

Date: September 7, 2001  
To: Executive Directors, Constituent Dental Societies  
From: James B. Bramson, D.D.S., executive director  
Subject: HIPAA Privacy Guidance

The Department of Health and Human Services (HHS) released guidance on July 6, 2001 that provides additional explanation concerning the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule that was published on December 28, 2000. Described as only the first of several technical assistance materials that HHS will issue to provide clarification and help covered entities implement the Rule, the guidance recognizes that privacy protections must not interfere with a patient's access to quality health care or the delivery of that care.

After a section of Frequently Asked Questions summarizing the Rule, the guidance provides clarification about HIPAA privacy standards related to the following areas:

- Consent requirements;
- Minimum necessary disclosure;
- Oral communications;
- Business associates;
- Parents and minors;
- Marketing;
- Research;
- Government access to health information; and
- Payment.

The guidance is mostly a good news interpretation of the Rule. Key elements include:

- The guidance responds to concerns raised by the ADA and other providers of care that the privacy rule would require extensive soundproofing of dental offices. Under the Guidance, dental and other providers need not restructure their offices (e.g., retrofit them to provide private rooms or soundproofed walls) to comply with the privacy rule. HHS acknowledged that overheard communications are unavoidable and that reasonable precautions can be taken through the use of lowered voices, or the use of curtains or screens in areas where oral communications often occur between doctors and patients or among professionals treating the patient.

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 2

- The guidance reinforces that the Rule gives needed flexibility for providers to create their own privacy procedures, tailored to fit their size and needs. Among other things, for a small practice this “scalability” means: the privacy official may be the office manager; the training requirement can be met by providing each new employee with a copy of its privacy policy and documenting the policies have been reviewed; and policies and procedures may be more limited than a large office or hospital, based on the volume of health information maintained and the number of interactions, etc.

HHS will also propose appropriate changes to the Privacy Rule in the form of a notice of proposed rule making (NPRM) and seek public comments on the changes. The ADA will comment on those changes as it has with previous proposed rules concerning privacy of protected health information (PHI). According to the guidance, the areas that HHS will revisit in the privacy rule include:

- Phoned-in Prescriptions - pharmacists will be permitted to fill prescriptions phoned in by a patient's doctor before obtaining the patient's written consent.
- Referral Appointments - direct treatment providers receiving a first time patient referral will be permitted to use a patients' PHI to schedule appointments, surgery, or other procedures before obtaining the patient's signed consent.
- Allowable Communications - a change will “increase the confidence” of covered entities that they are free to engage in whatever communications are required for quick, effective, high quality health care, including routine oral communications with family members, treatment discussions with staff involved in coordination of patient care, and using patient names to locate them in waiting areas.
- Minimum Necessary Scope – a change will “increase covered entities' confidence” that certain common practices, such as use of sign-up sheets and X-ray light boards, and maintenance of patient medical charts at bedside, are not prohibited under the rule.
- Rights of minors – HHS may reevaluate the privacy rule to ensure that parents have appropriate access to information about the health and well being of their children.

Congress specifically authorized HHS to make appropriate modifications in the first year after the final rule took effect in order to ensure the rule could be properly implemented in the real world. Efforts are underway at HHS to identify necessary modifications in these five areas to give dentists and other providers as much time as possible to implement the rule.

## GUIDANCE ON HIPAA PRIVACY STANDARDS

What follows is a summary of what the guidance clarifies about specific HIPAA privacy standards, with an eye towards items of interest to the practicing dentist. It is important to remember that the Rule sets a federal floor regarding privacy. If and to the extent that state laws provide more stringent privacy requirements, those must be met as well.

### **Consent Requirements:**

The guidance clarified the following issues about the Rule's requirement about obtaining prior written consent before disclosing personal health information (PHI) to carry out treatment, payment or health care operations (TPO):

- A provider need only obtain a patient's written consent one time;
- The consent document may be brief and may be written in general terms;
- The dentist must retain the signed document for 6 years, but the rule does not prescribe the form in which the consents are to be retained;
- It must be written in plain language and contain the following information:
  - inform the individual that information may be used and disclosed for treatment, payment, or healthcare operations (TPO),
  - state the patient's rights to review the provider's privacy notice,
  - how to request restrictions and to revoke consent, and
  - be dated and signed by the individual (or his or her representative).
- The guidance clarifies the differences between "consent" and "authorization;"
  - A **consent** is a general document that gives health care providers, which have a direct treatment relationship with a patient, permission to use and disclose all PHI for TPO. It gives permission only to that provider, not to any other person. Health care providers may condition the provision of treatment on the individual providing this consent. One consent may cover all uses and disclosures for TPO by that provider, indefinitely. A consent need not specify the particular information to be used or disclosed, nor the recipients of disclosed information.
  - An **authorization** is a more customized document that gives covered entities permission to use specified PHI for specified purposes, which are generally other than TPO, or to disclose PHI to a third party specified by the individual. Covered entities may not condition treatment or coverage on the individual providing an authorization. An authorization is more detailed and specific than a consent. It covers only the uses and disclosures and only the PHI stipulated in the authorization; it has an expiration date; and, in some

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 4

cases, it also states the purpose for which the information may be used or disclosed.

As an example, a dentist may, under the consent obtained from the patient, send an appointment reminder to the patient, but would need authorization from the patient to send their name and address to a company marketing a new dental product. Of course, this would be true under federal law, but state law may impose more stringent requirements. The same is true about all of the information in this section; e.g., state law may affect requirements for consent forms.

### **Minimum necessary disclosure**

Although the Privacy Rule generally requires dentists and other health care professionals to take reasonable steps to limit the use or disclosure of PHI to the minimum necessary to accomplish the intended purpose, the minimum necessary provisions do not apply to the following:

- Disclosures to or requests by another health care provider for treatment purposes;
- Disclosures to the individual who is the subject of the information;
- Uses or disclosures made pursuant to an authorization requested by the individual;
- Uses or disclosures required for compliance with HIPAA-mandated standard transactions;
- Disclosures to HHS when required under the rule for enforcement purposes, and
- Uses or disclosures that are required by law.

For use of PHI, policies and procedures must identify which employees need access to the information to carry out their job duties, the types of PHI needed, and conditions appropriate to access. For routine requests and disclosures, standard protocols must limit PHI to what is the minimum necessary for the type of request or disclosure. Covered entities must make their own assessment of what is reasonably necessary for a particular purpose, given the characteristics of their business and workforce.

“Minimum necessary” is an important point of possible future change in the Rule, including for items such as sign-in sheets in waiting rooms.

Finally, the state law issue is again relevant. For example, while the guidance clarifies that disclosures between health care providers are exempted from the minimum necessary requirement, similar state laws would still be binding.

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 5

### **Oral communications**

The Guidance clarifies that the Privacy Rule is not intended to prohibit providers from talking to each other and to their patients, recognizes that providers understand the sensitivity of oral information, and acknowledges the importance of oral communications occurring freely and quickly in treatment settings.

The privacy rule contains provisions requiring covered entities to implement reasonable safeguards that reflect their particular circumstances and exempting treatment disclosures from certain requirements. These are intended to ensure that providers' primary consideration is the appropriate treatment of their patients.

Under the guidance, the following practices would be permissible, if reasonable precautions are taken to minimize the chance of inadvertent disclosures to others who may be nearby (such as using lower voices and talking apart):

- Health care professionals may discuss a patient's condition over the phone with the patient, a provider, or a family member;
- A health care professional may discuss lab test results with a patient or other provider in a joint treatment area; and,
- Health care professionals may discuss a patient's condition during training rounds in an academic or training institution.

The Department does not consider facility restructuring to be a requirement under this standard. In determining what is reasonable, the Department will take into account the concerns of covered entities regarding potential effects on patient care and financial burden.

For example, the Privacy Rule does not require the following types of structural or systems changes:

- Private rooms.
- Soundproofing of rooms.
- Encryption of wireless or other emergency medical radio communications, which can be intercepted by scanners.
- Encryption of telephone systems.

HHS will propose regulatory language to reinforce and clarify that similar oral communications (such as calling out patient names in a waiting room) are permissible. While providers and health plans must provide reasonable safeguards to avoid prohibited disclosures, the rule does not require that all risk be eliminated to satisfy this requirement. Organizations must review their own practices and determine what steps are reasonable to

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 6

safeguard their patient information. In assessing what is “reasonable,” covered entities may consider the viewpoint of prudent professionals. Of course, HHS would then determine the reasonableness of any such assessment. This too is an area where state law may apply.

### **Business associates**

The Privacy Rule conditions disclosures to business associates on the providers obtaining, typically by contract, satisfactory assurances that the business associate will use the information only for the contracted purpose, will safeguard the information from misuse, and help them provide appropriate access about health information and disclosures to certain individuals. PHI may be disclosed to a business associate only to help the dentist carry out health care functions – not for independent use by the business associate.

Provided a covered entity complies with the Rule, it is not liable for privacy violations of a business associate. Among the requirements is that the business associate contract must obligate the business associate to advise the covered entity when a violation occurs. When a covered entity becomes aware of a pattern or practice that materially violates the Rule, the entity must take “reasonable steps” to cure the breach including terminating the relationship, if feasible, or reporting the problem to the Department.

### **Parents and minors**

Under the Rule, a parent is generally considered a “personal representative” and has the right to access health information about their minor child. The guidance reflects the following exceptions to these rights:

- When state or other law does not require parental consent prior to a minor obtaining care and the minor consents to the health care service;
- When a court determines or other law that authorizes some other individual to make treatment decisions for a minor;

In addition, the guidance clarifies that:

- If a parent agrees to a confidential relationship between the minor and the physician, the parent does not have access to the PHI stemming from the arrangement;
- If the physician reasonably believes that the minor has been or may be subject to abuse or neglect, or that treating the parent as the child’s personal representative

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 7

could endanger the child, the physician (dentist) may choose not to treat the parent as the personal representative of the child.

The Rule does not preempt state law that might authorize or prohibit a disclosure of PHI about a minor to a parent.

### **Marketing**

The Rule limits marketing that can be done as a health care operation, and requires authorization for other uses of PHI for marketing purposes. The guidance clarifies that the following uses of PHI to tailor health information sent to individuals do not constitute marketing:

- A covered entity may use PHI to individuals provided that the communication is part of the treatment and the purpose is to further the treatment (e.g. recommendations of specific brand name drugs)
- A communication directed to an individual's treatment or to make an alternate treatment recommendation. (e.g. reminder notices for appointments, annual exams, or prescription refills are not marketing)

If a communication is marketing, a covered entity may use or disclose PHI only with applicable consent (authorization) and only in the following circumstances:

- in a face-to-face communication
- if the product or service is of nominal value (e.g. free toothbrushes with name of covered entity, key chains, calendars, etc.)
- it concerns health-related products or services where the covered entity or third party is identified in the communication

In such cases, the communication must identify the covered entity that is making the communication; indicate that the covered entity is being compensated, if true; provide information on how the individual may "opt out" of future communications; and explain why an individual was targeted and how they might benefit.

All other communications that are "marketing" under the Rule require that the covered entity obtain the individual's authorization to use or disclose PHI to create or make the marketing communication.

Health promotion, preventative care and wellness programs may fall within the definition of marketing, depending on how they are conducted.

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 8

### **Research**

The Privacy Rule states that a covered entity may use or disclose for research purposes health information that has been de-identified. Where research is concerned, the Privacy Rule protects the privacy of individually identifiable health information, while at the same time, ensuring that researchers continue to have access to information necessary to conduct vital research. The guidance addresses the use or disclosure of PHI in the research context.

### **Government access to health information**

Under the Privacy Rule, government-operated health plans and health care providers must meet substantially the same requirements as private ones for protecting the privacy of individual identifiable health information. All federal agencies must also meet the requirements of the Privacy Act of 1974, which restricts what information about individual citizens – including any personal health information – can be shared with other agencies and with the public.

The rule does not expand current law enforcement access to individually identifiable health information. In fact, it limits access to a greater degree than currently exists. Today, law enforcement officers obtain health information for many purposes, sometimes without a warrant or other prior process. The rule establishes new procedures and safeguards to restrict the circumstances under which a dentist or other covered entity may give such information to law enforcement officers.

Where state law imposes additional restrictions on disclosure of health information to law enforcement, those state laws continue to apply.

### **Payment**

Under the Rule, a dentist may use and disclose PHI for payment purposes. The Rule provides examples of common payment activities that include, but are not limited to:

- Determining eligibility or coverage under a plan and adjudicating claims;
- Risk adjustments;
- Billing and collection activities;
- Reviewing health care services for medical necessity, coverage, justification of charges, and the like;

## **Executive Directors, Constituent Dental Societies**

September 7, 2001

page 9

- Utilization review activities; and
- Disclosures to consumer reporting agencies (limited to specified identifying information about the individual, his or her payment history, and identifying information about the covered entity).

The guidance specifically contemplates a covered entity's ability to carry out appropriate activities through a third party, such as a collection agency, under a business associate arrangement.

### **ADA Timeline for HIPAA Preparations**

Attached to the summary is the anticipated timeline for HIPAA-related regulations and the Association's preparations to help members comply with those regulations. The timeline is based on current information from HHS and is subject to change.

The HHS implementation period begins when the regulation is published and runs until the compliance date. During the first year of the implementation period the Secretary can modify a rule as necessary to permit compliance. As a consultant to the Secretary named in the enabling legislation, the ADA can advise HHS of clarifications and modifications that are needed. The ADA has requested changes to both the initial final regulations and expects these modifications to be accepted.

In an effort to educate our members about HIPAA regulations, our first step is to keep state executives informed, followed by a reference in the executive Director's Update. Then, information will be posted on [ADA.org/HIPAA](http://ADA.org/HIPAA) and in *ADA News*. Release dates are intended to reflect regulatory dates and are subject to change. The intent is to provide current information that is reasonably certain to allow members adequate time for preparation. I ask that you further disseminate HIPAA-related information within your organizations.

If you have questions concerning HIPAA, or the regulations that have been promulgated, please e-mail us at [informatics@ada.org](mailto:informatics@ada.org) or call Robert Lapp, 312-440-2750, for general information; Donald Collins, 312-440-2895, about privacy regulations; Michael Tate, 202-789-5175, about legislation and Mark Rubin, 312-440-2851, about legal issues.

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cc: Officers and Members of the Board of Trustees  
Senior Management

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