



LEGAL ADVICE FOR HEALTH PLANS

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## ***HEALTH LAW ALERT***

### ***May 13, 2018***

## **Guidance on Part 2 Rule Published**

### **SAMHSA Guidance Focuses on Providers, Health Information Exchanges**

On May 1<sup>st</sup>, the Substance Abuse and Mental Health Services Administration (SAMHSA) published two fact sheets and sixteen FAQs concerning compliance with the Confidentiality of Substance Use Disorder Patient Records Rule—the “Part 2 Rule” (42 C.F.R. Part 2). The guidance focuses on Part 2 Rule compliance for providers and Health Information Exchanges and fails to address health plans at all. Nevertheless, the guidance provides limited insights into SAMSHA’s view of how health plans are required to comply with the Part 2 Rule.

SAMHSA’s fact sheets and FAQs are posted on a separate page of the agency’s website ([click here](#)). The guidance addresses the requirement for a written statement to accompany disclosures of Patient Identifying Information that a Lawful Holder makes pursuant to a patient’s consent (the “Part 2 Disclaimer”). FAQ # 13 clarifies that a general statement that information being exchanged between parties may include Patient Identifying Information “would not be sufficient notification.” SAMHSA explains that providing the Part 2 Disclaimer when a person logs on to a Health Information Organization’s portal (or reaches the “splash page”—the introductory page for the website) is inadequate because the Disclaimer:

“would not accompany a *specific* disclosure. The notification ***must be tied to the Part 2 information*** being disclosed in order to ensure that the recipient of that information knows that ***specific information*** is protected by Part 2 and cannot be redisclosed except as authorized by the express written consent of the person to whom it pertains or as otherwise permitted by Part 2.” FAQ 13 (emphasis added).

Thus, for example, a Lawful Holder must do more than include the Part 2 Disclaimer in a contract involving the exchange of information. Rather, the Lawful Holder must include the Part 2 Disclaimer in a manner that identifies the “specific information [that must be] protected by Part 2.”

The SAMHSA guidance also discusses the circumstances under which information is subject to the Part 2 Rule. The Fact Sheets emphasize that information is subject to the Part 2 Rule only if it “would identify a person as having or having had a [Substance Use Disorder].” Hence, information that does not indicate a person has (or had) a Substance Use Disorder is not subject to the Rule.

In one illustration of this, the first Fact Sheet (“Does Part 2 Apply to Me?”) distinguishes between information disclosed by Part 2 Programs that are “mixed-use facilities” and Part 2 Programs that are not.<sup>1</sup> The guidance instructs that **any** patient-specific information disclosed by a Part 2 Program that is **not** a mixed-use facility qualifies as Patient Identifying Information and is therefore subject to the Part 2 Rule. This is because such information “would identify a patient as having or having had a [Substance Use Disorder]” by virtue of receiving treatment from a provider that exclusively furnishes treatment for Substance Use Disorders. In contrast, information disclosed by a mixed-use facility is **not** subject to the Part 2 Rule as long as the information “would not identify [an individual] as a patient with a [Substance Use Disorder],” such as information about diagnosis and treatment of the patient’s migraine headaches.

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<sup>1</sup> A “mixed-use facility” is a facility that provides diagnosis, treatment, or referral for treatment for other conditions, as well as for Substance Use Disorders. In contrast, a Part 2 Program that is **not** a mixed-use facility exclusively provides diagnosis, treatment, or referral for treatment for Substance Use Disorders.