

June 1, 2007

The Honorable Carolyn McCarthy  
106 Cannon House Office Building  
Washington DC 20515-3204

Dear Representative McCarthy,

On behalf of a coalition of seven leading mental health organizations, we are writing concerning HR 297, the NICS Improvement Act of 2007.

At the outset, we would like to communicate our strong support of your goal of keeping guns out of the hands of dangerous or potentially dangerous people. Our purpose in writing this letter is to provide feedback and recommendations that we hope will help achieve your objectives without impairing the privacy of sensitive personal records about mental health treatment or establishing further disincentives for people with mental illness to seek care when they need it.

**Scope of Reporting Requirements**

As you know, the Brady Handgun Violence Prevention Act requires states to report the names of certain categories of individuals to the Attorney General for inclusion in the National Instant Criminal Background Check System (NICS). Among these categories are persons who are “adjudicated as a mental defective” and persons “committed to a mental institution.

The term “adjudicated as a mental defective” is defined in the regulations implementing the Brady Act (27 CFR § 555.11) as follows:

*“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 contract or manage his own affairs.*

*(b) The term will 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 by any court or pursuant to articles 540a and 76b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.*

No definition of the term “committed to a mental institution” is in either the Brady Handgun Violence Prevention Act or the implementing regulations.

The Honorable Carolyn McCarthy  
June 1, 2007  
Page Two

Although the regulations attempt to define “adjudicated as a mental defective”, the definition remains vague and unclear and we are thus concerned that it will be interpreted in an overbroad and potentially harmful way for people with mental illness, the overwhelming majority of whom are law abiding and not violent.

For example, we are concerned that this language could be interpreted as including anyone who has ever been determined to need assistance with life activities by a court or administrative body, such as individuals temporarily assigned a representative payee by the Social Security Administration or individuals temporarily assigned a guardian for assistance in managing money by a Court. Many of these individuals go on to regain competency and independence. Moreover, these adjudications have no connection to dangerousness. Thus, as part of the process of clarifying who is and is not included within the definition, it is important to clarify that this category should not be included within the NICS background check system.

The lack of language in the regulations setting durational limitations or enabling individuals to petition to have their names removed from the NICS list is problematic as well. Recovery is today very possible for people with serious mental illness. Many people who may at one time or another have struggled with serious psychiatric symptoms go on to live productive and law abiding lives. Should a person involuntarily committed in his or her early twenties with no further civil commitments or involvement with the criminal justice system stay on the list for the remainder of his or her life? We notice that certain states such as California, in recognition that people with mental illness can and do recover, include durational limits and procedures for petitioning to have one’s name removed from the list in their background check systems.

These concerns can be addressed without amending the underlying law. We recommend adding a provision to HR 297 requiring that the regulations defining categories of individuals subject to the record collection requirement be updated. We specifically recommend adding the following provision to Section 102, (c) (3) entitled “Application to persons who have been adjudicated as a mental defective or committed to a mental institution.”

*“(C) Regulatory Update. --The Secretary of Treasury shall revise section 178.11 of title 27, Code of Federal Regulations, in consultation with the Substance Abuse and Mental Health Services Administration and the National Institute of Mental Health, to reflect current research on the effectiveness of mental health treatment and the likelihood of recovery from mental illness. These revisions should include updating the definition of who should be included in state reporting requirements based on current research and knowledge about mental illness and risks of violence. These revisions should also contain limitations on the amount of time mental health records*

The Honorable Carolyn McCarthy  
June 1, 2007  
Page Three

*must be included in the NICS. Such regulatory revisions shall be completed within six months following the effective date of this act.*

### **The Term “Adjudicated as a Mental Defective.”**

This term is both highly stigmatizing and incompatible with modern terminology used in the diagnosis and treatment of people with mental illness. No state official charged with carrying out the requirements of the Brady bill could possibly know what this means, as it is a term that has been obsolete for close to 40 years. Just as we would never use the term “idiot” or “imbecile” in federal law, so too should we not use the term “adjudicated as a mental defective.”

To address this, we recommend adding the following report language for the section-by-section analysis accompanying this section of the bill:

*"The Committee recognizes that the term "mental defective" is very stigmatizing and outdated and that research has shown that mental illness is highly treatable and that the vast majority of individuals with mental illness do not pose a danger to themselves or others . The federal regulations defining this category of individuals required to be reported to the NICS system must be revised to reflect current knowledge regarding mental illness. Accordingly, the Secretary of Treasury is directed to revise section 178.11 of title 27, Code of Federal Regulations, in consultation with the Substance Abuse and Mental Health Services Administration and the National Institute of Mental Health, to reflect current research on the effectiveness of mental health treatment and the likelihood of recovery from mental illness. Such regulatory revisions shall be completed within six months following the effective date of this act."*

### **Limitations on Information Reported to the NICS System.**

Section 102(c)(3)(A) of HR 297 specifies that the “State shall provide to the Attorney General, for inclusion in the National Instant Criminal Background Check System, the name and other relevant identifying information of persons adjudicated as mentally defective or those committed to mental institutions in order for the Attorney General to enforce section 922(g)(4) of title 18, United States Code.” We strongly recommend that the word “only” be inserted after “System” and before “the name” to ensure that sensitive information about diagnosis and treatment is not included with these records.

### **Limits on Information Sharing**

Section 102(c)(4) of HR 297, entitled “State Authority”, reads as follows. “*Records transmitted under this subsection shall be used only to determine eligibility to purchase or possess a firearm.*” We appreciate this effort to ensure that these records are not used or shared for any other purpose. We believe it important to specify as well that this information should not be shared with any other federal, state or local agency or person

for any purpose incompatible with the purposes of the Act. Thus, we recommend the addition of *“and may not be shared or transmitted to any other public or private agency or person for any purpose”* at the end of this sentence.

### **Privacy Protections**

We note with gratitude that HR 297 contains several provisions designed to enhance privacy protections for persons with mental illness. For example, Section 102 (c) )3 specifies that states shall make available to the Attorney General for use in the NICS system “the name and other identifying information of persons adjudicated as a mental defective or those committed to mental institutions. ...” This presumably is intended to ensure that sensitive information about diagnosis and treatment is not included.

Additionally, Section 102 (d) directs the Attorney General to work with “States and local law enforcement and the mental health community to establish regulations and protocols for protecting the privacy of information provided in the system” and further directs the Attorney General to “make every effort to meet with any mental health group seeking to express its views concerning these regulations and protocols... .” We very much appreciate your sensitivity to important considerations concerning the protection of privacy and confidentiality.

Since privacy concerns apply as well to States that collect information for transmission to the Attorney General, we recommend the addition of the word “collected” prior to “ the language “provided in the system” set forth in the above paragraph.

Additionally, to further strengthen these privacy protections, we recommend the establishment of a deadline of 18 months following the date of enactment for the Attorney General to promulgate these regulations.

We appreciate this opportunity to provide input concerning this legislation and would be pleased to meet with you to further discuss the recommendations contained in this letter. Please contact Ron Honberg, National Alliance on Mental Illness (NAMI), with questions or concerns.

Respectfully,

American Academy of Child and Adolescent Psychiatry  
American Psychiatric Association  
Federation of Families for Children’s Mental Health  
Judge David L. Bazelon Center for Mental Health Law  
Mental Health America (formerly the National Mental Health Association)  
National Alliance on Mental Illness  
National Association of State Mental Health Program Directors  
National Council for Community Behavioral Healthcare  
National Empowerment Center  
National Mental Health Consumers Self-Help Clearinghouse  
U.S. Psychiatric Rehabilitation Association

