



July 28, 2011

The Honorable Kathleen Sebelius, Secretary  
U.S. Department of Health and Human Services (HHS)  
Office for Civil Rights  
Hubert H. Humphrey Building, Room 509F  
200 Independence Avenue, SW  
Washington, DC 20201

Attention: Comments to RIN 0991-AB62; HIPAA Privacy Rule Accounting of Disclosures

Dear Secretary Sebelius:

The National Association of Dental Plans (NADP) is responding to the notice of proposed rulemaking by HHS posted on May 31, 2011 in the Federal Register, Vol. 76, No. 104 [45 CFR Part 164], titled "HIPAA Privacy Rule Accounting of Disclosures under the Health Information Technology for Economic and Clinical Health Act." Following are NADP's concerns regarding the proposed regulations specific to the dental benefits industry.

**Issue 1: Changing of EHR Designation**

- *Removal of the TPO Exception:* Under HITECH Act Section 13405(c), HHS was given authority to regulate information collected through the electronic health record. An electronic health record is defined as "an electronic record of health-related information that is created, gathered, managed and consulted by authorized health care clinicians and staff." The regulations on page 31436 expanded HIPAA oversight from the original electronic health record (EHR) to "all electronic protected health information about an individual in any designated record set." Therefore health plans, which do not have EHRs will have to include in a request for an accounting of disclosures, all the disclosures for treatment, payment and health care operations (TPO) as part of the designated record set. While dental plans have this information available, in order to be fully compliant with the proposed mandates it will require system changes that will be extremely costly for dental plans. Further, dental plans are not part of the funding grants established under HITECH to encourage the use of EHRs, thereby assisting in defraying significant expenses. In addition, the information under TPO is always available to consumers through their explanation of benefits (EOB), customer service and the claims adjudications process (i.e., from submission of claim up to and including any applicable appeal process). This new requirement should be eliminated or exempt separate dental policies.

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## Issue 2: Changes to the Access Logs and Reports

- *Accounting of Disclosures:* On page 31436, HHS “believes individuals are interested in learning who accessed their information without regard to whether the access is internal or by a person outside the covered entity and its business associate.” While HHS received various responses from consumer groups with their thoughts on what consumers would like to have access to, dental plans have rarely seen any interest from their enrollees. Since the enactment of HIPAA Privacy in 2002, one national company had 10 requests during the last 10 years, another has had 6 requests since 2003 and none in the past 5 years, while an additional national dental carrier has not had any requests since 2003. Expanding the scope of the mandates beyond EHR as originally intended will be a massive strain on the IT systems of the entities mandated to provide EHR. This proposed requirement needs to be reevaluated since very few individuals have actually exercised this right and the IT enhancements will likely be cost prohibitive for many of dental plans.
- *Employee’s Personal Names:* On page 31438, HHS proposes to “require that covered entities include in the access report the name of the natural person who is accessing the information.” Personal information pertaining to Plan employees should not be included in an access report, but rather the title/position of the employee accessing the information. Providing personal information infringes on plan employee privacy and may even subject personnel to danger. This is not a risk any employee of a dental plan, or any company, should be required to take as part of their employment. Instead, Plans should report only specific information about the department or type of employee who accessed the information (i.e. a customer service representative or claims processor).
- *Material Notices:* The regulations on page 31441 state that covered entities will be required to revise their notice of privacy practices to meet the proposed mandates and this change will constitute a material change to the notice. NADP requests flexibility with this specific provision due to substantial cost consideration. To defray costs, allow for efficiency and to keep pace with today’s consumer’s use of technology, a plan should be permitted to provide the revised notice to enrollees during various times and by different venues or methods. For example, plans should be able to provide the revised notice with other material change notices, as an electronic notice, with other materials being provided to enrollees, during reissuance of enrollment, a statement on a plan’s website or through other less-costly measures. The costs to mail privacy notices to plan enrollees are significantly higher than estimated in the regulations. The cost of printing, mailing, and including other state language assistance mandated notices (e.g., California language assistance program requirement) will add to expenses.
- *Electronic Formats:* The regulations on page 31435 request plans to respond to individuals “with the accounting in the form and format requested by the individual... and expect that individuals will prefer an electronic copy.” Many dental plans do not have email addresses for their enrollees. In some instances, interactions and exchanges occur mostly with the employer, not individual enrollees. While some plans do utilize email accounts for communications with their enrollees, it is not an industry standard. U.S. Mail and other formats should continue to be at a plan’s discretion, not the enrollee’s.

## Issue 3: Timeframes

- *Changing Plans’ Response Time to Individuals:* On page 31435 HHS has proposed “Decreasing the permissible response time from 60 days to 30 days” for the accounting of disclosures report as well as the access log for enrollees. NADP requests the original 60 days not be changed as accounting requests

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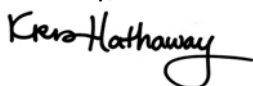
by enrollees are rare, and most requests are generally handled manually by dental plans. Due to the fact that the proposed regulations would now encompass disclosures and uses by both the covered entity and its business associates, shortening the timeframe will be overly burdensome and makes compliance unattainable. In addition, the proposed regulations will require an amendment to business associate agreements to effectuate compliance under these provisions.

- *Compliance Deadlines:* HHS proposes different deadline dates for compliance or with the Accounting of Disclosure (page 31429 - 240 days after publication) requirement, and the right to Access Reports (page 31429 – the year 2013 and 2014 depending on data acquired.) As stated earlier, the proposed rule will require plans to make significant system changes, amend business associate contracts, redistribute its notice of privacy practices, modify internal policies and business practices and provide considerable staff training, all of which will result in significant cost that will likely be passed onto consumers. Additionally, our plans will need to make considerable changes to operations and systems in anticipation of and compliance with the Affordable Care Act (ACA) in order to participate in specific markets as well as adhering to state by state requirements necessary to the upcoming Exchange market. Due to the considerable impacts of the proposed rule in relation to the benefit to consumers and the need for plans to focus on health care reform, re-evaluating and perhaps postponing the proposed regulations until 2015 or beyond seems more appropriate.

All areas of the market, including covered entities and purchasers of insurance, are impacted by the costs of complying with added regulation. As dental plans need to comply with the same regulations as medical plans, but with premiums that are 10% of medical premiums, allowing dental plans opportunities to comply in a less costly manner will be of benefit to employers, consumers, and plans alike.

NADP greatly appreciates the opportunity to share our views and is available to answer any of your questions. Please feel free to contact me directly at 972.458.6998x111 or khathaway@nadp.org.

Sincerely,



Kris Hathaway  
Director of Government Relations

NADP is the largest non-profit trade association focused exclusively on the dental benefits industry, i.e. dental HMOs, dental PPOs, discount dental plans and dental indemnity products. NADP's members provide dental benefits to more than 80% of the 166 million Americans with dental benefits. Our members include major commercial carriers, regional and single state companies, as well as companies organized as non-profit plans.

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