

HIPAA PRIVACY BULLETIN

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INTRODUCTION

In light of the impending April 14, 2003 Privacy Rule compliance deadline, organizations that are comprised of more than one covered entity, or organizations that engage in both covered and non-covered functions, must decide what type of organizational structure best suits their already existing policies and procedures as well as their HIPAA compliance plans. The status chosen by an organization will affect how it will comply with the HIPAA Privacy Rule.

WHAT TYPES OF ORGANIZATIONAL STRUCTURES ARE AVAILABLE?

There are three types of "virtual organizations" identified in the HIPAA regulations.

(1) Affiliated entities are defined as legally distinct covered entities that share common ownership or control. Common control exists if an entity has the power, directly or indirectly significantly to influence or direct the actions or policies of another entity. Common ownership exists where an entity or entities possess an ownership or equity interest of five percent or more in another entity. Affiliated entities should enter into some type of written agreement to document their relationship for HIPAA and other legal purposes. An example of a group of entities is a health system comprised of several affiliated hospitals.

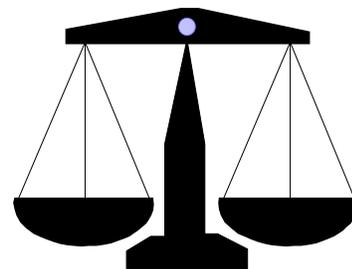
(2) An Organized Health Care Arrangement (OHCA) is an arrangement in which participants of the arrangement need to share protected health information regarding their patients to effectively manage and further the common enterprise. An essential component of any OHCA is that the individual who obtains services from the arrangement expects that the participants are integrated and that they jointly manage their operations. The privacy regulations define an OHCA as: (a) a clinically integrated setting in which patients receive care from more than one provider; (b) an organized system of healthcare in which the participants hold themselves out to the public as participating in a joint arrangement and in which the joint activities include at least one of several specified activities, such as utilization review, quality assessment and improvement or payment activities; or (c) a combination of group health plans or group health plans and insurers. A common type of OHCA is that which may be created between a hospital and its privileged physicians.

(3) A hybrid entity is a single legal entity, such as a corporation or partnership, whose primary functions are not covered functions under the Privacy Rule and that cannot be further differentiated into units with their own legal identities. One example of a hybrid entity is a manufacturing corporation that maintains a health clinic for its employees, so long as the health clinic is not separately incorporated. A university that owns and operates a hospital may also qualify as a hybrid entity, where the university's primary function is that of an academic institution. Corporations and their subsidiaries generally do not qualify as hybrid entities, as they can be broken down into separate legal entities.

No. An organization comprised of several covered entities

IS IT MANDATORY TO FORM ONE OF THESE ORGANIZATIONS FOR PURPOSES OF HIPAA COMPLIANCE?

may choose to treat each entity as separate for HIPAA purposes. Additionally, an entity whose primary function is not a covered function may designate itself as a single covered entity rather than a hybrid entity.



WHAT ARE THE IMPLICATIONS OF AN OHCA STATUS?

Participants in an OHCA may establish a joint Notice of Privacy Practices and may obtain joint consent for release of PHI from a patient; however, the participants are still subject to the minimum necessity requirement when sharing information within the OHCA. If any one of the covered entities included in the joint consent obtains the individual's consent, the requirement is met for all other covered entities to which the consent applies. However, if an OHCA member relies on a consent, but is unaware, due to communication or record keeping lapses, that the consent has been restricted or revoked, that member may have violated HIPAA by inadvertently disclosing or using PHI. An OHCA also may create the risk of joint liability for non-HIPAA related issues. Although each OHCA member is liable for its own HIPAA violations, because an OHCA, by definition, holds itself out to the public as participating in a joint arrangement, one member of the OHCA may be liable for the negligence of another member under the doctrine of apparent or ostensible agency. Additionally, there also may be a risk that a breach of confidentiality by one member would be considered a breach of confidentiality by the other members of the OHCA.

WHAT ARE THE IMPLICATIONS OF AFFILIATED ENTITY STATUS?

Affiliated entities may share a single Notice of Privacy Practices and a consent form. If a patient receives a privacy notice and consent form from one affiliated entity, the patient need not receive another notice and consent from another affiliated entity. The privacy notice must reference the privacy policies of all affiliated entities. The minimum necessity requirement still applies to the sharing of information between affiliated entities. Also, affiliated entities may not use joint authorizations. Each entity is responsible for obtaining an authorization from an individual for uses and disclosures other than treatment, payment and health care operations. Affiliated entities that together make up the affiliated covered entity are individually

are individually subject to liability under the rule. Additionally, the risks identified regarding an OHCA also apply to affiliated entities.

WHAT ARE THE IMPLICATIONS OF HYBRID ENTITY STATUS?

The Privacy Rule requirements apply only to the component of the hybrid entity that engages in covered functions. The lack of boundaries within such an entity, however, increases the risk of impermissible disclosures of PHI. Therefore, hybrid entities must create internal protections against the improper use or disclosure among the covered and non-covered components of the organization.

NOTE: It is important to remember that HHS has issued proposed modifications to the Privacy Rule which eliminate the consent requirement. The elimination of this requirement should be considered when choosing an organizational structure for the purpose of HIPAA compliance.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie, P.C. *HIPAA Privacy Bulletin* invite you to submit general 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 address issues of common interest.

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