
SUBJECT: MARKETING

GENERAL STANDARD (PRIVACY RULE SECTION 164.508(a)(3)):

In most situations, AHS health care providers and health plans are required to obtain an authorization from an individual before using or disclosing PHI to make a marketing communication to such individual. However, there are very significant exceptions to the Privacy Rule definition of “marketing”, as noted below.

PRIVACY RULE:

I. Definition of Marketing

A. Marketing means:

1. to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service, unless the communication is made:
 - a. To describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the CE making the communication, including communications about: the entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits;
 - b. For treatment of the individual; or
 - c. For case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.
2. An arrangement between a CE and any other entity whereby the CE discloses PHI to the other entity, in exchange for direct or indirect remuneration, for the other entity or its affiliate to make a communication about its own product or service that encourages recipients of the communication to purchase or use that product or service.

II. Uses and Disclosures of PHI for Marketing

- A. A CE must obtain an authorization for any use or disclosure of PHI for marketing, except if the communication is in the form of:
 - 1. A face-to-face communication made by a CE to an individual; or
 - 2. A promotional gift of nominal value provided by the CE.
 - B. If the marketing involves direct or indirect remuneration to the CE from a third party, the authorization must state that such remuneration is involved.
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GUIDELINES:

- 1. AHS has assessed its practices and determined that its health care providers and health plans do not engage in activities that would meet the HIPAA Privacy Rule definition of marketing.
- 2. AHS health care providers and health plans will occasionally provide the public with information about the services and benefits they provide. For example, the Department of Prevention, Assistance, Transition and Health Access (“PATH”) disclosed beneficiary lists to a Business Associate providing disease management services, to assist PATH in its population based activities relating to improving health or reducing health care costs (more specifically, the Business Associate used the lists to notify the beneficiaries (and their providers) about the disease management services, which are paid for by PATH. PATH was not engaging in marketing in this context, because the communication of the beneficiary list was about the health related services offered by PATH.

By way of further example, the Vermont Department of Health (“VDH”) issues the following publications (among many others):

- A. *This Is A Call For All Smokers* – a brochure notifying smokers of free personal counseling, information and local resources to assist them in taking the steps necessary to quit smoking;
- B. *Child Development Clinic* – a brochure notifying persons of services available through the VDH clinic;
- C. *Something To Smile About* – a brochure notifying persons of dental services that may be covered by Medicaid and Dr. Dynasaur;
- D. *Welcome To Dr. Dynasaur and Medicaid* – a letter sent to individuals advising them of routine health and dental visits covered by these programs; and

- E. *Sudden Infant Death Syndrome – We Can Help* – a brochure advising persons of services available to confront the consequences of SIDS.

In each of these situations, VDH is not engaging in marketing because it is merely advising persons of services available through VDH.

3. In addition, the Department of Health and Human Services has noted that (in response to a comment included in the August, 2002 preamble to the Privacy Rule):

Comment: Some commenters asked whether they could communicate with beneficiaries about government programs or government-sponsored programs such as information about SCHIP; eligibility for Medicare/Medigap (e.g., eligibility for limited, six-month open enrollment period for Medicare supplemental benefits).

Response: The Department clarifies that communications about government and government-sponsored programs do not fall within the definition of “marketing.” There is no commercial component to communications about benefits available through public programs. Therefore, a covered entity is permitted to use and disclose protected health information to communicate about eligibility for Medicare supplemental benefits, or SCHIP. As in our response above, these communications may reflect population-based activities to improve health or reduce health care costs as set forth in the definition of “health care operations” at Sec. 164.501.

Certainly, this response would lead one to believe that AHS does not engage in “marketing” when it directly notifies the public of benefits available through government-funded programs (e.g., Medicaid).

4. AHS does not knowingly sell, share or otherwise disclose any PHI to a third party, for that party’s own marketing efforts. In addition, AHS will not engage in such activities in the future, absent review and approval of a specific marketing proposal by the Assistant Attorney General or other counsel providing services to the Department, Division or Office at issue. Any approval, if given, would by necessity include use of a properly completed authorization form.
5. Each AHS health care provider and health plan has been informed that any activity that would arguably satisfy the definition of HIPAA Privacy Rule marketing will require review and approval from the Assistant Attorney General or other counsel providing services to the Department, Division or Office at issue.