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from the President

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Personal Representatives

HIPAA privacy regulations require covered entities to treat the personal representative of an individual (patient or health plan member) as if they were the individual in all respects involving the uses and disclosures of the individual's protected health information (PHI), as well as the individual's rights under the privacy regulations.

This means a covered entity must grant a personal representative of an individual patient or health plan member all of the rights granted to them under HIPAA privacy including the right to access, copy, amend or restrict access to medical records.

The scope of a personal representative's authority to act for an individual derives from the authority granted to the personal representative under applicable law (state, tribal, military, etc.) That is, where the personal representative has broad authority to act on the behalf of a living individual in making health care decisions, covered entities must treat the personal representative as the individual for all purposes under HIPAA, unless an exception applies (see below). Examples of these include parents with respect to a minor child, a legal guardian of a mentally incompetent adult or a personal representative granted general power of attorney or health care power of attorney with broad powers. Where the authority to act for the individual is limited or specific to particular health care decisions, the personal representative is to be treated as the individual only with respect to protected health information that is relevant to the limited scope or to the particular health care decision. For example, a person with an individual's limited health care power

of attorney regarding use of artificial life support is that individual's personal representative only with respect to protected health information that relates to that health care decision. Finally, where a person has authority to act on the behalf of a deceased individual or his estate, covered entities must treat the personal representative as the individual for all purposes under the privacy regulations.

Who is a Personal Representative?

State or other applicable law determines the specifics of who can be a personal representative of an individual as well as what rights can be granted to personal representatives. That is, each state has specifics as to what can be granted in a living will, power of attorney or health care power of attorney as well as the rights of parents regarding their minor children.

In general, for adults and emancipated minors (an emancipated minor is a teenager less than the age of majority who is married, pregnant, a parent, a member of the military, or self-supporting), personal representatives include someone with a health care power of attorney, a general power of attorney with health care provisions or a court appointed legal guardian.

For unemancipated minors, the parents or guardian of the minor are the personal representatives of the minor, except as outlined below. There are three exceptions to when a parent or guardian

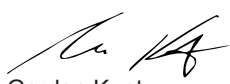
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Once again the deadline for Transactional compliance is here.

The deadline for compliance with the Transaction and Code Set portion of HIPAA is here again. October 16, 2002 was the original date by which all electronic transmission of health information in the U.S. was to be standardized. Due to pressure from covered entities (most notably large insurance companies) Congress passed an extension of one year to anyone who requested it and the Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) set rules for granting the extension. It is now a year later and once again it seems that some insurance companies and state Medicaid programs will not be ready for the deadline. So, CMS has come up with some new guidelines as to how they are planning to enforce compliance with the Transactions and Code Sets portion of HIPAA.

First, CMS recognizes that transactions require the participation of two covered entities and that noncompliance by one covered entity may put the other in a difficult position. That is, if a provider were ready to send HIPAA compliant transactions and the payor (insurance company, HMO, or state Medicaid service) was not ready to receive these transactions, this could put that provider in the difficult position of not having their claims paid. Therefore, during the period immediately following October 16, 2003, if CMS receives a complaint they intend to look at both covered entities. If it is determined that the failure to comply is based on reasonable cause and not due to willful neglect then you may be given more than the usual 30 days to fix the problem.

Second, CMS will not impose penalties on covered entities that deploy a contingency plan to accept non-compliant transactions if they have made reasonable and diligent efforts to become compliant. Specifically, as long as a payor can demonstrate to CMS its active outreach/testing efforts, it can continue processing non-compliant payment transactions to providers. As you can see, the government is taking compliance seriously, yet is also trying very hard to make the transition to standardization as painless as possible. There has been much discussion (and not a little paranoia) about a financial "train wreck" when the compliance date comes and some large payors are not ready. By granting extensions on a case-by-case basis and encouraging contingency plans so that payors can continue to accept non-compliant transactions, there should not be a major problem getting everyone paid properly.



Gordon Kuntz
CEO Agent 77 Inc.

is not the personal representative of a minor:

1. If state law permits a minor to consent to a particular healthcare service without permission from their parents or guardian.
2. When a court or other legal authority determines that someone else should make health care decisions for the minor (including another adult, a social worker or other legal authority, the minor or the court itself).
3. When the parent agrees to allow a confidential relationship between the minor and a health care professional.

Even in these instances where there is an exception, some states may still grant parents rights over their minor's health information. Conversely, in cases where the parent is not the personal representative of the minor (due to one of these exceptions) and state or other law does not require parental access, HIPAA does not give the parent or guardian the right to demand access and does not require a covered entity to provide it.

On the thorny issue of divorced parents and who has access (the custodial parent(s) only or both parents), HIPAA is silent and looks to individual state laws to guide you. In general, if you have been following state law on this do not make any changes.

For deceased individuals, personal representatives include anyone with legal authority to act on behalf of the decedent or the estate (not necessarily restricted to health care decisions). These include the executor of the estate, the next of kin or other family member or someone with durable power of attorney. Covered entities may also disclose PHI to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. And covered entities may disclose PHI to funeral directors, consistent with applicable law, including disclosing PHI prior to, and in reasonable anticipation of, the individual's death.

Regardless of the whether someone is a legitimate personal representative of an individual, covered entities may refuse to disclose protected health information to the personal representative if, in the covered entities professional judgment, they feel that disclosing the PHI may lead or contribute to domestic violence or the abuse, neglect or possible harm to the patient.

Disclosures allowed to individuals involved in the patient's care (not necessarily a personal representative)

Under certain conditions (outlined below), HIPAA allows covered entities to disclose to family members, relatives, friends or anyone else identified by the individual patient or member, protected health information appropriate to the individual's care or payment for their care, even when this disclosure is not to the personal representative of the individual. These disclosures can include information needed to locate or notify a family member, a personal representative, or another person responsible for the care of the individual of the individual's location, general condition, or death. When making this kind of disclosure to someone other than a personal representative, one of three conditions must be met:

1. If the individual is present, the covered entity must obtain the individual's permission, give them the opportunity to object or reasonably infer that the individual does not object.
2. If the individual is not present or is unconscious or otherwise incapacitated, the covered entity may use professional judgment to determine that such disclosure is in the best interest of the individual in the current health care situation.
3. A covered entity may use or disclose PHI to a public or private entity authorized by law or by its charter to assist in disaster relief.

Regardless of the circumstances, all of these kinds of disclosures must be subject to the minimum necessary rule.

This part of HIPAA was written to cover those instances where a friend, relative or family member is helping in the care of an individual, but is not necessarily a designated personal representative.

For example, under condition number 1 above (patient is present or conscious), an older sibling, grandparent, or other relative or friend may give a patient a ride to an appointment or to an emergency room. If the provider feels that it may be beneficial for the person accompanying the patient to be with them during treatment or to give out a limited amount of information about the treatment, it is a simple matter for the provider to ask the patient's permission. "Would it be all right for your Grandmother to come with us while I examine you?" "Coach, please explain how the accident happened." "You're here to give the patient a ride home after surgery?"

Under condition number 2 above, the patient is either not present or is unconscious, and thus unavailable to grant permission for release of protected health information. In

these instances, it is up to the health care provider to use their professional judgment as to whether to disclose the PHI. Examples of this can be as mundane as a friend or relative picking up a prescription, or as frightening as taking an unconscious friend or relative to the emergency room. In either case, it is clear that another person is assisting in the care of the patient and may need to be involved further with filling in details of an accident or being given follow-up instructions about a medication.

In the case of a disaster (hurricane, tornado, earthquake, fire, flood, terrorist attack, etc.), it may be necessary for a covered entity to release protected health information to a disaster relief agency, such as the Red Cross or FEMA (Federal Emergency Management Agency), to assist in identifying a patient, assist in the proper treatment (notification of heart problems or diabetes for example) or in locating the patient's friends or relatives, etc. This type of disclosure is allowed under the third condition above.

All of these types of disclosures are allowed, subject to the minimum necessary rule (i.e. protected health information only about the current situation.)

Verification of Identity

HIPAA requires that you verify the identity of anyone to whom you are disclosing protected health information. This means that, unless the identity of the person requesting the information is personally known to you, you must first verify that the person has the authority to act on behalf of the patient or member (and thus receive the requested protected health information.) This can be accomplished through documentation, signed statements, identification or through the use of professional judgment by the covered entity. What verification is required may depend on the extent of PHI being disclosed. For example, if a family member or friend wants to pick up a prescription for a patient, the pharmacist may depend on his or her professional judgment and not require additional verification to release the prescription. On the other hand, if a person asks a physician or health plan administrator for the entire medical record of a patient or health plan member, the covered entity may want to have a stricter verification process (requesting a copy of the power of attorney, for example). •

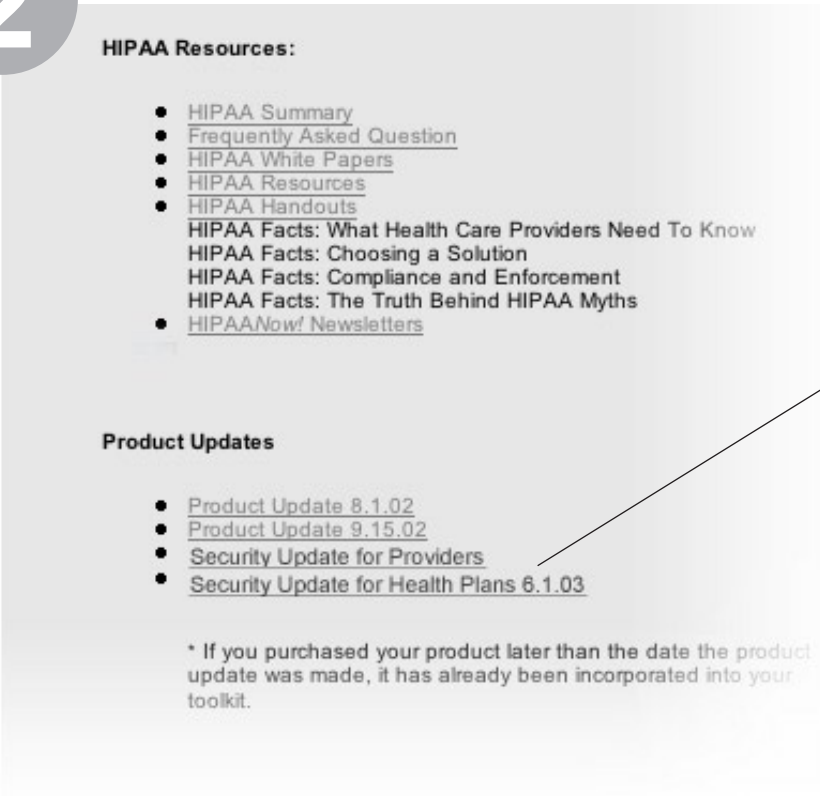
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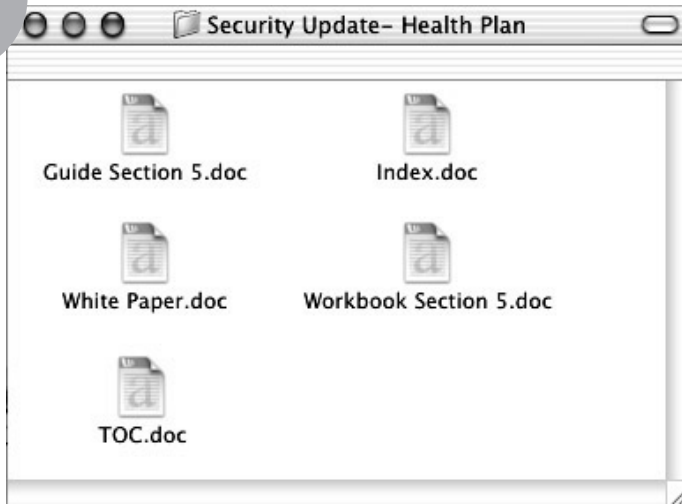
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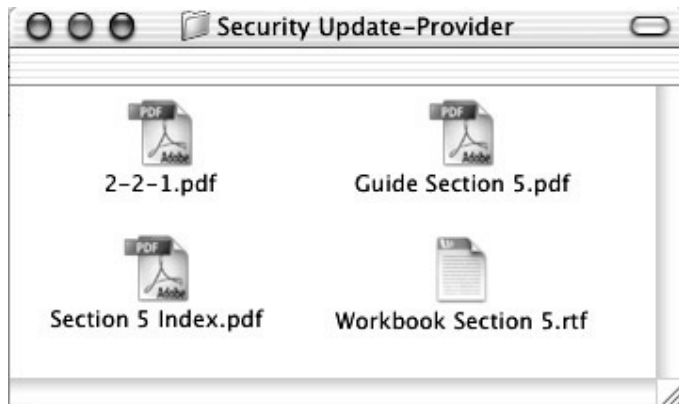
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3



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Marketing and HIPAA

Most of us don't want to be marketed to without our permission, thus the popularity of "do not call" lists and anti-spam filters. Many people are tired of being marketed to by the medical community, especially the drug companies. This is as true for your patients as for the populace at large. HIPAA helps to protect your patients from unwanted marketing.

HIPAA Marketing Restrictions in the Privacy Regulations

Under the HIPAA privacy regulations, marketing is defined: "to make a communication about a product or service that encourages the recipients of the communication or purchase or use the product or service."

HIPAA privacy regulations state that you must have the individual's prior written authorization to use or disclose Protected Health Information (PHI) in any marketing communication.

However, HIPAA does give some exceptions to this definition of marketing. These exceptions (described in detail below) include:

- Communications about a patient's treatment, including:
 - Case management or care coordination including prescription reminders
 - Directions or recommendations for alternative treatments or therapies
 - Recommending additional treatments at other providers
 - Explaining additional benefits or services available in the patient's provider network
- Health-related products or services offered by the covered entity
- Any face-to-face communications

HIPAA privacy goes on to define marketing as: "An arrangement between a covered entity and any other entity whereby the covered entity discloses protected health information to the other entity, in exchange for direct or indirect remuneration, for the other entity or its affiliate to make a communication about its own product or service that encourages recipients of the communication to purchase or use that product or service."

This part of the definition to marketing has no exceptions.

The individual must authorize these marketing communications before they can occur. This means that the provider cannot sell patient lists to another company for the other companies' marketing efforts. Simply put, a covered entity may not sell protected health information to a business associate or any other third party for that party's own purposes. Moreover, covered entities may not sell lists of patients or enrollees to third parties without obtaining authorization from each person on the list.

Exceptions to the HIPAA Privacy Marketing Regulations

For Treatment:

It is not marketing for a doctor to make a prescription refill reminder even if a third party pays for the communication, as the prescription refill reminder is considered treatment. Similarly, it is not marketing when a doctor or pharmacy is paid to recommend an alternative medication to patients. Communications about alternative treatments are excluded from marketing. The simple receipt of remuneration does not transform a treatment communication into a commercial promotion of a product or service.

Furthermore, covered entities may use a legitimate business associate to assist them in making such permissible communications. For instance, if a pharmacist has been paid by a third party uses a mail house to send out prescription refill reminders to the pharmacist's patients, neither the mail house nor the pharmacist needs a prior authorization.

HIPAA privacy also allows covered entities to distribute items commonly known as promotional gifts without prior authorization (provided these are of nominal value), even if such items are distributed with the intent of encouraging the receiver to buy the products or services. This exception generally applies to items and services of a third party, whether or not they are health-related, or items and services of the covered entity that are not health-related. A covered doctor, for instance, may send patients items such as pens, note-pads, and cups embossed with a health plan's logo without prior authorization. Similarly, dentists may give patients free toothbrushes, floss and toothpaste.

Treatment exceptions also include recommending a patient to a specialist for additional treatment. For example, a dentist may refer a patient to a specialist for additional treatment such as orthodontia, or endodontic treatments or a physician may recommend treatments to a specialist, even specialists not in

the physician's network.

For Health-Related Products or Services Offered by the Covered Entity

The HIPAA Privacy Rule excludes communications made to describe a covered entity's health-related product or service (or payment for such product or service) provided by the covered entity, or included in a plan of benefits. Thus, it would not be marketing for a physician who has developed a new anti-snore device to send a flyer describing it to all of her patients. Nor would it be marketing for an ophthalmologist to send existing patients or members discounts for eye-exams or eye-glasses. Similarly, it would not be marketing for a dentist to let patients know about teeth whitening or other services they offer.

However, it would be considered marketing for a provider to make communication about a non-health-related product or service, unless that communication was made face-to-face in the provider's office.

In Face-To-Face Communications

In face-to-face encounters, the HIPAA Privacy Rule allows covered entities to give or discuss products or services, even when not health-related, to patients without a prior authorization. This exception prevents unnecessary intrusion into the doctor-patient relationship. Physicians may give out free pharmaceutical samples, regardless of their value, hospitals may give infant supplies to new mothers, and providers may leave general circulation materials in their offices for patients to pick up during office visits. •

Q. When a minor reaches the age of majority or becomes emancipated do we need to send them a new Notice of Privacy Practices?

A. If there is a change in a minor patient's status (they either become emancipated or they reach an age of majority), their parents are no longer their personal representative and no longer control or have access to their protected health information. Thus, we recommend that you give a new Notice of Privacy Practices to the patient/member and, for providers, get a new acknowledgement signed.

Q. Does HIPAA change the way in which an individual can grant a general power of attorney (with healthcare provisions) or a health care power of attorney?

A. No. HIPAA defers to each individual state to determine how power of attorney (general or healthcare) is set up and what powers can be granted to a power of attorney as to treatment decisions. The HIPAA personal representative rule was designed to complement existing state laws, not interfere with them.

Q. How does a covered entity identify an individual's personal representative?

A. State or other law determines who can be authorized to act on an individual's behalf (such as with a health care power of attorney) and what documentation this authorization entails, thus HIPAA does not address how personal representatives should be identified. Covered entities should continue to identify personal representatives the same way they have in the past.

Contributors:

Don Kaiser
Gordon Kuntz
Rob Silas
Jeffrey Abramovitz

Design:

Phillip Koenig

Contact Agent 77:

phone: 651-686-6500
to order: 1-800-294-2556

info@agent77.com

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