Proposed HIPAA Amendments to Facilitate Reporting for Firearm Background Checks

The National Instant Criminal Background Check System (NICS) is a federal database containing the names of individuals prohibited under federal law from purchasing a firearm.   The Brady Handgun Violence Prevention Act of 1993 prohibits several categories of individuals from engaging in the shipment, transport, receipt, or possession of firearms. In addition to felons, fugitives, domestic violence offenders, and illegal drug users, the law prohibits gun possession by "individuals who have been involuntarily committed to a mental health institution, found incompetent to stand trial or not guilty by reason of insanity, or otherwise adjudicated as having a serious mental condition that results in the individuals presenting a danger to themselves or others or being unable to manage their own affairs."[1] This "mental health prohibitor" does not apply to individuals who are in a mental institution for observation, admitted voluntarily, or simply receiving treatment for a mental health diagnosis.

On January 7, 2014, HHS issued a Notice of Proposed Rulemaking (NPRM)[2] to modify the HIPAA Privacy Rule "to expressly permit certain HIPAA covered entities to disclose to [the NICS] the identities of individuals who are subject to" the mental health prohibitor. (This followed an April 2013 Advance Notice of Proposed Rulemaking requesting public comments on whether the HIPAA Privacy Rule presents a barrier to reporting of individuals who should be prohibited from possessing firearms for specified mental health reasons.) States report information to the NICS only voluntarily and reporting practices vary according to state law and agency procedures. Most reporting originates with the judiciary, but some states have designated repositories for information to be reported to NICS, and in some states, other authorities outside the judicial system (such as agencies, boards, and commissions) participate in decisions regarding involuntary commitments or mental health adjudications. Some of these agencies and authorities may be HIPAA covered entities. HIPAA permits reporting by covered entities to the extent that the state has a law requiring reporting, but state officials have reported that the absence of explicit state laws requiring reporting is an impediment to making mental health records available for NICS purposes.

In the NPRM, HHS proposes to revise HIPAA to "permit uses and disclosures of protected health information for purposes of reporting to the NICS or a State-designated entity the identities of individuals who are subject to the Federal mental health prohibitor under 18 U.S.C. 922(g)(4)." The permission would be limited to the mental health prohibitor, so HIPAA-covered entities (e.g., health care providers, health plans) could not disclose information about an individual's unlawful drug use under the proposed permission. It would apply only to covered entities that serve as repositories of information relevant to the mental health prohibitor for the state or that are responsible for ordering involuntary commitments or other adjudications that would make someone subject to the prohibitor. Thus, the proposed amendment would not permit most health care providers to disclose protected health information about patients for NICS purposes. The only permitted use for information disclosed under the new permission is reporting to the NICS or to a state repository of data for NICS, and the information disclosed must be limited to the minimum necessary for that intended purpose. (Existing permission for disclosures for law enforcement purposes would be unchanged.)

For more information about HIPAA, see here. Follow us on Twitter **@HealthInfoLaw.**

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[1] 27 CFR 478.11

[2] http://www.gpo.gov/fdsys/pkg/FR-2014-01-07/pdf/2014-00055.pdf