Take Another Look: Proposed Changes to Privacy Rule

Save to myBoK

by Dan Rode, MBA, FHFMA

In late March, the Department of Health and Human Services (HHS) released proposed changes related to the HIPAA privacy standards. By the time you read this column, the 30-day comment period for these regulations will have already passed, although debate on these changes will still be in full swing.

AHIMA posted a copy of the March 27, 2002, notice of proposed rule-making (NPRM) published in the *Federal Register* to the AHIMA Community of Practice at www.ahima.org. Comments made by AHIMA to the secretary of HHS are posted at www.ahima.org under "HIM Resources—Policy and Government Relations." This article offers an explanation of the proposed changes.

Consent

The "consent" sections of the rule and the changes suggested in the NPRM have caused the greatest debate since the release of the proposed changes. Essentially, HHS is proposing to eliminate the mandate for a consent form to be signed and used in favor of a "stronger" privacy notice provision and an optional use of the consent form requirements previously posted. This recommendation has raised discussion between those suggesting there is an implied consent and those who feel there must be a signed document. It is important to be aware of the reference in the NPRM that highlights the fact that state law would already supersede the privacy rule in cases where it is viewed as being "more stringent."

Prior to the new NPRM, most entities were not viewing the consent process from a state perspective. Those with applicable state law that is more stringent already have marching orders with regard to this provision. However, the problem is that there will again be a hodge-podge of consent rules to follow across state lines, should the secretary's proposal be placed in the final rule.

Parental Rights Regarding Disclosure

Much has also been made about the area of parental rights with regard to access or disclosure of personal health information of minors. It appears in our first reading that HHS was trying to take the middle road and again bow to state law wherever possible. Whether the wording used will stand up to the legal test is currently unknown, but either way, the providers and HIM professionals will be placed in situations where the rights of minors and parents will have to be considered from a state law (or lack of law) perspective. HHS has said that when there is doubt, the entity has to make a choice. This is not a new situation, but certainly one that needs the HIM professional's attention as the April 14, 2003, compliance date approaches.

Marketing

Marketing was another widely covered issue in the press, and it is unclear whether HHS' attempts to define marketing in the context of rendering medical treatment will end this discussion. Again the department has tried to change the privacy rule through the NPRM by applying a one-size-fits-all approach. Whether this will work remains to be seen.

Minimum Necessary

The minimum necessary standard was a hot topic in the months after the original final rule. It does not seem that most of the concerns raised by HIM professionals appeared in the rule. Essentially, the NPRM guidance says you don't have to make structural modifications and curtail appropriate conversations if personal health information is inadvertently heard or seen.

For now, it appears that HHS has decided to leave the exchange of health data between covered entities in the form of payment or operations for the entities to work out. In other words, HIM professionals will still have to decide what is minimally

necessary when information is released other than in those situations where HIPAA or state law is explicit regarding what must be released. Data requested or required of healthcare providers by plans continues to be an issue and may have to be addressed more from a standards perspective than from a minimum necessary definition.

The use of de-identified information, the use of authorizations for research, and some other research-related provisions have also been strongly contested, especially by consumer groups and teaching and research facilities. For the most part, the new NPRM does not finish the debate; rather HHS continues the discussion with a call for more information.

While You Are Waiting

Should you hold up on implementation? The answer is no. Certainly, continue general education concerning the privacy rule. While there may not be time to finish all the organization's policies, procedures, or notices or to establish a final design for consent or authorization forms, there is a lot left to do.

Clearly, the job of determining preemption situations and more stringent requirements remains, perhaps with a need to ensure that consent and parental rights are fully understood. Controlling the release of information is still an issue even if HHS has not resolved just what is involved in minimum necessary between entities in non-treatment situations.

Review the NPRM to get an idea of the parts of the privacy rule that may or may not change. HHS has indicated that it wants to issue a final rule on these recommendations by October 13, 2002. Until there is a final rule covering the issues in the March 27 NPRM, nothing is final, except that which is already contained in the December 28, 2000, privacy rule.

Update on the Transaction and Code Set Extension

By now, your organization should have looked at the model compliance plan form for the HIPAA transaction and code sets. The Centers for Medicare and Medicaid Services (CMS) have posted a PDF version of the form at www.cms.gov/hipaa. CMS has also announced that its HIPAA Web site will contain a way to submit an application for an extension electronically (the preferred method) with a confirmation number automatically returned. CMS will also accept paper submissions. Once your form has been accepted, the extension will automatically be approved.

CMS will also publish rules for completing the form. These rules will clarify who must submit a form and under what circumstances. They will also attempt to define some of the forms requirements from the legislation that provided for the extension. Forms must be received by CMS no later than October 16, 2002.

CMS has also indicated that due to the extension, it will be accepting Medicare transactions under both the HIPAA required format and current formats. This dual acceptance will occur to accommodate the extension, but will be terminated October 16, 2003. It is not known how many other health plans will provide this same service. CMS is testing its HIPAA compliance mechanisms and transactions this summer and expects to be fully prepared for HIPAA in October 2002.

Remember, the extension for the implementation of HIPAA transactions and code set standards does not apply to the privacy rule.

HIPAA Funding and Healthcare Infrastructure

Work continues on our advocacy efforts to push Congress to fund HHS' efforts for HIPAA with some of the $44 million noted in the HIPAA extension legislation but not appropriated by Congress. The Bush administration has also proposed some $96 million in similar HIPAA funding for fiscal year 2003. Unfortunately, there are more needs for healthcare funds than there are available funds.

We expect a lengthy and heated debate this spring and summer over a variety of healthcare programs. Because the president has indicated that healthcare expenditures should be budget neutral, each healthcare sector that wins Congressional approval for an increase (or no decrease) will result in another sector losing funds. HIPAA funding could get lost in these discussions, so it is important to address them early as part of the HHS operating budget.

The concept of a national healthcare information infrastructure has been discussed in this column before. The National Committee on Vital and Health Statistics has now posted a report on this subject on its Web site

(http://ncvhs.hhs.gov/nhiilayo.pdf). The document provides a clear explanation of many of the issues that AHIMA has highlighted for years. There is a lot to be determined before the April 2003 deadlines. Make sure you are staying current with the changes.

Dan Rode *(dan.rode@ahima.org) is AHIMA's vice president of policy and government relations.*

Article citation:
Rode, Dan. "Take Another Look: Proposed Changes to Privacy Rule." *Journal of AHIMA* 73, no.5 (2002): 14,16.