



White Paper

Proposed Changes to the Disclosure of Protected Health Information

The legal right for patients and individuals to receive information on disclosures of their protected health information is not a new concept to healthcare providers and those individuals receiving treatment. The 1996 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule established a national standard to protect the privacy and security of patients' protected health information by requiring Covered Entities to make available to patients the release, transfer, provision of access to, or divulging of their protected health informationⁱ. The HITECH (Health Information Technology for Economic and Clinical Health) Act further enhanced the Privacy Rule by stating that Covered Entities and now Business Associates will have to ensure the security and privacy of patient PHI by accounting for disclosures of protected health information involving treatment, payment and healthcare operations through the use of an electronic health record (EHR). Both statutory requirements specify the patient's right to learn about the disclosure of their PHI, however, implementing the systems to establish and account for these disclosures has started to surface with new proposed regulations.

On May 31, 2011, The Department of Health and Human Services (HHS) released the proposed changes to expand these statutory privacy requirements by stating that individuals should be able to receive an "access report" of who accessed their PHIⁱⁱ. The proposed access report would identify the date, time and name of the person (or name of the entity) that accessed the information and the purpose for their access over a three year period. The access information would only need to be collected for purposes of monitoring the access of protected health information maintained in a designated record set. A designated record set includes the medical and healthcare payment records maintained by or for a Covered Entity or for the Covered Entity to make decisions on treatment of a patient. "Peer Review" data, for example, would not be considered PHI from a designated record set as this information may not be used to make decisions about a patient's treatment. Covered Entities or Business Associates may disclose electronic designated record set information to a Patient Safety Organization, however, due to the protections afforded to Patient Safety Work Product (PSWP) under the Patient Safety Quality Improvement Rule; the proposed rule states that Covered Entities will not need to account for the access of PSWP as it will help avoid conflicts of two sets of regulations. The

proposed rule does state that because the disclosure access report is limited to designated record sets, some Business Associates may not be affected by this new proposed requirement.

Prior to the release of the proposed rule, the HHS sought opinions on patients' rights in learning of disclosures of their PHI. The comments submitted to the HHS reflect that both providers and consumers agreed that accounting for disclosures could foster transparency and patient trust; however providers indicated the additional burden this would require on their systems and processes. Although providing information on disclosure has inevitably been in effect for several years, the Proposed Rule does require Covered Entities and their Business Associates to invest time and incur costs to create and log these access requirements in current EHR systems. The HHS proposes to require Covered Entities and Business Associates to produce access reports upon request beginning January 1, 2013 for any electronic designated record set systems that were acquired after January 1, 2009. If electronic designated record systems were acquired before January 1, 2009, the proposed access report timeline would begin as early as January 1, 2014 and no later than 2016. Although legislation and logging access of PHI has been in place for several years, the HHS believes their proposed timelines will suffice for system and process modifications. Covered Entities and Business Associates will have 240 days after publication of the final rule to be in compliance.

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ⁱ Source: The Department of Health and Human Services. The Federal Register. *HIPAA Privacy Rule Accounting of Disclosures Under the Health*. Vol. 76.104. *Regulations.gov*. Federal Register Online via the Government Printing Office, 31 May 2011. Web. 19 July 2011. <<http://www.regulations.gov/contentStreamer?objectId=0900006480e352c2>>.

ⁱⁱ Source: The Department of Health and Human Services. The Federal Register. *HIPAA Privacy Rule Accounting of Disclosures Under the Health*. Vol. 76.104. *Regulations.gov*. Federal Register Online via the Government Printing Office, 31 May 2011. Web. 19 July 2011. <<http://www.regulations.gov/contentStreamer?objectId=0900006480e352c2>>.