



VIA FIRST CLASS MAIL AND  
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October 31, 2018

Megan G. Holloway  
Assistant General Counsel  
Texas State Board of Pharmacy  
333 Guadalupe Street  
Suite 3-500  
Austin, TX 78701

**RE: CIOX Health, LLC's comments on proposed rule change to 22 TAC 291.28**

Dear Ms. Holloway,

Please accept this letter as CIOX Health, LLC's ("CIOX") comments on the above-referenced proposed rule change.

CIOX is a HIPAA business associate responsible for the proper disclosure of protected health information for many medical providers and pharmacies across all fifty states, including many in Texas. Therefore, the provisions of 22 TAC §291.28 are very important to CIOX and its clients.

#### **HIPAA Discussion (Personal Representative vs. Patient's Agent)**

Before discussing the proposed rule change CIOX would like to discuss some general concepts under HIPAA and the current pharmacy rule. First, HIPAA only regulates the time for a response and the appropriate fees for a request by a (1) patient or (2) a patient's personal representative. Under HIPAA, a person authorized (under State or other applicable law, e.g., tribal or military law) to act on behalf of the patient in making health care related decisions is the patient's "personal representative." 45 CFR 164.502(g). However, the language of the current rule seems broader than HIPAA in that it refers to a "patient's agent." Patient's attorneys in personal injury actions are arguably the patient's agent, however, there are several reported cases that establish a patient's attorney is not a personal representative under HIPAA. See *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078 (9th Cir. 2007) and *Bocage v. Acton Corp.*, Case No. 2:17-cv-01201-RDP (N.D. Ala. Feb. 14, 2018).

CIOX recommends replacing "patient's agent" with "personal representative" to be consistent with HIPAA. An alternative would be to define "patient's agent" as



someone who can make healthcare decisions for the patient. Regardless of the approach it would be very helpful to use clear language consistent with HIPAA.

### **HIPAA Discussion (Who is an Authorized Third-Party?)**

HIPAA requires a third-party submitting a request for medical records to present a patient signed authorization. See 45 CFR 164.508, generally. Typically, patient's attorneys in personal injury actions present a patient signed authorization to obtain records because HIPAA does not recognize a patient's attorney as the patient's personal representative. However, under the existing pharmacy rule a patient's attorney could be considered a "patient's agent" or an "authorized third party". Other typical third-party requestors may include, life insurance companies, liability insurance companies, defense attorneys, and copy services. Since HIPAA does not regulate the fees for third-parties who present an authorization, the states may determine the appropriate fees.

Regarding response times, under HIPAA a provider has an obligation to respond to a patient or personal representative request within 30 days of receipt, with the opportunity for one extension, which will be discussed later, but responding to a third-party authorized request is permissive and not required. The language of the pharmacy rule would make responding to all requests for medical records mandatory making the process more confusing and difficult for providers.

For further information on this topic please reference the OCR Guidance on Patient Access to medical records dated February 25, 2016 and located at: <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html>

### **Proposed Rule Comments**

CIOX respectfully requests that the Board of Pharmacy (the "Board") reconsider the proposed amendment, which reduces the time to respond to all records requests from thirty (30) days to fifteen (15) days after receipt of the request. While CIOX acknowledges the fifteen (15) days is consistent with other Texas laws (Texas Health and Safety Code §241.154 regulating hospitals and 22 TAC §165.2 regulating physicians) for complying with a records request, the proposed rule would require a response in half the time required by HIPAA. 45 C.F.R. 164.524(b)(2) *et seq.* HIPAA established the 30-day requirement stating, "The time limitation is intended to be an outside deadline, rather than an expectation." The record disclosure process is a complicated multi-step process that takes trained professionals to ensure patient privacy is protected while only patient approved documents are disclosed. In fact, many requests are fulfilled well inside the 30-day deadline. However, delays do occur and

responding by mail may take several days, thereby reducing the number of days to adequately respond. Having an arbitrary 15-day response time may cause some unnecessary complications and frustrations.

In addition, the Board proposes striking the following language:

*"If the pharmacy is unable to take such action within thirty days of receiving the request, the pharmacy may extend the time for such action by no more than thirty days, provided that: (A) the pharmacy provides the requestor with a written statement of the reasons for the delay and the date by which the pharmacy will respond to the request; and (B) the pharmacy shall have only one such extension of time." 22 TAC §291.28(c)(1)(A) and (B).*

The above language in the existing rule is more consistent with HIPAA than the proposed language. While CIOX rarely experiences the need to request an extension, pharmacies in Texas would surely appreciate knowing the opportunity exists in the event of hardship or unintentional delay.

Since HIPAA regulates the fees for patient and their personal representative, CIOX recommends the Board rule only apply to third party requestors, such as attorneys, liability insurers and copy services, to name a few. What many states have done for clarity is to include in their statutory or regulatory language a reference to HIPAA for patient and personal representative response times and fees while establishing a fee schedule and response schedule for third-party requestors. If the Board would like to hear more about this suggestion or would like to see some relevant examples from other states please feel free to contact me directly or through Holly Deshields.

### Alternative Solutions

The record disclosure process is a complicated multi-step process that takes trained professionals to ensure patient privacy is protected while only patient approved documents are disclosed. The better approach may be legislative and regulatory action to amend the Texas Health and Safety Code §241.154 and 22 TAC §165.2 to provide hospitals and physicians thirty (30) days to respond to a records request. If the Board was interested in exploring this option CIOX would be willing to engage and explain

If CIOX can be of any further assistance on this issue please do not hesitate to contact me directly at [kyle.probst@ciouxhealth.com](mailto:kyle.probst@ciouxhealth.com) or (770) 360-1820. Alternatively, you



may contact CIOX's registered lobbyist, Holly Deshields, of McGuire Woods at [HDeshields@mwcllc.com](mailto:HDeshields@mwcllc.com) or (512) 751-7947.

Respectfully submitted,

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Deputy General Counsel and Director of  
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CIOX Health, LLC

cc: Holly Deshields, McGuire Woods, 816 Congress Avenue, Suite 940, Austin, TX  
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