

HHS Issues Final Rule on HIPAA and Firearm Background Check Reporting

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On January 6, as part of President **Obama's** [executive action](#) to combat gun violence, **HHS** promulgated [a final regulation](#) modifying the **HIPAA Privacy Rule** to allow certain HIPAA covered entities to disclose limited information to the National Instant Criminal Background Check System (NICS).

Background: The NICS, maintained by the **Federal Bureau of Investigation (FBI)**, is the national database used to conduct background checks on persons who may be disqualified from receiving firearms based on federal or state law. Federal law identifies several categories of potential disqualifiers, known as “prohibitors” including a federal mental health prohibitor. By statute, the federal mental health prohibitor applies to individuals who have been committed to a mental institution or adjudicated as a mental defective. The Department of Justice has promulgated regulations that defines these categories to include the following individuals:

- individuals committed to a mental institution for reasons such as mental illness or drug use;
- individuals found incompetent to stand trial or not guilty by reason of insanity, or
- individuals who have been otherwise determined by a court, board, commission, or other lawful authority to be a danger to themselves or others or to lack the mental capacity to contract or manage their own affairs as a result of marked subnormal intelligence or mental illness, incompetency, condition, or disease.

However, there is currently no federal law that requires state agencies to report data to the NICS, including the identity of individuals who are subject to the mental health prohibitor. HHS believes that HIPAA poses a potential barrier to such reporting. Under current law, HIPAA only permits covered entities (e.g., state mental health agencies) to disclose such information to the NICS in limited circumstances: when the entity is a “hybrid” entity under HIPAA (and the Privacy Rule does not apply to these functions) or when state law otherwise requires disclosure, and thus disclosure is permitted under HIPAA’s “required by law” category.

Final Rule: HHS finalized its proposed rule without any substantive changes. Under the final rule, a

new section 164.512(k)(7) of the HIPAA Privacy Rule expressly permits certain covered entities to disclose information relevant to the federal mental health prohibitor to the NICS.

The permitted disclosure applies only to those covered entities that function as repositories of information relevant to the federal mental health prohibitor on behalf of a State or are responsible for ordering the involuntary commitments or the adjudications that would make someone subject to the prohibitor. Thus, most treating providers may not disclose protected health information about their own patients to the NICS, unless otherwise permitted by the HIPAA Privacy Rule. HHS also clarifies that individuals who seek voluntary treatment are not subject to the prohibitor.

The rule limits disclosure only to the NICS or an entity designated by the State to report data to the NICS. And only that information that is “needed for purposes of reporting to the NICS” may be disclosed, though HHS gives States the flexibility to determine which data elements are “needed” to create a NICS record (consistent with requirements of the FBI, which maintains the NICS). At present, the required data elements for the NICS are: name; date of birth; sex; and codes identifying the relevant prohibitor, the submitting state agency, and the supporting record. The NICS also allows disclosure of certain optional data elements (e.g., social security number and identifying characteristics). HHS notes that applicable covered entities may disclose such optional data elements “to the extent necessary to exclude false matches.”

HHS declined many commenters’ suggestion to expand the rule to permit the disclosure of information about individuals who are subject to state-only mental health prohibitors. HHS fears that expanding the scope of the permitted disclosure would disrupt the careful balance between public safety and encouraging patients to seek mental health care.

Finally, in the preamble, HHS defended its statutory authority to make this change, despite the fact that Congress did not address HIPAA in recent legislation to strengthen the NICS. HHS explained that the “HIPAA statute confers broad authority on the Department to specify the permitted uses and disclosures of PHI by HIPAA covered entities.”

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