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4191-02U

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 421

[Docket No. SSA-2016-0011]

RIN 0960-AH95

Implementation of the NICS Improvement Amendments Act of 2007 (NIAA)

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: We propose to implement provisions of the NIAA that require Federal agencies to provide relevant records to the Attorney General for inclusion in the National Instant Criminal Background Check System (NICS). Under the proposed rule, we would identify, on a prospective basis, individuals who receive Disability Insurance benefits under title II of the Social Security Act (Act) or Supplemental Security Income (SSI) payments under title XVI of the Act and 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. We propose to provide pertinent information about these individuals to the Attorney General on not less than a quarterly basis. As required by the NIAA, at the commencement of the adjudication process we would also notify individuals, both orally and in writing, of their possible Federal prohibition on possessing or receiving firearms, the consequences of such inclusion, the criminal penalties for violating the Gun Control Act, and the availability of relief from the prohibitions imposed by Federal law. Finally, we also propose to establish a program

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that permits individuals to request relief from the Federal firearms prohibitions based on our adjudication. The proposed rule would allow us to fulfill responsibilities that we have under the NIAA.

DATES: To ensure that your comments are considered, we must receive them no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: You may submit comments by any one of three methods – Internet, fax, or mail. Do not submit the same comment multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA-2016-0011 so that we may associate your comments with the correct regulation.

CAUTION: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. Internet: We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the “Search” function to find docket number SSA–2016–0011. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we

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must post each comment manually. It may take up to a week or more for your comment to be viewable.

2. Fax: Fax comments to (410) 966-2830.

3. Mail: Mail your comments to NICS Comments, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235-6401.

Comments are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov> or in person, during regular business hours, by arranging with the contact identified below.

FOR FURTHER INFORMATION CONTACT: Social Security Administration, 410-965-3735 or Regulations@ssa.gov. We will not accept public comments at this telephone number or email address; to comment, please follow the instructions above. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION:

Background

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Section 103 of the Brady Handgun Violence Prevention Act (Brady Act) required the Attorney General to establish the NICS, which allows a Federal Firearms Licensee (FFL) to determine whether the law prohibits a potential buyer from possessing or receiving a firearm.¹ The Brady Act and its implementing regulations are designed to prevent the transfer of firearms by FFLs to individuals who are not allowed to possess or receive them because of restrictions contained in the Gun Control Act of 1968, as amended,² or State law. Federal law makes it unlawful for certain persons to ship, transport, receive, or possess any firearm or ammunition that has been shipped or transported in interstate or foreign commerce.³ As relevant to our programs, the Federal prohibition on the possession or receipt of firearms or ammunition applies to a person who, in the language of the statute, "has been adjudicated as a mental defective."⁴

In 2007, Congress found that many background checks were delayed if the Federal Bureau of Investigation (FBI) did not have automated access to complete information concerning persons prohibited from possessing or receiving a firearm under Federal or State law. Congress noted that the primary cause of delay in the NICS background checks included a lack of automated access to information concerning persons prohibited from possessing or receiving a firearm because of mental illness, restraining orders, or misdemeanor convictions for domestic

¹ Pub. L. 103-159, 107 Stat. 1536, 1541 (codified at 18 U.S.C. 922 note).

² Codified at 18 U.S.C. Chapter 44.

³ 18 U.S.C. 922(g) and (n).

⁴ 18 U.S.C. 922(g)(4). In these rules, we will refer to this prohibition as the "Federal mental health prohibitor" although we also use the statutory language in section 922(g)(4) in our proposed regulatory language below.

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violence.⁵ Congress also found that computerizing information relating to criminal history, criminal dispositions, mental illness, restraining orders, and misdemeanor convictions for domestic violence, or making this information available to the NICS in a usable format, could improve automated access to it.⁶

To address these concerns, Congress enacted the NIAA,⁷ which strengthened the NICS by increasing the quantity and quality of relevant records from Federal, State, and tribal authorities accessible by the system. Among other things, the NIAA requires that, if a Federal department or agency has any record demonstrating that a person falls within one of the categories in 18 U.S.C. 922(g) or (n), the head of that department or agency must provide the pertinent information contained in the record to the Attorney General, not less frequently than quarterly, for inclusion in the NICS.⁸

On January 16, 2013, the President issued a Memorandum to Federal departments and agencies aimed at further strengthening the accuracy and efficiency of the Federal background check system for firearms purchases.⁹ The President directed the Department of Justice (DOJ) to

⁵ NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. 110-180, § 2, 121 Stat. 2559, 2559-2560.

⁶ Id.

⁷ Pub. L. 110-180, 121 Stat. 2559 (codified at 18 U.S.C. 922 note).

⁸ NIAA, § 101(a)(4), 121 Stat. at 2161.

⁹ Memorandum for the Heads of Executive Departments and Agencies, Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 78 FR 4297 (2013).

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provide guidance to agencies regarding the identification and sharing of relevant Federal records

and their submission to the NICS; DOJ provided its guidance to agencies in March 2013.¹⁰

The relevant section of the DOJ Guidance discusses the Federal mental health prohibitor and the relevant agency records with respect to that prohibitor as follows:

Pursuant to 18 U.S.C. § 922(g)(4), any person 'who has been adjudicated as a mental defective or who has been committed to a mental institution' is prohibited from shipping, transporting, possessing or receiving firearms under federal firearms laws. ATF has clarified through regulations that this prohibitor covers the following circumstances and categories of individuals:

(1) 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:

- Is a danger to himself, herself or others; or
- Lacks the mental capacity to contract or manage his or her own affairs.

This includes (1) a person found to be insane by a court in a criminal case, and (2) a person found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 76b of the Uniform Code of Military Justice, 10 U.S.C. §§ 850a, 876b.

(2) A formal commitment of a person to a mental institution by a court, board, commission or other lawful authority. This includes commitment to a mental institution involuntarily, commitment for mental defectiveness or mental illness or commitment for other reasons, such as for drug use. It does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Please note the following four important things about this prohibitor:

- First, 'mental institution' includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities and other facilities that provide diagnoses by

¹⁰ Department of Justice, Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS (March 2013) ("DOJ Guidance").

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licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

- Second, 'mental defective' does not include a person who has been granted relief from the disability through a qualifying federal or state relief from disability program as authorized by the NIAA.
- Third, 'mental defective' also does not include a person whose adjudication or commitment was imposed by a federal department or agency, and:
 - 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;
 - The person has been found by a court, board, commission or other lawful authority to no longer suffer from the mental health condition that was the basis of the adjudication or commitment, or has otherwise been found to be rehabilitated through any procedure available under law; or
 - The adjudication or commitment is based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission or other lawful authority, and the person has not been adjudicated as a mental defective consistent with 18 U.S.C. § 922(g)(4), except that nothing in this section or any other provision of law shall prevent a federal department or agency from providing to the Attorney General any record demonstrating that a person 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.
- Fourth, agencies that conduct mental health adjudications must provide both oral and written notice to the individual at the commencement of the adjudication process. Such notice must include:
 - Notification that adjudication of the person as a mental defective or commitment to a mental institution, when final, will prohibit the individual from purchasing, possessing, receiving, shipping or transporting a firearm or ammunition under 18 U.S.C. § 922(d)(4) or § 922(g)(4);
 - Information about the penalties imposed for unlawful possession, receipt, shipment or transportation of a firearm under 18 U.S.C. § 924(a)(2); and

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- Information about the availability of relief from the disabilities imposed by federal laws with respect to the acquisition, receipt, transfer, shipment, transportation or possession of firearms.

Relevant Records. Records that are relevant to this prohibitor include judgment and commitment orders, sentencing orders and court or agency records of adjudications of an individual's inability to manage his or her own affairs if such adjudication is based on marked subnormal intelligence or mental illness, incompetency, condition or disease. This last category includes certain agency designations of representative or alternate payees for program beneficiaries.¹¹

Therefore, DOJ has determined that to comply with the NIAA, we must report to the Attorney General information about some of our title II and title XVI beneficiaries.¹²

The FBI collects and maintains, in the NICS Index, certain identifying information about individuals who are subject to one or more Federal prohibitors and thus are ineligible to possess or receive firearms.¹³ The minimum information required in a NICS Index record consists of the name of the ineligible individual, the individual's date of birth, sex, codes indicating the applicable prohibitor, and the submitting entity. We also propose to include the individual's Social Security number to ensure accurate identification. For individuals subject to the Federal

¹¹ The ATF regulations discussed in the DOJ Guidance are found at 27 CFR 478.11.

¹² As part of our responsibilities under the NIAA, we will also provide the Attorney General with copies of court orders that we receive regarding adult title II and title XVI disability beneficiaries who have been declared legally incompetent by a State or Federal court. Our procedures regarding these types of orders are found in POMS GN 00502.005 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502005>) and GN 00502.300 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502300>). The FBI would determine whether these court orders meet the requirements of the Federal mental health prohibitor.

¹³ See National Instant Criminal Background Check System (NICS) Operations, 2014, at page 1 (available at: <http://www.fbi.gov/about-us/cjis/nics/2014-operations-report>) (The NICS Index, "a database created specifically for the NICS, contains information contributed by local, state, tribal, and federal agencies pertaining to persons prohibited from receiving or possessing a firearm pursuant to state and/or federal law. Typically, the records maintained in the NICS Index are not available via the III [Interstate Identification Index] or the NCIC [National Crime Information Center].")

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mental health prohibitor, we would submit to the NICS only the fact that the individual is subject to that prohibitor; we would not provide underlying diagnoses, treatment records, or other identifiable health information, nor does the NICS maintain that information.

A NICS background check queries the NICS Index and certain other national databases to determine whether a prospective buyer's identifying information matches any prohibiting records contained in the databases.¹⁴ The NICS Index can be accessed only for the limited purposes authorized by regulation.¹⁵ The potential transfer of a firearm from an FFL to a prospective buyer proceeds as follows: (1) the prospective buyer is required to provide personal information on a Firearms Transaction Record (ATF Form 4473); (2) unless the prospective buyer has documentation that he or she qualifies for an exception to the NICS background check requirement,¹⁶ the FFL contacts the NICS—electronically, by telephone, or through a State level point of contact—and provides certain identifying information about the prospective buyer from

¹⁴ See [National Instant Criminal Background Check System, Fact Sheet](http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet) (available at: <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet>.) The other databases include the III, which contains criminal history record information; and the NCIC, which includes, e.g., information on persons subject to civil protection orders and arrest warrants.

¹⁵ 28 CFR 25.6(j). Under this regulation, access to the NICS Index for purposes unrelated to NICS background checks is limited to uses for the purposes of: (1) providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives; (2) responding to an inquiry from ATF in connection with a civil or criminal law enforcement activity relating to the Gun Control Act or the National Firearms Act; or (3) disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

¹⁶ These exceptions are outlined in 27 CFR 478.102(d). For example, a NICS check would not be required where the potential recipient of a firearm has presented a valid State permit or license, provided conditions at 27 CFR 478.102(d)(1) are met.

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ATF Form 4473;¹⁷ (3) the FFL receives a response that the prospective firearm transfer may proceed, is denied, or is delayed. If the prospective buyer's information matches a record contained in one of the databases reviewed, but there is insufficient information in the record to immediately determine whether the firearm transfer should proceed or be denied, the transfer is delayed.

If there is a match, a NICS examiner reviews the record to determine whether the information it contains is, in fact, prohibiting and then either: (1) advises the FFL to proceed with the transaction if the record does not contain prohibiting information, (2) denies the transaction (due to ineligibility) if the record does contain prohibiting information, or (3) delays the transaction pending further research if it is unclear based solely on the existing information in the record whether it is prohibiting.¹⁸ The NICS examiner does not disclose the reason for the determination to the FFL. As a result, the FFL does not learn that the individual is ineligible due to the Federal mental health prohibitor. If the NICS examiner does not provide a final status to the FFL within 3 business days of the initial background check request, the FFL may proceed with the transaction, if he or she chooses to do so.¹⁹

¹⁷ The form collects the prospective buyer's name; demographic information such as address, place and date of birth, sex, citizenship, race and ethnicity; and "yes" or "no" answers to questions about the person's criminal history and other potential prohibitors. The form is available at <http://www.atf.gov/forms/download/atf-f-4473-1.pdf>.

¹⁸ For example, a "delay" response may mean that further research is required because potentially prohibitive criteria exist, but the matched records are incomplete. See **Federal Bureau of Investigation (FBI) Fact Sheet**, available at: www.fbi.gov/about-us/cjis/nice/general-information/fact-sheet.

¹⁹ Some States have waiting periods that also must be complied with before a firearm may be transferred, regardless of whether a proceed response from the NICS is received by the FFL within 3 business days.

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The Proposed Rule

The regulatory changes in this proposed rule fall into three general categories: (1) identifying relevant records and reporting pertinent information to the NICS, (2) oral and written notification to our title II and title XVI beneficiaries who meet the requisite criteria, and (3) establishing a program that permits our beneficiaries who meet the requisite criteria to apply for relief from the firearms prohibition imposed by 18 U.S.C. 922(d)(4) or (g)(4) by virtue of our adjudication.²⁰

Identifying Relevant Records and Reporting Pertinent Information to the NICS

To comply with the requirements of the NIAA, we propose to identify, on a prospective basis, any title II or title XVI beneficiary whom we are required to report for inclusion in the NICS because that person is subject to the Federal mental health prohibitor as a result of our adjudication. Under the governing regulations, the Federal mental health prohibitor applies when there has been 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

²⁰ Section 101(c)(2)(A)(iii) of the NIAA specifies that relief and judicial review with respect to the “relief from disabilities” program shall be available according to the standards prescribed in 18 U.S.C. 925(c). In these rules, we will refer to this program as the “relief from firearm prohibitions” program in order to avoid any possible confusion with our disability programs.

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contract or manage his own affairs.”²¹ This regulation therefore contains three operative components. First, there must be a determination by a “lawful authority.” Second, the adjudication must concern (as relevant to our programs) an individual’s inability to manage his or her own affairs. Third, the adjudication regarding the inability to manage an individual’s affairs must be based on “marked subnormal intelligence or mental illness, incompetency, condition or disease.”

There are several relevant observations regarding the application of these three factors to our adjudication process. First, our determination regarding an individual’s claim for benefits, specifically our determination regarding the appointment of a representative payee, which we make in accordance with the authority granted to the Commissioner under the Act, constitutes a determination by a “lawful authority.”²² Second, the regulation’s focus on an individual’s lack of “mental capacity to contract or manage his or her own affairs” makes our appointment of a representative payee the determination that makes a person subject to the Federal mental health prohibitor.²³ The DOJ Guidance discussed above makes that point clear, specifying that relevant records for the Federal mental health prohibitor include “certain agency designations of representative or alternate payees for program beneficiaries.” As we discuss in more detail

²¹ 27 CFR 478.11.

²² See 42 U.S.C. 405(b)(1), 1383(c)(1)(A) (directing the Commissioner to “make findings of fact, and decisions as to the rights of any individual applying for a payment” under titles II and XVI of the Act), 902(a)(4) (providing that the Commissioner “shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof.”)

²³ See 42 U.S.C. 405(j)(1)(A), 1383(a)(2)(A)(ii); 20 CFR 404.2010(a), 416.610(a).

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below, once we have determined that an individual is disabled, we may need to decide whether he or she is capable of managing his or her benefits, or whether his or her interest would be served by the appointment of a representative payee.²⁴ Finally, the regulation requires that the individual lack the mental capacity to manage his or her own affairs “as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease.” Consequently, the basis for the individual’s inability to manage his or her own affairs must therefore be the “result of” his or her mental impairment. As a result, individuals whom we are required to report to NICS will be a subset of the universe of individuals for whom we have appointed a representative payee.

We recognize that there is no perfect fit between: (1) our adjudication regarding a claimant’s entitlement to benefits and determination of whether to designate a representative payee; and (2) the regulatory definition of an individual who is subject to the Federal mental health prohibitor. Considering the relevant regulatory factors, discussed above, however, we believe that there is a reasonable and appropriate fit between the criteria we use to decide whether some of our beneficiaries are disabled and require a representative payee and the Federal mental health prohibitor. Accordingly, we propose that, during the title II or title XVI claim development and adjudication process, or when we take certain post-entitlement or post-eligibility actions, we will identify individuals who: (1) filed a claim based on disability; (2) we have determined to be disabled based on a finding at step three of our sequential evaluation

²⁴ Id.

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process that the individual's impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listing of Impairments (Listings) (12.00 et seq.);²⁵ (3) have a primary diagnosis code in our records that is based on a mental impairment;²⁶ (4) have attained age 18, but have not yet attained full retirement age; and (5) require their benefit payments to be made through a representative payee because we have found that they are incapable of managing benefit payments.

We propose to include the first four factors in order to help us identify individuals for whom our determination is the "result of" his or her mental impairment, and not because of another factor, such as the individual's age or physical impairment. The final factor, our appointment of a representative payee, focuses on the second factor under the applicable regulations, the individual's inability to manage his or her affairs.²⁷

²⁵ See 20 CFR 404.1520(a)(4)(iii), 404.1520(d), 404.1525, 404.1526, 416.920(a)(4)(iii), 416.920(d), 416.925, 416.926. The Listings are found in 20 CFR Part 404, Subpart P, Appendix 1.

²⁶ The relevant diagnosis codes are: Listing 12.02: 2940 (Organic Mental Disorders); Listing 12.03: 2950 (Schizophrenic, Paranoid and Other Psychotic Disorders); Listing 12.04: 2960 (Affective Disorders); Listing 12.05: 3180 (Intellectual Disability); Listing 12.06: 3000 (Anxiety-Related Disorders); Listing 12.07: 3060 (Somatoform Disorders); Listing 12.08: 3010 (Personality Disorders); and Listing 12.10: 2990 (Autistic Disorders and Other Pervasive Developmental Disorders). See Program Operations Manual System (POMS) DI 26510.015G (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0426510015>); DI 28084.035A (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0428084035>). If we find a claimant's borderline intellectual functioning to be of listing-level severity, we will use the code 3195 and base the appropriate listing category for our finding of medical equivalence on a consideration of all the cognitive and behavioral manifestations in the particular claim. POMS DI 26510.015G.

²⁷ Our choice of an age criterion—individuals who have attained age 18, but have not yet attained full retirement age—also reflects the fact that when we appoint a representative payee for individuals at full retirement age or older, we do not obtain the type of medical evidence that would allow us to determine whether the inability to manage their benefit payments is as a result of a mental impairment or for some other reason.

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We propose to include the existence of a Listing-level mental impairment as one of the criteria for our reporting to the NICS because the existence of such an impairment best identifies those beneficiaries who are unable to manage their affairs as a result of their mental impairment, and are therefore subject to the Federal mental health prohibitor. We use a five-step sequential evaluation process to decide if an individual who has filed a claim for benefits is disabled.²⁸ At the third step of that process, we decide whether the individual has an impairment, or combination of impairments, that meets or medically equals the requirements of an impairment in the Listings.²⁹ The Listings describe, for each of the major body systems, impairments that we consider severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience.

Most body system sections in the Listings contain two parts: an introduction and the specific listings. The introduction to each body system contains information relevant to the use of the listings in that body system; for example, examples of common impairments in the body system and definitions used in the listings for that body system. The introductory section also may include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that an impairment(s) satisfies the criteria of a particular listing in the

²⁸ 20 CFR 404.1520(a), 416.920(a). When we perform a continuing disability review, we use a separate sequential evaluation process to decide if a beneficiary continues to be disabled. 20 CFR 404.1594(f), 416.994(b)(5).

²⁹ In the sequential evaluation process we use to determine an individual's continuing eligibility, we consider whether the individual's medically determinable impairment(s) meets or medically equals the requirements of the Listings at the second step of the process in title II claims, and at the first step of the process in title XVI claims. 20 CFR 404.1594(f)(2), 416.994(b)(5)(i).

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body system. The specific listings follow the introduction in each body system. Within each listing, we specify the objective medical evidence and other findings needed to satisfy the criteria of that Listing.³⁰

The Listings help us ensure that determinations or decisions of disability have a sound medical basis, that claimants receive equal treatment throughout the country, and that we can readily identify the majority of persons who are disabled. The level of severity described in the Listings—the inability to perform any gainful activity—is such that an individual who is not engaging in substantial gainful activity and who has an impairment that meets or medically equals the requirements of the Listings is generally considered unable to work by reason of the medical impairment alone.³¹ Thus, individuals who have a Listing-level impairment are the most severely disabled beneficiaries we serve. In our view, given the medical severity of a Listing-level impairment, using our award of benefits based on the mental disorders listings, combined with the appointment of a representative payee, as part of the criteria we use to identify individuals for reporting to the NICS most appropriately identifies beneficiaries who are subject to the Federal mental health prohibitor in a manner consistent with the congressional purpose expressed in the NIAA.

³⁰ 20 C.F.R. 404.1525(c), 416.925(c).

³¹ Social Security Ruling (SSR) 86-8 (available at: https://ssa.gov/OP_Home/rulings/di/01/SSR86-08-di-01.html).

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We acknowledge that we are not proposing to identify and report for inclusion in the NICS those individuals for whom we have appointed a representative payee after a finding of disability at step five of our sequential evaluation process. At step five of the sequential evaluation process we decide whether an individual can perform a significant number of jobs that exist in the national economy considering his or her age, education, past work experience, and residual functional capacity.³² In contrast to a step three finding of disability, which focuses on medical severity as established by objective criteria, a step five finding of disability takes into account vocational factors and depends on an assessment of the number of jobs in the economy that a person can perform. For the reasons discussed above, we believe that including individuals whom we have determined to have a Listing-level mental impairment (and who meet the other criteria that we propose), most closely comports with the requirements of the NIAA, the regulatory definition of the Federal mental health prohibitor, and the DOJ Guidance. However, we recognize that applying the proposal to beneficiaries who are found disabled at step five of our sequential evaluation process may also be a reasonable interpretation of the NIAA, its implementing regulations, and the DOJ Guidance, as applied to our programs. Therefore, during the comment period for this NPRM, we invite comment on the possible benefits and limitations of applying the proposal to beneficiaries who are found disabled based on a finding at step five of our sequential evaluation process. Further, we invite comment on the possible manner in which we could implement the proposal with respect to these beneficiaries in a manner that is least disruptive to our ability to process claims and deliver services to the public. We will

³² See 20 CFR 404.1520(a)(4)(v), 404.1520(g), 416.920(a)(4)(v), 416.920(g).

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consider the comments we receive on this issue, and determine whether to include these beneficiaries in our reporting to the NICS. If we decide to include beneficiaries who are found disabled at step five of our sequential evaluation process in our reporting to the NICS, we will respond to the comments and explain our reasons for doing so in any final rule, and make appropriate modifications to the regulatory language in the final rule.

The information about the individual that we propose to report for inclusion in the NICS would consist of his or her: (1) name, (2) full date of birth, (3) sex, and (4) Social Security number. We propose to provide the pertinent information about individuals meeting the proposed criteria to the Attorney General for inclusion in the NICS on not less than a quarterly basis. We also propose to provide information regarding these individuals on a prospective basis. That means we would report individuals to the Attorney General for inclusion in the NICS based on representative payee determinations meeting the 18 U.S.C. 922(g)(4) requirements, that we make on or after the effective date of any final rule.

In addition, if we conduct a continuing disability review (including an age-18 disability redetermination) in an individual's case and determine, on or after the effective date of any final rule, that the individual meets the criteria for inclusion in the NICS, we would also report that individual for inclusion in the NICS. That means that we would report an individual for inclusion in the NICS after a continuing disability review if we appoint a representative payee for the person because he or she is incapable of managing benefit payments as a result of a

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primary mental impairment that meets or medically equals the requirements of one of the Mental Disorders Listings. We would do so even if we originally determined that the individual did not require a representative payee because of his or her mental impairment before the effective date of any final rule.

Oral and Written Notification to Beneficiaries

Under our representative payee policy, unless direct payment is prohibited, we presume that an adult beneficiary is capable of managing or directing the management of benefits. However, if we have information that the beneficiary has a mental or physical impairment that prevents him or her from managing or directing the management of benefits, we will develop the issue of capability.³³ If a beneficiary has a mental impairment, we will develop the capability issue if there is an indication that the beneficiary may lack the ability to reason properly, is disoriented, has seriously impaired judgment, or is unable to communicate with others.³⁴

It is also important to remember that we can reevaluate a beneficiary's capability even though we may have already determined a beneficiary's capability in the past. We are always alert to changes in circumstances that might indicate the need for a new capability determination.

³³ POMS GN 00502.020 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502020>). Under our policy, we prohibit legally incompetent beneficiaries and children under age 15 from receiving benefits directly. In these cases, we will appoint a representative payee. POMS GN 00502.005A (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502005>).

³⁴ POMS GN 00502.020A.2.

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For example, a once incapable beneficiary who requests direct payment may now be capable, or a once capable beneficiary who is admitted to a mental hospital may now be incapable. We consider reviewing capability in a number of situations, including: when we perform a continuing disability review or an SSI redetermination (including an age-18 disability redetermination), when we discover that a beneficiary manages any other benefits that he or she may be entitled to, when a beneficiary appeals the appointment of a payee, and when any other contact with the beneficiary or payee raises a question about the beneficiary's capability.³⁵

We base our determination of whether to pay a beneficiary directly or through a representative payee on evidence provided to us.³⁶ When we adjudicate an individual's capability, we consider anything that helps us understand the beneficiary's ability to manage funds.³⁷ Usually, we characterize evidence of capability as one of three types. First, we consider legal evidence; legal evidence is required only where there is an allegation that the beneficiary is legally incompetent.³⁸ Second, we consider medical evidence; whenever possible, we will obtain medical evidence that indicates the beneficiary cannot manage or direct someone else to

³⁵ POMS GN 00502.020A.6.

³⁶ See 20 CFR 404.2015, 416.625.

³⁷ POMS GN 00502.020B.

³⁸ POMS GN 00502.005A.2 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502005>). Under our policy, there must be a court order in place for a finding that an individual is incompetent. The appointment of a legal guardian alone does not necessarily mean the beneficiary is legally incompetent. The court order must specifically address the beneficiary's competency or must contain a statement regarding the individual's ability to handle his or her financial affairs. If the court order does not specify incompetency, we may use the Digest of State Guardianship Laws found in POMS GN 00502.300 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502300>) to help determine if the court order represents a finding of legal incompetence, or we may call the court for clarification. Id.

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manage his or her benefits. Third, we consider lay evidence; in the absence of legal evidence, we will obtain lay evidence in all cases. If legal evidence establishes that the beneficiary is incompetent to manage or direct someone else to manage his or her benefits, the beneficiary must receive benefits through a representative payee, and no other development is necessary. Otherwise, we will make a capability determination based on lay and medical evidence.³⁹

The NIAA requires any Federal department or agency that conducts proceedings to adjudicate a person as subject to the Federal mental health prohibitor to provide the person with both oral and written notice of several things at the commencement of the adjudication process.⁴⁰ Consistent with the NIAA, the oral and written notice we propose to provide would advise the affected individual of the following: (1) the adjudication, when final, will prohibit him or her from purchasing, shipping, transporting, receiving, or possessing firearms and ammunition, pursuant to 18 U.S.C. § 922(d)(4) and (g)(4); (2) any person who knowingly violates these restrictions may be imprisoned for up to 10 years or fined up to \$250,000, or both; and 3) relief from the Federal firearms prohibitions imposed by 18 U.S.C. 922(d)(4) and (g)(4) as a result of our adjudication is available to the individual.

³⁹ POMS GN 00502.020B. We explain how we consider legal evidence of capability in POMS GN 00502.005 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502005>). We explain how we consider medical evidence of capability in POMS GN 00502.025 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502025>). We explain how we consider lay evidence of capability in POMS GN 00502.030 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502030>).

⁴⁰ Section 101(c)(3) of the NIAA, 121 Stat. at 2564.

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For our purposes, we consider the commencement of the adjudication process to mean the beginning of the capability determination process described above.⁴¹ Under these proposed rules, we would provide oral and written notice to the beneficiary after we have determined that he or she meets the medical requirements for disability based on a finding that his or her impairment(s) meets or medically equals the requirements of the Mental Disorders Listings, but before we find that he or she requires a representative payee. We recognize that this means we would provide some beneficiaries with the oral and written notice required by the NIAA, but ultimately not report them to the NICS because we determine that they do not require representative payees. We believe that the NIAA requires this result. Section 101(c)(3)(A) of the NIAA specifically states that an agency must provide oral and written notice that, “should the agency adjudicate the person as a mental defective,” the adjudication, “when final, will prohibit the individual from purchasing, possessing, receiving, shipping, or transporting a firearm or ammunition.” (Emphasis added). The statutory language clearly indicates that Congress intended for us to provide the oral and written notice before we actually find that an individual needs a representative payee.

Program for Relief

⁴¹ We recognize that, for purposes of reporting an individual to NICS, the “commencement of the adjudication process” differs from the meaning that we would attribute to that phrase in the context of our disability determination process. As we discuss here, for the purpose of these proposed rules, the commencement of the adjudication process refers to the commencement of the process we use to determine whether an individual requires a representative payee, after we have determined the individual to be disabled based on a finding at step three of our sequential evaluation process that the individual’s impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listing of Impairments.

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Section 101(a)(2)(A) of the NIAA requires a Federal agency that makes any adjudication related to the mental health of a person to establish a program that permits a person to apply for relief from the firearms prohibitions imposed by 18 U.S.C. 922(g)(4). We propose to allow a person who is subject to the Federal mental health prohibitor because he or she meets the criteria in § 421.110(b) to apply for relief from the Federal firearms prohibitions imposed as a result of our adjudication.

We propose to provide these individuals with a process by which they can apply for relief from the Federal firearms prohibitions and a means to submit evidence for us to consider. As required by the NIAA, this request for relief process would focus on whether the circumstances regarding the disability, and the applicant's record and reputation, are such that we find the applicant 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.⁴² To make these required findings, we propose to require the individual who requests relief to provide us with certain evidence, including evidence from his or her primary mental health provider regarding his or her current mental health status and mental health status for the past 5 years. We also propose to require an applicant for relief to submit written statements and any other evidence regarding the applicant's reputation. As part of the relief process, we would also obtain a criminal history report on the applicant.

⁴² Section 101(c)(2)(A)(iii) of the NIAA, 121 Stat. at 2563; see 18 USC 925(c).

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After the applicant submits the evidence required under the rules, a decision maker who was not involved in finding that the applicant's benefit payments must be made through a representative payee would review the evidence and act on the request for relief. We would notify the applicant in writing of our action regarding the request for relief.

Section 101(c)(2)(A)(iii) of the NIAA specifies⁴³ that relief and judicial review with respect to the relief program shall be available according to the standards prescribed in 18 U.S.C. 925(c). Section 925(c), in turn, provides that any person whose application for relief is denied may file a petition for a judicial review of the denial with the United States district court for the district in which he or she resides. The court may, in its discretion, admit additional evidence where failure to do so would result in a miscarriage of justice. Consistent with the standards contained in 18 U.S.C. 925(c), we propose to include in the regulation a provision that the individual may seek judicial review when we deny his or her request for relief through the filing of a petition for relief in the United States district court for the district in which the individual resides.

REGULATORY PROCEDURES

Executive Order 12866

⁴³ 121 Stat. at 2563.

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We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the requirements for a significant regulatory action under Executive Order 12866 and were subject to OMB review.

Regulatory Flexibility Act

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they only affect individuals. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These proposed rules pose new public reporting burdens in § 421.150(b), 421.151(b)(1)-(2) and (c)(1)-(3), 421.152(b), and 421.165(b). Since we will create new forms for these requirements, we will solicit public comment for them in a separate future notice in the *Federal Register* as part of the Paperwork Reduction Act process.

(Catalog of Federal Domestic Program Nos. 96.001, Social Security--Disability Insurance; 96.002, Social Security--Retirement Insurance; 96.004, Social Security--Survivors Insurance, and 96.006, Supplemental Security Income)

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List of Subjects

Administrative practice and procedure, Freedom of information, Privacy, Reporting and recordkeeping requirements.

Dated:

Carolyn W. Colvin,
Acting Commissioner of Social Security.

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For the reasons set out in the preamble, we propose to add a new part 421 to chapter III of title 20 of the Code of Federal Regulations to read as follows:

PART 421—NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS)

Sec.

421.100 What is this part about?

421.105 Definitions of terms used in this part.

421.110 Identifying records relevant to the NICS.

421.120 NICS reporting requirements.

421.140 Notice requirements for an affected individual.

421.150 Requesting relief from the Federal firearms prohibitions in 18 U.S.C. 922(g)(4).

421.151 Evidentiary requirements and processing a request for relief.

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421.152 Time limits to provide evidence supporting a request for relief.

421.155 Burden of proof in requests for relief.

421.160 Granting a request for relief.

421.165 Actions on a request for relief.

421.170 Judicial review following a denial of a request for relief.

Authority: Section 702(a)(5) of the Social Security Act (42 U.S.C. 902(a)(5)); sec. 101, Pub. L. 110-180, 121 Stat. 2559, 2561 (18 U.S.C. 922 note).

§ 421.100 What is this part about?

The rules in this part relate to the Brady Handgun Violence Prevention Act (Brady Act), as amended by the NICS Improvement Amendments Act of 2007 (NIAA) (Pub. L. 110-180).

The Brady Act required the Attorney General to establish the National Instant Criminal Background Check System (NICS), which allows a Federal firearms licensee to determine whether the law prohibits a potential buyer from possessing or receiving a firearm. Among other things, the NIAA requires a Federal agency that has any records demonstrating that a person falls within one of the categories in 18 U.S.C. 922(g) or (n) to report the pertinent

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information contained in the record to the Attorney General for inclusion in the NICS. The rules in this part define key terms and explain which records we will report to the NICS. They also explain how we will provide oral and written notification to our title II and title XVI beneficiaries who meet the requisite criteria. Finally, the rules explain how beneficiaries who meet the requisite criteria may apply for relief from the Federal firearms prohibitions, and how we will process a request for relief.

§ 421.105 Definitions of terms used in this part.

For the purposes of this part:

Adjudicated as a mental defective, in accordance with 18 U.S.C. 922(g)(4), as amended, means 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: is a danger to himself or others; or lacks the mental capacity to contract or manage his own affairs.

Affected individual means an individual:

(1) Who has been found disabled based on a finding that the individual's impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listing of

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Impairments (12.00 et seq.) under the rules in part 404, subpart P of this chapter, or under the rules in part 416, subpart I of this chapter; and

(2) For whom we need to make a capability finding under the rules in part 404, subpart U of this chapter, or under the rules in part 416, subpart F of this chapter, and that finding is the result of marked subnormal intelligence, or mental illness, incompetency, condition or disease.

Commencement of the adjudication process means, with respect to an affected individual, the beginning of the process we use to determine whether, as a result of a mental impairment:

(1) An individual is capable of managing his or her own benefits, or

(2) Whether his or her interests would be better served if we certified benefit payments to another person as a representative payee, under the rules in part 404, subpart U of this chapter, or the rules in part 416, subpart F of this chapter.

Full retirement age has the meaning used in § 404.409 of this chapter.

NICS means the National Instant Criminal Background Check System established by the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (codified at 18 U.S.C. 922 note), as amended.

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Primary diagnosis code means the code we use to identify an individual's primary medical diagnosis in our records. The primary diagnosis refers to the basic condition that renders an individual disabled under the rules in part 404, subpart P of this chapter, or under the rules in part 416, subpart I of this chapter.

Us or We means the Social Security Administration.

§ 421.110 Identifying records relevant to the NICS.

(a) In accordance with the requirements of the NIAA, we will identify the records of individuals whom we have "adjudicated as a mental defective." For purposes of the Social Security programs established under titles II and XVI of the Social Security Act, we have "adjudicated as a mental defective" any individual who meets the criteria in paragraphs (b)(1) – (5) of this section.

(b) During our claim development and adjudication process, or when we take certain post-entitlement or post-eligibility actions, we will identify any individual who:

(1) Has filed a claim based on disability;

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(2) Has been determined to be disabled based on a finding that the individual's impairment(s) meets or medically equals the requirements of one of the Mental Disorders Listing of Impairments (12.00 et seq.) under the rules in part 404, subpart P of this chapter, or under the rules in part 416, subpart I of this chapter;

(3) Has a primary diagnosis code in our records based on a mental impairment;

(4) Has attained age 18, but has not attained full retirement age; and

(5) Requires that his or her benefit payments be made through a representative payee because we have determined, under the rules in part 404, subpart U of this chapter, or the rules in part 416, subpart F of this chapter, that he or she is incapable of managing benefit payments as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease.

(c) We will apply the provisions of this section to:

(1) Capability findings that we make in connection with initial claims on or after [INSERT EFFECTIVE DATE OF FINAL RULES] under the rules in part 404, subpart U of this chapter or the rules in part 416, subpart F of this chapter, or

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(2) Capability findings that we make in connection with continuing disability reviews (including age-18 disability redeterminations under § 416.987 of this chapter) on or after [INSERT EFFECTIVE DATE OF FINAL RULES] under the rules in part 404, subpart U of this chapter, or the rules in part 416, subpart F of this chapter. We will apply the provisions of this paragraph only with respect to capability findings in which we appoint a representative payee for an individual in connection with a continuing disability review.

§ 421.120 NICS reporting requirements.

On not less than a quarterly calendar basis, we will provide information about any individual who meets the criteria in § 421.110 to the Attorney General, or his or her designate, for inclusion in the NICS. The information we will report includes the name of the individual, his or her full date of birth, his or her sex, and his or her Social Security number. We will also report any other information that the Attorney General determines Federal agencies should report to the NICS.

§ 421.140 Notice requirements for an affected individual.

(a) At the commencement of the adjudication process, we will provide both oral and written notice to an affected individual that:

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(1) A finding that he or she meets the criteria in § 421.110(b)(1) – (5), when final, will prohibit the individual from purchasing, possessing, receiving, shipping, or transporting firearms and ammunition, pursuant to 18 U.S.C. 922(d)(4) and (g)(4);

(2) Any person who knowingly violates the prohibitions in 18 U.S.C. 922(d)(4) or (g)(4) may be imprisoned for up to 10 years or fined up to \$250,000, or both, pursuant to 18 U.S.C. § 924(a)(2); and

(3) Relief from the Federal firearms prohibitions imposed by 18 U.S.C. 922(d)(4) and (g)(4) by virtue of our adjudication is available under the NIAA.

§ 421.150 Requesting relief from the Federal firearms prohibitions in 18 U.S.C. 922(g)(4).

(a) If we report an individual to the NICS based on a finding that he or she meets the criteria in § 421.110(b)(1) – (5), the individual may apply for relief from the Federal firearms prohibitions imposed by Federal law as a result of our adjudication. If such an individual requests relief from us, we will apply the rules in §§ 421.150 to 421.165.

(b) An application for relief filed under this section must be in writing and include the information required by § 421.151. It may also include any other supporting data that we or the applicant deems appropriate. When an individual requests relief under this section, we will also

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obtain a criminal history report on the individual before deciding whether to grant the request for relief.

§ 421.151 Evidentiary requirements and processing a request for relief.

(a) When we decide whether to grant an application for relief, we will consider:

(1) The circumstances regarding the firearms prohibitions imposed;

(2) The applicant's record, which must include the applicant's mental health records and a criminal history report; and

(3) The applicant's reputation, developed through witness statements or other evidence.

(b) Evidence. The applicant must provide the following evidence to us in support of a request for relief:

(1) A current statement from the applicant's primary mental health provider assessing the applicant's current mental health status and mental health status for the 5 years preceding the date of the request for relief; and

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(2) Written statements and any other evidence regarding the applicant's reputation.

(c) Evidentiary requirements.

(1) A current statement from the applicant's primary mental health provider submitted under paragraph (b)(1) of this section. We will consider a statement from the applicant's primary mental health provider to be current if it is based on a complete mental health assessment that was conducted during the 90-day period immediately preceding the date we received the applicant's request for relief under paragraph (b)(1) of this section. The statement must specifically address:

(i) Whether the applicant has ever been a danger to himself or herself or others; and

(ii) Whether the applicant would pose a danger to himself or herself or others if we granted the applicant's request for relief and the applicant purchased and possessed a firearm or ammunition.

(2) Written statements regarding the applicant's character submitted under paragraph (b)(2) of this section. The statements must specifically:

(i) Identify the person supplying the information;

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(ii) Provide the person's current address and telephone number;

(iii) Describe the person's relationship with and frequency of contact with the applicant;

(iv) Indicate whether the applicant has a reputation for violence in the community; and

(v) Indicate whether the applicant would pose a danger to himself or herself or others if we granted the applicant's request for relief and the applicant purchased and possessed a firearm or ammunition.

(3) The applicant may obtain written statements from anyone who knows the applicant, including but not limited to clergy, law enforcement officials, employers, friends, and family members, as long as the person providing the statement has known the applicant for a sufficient period, has had recent and frequent contact with the beneficiary, and can attest to the beneficiary's good reputation. The individual submitting the written statement must describe his or her relationship with the applicant and provide information concerning the length of time he or she has known the applicant and the frequency of his or her contact with the applicant. The applicant must submit at least one statement from an individual who is not related to the applicant by blood or marriage.

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§ 421.152 Time limits to provide evidence supporting a request for relief.

(a) An applicant has 30 days after the date on which he or she submits a request for relief under § 421.150 to provide us with the evidence required under § 421.151(b)(1) – (3).

(b) An applicant may ask us for more time to submit evidence under paragraph (a) of this section. The request for an extension of time must be in writing and must give the reasons why the applicant cannot give us the required evidence within the 30-day period. If the applicant shows us that he or she had good cause for missing the deadline, we will extend the 30-day period. To determine whether good cause exists, we use the standards explained in § 404.911 of this chapter.

(c) If the applicant does not submit the evidence required under § 421.151 within the 30-day period provided under paragraph (a) of this section, or within the extended period provided under paragraph (b) of this section, we will dismiss the request for relief.

§ 421.155 Burden of proof in requests for relief.

An applicant who requests relief under § 421.150 must prove that he or she is not likely to act in a manner dangerous to public safety and that granting relief from the prohibitions imposed by 18 U.S.C. 922(d)(4) and (g)(4) will not be contrary to the public interest.

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§ 421.160 Granting a request for relief.

(a) We may grant an applicant's request for relief if the applicant establishes, to our satisfaction, that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant 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.

(b) We will not grant an applicant's request for relief if the applicant is prohibited from possessing firearms by the law of the State in which the applicant resides.

§ 421.165 Actions on a request for relief.

(a) After the applicant submits the evidence required under § 421.151 and any other evidence he or she wants us to consider, we will review the evidence, which will include any evidence from our records that we determine is appropriate. A decision maker who was not involved in making the finding that the applicant's benefit payments be made through a representative payee will review the evidence and act on the request for relief. We will notify the applicant in writing of our action regarding the request for relief.

(b) If we deny an applicant's request for relief, we will send the applicant a written notice

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that explains the reasons for our action. We will also inform the applicant that if he or she is dissatisfied with our action, he or she has 60 days from the date he or she receives the notice of our action to file a petition seeking judicial review in Federal district court.

(c) If we grant an applicant's request for relief, we will send the applicant a written notice that explains the reasons for our action. We will inform the applicant that we will notify the Attorney General, or his or her delegate, that the individual's record should be removed from the NICS database. We will also notify the applicant that he or she is no longer prohibited under 18 U.S.C. 922(g)(4) from purchasing, possessing, receiving, shipping, or transporting firearms or ammunition based on the prohibition that we granted the applicant relief from. We will notify the Attorney General, or his or her delegate, that the applicant's record should be removed from the NICS database after we grant the applicant's request for relief.

(d) The NIAA requires us to process each application for relief not later than 365 days after the date we receive it. If we fail to resolve an application for relief within that period for any reason, including a lack of appropriated funds, we will be deemed to have denied the relief request without cause. In accordance with the NIAA, judicial review of any petition brought under this paragraph shall be de novo.

§ 421.170 Judicial review following a denial of a request for relief.

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(a) Judicial review of our action denying an applicant's request for review is available according to the standards contained in 18 U.S.C. 925(c). An individual for whom we have denied an application for relief may file a petition for judicial review with the United States district court for the district in which he or she resides.

(b) If, on judicial review, a Federal court grants an applicant's request for relief, we will notify the Attorney General that the individual's record should be removed from the NICS database.