

**Statement
of the
American Hospital Association
before the
Subcommittee on Privacy, Confidentiality & Security
of the
National Committee on Vital and Health Statistics**

“Minimum Necessary and the Health Insurance Portability and Accountability Act”

June 16, 2016

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 43,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to submit this statement about the Health Insurance Portability and Accountability Act’s (HIPAA) minimum necessary standard.

The minimum necessary requirement — mandating that HIPAA covered entities and business associates make “reasonable efforts to limit protected health information [PHI] to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request” — has been treated as a “reasonableness standard,” not an “absolute standard” since its inception. Time and again, the Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) has confirmed that covered entities have “substantial discretion with respect to how [they] implement the minimum necessary standard.” This provides continued comfort to hospitals that the minimum necessary requirements need not impede the provision of quality care and services, and that hospitals’ minimum necessary determinations will be judged under a standard of reasonableness. We believe that this approach to the minimum necessary requirement remains vitally important for patient care.

THE CURRENT EXCEPTION FOR TREATMENT SHOULD BE PRESERVED

The AHA supports the preservation of the existing regulatory exception to minimum necessary for treatment. Currently, uses and disclosures for treatment are not subject to the minimum necessary standard, and it is critical for hospitals that this exception be maintained. If uses and disclosures for treatment purposes were subject to the minimum necessary standard, patient care and safety could be jeopardized by a lack of information that does not meet the minimum necessary standard but is, in fact, ultimately essential to a patient receiving proper treatment.

Because hospitals are large entities in which dozens of professionals may work together to treat a single patient, it is very difficult to predict which information will be most useful for each specialist or other professional to have. Thus, the minimum necessary standard would make it impossible for hospitals to use or release limited information without exposing themselves and their patients to the risk of inaccurate or inadequate care. In particular, emergent care situations require physicians and other professionals to have a patient's information as quickly as possible. Requiring hospitals to apply the minimum necessary standard here would pose a grave harm to the patient. We strongly urge that treatment activities remain an exception for the application of the minimum necessary requirements.

CONSIDERATION OF A LIMITED DATA SET BEFORE MINIMUM NECESSARY WOULD APPLY SHOULD NOT BE REQUIRED

HHS should not require covered entities and business associates to first determine whether a limited data set (LDS) is feasible as the minimum necessary amount of data before the standard itself could apply. Such a requirement for prioritization, urged by some advocates in the past, would create a tremendous burden for covered entities and business associates through the added work involved in analyzing the limited data set, as well as the time and money lost when this step is taken in addition to applying the minimum necessary standard. Because LDS are not used frequently, it does not make sense to require covered entities and business associates to conduct the analysis, as it most often will require unnecessary effort and utilize scarce resources. We urge that the current regulation's structure of independent application of the two standards be maintained.

INCREASING DATA NEEDS RELATED TO PATIENT OUTCOMES AND POPULATION HEALTH ACTIVITIES MUST BE CONSIDERED IN APPLYING MINIMUM NECESSARY

Section 13405(b)(1)(B) of The Health Information Technology for Economic and Clinical Health Act (HITECH) requires that HHS, in developing guidance related to the minimum necessary standard, take into account "the information necessary to improve patient outcomes and to detect, prevent, and manage chronic disease." The AHA believes that, over time, the amount of information necessary to accomplish these goals will increase because new models of integrated care require greater access to data. For example, accountable care organizations, quality initiatives, and continuity of care initiatives each will require the reporting and analysis of an increasing amount of data. Therefore, the AHA urges that these broader needs for data be taken into account as any minimum necessary guidance is developed.

The AHA believes that the current HIPAA regulation is by no means without some regulatory impediments — not the subject of this hearing — to the robust use and disclosure of patients' PHI necessary to support high-quality care, care coordination and population health improvement. However, the regulation's minimum necessary standard remains workable because it continues to be a reasonableness standard with inherent flexibility in its application. Minimum necessary guidance must maintain that approach to ensure that the standard does not hinder the timely

delivery of high-quality health care, effective care coordination or robust population health activities.