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June 15, 2023

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The Honorable Xavier Becerra  
U.S. Department of Health and Human Services, Office for Civil Rights,  
Attention: HIPAA and Reproductive Health Care Privacy NPRM  
Hubert H. Humphrey Building  
200 Independence Avenue, Room 509F  
Washington, DC 20201

**HIPAA Privacy Rule to Support Reproductive Health Care Privacy (RIN Number 0945-AA20, HHS-OCR-0945-AA20)**

Dear Secretary Becerra,

The American Psychiatric Association (APA), the national medical society representing over 38,000 psychiatric physicians and their patients, appreciate the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) to modify the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to protect reproductive health care privacy. APA advocates for strong privacy protections for patients given the sensitivity of their information and how it may be used. APA also supports strong privacy protections for not only patients, but clinicians and those facilitating lawful reproductive health care and all legal health care services.

A range of services could be associated with reproductive health care, including mental health and substance use services. As OCR acknowledges, "a positive, trusting relationship between individuals and their health care providers is essential to an individual's health and well-being. The prospect of releasing highly sensitive protected health information (PHI) can result in medical mistrust and the deterioration of the confidential, safe environment that is necessary to quality health care, a functional health care system, and the public's health generally." If individuals withhold reproductive health information, or any sensitive PHI, it will 1) create barriers to evidence-based mental health care during preconception, pregnancy, and the postpartum period 2) increase the risk of the mental health and substance use disorders and 3) worsen the course of existing disorders. **APA encourages HHS to expand the proposal to other types of highly sensitive PHI including gender-affirming and sexual health care.** Highly sensitive PHI should be defined in a way that encourages quality and safe healthcare and limits law enforcement action when done within the scope and legalities of the jurisdiction.

This is an important acknowledgment that seeking health care should not be punitive for either the patient or clinician who is trained and acting lawfully within their scope of practice. APA opposes all constitutional amendments, legislation, and regulations curtailing family planning and abortion services to any segment of the population. Restrictive abortion and contraception policies have shown to be related to an increased risk for a variety of mental health problems and may have a negative impact on the overall health of women, including physical, emotional, and social wellbeing. Thus, there must be heightened protections that prohibit the uses and disclosures of PHI for criminal, civil, or administrative investigations

or proceedings against individuals, covered entities or their business associates (collectively, “regulated entities”), or other persons for seeking, obtaining, providing, or facilitating reproductive health care that is lawful under the circumstances in which it is provided.

### **Proposed Attestation**

The NPRM proposes to require covered entities to obtain an attestation from the person requesting the use or disclosure that the use or disclosure is not for a prohibited use. APA is concerned that the onus of the proposed attestation requirement is on the clinician rather than the requester. **APA would instead, encourage HHS to require the person or entity requesting the PHI to attest in good faith that the information will not be used under one of the four prohibited purposes (disclosures for health oversight activities, disclosures for judicial and administrative proceedings, disclosure for law enforcement purposes, and disclosures about decedents to coroners and medical examiners).** HHS should provide clear guidance and templates for all parties.

### **Requests for protected information**

HHS is asking how requests for PHI are currently submitted. Requests for HIPAA protected information are typically in hard copy, either mailed or hand delivered as either a subpoena or warrant. Even though the proposal would require covered entities in certain circumstances to obtain an attestation that the information would not be used for a prohibited purpose from the person requesting the use or disclosure; APA is concerned that if a clinician does not comply with the warrant or subpoena, or if the person requesting does not comply with the attestation, the covered entities can be brought to court and found to be in contempt. The onus is on a covered entity to know potentially 50 state laws and legal medical services in each. HIPAA protections are confusing and typically found to be used more cautiously than the law is intended. **APA encourages OCR to provide clear guidance on compliance as well as protect clinicians when working in good faith and have no actual knowledge of the intent of the use of PHI.**

### **Enforcement**

Enforcement of HIPAA is important for meaningful protections and HIPAA penalties due to violations of the privacy rule are severe and increased litigation can have a chilling effect on care for solo and small group entities. However, ensuring the balance between protecting sensitive information and sharing for clear identified reasons, needs to lean toward those who are acting in good faith to protect sensitive PHI to prevent reduced care for services that have already been affected by state laws and healthcare worker shortages. **APA recommends that the agency clarify that no covered entity acting in good faith will be found liable for recipient’s use of any PHI, unless the covered entity had actual knowledge of the use.**

APA appreciates HHS and OCR’s commitment to HIPAA protections. APA encourages the agency to further evaluate other health care services that may need similar protections in order to protect covered entities and patients highly sensitive PHI. If you have any questions or would like to discuss any of these comments further, please contact Brooke Trainum, Manager of Practice Policy at [btrainum@psych.org](mailto:btrainum@psych.org).

Sincerely,

A handwritten signature in blue ink that reads "Saul Levin" with "MD, MPA" written in smaller letters to the right.

Saul Levin, MD, MPA, FRCP-E, FRCPsych  
CEO & Medical Director  
American Psychiatric Association