

NICS IMPROVEMENT ACT (2008) – SUMMARY

The law concerning mental disabilities was significantly revised with enactment of the Act to Improve the National Instant Criminal Background Check System of 2008.¹ No federal entity may provide to NICS a disabling mental record if: (A) the adjudication or commitment “has been set aside or expunged, or the person has otherwise been fully released or discharged from all mandatory treatment, supervision, or monitoring”; (B) a court, board, or other lawful authority has found the person “to no longer suffer from the mental health condition that was the basis of the adjudication or commitment,” or the person has been “rehabilitated through any procedure available under law”; or (C) the adjudication or commitment “is based solely on a medical finding of disability, without an opportunity for a hearing” by a lawful authority, except for a person who “was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.”²

The new law requires all federal entities that render mental adjudications and commitments to establish a program for relief from disabilities. If an application for relief is not processed within 365 days, it is deemed denied. Judicial review is de novo. If the denial of a petition for relief is reversed, the applicant is entitled to attorney’s fees.³ Relief from disability removes the record from NICS and enables the person lawfully to receive firearms.⁴

A federal entity which conducts mental commitments and adjudications is required to provide oral and written notice at the commencement of the process of the prohibitions on receipt of firearms, the criminal penalties, and the availability of relief from disabilities.⁵ Any name or information provided in violation of the above procedures *except for this notice requirement*, before, on, or after the effective date of the law must be removed from NICS records.⁶ Query whether failure to give notice may be raised as a defense to a criminal prosecution.

The NICS improvement law provides grants to states to report mental commitment and

¹An Act to Improve the National Instant Criminal Background Check System, P.L. 110-180, 122 Stat. 2559 (2008).

²*Id.*, Title I, § 101(c)(1).

³*Id.*, Title I, § 101(c)(2)(A). Relief and judicial review shall be available according to the standards in 18 U.S.C. § 925(c). The fee recovery provision states: “If the denial of a petition for relief has been reversed after such judicial review, the court shall award the prevailing party, other than the United States, a reasonable attorney's fee for any and all proceedings in relation to attaining such relief, and the United States shall be liable for such fee. Such fee shall be based upon the prevailing rates awarded to public interest legal aid organizations in the relevant community.”

⁴*Id.*, Title I, § 101(c)(2)(B).

⁵*Id.*, Title I, § 101(c)(3).

⁶*Id.*, Title I, § 101(c)(4).

adjudication records, and a certain percentage of each grant is required to be used to maintain relief from disabilities programs.⁷ For a state to obtain grants, it must implement a program for relief from disabilities which (1) permits a person adjudicated as a mental defective or committed to a mental institution under state law to apply to the state for relief from the disabilities imposed by federal law; (2) provides that a State court, board, or other lawful authority “shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities . . . , and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest”; and (3) permits a person whose application for the relief is denied to file a petition with the appropriate State court for a de novo judicial review.⁸ If the state grants relief, the adjudication or commitment is deemed not to have occurred for purposes of the federal prohibition on receipt of a firearm.⁹

This is the first time since passage of the prohibitions in the Gun Control Act of 1968 to recognize relief from disabilities by the federal or state entities which ordered the mental commitment or adjudicated the person as a mental defective in the first place. The lifetime prohibition in the 1968 Act was revised by the Firearms Owners’ Protection Act of 1986 to allow ATF to remove such disabilities, but appropriations acts in recent years have prohibited this program.

⁷*Id.*, Title I, § 103(a)(1) (not less than 3% or more than 10%).

⁸*Id.*, Title I, § 105(a).

⁹*Id.*, Title I, § 105(b), citing 18 U.S.C. § 922(d)(4), (g)(4).