



**MEDICAL PROFESSIONAL
LIABILITY ASSOCIATION**

June 16, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, DC 20201

RE: HIPAA Privacy Rule to Support Reproductive Health Care Privacy (RIN: 0945-AA20)

Dear Secretary Becerra:

On behalf of the Medical Professional Liability (MPL) Association and its more than 50 medical professional liability insurer members, I am writing to offer comments regarding the Department of Health & Human Services' (hereinafter, the Department) recent notice of proposed rulemaking regarding the HIPAA Privacy Rule and reproductive healthcare information.

The MPL Association is the leading trade association representing insurance companies, risk retention groups, captives, trusts, and other entities owned and/or operated by their policy holders, as well as other insurance carriers with a substantial commitment to the MPL line. MPL Association members insure more than 2.5 million healthcare professionals around the world— doctors, dentists, oral surgeons, nurses and nurse practitioners, podiatrists, and other healthcare providers. MPL Association members also insure more than 3,000 hospitals and 50,000 medical facilities and group practices globally.

With regard to the proposed rule, the Association has two primary areas of concern: 1. Clarification of when a regulated entity may share relevant Protected Health Information (PHI) and, 2. Clarification of circumstances under which it is necessary for a regulated entity to share relevant PHI with another regulated entity.

We appreciate the Department's proposal to establish the use of an attestation in which the requester must verify that the circumstances under which they are seeking information would not render the disclosure of such information in violation of the proposed rule. To limit the potential impact on the regulated entity being asked to disclose such information, the Department suggests a standard in which the disclosing party would be deemed in compliance with HIPAA so long as the related attestation was "objectively reasonable." Such a standard, however, may be subject to interpretation on a variety of fronts. For instance, a request that appears "objectively reasonable" at a given time, may not be deemed "objectively reasonable" given the passage of time and subsequent circumstances. In order to clarify this matter, and not

subject regulated entities to potential penalty or liability inappropriately, we recommend an “actual knowledge” standard be applied. We believe a regulated entity should have to be shown to have had “actual knowledge” that the request for PHI was in violation of the proposed rule before being held accountable for a violation of the disclosure standard.

The proposed rule also states that, “The Department does not intend for this proposed prohibition [regarding reproductive healthcare information] to prevent a regulated entity from using or disclosing PHI for other permissible purposes under the Privacy Rule,” and that clarification will be provided via a Rule of Construction. The subsequent examples listed in the proposed rule include references to a regulated entity being allowed to use or disclose PHI in order to defend itself from a claim of medical negligence. It is critical to note, however, that such disclosures may be necessary for a regulated entity to provide information to another regulated entity for use in the defense of the second party. For example, if a health facility and health professional both faced a negligence action for the same adverse outcome, it would be necessary for them to share PHI so that both entities could mount an adequate defense. In addition, under some circumstances it may be necessary for a medical defendant to seek PHI from a regulated entity that is a non-party to a claim in order to mount an adequate and appropriate defense of the care provided. As such we request that the rule of construction explicitly state that the use and disclosure of PHI under the rule is always allowable when such PHI will be used in the defense of a medical negligence claim, regardless of whether the disclosing party is subject to that claim.

We appreciate this opportunity to comment on the Department of Health & Human Services’ notice of proposed rulemaking regarding Nondiscrimination in Health Programs and Activities. Should you have any questions or need further information, please do not hesitate to contact me at batchinson@MPLassociation.org or 240.813.6128 or my colleague Mike Stinson, Vice-President, Public Policy and Legal Affairs, at 240.813.6139 or via email at mstinson@MPLassociation.org.

Thank you.

Sincerely,

A handwritten signature in blue ink that reads "BK Atchinson". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Brian K. Atchinson
President & CEO