



LEGAL ADVICE FOR HEALTH PLANS

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## ***HEALTH LAW ALERT***

***April 6, 2020***

### **Congress Aligns Part 2 Rule with HIPAA**

#### **Information about Substance Use Disorders may be Used, Disclosed for TPO Changes to Take Effect in 2021**

On March 27<sup>th</sup>, the Coronavirus Aid, Relief, and Economic Security Act, or “CARES Act,” became law (Public Law No: 116-136). The primary purpose of the statute is to address fallout from the COVID-19 National Emergency; it will pump an estimated \$2.2 trillion into the economy through programs such as the “Paycheck Protection Program.” Buried in the legislation, however, is a provision that makes significant changes to how HIPAA covered entities are permitted to use and disclose information related to individuals with Substance Use Disorders—information that is subject to the Confidentiality of Substance Use Disorder Patient Records Rule, commonly referred to as “Part 2.”

The CARES Act amends the statute on which the Part 2 Rule is based—section 543 of the Public Health Service Act (42 U.S.C. § 290dd-2). These amendments (the “CARES Act Part 2 Amendments”) provide that:

“[o]nce prior written consent of the patient has been obtained, [information subject to the Part 2 Rule] may be used or disclosed by a covered entity, business associate, or a [Part 2] program . . . for purposes of treatment, payment, and health care operations as permitted by the HIPAA regulations. Any information so disclosed may then be redisclosed in accordance with the HIPAA regulations.” CARES Act at § 3221.

Although the legislation does not have an effective date, it requires the Department of Health and Human Services to “make such revisions to regulations as may be necessary for implementing and enforcing the [CARES Act Part 2 Amendments] such that [the CARES Act Part 2 Amendments] shall apply with respect to uses and disclosures of information occurring on or after [March 27<sup>th</sup> 2021]”—next year.

The CARES Act is published online ([click here](#)); for a downloadable (pdf) version of the Act, [click here](#). You may also download a copy of the statute with the CARES Act Part 2

Amendments incorporated into it from my website ([click here](#) or see first item under “Other Resources” on the “Resources” page at [tbixbylaw.com](http://tbixbylaw.com)).

### **Alignment with HIPAA**

The Part 2 Rule generally prohibits health plans, health care providers, and others from using or disclosing “Patient Identifying Information,” unless the patient provides a consent naming the specific entity or person permitted to use or disclose the information. Because the Part 2 Rule is significantly more restrictive than HIPAA, it has created a variety of compliance difficulties. The CARES Act Part 2 Amendments will resolve many of those difficulties by allowing covered entities to use and disclose Patient Identifying Information “for purposes of treatment, payment, and health care operations as permitted by the HIPAA regulations.” The Amendments will therefore eliminate many of the distinctions between Patient Identifying Information and Protected Health Information that covered entities were required to make under the Part 2 Rule.

### **Penalties for Non-Compliance**

Among the changes made by the CARES Act Part 2 Amendments is a change to the penalties that may be assessed against a person or entity that improperly uses or discloses Patient Identifying Information. Failure to comply with the original confidentiality of substance use disorder patient records statute could be addressed only as a criminal violation—the statute did not allow for civil penalties (*e.g.*, Civil Money Penalties). As revised, regulators will be able to impose penalties that apply to violations of the HIPAA Rules (with respect to Protected Health Information) to improper uses or discloses Patient Identifying Information.

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