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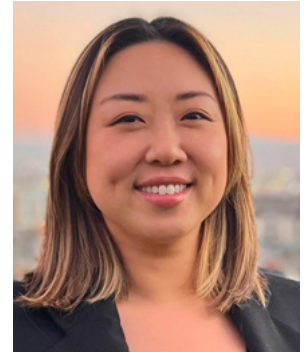
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Revisiting the HIPAA Proposed Rule: What Group Health Plan Sponsors Need to Know

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In late 2020, the Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) proposed significant changes to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, aimed primarily at improving care coordination and data sharing. As the final rule on these changes is expected to be published this year, it's a good time for HIPAA-covered group health plans to revisit the proposed changes and consider their potential impact. While the Proposed Rule generally applies to all HIPAA-covered entities, this article focuses on the proposed changes applicable to covered group health plans. We note that the final rule may deviate from the Proposed Rule described in this article.

Background

The OCR first issued an initial request for information in December 2018 seeking feedback on how certain HIPAA rules and procedures could be streamlined to improve cooperation and data sharing among members of an individual's health care delivery team, including family members, caregivers, and community-based organizations. The OCR subsequently released the

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Notice of Proposed Rulemaking proposing modifications to the HIPAA Privacy Rule on December 10, 2020, and published the Proposed Rule in the Federal Register on January 21, 2021.¹ After receiving a number of comments from stakeholders on the proposed changes, the OCR extended the comment period from its original end date of March 22, 2021, to May 6, 2021. While the final rule is expected to be issued later this year, there have been no further updates from the OCR to date.

Does the Proposed Rule apply to group health plans?

The proposed modifications to the HIPAA Privacy Rule apply to HIPAA-covered entities, which include (but are not limited to) ERISA fully insured and self-funded group health plans.² The proposed changes also apply to “business associates” of covered entities, which generally include any person or entity that performs functions or activities involving the use or disclosure of protected health information (PHI) on behalf of the covered entity. For group health plans, common business associates include third-party administrators, claims administrators or other service providers that respond to PHI requests or otherwise use or disclose PHI on behalf of the plan.

How do the proposed changes impact group health plans?

The Proposed Rule includes several significant changes to the HIPAA Privacy Rule aimed at improving data sharing, expanding individual access to PHI, and removing barriers to care coordination and case management. The major proposed changes which may impact group health plans and their business associates are highlighted below.

1. Notice of Privacy Practices (NPP)

- **Revises NPP content requirements.** The Proposed Rule modifies the content requirements of the NPP to help increase the group health plan participants’ understanding of the covered entity’s privacy practices, and their rights with respect to their PHI. The proposed modifications require group health plans to modify the header of the NPP that is distributed to plan participants. The header of the NPP is required to state: 1) how a participant may access their health information; 2) how a participant may file a HIPAA complaint; and 3) that the individual has a right to receive a copy of the notice and to discuss its contents with a designated

person. The header of the NPP must also specify whether the covered entity’s designated contact person for questions regarding the NPP is available onsite and include their phone number and email address. Providing this information at the beginning of the NPP is meant to improve the plan participants’ awareness of their Privacy Rule rights, explain what they can do if they suspect a HIPAA violation, and describe how the participant may contact a designated person to ask questions. The OCR has released model NPPs in the past and, based on the OCR’s request for comments relating to how the model notice can be improved, it is anticipated the OCR will provide an updated model NPP if the proposed changes become final.

Currently, group health plans which are HIPAA covered entities must provide the NPP to new participants with enrollment materials, and upon request. If the proposed changes are approved, plans will need to promptly update their NPP and ensure a copy of the updated notice is distributed as required.

2. Care Coordination and Case Management

- **Clarifies definition of “Health Care Operations” to include individual care coordination and case management.** Under HIPAA, “health care operations” are certain administrative, financial, legal, and quality improvement activities of a covered entity that are necessary to run its business and to support the core functions of treatment and payment.³ The Privacy Rule allows for certain uses and disclosures of PHI without individual authorization for health care operations, including for the purpose of care coordination and case management. Guidance published in the preamble of the 2000 Privacy Rule⁴ clarified that the existing definition of health care operations contemplates that health plans would, as part of such operations, conduct care coordination and case management activities on both a population-level and individual-level. However, despite this guidance, many have interpreted the current definition of health care operations to be limited to population-based care coordination and case management only. Such an interpretation excludes individual-focused care coordination and case management by health plans, limiting a health

plan's ability to perform such individual-level care coordination or case management activities. The Proposed Rule addresses this issue by revising the definition of health care operations to clarify that both population-level and individual-level care coordination and case management are covered.

- **Adds exception to minimum necessary requirement for health plan coordination and case management disclosures.** The Privacy Rule generally requires that covered entities use, disclose, or request only the minimum PHI necessary to meet the purpose of the use, disclosure, or request. While there is a current exception from the minimum necessary standard for PHI disclosures and requests relating to care coordination and case management, it does not apply to group health plans. Because group health plans generally do not perform treatment functions, any care coordination or case management activity conducted by a health plan is considered a health care operation subject to the minimum necessary standard. As a result, a health plan is required to determine what information constitutes the minimum information necessary each time it discloses or requests PHI for an individual's care coordination or case management, which takes time and administrative resources. Additionally, plans may be disincentivized from requesting or disclosing PHI if there is any uncertainty as to whether the information meets the minimum information necessary standard for fear of triggering an impermissible use or disclosure of PHI under the Privacy Act and incurring associated penalties. The Proposed Rule changes this by adding an express exception from the minimum necessary standard for disclosures to, or requests by, a health plan for care coordination and case management at the individual level.

If finalized, this change would promote more efficient and effective individual care coordination and case management by saving health plans the time and resources currently required to comply with the minimum information necessary requirements for such PHI disclosures and requests. Additionally, by expressly excepting such PHI disclosures and requests, the change eliminates any potential fears plans may have regarding

triggering an impermissible use or disclosure of PHI and incurring a penalty when requesting or disclosing PHI for an individual's care coordination or case management.

- **Expressly permits disclosures to facilitate care with social and community services.** The Proposed Rule expressly permits covered entities, including group health plans, to disclose PHI to social services agencies, community-based organizations, home and community-based service (HCBS, which are services supported by, among other payors, state Medicaid programs) providers, or similar third parties that provide or coordinate health-related services which are needed for care coordination and case management at the individual level.

3. Individuals' Right to Access PHI

- **Access to PHI.** The Proposed Rule allows individuals greater access to their PHI, including allowing individuals to take notes, videos and photographs and to use other personal resources to view and record PHI in person, barring unacceptable security risks. Additionally, under the proposed changes, covered entities would be prohibited from imposing unreasonable measures on an individual's right to access PHI (for example, requesting extensive or unnecessary information, requiring notarization, or accepting written requests in paper form only). If approved, group health plans should consider reviewing their policies relating to individual PHI requests to ensure they do not contain procedures that could be construed as unreasonable measures.
- **Form of PHI.** The Privacy Rule requires that covered entities provide individuals access to PHI in the form or format requested by the individual, if "readily producible." The Proposed Rule clarifies that "readily producible" copies of PHI include copies of electronic PHI (ePHI) requested through secure, standards-based application programming interfaces (APIs) using applications chosen by individuals, and any form or format required by applicable state or other laws. If approved, group health plans should confirm that they, or their business associates, have the ability to produce ePHI through standards-based APIs.

- **Time period to provide PHI.** Covered entities are currently required to provide individuals with access to their PHI upon request within 30 days, with one 30-day extension. The Proposed Rule shortens this period to 15 days, with one 15-day extension. The proposal to shorten the time for covered entities to provide individuals with access to their PHI would improve care coordination by allowing plan participants to share their records more rapidly with health care providers, informal caregivers, community-based support services, and family members — which could lead to improved health care communications and health outcomes. If approved, group health plans should ensure their written policies and operational procedures relating to PHI requests, and applicable contract language with business associates, are appropriately updated.
- **Right to direct PHI to third parties.** Currently, the Privacy Rule requires covered entities to transmit PHI to a third party (i.e., a family member, health-care provider, researcher, or any other person) designated by the individual when directed by the individual. The individual's direction must be in writing, signed, and clearly identify the designated person and where to send the PHI. Among the Proposed Rule's changes relating to individual access rights, covered entities would be required to facilitate an individual's request to direct ePHI in an electronic health record (EHR) to a third party upon the individual's written request or clear, conspicuous and specific oral request, within 15 calendar days. While group health plans generally do not maintain EHRs, this proposed change would still require health plans to facilitate such a request if the individual requests that the health plan, as "Requester-Recipient," obtain ePHI in an EHR from one or more covered health care providers, the "Disclosers," on the individual's behalf. In such a case, the health plan would be required to submit the individual's request to the Discloser. If approved, group health plans will need to review and update their policies and procedures for responding to PHI requests, determining when to respond to oral requests and how to record such requests. If such requests are handled by business associates, plans should ensure business associate agreements are appropriately updated to address these changes.
- **Clarifies fees and adds fee disclosure requirements.** The Proposed Rule clarifies when PHI must be provided to individuals at no charge and when a covered entity is permitted to charge fees, with certain limitations, when responding to PHI access requests. The proposed changes also require covered entities to post a notice of access and authorization including a fee schedule on their website (if they maintain a website), as well as make the notice available at "point of service" and upon request. The notice must include all types of access available free of charge and a fee schedule for copies of PHI provided to individuals, copies of PHI in an EHR directed to third parties designated by the individual, and copies of PHI sent to third parties with the individual's valid authorization. For health plans, the "point of service" could include a customer service call center that handles requests for records, or any location at which PHI is made available for individuals to inspect. The Proposed Rule also requires that, upon an individual's request, covered entities provide an individualized estimate with the approximate fees to be charged for requested copies of PHI and, if also requested, an itemization of charges constituting the total fee.

What does this mean for group health plans?

Once the proposed changes are finalized, HIPAA-covered group health plans should, at minimum, review their HIPAA policies and procedures, Notice of Privacy Practices, and contract language in business associate agreements and other potentially impacted contracts, to determine what, if any, changes are needed. Health plans' HIPAA training programs will also need to be updated to reflect any changes.

¹ 86 Fed. Reg. 6446 (proposed January 21, 2021) (to be codified at 45 C.F.R. pts. 160 and 164).

² 45 C.F.R. § 160.103. The definition of "group health plan" under HIPAA excludes self-administered group health plans with fewer than 50 participants.

³ 45 C.F.R. 164.501.

⁴ 65 Fed. Reg. 82462, 82627 (December 28, 2000).

DOL Releases RFI on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk

YATINDRA PANDYA

MAY 2022



On February 14, 2022, the Department of Labor (DOL) Employee Benefits Security Administration (EBSA), which is responsible for administering, regulating and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), published a *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk* (the RFI). The RFI sought public comments on EBSA's future work to protect the retirement savings and pensions of U.S. workers and families from potential risks that may result from climate change and that could potentially impact the safety and soundness of financial institutions and investments. The RFI sought input on actions EBSA can take under ERISA, the Federal Employees' Retirement System Act of 1986 (FERSA), and any other relevant laws. This article discusses the RFI as it relates to ERISA plans, including implications for resulting future EBSA actions.

Background on the Biden Administration's Attention to Climate-Related Risk

The RFI follows a series of climate-related executive orders issued by the Biden Administration. On his first day in office (January 20, 2021), President Biden issued *Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, which sets forth the administration's policy to listen to science, improve public health, protect our environment, and bolster resilience to the impacts of climate change.

Subsequently, on May 20, 2021, President Biden issued *Executive Order 14030 on Climate-Related Financial Risk* ("Executive Order 14030"), in which he articulated this policy, as follows:

It is therefore the policy of my Administration to advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk...

Executive Order 14030 outlined the administration's approach to developing a government-wide strategy to

advance public disclosure of climate-related financial risk in order to mitigate the systemic risks posed by climate change to families, businesses and the economy. Executive Order 14030 directs the Secretary of Labor to identify actions that may be taken under ERISA, FERSA, and other relevant laws, to protect the life savings of U.S. workers and families from the threats of climate-related financial risk. The DOL issued the RFI pursuant to this directive.¹

Roadmap to Build a Climate-Resilient Economy

In order to advance the general objectives of Executive Order 14030, on October 15, 2021, the Biden administration released a report entitled *A Roadmap to Build a Climate Resilient Economy* (the "Roadmap"). The Roadmap provides "a comprehensive, government-wide strategy to measure, disclose, manage, and mitigate the systemic risks climate change poses to American families, businesses, and the economy," including a strategy to protect life savings and pensions from climate-related financial risk and to "set a floor for regulatory, voluntary, and government public management action to address climate-related financial risk."

The Roadmap explains that 54% of American workers participate in employer-provided retirement, representing \$12.5 trillion in assets potentially at risk, and that the DOL, through regulation under ERISA, is responsible for leading the effort to enhance the resilience of life savings and pensions in the face of climate-related risks and opportunities.

The Roadmap characterizes “climate-related financial risk” as encompassing two broad categories: physical risks (i.e., risks to infrastructure and production resulting from climatological events), and transition risks and opportunities (i.e., opportunities for financial growth stemming from efforts to combat underlying causes of climatological events). The Roadmap explains that physical risks to assets, publicly traded securities, private investments and companies are increasing in frequency and severity, and notes that physical and economic damage from climate-related extreme weather has cost \$600 billion over the last five years. The Roadmap also describes that the global shift away from carbon-intensive economies presents transition risk and opportunity. The Roadmap notes that “[t]he failure to appropriately and adequately account for, disclose and measure these physical and transition risks threatens the competitiveness of U.S. companies and markets, **the life savings and pensions of U.S. workers and families**, and the ability of U.S. financial institutions to serve communities.” (Emphasis added.)

Request for Public Comment

Following the goals established by Executive Order 14030 and the Roadmap, the RFI consists of 22 distinct requests for public comment, the following eight of which relate to ERISA governed plans:

General

1. **Agency actions.** The DOL requested comment on any agency actions that may be taken under ERISA to protect the life savings and pensions of U.S. workers and families from threats of climate-related financial risk.
2. **Climate-related financial risk.** The DOL requested comment on the most significant climate-related financial risks to retirement savings under the broad categories of physical risks and transition risks.

Data Collection Regarding ERISA-Covered Plans

3. **Data collection on climate-related financial risk.** The DOL asked whether EBSA should collect data on climate-related financial risks, and if so, the type, source, and the method that EBSA should use to collect such data.
4. **Form 5500 Annual Return/Report.** The DOL asked if Form 5500 (the annual return for employee benefit plans) should be used to collect data on climate-related financial risks to pension plans, and if so, the manner in which Form 5500 should be used, the type of information collected, and how such information would help protect pensions.
5. **Information request/survey and other data collection methods.** The DOL also asked for ways to collect data by means other than using Form 5500, and for comment on whether and how such data should be categorized; for example, surveys directed to plan fiduciaries to gauge their awareness of climate-related risks to their participants’ pensions.
6. **Alternatives to Form 5500 for timelier reporting.** The DOL asked for comment on a potential new reporting regime, specific to climate-related financial risks, that is timelier and more easily accessible to the public than Form 5500, and which could possibly shed light on the steps taken by plans and the results of such steps.

ERISA Fiduciary Issues

7. **Plan fiduciaries’ use of market metrics/tools for evaluating ESG (environmental, social, and governance) performance.** The DOL requested comment on the best sources of information plan fiduciaries may use in evaluating risks to plan investments, as well as the challenges of obtaining such information and comparing to other metrics.
8. **Guaranteed life products.** The DOL requested comment on whether lifetime annuities could be helpful in transferring climate-related financial risks from participants to insurers/guarantors, whether there are climate-related annuity products available, and whether and how EBSA could facilitate the provision of such products.

Other Requests for Public Comment

1. **EBSA sponsor and publish research.** The DOL asked if EBSA should sponsor and publish research that helps plan fiduciaries evaluate climate-related financial risks, and which research subjects it should focus on.
2. **EBSA efforts to educate participant-directed investors and to coordinate with the Securities and Exchange Commission to avoid “green washing.”**³ The DOL requested comment on whether there is a need to educate plan participants who make their own investment choices, and whether it should work with the Securities and Exchange Commission to protect participants from misleading statements by funds regarding exposure to climate-related financial risks.

Implications of the RFI

The RFI makes it clear that the DOL wants to better understand key climate-related risks to retirees’ savings, as well as how it may use its interpretive authority under ERISA, including with respect to the fiduciary duties of prudence and loyalty, to address such risks. It is also apparent that the DOL anticipates using both monitoring and enforcement mechanisms to effectuate the policies it may develop. We can expect the DOL to release regulatory or sub-regulatory guidance addressing climate-related

risks, with possible related reporting and disclosure requirements and future enforcement practices.

By framing the discussion in terms of physical and transition risks, and especially by including the concept of *transition opportunities*, the regulatory and enforcement changes that may occur as a result of the RFI could potentially direct some portion of the \$12.5 trillion in retirement assets toward long-term investments in companies and new opportunities that would have the effect of reducing climate-related risk. In addition to safeguarding retirees’ savings, such investment flows could potentially serve to mitigate or otherwise address the negative effects of climate change.

Plan fiduciaries should expect future action from the DOL regarding A) changes to plans’ reporting obligations related to risks posed by climate change, and B) a stronger fiduciary framework for enforcing policies and practices that take into account climate-related risks and opportunities.

Public Comment Period Closed

The EBSA has collected a final round of public comments as of May 16, 2022, the final day of the public comment period. We anticipate discussing any proposed action from the DOL, including any response to the last round of public comments, in a future article.

¹ In a related effort, President Biden also ordered the Secretary of Labor to review the investment duties regulation published by the prior administration as it relates to environmental, social and governmental investments, resulting in a proposed regulation issued by the Secretary on October 14, 2021. The proposed regulation emphasizes that fiduciaries may consider climate change and other environmental, social and governance (ESG) factors when they make investment decisions and exercise shareholder rights. Our overview of that proposed regulation can be accessed [here](#).

² The RFI includes the following examples of information Form 5500 could be used to collect: how plan investment policy statements specifically address climate-related financial risk; whether service providers disclose or meet metrics related to financial risks; whether, and how, plans have factored

climate-related financial risk into their analysis of individual investments or investment courses of action, and; whether, and how, plan fiduciaries voted on proxy proposals involving climate-related financial risk.

³ The RFI describes “green washing” as potentially misleading statements about fund adherence to policies that address climate-related financial risk. The RFI also references an SEC Risk Alert, in which the SEC stated that during examinations of investment advisers, registered investment companies, and private funds engaged in ESG investing, the staff observed some instances of potentially misleading statements regarding ESG investing processes and representations regarding the adherence to global ESG frameworks. (See SEC Division of Examination Risk Alert: <https://www.sec.gov/files/esg-risk-alert.pdf>.)

FIRM NEWS

On April 27, **Robert Gower** was a presenter at the 2022 Bay Area Virtual Fiduciary Summit. Robert's presentation focused on fiduciary best practices and strategies for healthcare and retirement plans.

On June 14, Robert will moderate a panel at the Institutional Investor Retirement Plan Advisors Summit, *Fiduciary Breach Lawsuits and How to Mitigate Risk: Hughes vs. Northwestern U Case*. The panel will review potential impacts on retirement plan advisors and whether DOL changes in audit procedures will affect your practice.

On April 27, **Sarah Kanter** was a panelist for the Cancer Legal Advocacy Workshop at the ABA's *Emerging Issues in Healthcare Law* conference in Miami. Sarah discussed key laws and practices to equip attendees to provide initial legal assistance to people with life-threatening illnesses.

On May 24, **Brad Huss, Angel Garrett, Dylan Rudolph** and **Catherine Reagan** presented a Trucker Huss Webinar:

Developments in 401(k) Fee Cases, DOL Cybersecurity Investigations, and Cryptocurrency. The panelists discussed recent decisions in 401(k) and 403(b) fee cases filed against Northwestern University, Salesforce, and Trader Joe's, involving pleading standards for plaintiffs; recent developments and trends in U.S. Department of Labor investigations following last year's cybersecurity guidance; as well as the ramifications of the recent compliance assistance that the DOL issued for 401(k) fiduciaries considering plan investments in cryptocurrencies.

On May 26, 9:00–10:00 AM PDT, **Mary Powell** and **Sarah Kanter** will present a Trucker Huss Webinar: *Abortion Services and Possible Design Changes for Self-Funded Health Plans*. In response to the recent leak of a Supreme Court draft opinion, this webinar will discuss potential issues plan sponsors may want to consider should abortion services become illegal in many states.

To register: truckerhuss.com/events

Trucker Huss DEI Director Katuri Kaye

Trucker Huss, APC, recently implemented significant initiatives to bolster its Diversity, Equity, and Inclusion (DEI) efforts, including the appointment of Director **Katuri Kaye** as its first DEI Director and the establishment of a DEI billable hours credit program for all attorneys and paralegals.

As DEI Director, Katuri will lead the firm's efforts on overall DEI strategy and implementation, while also maintaining her practice in the firm's qualified retirement plan group. With a wealth of professional and volunteer experience with nonprofit organizations and other groups committed to DEI, and having recently completed advanced training in DEI at Cornell University, Katuri stated that she looks

forward to "identifying, developing, and supporting initiatives at Trucker Huss that will build on our organization's culture and strengthen our overall sense of belonging."

Both the appointment of a DEI Director and the implementation of a DEI billable hours credit program are unusual steps for a firm the size of Trucker Huss, which currently has 29 lawyers. As firm President and Director Robert Schwartz notes, "Our firm is remarkably diverse, at all levels, and it has been that way for many years. We want to be a DEI leader among smaller firms, so we are reinforcing our efforts in this area to make Trucker Huss the best workplace — and the best firm — that we can possibly be."

The Trucker ♦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ♦ Huss web site (www.truckerhuss.com).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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