

American Psychiatric Association  
1400 K St., NW  
Washington, DC 20005  
Telephone: (202) 682-6046  
Fax: (202) 682-6287  
Email: [ntrenti@psych.org](mailto:ntrenti@psych.org)  
Internet [www.psych.org](http://www.psych.org)

**Testimony of the  
American Psychiatric Association  
on  
Changes to the Medical Privacy Regulation  
Before the  
Health, Education, Labor, And Pensions Committee  
U.S. Senate  
Presented By  
Richard Harding, M.D.  
April 16, 2002**



Mr. Chairman, and members of the Committee, I am Richard Harding, MD, testifying on behalf of the American Psychiatric Association (APA), a medical specialty society, representing more than 40,000 psychiatric physicians nationwide. I serve the APA as its President and am currently Professor of Clinical Psychiatry and Pediatrics at the University of South Carolina School of Medicine. In addition, I serve as Vice-Chairman for Clinical Affairs of the Department of Psychiatry and maintain a busy outpatient practice.

While I also serve on the Subcommittee on Privacy and Confidentiality of the National Committee on Vital and Health Statistics within the Department of Health and Human Services (HHS), the views I am presenting today are my views and the views of the American Psychiatric Association.

First, I would like to thank Chairman Kennedy and the members of the Committee for the opportunity to testify today. My oral comments will be limited to two major concerns: consent and marketing. My written testimony is significantly more expansive as it reflects APA's comments on all of the NPRM privacy regulation changes, that we will formally submit to HHS, and I ask that it be made part of the hearing record.

Mr. Chairman we greatly appreciate your commitment to protecting medical records privacy. Privacy and particularly medical records privacy is an issue that not only affects all Americans but also one that they are deeply concerned about. On behalf of our profession and our patients I thank you for holding this hearing on the recent changes HHS made to the Medical Privacy Regulation.

While the Department of Health and Human Services (HHS) proposed HIPAA privacy regulation changes will reduce the burden on physicians and other healthcare providers, it is important to recognize they are inadequate to protect patients. The APA objects to the proposed elimination of the consent requirement that patients give written consent before their records are disclosed to physicians, hospitals or insurance companies. Under the proposed changes, consent is optional for direct treatment providers. HHS now gives their "regulatory permission" to allow a patient's information to be freely disclosed to health plans, providers, and clearinghouses without the patient's consent. The APA strongly believes patients should be able to choose who will see their medical records. The elimination of the consent requirement is a significant change not only to the historic doctor-patient treatment relationship but also an impediment to physicians' efforts to provide the best possible medical care. The consent requirement gave the physician the opportunity to discuss where their medical information would be released. We need to take steps to ensure that doctor-patient confidentiality is preserved and strengthened.

It is troubling to me as a practicing psychiatrist that a patient, under this rule, does not have consent authority over their medical records even if the patient pays out of pocket for their treatment. The proposed changes to the rule eliminate patient protection in a private payment situation with their provider by allowing information to be released without the patient's consent. For example, celebrities who seek help from a substance abuse center and pay in cash to be anonymous should be allowed to do so without their health information being released. Similarly, Medicare patients who elect to personally pay for treatment should not be at risk from the prying eyes of government.

Under the proposed changes, a privacy notice is substituted for consent. A privacy notice serves as a long and cumbersome notice that the records will be released. This is not privacy nor is it a protection of the patient's information. Furthermore, why must an ill patient have to look in the required privacy notice, which could be ten pages long as stated by the American Hospital Association. Buried within this lengthy notice is where a patient's medical information will be sent. As we have found out last week internet companies are selling a person's postal address and telephone number because the consumer did not notice in the long privacy notice that only e-mail addresses would not be released.

The APA recommends HHS retain the privacy rule's prior consent requirement, with targeted modifications to address the unintended implementation hurdles that result from the consent requirement in a couple of circumstances.

While the HHS proposed changes to the marketing provision appear to require an authorization from a patient before the patient receives marketing materials is well intentioned, the devil is truly in the details. The APA is concerned about the loopholes in the definitions of marketing through the enumerated exclusions from the appearance of protection by the so called marketing definition. There is no real effective privacy protection safety net against commercial usage of private patient information. Under HHS's changes, marketeers can use disease management, wellness programs, prescription refill reminders, case management and other related communications to send their marketing materials. These programs are not considered marketing. The regulations do not clearly restrict these marketing loopholes from abuses. It clearly is not in the best interest of the patient for a drug store to send a prescription refill reminder without the patient's authorization after the pharmacist was compensated by a pharmaceutical company. Recall not to long ago drug stores admitted to making patient prescription information available for use by a direct mail company and pharmaceutical companies. Now a pharmacy not only would be able to legally sell to a pharmaceutical company a list of patients that have been prescribed certain drugs in order to promote alternative drugs, but also the pharmacy could now in its own self financial interest in a medication's more profitable cost to them be suggesting a change in medication refill. The marketing communication would no longer need to identify the covered entity as the one making the communication, or need to state compensation was received.

Moreover, the fund raising provisions despite overwhelming testimony to the NCVHS urging that there be an "opt in" (prior consent) not "opt out" after the fact, using without permission an individual patient's name for the fund raising purposes of the covered entity. Can you imagine sending out millions of letters telling you the names of persons served in your substance abuse treatment program - -without their consent or authorization, and only thereafter, if the fund raiser wishes to do it again, then have to ask for the individual's permission to use her or his name in the fundraising endeavor. Does this sound reasonable to anyone.

I strongly urge the Committee to join us in requesting HHS require a patients consent and their authorization for marketing before their medical information is released under the Health Insurance Portability and Accountability Act (HIPAA). Also, in closing let me just briefly summarize our comments on parental rights to a minor's medical records, to wit: there should be

no changes to these provisions which have the effect of reducing access to health care by adolescent patients.

We thank you for this opportunity to testify, respond to your questions in continuing to work with the Committee on these important issues.