



July 5, 2016

SUBMITTED VIA FEDERAL E-RULEMAKING PORTAL

NICS Comments

Social Security Administration
3100 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235-6401

**Re: Comments of Everytown for Gun Safety on Docket IT SSA 2016-0011:
“Implementation of the NICS Improvement Amendments Act of 2007,”
81 Fed. Reg. 87 (proposed May 6, 2016)**

To Whom It May Concern:

Everytown for Gun Safety (“Everytown”), the country’s largest gun violence prevention advocacy group, submits this comment on the Social Security Administration’s (“SSA”) Notice of Proposed Rulemaking (“NPRM”), which proposes to identify SSA beneficiaries who are prohibited under federal law from possessing or receiving firearms due to severe mental illness and to provide records for these individuals to the Federal Bureau of Investigation (“FBI”) for inclusion in the National Instant Criminal Background Check System (“NICS”).

Everytown applauds the White House for a set of recent executive actions aimed at improving the gun background check system and giving law enforcement tools to combat gun trafficking. Those actions included initiating this rulemaking process, which seeks to bring the SSA in line with the NICS Improvement Amendments Act of 2007 (“the NIAA”) requirement that federal agencies submit prohibiting records into NICS.

As further elaborated below, the NPRM details a process for identifying beneficiaries who are prohibited from having guns under federal law by virtue of being found to lack the mental capacity to contract or manage their own affairs as a result of mental illness. SSA is required to send these records into NICS, where they will help to enforce our federal firearm laws by ensuring that prohibited people cannot pass a background check and purchase a gun. Everytown urges SSA to adopt the proposed rule.

1. Firearm Laws Can Only Be Fully Enforced if Records Are Sent to NICS

Since the 1968 Gun Control Act, federal law has prohibited people from receiving and possessing firearms if they are severely mentally ill—in the words of the statute, if they have been “adjudicated as a mental defective” or else “committed to a mental institution.”¹ Implementing regulations outline this prohibition in more detail, including—as is relevant for this NPRM—to cover any person “determin[ed] by a court, board, commission, or other lawful



authority...as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease...[to] lack[] the mental capacity to contract or manage his own affairs.”²

In order to enforce the gun prohibitions set forth in the Gun Control Act, the Brady Handgun Violence Prevention Act was passed in 1993 to require all persons who purchase firearms from a federally licensed dealer must first pass a background check. The NICS system was created to facilitate those checks, and was built to include several existing databases and also the newly established NICS Index—created to hold, among other files, records of people prohibited due to mental illness. Since NICS went online in 1998, over 2.5 million gun sales have been denied to prohibited people.³

But the background checks system is only as good as the records it contains—and gaps in the system, especially in the newly created NICS Index, have led to prohibited people getting armed. Much of the resulting tragedy can be traced to plain failure to submit records into the system, often because courts, mental health facilities, and other entities believe they are not authorized or expected to submit. For example, before killing 32 people at Virginia Tech in 2007, the shooter had been found to be a danger to himself.⁴ But the state of Virginia never submitted his name and record to NICS, and he was able to pass multiple background checks and buy his murder weapons.

Everytown (and Mayors Against Illegal Guns, as part of and predecessor to Everytown) has been involved in extensive research to determine why state actors fail to submit mental health records into the background check system—including speaking to officials in 50 states, writing multiple reports on the topic, and ultimately advocating for new state laws that enable or require record reporting. Since this work began in 2011, 22 states have passed laws in this area, the total number of mental health records submitted by states has nearly quadrupled,⁵ and the number of denials to people with severe mental illness has risen fourfold.⁶

Despite this considerable progress, gaps remain in the system, including that seven states have failed to pass laws enabling or requiring record reporting, four states still have submitted fewer than 100 total records, and—as is addressed in the current NPRM—federal agencies have not reported all of their records.

2. The NPRM Identifies Prohibiting Records Held by SSA

The NICS Act, passed in the wake of the Virginia Tech shooting, requires federal agencies to submit all prohibiting records in their possession into the background check system. An executive memorandum after the Sandy Hook shooting directed the Department of Justice (DOJ) to issue guidance for federal agencies on identifying these records. A January 2016 executive action directs the SSA to initiate this rulemaking process. The current NPRM is an effort to comply with the law following the January executive action.

The NPRM proposes to submit to NICS the names of beneficiaries who have a) filed a claim based on disability, b) been found to be disabled based on a finding that the person’s impairments meet the requirements of one of the Mental Disorders Listing of Impairments, c) been found to be impaired so severely that the person is unable to do any gainful activity,⁷ and d)



been found, as a result of mental illness, to lack the capacity to manage their own affairs and had a representative payee appointed to receive disability benefits on their behalf.

These beneficiaries are all prohibited from possessing firearms under current law; the rule does not impact any beneficiaries who are not already prohibited. As is required for a finding to be prohibiting, SSA officials have determined in these cases that the person “lacks the mental capacity to contract or manage his own affairs”, and, under the proposed language, these incapacity findings will only be prohibiting if they are made due to mental illness.

The rule does not reach any beneficiaries who are assigned a representative payee due to physical incapability or for reasons other than legal or mental incompetence. Indeed, all persons assigned a representative payee have already—separately—been found to be so severely disabled as a result of mental illness that they meet established criteria for serious mental illness, in a determination made by a licensed psychologist.

Disability beneficiaries may appeal an SSA determination that they be assigned a representative payee. The avenues for appeal include a hearing before an administrative law judge, a hearing before the SSA’s Appeals Council. A beneficiary may exercise these appeals options before the capacity finding is final—before the record is identified by SSA as prohibiting from gun possession and is submitted to the FBI. A person may also appeal to a federal district court.

Everytown understands that the NPRM does not call for the submission of records for individuals who have been found to be disabled based on findings of impairment that are less severe—findings made at “step 5” of the SSA’s evaluation process, wherein an individual may not be fully unable to engage in substantial gainful activity. We encourage the SSA to study whether individuals found to be disabled at this stage are indeed prohibited from possessing firearms under current law, and to publish a final rule that allows for submission of as many prohibiting records as SSA can identify. If useful, the DOJ should offer guidance on the intersection of the SSA process and the federal mental health prohibition.

3. Recommendation

Everytown supports the adoption of the proposed rule, which will support enforcement of federal firearm laws by ensuring that prohibited people cannot pass a background check simply because their mental health records were not submitted to the system. Everytown appreciates and applauds SSA’s work to identify prohibiting records and to fulfill its obligations under the law.

Respectfully submitted,

/s/

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Everytown for Gun Safety



¹ 18 USC 922(g)(4)

² 27 CFR 478.11, “adjudicated as a mental defective”

³ US Department of Justice, Bureau of Justice Statistics, Background Checks for Firearm Transfers, 2012 - Statistical Tables, by Jennifer C. Karberg, Ronald J. Frandsen, and Joseph M. Durso (2014): <http://1.usa.gov/1TgPRgB>

⁴ <http://cnn.it/29fmt4K>

⁵ From 1.17 million in October 2011 to 3.98 million in December 2015. Information obtained by Everytown from the FBI

⁶ From 2,187 in 2011 to 8,908 in 2015. Information obtained by Everytown from the FBI

⁷ at “step 3” of SSA’s sequential evaluation process