

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

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UNITED STATES

Department of  
Health and Human  
Services



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

# Agenda

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- Current HIPAA Privacy Rule
- Need for Rulemaking
- Proposed Rule Highlights
- Resources



# Current HIPAA Privacy Rule: Scope

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- Limited by HIPAA and the HITECH Act to:
  - Covered entities (CE)
    - Health care providers who transmit health information electronically in connection with a transaction for which there is a HIPAA standard (e.g., billing insurance electronically).
    - Health plans.
    - Health care clearinghouses.
  - Business associates (BA)
    - Privacy Rule restrictions on uses and disclosures apply directly to BAs.

*§ 160.103*

# Current HIPAA Privacy Rule: Scope

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- Protected Health Information (PHI):
  - Individually identifiable health information (IIHI).
  - Transmitted or maintained in any form or medium.
- Not PHI:
  - De-identified information.
  - Employment records.
  - Family Educational Rights and Privacy Act (FERPA) education records.

*§ 160.103*

# Current HIPAA Privacy Rule Highlights

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- Prohibits use or disclosure of PHI unless permitted or required by the Privacy Rule.
- HIPAA only requires disclosures to:
  - The individual who is the subject of the PHI.
  - The Secretary of HHS to determine compliance with the HIPAA Rules.
- All other uses and disclosures that the Privacy Rule allows are permitted, but not required.
- Covered entities may provide greater protections than required by the Privacy Rule.

*§ 164.502*

# Implications of Current Rule, Post *Dobbs*:

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- OCR has heard concerns and confusion from the public about the ability of law enforcement and others to access PHI.
- HHS is concerned about the effect of these concerns and changes in laws will have on individuals' trust in their providers and in the health care system.
- HHS believes a federal solution is required to protect the trust between individuals and providers.

# Need for Rulemaking

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- 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.
  - For public health activities.
  - For health oversight activities.
  - For judicial and administrative proceedings.
  - For law enforcement purposes.

*§ 164.512*

# Proposed Prohibition

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- Would 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
- Would prohibit regulated entities from using or disclosing PHI to identify any person to initiate such an investigation or proceeding in certain circumstances.

*Proposed § 164.502(a)(5)(iii)*

# Proposed Rule of Applicability

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- Circumstances in which prohibition would apply:
  - The reproductive health care 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.
  - The reproductive health care is protected, required, or authorized by federal law, regardless of the state in which such care is provided.
  - The reproductive health care 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.

*Proposed § 164.502(a)(5)(iii)(C)*



# 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:
  - 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 § 164.502(a)(5)(iii)(D)*



# 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.

*Proposed § 164.509*

# Proposed Attestation Contents

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- Name of individual(s) whose PHI is sought, if practicable.
  - If not practicable, a description of the class of individuals whose PHI is sought.
- Name or class of persons who are requested to make the use or disclosure.
- Name or class of persons to whom the regulated entity is to make the requested use or disclosure.
- Statement that the use or disclosure is not for a purpose prohibited under the proposed rule.
- Signature of the person requesting PHI and date.

*Proposed § 164.509(c)*

# Personal Representative Status

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- The Privacy Rule permits a regulated entity to elect not to treat a person as the personal representative of the individual in certain circumstances.
- The NPRM proposal would clarify that this provision does not apply where the reason for the regulated entity's determination is primarily because that person facilitates or facilitated or provided reproductive health care for the individual.

*Proposed § 164.502(g)(5)(iii)*

# Abuse, Neglect, or Domestic Violence

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- The Privacy Rule permits a regulated entity to use or disclose PHI without an authorization or an opportunity to agree or object where the PHI is about an individual whom the regulated entity reasonably believes to be a victim of abuse, neglect, or domestic violence in certain circumstances.
- The NPRM clarifies that this permission does not apply when the report is based primarily on the provision of reproductive health care.

*Proposed § 164.512(c)(3)*

# Disclosures to Law Enforcement

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- The Privacy Rule permits disclosures pursuant to process and as otherwise required by law, in compliance with and as limited by the relevant requirements of an administrative request, subject to certain conditions.
- The NPRM would clarify that the administrative request described in section 164.512(f)(1)(ii)(C) is one for which a response is required by law.

*Proposed § 164.512(f)(1)(ii)(C)*



# Notice of Privacy Practices

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- The Privacy Rule requires CEs to provide individuals with an NPP to ensure they understand how the CE may use and disclose their PHI, as well as their rights and the CE's duties with respect to PHI.
- The NPRM would require CEs to separately describe each type of use or disclosure that would be prohibited under the proposal in sufficient detail for an individual to understand the prohibition and the proposed attestation requirement.

*Proposed § 164.520(b)(1)(ii)(F) & (G)*

# HIPAA Privacy Rule Resources

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- Guidance on the HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care:  
<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>.
- Guidance on Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet:  
<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html>.
- NPRM
  - Published in the Federal Register on April 17, 2023.  
<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>.
  - Public comment period on the NPRM closes on June 16, 2023. Comments may be submitted at [www.regulations.gov](http://www.regulations.gov).

# Discussion

