



LEGAL ADVICE FOR HEALTH PLANS

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## ***HEALTH LAW ALERT***

***July 15, 2020***

### **SAMHSA Amends Part 2 Rule to Permit Case Management/Care Coordination Amendment *does not* Implement CARES Act Changes to Statute**

Today, the Substance Abuse and Mental Health Services Administration (SAMHSA), an agency of the Department of Health and Human Services (HHS), formally<sup>1</sup> published an amendment to the Confidentiality of Substance Use Disorder Patient Records Rule (Part 2 Rule). Although the CARES Act, passed by Congress earlier this year, requires SAMHSA to better align the Part 2 Rule with the HIPAA Privacy Rule ([click here](#) for my Health Law Alert on these CARES Act changes), today's amendment ***does not*** make those required changes—SAMHSA will publish an amendment to address the CARES Act later.

Today's amendment to the Part 2 Rule is designed to support case management and care coordination. In a reversal from previous iterations of the Part 2 Rule, SAMHSA now recognizes that case management and care coordination are health care operations that health plans ("third-party payers" in the Part 2 Rule) may conduct, rather than activities that only health care providers may be involved in. In addition to this broader definition of health care operations for purposes of the Part 2 Rule, today's amendment allows a patient's consent to name specific entities (in addition to health care providers and health plans), rather than requiring the consent to name specific individuals who may receive a patient's information.

Today's amendment is effective on August 14, 2020. It is published at 85 *Federal Register* 42986 ([click here](#)). [Click here](#) for my compilation of the Part 2 Rule (see second line under "Compiled Rules") (or see the "Resources" page at [tbixbylaw.com](http://tbixbylaw.com)).

#### **The CARES Act Amendments**

As SAMHSA explains in the preamble of today's amendment, "[t]he CARES Act requires HHS to update its regulations to implement" provisions in the CARES Act intended to better align the Part 2 Rule with the HIPAA Privacy Rule. Today's amendment ***is not that update***. Rather, the Department of Health and Human Services "intends to publish a [Notice

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<sup>1</sup> The Department informally published the amendment to the Part 2 Rule and released them to the public on July 13, when they were filed with the Office of the Federal Register.

of Proposed Rulemaking] and subsequently to issue a new final implementing rulemaking for the CARES Act in the future.” Accordingly, provisions of “this final rule will serve as interim and transitional standards, until regulations conforming to the CARES Act legislation can be promulgated.”

### **Revision to Consent Requirements**

Under the current rule, a consent may name an entity (*i.e.*, a company or organization) as the permitted recipient of Patient Identifying Information **only if** the recipient is (i) a health care provider; (ii) a Third Party Payer; or (iii) a research institution, health information exchange, or “other entity that facilitates the exchange of health information.” 42 C.F.R. § 2.31(a)(4). Otherwise, a consent must name a **specific individual** who may receive Patient Identifying Information. Thus, for example, as currently written, “if a patient wants a part 2 program to disclose impairment information to the Social Security Administration for a determination of benefits,” the consent must name **a particular employee** at the Social Security Administration to whom the information could be provided.

SAMHSA acknowledged that this limited patients’ ability to disclose their information as they deemed to be appropriate as well as required patients to provide additional consents to permit case management or care coordination. SAMHSA therefore revised the consent requirement to permit patients to name **any entity** in a consent. SAMHSA concluded:

“It is not [our] intent to limit patients’ ability to consent to the disclosure of their own information or create barriers to care coordination. We wish, rather, to empower patients to consent to the release and use of their health information in whatever way they choose, consistent with statutory and regulatory protections designed to ensure the integrity of the consent process.”

### **Case Management and Care Coordination**

In the past, SAMHSA has insisted that “case management” and “care coordination” are not “health care operations” for purposes of the Part 2 Rule. The agency argued that such activities were “treatment” and that patients had a right to determine which individuals would provide treatment to them. This made engaging in such activities extremely difficult for health plans. Based on comments received expressing concerns about this narrow view of case management and care coordination, as well as the fact that the CARES Act will require such changes in any event, today’s amendment discards this analysis. Thus, “SAMHSA is modifying . . . the [Part 2] rule . . . to add care coordination and case management as an example of an activity for which [any] lawful holder may [engage and] make a further disclosure to its contractors, subcontractors and/or legal representatives, in support of health care payment or operations.”

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