



June 1, 2013

Leon Rodriguez  
Director  
Office for Civil Rights  
Department of Health and Human Services  
Attention: HIPAA Privacy Rules and NICS  
Hubert H. Humphrey Building, Room 509F  
200 Independence Avenue, SW  
Washington, DC 20201

RE: HIPAA Privacy Rule and NICS  
45 CFR Parts 160 and 164

Dear Mr. Rodriguez:

On behalf of the more than 67,000 members of the American Health Information Management Association (AHIMA), it is my pleasure to submit our comments on the Advance Notice of Proposed Rulemaking (ANPR) “HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)” as published in the April 23, 2013 *Federal Register* (78FR23872-76).

AHIMA is the not-for-profit association for health information management (HIM) professionals who have been educated and trained in all aspects associated with health information and who work in over 40 settings associated with our nation’s healthcare industry. HIM professionals often serve in functions including the release of protected health information and as privacy officers for HIPAA covered entities.

AHIMA is pleased that your office is taking the step to gain insight from the health care industry and government agencies associated with protected health information (PHI). We fully understand the importance and responsibility of maintaining the confidentiality of behavioral health information and the challenge that you are facing as the federal government seeks a balance between the rights and responsibilities associated with behavioral health PHI and the concern for public safety.

AHIMA’s response below relates to the confidentiality, privacy and security of that information and the individual’s rights on a federal level. We have not, as a national association, taken on the questions related to individual states specifically; however, we have asked the leaders and members of our 52 component state associations to consider responding to your specific state questions. Our comments are of a general and specific (to your questions) nature.

General Comments:

AHIMA believes that it is the role of the federal and state judicial systems, as well as state designated (by law) agencies or specific state registries to provide the necessary information needed to make the NICS fully functional. It would be inappropriate to ask healthcare providers to submit the information discussed in the ANPR on a regular basis. Release from a healthcare provider in the case of behavioral health is a clinical decision that should not be required unless the clinician believes there is imminent danger that requires reporting to law enforcement, as already permitted by HIPAA. The preface to your question appears to agree with AHIMA's views and we urge you to keep this perspective.

AHIMA is aware that there could be federal or state designated agencies that are covered under HIPAA due to their having HIPAA-related functions. Therefore, we agree that these organizations should be proclaimed a "hybrid" organization with a sufficient firewall built between their judicial, enforcement, or oversight activities and their healthcare functions. If this is done properly, then only individuals committed by either a court or involuntarily committed by state organizations as designated by law would have the required information submitted to the NICS.

In addition to specifying that state HIPAA-related organizations must establish a hybrid organization, when necessary, as defined by HIPAA, a revision to the HIPAA rule should designate that in instances of data being reported to the NICS the term "minimum necessary" clearly means only that information designated by law for NICS purposes and nothing more.

Specific Question Responses

*Question 6:* AHIMA supports the firewall approach suggested so that all reporting to the NICS is conducted by the state judicial system or by state agencies empowered to involuntarily commit individuals to mental or behavioral health programs. While a state may have a contractor (which may or may not be a HIPAA-covered entity) to oversee the commitment and treatment of the individual, it would be inappropriate for such a contractor to be forced to report to the NICS. Likewise, a state agency or facility that is charged with making such a commitment as well as treating the individual should be segregating the two roles and not be reporting as a provider of mental or behavioral health services. In general, AHIMA believes that healthcare providers should not be required to report the status of its patients to the NICS. In cases of imminent danger, a healthcare provider should be reporting to the designated state or local organization as required by law and only the minimum necessary information. In all cases only the minimum necessary information should be provided (see *Question 10*).

*Question 8:* AHIMA agrees that the entities discussed in this question need more identification or definition. Any revision to the HIPAA rules should detail how a "hybrid entity" should be defined and how an appropriate firewall must be built, but also how such entities could be specifically identified to OCR for identification in potential investigations or breaches.

*Question 10:* Any HIPAA revision should specifically identify what information is required for NICS reporting, making it clear that under the minimum necessary rule this is the only information that may be submitted. If, in the future, additional information is deemed necessary, then a change can be proposed by ONC for public comment.

Question 12: As we have noted elsewhere in this letter, we believe that the adjudication function should be clearly separated from the provider function. For HIPAA purposes this can be accomplished by establishing a HIPAA “hybrid organization.” While many in the industry will understand the HIPAA hybrid approach, patients, the public, and the press may not. Therefore, state or federal regulations related to the NICS requirements must specifically identify the judicial or state agencies involved in involuntary commitment roles in NICS reporting and the clear distinction that mental and behavioral health providers will not, as providers, be submitting such required NICS information. Patients needing mental or behavioral health services (voluntary or involuntary) should not fear that their treatment relationship with the provider may result in such reporting. Patients committed by court action or an involuntary state commitment should be informed that their status will require NICS reporting

Question 14: Beyond the usual education provided to HIPAA-covered entities when there are changes to the HIPAA rule, we recommend that clear and specific education, including instructions for compliance, be directed to the specific entities responsible for commitment as noted above – judicial as well as state agencies responsible for adjudicating involuntary commitment.

Question 15: Given OCR’s relatively new relationship with state attorneys general under the HITECH rule, AHIMA suggests working with these same attorneys general to ensure understanding and compliance with any revised HIPAA rules related to mental or behavioral health and NICS.

In closing, please accept our thanks for the opportunity to provide input on how the OCR might reconcile the HIPAA and NICS requirements in order to meet the President’s order. AHIMA stands ready to respond to any questions related to our responses above as well as future questions. We appreciate OCR’s recognition of the stewardship requirements our members and others face under HIPAA and your respect for the confidentiality of individuals receiving behavioral or mental health services, and we continue our commitment to these individuals as well.

Thank you for your time and consideration of these general and specific comments and recommendations. If you should have further questions or need for input from AHIMA, please contact Dan Rode, AHIMA’s Vice President for Advocacy & Policy at [dan.rode@ahima.org](mailto:dan.rode@ahima.org) or (202) 659-9440.

Sincerely,



Lynne Thomas Gordon, MBA, RHIA, CAE, FACHE, FAHIMA  
Chief Executive Officer  
American Health Information Management Association

cc: Kathleen A. Frawley, JD, MS, RHIA, FAHIMA; Board President/Chair  
Dan Rode, MBA, CHPS, FHFMA; Vice President, Advocacy and Policy