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March 10, 2014
Via upload to regulations.gov

U.S. Department of Health and Human Services
Office for Civil Rights
Attn: HIPAA Privacy Rule and NICS
Hubert H. Humphrey Building
200 Independence Avenue, S.W., Room 509F
Washington, DC 20201

Re: HHS-OCR-2014-0001-0001, Fed. Reg. # 2014-00055
Gun Owners Foundation Comments on Proposed Regulations Regarding
HIPAA Privacy Rule and the NICS System

Dear Sirs:

Our firm represents Gun Owners Foundation ("GOF"). GOF is a nonprofit, educational and legal defense organization, defending the Second Amendment to the U.S. Constitution. GOF was incorporated in Virginia in 1983, is exempt from federal income tax under Internal Revenue Code Section 501(c)(3), and is headquartered in northern Virginia. In response to the Department of Health and Human Services' ("HHS") request for comments on its Notice of Proposed Rulemaking ("NPRM")[1] of changes to the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule, we hereby submit these comments on GOF's behalf.

BACKGROUND

On January 16, 2013, purporting to respond to the tragic December 2012 shooting in Newtown, Connecticut, President Obama announced 23 gun control "executive actions" to be taken by the Executive Branch. The Administration apparently saw a golden opportunity to exploit the mental health history of the Newtown shooter to expand its radical gun control agenda and deny gun ownership to as many Americans as possible through misuse of executive

[1] 79 Fed. Reg. 784, January 7, 2014.

power, without having to seek Congressional approval and action. Included among the "executive actions" was a proposal to "[a]ddress unnecessary legal barriers, particularly relating to the Health Insurance Portability and Accountability Act, that may prevent States from making information available to the background check system."[2]

A. The ANPR

On April 23, 2013, HHS issued an Advanced Notice of Proposed Rulemaking ("ANPR") (78 Fed. Reg. 23872), which proposed to create "express permission" in the HIPAA Privacy Rule to allow reporting of mental health records to NICS. The ANPR did not propose the promulgation of any specific regulations at that time, but sought only to obtain comments on the general concept of lowering alleged barriers to reporting.

Comments on the ANPR "generally expressed concern" that the ANPR "would infringe on [citizens'] Second Amendment right to bear arms and … due process of law…." NPRM at 788. Additionally, many "expressed concern that the Federal mental health prohibitor was overly broad and would result in individuals being reported to the NICS Index who do not pose a threat to society." *Id.* Still other objections involved the obvious breach of privacy which would result from the concept underlying the ANPR. *Id.* Additionally, several "State officials and many other commenters emphasized the importance of establishing mechanisms to remove an individual's name from the NICS when the basis for their inclusion no longer applies." *Id.*

Notwithstanding these and other objections, HHS decided to draft proposed rules relaxing the HIPAA Privacy Rule, even though it had gathered no evidence that the Privacy Rule was interfering in any significant way with reporting to NICS. Indeed, HHS admitted that it does "not have sufficient data to determine to what extent any of [a State's] lawful authorities or repositories [of NICS data] also may be a HIPAA covered entity." NPRM at 787.

B. NPRM

HHS has now issued this NPRM, 79 Fed. Reg. 784, *et. seq.*, proposing specific regulatory language to relax HIPAA's existing privacy requirements. *Id.* at 796. The proposed regulations are apparently designed to apply only to HIPAA-covered entities that

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[2] A sister Proposed Rulemaking is currently pending from the Department of Justice and ATF, which would expand the definition of individual persons to be denied possession of a firearm, even for self-defense in one's home, under a broadened definition of a "federal mental health prohibitor." 79 Fed. Reg. 774 *et. seq.*, January 7, 2014. http://gpo.gov/fdsys/pkg/FR-2014-01-07/pdf/2014-00039.pdf

(i) collect information and report directly to NICS, or (ii) make commitment or adjudication decisions that cause a person to be reported to NICS.

HHS attempts to downplay the severity of the HIPAA violation embodied in its proposed changes: (i) arguing that "only the fact that the individual is subject to that prohibitor is submitted to the NICS; underlying diagnoses, treatment records, and other identifiable health information are not provided to or maintained by the NICS" (*id.* at 785), and (ii) noting that "[t]he NICS examiner does not disclose the reason for the determination to the Federal Firearms Licensee ("FFL") (*e.g.*, the FFL would not learn that the individual was ineligible due to the Federal mental health prohibitor)." *Id.* at 786. HHS seems to be operating on the misconception that it is not a privacy violation to make it known that a person supposedly has a mental health problem, so long as the **particular type** of problem is not disclosed.

GENERAL COMMENTS

A. The Proposed Rule is Unnecessary and Unenforceable.

The NPRM proposes to authorize entities covered by HIPAA to report mental health disqualifications to NICS — but then the NPRM asserts this very reporting is already authorized. NPRM states that, under the current system, "[e]ven in circumstances where records are subject to HIPAA … there are ways in which the Privacy Rule permits the reporting to the NICS." *Id.* at 787. And, of course, "[r]ecords of individuals adjudicated as incompetent to stand trial, or not guilty by reason of insanity, originate with entities in the criminal justice system, and these entities are not HIPAA covered entities." *Id.* at 786.

Substantially relying upon a report submitted by a single commenter, the Law Center to Prevent Gun Violence, NPRM also claims that "HIPAA continues to be cited as a **perceived barrier** to reporting to the NICS…." *Id.* at 789 (emphasis added). NPRM adopts the gun control advocate's position as its own. Thus, HHS relied on this possibility of an ambiguity as a sufficient rationale to "solve" a problem that may not even exist.

Further, the NPRM appears to acknowledge that "many States continue to report little if any information to the NICS index." *Id.* at 786. HHS argues that this is so because of some "perceived barrier" from the HIPAA Privacy Rule. HHS appears to believe that States are simply too unsophisticated to understand the current rules, and the proposed rule is necessary in order to "dumb it down" for them.

On the contrary, many States do not report as much information as HHS would like — not because of HIPAA privacy barriers, but because they have chosen not to report on one or more prohibited categories of persons, perhaps believing such persons do not pose any particular danger, or because they are not persuaded by the federal government's expansive definition of who is ineligible to own firearms. To combat that alleged "problem," Congress

enacted the NICS Improvement Amendments Act of 2007 in order to entice States with "incentive grants" to provide additional information to NICS. Even with the lure of federal money, the NPRM reports that "many States still are not reporting…." *Id.* at 787. But, of course, States are not administrative subdivisions of the federal government which can be compelled to help disarm Americans.

HHS has apparently not stopped to consider that many States may not be reporting to NICS because they disagree with the Obama administration's high-handed anti-gun policies.

B. The Proposed Rule Exacerbates ATF's Misuse of 18 U.S.C. § 922(g)(4).

18 U.S.C. § 922(g)(4) prohibits anyone "who has been **adjudicated** as a mental defective or who has been **committed** to a mental institution…" from owning firearms (emphasis added). HHS has adopted the Department of Justice's creative, expansive reading of this simple limitation, nicknaming it the "Federal mental health prohibitor." NPRM at 786. HHS assumes that:

> Among the persons subject to the Federal mental health prohibitor are individuals who have been involuntarily **committed** to a mental institution; found incompetent to stand trial or not guilty by reason of insanity; or otherwise have been **determined** by a court, board, commission, or other lawful authority to be a danger to themselves or others or to lack the mental capacity to contract or manage their own affairs, as a result of marked subnormal intelligence or mental illness, incompetency, condition, or disease. [*Id.* at 784 (emphasis added).]

Under the ATF rule, the statutory provision's two categories — (1) **commitment** to a mental institution and (2) **adjudication** as a mental defective — are expanded to include additional categories, including:

- **findings** of:
  - incompetence to stand trial; and
  - not guilty because of insanity
- **determinations** of:
  - danger to themselves or others; and
  - lacking the mental capacity to contract or manage affairs as a result of:
    - subnormal intelligence;
    - mental illness;
    - incompetency;
    - condition; or
    - disease.

Under such an expansive reading, HHS could more readily justify a regulation authorizing disclosure of HIPAA-protected health information. Thus far, HHS refuses to address, much less analyze, any comments directed to the legitimacy of the DOJ regulation. To the contrary, HHS belittles concerns expressed in comments questioning the application of the regulation, for example, to the action of the Veteran's Administration whereby, on the basis of an administrative "determination" of "incompetency in managing his business affairs," the veteran loses his firearms right as if the veteran had been "adjudicated as a mental defective."

Additionally, by failing to request comments on the DOJ interpretation of 18 U.S.C. § 922(g)(4), HHS ignores court precedents such as State v. Buchanan, 155 N.H. 505, 924 A.2d 422 (2007), which ruled that the finding that a defendant is incompetent to stand trial was not the same as adjudicating a person to be a "mental defective."

Indeed, in a prosecution of a person convicted of violating 18 U.S.C. § 922(g)(4), the U.S. Court of Appeals for the Eighth Circuit ruled that a determination that a person is suffering from a mental illness was not synonymous with that person being adjudicated as a mental defective. *See* United States v. Hansel, 474 F.2d 1120 (8th Cir. 1973). In another prosecution of a person for violation of 18 U.S.C. § 922(g)(4), the U.S. Court of Appeals for the First Circuit ruled that "in section 922, Congress did not prohibit gun possession by those who were or are mentally ill and dangerous, and such a free floating prohibition would be very hard to administer." United States v. Rehlander, 666 F.3d 45, 50 (1st Cir. 2012). On the contrary, as the Rehlander Court ruled, without a clear adjudication process, one cannot be deprived of his Second Amendment right to keep and bear arms because "to work a permanent or prolonged loss of a constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required." *Id.* at 48. Thus, 18 U.S.C. § 922(g)(4) requires a formal, judicial-type proceeding where a person is afforded due process and the right to counsel. A decision made by an unaccountable counselor or claims-reviewer at the Veteran's Administration is no substitute.

It is no wonder that the States are not rushing to participate in a federal scheme that would forever disarm millions of American servicemen for no reason other than that they need assistance in conducting certain financial transactions, or that they sought counseling for PTSD.

SPECIFIC COMMENTS

A. The Scope of the Proposed Rule Should Be Narrowed, Not Broadened.

The Proposed Rule would exempt two groups from HIPAA compliance:

- any "entity designated by the State to report, or which collects information for purposes of reporting" to NICS **("designated entities")**; and

- "[a] court, board, commission, or other lawful authority that makes the commitment or adjudication…." **("nondesignated entities").** *Id.* at 796.

GOF opposes exempting any group from the HIPAA privacy rule, but there are special reasons for GOF's opposition to exempting the second group:

1. **The Need for Uniformity**. If there is no uniformity among the states in who is sending information to NICS, then granting exemptions (of information to be disclosed) to all sorts of nondesignated entities would give rise to disparate treatment of sensitive private information. This would also exponentially increase the difficulty of getting erroneous information removed, involving potentially several entities in the process, rather than just one. While GOF has made its opposition to the Brady Act very clear, it submits that a lack of uniformity in the application of this law would further jeopardize gun owners' rights — hence the reason that all protected health information should be screened by a single entity in each state.

2. **The Need for Privacy of Treatment**. If nondesignated entities are empowered to report to NICS, they will be tempted to compromise individual privacy of mental health records in favor of disclosure supposedly for public safety purposes. By tasking the same entity with the responsibility not only to treat the mental health of patients and preserve their privacy, but also to report the same patients to the NICS system, creates inherently conflicting duties.

   There is no question that relaxation of privacy rules will discourage persons needing treatment from seeking it, if they are concerned that their privacy might be compromised and their Second Amendment rights unfairly lost. Minimizing such risks of wrongful or accidental disclosure calls for decoupling the responsibility for treatment from the responsibility for reporting.

3. **The Need for Common Sense**. The NPRM states on the one hand that "the court system" is "not … covered [by] HIPAA." *Id.* at 786. On the other hand, the NPRM purports to exempt "covered entit[ies]" including "court[s]." *Id.* at 796. Since the judicial system is already not covered by HIPAA, it makes no sense for the NPRM to include it under an exemption.

B. The Proposed Rule Should be Clarified.

The proposed rule appears to contemplate that a nondesignated entity would report directly to NICS, as well as to the designated entity. This proposal could be construed as authorizing a nondesignated entity to report directly to NICS. It is not, however, within the jurisdiction of HHS to empower any such nondesignated State entity to report to NICS. As the

NPRM acknowledges, it is the State that "designates" the agency to "collect" information and decide which information "to report" to NICS.

The proposed rule should be clarified to specifically provide that the grant of permission to disclose protected health information does not authorize any nondesignated entity to report directly to NICS when it should report to the designated State entity.

C. HHS Has No Authority to Determine What Information Should Be Provided to NICS.

The proposed rule grants discretion to State entities to determine the "demographic and certain other information needed for purposes of reporting to [NICS]," so long as they do not divulge "diagnostic or clinical information." *Id.* at 796.

HHS has stated that it considers "the minimum necessary information [would] include an individual's name; date of birth; sex [and] a code or notation indicating that the individual is subject to the Federal mental health prohibitor." NPRM at 793. The NPRM states that HHS is "also considering permitting the disclosure of some or all the following additional data elements … as part of the minimum necessary for NICS reporting purposes: Social Security number, place of birth, State of residence, height, weight, eye color, hair color, and race." *See id.*

Even if HHS has authority to issue regulations defining the maximum information that may be disclosed under HIPAA, it has no authority to determine the "minimum" information required by NICS. Such regulatory authority would be not that of HHS, but would be within the jurisdiction of ATF under the DOJ, as limited by statute.

CONCLUSION

For the reasons stated above, the proposed regulations should not be implemented.

Sincerely yours,

/s/

Herbert W. Titus

HWT:ls