INCIDENTAL USES AND DISCLOSURES

[*45 CFR 164.502(a)(1)(iii)*]

Background

Many customary health care communications and practices play an important or even essential role in ensuring that individuals receive prompt and effective health care. Due to the nature of these communications and practices, as well as the various environments in which individuals receive health care or other services from covered entities, the potential exists for an individual's health information to be disclosed incidentally. For example, a hospital visitor may overhear a provider's confidential conversation with another provider or a patient, or may glimpse a patient's information on a sign-in sheet or nursing station whiteboard. The HIPAA Privacy Rule is not intended to impede these customary and essential communications and practices and, thus, does not require that all risk of incidental use or disclosure be eliminated to satisfy its standards. Rather, the Privacy Rule permits certain incidental uses and disclosures of protected health information to occur when the covered entity has in place reasonable safeguards and minimum necessary policies and procedures to protect an individual's privacy.

How the Rule Works

General Provision. The Privacy Rule permits certain incidental uses and disclosures that occur as a by-product of another permissible or required use or disclosure, as long as the covered entity has applied *reasonable safeguards* and implemented the *minimum necessary standard*, where applicable, with respect to the primary use or disclosure. See 45 CFR 164.502(a)(1)(iii). An incidental use or disclosure is a secondary use or disclosure that cannot reasonably be prevented, is limited in nature, and that occurs as a result of another use or disclosure that is permitted by the Rule. However, an incidental use or disclosure is not permitted if it is a by-product of an underlying use or disclosure which violates the Privacy Rule.

Reasonable Safeguards. A covered entity must have in place appropriate administrative, technical, and physical safeguards that protect against uses and disclosures not permitted by the Privacy Rule, as well as that limit incidental uses or disclosures. See 45 CFR 164.530(c). It is not expected that a covered entity's safeguards guarantee the privacy of protected health information from any and all potential risks. Reasonable safeguards will vary from covered entity to covered entity depending on factors, such as the size of the covered entity and the nature of its business. In implementing reasonable safeguards, covered entities should analyze their own needs and circumstances, such as the nature of the protected health information it holds, and assess the potential risks to patients' privacy. Covered entities should also take into account the potential effects on patient care and may consider other issues, such as the financial and

administrative burden of implementing particular safeguards.

Many health care providers and professionals have long made it a practice to ensure reasonable safeguards for individuals' health information – for instance:

- By speaking quietly when discussing a patient's condition with family members in a waiting room or other public area;
- By avoiding using patients' names in public hallways and elevators, and posting signs to remind employees to protect patient confidentiality;
- By isolating or locking file cabinets or records rooms; or
- By providing additional security, such as passwords, on computers maintaining personal information.

Protection of patient confidentiality is an important practice for many health care and health information management professionals; covered entities can build upon those codes of conduct to develop the reasonable safeguards required by the Privacy Rule.

Minimum Necessary. Covered entities also must implement reasonable minimum necessary policies and procedures that limit how much protected health information is used, disclosed, and requested for certain purposes. These minimum necessary policies and procedures also reasonably must limit who within the entity has access to protected health information, and under what conditions, based on job responsibilities and the nature of the business. The minimum necessary standard does not apply to disclosures, including oral disclosures, among health care providers for treatment purposes. For example, a physician is not required to apply the minimum necessary standard when discussing a patient's medical chart information with a specialist at another hospital. See 45 CFR 164.502(b) and 164.514(d), and the fact sheet and frequently asked questions on this web site about the minimum necessary standard, for more information.

An incidental use or disclosure that occurs as a result of a failure to apply reasonable safeguards or the minimum necessary standard, where required, is not permitted under the Privacy Rule.

For example:

- The minimum necessary standard requires that a covered entity limit who within the entity has access to protected health information, based on who needs access

to perform their job duties. If a hospital employee is allowed to have routine, unimpeded access to patients' medical records, where such access is not necessary for the hospital employee to do his job, the hospital is not applying the minimum necessary standard. Therefore, any incidental use or disclosure that results from this practice, such as another worker overhearing the hospital employee's conversation about a patient's condition, would be an unlawful use or disclosure under the Privacy Rule.

Frequently Asked Questions

To see Privacy Rule FAQs, click the desired link below:

FAQs on Incidental Uses and Disclosures

FAQs on ALL Privacy Rule Topics

(You can also go to http://answers.hhs.gov/cgi-bin/hhs.cfg/php/enduser/std_alp.php, then select "Privacy of Health Information/HIPAA" from the Category drop down list and click the Search button.)