

OCR Proposed Privacy Rule for Reproductive Healthcare

May 1, 2023

Quick Facts

- On April 12, 2023, the Office of Civil Rights (OCR), a division of the Department of Health and Human Services (HHS), issued a [Notice of Proposed Rulemaking \(NPRM\)](#) that would amend the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding the disclosure of reproductive healthcare personal health information (PHI).
- The proposed rule creates a new definition for the term “reproductive healthcare.”
- The proposed rule prohibits a covered entity or business associate from using or disclosing PHI for certain “non-healthcare purposes.”
- The proposed rule creates a new attestation process and updates the current HIPAA notice of privacy practices.

Background

On April 12, 2023, the Office of Civil Rights (OCR), a division of the Department of Health and Human Services (HHS), issued a [Notice of Proposed Rulemaking \(NPRM\)](#) that would amend the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding the disclosure of reproductive healthcare personal health information (PHI). The proposed rule was [published in the Federal Register](#) on April 17, 2023.

The proposed rule was written in direct response to [President Biden’s Executive Order](#), issued in July 2022, after the Supreme Court of the United States (SCOTUS) decision in *Dobbs v. Jackson Women’s Health Organization*, which overturned nearly 50 years of precedent case law under *Roe v. Wade*.

Proposed Rule

The proposed rule intends to strengthen privacy protection by prohibiting the use or disclosure of PHI due to fears that individuals may not share PHI about reproductive health, or that providers may omit important reproductive information from medical records, in states where abortions are illegal. The NPRM states, “The Department believes the proposals would increase the likelihood that individuals would seek lawful healthcare by improving their confidence in the confidentiality of their PHI; improve access to high quality and continuous healthcare by increasing the accuracy and completeness of individuals’ medical records; improve population health by encouraging individuals to receive disease screenings; safeguard the mental health of pregnant individuals; prevent increases in maternal mortality and morbidity; enhance support for victims of rape, incest, and sex trafficking; and maintain family economic stability.”

The proposed rule would only apply to covered entities and business associates and amends certain definitions under the HIPAA Privacy Rule.

New and Updated Definitions

In the NPRM, OCR adds and amends definitions to the HIPAA Privacy Rule. It adds a definition for “reproductive healthcare” which it defines as care, services, or supplies related to the reproductive health of the individual, including contraception, pregnancy-related healthcare, fertility and infertility-related healthcare, and other types of care, services or supplies used for the diagnosis or treatment of conditions related to the reproductive system. The definition of “person” is amended to expressly include a natural person, meaning a human who is born alive.

Purpose-Based Prohibition on Uses and Disclosures

The NPRM prohibits a covered entity or business associate from using or disclosing PHI for certain “non-healthcare purposes.” Under the NPRM, the OCR modifies HIPAA to prohibit the use or disclosure of PHI where the PHI would be used for a criminal, civil, or administrative investigation or proceeding against any person in connection with seeking, obtaining, providing, or facilitating lawful reproductive healthcare or identifying any person for the purpose of initiating such an investigation or proceeding. The new prohibition would apply in investigations or proceedings where reproductive healthcare:

- Is provided outside of the state where the investigation or proceeding is authorized and where such healthcare is lawful
- Is protected, required, or authorized by federal law, regardless of the state in which it is provided
- Is provided in the state in which the investigation or proceeding is authorized and that is permitted by that state’s laws

OCR proposes that “seeking, obtaining, providing, or facilitating” would include, but not be limited to, expressing interest in, inducing, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, assisting, or otherwise taking action to engage in reproductive healthcare, as well as attempting to engage in any of the same.”

Attestation

If passed, the proposed rule requires regulated entities to obtain an attestation from the individual requesting the use or disclosure of reproductive health information. The attestation must be a written statement attesting that the use or disclosure would not be for a prohibited purpose and that the request is permitted under the HIPAA Privacy Rule. The attestation must be signed and dated.

HIPAA Notice of Privacy Practices

The NPRM, if passed, would require updates to the current HIPAA Notice of Privacy Practices to help individuals understand the prohibition of reproductive healthcare PHI in certain scenarios. Under the proposed rule, the Notice of Privacy Practices would describe and provide examples of the use or disclosure of the PHI prohibited under the proposed rule and when an attestation would be required under the proposed rule.

Summary and Next Steps

If passed, covered entities and business associates would have compliance responsibilities including:

- Amending HIPAA policies and procedures
- Amending business associate agreements
- Amending and redistributing the Notice of Privacy Practices
- Creating the required attestation

Additionally, more training will likely be necessary for covered entities and business associates. OCR will be accepting comments on the NPRM until June 16, 2023, 60 days following publication in the Federal Register. Comments may be submitted by mail or electronically at <http://www.regulations.gov> by searching for the Docket ID number HHS–OCR–0945–AA20. It is likely that the final rule will be effective about six months after publication and will provide additional time for covered entities and business associates to comply.

EPIC Employee Benefits Compliance Services

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