April 9, 2014

United States 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: FR Doc 2014-00055; 45 CFR § 164.512: Health Insurance Portability and Accountability Act Privacy Rule and the National Instant Criminal Background Check Systems

Dear Sir or Madam:

The Health Law Section of the American Bar Association (the “Section”) respectfully submits the following comments on the proposed rule issued by the Office of Civil Rights, Department of Health and Human Services to modify the Health Insurance Portability and Accountability Act of 1996 Privacy Rule. The proposal would expressly permit certain HIPAA Covered Entities to disclose to the National Instant Criminal Background Check System (“NICS”) the identities of individuals subject to a federal “mental health prohibitor” that disqualifies them from shipping, transporting, possessing, or receiving a firearm. This proposed rule was published in the January 7, 2014, Federal Register (Vol. 79, No. 4, pp.784-796).

Sincerely,

[Signature]
[Name]
The views expressed herein are presented on behalf of the Section.¹ No government attorneys or government professionals participated in the drafting or submission of these comments. These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association. The views expressed in these comments should not be construed as representing the policy or views of any government employee who is a member of the Section, its Council, or the eHealth, Privacy, and Security Interest Group.

The American Bar Association is the largest voluntary professional association in the world. The Section, with nearly 9,000 attorney members, is the voice of the organized health care bar within the ABA. Its members represent clients in all aspects of the health care industry, including physicians, institutional providers, teaching and research organizations, managed care organizations and other third-party payors, governmental health care programs and regulatory bodies, pharmaceutical companies and device manufacturers.

We would be happy to work with you further on developments in this area of law that go beyond the scope of our comments on these proposed regulations. The Section respectfully submits the comments and suggestions below for consideration by HHS/OCR with regard to the Proposed Regulations.

I. HHS/OCR should conduct a thorough assessment as to how the Proposed Rule would interact with existing applicable laws

HHS should conduct a thorough impact assessment as to how the Proposed Rule would interact with existing applicable laws. Specifically, HHS should evaluate whether

¹ The comments were prepared by a working group of the Health Law Section’s eHealth, Privacy, and Security Interest Group. The contributors to these comments from the working group are Catherine A. Barrett, Anjali Dooley, Amy Fehn, Jamie Levin, Elaine Zacharakis Loumbas, Rich Marotti, Deborah Moldover, Caitlin Monjeau, Sue Nolan, Andrew Robertson, Robert Schwartz, Konrad Trope, and John Wright. In addition, Linda A. Malek served as a reviewer of the Task Force’s work and participated in the preparation of the final comments. The final comments were approved by the Section’s Council on March 2, 2014. Although members of the Section who participated in the preparation and review of these comments have clients that the proposed rule (if adopted) may affect, no such member has been engaged by a client to participate in the drafting or submission of these comments.
the Proposed Rule goes beyond the statutory requirements of the Brady law. Under the Brady law, there is a distinction between medical findings related to incompetency and disability, and a judicial/lawful authority’s determination of incompetency and involuntary commitment. The Brady statute\(^2\) states:

“No department or agency of the federal government may provide to the Attorney General any record of an adjudication related to mental health of a person or any commitment of a person to a mental health institution if—

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[T]he adjudication or commitment is based solely on a medical finding of disability, without an opportunity for a hearing by a court board, commission or other lawful authority…”

Under the Brady law, judicial/lawful authority determinations of mental health and involuntary commitment are reportable to the NICS; medical determinations of incompetency and disability by Covered Entities would not be.

HHS should provide guidance as to whether, in States where a Covered Entity is also a “lawful authority,” there is intended to be a separation between the Covered Entity and lawful authority functions; how preemption clauses in HIPAA would apply; and whether other due process safeguards would or should be applicable.

In most States, a Covered Entity would not also be the authorizing agent for an involuntary commitment. Most States require a judge or an administrative law judge to authorize an involuntary commitment longer than a 72-hour hold. Thus, HHS may want to clarify in the regulations that in order to be consistent with the Brady law and relevant state laws, it is not intending to create a new type of authority for Covered Entities to make disclosures to the NICS beyond what is otherwise allowable under the Brady law and by such States, as is discussed further in Section III below.

II. HHS/OCR should further clarify the reporting obligations of Covered Entities under the Proposed Rule

First, HHS/OCR should further clarify that the reporting obligations of Covered Entities under the Proposed Rule is permissive, as opposed to mandatory. The Section is concerned that the meaning of the language in paragraph (k)(7) of the proposed rule is

\(^{2}\) 18 U.S.C. 922(g)(4) in the Standard for Adjudication and Commitments Related to Mental Health
unclear with respect to the obligations of mental health providers (i.e. Covered Entities) and the standards for reporting certain individuals to NICS. The Section is concerned that the nature of the NICS reporting, while not “mandatory” by definition, will be adopted by courts and others as a new standard of care, thereby exposing those who choose not to report to greater professional liability. The dilemma is that if the Covered Entity reports all involuntary confinements that result from mental illness or drug use, it will be exposed to claims by patients prohibited from buying firearms, but if the Covered Entity does not report and someone is harmed, a third party may claim that the Covered Entity breached its duty.

The report of an involuntary confinement also becomes problematic after a patient is rehabilitated and is no longer a danger to herself or others. What is the mechanism for reinstating these patients to their full legal rights? Who is responsible for doing so? Will the mere reporting of the rehabilitated status eliminate the negative mandate of the law, or will further action be necessary? Although the Department of Justice has proposed regulations regarding reports of individuals subject to the mental health prohibitor,3 those proposals shed no light on the obligation of a Covered Entity that reports an involuntary commitment and subsequently learns that the person is no longer committed and no longer subject to supervision or monitoring.

The Section requests that OCR clarify the reporting obligations of Covered Entities in light of the issues identified above. Specifically, HHS should assess whether Covered Entities that are also lawful authorities would have added obligations to update information in the NICS database due to their dual role as both a lawful authority and a Covered Entity. This is especially important since Covered Entities would have information as to whether a person has been rehabilitated and released from the Covered Entity.

III. The Agency should further clarify that the Proposed Rule is not intended to preempt State Laws that would not permit or mandate reporting to NICS

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The Agency should further clarify that the Proposed Rule is not intended to preempt State Laws that would not permit or mandate reporting to NICS. HIPAA established a “floor for privacy protection” allowing the states to pass more “stringent than” State laws, particularly contemplating that all States have privacy laws related to mental health, substance abuse and other sensitive health conditions. The interplay between State Laws and HIPAA under the Proposed Rule needs to be considered and further clarified.

The Section agrees with OCR’s use of the word “may” in the proposed revision to 45 C.F.R. § 164.512(k) to indicate that reports to the NICS are permissive rather than mandatory. The Section is concerned, however, about possible confusion arising from state law: reporting of certain prohibitors, beyond the federal prohibitors, will be mandatory in some states and permissive or even prohibited in others. For example, if a state law, but not federal law, requires reporting to NICS or any other registry or entity, then HIPAA Covered Entities will be required to report as a matter of state law, regardless of the permissive nature of the HIPAA requirement. Furthermore, if a state has mental health privacy laws that protect patient privacy to a greater extent than HIPAA and no mandatory NICS or other reporting requirements, then the permissive HIPAA reporting obligation should not trump state law that would prohibit Covered Entities from reporting.

For example, in New York, the State Commissioner of Mental Health is required to report non-identifying information it receives from courts and mental health providers regarding persons with mental health prohibitors to the New York State Division of Criminal Justice Services or directly to the Federal Bureau of Investigation for purposes of responding to queries from NICS. As noted, the HIPAA privacy rule as currently construed does not preclude this type of disclosure.

5 See N.Y. Mental Hygiene Law §§ 7.09(j)(1), 13.09(g)(1), and 33.13(c)(13-14) (McKinney 2013).
6 See Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), supra n.4 at 786.
Under Michigan law, state courts are required to report mental health prohibitors to a database operated by the Michigan State Police called the Law Enforcement Information Network (LEIN). Specifically, the Michigan Mental Health Code requires state courts to order the state police to enter into LEIN court orders directing individuals to be hospitalized, to undergo treatment, or a combination of the two.\(^7\) Similarly, the state’s probate code requires the same for persons who are legally incapacitated.\(^8\) Finally, Michigan’s Code of Criminal Procedure requires the same for persons who are found not guilty by reason of insanity.\(^9\) No Michigan law, however, requires the state police to report these entries to the NICS.

Consequently, the Section urges OCR to recognize explicitly that state law may be authoritative on whether Covered Entities may or must report certain information relevant to firearm regulations, and that the federal regulation is merely intended to remove any perceived roadblocks to reporting by information-gathering agencies.\(^{10}\) To that end, the Section recommends the following statement at the beginning of the proposed revision to 45 C.F.R. § 164.512(k): “To the extent permitted or required by state law . . . .”

IV. The Agency should further clarify that the Proposed Rule is not intended to preempt State Laws concerning procedural protections, due process for individuals and privacy

The Section recommends that HHS/OCR address due process concerns when the FBI receives reports of individuals who are adjudicated as mentally ill directly from Covered Entities instead of from courts or law enforcement agencies.

A very important distinction exists between non-Covered Entities (i.e., court systems and law enforcement agencies, which are not covered by HIPAA) and entities that are covered by HIPAA. The distinction is the “expectation of privacy.” An individual has the expectation of privacy that his or her PHI (as defined under HIPAA) will be protected by a Covered Entity. Although the expectation of privacy is not an

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\(^{10}\) Id. at 793.
absolute right, and there are limits imposed by federal and state law to promote public health and safety goals, an incursion on that right should include adequate due process to protect the rights of the individual.

Most state mental health laws that allow mental health providers (i.e. Covered Entities) to disclose individuals’ names to law enforcement are typically much more narrowly tailored to achieve certain public safety objectives. Currently, exceptions in health privacy laws exist for public safety issues and law enforcement. Most state mental health statutes allow a health care provider to report to law enforcement those individuals who are a threat to themselves or others. These are examples of laws where the safety of the public is balanced against the right to individual privacy.

The definitions in the Brady law are broader than those who are a threat to themselves or others and include those who cannot care for themselves. Having

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11 It is of particular concern that Covered Entities are permitted to report health information to a “criminal” database even when an individual is not perceived to be a threat to society, but nevertheless still falls under one the overly broad categories subjecting them to the Federal mental health prohibitor.

The relevant statutory language at 18 U.S.C. 922(g)(4) prohibits firearm ownership for a person who “has been adjudicated as a mental defective or who has been committed to a mental institution.” The operative terms “adjudicated as a mental defective” and “committed to a mental institution” are further defined in 27 CFR § 478.11.

“Adjudicated as a mental defective” means: (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 mental capacity to contract or manage his own affairs.
(b) The term shall include—
(1) A finding of insanity by a court in a criminal case; and
(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.
(emphasis added)

“Committed to a mental institution” means: “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.” (emphasis added)
This term does not include those who are a threat to themselves or others. Thus, arguably someone who is involuntarily committed to a mental institution who is not a threat to themselves or others could be reported into the FBI database, according to these proposed regulations.
Covered Entities, which are not originally contemplated by the Brady law, make disclosures to the NICS database could create Constitutional challenges, especially in the absence of adequate due process procedures. As such, obtaining the information from Covered Entities (as opposed to the judicial system or law enforcement systems) creates a broader privacy issue.

Consequently, the proposed rule should be amended to clarify that allowing a Covered Entity to report is not intended to displace existing state mental health laws that provide greater privacy protection to an individual with mental illness. In addition, as indicated above, HHS should evaluate the dual role of those potential Covered Entities addressed by the Proposed Regulations and the procedural safeguards in place in such circumstances.

Sincerely,

Kathleen Scully-Hayes
Chair, Health Law Section

In addition, this definition is beyond the scope of what a health care provider (Covered Entity) is typically permitted to report to a law enforcement agency.