

**The National Instant Criminal Background Check System (NICS),
The NICS Improvement Act of 2007 (NIAA), and
H.B. 3352 (81st Texas Legislature)**

The NICS is a computerized system established under the Brady Handgun Violence Prevention Act of 1993 (Brady Act), Public Law 103-159, to provide information to federal firearms licensees (FFLs) on whether a prospective purchaser is eligible to receive or possess firearms. The NICS was implemented on November 30, 1998, and is a coordinated effort between local, state, and federal agencies. NICS checks are conducted by both the NICS Section of the FBI's Criminal Justice Information Services (CJIS) Division, and by state agencies acting as points of contact (POCs) for processing NICS checks for FFLs in their state. Before transferring a firearm to a non-licensed individual, an FFL must, pursuant to Title 18, United States Code (U.S.C.), Section 922(t), contact the NICS for a background check on the prospective transferee. The NICS then checks automated databases and, in cases where additional information is needed, makes follow-up requests to agencies such as the police, prosecutors, or the courts, that may have relevant information demonstrating whether the individual is prohibited from receiving a firearm under state or federal law. The NICS has three business days to determine whether a proposed gun transfer is prohibited. If the NICS has not been able to make a definitive determination within that time frame, the FFL may lawfully transfer the firearm.

The NICS Improvement Amendments Act of 2007, Pub. L. 110-180 ("the NICS Improvement Act"), was signed into law on January 8, 2008. The NICS Improvement Act amends the Brady Handgun Violence Prevention Act of 1993 ("the Brady Act") (Pub. L. 103-159), under which the Attorney General established NICS. The Brady Act requires Federal Firearms Licensees (FFLs) to contact the NICS before transferring a firearm to an unlicensed person for information on whether the proposed transferee is prohibited from receiving or possessing a firearm under state or federal law.

The NICS Improvement Act was enacted in the wake of the April 2007 shooting tragedy at Virginia Tech, wherein the shooter was able to purchase firearms from an FFL because information about his prohibiting mental health history was not available to the NICS and the system was therefore unable to deny the transfer of the firearms used in the shootings. The NICS Improvement Act seeks to address the gap in information available to NICS about such prohibiting mental health adjudications and commitments and other prohibiting factors. Filling these information gaps will better enable the system to operate as intended to keep guns out of the hands of persons prohibited by federal or state law from receiving or possessing firearms. The automation of records will also reduce delays for law-abiding gun purchasers.

During the 2009 legislative session, HB 3352 was developed and passed in order to implement the requirements of the NICS Improvement Act. With regard to relief from disability, the following new section of the Health and Safety Code (civil commitment law) was adopted:

Sec. 574.088. RELIEF FROM DISABILITIES IN MENTAL HEALTH CASES.

- (a) A person who is furloughed or discharged from court-ordered mental health services may petition the court that entered the commitment order for an order stating that the person qualifies for relief from a firearms disability.
- (b) In determining whether to grant relief, the court must hear and consider evidence about:

- (1) the circumstances that led to imposition of the firearms disability under 18 U.S.C. Section 922(g)(4);
 - (2) the person's mental history;
 - (3) the person's criminal history; and
 - (4) the person's reputation.
- (c) A court may not grant relief unless it makes and enters in the record the following affirmative findings:
- (1) the person is no longer likely to act in a manner dangerous to public safety; and
 - (2) removing the person's disability to purchase a firearm is in the public interest.

During session we sought the guidance of the Bureau of Alcohol and Tobacco on the wording of our statute. ATF indicated that they have not yet formally been delegated the duty to review the legislation, but did send us the minimum criteria (below, see No. 7 in particular) that must be satisfied for a relief program to qualify as being compliant under the NICS Improvement ACT. ATF did indicate that no state law has met these criteria and that the one that came the closest essentially cut and pasted the criteria into statute.

STATE RELIEF FROM DISABILITIES PROGRAMS UNDER THE NICS IMPROVEMENT AMENDMENTS ACT OF 2007

The following *minimum* criteria must be satisfied for a State to establish a qualifying mental health relief from firearms disabilities program under the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, Section 105 (enacted January 8, 2008):

1. State Law [NIAA § 105(a)(2)]: The relief program must be established by State statute, or administrative regulation or order pursuant to State law.
2. Application [NIAA § 105(a)(1)]: The relief program must allow a person who has been formally adjudicated as a mental defective¹ or committed involuntarily to a mental institution² to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).
3. Lawful Authority [NIAA § 105(a)(2)]: A State court, board, commission, or other lawful authority must consider the applicant's petition for relief. The lawful

¹ Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: 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 others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

² Federal regulations at 27 C.F.R. § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

authority may only consider applications for relief due to mental health adjudications that occurred in the same State.

4. Due Process [NIAA § 105(a)(2)]: The petition for relief must be considered by the lawful authority in accordance with principles of due process, as follows:
 - a. The applicant must have the opportunity to submit his or her own evidence to the lawful authority considering the relief application.
 - b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—shall review the evidence.
 - c. A record of the matter must be created and maintained for review.
5. Proper Record [NIAA § 105(a)(2)]: In determining whether to grant relief, the lawful authority must receive evidence concerning and consider the following:
 - a. the circumstances regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);
 - b. the applicant's record, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and
 - c. the applicant's reputation, developed, *at a minimum*, through character witness statements, testimony, or other character evidence.
6. Proper Findings [NIAA § 105(a)(2)]: In granting relief, the authority must issue findings that:
 - a. the applicant will not be likely to act in a manner dangerous to **public safety**; and
 - b. granting the relief will not be contrary to the **public interest**.
7. De Novo Judicial Review of a Denial [NIAA § 105(a)(3)]: The State must also provide for *de novo* judicial review of relief application denials. *De novo* judicial review includes the following principles:
 - a. If relief is denied, the applicant may petition the State court of appropriate jurisdiction to *review the denial*, including *the record of the denying court* [emphasis added here], board, commission, or other lawful authority.
 - b. Judicial review is *de novo*, in that the reviewing court may, but is not required to give deference to the decision of the lawful authority that denied the application for relief.
 - c. The reviewing state court must have discretion to receive additional evidence necessary to conduct an adequate review.

Part 7, the *de novo* review portion, is what now challenges us. During session, we were confident that requirements 1-4 were met, and reasoned that because a court will always be the entity that receives and evaluates a petition for relief (and not a "board, commission or other lawful authority") the legislation also met requirements 5-7. Now I must conclude that this was an error. We are asking the Court to consider a rulemaking exercise that would create a *de novo* procedure within the court system.