

Understanding Disclosures for Firearm Background Checks

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Federal law prohibits the sale of firearms to certain individuals with a history of mental illness. Recent mass shootings have focused attention on the fact that the individuals perpetrating these crimes often had a documented history of mental illness which went undetected despite state and federal background check systems.

Although there has been an increase in the number of mental health records reported to the National Instant Criminal Background Check System (NICS), a federal database system that checks available records on people who may be disqualified from purchasing firearms, many documented cases of individuals with a history of mental illness are still not reported.

On January 4, 2016, the US Department of Health and Human Services (HHS) moved forward with the Obama Administration's commitment to better reporting on those prohibited from purchasing firearms by modifying the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule through Final Rule [45 CFR 164.512\(k\)](#). This modification expressly permits states and certain covered entities (i.e., a state health agency) to disclose to NICS the identities of those individuals who, for mental health reasons, are prohibited by federal law from having a firearm. As the recognized sources for the disclosure of HIPAA information, HIM professionals must understand the current legal guidelines for the states in which they practice in order to answer questions about this rule from providers and patients.

Proposed HIPAA Modification Improves Public Safety

NICS was launched in 1998, mandated by the Brady Handgun Violence Prevention Act of 1993. The Federal Bureau of Investigation (FBI) developed the background check system through a cooperative effort with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and local and state law enforcement agencies. NICS is a computerized background check system designed to respond to Federal Firearm Licensees (FFL)—in other words, licensed gun dealers (but not unlicensed sellers)—within 30 seconds on most background check inquiries. The FFLs receive an almost immediate response, which allows them to proceed with or stop the purchase of a firearm.

The majority of states already have laws in place that require or authorize the reporting of potentially dangerous mentally ill individuals directly to the federal NICS database or to a state agency or database for use in firearm purchaser background checks. Other states collect information on potentially dangerous individuals but do not disclose the information to NICS.¹

Depending on the willingness of state governments to act as a liaison for NICS, the FFL contacts either the FBI or a designated state point of contact to initiate background checks. State requirements vary in terms of defining those who are "mentally ill," the information collected, whether the information is reported to the NICS, and which entities (such as courts, licensed therapists, law enforcement officials, and schools) are responsible for reporting to the state.

The modification better enables the reporting of prohibited individuals' identities to the NICS background check system and is an important step toward improving the public's safety while continuing to strongly protect individuals' privacy interests. The final rule gives states improved flexibility to ensure accurate but limited information is reported to the NICS.

The new final rule, effective February 5, 2016, adds a new category of permitted disclosures to NICS ([45 CFR 164.512\(k\)](#)). It reads:

The new provisions at (k)(7) would permit certain covered entities (e.g. state health agency) to disclose the minimum necessary demographic and other information for NICS reporting purposes, which would not include clinical, diagnostic, or other mental health information.

The regulation allows states and certain covered entities to report accurate but limited information to the NICS. The information that can be disclosed under the new regulation is the minimum necessary identifying information about individuals who have been involuntarily committed to a mental institution or otherwise have been determined by a lawful authority to be a danger to themselves or others, or who lack the mental capacity to manage their own affairs.²

The information that is collected by NICS about individuals for background checks includes name, sex, birth date, state of residence, Social Security number, height, weight, and place of birth. Because clinical and diagnostic information is not submitted to NICS, the new modification ensures the patient-provider relationship and ensures that individuals are not discouraged from seeking voluntary treatment.

In addition, this rule applies only to a small subset of HIPAA-covered entities that either make the mental health determinations that disqualify individuals from having a firearm or are designated by their states to report this information to NICS. The rule does not apply to most treating providers.

The modification creates a new permitted pathway for the specified HIPAA-covered entities to make disclosures to the NICS under the Privacy Rule, and the new rule does not change previous reporting arrangements. It should be noted that the rule does not require covered entities to disclose the identities of potentially dangerous mental health patients to the NICS; it permits such disclosures.

If a state law prohibits disclosures to the NICS, according to HHS, such a law is not contrary to the Privacy Rule. As a result, a covered entity could comply with the revised Privacy Rule, which does not mandate disclosures, and a state law prohibiting such disclosures by not disclosing the protected health information to the NICS.

Guidance for HIM Professionals

It is important that HIM professionals become familiar with current legal guidelines—which vary broadly by state—in order to respond to questions from providers, patients, and the public. Important considerations include knowing who is responsible for reporting potentially dangerous individuals to NICS. Depending on the state this could be law enforcement officials, school administrators, licensed psychotherapists, mental health facilities, or the court system.³

Additionally, time periods for reporting cases can range from “immediately” to “up to 30 days” or “in a timely manner” depending on state law. HIM professionals also need to know which state agency information is reported to, which can include state Departments of Justice.

It’s also important that HIM professionals understand which categories of mentally ill patients are reported on. These include:

- Those confined as inpatients
- Those ordered to receive involuntary outpatient mental health treatment
- Those appointed with guardians because they lack the capacity to manage their own affairs
- Those found “guilty by reason of insanity” or “guilty but insane” in a criminal case
- Those found incompetent to stand trial

Notes

[1] Law Center to Prevent Gun Violence. “[Mental Health Reporting Policy Summary](#).” September 16, 2013.

[2] US Department of Health and Human Services. “[HIPAA Privacy Rule and the National Instant Criminal Background Check System](#).” January 5, 2016.

[3] Law Center to Prevent Gun Violence. “Mental Health Reporting Policy Summary.”

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