



Submission of Mental Health Records to NICS and the HIPAA Privacy Rule

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Summary

Questions about the scope and efficacy of the background checks required during certain firearm purchases have gained prominence following recent mass shootings. These background checks are intended to identify whether potential purchasers are prohibited from purchasing or possessing firearms due to one or more “prohibiting factors,” such as a prior felony conviction or a prior involuntary commitment for mental health reasons. Operationally, such background checks primarily use information contained within the National Instant Criminal Background Check System (NICS) and a particular focus of the debate in Congress has been whether federal privacy standards promulgated under the Health Insurance Portability and Accountability Act (i.e., the HIPAA privacy rule) or state privacy laws are an obstacle to the submission of mental health records to NICS.

Under the Gun Control Act of 1968 (GCA), as amended, persons adjudicated to be mentally defective or who have been committed to a mental institution are prohibited from possessing, shipping, transporting, and receiving firearms and ammunition. Neither a diagnosis of a mental illness nor treatment for a mental illness is sufficient to qualify a person as “adjudicated as a mental defective.” Rather, an individual’s “adjudication as a mental defective” relies upon a determination or decision by a court, board, commission, or other lawful authority. The definition of “committed to a mental institution” may apply only to inpatient settings. At least one federal court has held that the Supreme Court’s recent recognition of an individual right to possess a firearm suggests that some emergency hospitalization or commitment procedures, that may not have as many procedural safeguards as formal commitment, should not be included within the meaning of “involuntary commitment” for purposes of the GCA. In 2007, Congress passed the NICS Improvement Amendments Act (NIAA), which authorizes the Attorney General to make additional grants to states to improve electronic access to records as well as to incentivize states to turn over records of persons who would be prohibited from possessing or receiving firearms.

In 2012, the Government Accountability Office (GAO) reported that a variety of technological, coordination, and legal (i.e., privacy) challenges limit the states’ ability to report mental health records to NICS. The HIPAA privacy rule, which applies to most health care providers, regulates the use or disclosure of protected health information. On February 14, 2013, HHS announced that it will seek to amend the HIPAA privacy rule to remove any potential impediments to state reporting of mental health records to NICS. The privacy rule is most relevant as a potential obstacle where information used to generate mental health records on individuals prohibited from gun possession under the GCA is held by health care providers in states that do not expressly require disclosure of such records to NICS. Courts and health care providers that generate such prohibiting mental health records may also be subject to state health privacy laws that may be more restrictive than the HIPAA privacy rule.