

**TO THE
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS**

**PETITION FOR RULEMAKING
TO PROMULGATE REGULATIONS TO PROHIBIT
TRANSMITTAL OF CERTAIN MISCATEGORIZED INFORMATION TO
THE DEPARTMENT OF JUSTICE FOR IMPROPER USE IN THE
NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM**

SUBMITTED BY

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PETITION FOR RULEMAKING

Pursuant to 5 U.S.C. § 553(e) and 38 U.S.C. § 501(a), Gun Owners of America, Inc., Gun Owners Foundation, The Independence Fund, and National Defense Committee (collectively “Petitioners”) hereby petition the Secretary of Veterans Affairs (“Secretary”) to initiate a rulemaking process to promulgate regulations to stop and prohibit the U.S. Department of Veterans Affairs (“VA”) from continuing to engage in the widespread and arbitrary disarmament of law-abiding veterans across the nation, a presumptively unconstitutional policy which has no statutory basis. The proposed rule would prohibit the VA from transmitting information about a VA beneficiary to law enforcement agencies, and specifically the National Instant Background Check System (“NICS”) run by the Federal Bureau of Investigation, solely and simply due to an appointment of a fiduciary to manage the finances of a beneficiary, without a judicial order in accordance with 18 U.S.C. § 922(g)(4).

STATEMENT

In 2008, Congress passed the NICS Improvements Amendments Act of 2007 (“NIAA”). The NIAA was touted as a boon for gun owners, because it required states to establish a “relief from disabilities program” so that individuals could be removed from FBI’s National Instant Background Check System (“NICS”) after they had been improperly added. However the NIAA adopted, without clear analysis, past erroneous interpretations of federal law by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), and offered federal money to entice states to report as many persons as possible to the NICS system as “prohibited persons” — focusing mainly on those allegedly “adjudicated as a mental defective” or “committed to a mental

institution.”¹ Now, Americans are continually being added to NICS even though they are not prohibited persons under federal law, with very little of the promised relief for those who should not be on the prohibited list.

In December of 2016, during the transition period between presidential administrations, the Social Security Administration (“SSA”) published a final rulemaking² to “implement provisions of the” NIAA. This rulemaking, had it gone into effect, reportedly would have added at least 75,000 persons receiving SSA disability payments to the NICS system as prohibited persons, based on nothing more than their having been designated a representative payee to handle their finances.³

Thankfully, the incoming administration reconsidered this rushed final proposal and acted to stop SSA’s misguided rulemaking. The eventual result was P.L. 115-8,⁴ a congressional joint resolution of disapproval (passed by the House 235-180, by the Senate 57-43, and signed by President Trump on February 28, 2017⁵) which effectively nullified the SSA rulemaking, meaning recipients of disability insurance and supplemental security income benefits should not be reported to NICS simply on the basis of their having been assigned a “representative payee.”

¹ See 18 U.S.C. § 922(d)(4) and 18 U.S.C. § 922 (g)(4)

² See <https://www.federalregister.gov/documents/2016/12/19/2016-30407/implementation-of-the-nics-improvement-amendments-act-of-2007>.

³ SSA proposed to “identify, on a prospective basis, individuals who receive Disability Insurance benefits ... or Supplemental Security Income ... and who also meet certain other criteria, including an award of benefits based on a finding that the individual’s mental impairment meets or medically equals the requirements of section 12.00 of the Listing of Impairments (Listings) and receipt of benefits through a representative payee.” SSA then proposed to “at the commencement of the adjudication process ... notify individuals, both orally and in writing, of their possible Federal prohibition on possessing or receiving firearms....”

⁴ See <https://www.govinfo.gov/content/pkg/PLAW-115publ8/pdf/PLAW-115publ8.pdf>.

Many of the same flaws in the SSA's rejected rule, are present in the VA's current policy. Commenters regarding the SSA's proposed rule noted that it unfairly stigmatized those with non-violent mental health disorders, thereby creating a tremendous disincentive to those who would seek psychological assistance; that the regulation failed to distinguish between being a physical danger to one's self or others, and lacking the capacity to contract or manage one's financial affairs; and the practical difficulties an individual faced in being removed from improper inclusion in NICS. The SSA's tone-deaf responses, including equating those suffering from mental illness with felons, and suggesting that those wrongfully included in NICS could (expensively) file suit in federal court, were obviously unpersuasive to Congress.

However, even though the SSA's flawed rulemaking was stopped by Congress and the Trump Administration, the Veterans Administration has reported and continues to report veterans to NICS as prohibited persons, based on essentially the same criteria of which Congress disapproved in P.L. 115-8.

BACKGROUND

Federal law prohibits the receipt or possession of a firearm or ammunition by anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution." 18 U.S.C. § 922(g)(4).

Federal law prohibits the receipt or possession of firearms or ammunition by anyone "who has been adjudicated as a mental defective or who has been committed to a mental

⁵ See <https://www.congress.gov/bill/115th-congress/house-joint-resolution/40/actions>.

institution” in 18 U.S.C. § 922(g)(4). In 1997⁶ and later in 2014,⁷ the BATFE expanded the definition of “adjudicated as a mental defective” to also include

“[a] determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.”

In contrast, however, the VA process for adjudicating a veteran for the fiduciary program is limited to the purpose of determining whether to appoint someone else manage a veteran’s VA benefits. Further, the VA’s fiduciary determination process is initiated by VA officials, and then places the burden of proof on the veteran to prove they are competent to handle their own VA benefits—all without judicial review.

This low standard, based upon a bureaucratic determination, is not commensurate with the BATFE’s higher standard of a determination by an authority such as a court that a person is for example of subnormal intelligence or a danger to others. The VA’s seriously flawed interpretive guidance sweeps up for reporting to NICS a host of persons who Congress never intended to disarm. Commitments and adjudications are done by the judicial system, not by VA bureaucrats. And the terms “mental defective” and “committed” apply to persons who, as a result of a marked subnormal intelligence or capacity, are permanently unable to function in society and historically were often institutionalized. Those concepts do not apply and should not

⁶ See ATF final rule promulgation in Federal Register, vol. 62, no. 124, June 27, 1997, p. 34634

⁷ See <https://www.regulations.gov/docket?D=ATF-2014-0002> and <http://www.lawandfreedom.com/wordpress/goagof-comments-to-atf-on-proposed-changes-to-form-4473/>

be applied far more broadly, such as to veterans temporarily suffering from mild post-traumatic stress who merely rely on a family member to balance their checkbooks.⁸

Yet, since 1998, at the demand of the Department of Justice, the VA has reported to the FBI for addition in the NICS index those beneficiaries who have had a fiduciary appointed for them by the VA based on a determination that the beneficiary requires a fiduciary to manage their VA benefits, under VA's regulations.⁹ In 2016, in response to public concern regarding inadequate procedures to protect the rights of beneficiaries, Congress included provisions in the 21st Century Cures Act to protect, to a small degree, the rights of VA beneficiaries. That provision states:

The Secretary may not make an adverse determination concerning the mental capacity of a beneficiary to manage monetary benefits paid to or for the beneficiary by the Secretary under this title **unless such beneficiary has been provided all of the following**, subject to the procedures and timelines prescribed by the Secretary for determinations of incompetency:

- (1) Notice of the proposed adverse determination and the supporting evidence.
- (2) An opportunity to request a hearing.
- (3) An opportunity to present evidence, including an opinion from a medical professional or other person, on the capacity of the beneficiary to manage monetary benefits paid to or for the beneficiary by the Secretary under this title.
- (4) An opportunity to be represented at no expense to the Government (including by counsel) at any such hearing and to bring a medical professional or other person to provide relevant testimony at any such hearing. [38 U.S.C. § 5501A (emphasis added).]

Nevertheless, even these additional protections fall far short of the legal standards necessary to qualify as a mental defective for reporting to the NICS database, and deprives veterans of their

⁸ See Gun Owners of America, Inc. and Gun Owners Foundation Comments in Docket No. ATF 51P, pp. 3-7.

⁹ The VA's website states that "VA reports the names of incompetent beneficiaries to the Federal Bureau of Investigations [sic] (FBI), which then adds the names to a database called the National Instant Criminal Background Check System (NICS)." <https://www.benefits.va.gov/fiduciary/beneficiary.asp>.

Second Amendment rights, based solely on the non-judicial appointment of a fiduciary to assist with management of monetary benefits. This VA determination was never meant to be used beyond the very narrowly prescribed purposes of managing veterans' benefits, and it is not based on an appropriate adjudication as required by 18 U.S.C. § 922(g)(4).

In contrast to Section 922, which pertains to disarming those “adjudicated as a mental defective or who ha[ve] been committed to a mental institution, 38 C.F.R. § 3.353’s determinations of incompetency pertain to the capacity of a veteran “to contract or to manage his or her own affairs, including disbursement of funds without limitation,”¹⁰ for the specific purposes of insurance and disbursement of benefits, and are made according to “the beneficiary's social, economic and industrial adjustment.”¹¹ Not only the standard, but the intention and scope of the criminal statute, used to justify reporting veterans in the fiduciary program to the NICS database, differ from those of the VA regulation so substantially as to make clear the inapplicability of the VA fiduciary process as a reasonable determination of “mentally defective” requiring reporting to the NICS database.

Proposals are pending in Congress designed to prohibit the VA from reporting beneficiaries to NICS without an adjudication in compliance with 18 U.S.C. § 922(g)(4). For example, H.R. 3826, the “*Veterans 2nd Amendment Protection Act*” would, if enacted, add the following prohibition:

The Secretary may not transmit to any entity in the Department of Justice, for use by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act, personally identifiable information of a beneficiary, solely on the basis of a determination by the Secretary to pay benefits to a fiduciary for the use and benefit of the beneficiary under section 5502 of this title, without the order or finding of a

¹⁰ See 38 C.F.R. § 3.353(a)

¹¹ See 38 C.F.R. § 3.353(b)

judge, magistrate, or other judicial authority of competent jurisdiction that such beneficiary is a danger to themselves or others.¹²

REASONS FOR GRANTING THE PETITION

The VA's current practice of reporting veterans who have financial fiduciaries to NICS penalizes those veterans for seeking mental health care and deters many veterans from seeking needed mental health care. The practice also conflicts with the plain text of 18 U.S.C. § 922(g)(4), as the standard employed in the VA regulation is a gross and unwarranted expansion of the statutory term "adjudicated a mental defective."

Significantly, the United States Court of Appeals for the First Circuit observed that the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), adds a "constitutional component" to every effort by the federal government to regulate the possession and use of firearms.¹³ The *Rehlander* Court observed that "the right to possess arms ... is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process." *Id.* at 48. Still less should any deprivation of rights be based upon the automatic misapplication of an administrative regulation, one with a low standard of proof, to criminal statute that contemplates a much higher standard of due process in evaluating more serious, permanent disabilities. Yet BATFE has continued to perpetuate the deprivation of the Second Amendment rights of this nation's veterans, based on nothing more than an inapplicable determination by the VA that the veteran may need help handling their finances.

PROPOSED REGULATION

Accordingly, Petitioners request the VA undertake a rulemaking to promulgate a rule to correct the VA's practice of submitting the name of a beneficiary to the NICS system solely

¹² See H.R. 3826, Sec. 2 (116th Congress)

based on a determination that the beneficiary is unable to manage his or her own benefits.

Petitioners offer the following text as a proposed rule:

No personally identifiable information of a beneficiary may be transmitted to any law enforcement entity, or for use by the National Instant Criminal Background Check System, as a basis for prohibiting the possession of firearms, solely on the basis of a determination to pay benefits to a fiduciary for the use and benefit of the beneficiary, without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such beneficiary has been adjudicated as a mental defective or has been committed to any mental institution.

Gun Owners of America, Inc., Gun Owners Foundation, The Independence Fund, and National Defense Committee respectfully request that a rulemaking be commenced to implement a regulation with this effect, to avoid the continued illegal and unconstitutional deprivation of the right to keep and bear arms of many veterans, based on the application of a vague standard that appears in no federal statute.

Respectfully submitted,

Gun Owners of America, Inc.
Gun Owners Foundation
The Independence Fund
National Defense Committee

¹³ See *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012)