

# HIPAA Accounting of Disclosures Proposed Rule

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## OCR Publishes Proposed Rule “Expanding” HIPAA Accounting of Disclosures Obligation and adding a new “Access Report” Right

On May 31, 2011, OCR published a highly anticipated proposed rule (the “Proposed Rule”) regarding the expanded HIPAA accounting of disclosure right for individuals. Despite the fact that virtually no individuals have elected to request an accounting of disclosures of their PHI under HIPAA, as part of HITECH, Congress expanded the accounting of disclosure right for individuals to include disclosures made through an electronic health record (“EHR”) for treatment, payment and health care operation (“TPO”) purposes. As a practical matter, this meant that covered entities would need to track these TPO disclosures in order to fulfill an accounting request. The Proposed Rule would implement that HITECH provision. But in a stunning development, instead of merely providing individuals with an accounting of disclosures for TPO activities, the Proposed Rule adds a new HIPAA right for individuals—namely, a right to request an “access report” from covered entities indicating who has accessed the individual’s PHI in an electronic designated record set.

### Background

Under HIPAA and the Privacy Rule, individuals have various rights, including a right to receive an accounting of disclosures of their PHI. The accounting of disclosures right is not unfettered. Currently, the right to an accounting only applies to disclosures made in the prior 6 years. The first accounting in any 12-month period is free, but covered entities may charge a reasonable, cost-based fee for other accountings. Covered entities may also account for disclosures made as part of a large research project and for repetitive disclosures in a more general manner. Most importantly, prior to HITECH implementation, the right to receive an accounting of disclosures does not apply to disclosures made for TPO activities. As a result, even if an individual requested an accounting of disclosures of their PHI, the accounting was not comprehensive and may not have captured all of the information that the requestor was seeking (e.g., unauthorized access/use by a workforce member).

Perhaps the limitations of the accounting of disclosure right contributed to the fact that virtually no persons requested an accounting of disclosures of their PHI from covered entities. Whatever the justification, as part of HITECH, Congress eliminated the exception for TPO activities from the accounting of disclosures right, at least for disclosures made through an EHR. On the flip side, Congress shortened the accounting of disclosure tracking period from 6 to 3 years. Congress also required the Secretary of HHS to promulgate regulations to implement the changes to the accounting of disclosure right required by HITECH.

On May 3, 2010, HHS published a Request for Information (“RFI”) seeking information pertaining to the accounting of disclosure right and its expansion. HHS inquired about the potential benefits and burdens of expanding the ac-

counting of disclosure right to include TPO activities, individuals’ awareness of their accounting disclosure rights, and what information should be included in a disclosure accounting report. In response to the RFI, HHS received approximately 170 comments and responses.

Following its evaluation of those responses, OCR published the Proposed Rule. The Proposed Rule contains more than a few surprises. Despite the plain language of HITECH, the Proposed Rule does not expand the disclosure accounting right to include TPO activities; rather, OCR creates a new “access report” right that would govern all “accesses” of an individual’s PHI (whether for use or disclosure) if that PHI is maintained in an electronic designated record set. The Proposed Rule also moves away from the current rule’s approach to tracking disclosures (i.e., all disclosures except those set forth in the rule) to a defined list of accountable disclosures (e.g., unauthorized disclosures for which the individual has not otherwise been notified about under the Breach Notification Rule). The purpose of the proposed modifications to the disclosure accounting right appears to be to make the disclosure accounting right more useful for consumers and align that right to what individuals would want to see in a meaningful disclosure accounting report. To supplement that disclosure accounting report, an individual can request a new “access report.”

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### “Expansion” of the Accounting of Disclosure Right

HITECH suggested that OCR would be expanding the HIPAA disclosure accounting right. The Proposed Rule suggests otherwise. Rather than expand the disclosure accounting right to include disclosures made for TPO activities, the Proposed Rule modifies the disclosure accounting right as follows:

- The disclosure accounting right would only apply to PHI maintained in a designated record set. Under the current rule, the disclosure accounting right applies to PHI, regardless of whether it is part of a designated record set. The designated record set typically encompasses a substantial portion of the PHI held by a covered entity, but an example of PHI that may fall outside the designated record set is a hospital’s peer review file or a health plan’s transcript of customer calls that are used only for purposes of customer service review, rather than to make decisions about the individual;
- The current rule sets forth disclosures that need not be tracked or accounted for (e.g., disclosures for TPO activities, disclosures to the individual). The Proposed Rule would change that approach and explic-

itly list the types of disclosures that must be tracked and accounted for (e.g., unauthorized disclosures not otherwise reported to the individual

under the Breach Notification Rule, disclosures for judicial proceedings);

- The Proposed Rule would eliminate the need to account for disclosures made as part of IRB-approved research projects;
- The Proposed Rule continues to exempt reports relating to child abuse; however, HHS, is also proposing to exclude from the accounting requirement disclosures related to reports of adult abuse, neglect, or domestic violence and is requesting comments on its proposal.
- The current rule requires a covered entity to track and account for disclosures made within the past six years. The Proposed Rule would shorten that period to 3 years;
- The Proposed Rule would expand upon the information that must be provided in a disclosure accounting report (e.g., if exact date of disclosure is unknown, month and year must be provided, at a minimum);
- Responses to requests for an accounting of disclosures must be provided within 30 days. Under the current rule, responses are due within 60 days. An opportunity for an extension would still be available.

The proposed compliance date for the accounting disclosure modifications would be 240 days after the date of publication of the final rule.

### New “Access Report” Right

While the Proposed Rule may have “narrowed” the disclosure accounting right, it also proposes a new HIPAA right for individuals (and burden for covered entities and their business associates); namely, the right to receive a written access report that indicates who has accessed PHI about the individual in an electronic designated record set maintained by the covered entity or its business associate. While HITECH only addressed “disclosures” made through EHRs, HHS nonetheless is proposing to expand the right to include both disclosure and use of all PHI in an electronic designated record set. The access report would need to include:

- The date of access;
- The time of access;
- The name of the person accessing the information (if available), otherwise the name of the entity accessing the electronic designated record set;
- A description of the information accessed; and

- A description of the action taken (e.g., create, modify, access, delete).

Unlike disclosure accounting reports, covered entities need not specify a purpose for the access. Like the accounting disclosure right, responses to a request for an access report must be made within 30 days (with an opportunity for an extension). Access reports must address uses and disclosures by the covered entity’s business associates of electronic designated record set information maintained by the business associates. Reports must be provided in a machine-readable or other form or format requested by the individual. Also, an individual has the right to one access report every 12-months without charge. The covered entity may charge a reasonable, cost-based fee for additional reports.

The proposed compliance date for the access report requirements would be January 1, 2013 (for covered entities with electronic designated record set systems acquired after January 1, 2009) and January 1, 2014 (for covered entities with electronic designated record set systems acquired on or before January 1, 2009).

### Takeaways

- The proposed modifications to the disclosure accounting right are arguably less than anticipated after enactment of HITECH. Covered entities need not account for disclosures made for TPO activities and only if the PHI disclosed is maintained as part of a designated record set;
- The new right to receive an access report would apply to all PHI maintained as part of an electronic designated record set. OCR implausibly intimates that this additional right would not be a significant burden for covered entities with electronic designated record sets. Covered entities will need to ensure that their electronic systems are capable of and do, in fact, track the required access report information ;
- Covered entities will need to ensure that their business associate agreements obligate the business associate to provide the information necessary to support the access right, as it applies to access by the business associate as well as the covered entity. Further, if an individual requests an access report, the covered entity must provide a single, comprehensive report for the covered entity and any business associates that maintain electronic designated record sets on behalf of the covered entity;
- Covered entities will need to update their Notice of Privacy Practices to reflect the access right; and
- Because the access right extends to electronic designated record sets and not EHRs, this could have significant impact on health plans and covered health care providers that maintain electronic designated record sets, but not EHRs.

Comments to the Proposed Rule may be submitted on or before August 1, 2011.

**If you have any questions about HIPAA or the Proposed Rule, please contact:**

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