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February 21, 2014

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: HIPAA Privacy Rule and NICS
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)

<http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2014-0001-0001>

File # HHS-OCR-2014-0001-0001

Dear Director Rodriquez,

The American Psychiatric Association (APA) appreciates the Office of Civil Rights's (OCR) solicitations on whether it should modify the HIPAA Privacy Rule to permit covered entities to disclose to the National Instant Criminal Background Check System (NICS) the identities of persons prohibited by State law from possessing or receiving a firearm for reasons related to mental illness. The APA appreciates the balance HHS strikes to protect the safety of the public, by allowing the reporting of appropriate individuals subject to the NICS federal "mental health prohibitor," while also preserving the patient-physician relationship and promoting mental health treatment. We applaud HHS for again recognizing the importance of the patient-physician relationship by limiting express permission for NICS reporting to a circumscribed category of HIPAA-covered entities. However, we have significant reservations about expanding the Proposed Rule's express permission to report prohibitors created by state law, because of our concern that states may require treating health care providers to engage in NICS reporting and unreasonably broaden the criteria that can trigger NICS reporting.



Federal Reporting Threshold

The APA represents approximately 35,000 psychiatric physicians. Our members practice across the country in a variety of settings and serve patients in many demographic categories. Psychiatrists want to encourage persons who suffer from mental illness and/or substance use disorders to obtain treatment. This HHS regulation clarifies that to be eligible for being reported to NICS as meeting a federal “mental health prohibitor” an individual must satisfy federal definitions of having been involuntarily committed to a mental institution or have been “adjudicated as a mental defective”¹ by a court, board, commission, or other lawful authority.

We recognize this federal definition’s use will result in some individuals being eligible for reporting to NICS when potential violence from the patient is highly improbable (*e.g.*, an eating disordered patient who is not violent but is involuntarily committed to treatment because of likely harm from reduced food intake could be reported to NICS under the federal “mental health prohibitor”). However, by making clear that an involuntary commitment or an adjudication meeting federal definitions must occur to even permit reporting to the NICS federal “mental health prohibitor,” the potential to indiscriminately report individuals to NICS under the federal mental health prohibitor is significantly limited.

Patient-Physician Relationship

Paramount to a patient’s mental illness outcomes is the relationship the patient has with his or her physician or other treating provider. The patient-physician relationship should be protected, and we appreciate HHS’s acknowledgement that too broad of a definition of HIPAA-covered entities that may report individuals under the NICS federal “mental health prohibitor” could chill the patient-physician relationship and deter individuals from seeking mental illness treatment. We agree with HHS’s decision to narrowly define the scope of HIPAA-covered entities with permission to report to NICS. The proposed definition would encompass HIPAA-covered entities that are the lawful authorities for performing adjudications of mental status and the repositories for data arising from the adjudications.

¹ As used in statute, “adjudicated as a mental defective” is defined by regulation to include 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 others; or 2) lacks the mental capacity to contract or manage his own affairs.

State Prohibitors Permission

HHS acknowledges states are free to offer a more expansive definition of who can be reported to NICS under their own state prohibitors and also the categories of entities that can do the reporting. HHS solicits input on extending an express reporting permission under HIPAA to state-enacted prohibitors. In some instances states may already have broader laws with respect to the scope of HIPAA-covered entities that can report to NICS. We disagree with involving physicians or other treating providers in NICS reporting. NICS reporting is best handled by the judicial system, which performs the adjudications. Where NICS reporting is performed by a HIPAA-covered entity, we agree reporting should be confined to state health agencies that are the lawful authorities in a given state to perform adjudications or state offices that serve as clearinghouses for information arising from the adjudication.

We strongly oppose any state law that would require treating providers to report to NICS the identities of persons suffering from mental illness. Consequently, we have strong reservations about expanding the newly created express reporting permission to apply to states. It would be much too easy for states to enact a statute expanding the definition of HIPAA-covered entities expected to, or required to, report to NICS so as to include treating providers. Additionally, there is nothing to stop a state from enacting its own mental health prohibitors, which do not meet the heightened threshold of “committed to a mental institution” or “adjudicated as a mental defective” as defined in federal statute and federal regulations and which must be met to report individuals under the federal “mental health” prohibitor. We recently learned of a state statute that would require the reporting to NICS of all individuals with intellectual disabilities and allow for the reporting to NICS of individuals who voluntarily commit themselves to a mental institution. This state reporting requirement is far broader than what federal law would permit under HIPAA to be reported as meeting the federal “mental health prohibitor.” Such a loose definition will have the effect of further stigmatizing mental illness. People will not seek treatment for mental illness and/or substance use disorders if they feel by simply seeking treatment they could potentially be reported to NICS.

Thank you for the opportunity to provide comments on this Proposed Rule. APA appreciates HHS's need to balance protecting the public and preserving the physician-patient relationship. If you have questions about our comments, please contact the APA's Deputy Director, Regulatory Affairs, Julie A. Clements, J.D., M.P.P., by telephone at (703) 907-7842 or by email at jclements@psych.org.

Sincerely,

A handwritten signature in black ink that reads "Saul Levin, M.D., M.P.A." in a cursive style.

Saul Levin, M.D., M.P.A.
CEO and Medical Director