CMS Enforcement of Transaction and Code Set Standards: Will It Hurt Your Cash Flow?

The Department of Health and Human Services (HHS) recently provided insight into how the electronic transactions and code set standards mandated under HIPAA will be enforced (in the form of another in its continuing “Guidance” series). Covered entities are required to comply with the standards by October 16, 2003.

The Centers for Medicare and Medicaid Services (CMS) says it is focusing on voluntary compliance, but as always, the government carries a big enforcement stick, including civil penalties, and, according to some commentators, even possible criminal sanctions for willful disclosure of protected health information. But the real “big stick” in CMS’ enforcement arsenal is its refusal to process paper Medicare claims after October 16, 2003 (with very few exceptions). For most providers, failing to transmit claims electronically in the formats mandated under the standards is likely to have an immediate and negative impact on cash flow and the bottom line.

Covered Transactions

The standards apply to electronic transactions involving the following: (a) health care claims or equivalent encounter information; (b) health care payment and remittance advice; (c) coordination of benefits; (d) health care claim status; (e) enrollment and disenrollment in a health plan; (f) eligibility for a health plan; (g) health plan premium payments; and (h) referral certification and authorization.

Applicability

Health plans are required to support all of the standards regardless of whether they conduct any particular electronic transaction in the normal course of their business. As mentioned above, although the standards do not technically require providers to conduct electronic transactions, as a practical matter, most providers will have little choice. In line with HIPAA’s goal to promote greater efficiency industry-wide, HHS has prohibited most covered entities, except for small providers (those under 10 FTEs or if it’s impossible to do electronic filing) from submitting paper claims to Medicare after the compliance date. With limited exceptions, payment will be conditioned upon electronic submission of HIPAA-compliant claims to CMS.

Enforcement

CMS has been charged with responsibility for enforcing the standards. CMS will focus on voluntary compliance and enforcement will be complaint-driven (necessitated in part by a lack of resources). A covered entity will receive written notification of any complaint filed against it. The covered entity will then have an opportunity to:

(a) demonstrate that it is in compliance with the standards

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How’s Your Billing Compliance?

With the recent interest of CMS in hospital outlier payments, management and board leadership should take steps to ensure that billing compliance plans and appropriate notification procedures are in place for employees to identify weaknesses in the billing system.

All hospitals, ambulatory care centers and physician practices should reacquaint their personnel with the policies and procedures which they worked to create over the last few years. Pepper attorneys can assist you with training; procedural guidelines and compliance plan language to be sure you can demonstrate to investigators that your compliance plan is more than a notebook on the shelf.

If you are unlucky enough to be the subject of an investigation or audit, we can lead your defense team in identifying the key issues to be resolved. For further information, contact your regular Pepper health care attorney or Henry C. Fader, John W. Jones, Jr., Rebekah A.Z. Monson or Barry H. Boise at the numbers listed on page 4 of this Alert.
Every month this newsletter will briefly profile a member of Pepper's Health Care Practice Group. This month we'll profile two—Steven J. Fox and Rachel H. Wilson, the authors of this issue's main article on enforcement of HIPAA's transaction and code set standards.

Have a question about HIPAA? Chances are that Steve Fox and Rachel Wilson know the answer—and have probably already written about it.

Steve and Rachel write a monthly Q&A column on HIPAA compliance for HIPAA­Advisory.com, a website operated by client Phoenix Health Systems. Examples of recent topics include “Use and Disclosure of PHI for Service Evaluation,” “Covered Entities as Employers: How Does HIPAA Apply?” and “How Fundraising and Marketing Fit Into HIPAA Privacy.” (For an archive of past articles, visit www.hipaadvisory.com/action/legalqa/archives.htm.)

Even more HIPAA answers are available in the Guide to Medical Privacy and HIPAA, co­written by Phoenix's D'Arcy Guerin Gue, Steve, Rachel and other Pepper lawyers. The Guide, published by Thompson Publishing, is a 500­page book supplemented by monthly updates and news bulletins. The Journal of the American Medical Association called the Guide “a dynamic tool for anyone from health care administrator to physician to medical records professional.” (For more information, visit www.thompson.com/phoenixhipaadvisory.)

Steve and Rachel also are frequent speakers about HIPAA compliance issues at health care industry conferences and seminars such as the annual Health Information Management Systems Society annual conference. Both are active in many professional organizations, and Rachel was recently named vice chairwoman of the eHealth and Privacy Interest Group of the American Bar Association's Health Law Section.

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(b) document its good faith efforts to comply with the standards and/or

(c) submit a corrective action plan.

As long as the compliance failure is based upon reasonable cause and is not due to willful neglect, HHS is not likely to impose a penalty—assuming the failure is corrected within 30 days or a longer period authorized by CMS.

In addition to civil liability, some commentators have expressed the view that entities that submit noncompliant claims risk criminal sanctions for failure to conduct transactions in the standardized format required by HIPAA. If true, noncompliant entities that knowingly obtain or disclose individually identifiable health information in violation of HIPAA may be subject to criminal penalties of up to $250,000 and/or imprisonment for up to 10 years. However, there is no consensus on this issue, and we believe that imposition of criminal liability for a violation of the electronic transactions and code set standards would require a real stretch of the prosecutorial imagination. (Please note that such noncompliance may violate applicable non-HIPAA laws or regulations, such as the False Claims Act or Medicare fraud and abuse provisions.) The purpose of HIPAA's criminal penalties is to punish people who use or disclose protected health information in a manner designed to subvert or evade HIPAA's stringent privacy requirements. Submitting an improperly coded claim hardly falls into that category, nor does it increase the likelihood of a breach of privacy. Until the courts begin to interpret HIPAA's sometimes arcane provisions, we will have to live with a certain amount of uncertainty.

**Good-Faith Compliance Effort**

CMS understands that any single transaction may involve more than one covered entity. Noncompliance by one entity may negatively impact the compliance efforts of another. For that reason, CMS has indicated its intent, during the period immediately following the compliance date, to look at the good-faith compliance efforts of each of the covered entities that are party to a transaction to determine if there is reasonable cause for the noncompliance.

CMS encourages covered entities to intensify their efforts towards compliance. As it relates to health plans, HHS has suggested that part of this focused initiative should include an assessment of future trading partners in the provider community to determine the need, if any, for contingency plans so that the flow of payments and other information is not interrupted while provider partners continue to work toward compliance. CMS has stated that it will not impose penalties on covered entities that deploy such contingencies if
Pepper in Public
A Roundup of Recent and Upcoming Activities by Pepper Health Care Lawyers

Articles
Pepper lawyers write frequently about issues of interest to the health care community. All the articles below are available on Pepper’s Web site, www.pepperlaw.com:


“Pa. Malpractice Reforms Could Set the Pace for Other States,” by Andrew R. Rogoff and Imiebihoro T. Ahonkhai, Physician Executive, May/June 2003


“Use and Disclosure of PHI for Service Evaluation,” by Steven J. Fox and Rachel H. Wilson, HIPAA Advisory, May 2003 (Steve and Rachel write a monthly Q & A column for HIPAA Advisory, a Web site operated by Pepper client Phoenix Health Systems. For an archive of past columns, visit www.hipaadvisor.com/action/legalqa/archives.htm)

Upcoming Events

“Hedge Funds and Advisers: Life Cycle Issues,” September 17 and October 7, 2003. These are the last two sessions of a five-part series of breakfast briefings by Gregory J. Nowak. All sessions are at the Philadelphia Country Club. For more information or to register, contact Nellie Spencer (215.981.4905; spencern@pepperlaw.com) or visit our Web site.

Recent Events

Barry H. Boise conducted two breakout sessions at the 12th Annual National Expert Witness and Litigation Seminar on June 26-27. His sessions were on “Pleasing the Client: What Attorneys Are Really Looking for From Experts,” and “Acting as an Expert Consultant.”

John W. Jones Jr. spoke about HIPAA privacy and security issues at a seminar in Reading, Pa., on June 25. The event was sponsored by Lorman Education Services.

Feedback Wanted
What health care issues keep you up at night? Drop us a line and let us know, and we’ll write about it in an upcoming issue of Health Care Law Alert. Contact Henry C. Fader at 215.981.4640 or faderh@pepperlaw.com.

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those entities have made reasonable and diligent efforts to become compliant. In making a determination whether such an effort has been made, CMS will place strong emphasis on demonstrable progress.

Focusing on progress might be a source of comfort, except that as noted above, CMS can afford to “speak softly” on enforcement, because in its refusal to process noncompliant Medicaid and Medicare claims after the compliance date, CMS carries a very “big stick” indeed.

So, essentially, the government’s message seems to be “Work hard, do the best you can, and if that doesn’t work, keep trying.” It sounds as if someone at CMS used to be our third grade teacher.

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The material in this publication is based on laws, court decisions, administrative rulings and congressional materials, and should not be construed as legal advice or legal opinions on specific facts.