VIEWPOINT

Mental Illness and Firearms Background Checks—Combatting Violence Without Inhibiting Care

Charles G. Kels, JD
Division of Legislative Counsel, American Medical Association, Washington, DC; and The Judge Advocate General's Corps, US Air Force Reserve, Washington, DC.

Jennifer A. Bernstein, JD, MPH
Department of Health Management and Policy, University of Michigan School of Public Health, Ann Arbor.

Y. Tony Yang, ScD, LLM, MPH
Department of Health Administration and Policy, George Mason University, Fairfax, Virginia.

Corresponding Author: Y. Tony Yang, ScD, LLM, MPH, Department of Health Administration and Policy, George Mason University, MS: 1J3, 4400 University Dr, Fairfax, VA 22030 (ytyang@gmu.edu).

The history of American firearms legislation is one of tragedy and response. The Gun Control Act of 1968, prohibiting certain categories of individuals from possessing or purchasing firearms, was prompted by political violence. The Brady Handgun Violence Prevention Act of 1993, requiring background checks on prospective buyers via the National Instant Criminal Background Check System (NICS), memorialized an attempted presidential assassination. The NICS Improvement Amendments Act of 2007, designed to strengthen the background check system, followed the mass shooting at Virginia Tech University.

The latest initiatives aimed at curbing gun violence were announced by President Barack Obama on the heels of the tragic events in Newtown, Connecticut. Among the President's 23 executive actions was a directive to "address unnecessary legal barriers" that prevent reporting "on people prohibited from gun ownership for mental health reasons."[1] In response, the US Department of Health and Human Services (HHS) recently published a final regulation that amends the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to enable disclosures to the federal background check system under specified circumstances.[2] This Viewpoint analyzes the new rule, explores the nexus between mental health records and firearms background checks, and examines implications for psychiatrists.

Prohibiting Mental Health Factors

Federal law prohibits 9 categories of persons from shipping, transporting, possessing, or receiving firearms or ammunition. One such category applies to individuals who (in now-antiquated terminology) have been either "adjudicated as a mental defective" or "committed to a mental institution."[3] Such adjudications and commitments involve action "by a court, board, commission, or other lawful authority."[4]

While there is some judicial disagreement as to how much due process is required before the federal mental health prohibitor can be invoked, there is widespread consensus that "a mental health diagnosis does not, in itself," trigger the prohibitor.[2] Moreover, in most cases the treating psychiatrist is not the legal authority responsible for placing an individual in a prohibited class. This distinction between treatment and adjudication is a cornerstone of both the physician-patient relationship and the due process rights of mentally ill individuals.

The Background Check System

The NICS was activated in 1998 to help enforce the firearms prohibitions under federal and state law by creating a mechanism to determine the eligibility of a prospective gun buyer at the point of sale. Licensed sellers are required to contact the NICS to relay identifying information about the customer. The Federal Bureau of Investigation checks the information against 3 databases to see if there is a record match and advises whether the sale may proceed.

Federal agencies are required to report prohibited persons to the NICS, whereas states are incentivized via grants.[2] The US Supreme Court has held that states may not be compelled to participate.[5] The efficacy of the NICS is predicated on the currency and completeness of available data. In 2012, investigators examined the extent to which states had made mental health prohibiting information available to the NICS and found overall progress to be limited and uneven. Specifically, officials from half of the states studied cited privacy laws as an obstacle.[6] The perception that HIPAA in particular created an impediment to NICS reporting formed the backdrop for the latest regulatory action.

Privacy and Mental Health

The HIPAA Privacy Rule sets forth national standards to safeguard the privacy of individuals' health information. The Privacy Rule governs the use and disclosure of protected health information by covered entities, which include most physicians. With the limited exception of psychotherapy notes maintained apart from the mental health record, HIPAA does not distinguish between categories of health information nor provide extra protections for information pertaining to psychiatric disorders. However, where state law imposes additional safeguards on mental health information, HIPAA defers to these more protective standards. Most disclosures under HIPAA are permissive rather than required, enabling physicians to act in accordance with their professional ethics obligations.[7]

In general, physicians may only share health information as the Privacy Rule allows, which includes carrying out routine treatment, payment, and health care operations, as well as achieving 12 national priority purposes recognized as essential to striking a balance between individual privacy and the public interest. These dozen exceptions include disclosures that are required by law, made for certain law enforcement purposes, or needed to avert a serious and imminent threat in a duty-to-warn scenario (**Table**).[7] Prior to this year, however, no HIPAA provision expressly permitted covered entities to report protected health information to the NICS, unless such reporting was affirmatively required under applicable law.[2]

A Limited Permission

The newly finalized regulation seeks to remedy this gap by explicitly authorizing certain disclosures about the mental health prohibitor to the NICS. At the same time,

Table. Selected Public Interest and Benefit Activities Recognized by the Privacy Rule

Permitted Use or Disclosure	By Whom	To Whom	What May Be Used or Disclosed	Key Takeaways
Required by law. 45 CFR §164.512(a)	Covered entity (health plan, health care clearinghouse, most physicians).	Recipient required by law.	Limited to the relevant requirements of such law.	Includes federal and state statutes, regulations, and court orders.
Law enforcement purposes. 45 CFR §164.512(f)	Covered entity.	Law enforcement official.	Minimum necessary and as delimited by the applicable law enforcement exception.	6 Specified law enforcement purposes with accompanying conditions and limitations.
Serious threat to health or safety. 45 CFR §164.512(j)	Covered entity.	Person(s) reasonably able to prevent or lessen a serious and imminent threat to health or safety.	Minimum necessary.	Consistent with duty-to-warn laws and standards of ethical conduct. Good faith generally presumed.
New: Specialized government functions (NICS). 45 CFR §164.512(k)(7)	Covered entity that is a state agency, reports to the NICS for the state, or exercises adjudicatory authority.	The NICS or an entity that reports to the NICS for the state.	Limited information needed for reporting to the NICS. Not diagnostic or clinical information.	Criteria for the federal mental health prohibitor unchanged. Most psychiatrists unaffected.

Abbreviation: NICS, National Instant Criminal Background Check System.

HHS narrowly tailored the permission in recognition of the importance of encouraging individuals to seek psychiatric care. Notably, the rule limits: (1) who can make such disclosures (only adjudicators or repositories of information regarding the mental health prohibitor); (2) to whom the disclosures may be made (only directly to the NICS or to a state-designated entity); and (3) what may be disclosed (only necessary identifying data and never diagnostic or clinical information).[2]

The rule balances important values, including the public safety function of the NICS and the confidentiality of care, on which patients' willingness to undergo psychiatric treatment often hinges. The regulation maintains the separation between treatment for psychiatric disorders and adjudication as an individual prohibited from gun ownership by ensuring that NICS reporting functions adhere only to the latter. Most clinical psychiatrists are neither adjudicators nor repositories of firearms-prohibiting classifications and will thereby continue in a nonreporting role. However, the small subset of HIPAA-covered entities that do serve as state-designated NICS data repositories—such as certain state mental health agencies—now have a pathway under HIPAA to report limited demographic information to the NICS, even without a corresponding legal mandate.

Finding an Equilibrium

While some patient advocates have criticized the rule change as stigmatizing mental illness, most professional organizations have supported the regulation's narrow scope as consistent with physicians' overall duty of confidentiality.[2] Conversely, some groups have decried the regulation as unnecessary, deeming NICS-related HIPAA barriers to be illusory. Yet HHS found that the Privacy Rule could depress NICS reporting in multiple states that rely on covered entities for this function, at least absent changes in state law . Moreover, misconceptions about HIPAA can, in themselves, impede information sharing.[1,2]

For psychiatrists, the limited exception crafted to remove cited obstacles while preserving the sanctity of clinical care offers an opportunity to counteract any chilling effects among persons with mental illness. While creating an avenue for NICS reporting under HIPAA, the rule neither mandates such disclosures nor permits clinical information to be divulged. Ultimately, the rule's success in ensuring that patients are not deterred from seeking care or communicating openly with their psychiatrists depends on effective education of the mental health community.

ARTICLE INFORMATION

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3. 18 USC §922(g)(4).

4. 27 CFR §478.11.

5. *Printz v US*, 521 US 898 (1997).

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7. 45 CFR Parts 160 and 164, Subparts A and E.