

# **HIPAA Privacy Rule to Support Reproductive Health Care Privacy**

**NCVHS Full Committee Meeting  
July 20, 2023**

UNITED STATES

Department of  
Health and Human  
Services



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
**Office for Civil Rights**

# Post *Dobbs* Privacy Concerns

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- OCR has held listening sessions with providers nationwide, as well as convened major medical associations (AHA, AMA, AAFP, ACOG, AAP) and abortion providers.
- Providers nationwide have flagged various scenarios where protected health information (PHI) is being used to target doctors and patients.
- Example: In Colorado, we heard that the Texas AG is establishing travel checkpoints as women leave the state for health care, and then seeking PHI from providers who lawfully provide care in other states, such as Colorado.
- Some states have passed laws to insulate their patients and doctors (e.g., California), while others have not.
- There are concerns that without federal intervention, the targeting of PHI will continue, and medical boards do not have support.

# Proposed Modifications to the HIPAA Privacy Rule to Support Reproductive Health Care Privacy

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- NPRM published in the Federal Register on April 17, 2023
- Key proposals
  - Prohibit regulated entities from using or disclosing PHI for a criminal, civil, or administrative investigation into or proceeding against any person in connection with seeking, obtaining, providing, or facilitating reproductive health care in certain circumstances.
  - Prohibit regulated entities from using or disclosing PHI to identify any person to initiate such an investigation or proceeding in certain circumstances.
  - Require signed attestation for certain requests of PHI potentially related to reproductive health care that the request is not for a prohibited purpose.
- Public comment period on the NPRM closed on June 16, 2023

# Current HIPAA Privacy Rule

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- Applies to protected health information (PHI) transmitted or maintained by covered entities and their business associates.
  - Covered entities: Health plans; health care clearinghouses; and health care providers that conduct standard electronic transactions.
  - Business associates: Persons that create, receive, maintain, or transmit protected health information (known as PHI) for or on behalf of covered entities.
- Prohibits the use or disclosure of PHI by covered entities and their business associates unless permitted or required by the Privacy Rule.
- *HIPAA as a matter of law does not require any disclosures of PHI except:*
  - To the individual who is the subject of the PHI.
  - To the Secretary of HHS in order to determine compliance.
- All other disclosures allowed under HIPAA are permissive, meaning they require a specific permission under the Privacy Rule.

# Need for Rulemaking

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- The HIPAA Privacy Rule permits regulated entities to use or disclose PHI without an individual's authorization for certain purposes in certain circumstances.
  - Where required by law (e.g., state law requires disclosing PHI to a public health authority for an overdose detection mapping program).
  - For public health activities (e.g., reporting certain public health activities to state or federal officials, such as PHI on deaths attributed to COVID-19).
  - For health oversight activities (e.g., disclosing PHI to state Medicaid fraud control units).
  - For judicial and administrative proceedings (e.g., disclosing PHI in a custody hearing pursuant to a court order).
  - For law enforcement purposes (e.g., disclosing PHI to law enforcement pursuant to a search warrant in a criminal investigation into Medicaid fraud or unlicensed health care).
- OCR issued guidance explaining how these permissions are limited.
- OCR is hearing concerns from health care entities about the need for a stronger regulation to protect reproductive health care privacy.

# Proposed Prohibitions

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- Prohibit regulated entities from using or disclosing PHI for a criminal, civil, or administrative investigation into or proceeding against any person in connection with seeking, obtaining, providing, or facilitating reproductive health care, but only where the investigation or proceeding is in connection with reproductive health care that:
  - Is provided outside of the state where the investigation or proceeding is authorized and where such health care is lawful in the state in which it is provided.
  - Is protected, required, or authorized by federal law, regardless of the state in which such care is provided.
  - Is provided in the state where the investigation or proceeding is authorized and that is permitted by the law of the state in which the health care is provided.
- Prohibit regulated entities from using or disclosing PHI to identify any person to initiate an investigation or proceeding for the above purpose (with the same restrictions listed above).

# Proposed Rule of Construction

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- Would not prohibit a use or disclosure of PHI otherwise permitted by the Privacy Rule unless it is primarily for the purpose of investigating or imposing liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care.
- Examples of permitted disclosures
  - In defense of a person, including a regulated entity, against a lawsuit for providing lawful reproductive health care.
  - Against a person for knowingly submitting a false claim for reproductive health care for payment to the government.

# Proposed Attestation

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- Would require a regulated entity to obtain a signed “attestation” when both of the following conditions are met:
  - The request is for PHI potentially related to reproductive health care.
  - The request is for one of the following purposes:
    - Health oversight activities.
    - Judicial and administrative proceedings.
    - Law enforcement purposes.
    - To coroners or medical examiners.
- Attestation may be electronic, but it may not be combined with any other document.



# HIPAA Privacy Rule to Support Reproductive Health Care NPRM Resources

- NPRM may be viewed or downloaded at:  
<https://www.federalregister.gov/documents/2023/04/17/2023-07517/hipaa-privacy-rule-to-support-reproductive-health-care-privacy>.
- NPRM Fact Sheet may be viewed or downloaded at:  
<https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/hipaa-reproductive-health-fact-sheet/index.html>.
- OCR updates on HIPAA rulemaking, guidance, and enforcement activities:  
<https://www.hhs.gov/hipaa/for-professionals/list-serve/>.
- HHS Reproductive Health Care website:  
<https://reproductiverights.gov/>