



June 7, 2013

Submitted through the Federal eRulemaking portal at:
www.regulations.gov

Leon Rodriguez, Director
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

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: 45 CFR Parts 160 and 164
Comments on the HIPAA Privacy Rule and the National Instant
Criminal Background Check System (NICS)

Dear Mr. Rodriguez:

On behalf of the American Civil Liberties Union (ACLU), over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to comment on the Advance Notice of Proposed Rulemaking (ANPRM) on the Health Insurance Portability and Accountability Act of 1996¹ (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS). The ACLU strongly cautions against creating another HIPAA exemption specifically for the transmission of information to the NICS system on people who have been involuntarily committed and/or adjudicated “mentally incompetent.”

Not only is such an exemption for HIPAA unnecessary, because HIPAA does not pose a barrier to the transmission of relevant information to the system, the creation of such an exemption may increase the risk of inadvertent disclosure of private information, including medical records, thus subjecting countless individuals to a loss of privacy and certain civil liberties. Millions of Americans are impacted every year by a mental disability, and despite progress in recent decades in increasing access to treatment and dismantling harmful and archaic stereotypes, many impacted

¹ Pub. L. No. 104-191, 110 Stat. 1936 (1996).

individuals are still hindered from seeking help when needed due to fear of stigma and the consequences for their civil liberties.

While there is a public interest in the prompt transmission of eligible information into the NICS system, it may be satisfied through existing law and regulation. On the other hand, the consequences of another express HIPAA exemption in this context to the millions of Americans with mental disabilities is immense – it would markedly increase the risk of privacy violations, including the disclosure of medical information, given the high error rate of the NICS system. Further, the increasing aggregation of information on these individuals in databases could have broader civil liberties consequences, particularly with regard to employment and the criminal justice system. The cumulative effect of these consequences would be to further isolate and stigmatize people with mental disabilities, and to increase the likelihood that they would be deterred from seeking treatment when needed.

Since the ACLU opposes the creation of another HIPAA exemption, these comments will focus exclusively on why HIPAA does not serve as a barrier to the sharing of information with NICS under current laws and regulations, and the civil liberties consequences for millions of Americans with mental disabilities of creating such an exemption.

I. HIPAA does not serve as a barrier to the transmission of information to NICS on individuals prohibited from possessing a gun under federal law due to a “mental competency” adjudication or an involuntary commitment to a hospital or treatment facility.

The majority of people prohibited from possessing a gun under federal law have gone through an adjudicatory process in either the criminal or civil court system, to which HIPAA is not applicable. HIPAA’s privacy protections apply to all of the medical records of every individual, and only their medical records.

HIPAA’s general principle is that an individual’s protected health information may not be used or disclosed except as the individual or the individual’s personal representative² authorizes in writing, or as HIPAA permits or requires.³ The scope of HIPAA extends to all “individually identifiable health information,” whether electronic, paper, or oral, held or transmitted by a “covered entity,” which include (1) health plans, (2) health care providers, and (3) health care clearinghouses, or their business associates.⁴ HIPAA classifies this information as “protected health information” (PHI).⁵ However, several entities that may possess health information – such as elementary and secondary schools, life insurance companies, law enforcement, and the judicial system – are not subject to HIPAA.⁶ Since

² 45 C.F.R. § 164.502(g).

³ 45 C.F.R. § 164.502(a).

⁴ 45 C.F.R. § 160.102, 160.103, 162, 164.500(b), 164.504(e), 164.532.

⁵ 45 C.F.R. § 160.103.

⁶ See generally, Off. for Civ. Rights, Dep’t of Health & Human Servs., *Frequently Asked Questions: Who must comply with HIPAA privacy standards?*, http://www.hhs.gov/oct/privacy/hipaa/faq/covered_entities/190.html (last visited Apr. 24,

court records are not subject to HIPAA, there are extremely limited (and potentially only one) circumstances in which a HIPAA-covered entity could possess information on individuals prohibited from possessing a gun under federal law due to an involuntary inpatient commitment or an adjudication of “incompetence,” (collectively referred to a “mental health prohibitor” in the ANPRM) that are not also possessed by a legal authority. Thus, as will be discussed in more detail below, HIPAA is not relevant to the transmission of virtually all records into NICS on individuals who are subject to the “mental health prohibitor.”

Under current law certain categories of individuals are prohibited from possessing, shipping, transporting, and receiving firearms and ammunition, either for a period of time or permanently, depending on the relevant prohibitor. These federal firearms restrictions⁷ apply to individuals convicted of or indicted for certain crimes, including fugitives from justice, those subject to certain restraining orders, people in the United States without legal status, individuals who have renounced their U.S. citizenship, people who have been dishonorably discharged from the U.S. Armed Forces, individuals who are unlawful users or addicted to a controlled substance, and people adjudicated to be “mentally defective” or who have been committed to a “mental institution.”⁸

Federal regulations provide greater specificity on the two categories of individuals subject to the “mental health prohibitor” – (1) those who are adjudicated mentally incompetent, and (2) those who are involuntarily committed for inpatient treatment.

“Adjudicated as a mental defective” means⁹

- (a) 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 to others; or
 - 2. Lacks the capacity to manage his own affairs.

- (b) The term shall include –
 - 1. A finding of insanity by a court in a criminal case, and

2013); Off. for Civ. Rights, Dep’t of Health & Human Servs., *Frequently Asked Questions: Does the HIPAA Privacy Rule apply to an elementary or secondary school?*, http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/513.html (last visited Apr. 24, 2013) (“In most cases, the HIPAA Privacy Rule does not apply to an elementary or secondary school because the school either: (1) is not a HIPAA covered entity or (2) is a HIPAA covered entity but maintains health information only on students in records that are by definition “education records” under FERPA and, therefore, is not subject to the HIPAA Privacy Rule.”).

⁷ 18 U.S.C. § 922(g) & § 922(n).

⁸ In order to be legally precise, these comments refer to the statutory terms “adjudicated as a mental defective” and “committed to a mental institution,” but it should be noted that these terms are outdated and offensive to many individuals with mental disabilities.

⁹ 27 C.F.R. § 478.11.

2. Those persons found incompetent to stand trial or found not guilty by lack of mental responsibility.

“Committed to a mental institution” means¹⁰

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Thus, in order for an individual to be adjudicated as mentally incompetent, there must be a judicial or administrative process that results in an official finding that the individual is either a danger to self or others, or that the person is unable to manage his or her own affairs. While a HIPAA-covered entity, such as a health care provider, may provide an evaluation of an individual as part of a legal proceeding, such an assessment alone is not an adjudication under the statute.¹¹

Similarly, these regulations contemplate that an involuntary commitment to an inpatient treatment facility will occur as the result of a judicial or administrative process, whether criminal or civil. However, there is one limited circumstance in which an individual could be temporarily involuntarily committed without receiving the due process protections of a judicial or administrative proceeding – an emergency admission to a hospital or treatment facility. Under some state laws, a health care provider has the legal authority to admit an individual involuntarily, when that person presents a danger to self or others. Presumably, the health care provider – a HIPAA-covered entity – would constitute a “lawful authority” under the statute. But, even under this circumstance, an individual subject to involuntary commitment as an emergency psychiatric admission would not necessarily be subject to the “mental health prohibitor,” since the temporary admission could be for observation purposes – which explicitly exempts the individual from the statute.

Even if the individual is not involuntarily committed to a hospital or treatment facility for observation purposes as part of the emergency admission by a health care provider, he or she may still not trigger the federal firearms prohibition under the Gun Control Act. The First and Fifth Circuits have held that these emergency involuntary commitments do not constitute a “commitment” under the statutory terms, and the Fourth and Eighth Circuits have only held that an individual is “committed” under the statute if he or she receives full due process protections – including access to an administrative or court hearing.

In *United States v. Giardina*, the Fifth Circuit stated that, “[a]n essential element of that federal offense is either a formal adjudication that a person suffers a mental defect, or a formal commitment,

¹⁰ 27 C.F.R. § 478.11.

¹¹ EDWARD C. LIU ET AL., CONG. RESEARCH SERV., SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 2 (2013), available at <http://www.fas.org/sgp/crs/misc/R43040.pdf>.

which latter, in the instance of Louisiana, requires formal action by the state district court.”¹² And, in *United States v. Rehlander*, the First Circuit overturned its previous decisions that an involuntary commitment on the basis of an *ex parte* procedure constituted an involuntary commitment under the Gun Control Act due to the Supreme Court’s decision in *District of Columbia v. Heller*.¹³ The First Circuit held that the emergency hospitalization procedure did not have sufficient procedural safeguards, including notice and the opportunity to contest one’s involuntary confinement, and that this hospitalization could not be construed as an involuntary commitment under the statute without depriving people of their right to bear arms without due process.¹⁴

Similarly, in *United States v. Midgett*, the Fourth Circuit held that an individual was “committed” under the statute when he had the opportunity to participate, with counsel, in a court hearing before a judge who heard evidence, made factual findings, and ordered his commitment to a hospital.¹⁵ The Eighth Circuit made the same determination in both *United States v. Whiton*¹⁶ and *United States v. Dorsch*,¹⁷ holding in each case that an individual was “committed” within the statutory terms based upon a judicial or administrative order issued after a hearing with appropriate due process protections. In fact, the Eighth Circuit stated that if an individual “was truly prevented from seeking review of or relief from the administrative proceeding that resulted in his involuntary commitment, due process may well prevent use of his prior commitment to a mental institution from serving as the predicate element of his § 922(g)(4) conviction.”¹⁸

¹² 861 F.2d 1334, 1337 (5th Cir. 1988).

¹³ 666 F.3d 45, 49-50 (1st Cir. 2012) (*referencing* *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

¹⁴ *Id.* at 49.

¹⁵ 198 F.3d 143, 146 (4th Cir. 1999). Note that the Court specifically stated that, “[i]n this case, however, we are not called upon to decide the outer parameters of the term because Midgett’s confinement falls squarely within any reasonable definition of ‘committed’ as used in section 922(g)(4).” *Id.* In a footnote, the Court added, “[w]e express no opinion as to other situations involving involuntary admissions to mental institutions, but deal only with the case before us.” *Id.* at n.2.

¹⁶ 48 F.3d 356, 358 (8th Cir. 1995) (“We conclude that there is no real question that Whiton was committed to a mental institution under Texas law. An application was filed in state court requesting that he be committed to a mental institution. Following a court hearing, a Texas state judge found that Whiton was mentally ill and ordered that he be ‘committed’ to the hospital for temporary mental health services.”).

¹⁷ 363 F.3d 784, 786 (8th Cir. 2004) (“...the South Dakota county board found that Dorsch was mentally ill and that involuntary commitment to a mental facility was the least restrictive treatment available for him. This determination followed a hearing, during which Dorsch was represented by counsel, was given the opportunity to present evidence and cross-examine witnesses, and during which a physician testified that Dorsch was mentally ill and met the requirements of the statute.”).

¹⁸ *Id.* at 787 (*Cf.* *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987) (“If the statute [criminalizing reentry of an alien following deportation] envisions that a court may impose a criminal penalty for reentry after any deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirements of due process.”)).

There is a U.S. Circuit Court split on this issue, as the Second and Sixth Circuits have held the opposite – that an emergency involuntary commitment by a health care provider does constitute an involuntary commitment under the Gun Control Act.¹⁹ However, both Circuit Courts based their decisions at least partially on the fact that more than one individual signed off on the authorization for the involuntary, emergency hospitalization. As the Sixth Circuit stated in *United States v. Vertz*, “[w]hile a judicial order may not be necessary, we do believe that some degree of formal corroboration of the assertions set forth in a petition for involuntary admission is required to transform an emergency admission into a commitment for purposes of the federal firearm statute.”²⁰

Further, even in states that both provide health care professionals with the authority to involuntarily commit individuals to hospitals or treatment facilities on an emergency basis, and that construe that commitment to disqualify the individual from possessing a gun under federal law, the individual subject to the emergency inpatient treatment will still eventually be entitled to a judicial or administrative process to challenge their involuntary commitment. In *Addington v. Texas*, the Supreme Court affirmed that the Due Process Clause protections apply when an individual is civilly committed, and held that the State’s burden of “proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases,” to justify the involuntary commitment of an individual on the basis that he poses a threat to self or others.²¹

Even under this one possible circumstance in which a HIPAA-covered entity possesses exclusive information on an individual subject to the “mental health prohibitor,” due to an involuntary commitment authorized by a health care provider, the information must eventually – typically within 48 or 72 hours – be shared with a judicial or administrative authority. Such a legal authority, whether judicial or administrative, is not subject to HIPAA. Thus, not only do the majority of records of individuals who are or were previously subject to the “mental health prohibitor” originate in non-HIPAA covered entities, but they also eventually receive the records of the impacted individuals. During this intermittent time period, the impacted individual is not able to access firearms, since he or she is confined to an inpatient treatment setting.

Finally, while we believe this is a very small potential number of cases, we note in the limited situation that a State agency, board, commission, or other lawful authority is covered by HIPAA, there are two clear options for the lawful authority to currently report information to NICS and comply with HIPAA. First, HIPAA specifically allows the reporting of information as required by law,²² so a State could simply enact a law requiring reporting to NICS. Although NICS reporting is voluntary, approximately half of the states mandate NICS reporting by state law, with another seven states authorizing it.²³ Second, entities performing both health care and non-health care functions may apply

¹⁹ *United States v. Waters*, 23 F.3d 29 (2d Cir. 1994); *United States v. Vertz*, 40 Fed.Appx. 69 (6th Cir. 2002).

²⁰ *Vertz*, 40 Fed.Appx. at 75.

²¹ 441 U.S. 418, 433 (1979).

²² 45 C.F.R. § 164.512.

²³ LIU ET AL., *supra* note 11, at 11.

to become a hybrid entity under HIPAA, thereby limiting the application of HIPAA solely to its health care functions – not its reporting to NICS of an individual’s name and identifying information.²⁴

Thus, HIPAA is not relevant to entities – like the judicial system – which are most commonly in possession of relevant records for submission to the NICS system. For the small minority of records relevant to NICS maintained exclusively by a HIPAA-covered entity around the country, approximately half of the states already provide them with an exemption due to state statutes mandating NICS reporting. Among the remaining states, HIPAA-covered entities may avail themselves of the option to become a hybrid entity, so that HIPAA does not apply to its reporting to NICS of an individual and their identifying information.

II. Not only is another HIPAA exemption unnecessary, it also poses a risk to civil liberties and could deter people from seeking psychiatric treatment when needed.

a. The NICS system now maintains records of individuals prohibited from possessing a gun under both federal and state law, which includes many people who voluntarily seek inpatient treatment.

In order to centrally administer federal firearms law, Congress created NICS through the Brady Handgun Violence Prevention Act of 1993.²⁵ Under NICS, federal firearms licensees submit queries on a potential gun transfer to the Federal Bureau of Investigation (FBI), which then runs an individual’s name and identifying information (e.g. date of birth) through the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Index.²⁶ The NICS, which is the only centralized database created for the express purpose of regulating firearms transfers, relies on the voluntary submission of records by state, county, local, and tribal entities, as well as federal agencies.

Last year, the NICS began including the identities of individuals prohibited from possessing a gun under state law, even though some state laws are more restrictive than the federal law.²⁷ For instance, several states now prohibit gun ownership for a period of time by people who voluntarily

²⁴ 45 C.F.R. §§ 164.103, 164.105; OFF. FOR CIV. RIGHTS, DEP’T OF HEALTH & HUMAN SERVS., OCR PRIVACY BRIEF: SUMMARY OF THE HIPAA PRIVACY RULE 15 (2003), *available at* <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (“To be a hybrid entity, the covered entity must designate in writing its operations that perform covered functions as one or more ‘health care components.’ After making this designation, most of the requirements of the Privacy Rule will apply only to the health care components. A covered entity that does not make this designation is subject in its entirety to the Privacy Rule.”).

²⁵ Pub. L. 103-159, 107 Stat. 1536 (1993).

²⁶ GOV’T ACCOUNTABILITY OFF., GUN CONTROL: SHARING PROMISING PRACTICES & ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 4-5 (2012).

²⁷ *The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement: Hearing on S. 436 Before the Subcomm. on Crime & Terrorism of the S. Comm. on the Judiciary*, 112th Cong. (2001) (statement of David Cuthbertson, Asst. Dir., Crim. Justice Info. Serv. Div., Fed. Bureau of Investigation).

seek inpatient psychiatric treatment, including Connecticut, Maryland, and Texas.²⁸ Now, people in these states who seek inpatient treatment are eligible for inclusion in the NICS, despite the fact that they would be eligible to purchase a gun under federal law in another state (assuming that they were not disqualified under another federal prohibitor).

b. Although the NICS system contains only some identifying information, other than an individual’s name, there is a heightened risk of inadvertent disclosure of medical records if another HIPAA exemption is created.

The information required by the NICS is limited to an individual’s name and identifying information (e.g. birth date) – in order to distinguish individuals with identical names – and a code for the applicable prohibitor and the entity submitting the information. An individual’s “medical records,” such as their physician’s notes or a record of their treatment for a mental disability, would not be part of the NICS information submission. However, the creation of a specific HIPAA exemption for NICS records could substantially increase the possibility that an individual’s medical records would be inadvertently disclosed to NICS or another federal or state database.

The risk of inadvertent disclosure of private health or identifying information is especially acute, given that a recent validation audit of the NICS system determined that it has an across the board error rate of 14.26 percent.²⁹ Further, in the triennial audit, 6 out of the 42 states reviewed were flagged for having NICS records that were inappropriate for inclusion, including information on individuals who voluntarily sought inpatient treatment and deceased individuals who had received inpatient psychiatric treatment.³⁰

c. Given the limited opportunities for individuals to seek the removal of their information from the NICS system and its high error rate, it is very possible that some individuals would be without immediate recourse if their private medical information was inadvertently disclosed or their personal information transmitted to NICS proved to be inaccurate or outdated (e.g. the individual was no longer subject to a relevant “mental health prohibitor”).

Only nineteen states have an established process, referred to as a “relief from disabilities” program, by which an individual can seek to be removed from the NICS system and have their federal firearms right restored.³¹ As of July 2012, only six of the nineteen states with “relief from disabilities”

²⁸ An Act Concerning Gun Violence Prevention and Children’s Safety, S.B. 1160, 2013 Gen. Assem., Jan. Sess. (Conn. 2013); Firearms Safety Act of 2013, S.B. 281, 2013 Leg., Reg. Sess. (Md. 2013); Tex. Health & Safety Code §611.004 (2011), Tex. Gov’t Code §411.172 (2011).

²⁹ GOV’T ACCOUNTABILITY OFF., *supra* note 26, at 50.

³⁰ *Id.* at 49-50.

³¹ Under the NICS Improvement Amendments Act of 2007, Pub. L. 110-180, 121 Stat. 2559 (2008), the Bureau of Alcohol, Tobacco, Firearms and Explosives provides federal certification of a state’s “relief from disabilities” program, which entitles the state to grant funding. The statutory criteria require that the program “(1) permits a person who, pursuant to State law, has been adjudicated as described in subsection (g)(4) of section 922 of title 18, United States Code, or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by subsections (d)(4) and

programs reported ever receiving an application from an individual, with a total of only 60 applications being submitted in those six states.³² While some states do not maintain centralized data on applications from individuals seeking to have their records purged from NICS and their federal firearms right restored, it appears that this process is either not widely known or difficult to navigate for eligible individuals living in the minority of states with “relief from disabilities” programs. Further, despite statutory authority for the operation of a federal program to grant relief to individuals prohibited from possessing or receiving a gun under federal law, if the individual does not pose a public safety risk, an annual appropriations rider has blocked the expenditure of any funds for such a purpose for more than two decades.³³

As a result, many individuals who would be eligible to have their information removed from the NICS system and their federal firearms rights restored – either because they are no longer subject to a prohibitor under the Gun Control Act or because they no longer pose any public safety risk – are unable to do so. Although the NICS Improvement Amendments Act of 2007 sought to both incentivize states to submit records to NICS – which is voluntary – and to maintain the records by

(g)(4) of such section by reason of the adjudication or commitment; (2) provides that a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest; and (3) permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a *de novo* judicial review of the denial.” *Id.* at § 105(a).

³² Note that three states – Indiana, Nebraska, and West Virginia – only received federal certification of their program in June 2012, and it is unknown whether they received or approved any applications since then. The six states reporting receipt of applications as of July 2012 include: Iowa (8 applications), Kentucky (9 applications), New Jersey (at least 1 application), New York (15 applications), Oregon (2 applications), and Virginia (26 applications). The ten states with federally-certified “relief from disability” programs that reported either zero applications or an unknown number as of July 2012 (with not a single application ever being approved) are Arizona, Florida, Connecticut, Idaho, Illinois, Kansas, North Dakota, Nevada, Texas, and Wisconsin. GOV’T ACCOUNTABILITY OFF., *supra* note 26, at 29-30.

³³ Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep’t of Justice, *Frequently Asked Questions: How can a person apply for relief from Federal firearms disabilities?*, <http://www.atf.gov/firearms/faq/general.html#firearms-relief> (last visited Jun. 3, 2013) (“The [Gun Control Act] provides the Attorney General with the authority to grant relief from this disability where the Attorney General determines that the person is not likely to act in a manner dangerous to the public safety and granting relief would not be contrary to the public interest. The Attorney General delegated this authority to ATF. Since October 1992, however, ATF’s annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities submitted by individuals. As long as this provision is included in current ATF appropriations, the Bureau cannot act upon applications for relief from Federal firearms disabilities submitted by individuals. 18 U.S.C. 922(g), 922(n) and 925(c).”)

removing information on individuals no longer subject to a prohibitor,³⁴ non-compliant states have yet to receive a corresponding reduction in federal grant funding.³⁵ Further, since the NICS system is now incorporating information on people subject to state-level prohibitions, including those who voluntarily receive inpatient treatment, there are a growing number of people eligible for inclusion.

d. The civil liberties consequences and the possibility of deterring people from seeking psychiatric treatment when needed, or sharing information freely within the context of the doctor-patient relationship, weigh heavily against the creation of another HIPAA exemption – which could have broader implications.

Mental disabilities are extremely common, as 1 in 5 adults will experience a psychiatric disability in any given year, and about half of the population will experience the symptoms of a mental disability at some point during their lifetime.³⁶ Yet, far fewer numbers of people receive treatment because many impacted individuals are deterred by a fear of being stigmatized, or of experiencing a restriction on their civil liberties as a consequence. A new HIPAA exemption for NICS purposes would only compound the fear of individuals with mental disabilities that if they seek treatment, their information will now – or in the future – subject them to inclusion in federal and state databases.

The civil liberties consequences of the increasing monitoring and aggregation of information on people with mental disabilities extend beyond the Second Amendment, as it may impact an individual's employment eligibility, their privacy rights, and their exposure and liability in the criminal

³⁴ Note that federal agencies are required to provide greater due process protections for individuals prior to submitting their information to the NICS system than those imposed on the states, including not submitting the information on an individual who is no longer subject to involuntary inpatient treatment or monitoring, and, in the case of a competency adjudication, the federal agencies may only submit the records of individuals who had the opportunity to contest their adjudication in a hearing. Pub. L. 110-180, § 101(c)(1). ((c) Standard for Adjudications and Commitments Related to Mental Health. – (1) In General. – No department or agency of the Federal Government may provide to the Attorney General any record of an adjudication related to the mental health of a person or any commitment of a person to a mental institution if— (A) the adjudication or commitment, respectively, has been set aside or expunged, or the person has otherwise been fully released or discharged from all mandatory treatment, supervision, or monitoring; (B) the person has been found by a court, board, commission, or other lawful authority to no longer suffer from the mental health condition that was the basis of the adjudication or commitment, respectively, or has otherwise been found to be rehabilitated through any procedure available under law; or (C) the adjudication or commitment, respectively, is based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority, and the person has not been adjudicated as a mental defective consistent with section 922(g)(4) of title 18, United States Code, except that nothing in this section or any other provision of law shall prevent a Federal department or agency from providing to the Attorney General any record demonstrating that a person was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.”)

³⁵ GOV'T ACCOUNTABILITY OFF., *supra* note 26, at 24 (“DOJ has not administered NIAA reward and penalty provisions because of limitations in state record estimates, which are to serve as the basis for implementing the provisions.”).

³⁶ *Assessing the State of America's Mental Health System: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 113th Cong. 2 (2013) (statement of Pamela S. Hyde, Administrator, Substance Abuse & Mental Health Serv. Admin., U.S. Dep't of Health & Human Serv.).

justice system. Since the system currently has such a high error rate, creating an express HIPAA exemption for the NICS system poses significant privacy concerns, and could increase the likelihood of a data security breach. Further, a HIPAA exemption might serve as an additional deterrent for people from seeking psychiatric treatment when needed, and could cloud the trust of the doctor-patient relationship.

Finally, although the focus of this rulemaking is on whether HIPAA impacts the ability of states to voluntarily transmit information on individuals prohibited from possessing a gun due to a “mental health prohibitor,” HIPAA-covered entities may also possess information on individuals prohibited from possessing a gun due to unlawful use or addiction to any controlled substance.³⁷ These comments have focused on the potential implications of creating another HIPAA exemption specifically for the transmission of information to the NICS system on people who have been involuntarily committed and/or adjudicated “mentally incompetent.” Yet, it is worth noting that an exception to HIPAA for the purposes of transmitting records to NICS could be interpreted to include information on individuals receiving treatment for the unlawful use or addiction to a controlled substance, and that similar privacy and civil liberties concerns apply to these individuals as well.

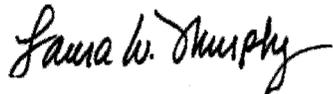
Conclusion

Since its enactment nearly two decades ago, HIPAA’s privacy guarantees have advanced public health by re-assuring millions of Americans that their medical records will be private and secure. There are exceptions to HIPAA, under which an individual’s confidential medical information or records could be disclosed without their permission, but these exceptions are carefully crafted to permit the transfer of the minimally necessary information in limited circumstances. Given that HIPAA does not pose a barrier to the transfer of information to NICS under current law and regulation, an express exception is not needed. And, not only is such an exception unnecessary, it would also increase the risk of privacy breaches, pose potentially significant civil liberties consequences for the individuals impacted, and it could further deter people from seeking treatment when needed and discourage full and open communication between doctors and patients.

³⁷ 27 C.F.R. § 478.11 (An “unlawful user of or addicted to any controlled substance” means a person who uses a controlled substance and has lost the power of self-control with reference to the use of [a] controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g. a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year.”)

The ACLU appreciates the opportunity to submit comments for this ANPRM on the HIPAA Privacy Rule and the NICS; please feel free to contact Demelza Baer, ACLU Policy Counsel, at dbaer@dcaclu.org or (202) 715-0807 with any questions.

Sincerely,



Laura W. Murphy
Director
ACLU Washington Legislative Office



Demelza Baer
Policy Counsel
ACLU Washington Legislative Office



Chris Calabrese
Legislative Counsel
ACLU Washington Legislative Office



Susan Mizner
Disability Counsel
American Civil Liberties Union