



DEPARTMENT OF VETERANS AFFAIRS  
WASHINGTON DC 20420

May 13, 2016

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your March 16, 2016, cosigned letter to the Department of Veterans Affairs (VA) regarding the National Instant Criminal Background Check System (NICS) reporting requirements. I am responding on behalf of the Department.

Enclosed are VA's responses to your questions about our compliance with the Department of Justice NICS reporting requirements, specifically reporting identifying information regarding VA beneficiaries who are unable to manage their VA benefits.

VA is grateful for your continuing support of Veterans and appreciates your efforts to pass legislation enabling VA to provide Veterans with the high-quality care they have earned and deserve. As the Department focuses on ways to help provide access to health care in your district or state and across the country, we have identified a number of necessary legislative items that require action by Congress in order to best serve Veterans.

Flexible budget authority would allow VA to avoid artificial restrictions that impede our delivery of care and benefits to Veterans. Currently, there are over 70 line items in VA's budget that dedicate funds to a specific purpose without adequate flexibility to provide the best service to Veterans. These include limitations within the same general areas, such as health care funds that cannot be spent on health care needs and funding that can be used for only one type of Care in the Community program, but not others. These restrictions limit the ability of VA to deliver Veterans with care and benefits based on demand, rather than specific funding lines.

VA also requests your support for the Purchased Health Care Streamlining and Modernization Act. This legislation would allow VA to contract with providers on an individual basis in the community outside of Federal Acquisition Regulations, without forcing providers to meet excessive compliance burdens. Already, we have seen certain nursing homes not renew their agreements with VA because of these burdens, requiring Veterans to find new facilities for residence. VA further requests your support for our efforts to recruit and retain the very best clinical professionals. These include, for example, flexibility for the Federal work period requirement, which is not consistent

Page 2.

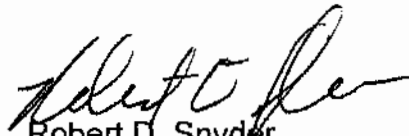
The Honorable Chuck Grassley

with private sector medicine, and special pay authority to help VA recruit and retain the best talent possible to lead our hospitals and health care networks.

Should you have further questions, please have a member of your staff contact Mr. Joe Sixeas, Director, Veterans Benefits Legislative Affairs, at (202) 461-5899 or by email at Joe.Sixeas@va.gov. A similar response has been sent to Chairman Isakson.

We hope this information is helpful to you and thanks, again, for your continued support of our mission.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Snyder", written in a cursive style.

Robert D. Snyder  
Chief of Staff

Enclosure

**Department of Veterans Affairs (VA)  
Response to Oversight Inquiry  
on the  
National Instant Criminal Background Check System**

VA received the following questions from Chairman Grassley (Senate Committee on the Judiciary) and Chairman Isakson (Senate Committee on Veterans' Affairs) about the National Instant Criminal Background Check System (NICS):

**Question 1: Prior to reporting a name to the DOJ, does VA determine that person to be a serious safety risk to themselves or the public? If so, please describe the process in detail including the standard used to make that determination.**

**VA Response:** VA does not determine whether a beneficiary is a serious safety risk to him/herself or the public before providing the beneficiary's identifying information to the Department of Justice (DOJ) for NICS. The law requires VA to report to NICS any person who lacks the mental capacity to contract or manage his or her own affairs. See 18 U.S.C. § 922(g)(4); the Brady Handgun Violence Prevention Act of 1993, Public Law 103-159 (Brady Act), as amended by Public Law 110-180, the NICS Improvement Amendments Act of 2007 (NIAA); and 27 C.F.R. § 478.11.

**Question 2: Does VA use a metric to flag certain veterans for further investigation and possible reporting to the DOJ? If so, what is that metric?**

**VA Response:** VA does not use a metric to flag certain Veterans for further investigation and possible reporting to DOJ. Federal law requires VA to report to NICS the names of individuals who, due to disability, are unable to manage their VA benefits. A VA determination that a beneficiary cannot manage his or her VA benefits is based upon a definite finding regarding that fact by a responsible medical authority or medical evidence that is clear, convincing, and leaves no doubt as to the person's inability to manage his/her affairs, including disbursement of funds without limitation, or a court order finding the individual to be incompetent. See 38 C.F.R. § 3.353

**Question 3: During the hearing that ultimately determines whether a veteran will be placed on NICS, it appears the burden is not on the government to justify its effort to report the name to the DOJ for eventual placement on the NICS. How does that comply with fundamental due process?**

**VA Response:** VA affords due process to any individual who it proposes to find incapable of managing his/her VA benefits. VA provides that person the opportunity for a hearing as well as notice of how that finding would impact the ability of that person under Federal law to own, purchase, possess, transport, or receive firearms or ammunition.

**Question 4: Do you believe that a veteran adjudicated as incompetent to manage finances and appointed a fiduciary is likewise mentally defective under the ATF standard? If so, what is the basis for that conclusion?**

**VA Response:** Yes, VA's determination under 38 C.F.R. § 3.353(a) that a beneficiary cannot manage his/her affairs for purposes of receipt of VA benefits comports with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) standards for "adjudicated as a mental defective". ATF's regulation at 27 C.F.R. § 478.11 defines "adjudicated as a mental defective" as including a determination that a person "[l]acks the mental capacity to manage his or her own affairs". ATF considered VA's determinations, defined at 38 C.F.R. § 3.353(a), in its rulemaking for administering the Brady Act. Definitions for the Categories of Persons Prohibited From Receiving Firearms, 61 Federal Register (FR) 47,095, 47,097 (proposed September 6, 1996). In response to a comment submitted by VA on the proposed rule, ATF clarified that "the proposed definition of 'adjudicated as a mental defective' [includes] any person who is found incompetent by the Veterans Administration under 38 C.F.R. § 3.353." Definitions for the Categories of Persons Prohibited From Receiving Firearms, 62 FR 34,634, 34,637 (June 27, 1997). DOJ has reiterated its general definition regarding agency adjudications of incompetency in a March 2013, publication, "Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS." That publication discusses relevant records to provide to NICS for persons adjudicated as mentally defective under 18 U.S.C. section 922(g)(4), and advises, "[r]ecords that are relevant to this prohibitor include . . . agency records of adjudications of an individual's inability to manage his or her own affairs if such adjudication is based on. . . incompetency." U.S. Dept. of Justice, Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS, 7 (March 2013) (available upon request).

**Question 5: Given that the VA adjudication process can result in a complete infringement of a person's fundamental Second Amendment right, do you believe that the use of the "clear and convincing" evidentiary standard is proper? If so, why?**

**VA Response:** VA determines only the ability to handle one's own affairs, while DOJ, rather than VA, administers laws that affect gun ownership. A VA determination that a beneficiary cannot manage his/her VA benefits is based on either a definite expression on that issue by a responsible medical authority or on medical evidence that is clear, convincing, and leaves no doubt as to the person's mental inability to manage his/her affairs. See 38 C.F.R. § 3.353(c). VA provides due process, including the right to present evidence to rebut the proposed finding and request a hearing. Federal law requires VA to report those it finds incompetent to NICS. DOJ enforces certain firearms laws using the names reported to NICS.

**Question 6: Does the financial incompetence standard employed by the VA to report names to the DOJ for subsequent placement on the NICS list comply with the protections of the Second Amendment? If so, please explain how, in light of due process concerns described above.**

**VA Response:** The standard employed by VA to report names to DOJ for placement on the NICS list complies with Federal law. VA takes no other position with regard to reporting names to NICS and the Second Amendment. ATF, not VA, administers the laws that affect gun ownership.

**Question 7: Do you believe that the financial incompetence standard as used by the VA to appoint a fiduciary satisfies the Second Amendment as the Supreme Court has interpreted it? Please explain.**

**VA Response:** The standard applied by VA to appoint a fiduciary is in accordance with Federal law, 38 U.S.C. § 5502, and administered after a finding that a beneficiary cannot manage his/her VA benefits in accordance with 38 C.F.R. § 3.353. Use of the standard employed by VA as a basis to report names to DOJ for placement on the NICS also complies with Federal law. See 18 U.S.C. § 922(g)(4); the Brady Act; and 27 C.F.R. § 478.11. VA does not enforce the laws affecting gun ownership and takes no position as to whether those laws are consistent with the Second Amendment.

**Question 8: Do you believe that the process by which a veteran is analyzed for competency and appointed a fiduciary by the VA is constitutionally sound? Please explain.**

**VA Response:** Yes, VA affords all beneficiaries who it proposes to find incompetent with due process, including notice, assistance developing evidence, the opportunity for a hearing, and appellate rights. Moreover, a finding of incompetency and appointment of a fiduciary does not deprive a beneficiary of property. Rather, appointment of the fiduciary protects the beneficiary against deprivation or misuse of VA benefits.

Further, section 101 of the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, amended the Brady Act to require agencies to allow beneficiaries the opportunity to request relief from the reporting requirements imposed by the law. The NIAA places the responsibility for administering the relief program on the agency that provided the information to NICS.

**Question 9: Is the VA satisfied that all names reported for placement on the NICS are persons who should not own or possess a firearm because they are dangers to themselves and/or others? If so, what evidence supports that conclusion?**

**VA Response:** VA takes no position on whether names incorporated in the NICS belong to persons who should not own or possess firearms, or persons who might be dangerous to themselves or others. VA's actions are predicated on Federal law that requires VA to report the names to NICS, and DOJ uses NICS to administer firearms laws.

**Question 10:** Given that 99.1% of all names in the NICS "mental defective" category are reported from the VA, has the VA reviewed its reporting standards and procedures? If so, please provide a copy of the review that took place. If no review took place, please explain why not.

**VA Response:** While VA has not conducted a formal review of its reporting standards and procedures, VA ensures accuracy in its NICS reporting by reconciling the NICS entries with DOJ. Beginning around October 2015, VA has worked with the Federal Bureau of Investigation (FBI) to identify all discrepancies between the NICS and VA databases. These discrepancies primarily consist of records of deceased individuals and individuals that VA has determined to be competent since originally reporting their names to NICS. VA expects to complete this reconciliation during the 2016 fiscal year.

**Question 11:** How many individuals have appealed a finding that would have resulted in their name being reported to the NICS? How many individuals were successful in their appeal?

**VA Response:** Since inception of the relief program from the NICS reporting requirements, from around November 2010, through January 28, 2016, VA has rated 200,339 individuals as unable to manage their VA benefits. During the same time, VA received 325 requests (0.2 percent of the beneficiaries VA had declared unable to manage their funds) for relief from the NICS reporting requirements. VA was able to ask the FBI to remove a total of 66 names from the NICS database. These names consisted of 13 beneficiaries who were granted relief based on DOJ requirements of not being a danger to themselves or to others and 53 beneficiaries who VA found were no longer incompetent. VA denied 248 requests for relief, and 11 requests are currently pending.

**Question 12:** In light of the fact that the Supreme Court has held the Second Amendment to be a fundamental right, has the VA changed any processes and procedures relating to the NICS system which were in existence prior to that holding? If so, what changes have been implemented? If not, why not?

**VA Response:** VA is required to comply with all applicable Federal laws. Accordingly, VA complies with Federal NICS reporting laws.