



May 6, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Proposed Modifications to the HIPAA Privacy Rule to Support and Remove Barriers to Coordinated Care and Individual Engagement NPRM [RIN 0945-AA00]

Dear Secretary Becerra,

The Association for Behavioral Health and Wellness (ABHW) appreciates the opportunity to comment on the Proposed Modifications to the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (proposed rule). Our comments are outlined below.

ABHW is the national voice for payers that manage behavioral health insurance benefits. ABHW member companies provide coverage to over 200 million people in both the public and private sectors to treat mental health (MH), substance use disorders (SUDs), and other behaviors that impact health and wellness.

While the country is currently grappling with the COVID-19 pandemic, underlying issues of equal access to quality care are becoming an integral part of the analysis for bettering our healthcare system. While the pandemic has simply brought these issues to the forefront of health policy and action, they have long been problematic. ABHW is committed to ensuring that our policies will continue to strive for expanding MH and SUD services, with a focus on equal access and equal quality for those services. As HHS considers these important issues, we urge that meaningful action to address current racial inequality and health disparities be factored into any policy changes.

Coordinated, integrated medical and behavioral healthcare improves outcomes and is cost-effective.¹ One way to significantly allow for better coordination is to ensure that patient records flow between providers and caregivers with limited road blocks. We are therefore

¹ Croze, Colette. *Healthcare Integration in the Era of the Affordable Care Act*, Association for Behavioral Health and Wellness, July 2015. <http://box5595.temp.domains/~abhworg/sample/wp-content/uploads/2019/06/IntegrationPaper-1.pdf>, last visited December 9, 2020.

overall supportive of the intent of the proposed rule. Specifically, we agree that patients should have access to their records and data should flow easily between providers, plans, and patients. However, there are a number of areas where we see concerns.

1. **Concerns related to the implementation of the rule.**

- ***Expanding use of PHI for care coordination and case management.*** As previously stated, ABHW has long advocated for care coordination as it has proven to lead to better health outcomes. However, we believe this provision, as drafted, may lead to ambiguity in practice. Specifically, the proposed rule allows for protected health information (PHI) to be disclosed to social services agencies when in the best interest of the patient, but the term “social services agencies” needs to be further defined so only those organizations that are involved in the patient’s care coordination receive the PHI, thus safeguarding patient privacy.
- ***Replacing “professional judgment” with “good faith belief”.*** The proposed rule will allow providers to share PHI in an emergency with a “good faith belief”. We believe the intent of this change is to lessen the burden on the flow of information, a concept with which we agree. However, we also believe that there may be some unintended negative consequences, particularly in the cases of patients receiving treatment for SUDs. As such, we urge HHS to clearly define the parameters of “good faith belief” and clarify that patient privacy will not be impacted by this change.
- ***Individual’s right to access to information within 15 days of request.*** The proposed rule halves the time a covered entity has to respond to patient access requests from 30 days to 15 days. This reduction will cause a significant administrative burden on plans, especially during the current pandemic. As such, we urge HHS to keep the response time requirement to 30 days.
- ***Overall timing.*** If the proposed rule is finalized this year, the expectation is that covered entities will have to begin compliance during a pandemic. As you know, the public health emergency will last at least through 2021 and insurance plans as well as providers continue to face significant challenges in ensuring access to care, delivering that care, and certifying the quality of care of MH and SUD services. As such, we recommend delaying the proposed rule by an additional year to assist plans in the transition to the new provisions.

2. **The changes in the proposed rule may still conflict with state laws.** We applaud the numerous provisions in the proposed rule which aim to remove barriers to data sharing for care coordination as ABHW has long advocated for integration of care to deliver services that treat an individual holistically. However, it is prudent to note that state level restrictions often pose the largest barrier to the data sharing the proposed rule hopes to achieve. This is particularly true for SUD treatment.

We also understand that HHS does not have the authority to preempt more stringent state laws. However, there are requirements in the Privacy Rule itself that require covered entities to defer to, and rely on, state laws outside the issue of preemption, particularly in the area of personal representatives and minor records. This exacerbates the inconsistencies between HIPAA and state laws, is extremely challenging from a compliance perspective, and makes it far more challenging for covered entities and their business associates to share health data for care coordination with caregivers and others involved in an individual's care.

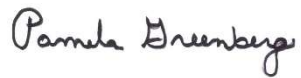
3. **Additional concerns not addressed in the rule.**

- ***Additional update to HIPAA privacy and security regulations.*** Currently, HIPAA standards for protecting individuals' medical records and other personal health information apply to defined group of healthcare entities, namely: health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. As technology advances, it creates new platforms that exchange protected health information which are not covered by HIPAA. As more entities are engaged in the transfer health data, serious considerations must be given to capture these new methods and ultimately have them comply with the HIPAA privacy standards. ABHW supports reevaluating the entities and data that are covered by the HIPAA regulations, specifically in the issue areas of protected health information, interoperability, and information blocking.
- ***Expediently promulgate updated 42 CFR Part 2 (Part 2) Rules as required by the CARES Act.*** While not directly addressed in this proposed rule, it is prudent to highlight the need for uniformity. SUD records should be shared for the purposes of TPO without unnecessary administrative burdens, to ensure patients receive the treatment they need without delays or gaps in care. Additionally, patient privacy must continue to be strongly safeguarded. Therefore, to minimize administrative burdens without sacrificing patient privacy, the Partnership advocates for HHS to promulgate rules pursuant to the CARES Act of 2020, which would more closely align Part 2 with the requirements

of HIPAA.

4. **Conclusion.** Thank you for the opportunity to comment on this important proposed rule. Please feel free to contact Deepti Loharikar, Director of Regulatory Affairs, at loharikar@abhw.org or (202) 505-1834 with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Greenberg".

Pamela Greenberg, MPP
President and CEO