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# Program Memorandum Intermediaries/Carriers

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Department of Health &  
Human Services (DHHS)  
Centers for Medicare &  
Medicaid Services (CMS)

Transmittal AB-03-078

Date: MAY 23, 2003

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## CHANGE REQUEST 2712

**SUBJECT: Medicare Fee-for-Service (FFS) Contractor Guidance on the HIPAA Privacy Rule Business Associate Provisions**

This Program Memorandum (PM) provides guidance for the Medicare FFS contractors, including Program Safeguard Contractors, regarding the business associate provisions of the Health Insurance Portability and Accountability Act (HIPAA) Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”).

Medicare FFS contractors that perform health care activities involving the use of protected health information on behalf of the Medicare FFS health plan (i.e., claims processing functions) are business associates of the Medicare FFS health plan (the covered entity). By definition, a business associate is a person or entity that performs or assists in the performance of a function or activity involving the use or disclosure of individually identifiable health information on behalf of a covered entity (45 CFR §164.103).

Medicare contractors that perform health care activities involving the use of protected health information on behalf of the Medicare FFS health plan are not business associates of providers, physicians, suppliers or other health plans. Likewise, providers, physicians, suppliers, or other health plans are not business associates of the Medicare contractor, unless the provider, physician, supplier or other health plan is doing work on behalf of the Medicare contractor. For these reasons, Medicare FFS contractors should not sign business associate agreements with any provider, physician, supplier, or other plan unless the provider, physician, supplier, or other health plan is doing work on your behalf.

Questions have been raised about whether there is a business associate relationship between Medicare contractors and the trading partners that receive crossover claims data from you. Currently, you execute trading partner agreements (TPAs) with a host of payers, including Medigap insurers, Medicare supplemental/employee retiree health plans, multiple employer welfare trusts, as well as state Medicaid Agencies, for the purpose of exchanging adjudicated Medicare claims for secondary liability determination by those partners. This exchange of data is commonly referred to as the “claims crossover process.” For coordination of benefits (COB) purposes, Medicare contractors and trading partners are not business associates since neither entity is doing work on the other’s behalf; therefore, the Medicare FFS contractors should not sign business associate agreements with supplemental insurers (trading partners). Further, the Standard TPA for eligibility file-based COB, which CMS will soon be issuing, is not a business associate agreement.

Business associate provisions developed by CMS in accordance with Privacy Rule sample language, including instructions for ensuring the compliance of your subcontractors, will be added to your existing contracts shortly in accordance with 45 CFR §164.504(e)(2)(ii)(D). You must incorporate this language into your subcontracts, either on the next contract modification cycle or by April 14, 2004, whichever is the earlier date.

This information must be shared with providers through your Web site within two weeks of receiving this PM, and published in your next regularly scheduled bulletin. In addition, if you have a list-serv that targets the affected provider communities, use it to notify subscribers that important information about the HIPAA Privacy Rule business associate provisions is available on your Web site.

**The *effective date* for this PM is April 14, 2003.**

**The *implementation date* for this PM is May 31, 2003.**

**These instructions should be implemented within your current operating budget.**

**This PM may be discarded after May 31, 2004.**

**If you have any questions, contact Robin Getzendanner at [rgetzendanner@cms.hhs.gov](mailto:rgetzendanner@cms.hhs.gov) or call 410-786-9621.**