

## Gun Control: HIPAA Final Rule Targets Background Checks and Mental Health Reporting

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Thursday, January 7, 2016

President **Obama** has announced plans to tighten gun control regulations, including applying the background check requirement to dealers at gun shows and on websites. Federal law already requires that those “engaged in the business” of selling guns must have a **Federal Firearms License (FFL)** and conduct background checks at the time of every purchase. Some sellers assert they are not gun dealers but collectors or hobbyists who do not sell regularly and, therefore, are not “engaged in the business” of selling firearms and not required to have a FFL and conduct background checks. The Obama administration has clarified that people who claim to be hobbyists may be engaged in the business if, for example, they operate an online gun store, frequently sell guns in their original packaging, or pass out business cards. The **Bureau of Alcohol, Tobacco and Firearms (“ATF”)** issued [Guidance](#) to help individuals understand when a FFL is required.

Consistent with this initiative, the Office for Civil Rights (“OCR”) released a [Final Rule](#) modifying the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rule to permit certain covered entities to disclose identifying information on persons subject to a “Federal mental health prohibitor” to the [National Instant Criminal Background Check System \(“NICS”\)](#).

### Intersection of NICS and HIPAA

As background, the NICS is a national system mandated by the Brady Handgun Violence Prevention Act of 1993. Maintained by the FBI since November 1998, NICS is used by Federal Firearms Licensees to instantly determine whether an individual seeking to buy firearms is eligible to do so. [Federal law](#) provides that it is unlawful for certain categories of persons to ship, transport, possess, or receive a firearm. These categories are referred to as “prohibitors.” Among them are the following mental health prohibitors, which provide that it is unlawful for the following individuals to possess a firearm:

- individuals who have been involuntarily committed to a mental institution, for reasons such as mental illness or drug use;
- individuals found incompetent to stand trial or not guilty by reason of insanity; or
- those otherwise determined by a court, board, commission or other lawful authority to be a danger to themselves or unable to manage their own affairs as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease.

Many of the records qualifying an individual for a Federal mental health prohibitor are maintained by the criminal justice system, which does not generally include HIPAA covered entities. However, some qualifying information may be housed within HIPAA covered entities that are either (i) involved in involuntary commitments or mental health adjudications; or (ii) have been designated by states to serve as repositories to collect applicable mental



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health data and report it to the NICS.

In balancing individuals' privacy with public safety, the Final Rule modifies HIPAA to permit the disclosure of select demographic information to the NICS by covered entities that either (i) function as repositories of information relevant to the Federal mental health prohibitor on behalf of the state; or (ii) are responsible for ordering the involuntary commitments or other adjudications. The Final Rule limits disclosure to demographic and other information needed for purposes of reporting to the NICS, and disclosure of diagnostic or clinical information is not permitted.

## **Potential Impact on Mental Health Legislation**

This Final Rule is one aspect of a multi-faceted approach the Obama administration is taking on gun control. An open question remains as to whether Congress will act with respect to gun control and mental health, and if so, how? Certain Republicans are already looking for ways to halt President Obama's actions, while, others in Congress do not believe that the actions go far enough and seek additional gun control measures.

At a minimum, the President's decision to take action related to gun controls is certain to have an impact on mental health legislation. Congressional Republicans have been discussing improving the nation's mental health system since 2013. Many see this focus on mental health as an effort to redirect the conversation away from gun control. As such, the President's recent actions propose adding \$500 million to increase access to mental health care.

The combination of Republicans seeking to dismantle the recent executive actions, while redirecting the conversation to mental health may place Senate Democrats in a tough position. The President's action increases the likelihood that gun control measures may be attached to mental health legislation. The issue is whether Senate Democrats are willing to filibuster mental health legislation in order to keep the focus on gun control and prevent the unraveling of some of the President's executive actions.

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**Source URL:** <https://www.natlawreview.com/article/gun-control-hipaa-final-rule-targets-background-checks-and-mental-health-reporting>