

Congressional Response Report

The Social Security Administration's
Implementation of Reporting
Information to the National Instant
Criminal Background Check System

September 28, 2016

The Honorable Sam Johnson
Chairman
Subcommittee on Social Security
Committee on Ways and Means
House of Representatives
Washington, DC 20515

Dear Chairman Johnson:

In a May 2, 2016 letter, you asked that we answer specific questions about the Social Security Administration's plans to refer individuals to the National Instant Criminal Background Check System and how that process would interact with determinations about whether an individual needs a representative payee.

The report addresses the specific questions in your letter. To ensure the Agency is aware of the information provided to your office, we are forwarding it a copy of this report.

If you have any questions concerning this matter, please call me or have your staff contact Kristin Klima, Congressional and Intragovernmental Liaison at (202) 358-6319.

Sincerely,



Gale Stallworth Stone
Acting Inspector General

Enclosure

cc:

Carolyn W. Colvin



September 28, 2016

Senator Mike Crapo
Senate Finance Committee
Washington, DC 20510

Dear Senator Crapo:

In a May 2, 2016 letter, you asked that we answer specific questions about the Social Security Administration's plans to refer individuals to the National Instant Criminal Background Check System and how that process would interact with determinations about whether an individual needs a representative payee.

The report addresses the specific questions in your letter. To ensure the Agency is aware of the information provided to your office, we are forwarding it a copy of this report.

If you have any questions concerning this matter, please call me or have your staff contact Kristin Klima, Congressional and Intragovernmental Liaison at (202) 358-6319.

Sincerely,

A handwritten signature in black ink that reads "Gale Stallworth Stone".

Gale Stallworth Stone
Acting Inspector General

Enclosure

cc:

Carolyn W. Colvin

The Social Security Administration's Implementation of Reporting Information to the National Instant Criminal Background Check System

A-01-16-50218



September 2016

Office of Audit Report Summary

Objective

To answer questions from Congress regarding the Social Security Administration's (SSA) proposed reporting of individuals to the National Instant Criminal Background Check System (NICS) and how this relates to SSA's Representative Payment Program.

Background

The President signed the *NICS Improvement Amendments Act of 2007* (NIAA) into law on January 8, 2008. The NIAA amended the *Brady Handgun Violence Prevention Act* (Brady Act) under which the Attorney General established the NICS. The Brady Act requires that Federal Firearms Licensees contact the NICS before they transfer a firearm to an unlicensed person. The purpose is to determine whether State or Federal law prohibits the unlicensed person from possessing a firearm.

On January 16, 2013, the President issued a memorandum directing the Department of Justice to provide agencies guidance regarding the identification and sharing of relevant Federal records and their submission to the NICS.

On May 2, 2016, Congress wrote to the Office of the Inspector General with specific questions about the information SSA proposed to provide NICS.

Conclusions

SSA proposes to report to NICS individuals who, among other things, are age 18 or older, meet or medically equal one of the Mental Disorder Listing of Impairments, and who have a representative payee. However, the *Notice of Proposed Rulemaking* detailing SSA's proposal closed for public comment on July 5, 2016, and SSA informed us that it received 90,920 comments. As of August 2016, the Agency was still evaluating the comments and had not made a final decision as to what it will *actually* report to NICS.

If the beneficiary has a mental impairment, the Agency's policy is to develop for capability only if there is an indication that the beneficiary's impairment prevents him/her from managing or directing someone else to manage his/her benefits.

Supervisors do not need to sign off on most representative payee determinations. However, certain representative payee selections require management approval—for example, the selection of an individual as payee who was previously not selected because of past poor performance.

Training on representative payee determinations is part of required training for SSA employees who make these types of determinations. However, additional training is needed based on Office of the Inspector General, SSA, and Institute of Medicine reports.

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ABBREVIATIONS

Brady Act	<i>Brady Handgun Violence Prevention Act</i>
C.F.R.	Code of Federal Regulations
DOJ	Department of Justice
Fed. Reg.	Federal Register
NIAA	<i>NICS Improvement Amendments Act of 2007</i>
NICS	National Instant Criminal Background Check System
OASDI	Old-Age, Survivors and Disability Insurance
OIG	Office of the Inspector General
POMS	Program Operations Manual System
Pub. L. No.	Public Law Number
SSA	Social Security Administration
SSI	Supplemental Security Income
U.S.C.	United States Code

OBJECTIVE

Our objective was to answer questions from Congress regarding the Social Security Administration's (SSA) proposed reporting of individuals to the National Instant Criminal Background Check System (NICS) and how this relates to SSA's Representative Payment Program.

BACKGROUND

In a May 2, 2016 letter, the Senate Finance Committee and House Subcommittee on Social Security requested that the Inspector General answer specific questions regarding SSA's reporting of individuals to the NICS and how this relates to SSA's Representative Payment Program. See Appendix A for Congress' letter. See Appendix B for our scope and methodology.

The National Instant Criminal Background Check System

The President signed the *NICS Improvement Amendments Act of 2007* (NIAA) into law on January 8, 2008.¹ The NIAA amended the *Brady Handgun Violence Prevention Act* (Brady Act)² under which the Attorney General established the NICS. The Brady Act requires that Federal firearms licensees contact the NICS before they transfer a firearm to an unlicensed person. The purpose is to determine whether State or Federal law prohibits the unlicensed person from receiving or possessing a firearm.

On January 16, 2013, the President signed a memorandum directing the Department of Justice (DOJ) to provide guidance to Federal agencies regarding identifying and sharing relevant Federal records and their submission to the NICS.³ In March 2013, SSA received this guidance from DOJ.⁴ In May 2013, SSA provided feedback in response to DOJ's guidance⁵ and consulted with DOJ to determine the actions SSA must take to comply with NICS reporting obligations.⁶

¹ *NICS Improvement Amendments Act of 2007*, Pub. L. No. 110-180 (January 8, 2008), 121 Stat. 2559-2572.

² *Brady Handgun Violence Prevention Act*, Pub. L. No. 103-159 (November 30, 1993), 107 Stat. 1536-1546.

³ *Improving the Availability of Relevant Executive Branch Records to the NICS*, 78 Fed. Reg. 4297-4299 (January 22, 2013).

⁴ DOJ, *Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS* (March 2013).

⁵ Letter from the Acting Commissioner of SSA to the Attorney General, DOJ, May 3, 2013.

⁶ Letter from the Acting Commissioner of SSA to the Chairman of the Senate Committee on the Judiciary, October 7, 2015.

SSA published a notice of proposed rulemaking,⁷ *Implementation of the NICS Improvement Amendments Act of 2007*, in the Federal Register on May 5, 2016 to provide details on SSA's proposed plans for sharing information with NICS.⁸ In short, SSA proposed to report

. . . 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.⁹

However, the proposed rule is subject to change based on the feedback SSA received during the public comment period, which was May 5 through July 5, 2016. SSA stated it received 90,920 comments during the comment period, and, as of August 2016, the Agency was evaluating those comments. Therefore, as of the date of this review, the *actual* records that SSA will provide to NICS was still unknown.

Listing of Impairments

The Listing of Impairments describes impairments considered severe enough to prevent a person from doing any gainful activity.¹⁰ The Listing is organized by section generally based on body systems, such as musculoskeletal, cardiovascular, and mental disorders. Section 12.00 lists mental disorders for adults.¹¹ See Appendix C for additional information on the Listings.

Representative Payment Program

For individuals who cannot manage or direct the management of their benefit payments because of their youth or mental or physical impairments, Congress provided for payment through a representative payee.¹² A representative payee may be an individual or an organization. If the Agency cannot find a representative payee for someone it determines is incapable, it will pay

⁷ A proposed rule announces and explains an agency's plan to address a problem or accomplish a goal. The proposed rule and public comments form the basis of the final rule. The notice-and-comment process enables anyone to submit a comment on any part of the proposed rule. The agency must base its reasoning and conclusions on the rulemaking record—consisting of the comments, scientific data, expert opinion, and facts accumulated during the pre-rule and proposed rule stages. *A Guide to the Rulemaking Process*, Office of the Federal Register, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

⁸ SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27059-27067 (May 5, 2016).

⁹ *Id.* at 27059.

¹⁰ Gainful activity is any work activity that a person does for pay or profit whether or not a profit is realized; 20 C.F.R. § 404.1572(b) and 20 C.F.R. § 416.972(b).

¹¹ SSA, POMS, DI 34001.005 (September 21, 2000) and DI 34001.032 (November 6, 2013).

¹² *Social Security Act* §§ 205(j)(1) and 1631(a)(2)(A)(ii), 42 U.S.C. §§ 405(j)(1) and 1383(a)(2)(A)(ii).

benefits directly to the individual unless he/she is legally incompetent, he/she is under age 15, or the Agency determines direct payment would cause physical or mental injury to the beneficiary “more injurious than the risk of not having money for basic needs.”¹³

RESULTS OF REVIEW

Question 1: How many individuals with a mental impairment were allowed at Step 3 in the determination process?¹⁴ Of those, how many have a representative payee?

Table 1: Individuals Allowed in Fiscal Year 2015 with Mental Impairments at Step 3 and Who Have a Payee¹⁵

Description	Under Age 18 ¹⁶	Age 18 and Older	Total
Number of individuals who met or equaled the mental impairment medical listing in Fiscal Year 2015 at Step 3 for initial and reconsideration disability determinations. ¹⁷	106,156	103,103	209,259
Number of individual allowed at Step 3 (from above) who had a representative payee as of July 2016. ¹⁸	101,066	80,898	181,964

¹³ SSA, POMS, GN 00502.005 (April 15, 2016) and GN 00504.105.A (April 15, 2016).

¹⁴ See Appendix D for a description of SSA’s 5-step evaluation process.

¹⁵ In Fiscal Year 2015, disability determination services processed almost 3.3 million initial and reconsideration claims and allowed about 930,000 claims—268,000 of which had a primary mental impairment. We focused on initial and reconsideration claims because the data were readily available.

¹⁶ Date of birth calculated as of April 30, 2016. SSA’s Notice of Proposed Rulemaking proposed to only report records for individuals who attained age 18 but have not yet attained full retirement age. SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27062 (May 5, 2016). As of August 2016, a final rule had not been issued on what records SSA would *actually* provide to NICS.

¹⁷ If a claimant disagrees with the initial determination, he/she can file an appeal for reconsideration within 60 days of the date SSA notifies him/her of the determination. A reconsideration involves a thorough review of all evidence from the initial determination and any new evidence.

¹⁸ This is based on the representative payee data on SSA’s Master Beneficiary and Supplemental Security Records.

Question 2: Which employees make the determination that a representative payee is required? What is the education required for these positions? Is supervisor sign off required?

Customer service representatives or claims specialists make capability determinations in SSA field offices.¹⁹ Generally, employees in these positions must have a college degree or at least 3 years' experience that equipped the individual with the particular knowledge, skills, and abilities to perform successfully the duties of the position and that is typically in, or related to, the position.²⁰ Eighty percent of customer service representatives or claims specialists in the field offices who make representative payee determinations have at least some college education—with 58 percent having an undergraduate degree or higher. Also, SSA provides its employees training on representative payee determinations (see answer to Question 4 for more information on training).

Supervisors are not required to sign off on most representative payee determinations. However, certain representative payee selections require management approval—for example, the selection of an individual as payee who was previously not selected because of past poor performance.

Question 3: How are the capability determinations made? What evidence is always required? For medical evidence, how recent does the evidence have to be in order to be considered? Is a face-to-face meeting always a part of the determination process?

SSA's general policy is to presume all legally competent adults are capable of managing their benefits, or directing someone else to do so, unless there is information to the contrary. For example, a representative payee may be needed if the beneficiary has difficulty (a) answering questions, (b) obtaining information necessary for the claim, (c) understanding explanations, or (d) understanding the information that needs to be reported to SSA.²¹

If a beneficiary has a mental impairment, the Agency's policy is to develop for capability only if there is an indication the beneficiary may lack the ability to reason properly, is disoriented, has seriously impaired judgment, or is unable to communicate with others. If the beneficiary can direct someone else to manage his/her benefits, SSA must find him/her capable.²²

¹⁹ SSA, POMS, GN 00501.015 A.1 and A.2 (August 19, 2016).

²⁰ U.S. Office of Personnel Management, *Classification & Qualifications General Schedule Qualification Standards*.

²¹ SSA, POMS, GN 00502.010 (February 25, 2003) and GN 00502.020.A.1 (April 15, 2016).

²² SSA, POMS, GN 00502.020.A.2 (April 15, 2016).

Agency staff that makes a capability determination must obtain and evaluate lay and medical evidence²³ and document the capability decision—whether staff finds the beneficiary needs a representative payee or direct payment is appropriate.²⁴

Lay evidence can include direct observation during a face-to-face interview and signed statements from such individuals as a relative, friend, neighbor, or person applying to be an individual's representative payee.²⁵

Medical evidence must be based on an examination within the last year. Although medical evidence is a major factor in the determination, it is not the definitive, determining factor of capability.²⁶ Lay evidence may support or disprove the medical evidence, and the customer service representatives or claims specialists must carefully evaluate it all to make a determination.²⁷

SSA also considers legal evidence if there is an allegation the beneficiary is legally incompetent.²⁸ The Agency prohibits direct payment to individuals judged incompetent by a court and to children under age 15.²⁹

SSA does not require that a face-to-face meeting be held with a claimant to determine his/her capability to manage funds. However, SSA encourages face-to-face meetings. Specifically, SSA policy states

A face-to-face interview with the beneficiary (if practicable) is the best source for lay evidence of capability because it gives . . . the opportunity to observe the beneficiary's behavior, ability to reason, ability to function with others, and effectiveness with which he/she pursues the claim.

The face-to-face interview with the beneficiary is an invaluable tool for determining capability.³⁰

²³ SSA, POMS, GN 00502.020.B (April 15, 2016) and GN 00502.030.A (April 15, 2016).

²⁴ SSA, POMS, GN 00502.020.C (April 15, 2016).

²⁵ SSA, POMS, GN 00502.030.A.1 (April 15, 2016).

²⁶ SSA, POMS, GN 00502.025 (January 18, 2012).

²⁷ SSA, POMS, GN 00502.030.A (April 15, 2016).

²⁸ SSA, POMS, GN 00502.020.B (April 15, 2016). For SSA's representative payee purposes, *legal incompetency* is a decision by a court of law that an individual is unable to manage his/her affairs. *Incapacity* is a determination by SSA that an individual is unable to manage his/her affairs, or direct the management of them, in his/her own best interests. SSA, POMS, GN 00501.010.B (July 14, 2008) and GN 00502.005.A (April 15, 2016).

²⁹ SSA, POMS, GN 00502.005.A (April 15, 2016).

³⁰ SSA, POMS, GN 00502.050.A (April 15, 2016).

Question 4: What training is SSA providing to its employees to make a representative payee determination? Over the past 5 years, how often was the training provided? Is it required?

Training on representative payee determinations is part of required customer service representative and claims specialist training for entry-level employees and those promoted internally. SSA conducts training on all representative payee actions, including capability determinations. The training includes

- completing exercises;
- researching SSA's Program Operations Manual System (POMS);
- reading technical and support material;
- reviewing local office procedures with the support of a mentor;
- performing course-related activities, including on-the-job training; and
- taking tests.

According to SSA, it monitors and evaluates this training.

The initial training consists of a minimum of 40 hours classroom as well as on-the-job training. The objectives of this training include the following.

- Determining whether an individual needs a representative payee and evaluating the evidence required to support the determination.
- Defining the technician and the representative payee's roles in the Representative Payment Program.
- Interviewing a representative payee.
- Documenting the interview and determination and selecting the representative payee using SSA information technology systems.
- Providing the proper advance notification of a representative payee's selection.
- Recognizing indicators for potential improper use or misuse of benefits.
- Addressing potential improper use or misuse of benefits.
- Using SSA information systems to track and manage representative payee workloads, including representative payee suspension and reinstatement.

SSA also informed us that field offices were (a) addressing staff's training needs after their initial required training, (b) conducting refresher training, (c) reviewing policies and procedures, and (d) responding to audit recommendations and Agency quality reports.

Some SSA regional office staffs created training tools, desk guides, and other resources on their own, consistent with existing policies and procedures. We were able to locate resources related

to representative payee determinations at SSA Regional Intranet Websites that were accessible to employees Agency-wide.

According to SSA, it normally offers representative payee training semiannually. SSA said, over the last 5 years, it has delivered the training at the following times.

- April and November 2011.
- April and September 2012.
- February and August 2013.
- April and September 2014.
- April and November 2015.

Additionally, SSA issued a user guide related to representative payee misuse as part of its implementation of a new representative payee system that was implemented in April 2016.

SSA also offers some representative payee-related training on the Agency Intranet site that employees can access anytime:

- an online 20-minute course (dated October 2008) on the use of its representative payee management system;
- a two-part course (dated May and July 2009) totaling 47 minutes for managers on representative payee issues;
- a 24-minute video (dated March 2014) on representative payee selection; and
- a 7-minute video (dated April 2016) on the new representative payee management system.

Accuracy of Representative Payee Determinations

Despite the training SSA provides, a June 2015 Agency internal quality review report concluded—based on a review of 500 cases—that capability determinations were underdeveloped, undocumented, or insufficiently documented.³¹ The report contained four recommendations, including that SSA review and clarify policy sections that explain capability development and documentation requirements and that training be provided—after SSA reviews or revises policy—to SSA field office employees. As of August 2016, SSA was addressing the recommendations. According to SSA, it created an action plan to improve the capability determination process. Further, in May 2016, SSA issued a reminder to employees regarding capability determinations. We have also issued several reports that recommended improvements in SSA's representative payee process, see Appendix E. Additionally, a 2016

³¹ SSA, Office of Budget, Finance, Quality, and Management, Office of Quality Review, *Representative Payee Capability Review Report*, June 2015.

National Academy of Sciences, Institute of Medicine, report contained recommendations that SSA improve its Representative Payment Program.³²

Question 5: How did SSA decide to report to NICS individuals whose conditions meet or equal the mental illness medical listing?

SSA explained in its May 5, 2016 *Notice of Proposed Rulemaking* that DOJ determined SSA must identify Old-Age, Survivors and Disability Insurance (OASDI) beneficiaries and SSI recipients who meet the NIAA criteria and report them to the Federal Bureau of Investigation, which maintains the NICS.³³ The relevant statute, 18 U.S.C. § 922(g)(4), states that it is “. . . unlawful for any person who has been adjudicated as a mental defective . . . to ship, transport . . . possess . . . or to receive any firearm or ammunition . . .” The Bureau of Alcohol, Tobacco, Firearms and Explosives has clarified in regulations that this prohibitor applies, as relevant here, to an individual who, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, has been found by a lawful authority to lack the mental capacity to contract or manage his or her own affairs.³⁴ DOJ’s guidance indicates that this includes certain agency designations of representative or alternate payees for program beneficiaries.³⁵

SSA proposes to report to NICS those individuals with the existence of a Listing-level mental impairment—along with the need to have benefits paid through a representative payee—because it believes the existence of these two factors most closely approximate those beneficiaries who cannot manage their affairs due to a mental condition and are therefore subject to the Federal mental health prohibitor.³⁶ SSA holds that individuals who have a Listing-level impairment are the most severely disabled beneficiaries the Agency serves. Therefore, SSA’s proposal is to report to NICS individuals awarded benefits based on the mental disorders listings and who have a representative payee. The Agency believes these criteria most appropriately identify beneficiaries who are subject to the Federal mental health prohibitor, consistent with the

³² National Academy of Sciences, Institute of Medicine, Board on the Health of Select Populations, Committee to Evaluate SSA’s Capability Determination Process for Adult Beneficiaries, *Informing Social Security’s Process for Financial Capability Determination*, 2016.

³³ SSA proposes to report individuals’ full name, date of birth, sex, and Social Security number as well as any other information that the Attorney General determines Federal agencies should report. SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27059, 27061, 27066 (May 5, 2016).

³⁴ 27 C.F.R. § 478.11.

³⁵ SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27059, 27061 (May 5, 2016).

³⁶ Specifically, Medical Listings 12.02 (Organic Mental Disorders); 12.03 (Schizophrenic, Paranoid and Other Psychotic Disorders); 12.04 (Affective Disorders); 12.05 (Intellectual Disability); 12.06 (Anxiety-Related Disorders); 12.07 (Somatoform Disorders); 12.08 (Personality Disorders); and 12.10 (Autistic Disorders and Other Pervasive Developmental Disorders); and individuals where SSA finds the individual’s borderline intellectual functioning to be of listing-level severity. *Id.* at 27062, Footnote 26.

congressional purpose expressed in the NIAA. However, the *Notice of Proposed Rulemaking* detailing SSA's proposal closed for public comment on July 5, 2016;³⁷ and, as of August 2016, SSA had not made a final decision as to what it will actually report to NICS.

Question 6: What is the current process for reevaluating if an individual no longer needs a representative payee? How many individuals in the past 5 years have been determined to no longer need a representative payee? How will the SSA handle cases where it has determined that an individual who has been reported to the NICS no longer needs a payee?

SSA does not have a fixed schedule to re-evaluate the capability of all individuals who have a representative payee. However, it periodically re-evaluates the disability of beneficiaries through the continuing disability review process.³⁸

SSA instructs staff to be mindful of changes in circumstances that may indicate a new capability determination is necessary, and Agency policy is to re-evaluate a beneficiary's capability when staff receives a valid request for a new determination. Further, SSA's policy is to consider reviewing a beneficiary's capability whenever there is an allegation or indication that an incapable beneficiary has become capable or that a capable beneficiary may have become incapable. Situations in which SSA must consider reviewing capability include

- continuing disability reviews;
- SSI redeterminations (including age 18 disability redeterminations);
- discovery that a beneficiary manages any other benefit(s) to which he/she may be entitled;
- beneficiary appeal of the appointment of a payee; and
- any other contact with the beneficiary or payee that raises a question about the beneficiary's capability.³⁹

Additionally, SSA monitors representative payees to ensure they are performing their duties satisfactorily and protect individuals from misuse.⁴⁰ SSA instructs employees to be aware of indicators that may call into question the representative payee's suitability to continue as payee.

³⁷ *Id.* at 27059.

³⁸ SSA, POMS, DI 40501.001 (August 11, 2016). The law requires that SSA perform periodic reviews to determine whether individuals entitled to disability payments continue to be disabled. 20 C.F.R. § 404.1594, 20 C.F.R. § 416.989. SSA, POMS, DI 28001.001 (May 18, 2015).

³⁹ SSA POMS, GN 00502.020.A.6 (April 15, 2016).

⁴⁰ *Social Security Protection Act of 2004*, Pub. L. No. 108-203, Sec. 102(b), (March 2, 2004), 118 Stat. 498.

SSA may also re-evaluate certain beneficiaries, recipients, or representative payees in response to an OIG recommendation. See Appendix E for a list of OIG reports.

Over the last 5 years, SSA has determined that 176,824 adult beneficiaries/recipients with mental impairments no longer need a representative payee.⁴¹

There were no details in the May 5, 2016 *Notice of Proposed Rulemaking* on whether SSA would notify NICS that a person should be removed from the firearms prohibition because SSA determined the person was capable of managing his/her funds and no longer needed a representative payee. We requested information from SSA; however, the Agency would only refer us to the section in the *Notice of Proposed Rulemaking* on requesting relief from the firearms prohibition.⁴² (For additional information on requesting relief, see answer to Question 7.)

Question 7: What are SSA's plans to develop an adjudication process to handle cases where an individual believes SSA will erroneously report him or her to the NICS?

Per the May 5, 2016 *Notice of Proposed Rulemaking*, once SSA has found an individual meets or medically equals the mental disorders listing but before it finds that the individual requires a representative payee, it will provide the individual with oral and written notice that when the adjudication is final, if he/she meets all the criteria for inclusion, SSA will report them to the NICS. This notification would precede a representative payee determination. However, if the Agency then determines he/she does not need a representative payee, SSA will not report the individual to the NICS.⁴³ The proposed rule does not indicate whether SSA will let notified individuals know they were not reported to the NICS if the Agency determines they do not need a representative payee, and, as of August 2016, SSA had not commented on this point.

Further, in its May 5, 2016 *Notice of Proposed Rulemaking*, SSA included information on how a person could request relief from the Federal firearms prohibitions as a result of information reported by SSA to NICS.⁴⁴ Specifically, as required by the NIAA, request for relief would focus on whether the circumstances regarding the disability as well as the applicant's record and reputation are such that SSA finds 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. SSA's proposal was to require that the individual who requests relief to provide SSA with certain evidence, including evidence from his/her primary mental health provider regarding his/her current mental health status and mental health status for the past 5 years. SSA also proposed to

⁴¹ This is based on the representative payee data on SSA's Master Beneficiary and Supplemental Security Records.

⁴² SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27064 (May 5, 2016).

⁴³ Id.

⁴⁴ Id.

require that an applicant for relief submit written statements and any other evidence regarding the applicant's reputation. SSA also proposed to obtain a criminal history report on the applicant.⁴⁵

A decisionmaker who was not involved in determining whether the individual needed a representative payee would then review the evidence and act on the request for relief. If the decisionmaker denies relief, the individual may seek judicial review through the U.S. district court for the district in which he/she resides. Because SSA proposed this process and it has not been finalized, SSA may modify it based on public responses to the *Notice of Proposed Rulemaking*. Therefore, the final process SSA implements for sharing information with NICS may differ from what is described in the report and the *Notice of Proposed Rulemaking*.

Question 8: How much staff time was devoted to implementing the President's directive? How many meetings took place between 2013 and today on this topic?

SSA told us it could not identify the staff time devoted to implementation as it had no tracking mechanism in place. Also, although SSA initially informed us it tracked the meetings it held, the Agency later informed us that it did not have a mechanism that tracked the number of meetings held by subject. Therefore, SSA informed us that it was not able to respond to the question.

⁴⁵ Section 101(a)(2)(A) of the NIAA requires that a Federal agency that makes any adjudication related to the mental health of a person establish a program that permits a person to apply for relief from the firearms prohibitions imposed by 18 U.S.C. § 922(g)(4). This section of the NIAA also states that relief and judicial review "shall be available according to the standards" in 18 U.S.C. § 925(c), which requires evidence "that the circumstances regarding the [applicant's] 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." *NICS Improvement Amendments Act of 2007*, Pub. L. No. 110-180 (January 8, 2008), 121 Stat. 2559-2572.

CONCLUSIONS

SSA consulted with DOJ concerning the implementation of the President's directive and published a *Notice of Proposed Rulemaking* in the Federal Register on May 5, 2016.⁴⁶ The *Notice of Proposed Rulemaking* closed for public comment on July 5, 2016,⁴⁷ and, as of August 2016, the Agency was evaluating the 90,920 comments it had received from the public.



Rona Lawson
Assistant Inspector General for Audit

⁴⁶ SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27059 (May 5, 2016).

⁴⁷ Id.

APPENDICES

Appendix A – LETTER FROM CONGRESS

Congress of the United States
Washington, DC 20515

May 2, 2016

The Honorable Patrick P. O'Carroll, Jr.
Inspector General
Social Security Administration
6401 Security Boulevard
Altmeyer Building, Suite 300
Baltimore, MD 21235

Dear Mr. O'Carroll:

We are writing today to request a review of the framework the Social Security Administration (SSA) will use to refer certain individuals to the National Instant Criminal Background Check System (NICS) and the way this process interacts with determinations about whether an individual needs a representative payee.

In January 2013, President Obama issued a memorandum directing the SSA and other Federal agencies to assess whether they possess relevant records that should be made available to the NICS. Since this time, the SSA has taken steps to implement this directive and submitted a notice of proposed rulemaking for publication in the Federal Register.

We have serious concerns about the SSA reporting certain individuals to the NICS and potentially limiting these individuals' ability to exercise their Constitutional rights. A recent report from the Institute of Medicine (IOM) raises questions about the SSA's current method for determining whether an individual lacks the capability to manage their benefits and needs assistance from a representative payee. Specifically, the report finds that there is no single diagnosis or set of diagnoses that point to an inability to manage and direct the management of benefits. The IOM cited a lack of empirical data on the reliability and validity of capability determinations currently made by the SSA.

We are interested in determining how the SSA is using taxpayer funds to arrive at a process for judging whether some individuals should be reported to the NICS. In particular, we would like a review that answers the following questions:

- How many individuals with a mental impairment were allowed at Step 3 in the determination process? Of those, how many have a representative payee?
- Which employees make the determination that a representative payee is required? What is the education required for these positions? Is supervisor sign off required?

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- How are the capability determinations made? What evidence is always required? For medical evidence, how recent does the evidence have to be in order to be considered? Is a face-to-face meeting always a part of the determination process?
- What specific training is the SSA providing to its employees to make a representative payee determination? Over the past 5 years, how often was the training provided? Is it required?
- In the notice of proposed rulemaking, the SSA proposes to report Disability Insurance beneficiaries and Supplemental Security Income recipients who meet or equal the medical listings for mental illness and have a representative payee to the NICS. In light of the IOM study, which indicates that determining if someone needs a representative payee requires reviewing a person's individual medical history and circumstances, how did the SSA decide that individuals whose conditions meet or equal this particular set of medical listings should be reported to the NICS?
- What is the current process for reevaluating if an individual no longer needs a representative payee? How many individuals in the past 5 years have been determined to no longer need a representative payee? How will the SSA handle cases where it has determined that an individual who has been reported to the NICS no longer needs a representative payee?
- What are the SSA's plans to develop an adjudication process to handle cases where an individual believes that the SSA will erroneously report him or her to the NICS?
- How much staff time was devoted to implementing the President's directive? How many meetings took place between 2013 and today on this topic?

Thank you for your assistance. Should you or your staff have any questions concerning this request, please contact Amy Shuart, Staff Director of the House Ways and Means Subcommittee on Social Security at (202) 225-9263, and Kellie McConnell from Senator Crapo's office at (202) 224-6142.

Sincerely,

Rep. Sam Johnson
Chairman
Subcommittee on Social Security
House Committee on Ways and Means

Senator Mike Crapo
Senate Finance Committee

Appendix B – SCOPE AND METHODOLOGY

To achieve our objective, we:

- Reviewed applicable sections of the *Social Security Act* and the Social Security Administration's (SSA) regulations, rules, policies, and procedures.
- Reviewed applicable Federal Register notices related to the National Instant Criminal Background Check System (NICS).
- Reviewed Department of Justice guidance and other information regarding implementing the requirements for NICS reporting.
- Reviewed SSA's training material on representative payee determinations.
- Reviewed SSA's Office of Quality Review report, *Representative Payee Capability Review Report*, June 2015.
- Reviewed National Academies Press report, *Informing Social Security's Process for Financial Capability Determination*, 2016.
- Reviewed Office of the Inspector General reports related to representative payees.
- Requested information from SSA regarding the staff time and the number of meetings held related to implementing the directive on NICS.
- Reviewed SSA position descriptions for customer service representatives and claims specialists as well as Office of Personnel Management education requirements for these types of positions.
- Requested from SSA information on the education levels of customer service representatives and claims specialists. SSA maintains education information in its Human Resources Operational Data Store. We did not test the reliability of these data.
- Obtained and analyzed the SSA-831 disability file for Fiscal Year 2015, which contained data on initial and reconsideration applications, and identified claimants whose record showed body system 12 (mental body system) and met or equaled a medical listing at Step 3 of SSA's sequential evaluation for the disability determination process¹ and who had a primary or secondary diagnosis code for a mental impairment.² We unduplicated the data so a claimant would only appear once—even if he/she filed for both Disability Insurance

¹ We included records with Regulation Basis Codes A1, A61, A62, A65, A66, and B1, which indicate that the claimant met or equaled a Listing of Impairment. SSA, POMS, DI 26510.045 (March 14, 2016).

² We included 26 records that had a mental impairment for the secondary diagnosis code even though the primary diagnosis code was not for a mental impairment. Of these 26 records, 12 met a mental listing but 14 met a listing for another body system. The Notice of Proposed Rulemaking proposed only including records with a primary diagnosis code for a mental disorder; not a secondary diagnosis code. SSA, Notice of Proposed Rulemaking, *Implementation of the NICS Improvement Amendments Act of 2007*, 81 Fed. Reg. 27062 (May 5, 2016). As of August 2016, a final rule had not been issued on what records SSA would *actually* provide to NICS.

benefits and Supplemental Security Income payments. We removed individuals from the file who did not have a diagnosis code that indicated mental impairment. We tested the data and concluded they were reliable to meet our objective.

- We matched the list of beneficiaries/recipients with initial and reconsideration allowances from the prior step to the representative payee data on the Master Beneficiary and Supplemental Security Records as of July 2016 to identify those beneficiaries/recipients who had representative payees.
- Obtained and analyzed representative payee data for Fiscal Years 2011 through 2015 on SSA's Master Beneficiary and Supplemental Security Records. We identified beneficiaries and recipients who previously had a representative payee but became their own payee during these years. We tested the data and concluded they were sufficiently reliable to meet our objective.

We conducted our review between June and August 2016 in Boston, Massachusetts. The principal entity reviewed was SSA's Office of the Deputy Commissioner for Retirement and Disability Policy. We conducted our review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*.

Appendix C – MEDICAL LISTINGS

The Social Security Administration (SSA) has a 5-step sequential process for evaluating disability for adults. The process generally follows the definition of disability in the *Social Security Act* and the regulations. At Step 3 of the process, SSA uses the Listings to evaluate disability claims under the Disability Insurance and Supplemental Security Income programs. The Listings for each body system describe impairments that SSA considers severe enough to prevent an adult from doing any gainful activity or to cause marked and severe functional limitations in a child younger than 18-years-old. Most of the listed impairments are permanent or are expected to result in death; however, some include a specific statement of duration. For all others, the evidence must show the impairment has lasted, or can be expected to last, for a continuous period of at least 12 months.¹

The Listings is organized by major body system—14 for adults (Part A) and 15 for children (Part B), although adult criteria can be applied to children if the disease processes have a similar effect on adults and children (see Table C–1).

Table C–1: Listings for Adults and Children

Part A Medical Listings – Adults	Part B Medical Listings – Children
N/A	100.00 Growth Impairment
1.00 Musculoskeletal System	101.00 Musculoskeletal System
2.00 Special Sense and Speech	102.00 Special Senses and Speech
3.00 Respiratory System	103.00 Respiratory System
4.00 Cardiovascular System	104.00 Cardiovascular System
5.00 Digestive System	105.00 Digestive System
6.00 Genitourinary Impairments	106.00 Genitourinary Impairments
7.00 Hematological Disorders	107.00 Hematological Disorders
8.00 Skin Disorders	108.00 Skin Disorders
9.00 Endocrine System	109.00 Endocrine System
10.00 Impairments that Affect Multiple Body Systems	110.00 Impairments that Affect Multiple Body Systems
11.00 Neurological	111.00 Neurological
12.00 Mental Disorders	112.00 Mental Disorders
13.00 Malignant Neoplastic Diseases	113.00 Malignant Neoplastic Diseases
14.00 Immune System Disorders	114.00 Immune System Disorders

¹ SSA, POMS, DI 34001.001 (September 21, 2000).

Appendix D – THE SOCIAL SECURITY ADMINISTRATION’S PROCESS FOR EVALUATING DISABILITY

The Social Security Administration (SSA) has a 5-step sequential process for evaluating disability for adults, which generally follows the definition of disability in the *Social Security Act* and the regulations (Figure D-1). An individual is considered to be disabled under SSA’s regulations if he/she is unable to engage in substantial gainful activity (SGA)¹ by reason of a medically determinable physical or mental impairment that can be expected to result in death or has lasted, or can be expected to last, for a continuous period of not less than 12 months.²

At Step 1 in the process, SSA considers whether the claimant is still working. If the claimant is not performing SGA, the claim is sent for a medical determination of disability. When the claim is initially developed, the adjudicator concurrently requests all the evidence needed for consideration at steps 2 through 5 of the sequential evaluation process.³

At Step 2, SSA determines whether the claimant’s condition is severe.⁴ If a claimant has a medically determinable severe impairment, the Agency applies step 3 and looks to the Listings. If the severity of the impairment meets or medically equals a specific listing, the individual is determined to be disabled.

If the individual’s impairment does not meet or medically equal a listing, the Agency looks to Steps 4 and 5. At Step 4, the Agency determines whether the claimant can perform past relevant work, considering his/her residual functional capacity⁵ and the physical and mental demands of the work he/she did. If the claimant can perform past relevant work, the claim is denied. If the claimant cannot perform past relevant work, at Step 5, the Agency determines whether the claimant can perform any other work, considering his/her residual functional capacity, age,

¹ 20 C.F.R. §§ 404.1572 and 416.972. SGA means the performance of significant physical and/or mental activities in work for pay or profit, or in work of a type generally performed for pay or profit. As of 2016, “countable earnings” of employees indicate SGA and “countable income” of the self-employed is “substantial” if the amount averages more than \$1,130 per month for non-blind individuals or \$1,820 for blind individuals. SSA, POMS, DI 10501.015 (October 15, 2015).

² *Social Security Act* § 223(d)(1)(A), 42 U.S.C. § 423(d)(1)(A), and § 1614(a)(3)(A), 42 U.S.C. § 1382c(a)(3)(A). See also 20 C.F.R. §§ 404.1520 and 416.920.

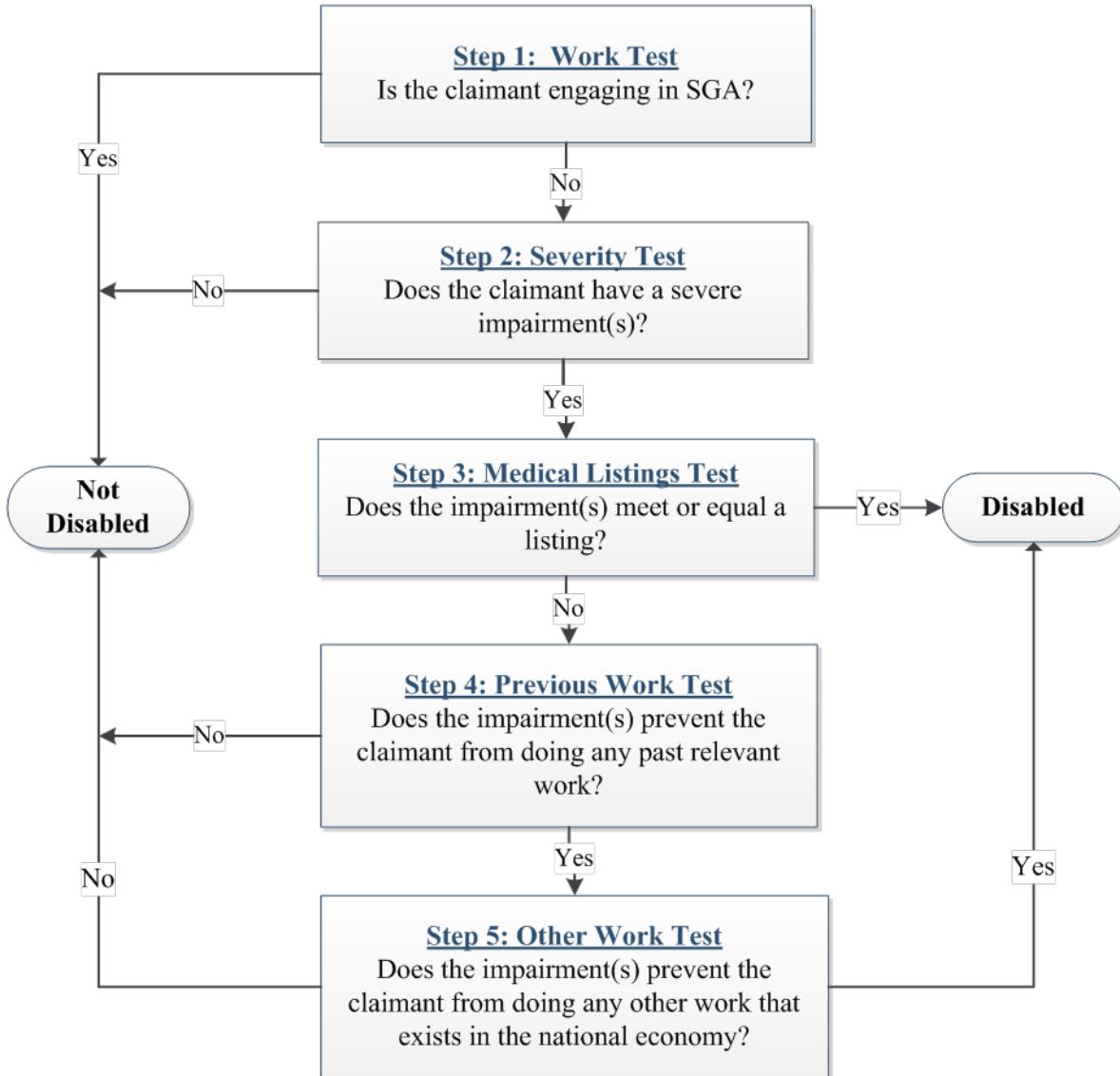
³ If the claimant disagrees with the Agency’s initial disability determination, he/she can file an appeal within 60 days from the date of notice of the determination. In most cases, there are four levels of appeal, including (1) reconsideration by the disability determination services, (2) hearing by an administrative law judge, (3) review by the Appeals Council, and (4) review by the Federal Courts.

⁴ 20 C.F.R. §§ 404.1521 and 416.921. An impairment or combination of impairments is not severe if it does not significantly limit an individual’s physical or mental ability to do basic work activities.

⁵ 20 C.F.R. §§ 404.1545 and 416.945. An individual’s impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what he or she can do in a work setting. The residual functional capacity is the most the individual can still do despite these limitations. SSA assesses the residual functional capacity based on all relevant evidence in the case record.

education, and past work experience. If the claimant cannot perform any other work, SSA finds him/her disabled.⁶

Figure D-1: SSA's 5-Step Sequential Evaluation for Determining Disability for Adults



⁶ SSA has another sequential process for evaluating whether a disabled beneficiary's disability continues, which includes a step for considering the Listings. 20 C.F.R. §§ 404.1594(f) and 416.994(b)(5).

Appendix E – OFFICE OF THE INSPECTOR GENERAL REPORTS ON THE PAYEE PROCESS

The Office of the Inspector General has issued a number of reports related to the Social Security Administration's representative payment program, including the following. These reports can be found on our website at <https://oig.ssa.gov>.

- *Beneficiaries Serving as Representative Payees Who Have a Representative Payee* (A-09-16-50109), August 2016.
- *Concurrently Entitled Beneficiaries Receiving Representative Payee and Direct Payments* (A-09-16-50093), May 2016.
- *Deceased Representative Payees* (A-01-14-34112), June 2015.
- *Representative Payees and Beneficiaries Who Were Residing in Different States* (A-02-14-14044), August 2014.
- *Disabled Individuals with Mental Impairments Acting as Representative Payees* (A-07-12-21265), September 2013.
- *Disabled Individuals with Mental Impairments in Need of a Representative Payee* (A-07-11-11110), September 2012.

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