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## **THE IMPORTANCE OF PRESERVING 42 C.F.R. PART 2 TO PROTECT THE CONFIDENTIALITY OF SUBSTANCE USE DISORDER RECORDS**

### **What is 42 C.F.R. Part 2 and what does it do?**

The federal confidentiality law (42 U.S.C. § 290dd-2) and regulations (42 C.F.R. Part 2) govern substance use disorder patient records. Congress passed the law and then Department of Health Education and Welfare promulgated the Part 2 regulations in the 1970s to control the disclosure and use of patient records generated by treatment at a federally assisted drug and/or alcohol (substance use disorder) treatment program.<sup>i</sup>

Part 2 regulates any treatment “program” that “holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment. . . .”<sup>ii</sup>

### **Why is Part 2 important to people living with substance use disorders (“SUD”)?**

People living with SUD continue to experience stigma, discrimination, and negative consequences associated with their illness – such as possible arrest and prosecution, loss of housing and child custody, loss of employment, loss of insurance and public benefits – when their confidential information is disclosed without their knowledge or consent.<sup>iii</sup> As a result, public health experts agree that people living with SUD are more likely to seek out and stay in treatment if they know their treatment records will not be unnecessarily disclosed to others without their knowledge or permission.<sup>iv</sup>

### **How does Part 2 work?**

Patients can directly obtain a copy of their records and re-disclose them at will. But, Part 2 prohibits treatment programs (and certain other third party record recipients) from disclosing patient identities or records to others, particularly in response to law enforcement related inquiries, subpoenas, search warrants, or generic court orders, without the patient’s written consent or other authorization (e.g., medical emergency, special court order, audits and evaluation, child abuse/neglect reporting, reporting patient crimes on the treatment program’s premises/against treatment personnel, research, Qualified Service Organization Agreements).<sup>v</sup>

### **Why not use HIPAA as a standard to protect SUD information?**

Unlike Part 2, HIPAA would allow virtually unlimited disclosure, without patients’ knowledge or consent to:

- law enforcement authorities to seize patient records that could lead to arrest and prosecution;<sup>vi</sup>
- judicial or administrative bodies to obtain patient information for civil legal proceedings that could lead to loss of child custody;<sup>vii</sup>
- insurers for “treatment, payment, or health care operations” purposes, which could lead to patients losing jobs and access to many types of insurance;<sup>viii</sup> and
- re-disclosures of SUD information that could lead to unnecessary stigma and negative consequences of loss of employment or housing.<sup>ix</sup>

### **How does the updated Part 2 regulation help to integrate SUD information with the rest of the patient’s health information?**

The Substance Abuse and Mental Health Services Administration (“SAMHSA”) revised and updated Part 2’s regulations in 2017, with input from a variety of stakeholders, to make it easier to share Part 2 information with providers and other entities who may need access to it.<sup>x</sup> Patients can now disclose their SUD information to their “treating providers” in entities that are involved in integrated care settings (e.g., health information exchanges, networks of care and accountable care organizations), instead of satisfying the previous consent requirement of providing the names of recipient health providers of SUD information in these health care settings. Similarly, consent forms can authorize disclosure of information to whole entities with treating provider relationships with patients (e.g., community health centers and medical centers).<sup>xi</sup>

The new regulations also allow patients to consent to disclose their information using a general designation and a time-frame for the disclosure, such as to “all of my past, present, and future treating providers at the County Health Information Exchange.”<sup>xii</sup>

These and other developments should help to integrate SUD information with overall health information to assist providers in delivering comprehensive care to their patients, while maintaining substance use disorder patients’ right to confidentiality.

### **What’s the bottom line?**

People living with substance use disorder continue to experience stigma, discrimination, and serious negative consequences when treatment information is disclosed without their knowledge or consent. Part 2 regulations play an integral and unique role in safeguarding the confidentiality of SUD information against this, by allowing patients to consent to disclosures or permitting authorized disclosures. The regulations also allow patients to consent to disclosures of their SUD information to their treating providers in integrated care settings with greater ease. ***In light of the current national opioid crisis, now more than ever – people living with substance use disorder depend on Part 2’s protections to stay and complete their treatment without fear of negative consequences.***

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<sup>i</sup> See amended federal code sections 21 U.S.C. §1175 (drug abuse, 1972 & 1974); 42 U.S.C. §4582 (alcohol abuse, 1974) and the federal confidentiality rules passed to implement the changes at 42 C.F.R. Part 2 (published at 40 Fed. Reg. 27802, (July 1, 1975); effective on Aug. 1, 1975). The Department of Health Education and Welfare is now known as the U.S. Department of Health and Human Services.

<sup>ii</sup> 42 C.F.R. §2.11.

<sup>iii</sup> See generally Legal Action Center, *Discrimination Against Patients With Substance Use Disorders Remains Prevalent and Harmful: The Case for 42 CFR Part 2* (Apr. 13, 2017), available at <http://healthaffairs.org/blog/2017/04/13/discrimination-against-patients-with-substance-use-disorders-remains-prevalent-and-harmful-the-case-for-42-cfr-part-2/>.

<sup>iv</sup> See U.S. Dep't of Health & Human Services, Substance Abuse & Mental Health Services Admin., *Confidentiality of Patient Records for Alcohol and Other Drug Treatment - Technical Assistance Publication (TAP) Series 13* (1994), available at <http://adaiclearinghouse.org/downloads/tap-13-confidentiality-of-patient-records-for-alcohol-and-other-drug-treatment-103.pdf>

<sup>v</sup> See 42 C.F.R. §§§§2.12, 2.13(a), 2.13(b), 2.20.

<sup>vi</sup> *But see* 42 C.F.R. §§ 2.61-2.67 (describes Part 2's requirements of disclosures of SUD information for the purposes of criminal investigations).

<sup>vii</sup> *But see* 42 C.F.R. §§2.61-2.67 (describes Part 2's requirements when subpoenas or general court orders request disclosures of SUD information).

<sup>viii</sup> U.S. Dep't of Health & Human Services, Office for Civil Rts., *Uses and Disclosures for Treatment, Payment, and Health Care Operations* (Apr. 2003), available at <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/coveredentities/sharingfo-rtpo.pdf>.

<sup>ix</sup> *But see* 42 C.F.R. §§2.32, 2.33. Part 2 prohibits re-disclosures of patient identifying SUD information, unless the patient provides written consent, a court order exists, or if an exception to the Part 2 regulations applies.

<sup>x</sup> Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 6052, 6055 (Jan. 18, 2017).

<sup>xi</sup> 42 C.F.R. §2.11. A "treating provider relationship" means that, regardless of whether there has been an actual in-person encounter:

- A patient is, agrees, to, or is legally required to be diagnosed, evaluated, and/or treated, or agrees to accept consultation, for any condition by an individual, or entity, and;
- The individual or entity undertakes or agrees to undertake diagnosis, evaluation, and/or treatment of the patient, or consultation with the patient, for any condition.

<sup>xii</sup> 42 C.F.R. §2.31; 82 Fed. Reg. at 6082.