

HIPAA Privacy WorkGroups™

The innovative approach to self-implementation

December Double WorkGroups Sessions

**Authorizations “Opt-Out” Uses
and Related Issues and Disclosures**

**“Opt-Out” Uses
and Disclosures**

Lafayette, Louisiana – December 10, 2001
Baton Rouge, Louisiana – December 12, 2001
Monroe, Louisiana – December 14, 2001

§ 164.510 Uses and disclosures requiring an opportunity for the individual to agree or to object**§ 164.510 Uses and disclosures requiring an opportunity for the individual to agree or to object.**

A covered entity may use or disclose protected health information without the written consent or authorization of the individual as described by §§ 164.506¹⁵ and 164.508¹⁶, respectively, provided that the individual is informed in advance of the use or disclosure and has the opportunity¹⁷ to agree to or prohibit or restrict the disclosure in accordance with the applicable requirements of this section. The covered entity may orally inform the individual of and obtain the individual's oral agreement or objection to a use or disclosure permitted by this section.

(a) Standard: use and disclosure for facility directories.

(1) Permitted uses and disclosure. Except when an objection is expressed in accordance with paragraphs (a)(2) or (3) of this section, a covered health care provider may:

(i) Use the following protected health information to maintain a directory of individuals in its facility:

(A) The individual's name;

(B) The individual's location in the covered health care provider's facility;

(C) The individual's condition described in general terms that does not communicate specific medical information about the individual¹⁸; and

(D) The individual's religious affiliation; and

(ii) Disclose for directory purposes such information:

(A) To members of the clergy¹⁹; or

¹⁵ Consent for uses or disclosures to carry out treatment, payment or health care operations. See Rules, page 82810.

¹⁶ Uses and disclosures for which an authorization is required. See Rules, page 82811.

¹⁷ Described in the Preamble as a "meaningful opportunity for the individual to prevent or restrict the disclosure." Preamble, page 82521

¹⁸ "[E].g., fair, critical, stable, etc." Preamble, page 82521

¹⁹ "A disclosure of directory information may be made to members of the clergy even if they do not inquire about an individual by name." Preamble, page 82522.

[[Page 82813]]

[left column]

(B) Except for religious affiliation, to other persons who ask for the individual by name.

(2) Opportunity to object.¹ A covered health care provider must inform an individual of the protected health information that it may include in a directory and the persons to whom it may disclose such information (including disclosures to clergy of information regarding religious affiliation) and provide the individual with the opportunity to restrict or prohibit some or all of the uses or disclosures² permitted by paragraph (a)(1) of this section.

(3) Emergency circumstances.

(i) If the opportunity to object to uses or disclosures required by paragraph (a)(2) of this section cannot practicably be provided because of the individual's incapacity or an emergency treatment circumstance, a covered health care provider may use or disclose some or all of the protected health information permitted by paragraph (a)(1) of this section for the facility's directory, if such disclosure is:

(A) Consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider; and

(B) In the individual's best interest as determined by the covered health care provider, in the exercise of professional judgment³.

(ii) The covered health care provider must inform the individual and provide an opportunity to object to uses or disclosures for directory purposes as required by paragraph (a)(2) of this section when it becomes practicable to do so.

(b) Standard: uses and disclosures for involvement in the individual's care and notification purposes.

(1) Permitted uses and disclosures.

(i) A covered entity may, in accordance with paragraphs (b)(2) or (3) of this section, disclose to a family member, other relative, or a close personal friend of the individual⁴, or any other person

¹ "The facility's notice and the individual's opt-out or restriction may be oral." Preamble, page 82521.

² "A patient must be allowed, for example, to have his or her name and condition included in the directory while not having his or her religious affiliation included." Preamble, page 82521.

³ "... several factors that we encouraged covered entities to take into account when making decisions about whether to include an incapacitated patient's information in the directory. These factors included: (1) whether disclosing that an individual is in the facility could reasonably cause harm or danger to the individual (e.g., if it appeared that an unconscious patient had been abused and disclosing the information could give the attacker sufficient information to seek out the person and repeat the abuse); (2) whether disclosing a patient's location within a facility implicitly would give information about the patient's condition (e.g., whether a patient's room number revealed that he or she was in a psychiatric ward); (3) whether it was necessary or appropriate to give information about patient status to family or friends (e.g., if giving information to a family member about an unconscious patient could help a physician administer appropriate medications); and (4) whether an individual had, prior to becoming incapacitated, expressed a preference not to be included in the directory." Preamble, page 82521.

⁴ "Such persons involved in care and other contact persons might include, for example: blood relatives; spouses; roommates; boyfriends and girlfriends; domestic partners; neighbors; and colleagues. Inclusion of this list is intended to be illustrative only, and it is not intended to change current practices with respect to: (1) involvement of

identified by the individual⁵, the protected health information directly relevant to such person's involvement with the individual's care or payment related to the individual's health care.

(ii) A covered entity may use or disclose protected health information to notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death. Any such use or disclosure of protected health information for such notification purposes must be in accordance with

[middle column]

paragraphs (b)(2), (3), or (4) of this section, as applicable.

(2) Uses and disclosures with the individual present. If the individual is present for, or otherwise available prior to, a use or disclosure permitted by paragraph (b)(1) of this section and has the capacity to make health care decisions, the covered entity may use or disclose the protected health information if it:

(i) Obtains the individual's agreement;

(ii) Provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or

(iii) Reasonably infers from the circumstances, based the exercise of professional judgment⁶, that the individual does not object to the disclosure.

(3) Limited uses and disclosures when the individual is not present.⁷ If the individual is not present for, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. A covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information.

other persons in individuals' treatment decisions; (2) informal information-sharing among individuals involved in a person's care; or (3) sharing of protected health information to contact persons during a disaster." Preamble, page 82522.

⁵ "In § 164.510(b) we do not require verification of identity for persons assisting in an individual's care or for notification purposes." Preamble, page 82547.

⁶ "Situations in which covered providers may infer an individual's agreement to disclose protected health information pursuant to option (3) include, for example, when a patient brings a spouse into the doctor's office when treatment is being discussed, and when a colleague or friend has brought the individual to the emergency room for treatment." Preamble, page 82523.

⁷ "A pharmacist may use professional judgment and experience with common practice to make reasonable inferences of the patient's best interest in allowing a person, other than the patient, to pick up a prescription (see § 164.510(b)). For example, the fact that a relative or friend arrives at a pharmacy and asks to pick up a specific prescription for an individual effectively verifies that he or she is involved in the individual's care, and the rule allows the pharmacist to give the filled prescription to the relative or friend. The individual does not need to provide the pharmacist with the names of such persons in advance." *HHS Guidance on Privacy Rules*, July 6, 2001, § TA 164.506.001

(4) Use and disclosures for disaster relief purposes. A covered entity may use or disclose protected health information to a public or private entity authorized by law or by its charter to assist in disaster relief efforts, for the purpose of coordinating with such entities the uses or disclosures permitted by paragraph (b)(1)(ii) of this section. The requirements in paragraphs (b)(2) and (3) of this section apply to such uses and disclosure to the extent that the covered entity, in the exercise of professional judgment, determines that the requirements do not interfere with the ability to respond to the emergency circumstances.