

AHIMA Comments on Privacy Rule

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by Donald D. Asmonga

On January 18, 2000, AHIMA submitted comments to the Department of Health and Human Services (HHS) on the proposed rule for 45 Code of Federal Regulations (CFR), Parts 160 through 164: "Standards for Privacy of Individually Identifiable Health Information." The proposed rule was published in the Federal Register on November 3, 1999, with an original comment due date of January 3, 2000. Under mounting pressure from the healthcare community and others, the HHS extended the comment deadline to February 17, 2000, thus granting more time for interested parties to develop more extensive comments.

With the assistance of its Legislative Committee, Behavioral Health Section, and others, AHIMA developed very specific comments to the proposed rule. First, AHIMA commended the HHS for its efforts and offered congratulations for addressing nearly all of AHIMA's health information confidentiality principles in the proposed rule. Second, 18 specific recommendations were provided to the HHS to help strengthen the proposed rule and increase its consistency with the intent of the Health Insurance Portability and Accountability Act's (HIPAA) administrative simplification provisions.

In reviewing the proposed regulation and developing recommendations, AHIMA proceeded from three baseline requirements:

1. Consistency with clinical health information management practices and AHIMA's principles
2. Protecting the confidentiality of the health information
3. Remaining consistent with the intent of HIPAA's administrative simplification standards that call for improving the "efficiency and effectiveness of the health care system"

The comments detail the Association's areas of support and concern, including:

- Extend rules to all health information, not just electronic
- Electronic standards may act as a disincentive to develop electronic records
- Support for minimum necessary use and disclosure
- Support of "de-identification" of health information
- All health information should be treated equally

AHIMA also reemphasized the need for federal legislation that preempts state laws and regulations, creating a single national standard for maintaining the confidentiality of all health information.

A copy of AHIMA's comments to the HHS can be obtained on AHIMA's Web site. The comments contain a complete and detailed explanation for each of AHIMA's recommendations. HHS is expected to receive a plethora of comments on the proposed rule. The final rule is not expected until sometime later in the year. The promulgation of the other HIPAA administrative simplification final rules is expected to commence in March.

The final rule for transactions and coding is expected first. The final rules for security and the national provider identifier will be published shortly thereafter. The electronic signature provisions have been separated from the expected security final rule and will be published independently. The electronic signature final rule is likely to be published several months following the security final rule. The claims attachments final rule is slated for September, and the final rule for the national health plan identifier is scheduled for May 2001.

AHIMA will continue to closely monitor HIPAA developments and make you aware of any content or scheduling changes. We will also actively pursue those legislative issues pending in Congress that have the potential to affect health information management. The full text of AHIMA's comments to HHS follow.

AHIMA's recommendations for HHS

Applicability

AHIMA recommends that the scope of the rule be extended to include all individually identifiable health information, including purely paper records, maintained by covered entities. AHIMA will support legislation to expand the scope of this regulation.

160.103 and 160.504 Definitions

Healthcare operations: AHIMA recommends that the words "risk reduction activities" be added to the definition of "healthcare operations" under subpart 1 or 5.

Individual: Disclosures pursuant to power of attorney. AHIMA requests further clarification on "the person informally designated as the patient's healthcare decision maker."

AHIMA recommends amending the definition of psychotherapy notes to ensure their appropriate inclusion in the medical record. AHIMA recommends that the definition recognize a distinction between psychotherapy notes and the case notations maintained by the therapist.

164.506 Introduction to General Rules

AHIMA recommends treating all health information equally, regardless of its type.

164.506(b) Minimum Necessary Use and Disclosure

AHIMA supports the concept of "minimum necessary use and disclosure." However, AHIMA urges HHS to establish a "good faith" standard for covered entities who disclose the information with a statement that prohibits the use of the information for other than the stated purpose and requires destruction of the information after the stated need has been fulfilled. AHIMA further recommends that covered entities be deemed in compliance with the "minimum necessary use and disclosure" standard with regard to internal uses and disclosures if their computer-based patient record (CPR) systems use the appropriate safeguard mechanisms and meet the forthcoming security requirements.

164.506(c) Right of an Individual to Request Restrictions on Uses and Disclosures

AHIMA recommends deleting the proposed standard "Right of an individual to request restriction on uses and disclosures."

164.506(d) Creation of De-Identified Information

AHIMA supports this concept but requests further guidance on removing identifiable information that is contained in the body of the medical record. Additionally, AHIMA recommends that the receiver of the de-identified information be required to sign an agreement not to re-identify or link the information to the individual(s) to whom it pertains. AHIMA believes that the proposed rule should make it a violation to attempt to re-identify or link the previously de-identified information to the individual(s) to whom it pertains.

164.506(f) Deceased Persons

AHIMA recommends that the privacy standards for deceased persons be the same as those for living persons.

164.508 Individual Authorization

AHIMA recommends that authorizations be required to specify an expiration date not to exceed one year. AHIMA also recommends that the use of "prospective" authorizations (authorizations signed

prior to the treatment episode from which the information is requested) be prohibited. In all cases, AHIMA recommends that it be a violation of the rule if the information is redisclosed beyond what was authorized by the patient or the patient's legal representative.

164.510(f) Law Enforcement

AHIMA recommends that, except in the cases described in Section 164.510(f)(2), Limited information for identifying purposes, a warrant, subpoena, or court order be required for the release of protected health information.

164.512 Rights and Procedures for a Written Notice of Information Practices

AHIMA supports the requirement that any entity maintaining healthcare information must prepare and make available to patients upon request a written statement outlining its information practices and posting the notice in a clear and conspicuous manner. AHIMA does not support the idea of obtaining a signed acknowledgement from the individual upon the receipt of a notice of information practices.

164.514 Access for Inspection or Copying

AHIMA supports the reasonable, cost-based fee standard for copying health information pursuant to this section. In addition, AHIMA recommends that a covered entity be permitted to charge a reasonable, cost-based fee for inspection of the record and be able to establish the procedures for the review process.

164.515 Accounting of Disclosures

AHIMA does not support the proposed requirement that covered entities maintain an accounting of disclosures for as long as the entity maintains the protected health information. AHIMA recommends that the accounting of disclosures of records be maintained for a period of six years.

164.516 Rights and Procedures for Amendment and Correction

AHIMA supports the proposed requirement that covered plans and providers be required to accommodate requests for amendment or correction for as long as the entity maintains the protected health information.

164.518(a) Designation of a Privacy Official

AHIMA supports the proposal that covered entities designate a privacy official. AHIMA strongly recommends that the privacy official be a credentialed health information management professional.

164.518(b) Training

AHIMA supports the concept of requiring recertification once every three years and retraining in the event of material changes in the policy.

Relationship to State Laws

AHIMA continues to support federal preemptive legislation as a necessary ultimate solution. While recognizing the limitations of the HIPAA statute with respect to state laws and regulations, AHIMA recommends that federal efforts must preempt state laws and regulations to create a single national standard for handling health information. AHIMA will continue to pursue health information confidentiality legislation that preempts state laws and regulations, treats all health information equally, and establishes a strong, single, national standard for the use and disclosure of health information.

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