

# Gun Control, Mental Incompetency, and Social Security Administration Final Rule

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## Summary

The House of Representatives has scheduled floor consideration of a Congressional Review Act disapproval resolution (H.J.Res. 40) to overturn a final rule promulgated by the Social Security Administration (SSA) regarding implementation of firearms restrictions for certain persons. The rule implements provisions of the NICS Improvement Amendments Act of 2007 (NIAA) on reporting requirements for any federal agency holding records on persons prohibited from possessing firearms. NIAA mandates that agencies must share those records with the Federal Bureau of Investigation (FBI) for inclusion in a computer index accessible to the National Instant Criminal Background Check System (NICS). As described below, some of these prohibiting records are based upon findings of “mental incompetency” made during certain federal benefits claims processes administered by the Department of Veterans Affairs (VA) since 1998 and the SSA beginning in December 2017.

Activated by the FBI, NICS is a national computer network that allows federally licensed gun dealers to initiate a background check through either the FBI or a state or local authority, before transferring a firearm to an unlicensed, private person. Under federal law, persons who are “adjudicated as a mental defective” are ineligible to ship, transport, receive, or possess firearms or ammunition. In 1998, the Bureau of Alcohol, Tobacco, Firearms and Explosives promulgated a rule that defined this term to include any individual that a court board, commission, or other lawful authority has made a determination that—as a result of marked subnormal intelligence, mental illness, incompetency, condition or disease—he or she is a person who:

- is a danger to himself or others;
- lacks the mental capacity to contract or manage his affairs;
- is found insane by a court in a criminal case; or
- is found incompetent to stand trial, or not guilty by reason of lack of moral responsibility.

Since 1998, the Department of Veterans Affairs has referred the name of any beneficiary determined to be incompetent—because he or she lacks the mental capacity to contract or manage their own affairs due to injury or disease—to the FBI for inclusion in the NICS index pursuant to the Brady Handgun Violence Prevention Act, 1993 (Brady Act; P.L. 103-159). Under NIAA, since 2007, the VA must inform any benefits claimant that such determinations could lead to a loss of his or her firearms rights and privileges. But, NIAA also requires any federal authority that provides prohibiting mental health records to the FBI for inclusion in the NICS index to establish an administrative process, by which prohibited beneficiaries may petition to have those rights and privileges restored.

Pursuant to both the Brady Act and NIAA, the SSA final rule specifies the conditions under which individuals are to be reported for inclusion in the NICS index as Social Security or SSI disability beneficiaries who are too mentally incompetent to be trusted with firearms or ammunition. The rule also outlines SSA’s process for notifying affected individuals as well as an administrative appeals process under which such individuals may request relief from the federal firearms prohibitions. The final rule became effective on January 18, 2017; however, compliance is not required until December 19, 2017.

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## Introduction

The House of Representatives has scheduled floor consideration of a Congressional Review Act disapproval resolution (H.J.Res. 40) to overturn a final rule promulgated by the Social Security Administration (SSA) regarding implementation of firearms restrictions for certain persons.<sup>1</sup> The rule implements provisions of the NICS Improvement Amendments Act of 2007 (NIAA) on reporting requirements for any federal agency holding records on persons prohibited from possessing firearms.<sup>2</sup> NIAA mandates that agencies must share those records with the Federal Bureau of Investigation (FBI) for inclusion in a computer index accessible to the National Instant Criminal Background Check System (NICS). As described below, some of these prohibiting records are based upon findings of “mental incompetency” made during certain federal benefits claims processes administered by the Department of Veterans Affairs (VA) since 1998 and the SSA beginning in December 2017.

## Brady Act, NICS, and Firearms Ineligibility

As amended by the Brady Handgun Violence Prevention Act, 1993 (Brady Act), the Gun Control Act of 1968 (GCA) requires background checks to be completed for all unlicensed persons seeking to obtain firearms from federally licensed gun dealers (otherwise referred to as federal firearms licensees, or FFLs).<sup>3</sup>

Pursuant to the Brady Act, the FBI activated NICS on November 30, 1998. This national computer network allows FFLs to initiate a background check through either the FBI or a state point of contact (POC),<sup>4</sup> before transferring a firearm to an unlicensed, private person.<sup>5</sup>

Under the GCA, there are nine classes of persons prohibited from shipping, transporting, receiving, or possessing firearms or ammunition:

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<sup>1</sup> The Congressional Review Act is a tool Congress can use to overturn federal regulations. If a joint resolution of disapproval overturning a rule is enacted, the rule immediately goes out of effect (or is not allowed to take effect), and the agency is prohibited from issuing a rule that is “substantially the same” unless Congress authorizes them to do so. For further information, see CRS Report R43992, *The Congressional Review Act: Frequently Asked Questions*, by ( name redacted), (name redacted), and (name redacted) .

Also, see Social Security Administration, “Implementation of the NICS Improvement Amendments Act of 2007,” 81 *Federal Register* 91702-91715, December 19, 2016.

<sup>2</sup> P.L. 110-180, January 8, 2008; 121 Stat. 2559.

<sup>3</sup> P.L. 103-159, November 30, 1993, 107 Stat. 1536. Congress passed the Brady Act after nearly six years of sometimes contentious debate. As originally introduced in the 100<sup>th</sup> Congress, the Brady bill (H.R. 975 and S. 466) called for a seven-day waiting period on handgun transfers. Supporters deemed this waiting period necessary to give law enforcement officials the time necessary to conduct a thorough background check. Later versions of the bill would have implemented a five-business-day waiting period. Opponents of the waiting period called for an “instant” computerized criminal history background check systems as had been implemented in four states (VA, FL, MD, and DE).

<sup>4</sup> The FBI handles background checks entirely for most states, while other states serve as full or partial points of contact (POCs) for state and local firearms background check purposes. In POC states, federally licensed gun dealers contact a state agency, and the state agency contacts the FBI for background checks.

<sup>5</sup> Under federal law, persons who are not “engaged in the business” of dealing in firearms are not required to be licensed to ship, transport, receive, or possess firearms. Intrastate, firearms transactions between unlicensed persons are not covered by the recordkeeping or the background check provisions of the GCA. However, these transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances.

- persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- fugitives from justice;
- unlawful users or addicts of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802);
- persons adjudicated as “mental defective” or committed to mental institutions;
- unauthorized immigrants and nonimmigrant visitors (with exceptions in the latter case);<sup>6</sup>
- persons dishonorably discharged from the U.S. Armed Forces;
- persons who have renounced their U.S. citizenship;
- persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner; and
- persons convicted of a misdemeanor crime of domestic violence.<sup>7</sup>

In addition, there is a 10<sup>th</sup> class of persons prohibited from shipping, transporting, or receiving (but not possessing) firearms or ammunition:

- persons under indictment in any court of a crime punishable by imprisonment for a term exceeding one year.<sup>8</sup>

It also unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any of the prohibited persons enumerated above, if the transferor (seller) has reasonable cause to believe that the transferee (buyer) is prohibited from receiving those items.<sup>9</sup>

## **Mental Incompetency and Firearms Ineligibility**

To implement the Brady Act, inter-agency discussions were held in 1996/1997 about who should be considered “adjudicated as a mental defective” for the purposes of gun control.<sup>10</sup> These discussions were largely led by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the agency principally responsible for administering and enforcing federal gun control laws. On June 27, 1997, the ATF promulgated a final rule defining the following terms:

“Adjudicated as a mental defective” includes a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to

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<sup>6</sup> Until 2011, ATF interpreted this provision to apply to any noncitizen whose immigration status was “nonimmigrant alien,” regardless of whether the alien had been required to obtain a visa prior to arrival at a U.S. port of entry. In 2011, ATF was informed by the DOJ Office of Legal Counsel (OLC) that its interpretation was too broad and that the prohibition “applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status.” See 2011 WL 6260326 (O.L.C) (Oct. 28, 2011). As such, nonimmigrants who enter the country validly without a visa (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition; however, those individuals must meet a residency requirement, which requires them to demonstrate that they have “the intention of making a home” in the state where they wish to purchase the firearm. See 77 *Federal Register* 33625-33634 (June 7, 2012).

<sup>7</sup> 18 U.S.C. §922(g).

<sup>8</sup> 18 U.S.C. §922(n).

<sup>9</sup> 18 U.S.C. §922(d).

<sup>10</sup> The term “mental defective” is a pejorative artifact of a bygone era. To the extent possible, the term, “mentally incompetent” will be used in place of “mental defective.”

himself or others, or (2) lacks the mental capacity to manage his own affairs. The term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).

“Committed to a mental institution” means a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes commitments: (1) to a mental institution involuntarily; (2) for mental defectiveness or mental illness; or (3) for other reasons, such as drug use. The term does not include a person who is admitted to a mental institution for observation or who is voluntarily admitted.

“Mental institution” includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including psychiatric wards in general hospitals.<sup>11</sup>

In its final rule, ATF noted that the Department of Veterans Affairs had commented on the proposed rulemaking and had “correctly interpreted” the proposed definition of “adjudicated as a mental defective” to include persons who have been determined to be “mentally incompetent” by the Veterans Benefits Administration (VBA).<sup>12</sup> Under current law, an individual is considered “mentally incompetent” if he or she lacks the mental capacity to contract or manage his or her own affairs for reasons related to injury or disease (under 38 C.F.R. §3.353).<sup>13</sup> In a proposed rulemaking, the ATF opined that the inclusion of “mentally incompetent” in the definition of “mental defective” was wholly consistent with the legislative history of the 1968 Gun Control Act.<sup>14</sup>

In wake of the December 2012, Newtown, CT, mass shooting,<sup>15</sup> the ATF issued proposed regulations to clarify further individuals who might fall under this definition. This proposed regulation has not been made final.<sup>16</sup> It is significant to note that the NICS index is not intended to be a registry of all individuals diagnosed with a mental illness. Nonetheless, the subsequent legislative history shows that some Members of Congress have long taken issue with the ATF interpretation of the term “adjudicated as a mental defective.”<sup>17</sup>

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<sup>11</sup> *Federal Register*, vol. 62, no. 124, June 27, 1997, p. 34634.

<sup>12</sup> *Ibid.*, p. 34637.

<sup>13</sup> *Federal Register*, vol. 61, no. 174, September 6, 1996, p. 47095.

<sup>14</sup> *Ibid.*

<sup>15</sup> On December 14, 2012, in Newtown, CT, a 20-year-old male entered Sandy Hook Elementary School and shot 20 1<sup>st</sup> graders and 6 adult staff members to death. He also shot his mother to death. For further information, see *Report of the State’s Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, November 25, 2013, 116 pp.

<sup>16</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, “Amended Definition of ‘Adjudicated as a Mental Defective’ and ‘Committed to a Mental Institution’ (2010R-21P),” 79 *Federal Register* 774, January 7, 2014.

<sup>17</sup> In the 110<sup>th</sup>, 111<sup>th</sup>, 112<sup>th</sup>, and 113<sup>th</sup> Congresses, either the Senate or House, or both, acted on bills that would have prohibited the VA from finding a veteran or other beneficiary to be “mentally incompetent” and thus a “mental defective” for the purposes of gun control, unless such a finding were made by a judge, magistrate, or other judicial authority based upon a finding that the beneficiary posed a danger to himself or others. None of these bills were enacted. For further information, see CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by (name redacted) .

## NICS Improvement Amendments Act of 2007

In April 2007, an offender armed with two pistols shot to death 32 individuals and nonfatally wounded another 17, before shooting himself to death at the Virginia Polytechnic Institute and State University (Virginia Tech) in Blacksburg, Virginia. Due to his disturbing on-campus behavior, the offender had previously been evaluated by health care professionals and ordered by a judge to undergo “outpatient” mental health treatment, because he was deemed to be a threat to himself or others.<sup>18</sup> At that time, however, Virginia state law only referred the subjects of “inpatient” court orders for such treatment to the FBI for inclusion in the NICS index.<sup>19</sup>

Following this massacre, the Virginia governor, now-Senator Timothy Kaine, reviewed the state statute and determined that henceforward subjects of either court-ordered inpatient or outpatient mental health care under such circumstances would be referred to the FBI for inclusion in the NICS index.<sup>20</sup>

In response to the Virginia Tech mass shooting, Congress passed the NICS Improvement Amendments Act of 2007 (NIAA).<sup>21</sup> This act includes provisions designed to encourage states to make available to the Attorney General certain records related to persons who are disqualified from acquiring firearms, particularly disqualifying records related to mental health adjudications, as well as domestic violence misdemeanor convictions and restraining orders. To accomplish this, the act establishes a framework of incentives and disincentives whereby the Attorney General is authorized to either waive a grant match requirement or reduce a law enforcement assistance grant depending upon a state’s compliance with the act’s goals of bringing such firearms-related disqualifying records online.

During congressional debate, however, some Members expressed opposition to the NIAA based on the assertion that, under these amendments, any veteran who was or had been diagnosed with Post Traumatic Stress Disorder (PTSD)<sup>22</sup> and was found to be a “danger to himself or others would have his gun rights taken away ... forever.”<sup>23</sup> Members of Congress included a provision in NIAA that required agencies to inform a claimant beforehand that they could lose their gun rights and privileges if they are found to be mentally incompetent as a condition of a benefit program’s administration and eligibility. In addition, as under the state grant provisions, NIAA required those referring agencies to establish a firearms disabilities relief program, whereby any individual referred to the NICS index for reasons related to mental incompetency would be able to petition to have his or her gun rights and privileges restored, if and when he or she had overcome the incapacities that led to the initial finding.

Thirty-two states and the VA have established disability relief programs under NIAA. The Bureau of Justice Statistics (BJS) has awarded \$94.9 million in NICS improvement grants to state, local,

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<sup>18</sup> For further information, see *Mass Shootings at Virginia Tech, April 16, 2007: Report of the Virginia Tech Review Panel Presented to Timothy M. Kaine, Governor, Commonwealth of Virginia*, August 2007, 147 pp.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> P.L. 110-180, January 8, 2008; 121 Stat. 2559.

<sup>22</sup> PTSD is an anxiety disorder that can occur after one has been through a traumatic event. Symptoms may manifest soon after the trauma, or may be delayed. For further information, see U.S. Department of Veterans Affairs, National Center for Posttraumatic Stress Disorder, Fact Sheet, [http://www.ncptsd.va.gov/ncmain/ncdocs/fact\\_shts/fs\\_what\\_is\\_ptsd.html](http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html).

<sup>23</sup> Larry Pratt, “Veterans Disarmament Act to Bar Vets from Owning Guns,” September 23, 2007, <http://www.prisonplanet.com/articles/september2007/230907Disarmament.htm>.

and tribal governments from FY2009 through FY2015.<sup>24</sup> According to the BJS, there were 298,571 prohibiting records related to mental incompetency in the NICS index as of January 1, 2007.<sup>25</sup> Of those records, state and local authorities had contributed 159,418 records (53.4%).<sup>26</sup> According to the FBI, there were 4,658,573 active prohibiting records related to mental incompetency in the NICS index as December 31, 2016.<sup>27</sup> Of those records, state and local authorities had contributed 4,487,573 records (96.3%).<sup>28</sup> From the beginning of 2007 to the end of 2016, the number of those records contributed by state and local authorities to the NICS index had increased by 2,715%.

Federal agencies had contributed 171,083 such records to the NICS index, of which the VA had contributed 167,815 (98.1%), as of December 31, 2016.<sup>29</sup> By comparison, federal agencies had contributed 139,153 records to the NICS index as of January 1, 2007, the bulk of which were contributed by the VA.<sup>30</sup> The December 2016 SSA final rule established a similar program to the VA's; however, the SSA has not referred any disqualifying records to the FBI for inclusion in NICS.

## Senate Action in the 114<sup>th</sup> Congress

In the 114<sup>th</sup> Congress, the Senate considered several amendments following the December 2015 San Bernardino, CA, and June 2016 Orlando, FL, mass shootings. On December 3, 2015, for example, during Senate consideration of the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762), Senators Joe Manchin and Patrick Toomey offered an amendment (S.Amdt. 2908) that would have amended veterans law to prohibit the VA from turning records on veterans or other beneficiaries who had been deemed mentally incompetent over to the FBI for inclusion in NICS index without "the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself, or others."

On June 16, 2016, by comparison, during Senate consideration of the Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2017 (H.R. 2578, the expected vehicle for S. 2837), Senator Christopher Murphy offered an amendment (S.Amdt. 4750) that would have codified the ATF current law regulatory definition of "adjudicated as a mental defective."

Senator Grassley offered amendments (S.Amdt. 2914 and S.Amdt. 4751), during consideration of H.R. 3762 and H.R. 2578, respectively, that would have also amended veterans law with

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<sup>24</sup> SEARCH and National Center of State Courts (under cooperative agreement with the Bureau of Justice Statistics, *State Progress in Record Reporting for Firearm-Related Background Checks: Mental Health Submissions*, by Becki Goggins and Anne Gallegos, February 2016, p. 6.

<sup>25</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2007—Statistical Tables*, Table 9, <https://www.bjs.gov/content/pub/html/bcft/2007/bcft07st.pdf>.

<sup>26</sup> Ibid.

<sup>27</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Check System (NICS) Section, *Active Records in the NICS Index as of December 31, 2016*, <https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view>.

<sup>28</sup> Ibid.

<sup>29</sup> According to the FBI, the VA had contributed 260,381 of these records as of December 31, 2015. The FBI informed CRS that the VA had refreshed its records and, among other measures, purged records related to deceased beneficiaries.

<sup>30</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2007—Statistical Tables*, Table 9, <https://www.bjs.gov/content/pub/html/bcft/2007/bcft07st.pdf>.

provisions that were substantially similar to the Manchin-Toomey amendment described above. The Grassley amendments would have also amended the GCA and replaced the term “adjudicated as a mental defective” with the term “mentally incompetent” in both 18 U.S.C. Section 922(d) and (g). In addition, these amendments would have also amended the GCA to define the terms, “has been adjudicated mentally incompetent or has been committed to a psychiatric hospital,” “order or finding,” and “psychiatric hospital.” These definitions and other language would have narrowed the scope of whose records, and under what circumstances, a federal or state agency could refer to the FBI for inclusion in the NICS mental defective file.

## **VA Implementation of NIAA**

As noted above, the VA has contributed the bulk of the federal records in the NICS index related to individuals who have been “adjudicated as a mental defective.” Hence, the VA and its policies are one example of federal implementation of the Brady Act and NIAA. Under current VA regulations, the VA has the authority to determine the competency status of a person receiving VA benefits.<sup>31</sup> The VA may appoint a fiduciary to receive benefits on behalf of a beneficiary determined to be incompetent. In addition, the VA is to refer the name of any beneficiary determined to be incompetent to the FBI for inclusion in the NICS.<sup>32</sup>

## **Individuals Who Have Their Names Reported to NICS**

The VA is to report the names of all beneficiaries determined to be incompetent to the FBI for inclusion in the NICS. The VA’s regulations define a “mentally incompetent person” as:

one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.<sup>33</sup>

When making a determination as to the competency of a beneficiary, the regulations require that VA only make a determination of incompetency if either:

- the medical evidence is clear, convincing, and leaves no doubt as to the beneficiary’s incompetency; or
- there is a definite expression regarding the beneficiary’s incompetency by responsible medical authorities.<sup>34</sup>

In addition, the regulations provide that if there is reasonable doubt as to the incompetency of the beneficiary, the beneficiary will be determined to be competent.<sup>35</sup>

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<sup>31</sup> 38 C.F.R. §3.353.

<sup>32</sup> The authority for the VA to refer the names of beneficiaries determined to be incompetent to the FBI for inclusion in the NICS is not explicitly provided for in the VA regulations. However, it is described in Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.a., [http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ss/#!/portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual](http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual).

<sup>33</sup> 38 C.F.R. §3.353(a).

<sup>34</sup> 38 C.F.R. §3.353(c).

<sup>35</sup> 38 C.F.R. §3.353(d).

## **How Affected Individuals Are Notified by the VA and What Information Is Provided?**

Federal regulations require that a beneficiary be notified by the VA about the agency's proposed determination of incompetency.<sup>36</sup> It is the policy of the VA that both this notice, as well as the notice of the final determination of incompetency, include information on the impact of an incompetency decision on the beneficiary's right to purchase, possess, receive, or transport a firearm or ammunition.<sup>37</sup>

## **How Do Affected Individuals Have Their Records Removed from the NICS?**

Beneficiaries who have had their names submitted by the VA to the FBI for inclusion in the NICS due to determinations of incompetency may contest both the determination and the inclusion of their names on the NICS. The VA's determination of incompetency is subject to the same due process and appeals procedures as other VA decisions.<sup>38</sup> This includes the right to a hearing before the Board of Veterans Appeals (BVA) and the right of judicial review of the BVA's decision by the U.S. Court of Appeals for Veterans Claims. Decisions of the U.S. Court of Appeals for Veterans Claims may be appealed to the U.S. Court of Appeals for the Federal Circuit.

In addition to contesting or appealing the determination of incompetency, a beneficiary may separately seek relief from the VA's decision to report his or her name to the FBI for inclusion in the NICS. Because the decision of the VA to report a beneficiary to the FBI for inclusion in the NICS is not considered a decision by the agency on a benefit provided by law, the VA does not have a duty to assist the beneficiary with the request for relief, burden of proof is on the beneficiary requesting relief, and failure to meet the burden of proof is sufficient cause for the request for relief to be denied.<sup>39</sup>

When deciding whether or not to grant a veteran's request for relief, the VA must consider the following types of evidence:

- a current statement from the beneficiary's primary mental health physician that assesses the beneficiary's current and past mental health status; and
- evidence concerning the beneficiary's reputation.<sup>40</sup>

The VA must deny a request for relief if there is clear and convincing evidence that the beneficiary would be a danger to himself/herself or others if the relief was granted.<sup>41</sup> If such evidence does not exist, the VA must consider granting the request for relief.<sup>42</sup> In order to grant

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<sup>36</sup> 38 C.F.R. §3.353(e).

<sup>37</sup> Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.b.

<sup>38</sup> 38 C.F.R. §§3.103 and 3.353(e).

<sup>39</sup> Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.c. Federal law at 38 U.S.C. §5103A requires the VA to assist claimants in obtaining evidence necessary to substantiate their claims for benefits.

<sup>40</sup> Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.h.

<sup>41</sup> *Ibid.*, Section III.v.9.B.4.i.

<sup>42</sup> *Ibid.*, Section III.v.9.B.4.j.

relief, there must be clear and convincing evidence that affirmatively, substantially, and specifically, shows that:

- the beneficiary is not likely to act in a manner that is dangerous to the public; and
- granting relief will not be contrary to the public interest.<sup>43</sup>

A decision of the VA to deny relief cannot be appealed to the BVA or U.S. Court of Appeals for Veterans Claims, but is subject to judicial review by a U.S. District Court.<sup>44</sup>

## SSA Implementation of NIAA

In March 2013, the Department of Justice (DOJ) issued guidance to agencies regarding the identification and sharing of relevant federal records and their submission to the NICS. DOJ later determined that SSA must report to the Attorney General information about certain Social Security and Supplemental Security Income (SSI) beneficiaries for whom a representative payee (fiduciary) is appointed because they are determined by SSA to be unable to manage their benefits due to a mental impairment.

SSA issued a notice of proposed rulemaking concerning its implementation of the NIAA on May 5, 2016,<sup>45</sup> and published its final rule on December 19, 2016.<sup>46</sup> The new rule specifies the conditions under which SSA will report for inclusion in the NICS a Social Security or SSI disability beneficiary's disqualifying records. The rule also outlines SSA's process for notifying affected individuals as well as the administrative appeals process under which such individuals may request relief from the federal firearms prohibitions. The final rule became effective on January 18, 2017; however, compliance is not required until December 19, 2017.<sup>47</sup>

## Individuals Who Would Have Their Records Reported to the NICS

Under the new rule, an individual is to be considered to be "adjudicated as a mental defective" by SSA if the individual meets all of the following requirements:

- has filed a claim for Social Security or SSI benefits based on a disability;
- has been determined to have an impairment (or combination of impairments) that meets or medically equals the criteria of one of the mental disorders specified in SSA's *Listing of Impairments* (Step 3 of the disability determination process);<sup>48</sup>

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid., Section III.v.9.B.4.g.

<sup>45</sup> Social Security Administration (SSA), "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 27059, May 5, 2016.

<sup>46</sup> SSA, "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 91702, December 19, 2016.

<sup>47</sup> See 20 C.F.R. §§421.100-421.170.

<sup>48</sup> Section 12.00 of appendix 1 to subpart P of 20 C.F.R. §404. SSA employs a five-step sequential evaluation process for determining whether an adult is disabled for Social Security and SSI purposes. According to the agency, claimants determined to meet the criteria at Step 3 of the process are the most severely disabled because they are awarded benefits based solely on medical evidence, whereas claimants awarded at the later steps are awarded benefits based on a combination of medical and vocational evidence. Because SSA will not report to the NICS individuals whom the agency finds disabled at Step 5 of the process, the new rule will affect a subsample of the disability beneficiary population who have a representative payee and whose primary impairment is a mental disorder. For more information on the sequential evaluation process, see CRS Report RL32279, *Primer on Disability Benefits: Social Security* (continued...)

- has a primary diagnosis code based on a mental impairment;
- has attained age 18 but not yet attained Social Security’s full retirement age (currently 66); and
- has had a representative payee appointed because he or she has been determined by SSA to be mentally incapable of managing benefit payments.

In general, adult Social Security and SSI disability beneficiaries are presumed to be capable of managing or directing the management of their benefits. However, if legal, medical, or lay evidence exists to the contrary, SSA will make a capability determination. If the agency determines that it is clearly in the best interest of the beneficiary to do so, it will certify benefit payments to another person as a representative payee. In this case, the appointment of a representative payee for a beneficiary with a listing-level mental impairment demonstrates that the individual “lacks the mental capacity to manage his own affairs.”

According to the new rule, SSA will identify individuals who meet the aforementioned requirements on a *prospective* basis, meaning that the final rule will largely affect certain new disability beneficiaries. However, the agency is to report existing disability beneficiaries to the NICS who currently do not meet all five requirements but who later demonstrate a change in status that satisfies all five requirements. The Obama Administration estimated that the new rule will affect about 75,000 individuals annually.<sup>49</sup> A report by SSA’s Office of the Inspector General found that about 81,000 Social Security and SSI disability awardees in FY2015 met all five requirements for reporting to the NICS, which was about 9% of the total disability awardee population.<sup>50</sup>

## **How Would Affected Individuals be Notified by SSA and What Information Would be Provided?**

Under the rule, SSA plans to provide both oral and written notice to the affected individual that he or she meets all five criteria for reporting to the NICS and that when final, such reporting will prohibit the individual from possessing firearms. In addition, SSA plans to inform the affected individual of his or her ability to request relief from the federal firearms prohibitions at any time after SSA’s adjudication has become final.

## **How Would Affected Individuals Have Their Records Removed from the NICS?**

SSA plans to notify the Attorney General that an affected individual’s record should be removed if (1) the individual is now capable of managing his or her benefit payments, (2) the individual died, (3) SSA receives information that it reported the record to the NICS in error, or (4) the

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(...continued)

*Disability Insurance (SSDI) and Supplemental Security Income (SSI)*, by (name redacted) .

<sup>49</sup> Obama Administration, “FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer,” <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our-communities-safer>.

<sup>50</sup> SSA, Office of the Inspector General, *The Social Security Administration’s Implementation of Reporting Information to the National Instant Criminal Background Check System*, A-01-16-50218, September 2016, <http://oig.ssa.gov/audits-and-investigations/audit-reports/A-01-16-50218>. Figure includes awards issued only at the initial and reconsideration stages of the adjudicative process. The total disability awardee population includes children under age 18.

agency grants the individual's request for relief under the new rule.<sup>51</sup> In requesting relief, an affected individual must prove that he or she is not likely to act in a manner dangerous to public safety and such relief will not be contrary to the public interest. Affected individuals denied relief by SSA may file a petition seeking judicial review in U.S. district court.

## Conclusion

As discussed above, Congress has passed legislation to encourage state, local, tribal, and territorial governments to submit prohibiting records to the FBI for inclusion in the NICS index for individuals who have been “adjudicated as a mental defective” and, therefore, deemed too mentally incompetent to be trusted with firearms or ammunition. The legislative record suggests that some Members of Congress have taken issue with the current regulatory definition of “adjudicated as a mental defective,” while other Members would prefer to have it codified.

The VA has complied with the Brady Act and NIAA and submitted prohibiting records on beneficiaries “who because of injury or disease lack the mental capacity to contract or to manage his or her own affairs.” After the December 2013 Newtown, CT, tragedy, the Obama Administration directed the SSA to administer the Brady Act and NIAA in a similar manner.

The SSA adopted a final rule that does not completely parallel the VA's administration of these laws, in that it would result in a narrower set of prohibiting records of beneficiaries being submitted to the FBI for inclusion in the NICS index. As described above, the SSA tied such “adjudications” to “mental impairments,” in addition to a beneficiary's ability to handle his or her day-to-day affairs, whereas the VA only ties it to the beneficiary's ability to manage his or her day-to-day affairs.

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<sup>51</sup> The decision to appoint a representative payee is subject to SSA's formal appeals process with certain exceptions.

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