



AMERICAN BENEFITS  
COUNCIL

May 6, 2021

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

Robinsue Frohboese  
Acting Director and Principal Deputy, Office for Civil Rights  
U.S. Department of Health and Human Services  
Attention: Proposed Modifications to the HIPAA Privacy Rule to Support and  
Remove Barriers to, Coordinated Care and Individual Engagement NPRM  
RIN 0945-AA00  
Hubert H. Humphrey Building  
Room 509F  
200 Independence Avenue SW  
Washington, DC 20201

RE: **Comments on Proposed Modifications to the HIPAA Privacy Rule to  
Support and Remove Barriers to, Coordinated Care and Individual  
Engagement [Docket ID number HHS-OCR-0945- AA00]**

Dear Ms. Frohboese:

I write on behalf of the American Benefits Council (the “Council”) to comment on the Proposed Modifications to the HIPAA Privacy Rule to Support and Remove Barriers to, Coordinated Care and Individual Engagement (“Proposed Rules”).

The Council is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world’s largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

The Council strongly supports the ability for health plans and health care providers to share data and coordinate care in order to offer innovative benefits and address real-time health needs of enrollees. We also support enrollees being able to access their own

data and to direct their information. We applaud the Office of Civil Rights' (OCR's) timely response to requests for increased transparency and care coordination.

We understand that these Proposed Rules largely are directed at health care providers. However, these regulatory changes directly impact health plans that are HIPAA covered entities as well. For the most part, health plans are fully involved in care coordination activities and support the exchange of information for care coordination and transparency purposes. Nevertheless, as outlined below, we are writing to raise three issues for OCR to consider that are important for the administration of health plans and the vital health benefits that they provide throughout the country.

#### **DEADLINE TO GRANT REQUESTS FOR ACCESS**

The Proposed Rules would shorten the deadline to comply with an enrollee's request to access protected health information (PHI) – for both health plans and health care providers – from 30 days to 15 days.

We strongly support transparency and the ability of individuals to access their health data. However, this proposal would cut in half the time that health plans have to respond to enrollees' requests. Our members have raised concerns that this significant reduction in the timeframe presents real issues for health plans because many health plans utilize multiple business associates to provide services and so do not hold PHI in a single site. A large employer may have a dozen different health plan options and benefits, each with their own service providers. In addition, the PHI requested could reside in any number of forms, including microfiche, hard copy and electronic and would need to be assimilated to be able to respond to a request for access. As a further step, the health plan may need to coordinate with the enrollee to determine which PHI the enrollee is requesting – medical, dental, vision, etc. and with respect to which claim. All of this takes time.

Moreover, health plans do not receive requests for access on a routine basis, unlike health care providers and may need to direct an individual to the appropriate business associate or coordinate with several business associates to fulfill these requests. In addition, requests for records from a health plan typically do not carry the same urgency as a request might to a health care provider. State laws that apply faster timeframes for access generally are directed at health care providers, not health plans. The type of change contained in the Proposed Rules would add a much more significant administrative burden on health plans. In addition, the Proposed Rules would generally mean that employers must review and update all business associate agreements, which would be a time consuming and potentially expensive process.

As such, for health plans, we would support a requirement that records be provided “as soon as practicable” but request that the 30-day deadline (with 30-day extension) remain the same as under the current rules in order to give health plans the chance to clarify with enrollees what records they need and to coordinate with the health plan’s business associates to provide access.

## **RIGHT TO DIRECT ACCESS**

The Proposed Rules would add a new category of access to PHI, which allows an individual to direct his or her health plan or health care provider to submit a request for access on the individual’s behalf to a particular health care provider. The request would be for the individual’s PHI to be delivered to the health plan or provider that made the request on the individual’s behalf (referred to as the “Requester-Recipient”). The Requester-Recipient must submit the individual’s request, including an oral request, as long as the request is clear, conspicuous and specific, within 15 days with no extensions.

The Council supports individuals being able to direct their own health information and for health care providers and health plans to be able to access PHI where an individual requests. However, the requirements regarding how to make a request could be viewed inconsistently. On one hand, the Proposed Rules require that the individual’s request be clear, conspicuous and specific. On the other, the individual is permitted to make their request orally. We are concerned that it may be difficult for a health plan to be able to fully act on an individual’s oral request or to know with certainty that the 15-day deadline has begun to run. Furthermore, oral requests may introduce unintended confusion or misunderstanding into the process.

It is important that both the health plan and individual fully understand what the individual is requesting and to whom the request is to be made. As such, we request that the final rules provide that health plans be permitted to require that the request be in writing. This will allow health plans to clearly identify the date on which the 15-day deadline to submit the request begins to run and to better track the request, as well as to understand what PHI is involved, the party to whom the request is made and for what purpose. Other areas of HIPAA allow covered entities to require that requests be in writing, including the right to access generally and the rights to amendment, accounting, restriction and confidential communications. There is not a compelling reason to treat this new type of request differently. In addition, allowing plans to require that requests be in writing is consistent with other areas of law governing health plans, including, in general, the Employee Retirement Income Security Act (ERISA) claims procedures rules.

In addition, we ask that the final rules follow the general right to access provision, which allows 30 days to respond, with a 30-day extension (or 15 days plus a 15-day extension under the Proposed Rules – which we comment on above). Otherwise, health

plans will have to track multiple timeframes for the right to access requirement. At the very least, we request that the final rules include a 15-day extension, similar to the general right to access provision, in case a health plan needs to clarify the request with the individual, address issues of guardianship/power of attorney, or confirm with the discloser the logistics of a health plan's ability to receive such information (such as where to send, format, etc.).

## APPLICABILITY DATE

The Preamble to the Proposed Rules provides that the compliance date will be 180 days after the effective date of the final rules unless a different compliance period is provided. OCR asks for comment on whether this compliance period is sufficient.

We agree with the generally applicable 180-day timeframe for changes that would facilitate care coordination overall. However, for changes related to the right to access, particularly those that involve a new or revised deadline for a health plan to act, we would request that HHS provide health plans and business associates additional time to come into compliance.

- With respect to the right to access requirement, if the rules are finalized as proposed, the deadline to respond to requests would be cut in half, requiring health plans to coordinate with a number of business associates to create additional expedited procedures, including updates to their Business Associate Agreements.
- The Requester-Receiver provisions are completely new, so they would require health plans to build new systems, including those that capture the possible influx of new PHI requested by enrollees that would be sent to their health plans. Permitting oral directions would add a new level of complexity and the possibility for confusion and misunderstanding.
- Health plans will need to update communications, including plan documents and their HIPAA Privacy Notices and provide updated training to workforce members.

Health plans already are facing a number of other changes relating to the COVID-19 pandemic and COVID-19 related guidance and law changes, including implementing the American Rescue Plan Act, as well as the surprise billing and transparency rules under the Consolidated Appropriations Act and the CMS and ONC Interoperability and Patient Access Rules. Since many of these rules overlap in their goals - and sometimes in their specific requirements - it would be vital to be able to coordinate all these updates together and have time to build out procedures, systems and training

accordingly. In addition, the Proposed Rules would require compliance efforts across many systems, platforms and vendors.

As such, we request that OCR provide a compliance deadline of at least two years for changes related to right to access, particularly changes that involve a new deadline or procedure, to allow health plans to coordinate with systems they are building for other rules.

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We appreciate the opportunity to comment on these Proposed Rules. If you have any questions or would like to discuss, please do not hesitate to reach out. Thank you again.

Sincerely,

A handwritten signature in black ink that reads "Katy Johnson". The signature is written in a cursive, flowing style.

Katy Johnson  
Senior Counsel, Health Policy