

HIPAA'S DECONSTRUCTION OF THE STANDARD MEDICAL RECORDS RELEASE FOUND IN LIFE & HEALTH INSURANCE APPLICATIONS

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The privacy regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") significantly impact the format and structure of the traditional form of medical information releases long used by life and health insurance companies prior to HIPAA (the "Traditional Medical Records Release"). For many insurers, these releases are not truly free-standing forms, but rather are a part of the insurance application forms filed with and approved by state insurance departments. The changes to the medical information release provisions of insurance applications resulting from HIPAA may require some reengineering of these applications and of how insurers obtain authorizations for the release of individually identifiable health information protected under HIPAA ("PHI") about insurance applicants.

I. Traditional Medical Records Releases

A typical Traditional Medical Records Release addresses two (2) basic matters: (1) the insurance applicant's authorization of a variety of health care providers and the Medical Information Bureau ("MIB") to release to the insurer and its reinsurers medical information about the applicant and (2) notice to the insurance applicant that the insurer may (a) obtain an investigative consumer report about the applicant as required under the Fair Credit Reporting Act (the "FCRA Notice") and (b) disclose information obtained by the insurer to MIB (the "MIB Notice"). Usually, a Traditional Medical Records Release has a stated duration of 2 and 1/2 years. The HIPAA privacy regulations contain specific provisions regarding the form and substance of authorizations for the use and disclosure of PHI and therefore have an impact on how these two basic matters are addressed in the Traditional Medical Records Release.

A Traditional Medical Records Release reads as follows:

ABC Life Insurance Company: Executive Offices 1107 Isle Royal Bay, Roselle, Illinois 60172

I hereby authorize any licensed physician, medical practitioner, hospital, clinic or other medically related facility, Veteran's Administration or government facility, insurance company, the Medical Information Bureau or other organization, institution or person having any records or knowledge about me to provide to ABC Life Insurance Company, and its reinsurers any such medical or personal information, and to testify as to such information, all to the extent permitted by law. As part of the Company's regular underwriting procedure, an investigative consumer report may be obtained which will contain personal information concerning an individual's character, habits, general reputation, personal characteristics and mode of living, except as may be related directly or indirectly to your sexual orientation. This information may be obtained through personal interviews with my neighbors, friends, associates and acquaintances. Medical information includes the diagnosis, treatment and prognosis with respect to any physical or mental condition, as well as the use of drugs or alcohol. Although the Company maintains confidentiality of information obtained, the Company may disclose information to the MIB, and in certain circumstances be required by a law enforcement or government agency to furnish information to others without my prior authorization. In the event that a report is obtained, I understand that I may request to be interviewed in connection with the preparation of the report. Upon written request to the Company at the address listed above, further detailed information on the nature and scope of the report will be provided. I understand that the information obtained by use of this Application will be to determine eligibility for insurance. I know that I or my legal representative may request to receive a copy of this Authorization. A photographic copy of this Authorization shall be as valid as the original and will be valid for two and one half (2-1/2) years from the date this Application was signed. Because our affiliates may be able to offer other valuable products

and services that you may need, ABC Life Insurance Company may share (unless you check the box(es) below) information we have received in connection with your application, including information from any consumer reports. Check the following boxes if you do not want information shared with our affiliates.

Proposed primary insured Proposed spouse insured, if any.

II. MIB's Position Under HIPAA Privacy Regulations

MIB has stated that it is not subject to the HIPAA privacy regulations because it is neither a "covered entity" nor a "business associate" as those terms are defined under HIPAA.¹ It is clear that MIB is not a covered entity under HIPAA; however, whether MIB is a business associate of its member insurance companies that are also covered entities under HIPAA ("CE Members") is not so obvious. The third article of MIB's Certificate of Incorporation draws into question MIB's position that it is not a business associate of its CE Members. This article essentially provides that MIB will collect information, some of which is likely PHI, and provide its members with access to this information to aid in underwriting decisions and to help prevent the perpetration of fraud.²

Under HIPAA, a business associate is a person that creates, collects, uses or discloses PHI for, or on behalf of, a HIPAA covered entity.³ A covered entity may disclose PHI to a business associate and allow it to create or receive PHI on behalf of the covered entity, as long as the covered entity obtains satisfactory assurance in the form of a written contract (a business associate agreement or "BAA") that the business associate will appropriately safeguard the PHI⁴ and agree to adhere to certain of the HIPAA privacy regulations imposed upon the covered entity.⁵ A business associate can only collect, use or disclose PHI on behalf of a covered entity as provided in its BAA with such covered entity.

If MIB is characterized as a business associate of its CE Members, then those members would be able to disclose the PHI they collect to MIB under BAAs without obtaining authorizations from the individuals who are the subject of the PHI. A discussion of which MIB members are CE members and which are not is beyond the scope of this paper. The important point here is that CE Members are directly covered by HIPAA, whereas non-CE Members are not subject to HIPAA. The obvious detriment to MIB in being a business associate of each of its CE Members is that, unless specifically authorized in the applicable BAA to perform "data aggregation services," as described below, MIB would not be able to share PHI contributed to MIB by one CE Member with any other member insurer, the *raison d'être* of MIB, without first receiving HIPAA authorizations from each individual whose is the subject of the PHI to permit such sharing of PHI.

A business associate under HIPAA includes, among others, persons that provide, other than in the capacity of a member of the workforce of a covered entity, "data aggregation" services to or for the covered entity, where the provision of the service involves the disclosure of PHI from the covered entity to such person. The HIPAA privacy regulations specifically address the concept of "data aggregation" services performed for covered entities.

Data aggregation means, with respect to protected health information created or received by a business associate in its capacity as the business associate of a covered entity, the combining of such protected health information by the business associate with the protected health information received by the business associate in its capacity as a business associate of another covered entity, to permit data analyses that relate to the health care operations of the respective covered entities.⁶

Because data aggregation services are defined by reference to a business associate, MIB's position that it is not a business associate of its CE Members provides a convenient basis for the proposition that MIB is not engaged in data aggregation services as contemplated by the HIPAA privacy regulations. Nevertheless, the core services of MIB are without question the accumulation and sharing of data, including PHI. So long as it is provided in the applicable BAA, the HIPAA privacy regulations allow for a business associate providing data aggregation services to different covered entities to combine and use the PHI of such covered entities to assist with their respective health care operations.⁷

Interestingly, the privacy rules under the Gramm-Leach Bliley Act (“GLBA”) produce an anomalous result here. Under the Privacy of Consumer Financial and Health Information Model Regulation promulgated by the National Association of Insurance Commissioners (“NAIC”), insurers may disclose non-public health information about an individual without the consent or authorization from such individual for, among other purposes, fraud detection and prevention.⁸

III. Basic Rules for HIPAA Authorizations

To understand how a member insurer’s relationship with MIB affects the authorizations for use and disclosure of PHI which such member must obtain from insureds, it is necessary to examine how HIPAA regulates authorizations for the use and disclosure of PHI. Generally, other than as permitted under certain exceptions not relevant for the present analysis, a covered entity may not use or disclose PHI without a valid authorization in the form prescribed by the HIPAA privacy regulations.⁹ When a covered entity obtains or receives such an authorization, the covered entity’s use or disclosure of the PHI must be consistent with the authorization.¹⁰ It is important to note that not all of MIB’s member insurers are CE Members; however, the HIPAA authorization rules affect all of MIB’s members in some fashion because the entities from whom they seek to obtain PHI in connection with an insurance application (i.e., attending physicians and other health care providers) are in most cases HIPAA covered entities subject to the authorization rules. Obviously, MIB members that are CE Members are themselves covered by the HIPAA authorization rules.

A. Exceptions for Uses and Disclosures of PHI for Payment, Treatment and Health Care Operations

The HIPAA privacy rules contain certain exceptions to the general requirement to obtain an individual’s authorization to use or disclose PHI. Among the exceptions, other than uses and disclosures of psychotherapy notes and uses and disclosures for marketing purposes for which a HIPAA authorization must be obtained,¹¹ a covered entity may use or disclose PHI without a specific authorization in certain circumstances for treatment,¹² payment¹³ or health care operations (“TPO”).¹⁴ These exceptions are generally intended to cover certain common and essential health care communications. None of the circumstances allowing for use or disclosure of PHI for TPO appear to cover the relationship between MIB and its member insurers.¹⁵

B. Special Rule for Psychotherapy Notes

The HIPAA privacy rules provide for special treatment of psychotherapy notes given their highly sensitive nature. Under the HIPAA privacy rules, “Psychotherapy notes” means notes recorded in any medium by a health care provider who is a mental health professional documenting or analyzing the contents of an individual’s conversation during a private counseling session or a group, joint or family counseling session that are separated from the rest of the individual’s medical record.¹⁶ However, psychotherapy notes exclude medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests and any summary of diagnosis, functional status, treatment plan, symptoms, prognosis and progress to date.¹⁷ Notwithstanding any of the exceptions to the general rule requiring a HIPAA authorization for a covered entity’s use and disclosure of PHI, a covered entity must obtain an authorization for *any* use or disclosure of psychotherapy notes, except under certain limited situations, none of which apply to the situation involving MIB and its member insurers:

C. Restrictions on Compound Authorizations

A HIPAA authorization may not be combined with any other document to create a compound authorization except in three situations.¹⁸ First, a HIPAA authorization for the use and disclosure of PHI for a research study may be combined with any other type of written permission for the same research study.¹⁹ Second, a HIPAA authorization for the use and disclosure of psychotherapy notes may only be combined with another HIPAA authorization for a use or disclosure of psychotherapy notes.²⁰ Third, a HIPAA authorization, other than a HIPAA authorization for the use or disclosure of psychotherapy notes, may be combined with any other HIPAA authorization except when a covered entity has conditioned the provision of treatment, payment, enrollment in a health plan or eligibility for benefits on the provision of the authorization.²¹ The HIPAA restrictions on compound

authorizations would necessarily affect authorizations sought to be obtained by member insurers for disclosures to MIB.

III. Revised Authorizations for Member Insurers

As a result of the HIPAA privacy regulations, MIB's member insurers, even member insurers that are not CE Members, must revise their Traditional Medical Records Releases. The necessary revisions are not the same for non-CE Members insurers and CE members.

A. Non-CE Members.

A non-CE Member that collects all forms of PHI, including psychotherapy notes, about prospective insureds must obtain two (2) types of HIPAA authorizations:

1. A general (non-psychotherapy notes) HIPAA authorization for health care providers to provide PHI to the insurer; and

2. A specific HIPAA authorization for only psychotherapy notes for health care providers to provide psychotherapy notes to the insurer.

B. CE Members.

A CE Member that collects all forms of PHI, including psychotherapy notes, about prospective insureds and is a member of MIB, must obtain four (4) types of HIPAA authorizations; the two previously mentioned for non-CE Members, as well as:

1. A general (non-psychotherapy notes) HIPAA authorization for the CE Member's disclosure of PHI, other than psychotherapy notes, to MIB; and

2. A specific HIPAA authorization for only psychotherapy notes for the CE Member's disclosure of psychotherapy notes to MIB.

Even though a non-CE Member shares PHI about insurance applicants with MIB, it does not have to procure separate authorizations from the applicants for this type of sharing because the non-CE Member is not a covered entity subject to the HIPAA privacy regulations. This disclosure also is generally permitted without the applicant's consent or authorization for GLBA purposes under the NAIC's Privacy of Consumer Financial and Health Information Regulation, which, as mentioned above, allows such disclosure for fraud prevention and underwriting purposes.²²

IV. Filing of Revised Insurance Application Forms

The pressing practical question for MIB member insurers is whether they must, or should, file revised forms of their insurance applications for approval by state insurance departments to address the changes resulting from the impact of HIPAA on authorizations for the disclosure to and by insurers of PHI pertaining to insurance applicants.

- One approach, which avoids the regulatory refiling of insurance application forms is simply to leave the existing forms alone, have applicants sign the Traditional Medical Records Release contained in the application and supplement the application with HIPAA compliant authorizations, relying on the Traditional Medical Records Release only for purposes of the FCRA Notice and MIB Notice provisions. One potential risk of this approach is that a state insurance regulator could assert that the continued use of the ineffective, non-HIPAA compliant provisions of the Traditional Medical Records Release is misleading and an unfair trade practice.

- The other approach is to revise the insurance application forms, stripping out the portions pertaining to the authorizations of health care providers to disclose PHI to the insurer, and file the revised application forms with the state insurance departments for approval.

Now that the HIPAA privacy regulations are in full swing, MIB member insurers must promptly address their forms and processes of obtaining authorizations from insurance applicants for the release of PHI to, and subsequent disclosure by, the insurers.

¹ Heidi K. Abegg, MIB White Paper Health Insurance Portability and Accountability Act (HIPAA) Compliance (Sept. 2002) (article on file with author).

² Certificate of Incorporation of MIB Group, Inc., filed September 9, 1999.

³ 45 C.F.R. §160.103.

⁴ 45 C.F.R. §164.502 (e)(1).

⁵ 45 C.F.R. §164.502 (e)(2) and 45 C.F.R. §164.504 (e).

⁶ 45 C.F.R. §164.501 (emphasis added).

⁷ 45 C.F.R. § 164.504 (e)(2)(i)(B).

⁸ Privacy of Consumer Financial and Health Information Regulation, § 17 B, National Association of Insurance Commissioners.

⁹ 45 C.F.R. §164.508 (a)(1).

¹⁰ *Id.*

¹¹ 45 C.F.R. §164.506(a).

¹² *See* 45 C.F.R. §164.501 (defining the term treatment).

¹³ *See Id.* (describing what constitutes payment).

¹⁴ *See Id.* (describing what constitutes health care operations).

¹⁵ 45 C.F.R. §164.506(c)(5).

¹⁶ 45 C.F.R. §164.501.

¹⁷ *Id.*

¹⁸ 45 C.F.R. §164.508(b)(3).

¹⁹ 45 C.F.R. §164.508 (b)(3)(i).

²⁰ 45 C.F.R. §164.508 (b)(3)(ii).

²¹ 45 C.F.R. §164.508 (b)(3)(iii).

²² NAIC Privacy of Consumer Financial and Health Information Regulation, §18 B.