

# HIPAA PRIVACY BULLETIN

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## INTRODUCTION

The privacy rules promulgated by the Department of Health and Human Services (HHS) permit a "Covered Entity" to disclose Protected Health Information (PHI) to a "business associate," but only after the covered entity receives "satisfactory assurance" that the business associate will safeguard the information. 45 C.F.R. §164.502(e)(1). This bulletin addresses who is a business associate and what covered entities must do to safeguard PHI provided to their business associates.

### WHO IS A BUSINESS ASSOCIATE?

A business associate is a person who, on behalf of a covered entity (or on behalf of an organized health care arrangement in which the covered entity participates) performs, or assists in the performance of a function or activity involving the use or disclosure of individually identifiable health information. These functions or activities may include claims processing, data analysis, utilization review, quality assurance, billing, practice management or repricing. 45 C.F.R. §160.103. A person is also a business associate of a covered entity if he or she provides legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation or financial services to a covered entity where the provision of the services involves the disclosure of individually identifiable health information from the covered entity or another business associate of the covered entity.

### CAN A COVERED ENTITY BE A BUSINESS ASSOCIATE OF ANOTHER COVERED ENTITY?

Yes. If one covered entity provides services on behalf of another covered entity involving the use or disclosure of individually identifiable health information, a business associate relationship is created. The regulations further provide that a covered entity that is also a business associate of another covered entity is in violation of HIPAA if it violates

the satisfactory assurances its provided as a business associate of another covered entity. 45 C.F.R. §164.502(e)(1)(iii).

### CAN A COVERED ENTITY BE LIABLE FOR VIOLATIONS OF ITS BUSINESS ASSOCIATES?

A covered entity may be liable for violations of HIPAA by its business associates, but only if the covered entity knew of the wrongful activity on the part of the business associate and failed to take reasonable steps to cure the breach or terminate the contract. 45 C.F.R. §164.504(e)(1)(ii). This represents a relaxation from the proposed rule, which essentially made the covered entity liable for any violations by its business associates.

### DOES THE DISCLOSURE OF PHI TO A THIRD PARTY PAYOR REQUIRE A BUSINESS ASSOCIATE AGREEMENT?

No. Since neither the provider nor the third party payor is acting on behalf of the other in that situation, they are not business associates of each other. However, a health plan may become a business associate of a provider, or vice versa if either of them furnishes services on behalf of the other. 65 Fed. Reg. at 82476.

## **MUST A COVERED ENTITY ENTER INTO A BUSINESS ASSOCIATE AGREEMENT WITH ITS OWN EMPLOYEES?**

No. Members of the covered entity's own workforce, including employees, volunteers or trainees, are not considered to be business associates of the covered entity. HIPAA requires each covered entity to have and enforce privacy standards with respect to the covered entity's employees. 45 C.F.R. §160.103

## **WHAT CONSTITUTES SATISFACTORY ASSURANCE?**

The rule requires a written agreement between the covered entity and the business associate that the business associate will maintain the confidentiality of protected health information it receives from the covered entity. The agreement must specify that the business associate will not use or further disclose the information other than as permitted or required by the contract or as required by law. The business associate must use appropriate safeguards to prevent the use or disclosure of information other than as provided for in its contract and must report to the covered entity any use or disclosure of information not provided by its contract of which it becomes aware. In addition, the business associate must ensure that any agents or subcontractors to whom it provides protected health information agree to the same restrictions that apply to the business associate with respect to such information. The business associate must also account for any disclosures of information and make its internal practices, books and records related to the use or disclosure of protected health information available to the secretary of HHS for the purpose of deter-

mining the covered entity's HIPAA compliance. The agreement must contain provisions for the disposition of protected health information at the termination of the contract, and must provide for the termination of the contract in the event the covered entity determines that the business associate has violated a material term of the contract. 45 C.F.R. §164.504(e)(2).

## **WHAT MUST I DO BEFORE THE COMPLIANCE DATE?**

Covered entities are expected to have business associate agreements in place by the compliance date, April 14, 2003. (The deadline is April 14, 2004 for small health plans.) The first step is to identify each person or company that is performing a function which involves the use of individually identifiable health information. Each of these entities must enter into a business associate agreement, which may be a separate contract, or an addendum to an existing written contract.

**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.

Send questions to:

L. Jane Charlton ([ljc@trc-law.com](mailto:ljc@trc-law.com))  
William James Rogers ([wjr@trc-law.com](mailto:wjr@trc-law.com))

Thomson, Rhodes & Cowie, P.C.  
1010 Two Chatham Center  
Pittsburgh, PA 15219

Phone: 412-232-3400  
Facsimile: 412-232-3498

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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.