

HIPAA PRIVACY BULLETIN

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INTRODUCTION

The privacy rule promulgated by the Department of Health and Human Services (HHS) requires covered entities, except as provided in the rule, to obtain an individual's consent prior to using or disclosing Protected Health Information (PHI) to carry out Treatment, Payment or Health Care Operations (TPO). 45 C.F.R. §164.506(a)(1). There are, however, certain exceptions to this general rule. In July, HHS published its official guidance for the regulations which help to clarify when a consent is not required under the rule.

ARE THERE ANY HEALTH CARE PROVIDERS WHO ARE NOT REQUIRED TO OBTAIN CONSENT UNDER THE RULE?

Yes. There are two types of health care providers who are exempt from the consent requirements of the rule.

First, providers that have a "indirect treatment relationship" with the individual are not required to obtain consent prior to using or disclosing PHI to carry out TPO. 45 C.F.R. §160.506(a)(2)(I).

An indirect treatment relationship is defined by the rule as a health care provider in which:

- (1) the health care provider delivers health care to the individual based upon the orders of another health care provider; or
- (2) the health care provider typically provides services or products or reports a diagnosis or results associated with the health care directly to another health care provider, who in turn provides the services or products directly to the individual.

Examples of indirect treatment relationships include health care providers who provide consultation services without seeing the patient first, laboratories and hospital radiologists.

The second general exception applies to information created or received while providing health care

to an individual who is an inmate, incarcerated in or confined to a correctional institution.

Yes. Consent is not required in several treatment

ARE THERE CERTAIN TREATMENT SITUATIONS IN WHICH PRIOR WRITTEN CONSENT TO TPO WILL NOT BE REQUIRED?

situations:

- (1) Consent will not be required in emergency situations. However, the health care provider must obtain consent as soon after the emergency treatment as reasonably possible. The health care provider is expected to exercise professional judgment in determining whether or not an emergency situation exists. If the practitioner believes that a delay in obtaining consent will compromise patient care, the provider may use or disclose PHI obtained during such treatment for purposes of TPO without obtaining prior consent. If, however, consent may be obtained without compromising patient care, the rule requires that it be done.
- (2) Consent will not be required where a health care provider is required by law to treat an individual, as is the case with certain publicly funded providers. In such cases, the provider must nevertheless attempt to obtain the individual's consent.

(3) Consent is not required where an attempt to obtain consent is unsuccessful due to substantial communication barriers, and the health care provider determines, in the exercise of professional judgment, that consent may be inferred under the circumstances. An example is found in the case of a mentally incapacitated individual who has no personal representative to consent on his or her behalf. HHS has determined that this requirement does not affect any requirements under Title VI of the Civil Rights Act of 1964 or the Americans with Disabilities Act, but rather works with these laws to “remove impediments to access to necessary health care for all individuals.”

Where treatment is provided without consent in these three treatment situations, the health care provider must document the attempt to obtain consent and the reason why the health care provider was not successful in obtaining consent.

IS A PROVIDER IN AN INDIRECT TREATMENT RELATIONSHIP REQUIRED TO OBTAIN WRITTEN CONSENT?

Yes. A provider who has a indirect treatment relationship with the individual and is not required to obtain written consent to TPO may elect to seek consent. If the provider does seek consent, the consent form must meet minimum requirements set forth by the rule. If the provider then obtains consent, it may use or disclose information pursuant to its notice of privacy practices. However, if the health care provider seeks to obtain consent which

is refused by the individual, it is prohibited from using or disclosing PHI included in the consent. If the individual refuses to provide consent when requested, the health care provider may elect not to treat the individual.

ARE HEALTH PLUS AND HEALTH CARE CLEARINGHOUSES REQUIRED TO OBTAIN PATIENT CONSENT FOR TPO?

No. Only health care providers are required to obtain patient consent for TPO. The rule permits such entities to obtain consent, if they choose. Such consent, if obtained, must meet the requirements of the rule.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie *HIPAA Privacy Bulletin* invite you to submit questions you may have dealing with HIPAA issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified health care law attorney.

Send questions to:

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Prior issues are available on request. Please direct inquiries to L. Jane Charlton or William James Rogers, Thomson, Rhodes & Cowie, P.C., Tenth Floor, Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, TRC_Law@nauticom.net.