A SEARCH White Paper

By the Mental Health Records in NICS Focus Group

Reporting Mental Health Records to the NICS Index

SEARCH

Recent high-profile mass shootings by persons with a known or apparent mental illness have led to increased public demand to keep firearms out of the hands of those who are prohibited by federal or state law. To this end, State legislatures and Congress have responded by providing states with significant funding to improve their methods for collecting and reporting mental health information. States have answered the call by making unprecedented improvements in the way mental health information is made available for conducting firearms background checks.

The system for conducting these checks is the National Instant Criminal Background Check System—known as the NICS. One of the databases that is checked in this system is the NICS Index, which contains data on individuals with a mental health history that prohibits them from receiving or possessing firearms.

Despite the intense focus on this issue in recent years—and the significant investments of time and money into addressing the problem—there is still an overall lack of understanding about how mental health records are contributed to the NICS Index and which records are eligible for inclusion. There is also a lingering perception that very few disqualifying mental health records are available for firearms background checks despite the tremendous progress over the past several years to improve this process.

SEARCH, The National Consortium for Justice Information and Statistics, formed the Mental Health Records in NICS Focus Group to examine this issue, and report on it as a resource for Congress, policymakers, justice and behavioral health officials, the media, and the public. This paper is intended to provide information about how mental health records become a part of the NICS Index, while examining common misconceptions about these records in the NICS. It also highlights the collective success states have had in making these records available to the NICS to enhance firearms background checks.

BACKGROUND

Congress passed the Brady Handgun Violence Prevention Act[1] in 1993, which created the NICS.[2] The NICS became operational on November 30, 1998, and is the national system that allows Federal Firearms Licensees (FFL) to initiate a background check through the FBI or a State Point of Contact (POC).

The FBI or POC will check all available records to identify persons who may be prohibited from receiving or possessing firearms. According to the FBI, nearly 90% of the records used for a NICS check come from the states. When a NICS background check is initiated, it checks for records in three nationally held databases:

- the **National Crime Information Center**[3] (NCIC), which includes information on persons subject to civil protection orders and arrest warrants
- the **Interstate Identification Index** (III), a database of criminal history record information, and
- the **NICS Index**, which includes information contributed by Federal and state agencies identifying persons prohibited from possessing firearms who are not included in the III or NCIC, such as persons with a prohibiting mental health history or who are illegal or unlawful aliens.

Additionally, states acting as a POC search state and local databases that may contain disqualifying information that has not been made available to the NICS.

Categories of disqualifying records include:

- persons with convictions for felonies punishable by a term of imprisonment exceeding one year and misdemeanors punishable by a term of imprisonment of more than two years
- fugitives from justice
- unlawful users of controlled substances
- *persons adjudicated mentally defective, found not guilty by reason of insanity, or involuntarily committed to a mental health institution*
- illegal or unlawful aliens
- persons dishonorably discharged from the military
- persons who have renounced their U.S. citizenship
- subjects of protection orders
- persons convicted of a misdemeanor crime of domestic violence
- persons under indictment or information for a crime punishable by imprisonment for a term exceeding one year.

Most information concerning disqualifying records is supplied to state repositories of criminal history record information (CHRI) by law enforcement agencies, prosecutors, courts, and

[1] http://thomas.loc.gov/cgi-bin/query/z?c103:H.R.1025.ENR:

[2] For details on background checks and links to information on the NICS, NCIC, III, and more, see http://www.search.org/solutions/criminal-history-records/compiling-disseminating-criminal-history-record-information/ and http://www.search.org/solutions/criminal-history-records/noncriminal-justice-background-checks-and-the-nics/

[3] https://www.fbi.gov/about-us/cjis/ncic

corrections entities as a part of their routine reporting processes. However, records relevant to NICS mental health disqualifiers—such as involuntary commitments to a mental facility or adults placed in guardianship status due to mental incapacitation—may originate from outside the "traditional" criminal justice system. Sources of information may be probate courts, civil courts, mental health boards, etc.—agencies that do not typically have automated interfaces to the state CHRI repository. As a result, it has historically been challenging to ensure that mental health records are also made available in the NICS Index.

Criminal justice agencies have little to no control over the external agency records; therefore, policies that impose penalties on criminal justice agencies that fail to provide these records will likely be ineffective. More broadly, the penalties that have been established (e.g., cuts to the Byrne Justice Assistance Grant Program[4]) threaten unrelated and essential criminal justice programs.

MISCONCEPTIONS ABOUT MENTAL HEALTH RECORDS IN NICS

It is important to recognize that the NICS Index is not designed to be—nor should it be—a registry of individuals suffering from mental illness. *Only* persons who have been adjudicated as not guilty by reason of insanity, determined to be incompetent to stand trial, involuntarily committed to a mental institution, or placed in legal guardianship status as an adult due to mental incapacitation may be placed in the Index. Simply having a history of mental illness—even a very serious one—does not meet the program requirements for inclusion unless a person voluntarily elects to be placed in the Index. In fact, there is a form an individual can complete and submit to the FBI if he or she voluntarily wants to be placed in the NICS Index due to mental health reasons. There is a general lack of understanding about what "counts" in terms of disqualifying a person to purchase or possess a firearm for mental health reasons. Simply seeking and/or receiving mental health treatment does not lead to a person's mental health information being entered into the NICS Index.

In recent years, a number of mass shootings have occurred in which the perpetrator was known or suspected of having a history of mental illness:

- On April 16, 2007, Seung-Hui Cho, a senior at Virginia Tech, shot and killed 32 people and wounded 17 others on the university campus in Blacksburg, Virginia, prior to fatally shooting himself. Later it was revealed that he had been ordered by a judge to participate in mental health treatment, although he was not committed to a mental institution.
- On July 20, 2012, James Eagan Holmes was accused of shooting 12 people in a movie theatre in Aurora, Colorado. He subsequently pleaded not guilty by reason of insanity.
- On December 14, 2012, Adam Lanza shot and killed his mother and 26 other individuals at the Sandy Hook Elementary School in Newtown, Connecticut, prior to committing suicide. Subsequent investigation revealed several diagnoses of

[4] https://www.bja.gov/ProgramDetails.aspx?Program_ID=59

mental illness in Lanza's past, including obsessive-compulsive disorder, and a diagnosis of Asperger Syndrome, a developmental disorder.

- On April 2, 2014, Ivan Lopez, an Army Specialist, shot and killed four people and injured an additional 16 individuals at Fort Hood, Texas, prior to killing himself with a self-inflicted gunshot wound. Army records revealed after the incident indicate that Lopez was undergoing regular psychiatric treatment for depression, anxiety, and post-traumatic stress disorder.

Following each of these events, there were public and media outcries as to why these individuals were able to obtain or access firearms despite apparent histories of mental illness. However, the only instance where there could have been an allowable NICS entry—which possibly could have averted the tragedy—was for the shooter at Virginia Tech. Cho had previously been ordered to participate in an outpatient mental health treatment program following accusations of stalking by two fellow female students. At the time, Virginia law did not clearly require outpatient commitments to be reported. In 2008, the Virginia General Assembly amended their statute to clarify that outpatient commitment orders must be reported to the Criminal Records Exchange Division of the state police.[5]

REPORTING MENTAL HEALTH RECORDS IN THE NICS INDEX

Since the Virginia Tech shootings in 2007, Congress and the states have focused on increasing the number of mental health records included in the NICS Index. The Virginia Tech shooter was able to purchase firearms from an FFL because information about his prohibiting mental health history was not available to the NICS, and the system was therefore unable to deny the transfer of the firearms used in the shootings. The NICS Improvement Amendments Act of 2007[6] (NIAA) was signed into law on January 8, 2008, and it is intended to address the gap in information available to NICS about prohibiting mental health adjudications and commitments along with other prohibiting factors.

From FY 2009 to FY 2014, the U.S. Department of Justice Bureau of Justice Statistics (BJS) awarded over $72 million to states in NICS Act Record Improvement Program (NARIP) Awards,[7] which were authorized under the NIAA. On February 23, 2015, BJS announced the availability of another $25 million for states—once again with an emphasis on increasing the availability of mental health records in the NICS.

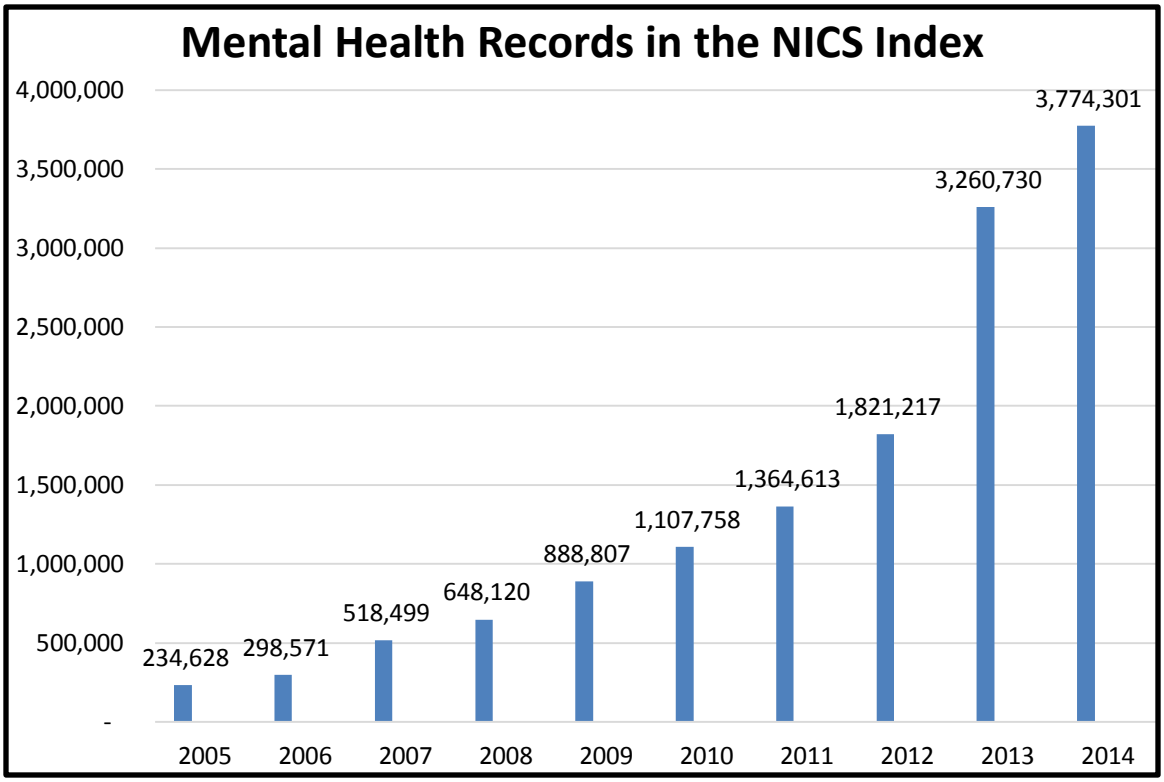
According to the FBI, there were 234,628 mental health records in the NICS Index as of December 31, 2005. By December 31, 2014, this number had increased to over 3.7 million records—representing a 1,509% increase in the past 10 years.[8]

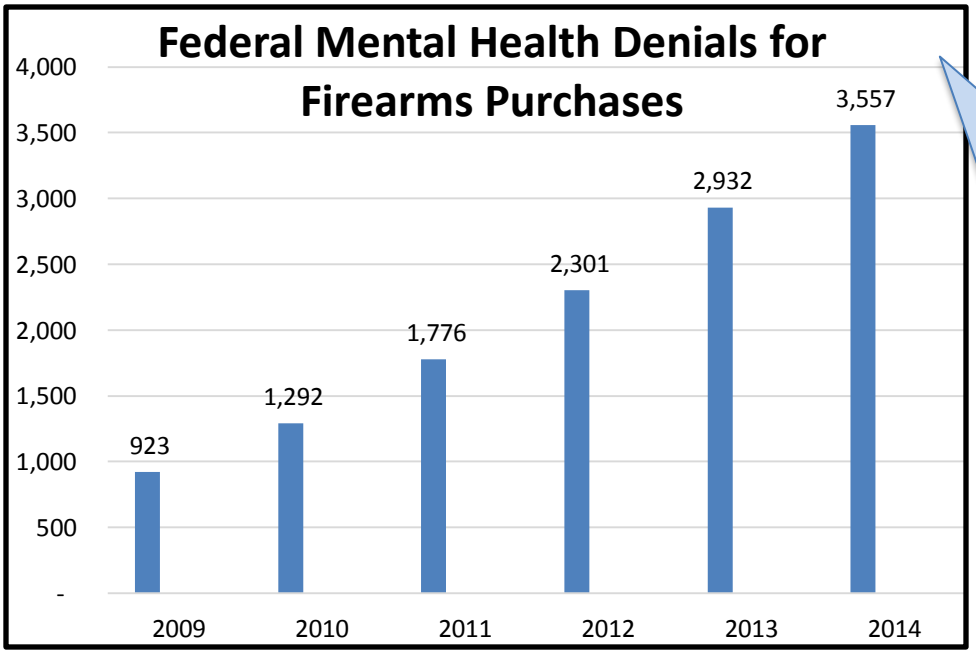
[5] http://services.dlas.virginia.gov/user_db/frmjchc.aspx?viewid=468

[6] http://www.bjs.gov/index.cfm?ty=tp&tid=49

[7] http://www.bjs.gov/index.cfm?ty=tp&tid=491

[8] http://www.fbi.gov/about-us/cjis/nics





During 2009—the first year NARIP funds were awarded—there were 923 federal denials to purchase firearms based on mental health records in the NICS Index. During 2014, there were 3,557 federal denials—a 285% increase.

In 2012, SEARCH and the National Center for State Courts published estimates of the total number of mental health records eligible for inclusion in the NICS Index.[9] At that time, it was estimated there were 4,416,275 records in originating agencies that could be included in NICS if they were forwarded to the state criminal history repository. At the time, states indicated that only 1,289,142 records (or 29%) of these records had been reported to the repository. Assuming the estimate for originating agencies held constant, this means that over 80% of eligible records are now included in the NICS Index.

BARRIERS TO REPORTING

Despite the progress achieved in recent years, some barriers to reporting mental health records remain. First, not all states are eligible for NARIP grants. In order to apply for funds, states must have a "relief from disabilities program" that allows individuals with a precluding mental health adjudication or commitment to have their right to purchase or receive a firearm restored. As of today, 27 states have qualifying legislation, and 26 states have received NARIP funds as of 2014.

It is important to note that states that do not qualify for NARIP grants may receive funding to support criminal history reporting programs. All states may apply for National Criminal History Improvement Program (NCHIP)[10] funds to increase the number of criminal history records available for conducting firearms background checks. NCHIP allows states to focus on a *broad range* of activities that are unique and specific to each state. The flexibility of NCHIP funding allows states to enhance enterprise information sharing and data use to support a myriad of key decisions in the justice arena every day.

Even some states that receive NARIP or NCHIP funding still face challenges of including mental health records in the NICS Index. Recently, SEARCH conducted a survey of its Membership Group, which is comprised of state repository managers who are primarily responsible for submitting records to the NICS Index. Thirty-five states responded.[11] Just over half of the reporting states indicated that they did not face any barriers in contributing mental health records to the NICS Index. Of those that reported barriers, eight states indicated that they lacked the statutory authority to require agencies to submit mental health records. Other states cited a lack of personnel or technical barriers such as not having a web portal to allow external agencies to submit records. Additionally, 10 states reported that their state law does not require outpatient mental health commitments to be reported, which is also a potential gap in the system.

STATE SUCCESSES IN PROMOTING ENTRY OF MENTAL HEALTH RECORDS IN THE NICS INDEX

While there are still some opportunities for improvement in reporting mental health records to the NICS Index, states have achieved significant progress in recent years. In addition to merely redoubling efforts to collect relevant

[9] *NICS Improvement Amendments Act: State Records Estimates Development and Validation Project, Year Three Report*, https://www.ncjrs.gov/pdffiles1/bjs/grants/240401.pdf

[10] http://www.bjs.gov/index.cfm?ty=tp&tid=47

[11] See http://www.search.org/files/pdf/MentalHealthRecordsNICS_Survey.pdf

mental health records from all available sources, several states have adopted "promising practices" to further promote the entry of mental health records in the NICS Index. Some examples include:

- Adopting laws or policies creating a single state point of contact for submitting entries to the NICS Index—which helps avoid duplicate entries.
- Allowing citizens to seek relief from disabilities through an online system. This makes it easier for individuals to seek relief and can improve the efficiency of the process of reviewing requests for relief.
- Establishing mechanisms for automating the entry for eligible populations into the NICS Index. By reducing reliance on manual data entry processes, states can increase the number of records entered into the NICS Index without overburdening staff. Automation also improves the timeliness of records entered into the NICS Index by allowing for near real-time entries of disqualifying records.
- Creating NICS task forces to bring together agencies to achieve a comprehensive approach to entering all eligible records in the NICS Index—e.g., law enforcement, prosecutors, courts, NICS POC agency, mental health providers, state mental health agencies, probation, parole, and corrections.

CONCLUSION

States have made and continue to make strides in terms of the quantity and quality of mental health records made available through the NICS Index. However, while the number of mental health records in the Index has increased significantly, other categories of disqualifiers have improved—but not as dramatically. As Congress continues to provide significant support for improving the overall NICS Index through NCHIP and NARIP funds, it is anticipated that states will continue to enhance their processes and systems to ensure that **all** qualifying records—not just mental health entries—are available to support firearm background check decisions.

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