that the Department observes the requirements of the Omnibus bill, beginning July 21, 2004, such POC states must destroy records relating to allowed transfers, in accordance with 28 CFR 25.9(d), no more than 24 hours after advising FFLs of proceed determinations. Otherwise, NICS transactions in those states will have to be processed by the FBI to ensure compliance with the Omnibus provision.

#### **5. Proposal #5: Voluntary Appeal File (§ 25.10(g))**

The final rule would permit lawful transferees to request that the NICS maintain information about themselves in a Voluntary Appeal File, a separate computer file that will be checked by the NICS, so that the NICS will not erroneously deny a firearm transfer in the future. Persons who may request that the NICS maintain information about them to facilitate future firearms transactions include lawful purchasers who have been delayed or denied a firearm transfer because they have a name and date of birth similar to that of a prohibited person. The NICS has the authority to maintain such information in order to reduce the number of requests it receives for the reasons underlying a delay or denial of a firearm transfer and the number of unnecessary appeals. Doing so will enhance the service that NICS provides to FFLs and lawful firearm transferees and help fulfill the Brady Act’s goal of providing an “instant” background check where possible.

This provision would also avoid erroneous denials or extended delays on NICS checks of persons who were convicted but have had their rights restored or have obtained from ATF relief from the firearm disability. Some

commenters noted that some states provide that the firearm privileges of certain convicted persons are automatically restored after the passage of a set period of time. The commenters asserted that use of the Voluntary Appeal File should not be available to persons receiving the restoration of their rights because possession of a firearm by such persons presents a threat to public safety. Under certain conditions, however, the Gun Control Act allows individuals with otherwise disqualifying convictions to possess and receive firearms if their civil rights have been restored. See 18 U.S.C. 921(a)(20) and 921(a)(33)(B)(ii). The NICS is required by law to recognize such restorations of rights when determining a person's eligibility to obtain a firearm. The Department, therefore, declines to impose the suggested limitation on the use of the Voluntary Appeal File.

At the suggestion of the FBI, the Department amends this provision to clarify that the FBI may remove a person from the Voluntary Appeal File when the FBI finds that a disqualifying record has been created after the date of the person's entry into the file. Thus, the following sentence is added to the end of the new § 25.10(g): "If the FBI finds a disqualifying record on the individual after his or her entry into the Voluntary Appeal File, the FBI may remove the individual's information from the file." The Department is also correcting an error in the last sentence of this section of the proposed rule, which used the term "Voluntary Audit Log" instead of "Voluntary Appeal File." That sentence in the final rule reads: "However, the FBI shall not be prohibited from retaining such information contained in the Voluntary Appeal File as long as needed to pursue cases of identified misuse of the system."

## 6. Other Comments on the Proposed Rule

One comment raised procedural objections concerning the delays in the effective date of the 90-day retention rule published in January 2001. The Department provided explanations for the postponement of the effective date when those actions were taken. See 66 FR 12854 (Mar. 1, 2001); 66 FR 22898 (May 3, 2001). Criticisms of those delays are irrelevant to the lawfulness of the process by which the current rule is being promulgated.

## 7. Effective Dates

For the reasons specified below, the effective date for this rule is July 20, 2004, the date of its signature. No later than July 21, 2004, the FBI will implement the 24-hour destruction

requirement in the Omnibus provision, together with the associated changes to the NICS quality review process, and the creation of the "open" category under proposal #3.

While the authority to provide ATF with Individual FFL Audit Logs under proposal #2 and to establish a Voluntary Appeals File under proposal #5 is effective as of July 20, 2004, the FBI will not be able to implement those system enhancements immediately. The FBI will implement those enhancements as soon after the effective date as practicable.

No later than July 21, 2004, the FBI will establish the capacity for POCs to send to the NICS an electronic message on the status of the specified transactions as provided in proposal # 4. Due to programming and other changes that have to be made for certain states to send the POC determination messages, some POCs will not be able to take advantage of this capacity on July 21, 2004. All POCs must, however, continue to work with the FBI to satisfy the final rule's POC determination message requirement.

## Applicable Administrative Procedures and Executive Orders

### Administrative Procedure Act

The Department finds "good cause" for exempting this rule from the provision of the Administrative Procedure Act providing for a delayed effective date. 5 U.S.C. 553(d). Consistent with section 617 of the Omnibus bill, this rule must be in place by July 21, 2004 to ensure continued funding for the NICS system. Because it would be contrary to the public interest to have any interruption in this program, which protects the public by making it unlawful for felons and other prohibited persons from receiving or possessing firearms, this rule took effect July 20, 2004, upon signature.

### Regulatory Flexibility Analysis

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Although many FFLs are small businesses, they are not subject to any additional burdens under the plan adopted to audit their use of the NICS. In addition, the rule will not have any impact on an FFL's ability to contact the NICS, nor will it result in any delay in receiving responses from the NICS.

### Executive Order 12866

The Department of Justice has drafted this final rule in light of Executive Order 12866, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, and accordingly it has been reviewed by the Office of Management and Budget ("OMB").

### Executive Order 13132

This final rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The states are not required to act as POCs for the NICS, but do so voluntarily. The FBI consults with the state POCs on a regular basis about NICS operational issues and has held annual User conferences where POC questions and concerns are addressed. In addition, several POCs made comments on the current proposed rule and the rule has been modified to be more flexible in light of the concerns expressed by the POCs. For these reasons, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

### Unfunded Mandates Reform Act

This final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### Paperwork Reduction Act of 1995

Information collection associated with this regulation will be submitted to the



Office of Management and Budget for review under the provisions of the Paperwork Reduction Act of 1995. The OMB control number for this collection is 1110-0035.

The proposed rule would have made a condition of state participation in the system as a POC the requirement to transmit all determination information to the NICS as soon as it is available to the state, including determinations that a firearm transfer may proceed, is denied, or the check is open. While the Department did not receive any comments specifically addressing the Paperwork Reduction Act, the FBI did receive comments from POC states addressing the burden and utility of the proposed information collection. As noted above, as a result of these comments, the final rule eliminates the requirement that POCs provide transaction status information to the FBI on approximately 74 percent of the transactions, i.e. no information need be submitted for transactions in which POCs provide a "proceed" response to an FFL during the operational day on which the check was requested. The rule does require POCs to submit transaction status information on: (1) Open transactions that are not resolved before the end of the operational day the check is requested; (2) denied transactions; (3) transactions reported to NICS as open and later changed to proceed; and (4) denied transactions that have been overturned. As a result of this change in the final rule, POCs will only be required to submit information on approximately twenty-six percent of determinations.

The number of respondents that will be affected by this information collection will be 18, the number of states that act as POCs for the NICS (states that do NICS checks only in connection with the issuance of firearm permits are not considered POCs for these purposes). The FBI estimates that it will require one minute for each POC state to send to the NICS the required information in each POC determination message. Collectively, the POCs conduct approximately 4 million NICS checks per year. Assuming a 74 percent immediate proceed rate, the POCs will have to send electronic messages with the details of the transaction in only 26 percent of their determinations. Thus, it is estimated that the total public burden (in hours) associated with this collection from the estimated 19 respondents is 17,333 hours in the first year.

List of Subjects in 28 CFR Part 25

Administrative practice and procedure, Computer technology,

Courts, Firearms, Law enforcement officers, Penalties, Privacy, Reporting and recordkeeping requirements, Security measures, Telecommunications.

Accordingly, part 25 of title 28 of the Code of Federal Regulations is amended as follows:

PART 25—DEPARTMENT OF JUSTICE INFORMATION SYSTEMS

1. The authority citation for Part 25 continues to read as follows:

Authority: Pub. L. 103-159, 107 Stat. 1536.

Subpart A—The National Instant Criminal Background Check System

§ 25.2 [Amended]

2. Section 25.2 is amended:

a. By revising the definition of "Delayed" to read as follows:

\* \* \* \* \*

Delayed means the response given to the FFL indicating that the transaction is in an "Open" status and that more research is required prior to a NICS "Proceed" or "Denied" response. A "Delayed" response to the FFL indicates that it would be unlawful to transfer the firearm until receipt of a follow-up "Proceed" response from the NICS or the expiration of three business days, whichever occurs first.

\* \* \* \* \*

b. By adding the following definitions:

\* \* \* \* \*

NICS operational day means the period during which the NICS Operations Center has its daily regular business hours.

\* \* \* \* \*

Open means those non-canceled transactions where the FFL has not been notified of the final determination. In cases of "open" responses, the NICS continues researching potentially prohibiting records regarding the transferee and, if definitive information is obtained, communicates to the FFL the final determination that the check resulted in a proceed or a deny. An "open" response does not prohibit an FFL from transferring a firearm after three business days have elapsed since the FFL provided to the system the identifying information about the prospective transferee.

\* \* \* \* \*

c. By removing the following definition:

\* \* \* \* \*

NICS Operations Center's regular business hours means the hours of 9:00 a.m. to 2:00 a.m., Eastern Time, seven days a week.

\* \* \* \* \*

§ 25.6 [Amended]

3. In § 25.6, paragraph (h) is revised to read as follows:

\* \* \* \* \*

(h) POC Determination Messages. POCs shall transmit electronic NICS transaction determination messages to the FBI for the following transactions: open transactions that are not resolved before the end of the operational day on which the check is requested; denied transactions; transactions reported to the NICS as open and later changed to proceed; and denied transactions that have been overturned. The FBI shall provide POCs with an electronic capability to transmit this information. These electronic messages shall be provided to the NICS immediately upon communicating the POC determination to the FFL. For transactions where a determination has not been communicated to the FFL, the electronic messages shall be communicated no later than the end of the operational day on which the check was initiated. With the exception of permit checks, newly created POC NICS transactions that are not followed by a determination message (deny or open) before the end of the operational day on which they were initiated will be assumed to have resulted in a proceed notification to the FFL. The information provided in the POC determination messages will be maintained in the NICS Audit Log described in § 25.9(b). The NICS will destroy its records regarding POC determinations in accordance with the procedures detailed in § 25.9(b).

\* \* \* \* \*

§ 25.9 [Amended]

4. Section 25.9 is amended by revising paragraph (b) to read as follows:

\* \* \* \* \*

(b) The FBI will maintain an automated NICS Audit Log of all incoming and outgoing transactions that pass through the system.

(1) Contents. The NICS Audit Log will record the following information: Type of transaction (inquiry or response), line number, time, date of inquiry, header, message key, ORI or FFL identifier, and inquiry/response data (including the name and other identifying information about the prospective transferee and the NTN).

(i) NICS Audit Log records relating to denied transactions will be retained for 10 years, after which time they will be transferred to a Federal Records Center for storage;

(ii) NICS Audit Log records relating to transactions in an open status, except the NTN and date, will be destroyed

after not more than 90 days from the date of inquiry; and

(iii) In cases of NICS Audit Log records relating to allowed transactions, all identifying information submitted by or on behalf of the transferee will be destroyed within 24 hours after the FFL receives communication of the determination that the transfer may proceed. All other information, except the NTN and date, will be destroyed after not more than 90 days from the date of inquiry.

(2) *Use of information in the NICS Audit Log.* The NICS Audit Log will be used to analyze system performance, assist users in resolving operational problems, support the appeals process, or support audits of the use and performance of the system. Searches may be conducted on the Audit Log by time frame, *i.e.*, by day or month, or by a particular state or agency. Information in the NICS Audit Log pertaining to allowed transactions may be accessed directly only by the FBI and only for the purpose of conducting audits of the use and performance of the NICS, except that:

(i) Information in the NICS Audit Log, including information not yet destroyed under § 5.9(b)(1)(iii), that indicates, either on its face or in conjunction with other information, a violation or potential violation of law or regulation, may be shared with appropriate authorities responsible for investigating, prosecuting, and/or enforcing such law or regulation; and

(ii) The NTNs and dates for allowed transactions may be shared with ATF in Individual FFL Audit Logs as specified in § 25.9(b)(4).

(3) *Limitation on use.* The NICS, including the NICS Audit Log, may not be used by any Department, agency, officer, or employee of the United States to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons prohibited from receiving a firearm by 18 U.S.C. 922(g) or (n) or by state law. The NICS Audit Log will be monitored and reviewed on a regular basis to detect any possible misuse of NICS data.

(4) *Creation and Use of Individual FFL Audit Logs.* Upon written request from ATF containing the name and license number of the FFL and the proposed date of inspection of the named FFL by ATF, the FBI may extract information from the NICS Audit Log and create an Individual FFL Audit Log for transactions originating at the named FFL for a limited period of time. An Individual FFL Audit Log shall contain all information on denied transactions, and, with respect to all other

transactions, only non-identifying information from the transaction. In no instance shall an Individual FFL Audit Log contain more than 60 days worth of allowed or open transaction records originating at the FFL. The FBI will provide POC states the means to provide to the FBI information that will allow the FBI to generate Individual FFL Audit Logs in connection with ATF inspections of FFLs in POC states. POC states that elect not to have the FBI generate Individual FFL Audit Logs for FFLs in their states must develop a means by which the POC will provide such Logs to ATF.

\* \* \* \* \*

#### § 25.10 [Amended]

■ 5. In § 25.10, a new paragraph (g) is added to read as follows:

\* \* \* \* \*

(g) An individual may provide written consent to the FBI to maintain information about himself or herself in a Voluntary Appeal File to be established by the FBI and checked by the NICS for the purpose of preventing the future erroneous denial or extended delay by the NICS of a firearm transfer. Such file shall be used only by the NICS for this purpose. The FBI shall remove all information in the Voluntary Appeal File pertaining to an individual upon receipt of a written request by that individual. However, the FBI may retain such information contained in the Voluntary Appeal File as long as needed to pursue cases of identified misuse of the system. If the FBI finds a disqualifying record on the individual after his or her entry into the Voluntary Appeal File, the FBI may remove the individual's information from the file.

Dated: July 20, 2004.

**John Ashcroft,**  
*Attorney General.*

[FR Doc. 04-16817 Filed 7-22-04; 8:45 am]

**BILLING CODE 4410-06-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[CGD01-04-030]

RIN 1625-AA09

#### Drawbridge Operation Regulations: Mystic River, MA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard has temporarily changed the drawbridge

operation regulations that govern the operation of the S99 (Alford Street) Bridge, at mile 1.4, across the Mystic River, Massachusetts. Under this temporary final rule, effective from 7 a.m. on July 26, 2004 through 7 a.m. on July 30, 2004, the S99 (Alford Street) Bridge shall open on signal only between 4 a.m. and 5 a.m., daily. Vessels that can pass under the draw without a bridge opening may do so at all times. This action is necessary in the interest of public safety to facilitate vehicular traffic during the Democratic National Convention.

**DATES:** This rule is effective from July 26, 2004 through July 30, 2004.

**ADDRESSES:** Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01-04-030) and are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, 408 Atlantic Avenue, Boston, Massachusetts, 02110, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary Kassof, Bridge Administrator, First Coast Guard District, (212) 668-7165.

#### SUPPLEMENTARY INFORMATION:

##### Regulatory Information

On June 18, 2004, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations, Mystic River, Massachusetts, in the **Federal Register** (69 FR 34099). The Coast Guard provided a 20-day comment period to the public to comment on the proposed rule. We received one comment letter in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because this final rule needs to be in effect on July 26, 2004, in order to provide the necessary safeguards in the interest of national security and public safety during the week the Democratic National Convention (DNC) will be convened in Boston, Massachusetts.

##### Background and Purpose

The S99 (Alford Street) Bridge, mile 1.4, across The Mystic River has a vertical clearance in the closed position of 7 feet at mean high water and 16 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.609.