

Questions or Assistance?

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OCR Proposes Significant Revisions to HIPAA Rules on Accounting of Disclosures

In a Notice of Proposed Rulemaking issued May 31, 2011 (the “Proposed Rule”), the U.S. Department of Health and Human Services Office for Civil Rights (“OCR”) proposes to revise and expand the HIPAA Privacy Rule’s accounting of disclosures requirement. The Proposed Rule is not final and does not change current law or regulations, unless and until a final rule is issued. Covered entities, business associates and other interested parties can submit comments on the Proposed Rule to OCR no later than August 1, 2011. A copy of the Proposed Rule is available [here](#).

I. Accounting of Disclosures.

Under the Proposed Rule, an individual may request a written accounting of certain disclosures of PHI made by a covered entity or its business associates during the 3 previous years, as opposed to 6 years currently. The Proposed Rule would reduce the accounting requirement to apply only to the following disclosures: (a) impermissible disclosures, unless the individual has received notice of the impermissible disclosure; (b) disclosures for public health activities, except reports of child abuse or neglect and other reports that are required by law; (c) disclosures for judicial and administrative proceedings; (d) disclosures for law enforcement purposes; (e) disclosures to avert serious threats to health or safety; (f) disclosures for military and veterans activities, for the Department of State’s medical suitability determinations, and to government programs providing public benefits; and (g) disclosures for workers’ compensation purposes.

The Proposed Rule also provides that the following information must be included in each accounting: (a) the date or, if not known, the approximate date or period of time of the disclosure; (b) the name of the entity or person who received the information and, if known, the address of the entity or person; (c) a brief description of the type of information disclosed; and (d) a brief description of the disclosure’s purpose. The Proposed Rule would require that the covered entity provide the accounting in the form (e.g., paper or electronic) and format (e.g., compatibility with a specific software application) requested by the individual, if it is readily producible in the form and format the individual requests. The Proposed Rule would also decrease the permissible response time from 60 days to 30 days, with an option for a 30-day extension in “rare cases.”

II. Access Reports.

The Proposed Rule would give individuals a new right to obtain an access report that identifies who has accessed the individual’s electronic PHI maintained in a designated record set (including, but not limited to, an electronic health record) maintained by a covered entity or its business associate during the 3 previous years. OCR foresees the access report as being derived from access logs maintained pursuant to the HIPAA Security Rule.

An access report would contain the following information: (a) the date of access; (b) the time of access; (c) the name of the person who accessed the information (or, if unavailable, the name of the entity that accessed the information); (d) a description of what information was accessed, if available; and (e) a description of action by the user, if available (i.e. “create,”



“access,” or “delete”). The access report would need to include every instance any user accessed the individual’s PHI in an electronic designated record set, regardless of whether the user is a third party or an employee of the entity and regardless of the purpose for which the user accessed the PHI. The access report would be required to be produced within 30 days following the individual’s request, though the covered entity may extend the time by 30 days, if necessary. As is currently the rule for accountings of disclosures, OCR proposes that the covered entity may not charge for providing the first access report to an individual in any 12-month period, but may charge a reasonable, cost-based amount for each additional access report that is requested within the same 12-month period.

The Proposed Rule would also require that covered entities update and post or distribute their notices of privacy practices to reflect the changed rules, particularly to describe the right to request and receive access reports.

III. Comparison.

Though complementary, accountings of disclosures and access reports would be separate and distinct individual rights. The following is a brief comparison of some of their major attributes.

Issue	Accounting of Disclosures	Access Report
Form of PHI	Electronic or hard copy PHI in a designated record set	Electronic PHI in a designated record set
Scope	Disclosures	Uses and Disclosures
Purpose of Use/Disclosure	Only applies to the disclosures set forth in the Proposed Rule	Applies to all uses and disclosures, regardless of purpose
Use/Disclosure for Treatment, Payment or Health Care Operations?	No	Yes
Time Period	3 previous years	3 previous years

IV. Looking Ahead.

The Proposed Rule would require compliance with the revised requirements for accountings of disclosures within 240 days following the final rule’s publication date. OCR has acknowledged that certain older electronic systems may not readily support compliance with the access report requirements and proposes that those covered entities and business associates with systems acquired after January 1, 2009 would be required to comply with the access report rules beginning January 1, 2013. Those with systems acquired on or prior to January 1, 2009, would be required to comply beginning January 1, 2014.

V. Concluding Comments.

Covered entities and business associates should be aware of their potential future obligations as they consider their HIPAA compliance programs and should consider providing comments to OCR.

If you have any further questions regarding the Proposed Rule or HIPAA compliance generally, please feel free to contact any member of our Health Law Practice Group.

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