American College of Emergency Physicians®
ADVANCING EMERGENCY CARE

September 24, 2019

Re: SAMHSA–4162–20/ RIN 0930–AA30

Elinore F. McCance-Katz, M.D., Ph.D.
Assistant Secretary for Mental Health and Substance Use
Substance Abuse and Mental Health Services Administration
Department of Health and Human Services
5600 Fishers Lane
Rockville, Maryland 20857

Re: 42 CFR Part 2: Confidentiality of Substance Use Disorder Patient Records Proposed Rule

Dear Dr. McCance-Katz:

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On behalf of our 40,000 members, the American College of Emergency Physicians (ACEP) appreciates the opportunity to comment on a proposed rule that seeks to eliminate the phrase "allegedly committed by the patient" from 42 CFR § 2.63(a)(2). **ACEP believes that this proposed elimination would lead to unintended consequences that are not aligned with the overall intent of the 42 CFR Part 2 regulations and therefore requests that the Substance Abuse and Mental Health Services Administration (SAMHSA) not finalize the proposal.**

The current 42 CFR § 2.63(a) language states that a court order may authorize disclosure of confidential communications made by a patient to a 42 CFR Part 2 program (i.e. a federally-assisted individual or entity providing substance use disorder treatment services) in the course of diagnosis, treatment, or referral for treatment only if:

1. The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;
2. The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime *allegedly committed by the patient*, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or
3. The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

In the proposed rule, SAMHSA states that the italicized phrase above was unintentionally added in a 2017 final rule and that its removal "is necessary to encourage

valid enforcement efforts in the fight to address the opioid crisis, including investigations that involve disclosures of 42 CFR Part 2 program records authorized by court orders."[1]

While ACEP supports law enforcement investigations of extremely serious crimes, we believe that the current regulatory text of § 2.63 needs to be preserved in order to make sure that **patient records and other confidential communications are only disclosed for targeted investigations that actually involve the patient at hand**. By removing this necessary guardrail, SAMHSA would be allowing *any* confidential patient communications to be released to law enforcement whenever they are investigating an "extremely serious crime" that relates to a 42 CFR Part 2 program, regardless of whether the patient in question was themselves a suspect, or just happened to be in the same program as another patient being investigated.

This proposed removal becomes even more concerning since SAMHSA seems to expand the definition of an "extremely serious crime" in the proposed rule to include drug trafficking. SAMHSA specifically states in the rule that the proposal is necessary to "deter drug trafficking at or from part 2 programs, and thereby to prevent the occurrence of extremely serious crimes from interfering with the delivery by part 2 programs of high quality, medically necessary treatment."[2] By expanding the definition of an "extremely serious crime," the agency is radically broadening the scope of those investigations that could allow law enforcement to gain access to the communications through a court order. SAMHSA would effectively be sanctioning law enforcement (through a court order) to pull medical records of *all* patients in a 42 CFR Part 2 program for crimes that may be totally unrelated to the patients. We believe that the intent of § 2.63 was to allow law enforcement to appropriately investigate extremely serious crimes involving the particular patient, such as those current listed in the regulation: "homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect." SAMHSA should not finalize a regulatory change that would fundamentally alter this clear purpose of the regulation. Doing so may force patients and 42 CFR Part 2 programs to divulge confidential information to law enforcement even when it proves to be unnecessary to do so, thereby violating the important protections to this information put in place in the first place by the 42 CFR Part 2 regulations. Over time, patients could easily begin to be afraid of seeking treatment. This would be a devastating outcome just as we are beginning to finally overcome some of the stigma that has long posed a barrier to effective treatment of substance use disorder in our nation.

We appreciate the opportunity to share our comments. If you have any questions, please contact Jeffrey Davis, ACEP's Director of Regulatory Affairs at jdavis@acep.org.

Sincerely,

Vidor E. Friedman, MD, FACEP
ACEP President

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[1] 42 CFR Part 2: Confidentiality of Substance Use Disorder Patient Records Proposed Rule. 84 Fed. Reg. 44567 (August 26, 2019).
[2] Ibid.