

Release of Information for Marketing or Fund-raising Purposes (2002 update)

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Editor's Note: The following information replaces information contained in the Web version of the May 2001 "[Release of Information for Marketing and Fund-raising Purposes](#)" Practice Brief in the May 2001 Journal of AHIMA and on AHIMA's Web site at www.ahima.org.

Requests for individually identifiable patient health information for use in marketing and fund raising are not uncommon. Within a healthcare organization, patient information might be used to identify potential benefactors or those interested in one of the facility's new services. Externally, medical, surgical, and pharmaceutical companies want information to identify potential customers. Yet, healthcare consumers want protection from unwanted marketing solicitations. Organizations must establish clear policies and procedures that address the use of individually identifiable patient health information for marketing and fund raising.

Standards for Use and Disclosure of Protected Health Information for Marketing

The HIPAA standards for privacy of individually identifiable health information require covered entities (health plans, healthcare clearinghouses, and healthcare providers that transmit certain transactions electronically) to adhere to certain standards relative to the use and disclosure of individually identifiable health information for marketing and fund-raising purposes. Briefly, the standards state that the amended privacy rule under 164.508 requires that an authorization be obtained for activities that meet the definition of marketing. The amended rule defines marketing as "to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service." The new definition includes the selling of protected health information by a covered entity to another company or provider for the marketing of that company's products and services.

The amended privacy rule also clarifies that nothing in the marketing provisions of the privacy rule is to be construed as amending, modifying, or changing any other federal or state statutes or regulations, such as anti-kickback, fraud and abuse, or self-referral statutes or regulations.

Although the amended rule requires an authorization for uses or disclosures of protected health information (PHI) for marketing communications, it exempts two types of marketing activities. They are:

- face to face communication between the individual and the covered entity
- when the marketing communication involves a promotional gift of nominal value

Communications that are specifically excluded in the definition of marketing are:

- Communications that describe the covered entity's health-related products or services (or payment for such products or services) provided by or included in a plan of benefits of the covered entity making the communication (i.e., brochures)
- Communications that describe the health plan or participating providers in a network. Communications that inform health plan enrollees of participating physicians and hospitals are not considered marketing
- For treatment of the individual, such as recommending a medication. In addition, prescription refill or appointment reminders are not considered marketing under the amended privacy rule
- Case management or care coordination for the individual or directions or recommendations for alternative treatments, therapies, healthcare providers, or settings of care to the individual

Marketing activities that do not use PHI to target market a specific group of individuals are not subject to HIPAA. Mass mailings and communications, such as newsletters that do not use PHI to identify the recipients of the mailing, would not fall under the HIPAA regulations.

State Law

Individual states may also have laws or regulations relative to the use of patient health information for marketing or fund raising. As the HIPAA standards for privacy will preempt state law (except where state law is more stringent than HIPAA or provides individuals with greater control over their PHI), health organizations may find it necessary to consult legal counsel when developing their own policies and procedures.

Standards for the Use and Disclosure of Protected Health Information for Fund Raising

Section 164.514(f) of the HIPAA amended final rule does not require an authorization from the individual if the fund-raising activity is for the covered entity and the only PHI used or disclosed is demographic information and dates of service.

Non-profit organization fund-raising activities that use PHI to target individuals for awareness, research, or other disease-related efforts require an authorization. The final rule allows a covered entity to use or disclose PHI to a business associate without an authorization to identify individuals for fund raising for its own benefit.

The organization's notice of privacy practice must include a description about the use or disclosure of individually identifiable health information for fund raising, including information on how to opt out of future fund-raising mailings.

Recommendations

- **Become knowledgeable about the standards** and any other federal and state laws and regulations for your facility's population that address the use of individually identifiable patient health information for marketing or fund-raising purposes.
- **Draft policies and procedures** to address handling requests for individually identifiable patient health information for marketing or fund-raising purposes. One possible approach would be to enlist the expertise of the appropriate oversight committee or to identify a committee responsible for approving or rejecting requests.
- **Ask legal counsel** to review draft policies and procedures.
- **Establish a system** wherein patients who sign authorizations to allow for the use and disclosure of their PHI for targeted marketing can be identified and tracked.
- In the organization's notice of privacy practices, **include a description about the use or disclosure of individually identifiable health information for marketing or fund raising** that requires the patient's specific written authorization. Include definitions of communications that are specifically excluded from the definition of marketing.
- **Educate staff** about the issues, policies, and procedures related to health information for marketing and fund raising.
- **Monitor adherence** to policies and procedures and implement corrective action where indicated.

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Acknowledgments

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References

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