



# Compliance TODAY

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# Gun control debate prompts HIPAA change

- » Changes to HIPAA went into effect February 5, 2016.
- » Covered entities will now be permitted to report “mental health prohibitors” to the NICS.
- » This reporting was previously barred by HIPAA without a patient’s authorization.
- » The determinations to prompt disqualification on mental health grounds are made almost exclusively by organizations not bound by HIPAA.
- » It is anticipated these changes to HIPAA will have very little impact on covered entities.

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**I**n January, President Obama announced a series of Executive Actions focused on gun control. In a somewhat related measure, the Department of Health and Human Services (HHS) announced a final rule, effective on February 5, to ease the reporting of certain mental health indicators to the National Instant Criminal Background Check System (NICS). In recent weeks, there has been a great deal of reporting on the fact that the Health Insurance Portability and Accountability Act (HIPAA) has been changed to make it easier for covered entities to make disclosures to the NICS. On a very superficial level that is correct, but the reality of the situation is less extreme. Therefore, a more thorough analysis of the changes to HIPAA and who it impacts is in order.



Bullian

## What the final rule changes

The final rule changes HIPAA to make it easier to report “mental health prohibitors” to the NICS. A mental health prohibitor is a term of art for the mental health justifications that make

a person ineligible from buying or owning a gun. The mental health prohibitors include:

- ▶ Having been involuntarily committed to a mental institution;
- ▶ Having been found incompetent to stand trial, or found not guilty by reason of insanity; or
- ▶ Having been determined by a lawful authority to be a danger to themselves or others, or unable to manage their affairs.<sup>1</sup>

Prior to this change in HIPAA, covered entities would have to receive explicit authorization from the patient (or their representative) before releasing this information to the NICS. It is easy to see the necessity for the change, because it would be unlikely that a patient would provide such an authorization. However, this change now creates an exemption for the release of limited demographic information to the NICS. This is similar to other seldom-used disclosure exemptions for “specialized government functions,” such as disclosures necessary to protect the President.<sup>2</sup>

## Who is affected by this change?

The question of who is actually affected by this slight change in HIPAA has been widely misrepresented. A cursory review of industry

news would lead one to believe that this change would have a dramatic impact on all covered entities across the country. However, by HHS's own admission, this change will affect very few covered entities.

Under the final rule, only covered entities with the lawful authority to make the adjudications or commitment decisions that make someone subject to the mental health prohibitor, or are repositories of information for NICS reporting, are actually permitted to make the disclosure. The fact is few, if any, covered entities fall within those categories. In the vast majority of situations, the authority for performing these adjudications or commitments lay with entities outside of the scope of HIPAA, such as courts, boards, or commissions. HHS acknowledged that in rare instances, covered entities may serve as repositories for this information, in which case this change would apply. However, HHS was unaware of any situations in which this was actually occurring.

At the end of the day, this change is going to impact a very limited number of covered entities, if it affects any at all. Contrary to initial reports, this additional exemption will not

require all covered entities to send information to the NICS about individuals undergoing treatment for mental illness. The bar has been, and will continue to be, very high to prevent someone from buying or possessing a gun for mental health reasons. These HIPAA changes neither change that standard, nor put the duty to notify NICS on additional covered entities.

## Conclusion

HIPAA changed on February 5, 2016, but the change may not actually impact any covered entities. It is a change that seems almost common sense—to not require a patient to authorize a disclosure that would make them ineligible from purchasing a firearm. However, the determinations, and thus the reporting of a mental health prohibitor, take place almost exclusively in organizations outside the scope of HIPAA. Therefore, despite garnering significant attention to the contrary, the change will actually have a very limited impact on HIPAA covered entities. ■

1. See 18 U.S.C. 922(g) and (n) and implementing regulations at 27 CFR 478.11 and 27 CFR 478.32.
2. See 45 CFR 164.512 (k).

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