



Statement of

**Jordan B. Cohen**  
Analyst in Firearms Policy

Before

Veterans' Affairs Committee  
Disability Assistance and Memorial Affairs Subcommittee  
U.S. House of Representatives

Hearing on

# **“Correcting VA’s Violations of Veterans’ Due Process and Second Amendment Rights”**

January 23, 2025

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

<Product Code>

## Overview:

Chairman Luttrell, Ranking Member McGarvey, and distinguished Members of the Committee, my name is Jordan Cohen, and I am a CRS analyst in firearms policy. Thank you very much for the opportunity to testify before the subcommittee. My testimony will focus on National Instant Criminal Background Check System (NICS) reporting requirements for the Department of Veterans Affairs (VA). Joining me is my colleague Scott Szymendera and we will both be available to answer your questions

NICS is a national namecheck system for Federal Firearms Licensees (FFLs). It is used to confirm that a person is not prohibited from legally buying, selling, or possessing a firearm.<sup>1</sup> It is administered by the Federal Bureau of Investigation (FBI).

Federal law at 18 U.S.C. 922(g) lists the nine classes of people (listed below) who cannot ship, transport, possess, or receive firearms and ammunition. The fourth class, persons “adjudicated as a mental defective” does not require an order or finding from a judge, magistrate, or other judicial authority of competent jurisdiction for this information to be added to NICS.<sup>2</sup> Furthermore, ATF regulation 27 CFR § 478.11 reads: “a determination by a court, board, commission, or other lawful authority that a person . . . lacks the mental capacity to contract or manage his own affairs.”<sup>3</sup>

Accordingly, the Department of Veterans Affairs (VA) interpreted this provision such that any beneficiary determined by the agency to be mentally incompetent because they need a fiduciary to receive benefit payments would, in turn, be reported to NICS in the prohibited class of persons “adjudicated as a mental defective.” While veterans determined by the VA to be mentally incompetent and thus reported to NICS have certain appellate rights, the determination of mental incompetency by the VA, prior to March 2024, was made without any order from a court or judge or finding that the veteran is a danger to themselves or others.<sup>4</sup>

A provision in the Consolidated Appropriations Act, 2024 (P.L. 118-42) prohibits the VA from expending any appropriated funds in FY2024 to report any person to NICS based on mental incompetency without “an order or finding from a judge, magistrate, or other judicial authority of competent jurisdiction that the beneficiary is a danger to themselves or others.”<sup>5</sup> This provision was extended through March 14, 2025 by the two continuing resolutions enacted in 2024 (P.L. 118-83 and P.L. 118-158). Because this provision is in an annual appropriations bill, rather than in U.S. code, it expires on March 14, 2025 unless extended through additional legislation. In addition, this provision does not require removal of names already reported to NICS.

## NICS Reporting Requirements

The Gun Control Act of 1968, as amended (GCA), makes it illegal for nine classes of persons to ship, transport, possess, or receive firearms and ammunition. The classes of prohibited persons under the GCA are

1. persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

---

<sup>1</sup> FBI, “About NICS,” <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics>, accessed December 17, 2024.

<sup>2</sup> Federal Bureau of Investigation, *National Instant Background Check System: Prohibiting Categories Defined By Statute*, February 2016, <https://ucr.fbi.gov/nics/general-information/nics-index-brochure>.

<sup>3</sup> 27 C.F.R. § 478.11.

<sup>4</sup> P.L. 118-42, Title IV, Section 413.

<sup>5</sup> P.L. 118-42, Title IV, Section 413.

2. fugitives from justice;
3. unlawful users or addicts of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802);
4. persons “adjudicated as a mental defective” or committed to mental institutions;
5. unauthorized immigrants and nonimmigrant visitors (with exceptions in the latter case);<sup>6</sup>
6. persons dishonorably discharged from the U.S. Armed Forces;
7. persons who have renounced their U.S. citizenship;
8. persons under court-ordered restraints related to harassing, stalking, or threatening intimate partners or children of such intimate partners; and
9. persons convicted of misdemeanor crimes of domestic violence.<sup>7</sup>

NICS is a national namecheck system for Federal Firearms Licensees (FFLs). It is used to confirm that a person is not prohibited from legally buying, selling, or possessing a firearm.<sup>8</sup> It is administered by the Federal Bureau of Investigation (FBI). A new background check is initiated every time an FFL contacts NICS electronically or by phone.<sup>9</sup> Section 102 of the Brady Handgun Violence Prevention Act of 1993, P.L. 103-159, requires all FFLs to use NICS to conduct background checks on prospective buyers before completing a firearm transfer. Only FFLs are permitted to request a background check through NICS.<sup>10</sup> *NICS reporting* refers to the process, for federal, state, local, and tribal law enforcement agencies, to report persons ineligible, according to federal law, to own a firearm to NICS. In order to purchase a firearm, a prospective buyer must complete a Firearms Transaction Record (ATF Form 4473). Using the information acquired from ATF Form 4473, NICS staff verify the prospective buyer’s eligibility to purchase a firearm and issue a final “proceed” or “denied” response to the FFL. In some cases, NICS may issue a temporary “delayed” response if the initial NICS check reveals a record that requires more research to determine the prospective buyer’s eligibility to possess a firearm. If the FFL has not received a final determination from NICS within three business of the “delayed” response, it is within the FFL’s discretion whether or not to transfer the firearm (if state law permits the transfer).<sup>11</sup>

---

<sup>6</sup> Until 2011, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (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 port of entry. In 2011, the ATF was informed by the Department of Justice’s Office of Legal Counsel (OLC) that the ATF 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” (Department of Justice, Office of Legal Counsel, *Firearms Disabilities of Nonimmigrant Aliens Under the Gun Control Act*, 35 Op. O.L.C. 171 (2011), October 28, 2011, <https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-10-28-firearms-nonimmig-aliens.pdf>). Under current ATF regulations at Title 27, Part 478, of the *Code of Federal Regulations*, nonimmigrants who enter the country validly without visas (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition. However, those individuals must demonstrate that they are “present in a State with the intention of making a home in that State.”

<sup>7</sup> 18 U.S.C. §922(g).

<sup>8</sup> FBI, “About NICS,” <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics>, accessed December 17, 2024.

<sup>9</sup> FBI, “Firearms Checks (NICS),” <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics>, accessed December 17, 2024.

<sup>10</sup> Some states require that sales from private individuals go through NICS. In such cases the private seller can contract with an FFL to perform the NICS background check for the seller.

<sup>11</sup> ATF, *A NICS DELAY*, October 29, 2004, p. 1, <https://www.atf.gov/file/61086/download>.

## NICS Amendments

Two pieces of legislation have been enacted to improve the efficiency and frequency of NICS reporting and are relevant to VA reporting: the NICS Improvement Amendments Act of 2007 (NIAA: P.L. 110-180 ) and the Fix NICS Act of 2017 (P.L. 115-141).

### NIAA

The NIAA was enacted after the 2007 mass shooting at Virginia Tech University and was meant to improve federal department and agency reporting to NICS as well as reporting from state, local, and tribal law enforcement agencies. This information included reporting prohibiting mental health adjudications and commitments.<sup>12</sup> Specifically, the NIAA authorizes the Attorney General to obtain electronic versions of information from federal agencies on persons disqualified from receiving firearms and requires federal agencies to, quarterly, provide such information to the Attorney General. It also requires these agencies to update, correct, modify, or remove records and notify the Attorney General of such actions.<sup>13</sup>

Furthermore, states must certify to the Attorney General, once every two-year period, that at least 90 percent of all records relevant to a determination of whether a person is disqualified from possessing or receiving a firearm have been submitted to NICS.

### *FBI NICS Appeals and Overturning*

Under the GCA, there is a provision that allows the Attorney General (previously, the Secretary of the Treasury) to consider petitions from a prohibited person for “relief from disabilities” and to have his firearms transfer and possession eligibility restored.<sup>14</sup> Since FY1993, however, a limitation (or “rider”) on the ATF annual appropriations for salaries and expenses has prohibited the expenditure of any appropriated funding for ATF to process such petitions from individuals.<sup>15</sup> Conversely, under the NICS Improvement Amendments Act of 2007 (P.L. 110-180), any federal agency that submits any records on individuals considered to be mentally incompetent and thereby prohibited from possessing a firearm under the GCA must provide an avenue of administrative relief to those individuals, so if their mental health or other related conditions improve, their firearms rights and privileges may be restored. As a condition of grant eligibility, states must provide similar administrative avenues of relief for those purposes, that is, “disability relief.”

### *Relief from Disability<sup>16</sup>*

Section 101(c)(2)(A) of the NIAA requires that each federal department or agency that makes mental health adjudications or commitments to mental institutions that would affect the ability of persons to ship, transport, possess, or receive firearms and ammunition, to establish processes in which such persons can apply for relief from disability. Applications for disability relief must be processed by federal departments and agencies within one year of receipt. If a federal department or agency fails to resolve an application for disability relief within one year for any reason, including a lack of appropriated funds, the application

---

<sup>12</sup> The Virginia Tech school shooter was “cleared” by NICS to purchase firearms from an FFL because the shooter’s prohibiting mental health adjudications were not made available to NICS. DOJ, BJS, NICS Act Record Improvement Program (NARIP), March 3, 2021, <https://bjs.ojp.gov/programs/nics-improvement-amendments-act>.

<sup>13</sup> P.L. 110-180.

<sup>14</sup> 18 U.S.C. §925(c). See also Relief from Disabilities Under the Act, 27 C.F.R. §478.144.

<sup>15</sup> For FY1993, see P.L. 102-393, 106 Stat. 1732 (1992). For FY2024, see P.L. 118-42, 138 Stat. 139 (2024) and the ATF appropriation for salaries and expenses. It reads: “none 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.”

<sup>16</sup> In this context, the term *disability* refers to a prohibited person’s inability to purchase or possess firearms and ammunition.

is deemed to have been denied without cause and subject to de novo judicial review.<sup>17</sup> All denials of disability relief by federal departments and agencies are subject to judicial review by the U.S. District Court for the district of residence of the petitioner.

Section 101(c)(2)(B) of the NIAA provides that for persons who are granted relief from disability or who are subjects of mental health records that are prohibited from being provided to the Attorney General, the underlying events that were the basis for those records are deemed not to have occurred for the purposes of determining eligibility to ship, transport, possess, or receive firearms and ammunition.

### *Petitions for Relief from Disability*

The NIAA requires the VA to allow a beneficiary determined to be incompetent and referred to NICS to petition for relief from disability. As this relief is not provided by the VA, the VA does not have a statutory “duty to assist” a beneficiary in a request for relief, and a beneficiary is not entitled to the “benefit of the doubt” in the evaluation of a request for relief.<sup>18</sup> A denial of relief from disability may not be appealed to the Board of Veterans Appeals or U.S. Court of Appeals for Veterans Claims.<sup>19</sup> The decision can, however, be reviewed by the U.S. District Court for the district of residence of the beneficiary.

The policy of the VA is to deny a request for relief if evidence shows the beneficiary would be a “danger to self or others” if relief were granted. The evidence must be “clear and convincing” to deny a request for relief, and according to the VA, claims processors must deny a request for relief from disability if any of the following is reflected in the beneficiary’s record:

- an assessment performed by the beneficiary’s primary mental-health physician that indicates the beneficiary would be a danger to self or others if VA granted the request;
- a diagnosis of mental disability with symptoms that include the presence of suicidal or homicidal ideations;
- a diagnosis of substance abuse with symptoms that would render the beneficiary a danger to self or others;
- a reputation for violence, which a claims processor has confirmed by personally contacting the person that cited the reputation;
- conviction of a felony unless the beneficiary presents evidence that, notwithstanding the felony conviction, the right to possess a firearm has been restored;
- conviction of a misdemeanor in the past five years for committing or attempting to commit a violent offense;
- pending felony or misdemeanor charge for committing or attempting to commit a violent offense (including, but not limited to, menacing, stalking, assault, or battery); or
- a charge for a violent offense (including, but not limited to, menacing, stalking, assault, or battery) that has not been brought to trial because a court, board, or commission has determined that the beneficiary lacks the mental capacity to proceed with a trial unless:

---

<sup>17</sup> De novo review is a standard of review used by an adjudicative body to rule on evidence and matters of law without giving deference to the findings, rulings, or conclusions of a lower-level adjudicative body.

<sup>18</sup> Per Title 38, Section 5303A, of the *U.S. Code*, the VA has a “duty to assist” claimants with their claims for benefits administered by the VA. Per Section 5107(b), when there is an “approximate balance of positive and negative evidence regarding any issue material to the determination of a matter,” the VA must give the “benefit of the doubt” to the claimant.

<sup>19</sup> VA, *M21-1 Adjudication Procedures Manual*, Part X, Subpart ii, Chapter 6, Section D, Topic 4.g, December 28, 2022, [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4).

- competency has been restored; or
- the beneficiary has been rehabilitated through any procedure available under the law.<sup>20</sup>

If clear and convincing evidence to deny a request for relief does not exist, the VA must consider granting the request. The VA must grant relief if clear and convincing evidence “affirmatively, substantially, and specifically” shows that

- the beneficiary is not likely to act in a manner dangerous to the public; and
- granting relief will not be contrary to the public interest.<sup>21</sup>

In FY2022, the VA indicated it processed 33 petitions for relief and did not grant relief in any of these cases.<sup>22</sup>

## Fix NICS Act

The Fix NICS Act requires the Attorney General to establish a plan to ensure maximum coordination and *automation* of reporting to NICS and release a semiannual report on NICS reporting by each federal department or agency, and state and tribal governments. Each federal department or agency is required to certify that it has accurately and efficiently provided disqualifying records of persons prohibited from receiving or possession a firearm. The act also requires each department or agency to establish and comply with their own implementation plan to maximize accurate submissions. Moreover, the Fix NICS Act requires the Attorney General to publish names of each federal department or agency, and state and tribal government that failed to achieve compliance with an implementation plan, a description of why, and the types and number of records that have not been submitted.<sup>23</sup>

Recently, some have voiced concern about the comprehensiveness of NICS reporting requirements for federal departments or agencies, and state and tribal governments. They are concerned that it is possible that individuals who have court-identified risks for the perpetration of violence towards themselves or others may still be allowed to possess firearms because, for example, there is “substantial heterogeneity in [state] NICS reporting requirements and lack of clarity around processes,”<sup>24</sup> despite the September 2022 Fix NICS Act report, which is the most recent, suggesting that NICS reporting was up by twenty percent since 2018.<sup>25</sup> There have also been concerns expressed that government agencies as well as state, local, and tribal law enforcement overreport names to NICS, resulting in “false positives” every year.<sup>26</sup>

## Department of Veterans Affairs NICS Reporting

As described above, one of nine classes of persons prohibited by the GCA from shipping, transporting, receiving, or possessing firearms or ammunition are persons who have been “adjudicated as a mental

---

<sup>20</sup> Ibid., Topic 4.i.

<sup>21</sup> Ibid., Topic 4.j.

<sup>22</sup> VA data provided to CRS by the House Committee on Veterans’ Affairs.

<sup>23</sup> Section 601(F) of P.L. 115-141.

<sup>24</sup> Marian E. Betz, Deirdre M. Bowen, and Ali Rowhani-Rahbar, et al., “State Reporting Requirements for Involuntary Holds, Court-Ordered Guardianship, and the US National Firearm Background Check System,” *Journal of the American Medical Association*, vol. 4, no. 11 (November 17, 2023).

<sup>25</sup> Department of Justice, *The Department of Justice’s Semiannual Report on the Fix NICS Act*, September 2022, [https://www.justice.gov/d9/nics\\_semiannual\\_report\\_-\\_september\\_2022.pdf](https://www.justice.gov/d9/nics_semiannual_report_-_september_2022.pdf).

<sup>26</sup> John R. Lott Jr, “Background Checks Are Not The Answer To Gun Violence,” *New York Times*, February 12, 2018, <https://www.nytimes.com/2018/02/12/opinion/politics/background-checks-gun-violence.html>.



defective” or have been committed to mental institutions.<sup>27</sup> Neither the GCA nor the Brady Act define the term “*mental defective*” or provide any additional guidance on what would constitute such an adjudication.

The ATF’s regulations implementing the Brady Act provide the following definition for the term “*adjudicated as a mental defective*”:

- (a) 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.
- (b) The term shall include—
  - (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. 850a, 876b.<sup>28</sup>

Under the VA’s regulations, the VA has the authority to determine if a beneficiary in a VA program is mentally competent or mentally incompetent.<sup>29</sup> The VA’s regulations provide the following definition of *mental incompetency*:

A mentally incompetent person is 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>30</sup>

The VA employees tasked with adjudicating whether a veteran is financially incompetent are Veterans Service Representatives and Rating Veterans Services Representatives and their training does not require them to have legal or medical expertise.<sup>31</sup>

Generally, if the VA determines that a beneficiary is incompetent, that person’s benefits will be paid on his or her behalf to a third-party fiduciary.<sup>32</sup> The VA can later reverse a determination of incompetency based on evidence of the beneficiary’s competency.

The VA’s regulations require that no determination as to a beneficiary’s competency be made unless the “medical evidence is clear, convincing, and leaves no doubt as to the person’s incompetency” or there has been “a definite expression regarding the question by the responsible medical authorities.”<sup>33</sup> A determination of incompetency must be based on all evidence of record and be consistent with the percentage of disability and facts related to any hospitalization or commitment of the person. In a case in which there is a reasonable doubt as to the beneficiary’s competency to contract or manage his or her affairs, the regulations require the doubt to be resolved in favor of a determination of competency.<sup>34</sup>

---

<sup>27</sup> 18 U.S.C. §922(g)(4).

<sup>28</sup> 27 C.F.R. §478.11.

<sup>29</sup> 38 C.F.R. §3.353.

<sup>30</sup> 38 C.F.R. §3.353(a).

<sup>31</sup> U.S. Government Accountability Office, *Testimony Before the Subcommittee on Disability Assistance and Memorial Affairs, Committee on Veterans Affairs, House of Representatives: VA Disability Benefits: Training for Claims Processors Needs to Be Enhanced*, GAO-24-107510, July 23, 2024, pp. 3-4, <https://www.gao.gov/assets/gao-24-107510.pdf>.

<sup>32</sup> For additional information on benefit payments to a fiduciary, see the VA website at <https://www.benefits.va.gov/fiduciary/>.

<sup>33</sup> 38 C.F.R. §3.353(c).

<sup>34</sup> 38 C.F.R. §3.353(d).

## 21<sup>st</sup> Century Cures Act Provision

Section 14017 of the 21<sup>st</sup> Century Cures Act (P.L. 114-255) codified the existing due process policies and regulations of the VA regarding determinations of incompetency. As codified by this legislation, the VA may not determine that a beneficiary is incompetent unless the VA has provided all of the following to the beneficiary:

- notice of the proposed determination and supporting evidence;
- an opportunity to request a hearing;
- an opportunity to present evidence, including evidence from a medical professional or other person, of the beneficiary's ability to manage benefits paid by the VA; and
- an opportunity to be represented, including by counsel, at no expense to the federal government, at a hearing and to bring a medical professional or other person to provide testimony at the hearing.<sup>35</sup>

## VA Submissions to NICS

It is the VA's policy, subject to the limitation through March 14, 2025, imposed by the continuing resolutions, to submit the names of all beneficiaries determined to be incompetent to the Attorney General for inclusion in NICS.<sup>36</sup> This policy has been consistent since the ATF first promulgated its regulations implementing the Brady Act. In the preamble to the publication of the final rule regarding categories of prohibited persons, the ATF addressed a comment submitted on the Notice of Proposed Rulemaking by the VA regarding how the VA would interpret the definition of "*adjudicated as a mental defective*" as follows, indicating that ATF considered the VA's planned interpretation to be correct:

In its comment, the U.S. Department of Veterans Affairs correctly interpreted the proposed definition of "adjudicated as a mental defective" to mean that any person who is found incompetent by the Veterans Administration under 38 CFR 3.353 will be considered to have been adjudicated as a mental defective for purposes of the GCA. Section 3.353 provides that a mentally incompetent person is one who, because of injury or disease, lacks the mental capacity to contract or manage his or her own affairs.<sup>37</sup>

As of the end of 2023, of the 270,851 active entries in NICS submitted by federal agencies for having been "adjudicated as a mental defective" or committed to mental institutions, 264,893 (97.8%) were submitted by the VA, though all of these were not necessarily because a veteran was determined mentally incompetent and needed a fiduciary to collect benefit payments.<sup>38</sup> While state laws vary significantly about who is required to report an individual to NICS,<sup>39</sup> if the appropriations rider preventing this expires without replacement on March 14, 2025, VA may report people to NICS without a court order as mental

---

<sup>35</sup> 38 U.S.C. §5101A.

<sup>36</sup> VA, *M21-1 Adjudication Procedures Manual*, Part X, Subpart ii, Chapter 6, Section D, Topic 4.a, December 28, 2022, [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4).

<sup>37</sup> ATF, "Definitions for the Categories of Persons Prohibited from Receiving Firearms," 62 *Federal Register* 34637, June 27, 1997.

<sup>38</sup> FBI, *Active Records in the NICS Index as of December 31, 2023*, pp. 3-4.

<sup>39</sup> Marian E. Betz, Deirdre M. Bowen, and Ali Rowhani-Rahbar, et al., "State Reporting Requirements for Involuntary Holds, Court-Ordered Guardianship," *Journal of the American Medical Association Health Forum*, vol. 4, no. 11 (November 17, 2023).



incompetency determinations for veterans are determined through an administrative, rather than judicial process.<sup>40</sup>

VA policy requires that the following statement (or one with similar language) be included in the letter notifying a beneficiary of a proposed incompetency determination:

The Brady Handgun Violence Prevention Act prohibits you from purchasing, possessing, receiving or transporting a firearm or ammunition based upon our determination that you are incompetent to handle your VA funds. You may be fined and/or imprisoned if you knowingly violate this law.

You may apply to VA for relief of firearms prohibitions imposed by the law by submitting your request to the address at the top of this letter on the enclosed VA Form 21-4138, Statement in Support of Claim. VA will determine whether such relief is warranted.<sup>41</sup>

## Appeals of Incompetency Determinations

Unless a court has found the beneficiary incompetent or a guardian has been appointed for the beneficiary based on a court determination of incompetency, the VA is required to notify the beneficiary of the proposed incompetency determination and the right to have a hearing before the VA before the decision is finalized in the same manner as other adverse actions by the VA are subject to hearings.<sup>42</sup> The determination of the VA that a beneficiary is incompetent can be appealed to the Board of Veterans Appeals, whose decisions are subject to judicial review by the U.S. Court of Appeals for Veterans Claims. The court's decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit.

In FY2022, VA data indicates there were 135 hearings on incompetency determinations, 24 of which resulted in a finding of competency.<sup>43</sup>

## Recent Legislative Activity

### Veterans 2<sup>nd</sup> Amendment Protection Act

In the 110<sup>th</sup> Congress, Senator Richard Burr first introduced the Veterans 2<sup>nd</sup> Amendment Protection Act (S. 3167). This bill would have provided that “a veteran, surviving spouse, or child who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness shall not be considered adjudicated as a mental defective” for purposes of the GCA “without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such veteran, surviving spouse, or child is a danger to him or herself or others.” This legislation has been introduced in each subsequent Congress through the 118<sup>th</sup>. In the 118<sup>th</sup> Congress, the House bill was reported favorably by the House Committee on Veterans Affairs but was not acted on by the full House.

---

<sup>40</sup> Additionally, per a 2020 report from the GAO, “the Veterans Benefits Administration reported that it provides relevant records for those individuals rated as “mentally incompetent” to manage their financial affairs to the NICS Indices on a monthly basis using an automated system.”<sup>40</sup> This automatic reporting began occurring on a weekly basis in July 2020. See Department of Justice, *The Department of Justice Semiannual Report on the FIX NICS Act - September 2022*, September 2022, p. 29, [https://www.justice.gov/d9/nics\\_semiannual\\_report\\_-\\_september\\_2022.pdf](https://www.justice.gov/d9/nics_semiannual_report_-_september_2022.pdf).

<sup>41</sup> VA, *M21-1 Adjudication Procedures Manual*, Part X, Subpart ii, Chapter 6, Section D, Topic 4.b, December 28, 2022, [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4).

<sup>42</sup> 38 C.F.R. §3.353(e).

<sup>43</sup> VA data provided to CRS by the House Committee on Veterans' Affairs.

## Appropriations Restriction

In the 118<sup>th</sup> Congress, the Consolidated Appropriations Act, 2024 included language that mirrored the Veterans 2<sup>nd</sup> Amendment Protection Act. Sec. 413 of Title IV of the act provides that:

None of the funds made available by this Act may be used by the Secretary of Veterans Affairs under section 5502 of title 38, United States Code, in any case arising out of the administration by the Secretary of laws and benefits under such title, to report a person who is deemed mentally incapacitated, mentally incompetent, or to be experiencing an extended loss of consciousness as a person who has been adjudicated as a mental defective under subsection (d)(4) or (g)(4) of section 922 of title 18, United States Code, 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.<sup>44</sup>

This provision includes no language about removal of already-reported parties that were deemed mentally incompetent and reported to NICS under subsection (d)(4) or (g)(4) of section 18 U.S.C. §922.<sup>45</sup>

This provision was extended by the two continuing resolutions enacted to provide appropriations for FY2025 (P.L. 118-83 and P.L. 118-158) through March 14, 2025 at which point, absent the enactment of additional legislation, the VA will be permitted to resume its policy of reporting to NICS those persons it has determined to be mentally incompetent, regardless of any judicial finding or determination if they are danger to themselves or others.

---

<sup>44</sup> P.L. 118-42, Title IV, Section 413.

<sup>45</sup> This appropriations rider only affects NICS reporting and does not affect the underlying legality of an individual with a VA determination owning a firearm under § 922 or the ATF regulation 27 C.F.R. 478.11