FREQUENTLY ASKED QUESTIONS:
THE HIPAA PRIVACY REGULATIONS
(for Domestic Violence Service Agencies)

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Implementation of the HIPAA Privacy Regulation ("Privacy Regulation") has resulted in numerous questions by domestic violence service agencies, including whether or not agencies are covered under the Privacy Regulation and whether a business associate agreement, if requested by a hospital or other provider, is necessary or appropriate. There is no single answer to these questions. The following is to assist you in evaluating these questions for your organization. Each organization should make a determination and draw its own conclusions based on the following.

As a practical matter, the Family Violence Prevention Fund does not interpret the Privacy Regulation as requiring every domestic violence agency to enter into business associate agreement with covered entities. Business associate agreements are not required where the agency is a covered entity or where the agency independently obtains an authorization to use protected health information.

I. Are you covered by the Privacy Regulation?

For most Domestic Violence Service Agencies ("DVSA"), the answer to this question depends on several factors. Under the Privacy Regulation, covered entities include

- **Health plans**—payers or insurers of health care.
- **Health care clearinghouses**—includes entities who engage in activities such as billing services, repricing, community health information system, and "value-added" networks who receive or process health information.
- **Health care providers**—only providers of health or medical services who transmit information in electronic forum in connection with certain insurance-related transactions are subject to the regulation.

Most DVSAs that are covered will likely provide medical or health care services and be subject to the Privacy Regulation, if at all, as covered health care providers.

<u>Question No. 1</u>: Are You A Health Care Provider?

To determine whether your organization is a covered health care provider, consider whether your organization renders medical or health care services.

> *Health care* means care, services, supplies related to the health of an individual. Health care includes, but is not limited to, the following:
> (1) Preventative, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
> (2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.
> 45 C.F.R. Section 160.103.

If your organization does not provide any of these services, it is not covered. If, after reviewing this definition, you are still unsure, consider whether your organization provides any of the services defined in 42 U.S.C. 1395x(u) or 42 U.S.C. 1395x(s). See http://ssa.gov/OP_Home/ssact/title18/1861.htm for a complete list. A few examples of these services include:

- Physicians' services
- Services commonly furnished by physician offices
- Hospital services incident to physicians' services rendered to outpatients
- Various diagnostic services provided by a hospital
- Outpatient physical therapy
- Rural health clinic services and federally qualified health center services
- Qualified psychologist services
- Clinical social worker services

If your organization provides health care or medical services, you should proceed to Question No. 2.

Question No. 2: Do You Furnish or Provide, Bill For, or Receive Payment for Health Care Services in the Normal Course of Business?

In addition to providing health care services, a covered entity must furnish or provide, bill for, or receive health care services in the normal course of business. If you answer "no" to this question, your organization is not a covered entity. If you answer "yes", you should proceed to Question No. 3.

Question No. 3: Do You Conduct Electronic "Standard Transactions"

What Is A Standard Transaction?

If you answered "yes" to Question No. 2, it is likely that you engage in standard transactions. As a practical matter, standard transactions are *insurance related transactions*

such as a request to obtain payment for health care, or if there is no direct claim for payment (because the reimbursement contract is based on a mechanism other than charges or reimbursement rates for specific services), transmitting information for purposes of reporting health care would be considered the "transaction". Each organization should evaluate its payment structure to assess whether it conducts standard transactions.

What Is Electronic?

If your organization conducts any standard transactions electronically, you are covered. Electronic media include: Direct Data Entry, Internet-enabled transmission, diskettes, tapes, CDs, and electronic data interchange. If your organization conducts these transactions in a form other than in electronic format, such as paper, fax machine using paper (rather than faxing from a computer), telephone (voice), or automated voice response system, it is not covered.

II. Are you required to sign a business associate contract?

A "business associate" is an entity who conducts an activity involving the use and disclosure of protected health information *on behalf of* a covered entity. Business associates typically engage in claims processing or administration; data analysis, processing or administration; utilization review; quality assurance; billing; benefit management; and practice management. Business associates can include those who provide legal, actuarial, accounting, consulting, or financial services.

The Privacy Regulation requires that a covered entity obtain satisfactory assurances (i.e. contract or other written agreement) that a business associate will appropriately safeguard the protected health information received or created on behalf of the covered entity.

Covered entities are not required to have business associate contracts with providers to whom they disclose information for treatment of an individual. Although not required, a covered entity can request that the provider sign a business associate agreement.

The following are examples of when a business associate contract is not required:

- A hospital is not required to have a business associate contract with the specialist to whom it refers a patient and transmits the patient's chart for treatment purposes
- A physician is not required to have a business associate contract with a laboratory as a condition of disclosing protected health information for the treatment of the individual
- A hospital laboratory is not required to have a business associate contract to disclose protected health information to a reference laboratory for treatment of the individual

Questio **a covered entity?**

By definition, a business associate must receive protected health information from a covered entity. If your organization does not receive protected health information from a covered entity or you obtain an authorization for release of information directly from the patient, the Privacy Regulation does not require a business associate contract.

> Practical Tip
> If your organization currently obtains protected health information from a hospital, you may be required to enter a business associate contract. If, however, you or the hospital request that that patient sign an authorization for release of this information to your DVSA, a business associate contract is not required.

Question No. 2: Are you acting "on behalf of" a covered entity?

Although covered entities such as hospitals and other health care providers may refer victims to DVSAs for follow up treatment and counseling, in most cases, the DVSAs do not act "on behalf of" the covered entity. Whether an organization acts "on behalf of" another entity will likely depend on organizational structure. For example, a DVSA who receives referrals from a hospital or health care provider to perform follow up services, without a contract or other special relationship, is not likely be acting on behalf of the hospital.

For additional information, the Privacy Regulation is located at: http://www.hhs.gov/ocr/hipaa/finalreg.html, and the Department of Health and Human Services Guidelines for the Privacy Regulation are located at http://www.hhs.gov/ocr/hipaa/privacy.html.

The Family Violence Prevention Fund has also produced a "Summary of New Federal Medical Privacy Protections for victims of DV" and "Sample Business Agreement" (available mid June, 2003). If you have further questions about this issue, you can contact us at www.endabuse.org.

Rodney Hudson, JD, an associate at Drinker Biddle & Reath in San Francisco, California will be available to answer questions about the law and guidelines. From 1999-2001 he worked in the Federal Legislation Clinic at Georgetown Law Center and assisted the Family Violence Prevention Fund in developing recommendations to the administration on the inclusion of protections for victims of domestic violence in the Privacy Regulations, and has continued to help analyze the issue and draft the documents listed above.