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Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS)

Hearing on S. 1916 (Sen. Feinstein) and S. 2135 (Sen. Cornyn)
Committee on the Judiciary, United States Senate
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Testimony of Stephen P. Halbrook[1]

S. 1916, the Automatic Gunfire Prevention Act

S. 1916, The Fix NICS Act

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Chairman Grassley, Ranking Member Feinstein, and members of the Committee:

I appear as an attorney who has litigated extensively under the Gun Control Act, including issues concerning the Brady background check law[2] and technical definitions under the Gun Control Act.[3] I represented a majority of members of the U.S. Senate and House of Representatives as amici curiae in *D.C. v. Heller*.[4] I am the author of books on Second Amendment issues.[5] I will address S. 1916, the Automatic Gunfire Prevention Act, and S. 2135, the Fix NICS Act.

S. 1916, THE AUTOMATIC GUNFIRE PREVENTION ACT

Summary

The misnamed Automatic Gunfire Prevention Act would apply only to semiautomatics, not automatics. Its ban on any part that "functions to accelerate the rate of fire of a semiautomatic rifle" essentially bans any semiautomatic rifle, as a mere trigger adjustment for accuracy will increase the rate of fire. Since semiautomatic rifles are commonly possessed for lawful purposes, this would violate the Second Amendment. The terms are vague in violation of due process, as a person has no way to know or measure what may increase the rate of fire. "Bump-fire device" is not defined. Ten years imprisonment is imposed for mere possession without a willfulness requirement. This would be an unprecedented ban lacking a grandfather clause or an amnesty for registration.

Title Refers to "Automatic Gunfire," but Text *Excludes* Automatic Gunfire

S. 1916, the Automatic Gunfire Prevention Act, would amend the Gun Control Act to create a new § 922(v) of 18 U.S.C. It would provide that "it shall be unlawful for any person to import, sell, manufacture, transfer, or possess, in or affecting interstate or foreign commerce, a trigger crank, a bump-fire device, or any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun."

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[2] *Printz v. U.S.*, 521 U.S. 898 (1997); *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000).

[3] E.g., *U.S. v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992); *F.J. Vollmer Co., Inc. v. Higgins*, 23 F.3d 448 (D.C. Cir. 1994).

[4] *D.C. v. Heller,* 554 U.S. 570 (2008).

[5] *The Founders' Second Amendment* (2008); *Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* (2010); *That Every Man Be Armed* (2013); Gun *Control in the Third Reich* (2013).

But the term "machinegun" is defined as "any weapon which shoots . . . *automatically* more than one shot, without manual reloading, by a single function of the trigger."[6] By contrast, the term "semiautomatic rifle" is defined in part as a "repeating rifle . . . which requires a *separate pull of the trigger* to fire each cartridge."[7] Since it does not apply to "automatic" gunfire, S. 1916 would more correctly be entitled the "*Semiautomatic* Gunfire Prevention Act."

"Designed or Functions to Accelerate the Rate of Fire of a Semiautomatic Rifle" – Terms that Could Ban Any Semiautomatic Rifle

What would be banned is vague and could potentially prohibit countless numbers of firearms that are commonly and innocently possessed by law-abiding citizens. The bill refers to "any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle." The "rate of fire" of a firearm depends on the skill of the user. It is also a function of the design and quality of the firearm as originally made or enhanced. Manufacturers design parts, and gunsmiths and gun owners alter parts or install after-market parts, that allow firearms to fire more smoothly and accurately, which also increases the rate of fire.

As a prime example, four factors related to the trigger increase both accuracy and the rate of fire, and they are desirable for self-defense, competition, and hunting. First, a lighter trigger pull weight reduces the poundage required to pull the trigger back until it releases the hammer or striker; a ten-pound trigger pull would be slower, while a three-pound trigger pull such as used in target rifles would be faster. Second, a smoother trigger, rather than a gritty, rough one, enhances consistency in the pull. Third, reduction of trigger creep, the distance the trigger must be pulled, minimizes movement of the firearm. Fourth, reduction of trigger reset, the distance and time the trigger must travel back forward after firing, allows a quicker followup shot, which is important in competition and for self-defense. All of these factors minimize movement of the firearm and allow one to keep the sights steady on the target for quicker, more accurate followup shots.[8]

One expert sums up superior trigger mechanisms thus:

> A lighter trigger pull assists in accuracy and can aid in faster shooting. . . . If you are fast and accurate, your chances of winning a violent encounter are increased dramatically. . . . A lighter trigger pull aids in accuracy (when coupled with proper trigger control) by reducing the actual physical stress required to force the weapon

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[6]26 U.S.C. § 5845(b); 18 U.S.C. § 921(a)(23).

[7]18 U.S.C. § 921(a)(28).

[8]Dave Dolbee, "Trigger Pull Weight," Oct. 29, 2015. http://www.nssfblog.com/firstshotsnews/trigger-pull-weight/. See also Schuyler Barnum, "Trigger Pull," http://www.chuckhawks.com/trigger_pull.htm.

to discharge a round. It reduces the amount of time a sight picture needs to be held between the conscious decision to fire and the round actually leaving the barrel.[9]

In sum, a ban on "any part . . . that is designed or functions to accelerate the rate of fire of a semiautomatic rifle" is essentially a ban on semiautomatic rifles. Just to repeat the trigger example, a better, smoother, more accurate trigger "accelerates the rate of fire," while an inferior trigger slows it down while making the rifle more inaccurate, thus potentially missing the target. That is a perverse result if hunting, competing, or most of all engaged in the defense of life.

Violation of the Second Amendment

Since any trigger can be improved and an unlimited array of other parts may increase the rate of fire, S. 1916 potentially applies to and bans any and every semiautomatic rifle. Yet the Second Amendment protects firearms that are "in common use" and "typically possessed by law-abiding citizens for lawful purposes . . . ." *District of Columbia v. Heller,* 554 U.S. 570, 624-25 (2008). Like the handgun ban invalidated by the Supreme Court in *Heller*, S. 1916 could amount "to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for lawful purposes like self-defense. *Id*. at 628-29. As such, it would violate the Second Amendment.

Vagueness in Violation of Due Process

The terms are vague because one does not necessarily have any way of knowing whether a part, component, or device is designed by the manufacturer or objectively functions to accelerate the rate of fire of a semiautomatic rifle. An enhancement may imperceptibly accelerate the rate of fire from 1.4 seconds to 1.2 seconds. An ordinary person may buy a rifle and know nothing about the designer's intent or the presence of a part that would allow it to shoot faster than some other part. One would need technical devices and technical knowledge to measure rate of fire with a given part in comparison with another part that one does not know about or possess. Terms comparable to these have been declared unconstitutionally vague by the courts.[10]

Trigger Crank and Bump-Fire Device

No standard definitions exist for "trigger crank" or "bump-fire device," and the bill

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[9]Aaron Cowan, "The truth about trigger weight," Oct. 9, 2013. http://www.breachbangclear.com/a-critical-look-at-trigger-pull/.

[10]*Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 535-38 (6th Cir. 1998); *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252-54 (6th Cir. 1994); *Robertson v. City of Denver*, 874 P.2d 325, 334-35 (Colo. 1994).

provides no definitions. "Trigger crank" does not appear in any federal judicial decision on West Law. If the term refers to a gadget that is fixed on a trigger and is turned with one hand in a circular fashion, that leaves only one hand to hold the rifle. Firing would be inherently inaccurate. It is unclear if one has ever been used in a crime.

The term "bump fire" has been applied to a technique of firing that a person may learn to do with an ordinary rifle without adding any special parts or components. It has also been applied to a product used by the murderer in the Las Vegas mass attack. Audio tracks of his gunfire shows a slower, irregular rate compared to the full automatic fire of a machinegun, but much faster than a semiautomatic.[11]

The National Firearms Act (NFA) defines a machinegun conversion kit as "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." 26 U.S.C. § 5845(b). The ATF Firearms Technology Branch, in a 2010 opinion, determined that a "bump-stock" is not a conversion kit, as it "performs no automatic mechanical function" and requires constant manual in opposite directions by both hands, and is thus not regulated under the NFA or the Gun Control Act.[12] However, ATF classified a different device as a conversion kit, as it has a spring that causes automatic fire.[13]

ATF has no authority to stretch the definition and classify an item as something that it is not. That would set a dangerous precedent. ATF should be willing to reconsider its determinations, but in doing so it must still limit its classifications within the boundaries set by Congress.[14] If Congress wishes to restrict a "bump-fire device" that is not currently restricted by statute, it must define it explicitly in a manner that provides notice and due process.

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[11]https://www.nytimes.com/interactive/2017/10/02/us/vegas-guns.html.

[12]John R. Spencer, Chief, ATF Firearms Technology Branch, June 7, 2010. http://www.slidefire.com/downloads/BATFE.pdf.

[13]"As the firearm moves rearward in the composite stock, the shooter's trigger finger contacts the stock. The trigger mechanically resets, and the device, which has a coiled spring located forward of the firearm receiver, is compressed. Energy from this spring subsequently drives the firearm forward into its normal firing position and, in turn, causes the trigger to contact the shooter's trigger finger." ATF Ruling 2006-2. https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire/download.

[14]"[I]f there is no statute conferring authority, a federal agency has none." *Michigan v. E.P.A.,* 268 F.3d 1075, 1081-82 (D.C. Cir. 2001). See also *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 23 (D.C. Cir. 2012) (agency "may not exceed a statute's authorization or violate a statute's limits.").

Ten Years Imprisonment for Mere Possession Without a Willfulness Requirement

S. 1916 would amend 18 U.S.C. § 924(a)(2) to read: "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), (o), or (v) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." Thus, mere possession of a device that has never even been regulated, and may thus be innocently possessed by untold numbers of hobbyists, would subject a person potentially to ten years imprisonment, just like a felon in possession of a firearm.

Unlike other offences under the Gun Control Act that must be proven to be "willful," § 924(a)(1)(D), a person need not know that the device is illegal to be convicted. The person need not even possess a firearm with which to use the device. Just the inert piece of plastic, wood, or metal would suffice to get a person incarcerated.

In making it a felony to "possess, in or affecting interstate or foreign commerce" the listed items, the bill would apply to mere possession of any such item that has ever crossed state lines, not just one that crosses state lines after enactment of the law. Under these same terms, "we see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Scarborough v. U. S.*, 431 U.S. 563, 575 (1977).

Unprecedented Lack of a Grandfather Clause or Amnesty for Registration

The proposed complete, draconian ban is unprecedented in the history of the Gun Control Act. As passed in 1934, the National Firearms Act provided that a person already in possession of what became a restricted firearm would register it, without any tax payment.[15] When the National Firearms Act was expanded to include more firearm types in 1968, Congress declared an amnesty so they could be registered, again without any requirement to pay the $200 transfer/making tax.[16] When the Gun Control Act was revised in 1986 to ban future production for the civilian market of machineguns, the definition of a conversion kit was expanded, but owners were allowed to register them before the effective date, and all registered machineguns

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[15] § 5(a), National Firearms Act, 48 Stat. 1236, 1238 (1934).

[16] § 207(b), Gun Control Act, P.L. 90-618, 82 Stat. 1213, 1235-36 (1968). While never exercised, the 1968 Act authorized subsequent amnesties that would result in registration of NFA firearms that are not currently registered: "The Secretary of the Treasury [now the Attorney General] . . . is authorized to establish such periods of amnesty, not to exceed ninety days in the case of any single period, and immunity from liability during any such period, as the Secretary determines will contribute to the purposes of this title." § 207(d), 82 Stat. at 1236. It is unclear why more amnesties have never been declared that would result in the registration of such firearms.

were grandfathered.[17] When misnamed "assault weapons" were banned in 1994, all that were lawfully possessed on the effective date were grandfathered.[18]

Following these traditions, if bump stocks are banned, those that are lawfully possessed on the effective date should be grandfathered. If bump stocks are added to the NFA, an amnesty should be allowed so they may be registered without being taxed.

In short, S. 1916 is based on vague terminology that fails to give notice of what is unlawful, in violation of the due process clause of the Fifth Amendment. By banning commonly-possessed semiautomatic rifles, it would infringe on Second Amendment rights. Its imposition of ten years of imprisonment for mere possession of an item that by itself is not even a weapon is unnecessarily draconian.

S. 1916, THE FIX NICS ACT

Summary

S. 1916, the Fix NICS Act, would require Federal departments and agencies to report records of persons with firearm disabilities under 18 U.S.C. § 922(g) and (n) to the National Criminal Instant Background Check System (NICS), and would give the States financial incentives to do the same. Since NICS was established, all Federal departments and agencies should have been rendering such reports, but the bill would add teeth to the requirement. While principles of cooperative federalism prohibit Congress from mandating that the States conduct background checks on firearm purchasers,[19] Congress may give the States grants to encourage them to report the records to NICS.

The Fix NICS Act should be amended by adding the following provisions. In an appeal by a denied person, the denying agency should contact the record-originating agency to correct the record rather than requiring the denied person to do so. ATF's authority to decide petitions to remove disabilities should be restored. Restoration of state and federal civil rights that negate convictions under state and federal law should be recognized in NICS appeals.

Requiring Federal Departments and Agencies To Do Their Jobs as Mandated Long Ago

In the past no concrete mechanism existed to ensure that heads of Federal departments

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[17] 18 U.S.C. § 922(o)(2)(B).

[18] 18 U.S.C. § 922(v)(1), (2) (expired).

[19] *Printz v. U.S.*, 521 U.S. 898 (1997) (invalidating temporary Brady Act mandate that the States must conduct background checks).

and agencies reported records as required by law. As passed in 2008,[20] the NICS Improvement Amendments Act provides: "If a Federal department or agency . . . has any record of any person demonstrating that the person falls within one of the categories described in subsection (g) or (n) of section 922 of Title 18, the head of such department or agency shall, not less frequently than quarterly, provide the pertinent information contained in such record to the Attorney General."[21] The Attorney General is required to report to Congress annually regarding the compliance of each department or agency with that requirement.[22]

Some heads of departments and agencies have paid no attention to this explicit statement of their legal duties. Normal personnel rules call for firing, demoting, or otherwise disciplining employees who fail to do their jobs. Yet it has been standard practice during certain Administrations not to exercise any oversight on subordinate entities of the executive branch to enforce the law, while advocating ever more onerous and intrusive laws against gun owners.

Section 2 of the bill would require each department or agency head to develop an implementation plan and to submit a semiannual certification to the Attorney General regarding compliance with the record submission requirements. The Attorney General would publish the name of each department or agency that fails to submit the certification, and would report that information to the Judiciary and Appropriations committees of both Houses of Congress. Political appointees of such departments and agencies would not be eligible for bonus pay until the certification and the implementation plan are submitted.

Hopefully the public disclosure of the failure to report records and the threat of cutting bonus pay will prompt department and agency heads to fulfill their duties that were imposed a decade ago. If not, stiffer sanctions would be in order.

Federal courts are included in the above requirements, which will be implemented by the Director of the Administrative Office of the United States Courts. This is important because federal felony records originate in the courts and must be fully and accurately reported to NICS.

Denying Agencies Should Initiate Correction of Records Directly with Originating Agencies

Current law requires that, if NICS denies a firearm transfer, the person denied is entitled to the reason therefor and is further entitled to submit information to correct any erroneous records. The Attorney General is required to correct any erroneous Federal records and to notify

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[20] § 101(a)(4), NICS Improvement Amendments Act, P.L. 110-180, 122 Stat. 2559 (2008).

[21] 34 U.S.C. § 40901(e)(1)(C).

[22] 34 U.S.C. § 40901(e)(1)(E).

the Federal or State entity that was the source of the erroneous records.[23] The bill would add an explicit 60-day deadline for the Attorney General to remove any erroneous record.

These provisions are very important for ensuring the due process and Second Amendment rights of persons denied a firearm transfer due to erroneous records. However, the Fix NICS Act should be amended to correct a specific NICS regulation that unfairly shifts the burden to denied persons to correct any inaccurate record directly with the originating agency. That regulation provides: "If the denying agency is unable to resolve the appeal, the denying agency will so notify the individual and shall provide the name and address of the agency that originated the document containing the information upon which the denial was based. The individual may then apply for correction of the record directly to the agency from which it originated."[24]

In my practice, I have encountered instances in which the NICS Section at FBI advised that the denied person must seek correction of the record from the originating agency. Repeated requests to the originating agency failed to generate so much as an acknowledgment of my letters, much less a correction of the record. I contacted a NICS attorney I knew and we agreed that NICS could simply verify the inaccurate record by looking up the original record on the court's PACER system, which has the dockets and filings in all federal criminal cases.[25] That quickly resolved the matter in favor of the wrongfully-denied person.

Many erroneously-denied persons will simply give up when ignored by originating agencies in such manner. The Fix NICS Act should be amended to require that if the denying agency (NICS or a State POC (point of contact)) is unable to decide an appeal, the denying agency will contact the originating agency directly and attempt to resolve the record in question. The originating agencies have the ability to do so directly by obtaining the record electronically regarding federal records that are on PACER and state records that are on similar state systems.

Older records that are not available online will not be able to be obtained electronically. In such cases, denying agencies should contact originating agencies in an attempt to clarify the record. Originating agencies are more likely to assist a fellow government agency than an ordinary citizen. If an originating agency refuses to assist, or if it refuses to correct what is shown to be an erroneous record that denies a person the exercise of his or her rights under the Second Amendment, a cause of action on behalf of the wrongly-denied person should be

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[23] 34 U.S.C. § 40901(g).

[24] 28 C.F.R. § 25.10(c).

[25] "Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator. PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service." https://www.pacer.gov/.

recognized, including recovery of attorney's fees from the originating agency.

Regarding other provisions of the bill, § 3 would amend the NICS Improvement Amendments Act to authorize further funding to the States to report records to NICS. The Attorney General would prioritize the identification and uploading of all felony conviction records and domestic violence records.

Section 4 would reauthorize the National Criminal History Improvement Program and provide technical amendments.

Section 5 would improve information sharing with the States through the adoption of particularized implementation plans. As with the Federal department and agency heads who fail to comply, the Attorney General would publish the name of each State or Indian tribal government that receives a determination of failure to achieve substantial compliance with its implementation plan.

ATF's Authority to Resolve Petitions to Remove Disabilities Should be Restored

The Fix NICS Act would be improved by repealing the annual appropriations rider prohibiting ATF from using funds to consider and grant applications for relief from disabilities as provided in 18 U.S.C. § 925(c).[26] The NICS Improvement Amendments Act provided a mechanism to allow persons who had been committed to mental institutions or adjudicated as mental incompetents to have their firearm disabilities removed, but no comparable provision exists for persons with other legal disabilities. Some courts have granted restoration of firearm rights based on as-applied challenges under the Second Amendment.[27] Congress should reinstate the statutory means of doing so.

Restoration of Both State and Federal Civil Rights Should Be Recognized in Appeals of NICS Denials

Another improvement would be to clarify that restoration of civil rights includes federal, not just state, civil rights. NICS does not or should not include records on persons who are excluded from having been convicted of a "crime punishable by imprisonment for a term

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[26]"[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code . . . ." Title II, Consolidated Appropriations Act, 2017, P.L. 115-31, 131 Stat. 135, 199 (2017).

[27]*E.g.*, *Binderup v. Attorney General of the United States*, 836 F.3d 336 (3rd Cir. 2016) (*en banc*), *cert. denied*, 137 S.Ct. 2323 (2017) (holding that challengers' convictions were not serious enough to strip them of their Second Amendment rights).

exceeding one year" by reason of having "had civil rights restored" as provided in 18 U.S.C. § 921(a)(20). By the plain text, that includes restoration of rights under state or federal law regarding state or federal convictions.

The Supreme Court held that restoration of rights under state law extinguishes a state conviction, but has not decided a case regarding whether restoration of rights under federal law extinguishes a federal conviction.[28] In a 2-1 opinion, the Sixth Circuit held that a federal conviction may not be eliminated by restoration of federal civil rights.[29] That means that a federal felony, no matter how remote or innocuous and no matter how good is the person's character, amounts to a lifetime prohibition on gun ownership that can never be removed.

Since conviction records do not reflect restorations of civil rights, the Fix NICS Act could be amended simply with a provision stating that in the appeal of a denial, a person may show, as provided in § 921(a)(20) of Title 18, that such person has not been convicted of a crime punishable by imprisonment for a term exceeding one year by reason of having had civil rights restored under state law for purposes of a state conviction, and of having had civil rights restored under federal law for purposes of a federal conviction.

Conclusion

In sum, the Fix NICS Act would improve access by NICS to records on persons who are ineligible under the law to receive or possess firearms. It enhances the accuracy of records and expedites the correction of records on persons denied firearm transfers due to inaccurate records. It does not disturb existing provisions of law requiring that records on lawful gun buyers be destroyed once approved by NICS[30] and prohibiting any system of registration of firearms or firearm owners.[31] The bill thus is consistent with and will enhance the due process and Second

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[28]"We express no opinion on whether a federal felon cannot have his civil rights restored under federal law." *Beecham v. United States*, 411 U.S. 368, 373 n.* (1994).

[29]*Walker v. United States*, 800 F.3d 720 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2387 (2016). *See id.* at 730 (Clay, J., dissenting).

[30]18 U.S.C. § 922(t)(2) (requiring NICS to destroy records of identity of lawful transferee); § 511, Consolidated & Further Continuing Appropriations Act, 2012, P.L. 112-55, 125 Stat. 552, 632 (2011) (destruction required within 24 hours).

[31]34 U.S.C. § 40901(i) provides:

> No department, agency, officer, or employee of the United States may –
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision

Amendment rights of law-abiding citizens, while screening out persons who may not lawfully possess firearms. However, it should be expanded further as discussed above to ensure the accuracy of records and to protect the rights of persons who are prejudiced by incomplete and inaccurate records kept by governmental units.

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thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922(g) or (n) of Title 18 or State law, from receiving a firearm.