

HIPAA PRIVACY BULLETIN

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INTRODUCTION

On March 27, 2002, the Department of Health and Human Services issued proposed modifications to the Standards for Privacy of Individually Identifiable Health Information which took effect on April 14, 2001. The proposed modifications are designed to maximize the effectiveness of the protections for patient privacy and, at the same time, to ensure that the availability and quality of medical care will not be compromised. The Department's proposed modifications involve the issues of consent, notice of privacy practices for protected health information (PHI), minimum necessary uses and disclosures, business associates, uses and disclosures for marketing and research, un-emancipated minors, required authorizations for certain types of PHI, and de-identification of PHI.

WILL THE PROPOSED MODIFICATIONS AFFECT THE COMPLIANCE DEADLINES?

No. The Department has decided to keep the established compliance deadlines. For this reason, the Department will solicit comments for only thirty days. The Department states that a brief comment period suffices because the modifications are based upon and address public concerns already communicated to the Department.

DO THE PROPOSED MODIFICATIONS AFFECT THE CONSENT REQUIREMENT FOR THE USE AND DISCLOSURE OF PHI FOR TREATMENT, PAYMENT AND HEALTH CARE OPERATIONS (TPO)?

Yes. Covered entities are no longer required to obtain an individual's consent prior to the use and disclosure of PHI for TPO. The proposed modifications provide regulatory permission to covered entities to use PHI for TPO. This regulatory permission applies to PHI held by a covered entity whether the PHI was created or received prior to or after the compliance date. Despite this modification, Covered Entities still may obtain consent for the use and disclosure of PHI. The Department will allow such entities complete discretion in the design of their consent procedures. If a covered entity chooses to obtain such consent, the consent will be valid only for uses and disclosure of PHI for TPO.

Although the Department has eliminated the consent requirement, it has proposed that a covered entity that has a

provider, with an individual must make a good faith effort to secure a written acknowledgement of the entity's privacy rights and practices. When the individual signs the acknowledgement, the individual will have the opportunity to request specific restrictions regarding the use and disclosure of his/her PHI. The proposed modifications do not provide a specific format for the acknowledgement. Additionally, even though covered entities other than those with a direct treatment relationship with an individual are not required to attempt to obtain an acknowledgement of their privacy rights and practices, all covered entities must maintain such poli-

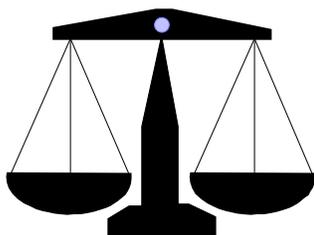
DO THE PROPOSED MODIFICATIONS AFFECT THE USE AND DISCLOSURE OF PHI?

Yes. The proposed modifications broaden the uses and disclosures permitted for the purpose of treatment, payment and health care operations. The proposed modifications include language that clarifies the Department's intent that a health care provider be able to share PHI for the treatment of an individual by another health care provider. Additionally, the proposed modifications explicitly allow a covered entity to disclose PHI to another entity, whether or not it is a covered entity, for the payment activities of that entity. Finally, the proposed modifications allow disclosure among covered entities for the purposes of their health care operations. The term health care operations as defined in the rule includes, among other things, detection of fraud and abuse, compliance programs, quality improvement and assessment, training programs, accreditation, licensing, credentialing and case management. Permissible disclosures between covered, and in some instances covered and non-covered, entities are

each entity has or has had a relationship with the subject of the PHI. For example, if the relationship between the individual and the covered entity ends, a disclosure of the individual's PHI would be allowed only if it related to the past relationship.

**WILL THE PROPOSED MODIFICATIONS
CHANGE EXISTING REGULATIONS
REGARDING BUSINESS ASSOCIATES?**

No. However, the proposed modifications extend the business associate agreement compliance date for all covered entities to April 14, 2004, with the exception of small health plans, which already have a 2004 compliance deadline. According to the proposed modifications, covered entities would be able to operate under existing contracts with business associates, so long as the contract is not renewed or modified between the effective date of the modifications and the new 2004 business associate agreement compliance date. Contracts which automatically renew without changes in the terms of the agreement and without any actions by either party to the contract, will be eligible for the extension despite the renewal. In other words, covered entities may operate under existing contracts with their business associates until April 14, 2004, or the date on which the contract is renewed or modified, whichever comes first. After the original April 14, 2003 compliance date, covered entities must ensure that their business associates will provide information to the Secretary of HHS for compliance purposes and to patients exercising their rights under HIPAA. The extension applies only to written agreements which exist prior to the effective date of these proposed modifications. Oral agreements and written agreements created after the effective date must meet the regulatory requirements by the original April 23, 2003 compliance date.



**DO THE PROPOSED MODIFICATIONS
CHANGE THE "MINIMUM NECESSARY"
AND ORAL COMMUNICATION
REQUIREMENTS?**

No, but the modifications add a provision that explicitly permits certain types of incidental disclosures that occur as a result of a permitted use or disclosure. An incidental disclosure will be permissible only to the extent that the covered entity has implemented the reasonable safeguards and minimum necessary requirements of the Privacy Rule. This proposed modification does not permit incidental disclosures resulting from failure to apply the minimum necessary standard or reasonable safeguards. Additionally, the modifications do not excuse erroneous uses or disclosures or those resulting from neglect or mistake.



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:

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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., Two Chatham Center, Tenth Floor, Pittsburgh, Pennsylvania 15219, (412) 232-3400.