

**Case Study: HIPAA  
Implementation Tips for Health  
Plans**

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## The 5 Stages of HIPAA

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- ◆ Denial
- ◆ Anger
- ◆ Bargaining
- ◆ Depression
- ◆ Acceptance

# Value Options

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- ◆ HIPAA compliance effort built upon information gathered in Gramm-Leach-Bliley initiative
  - ❖ Gather data once, analyze twice
- ◆ VO Effectively developed resident HIPAA experts in legal department, privacy officer and various departments
- ◆ In an organization as large and complex as VO, many experts are required.

# Covered Entity Analysis

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- ◆ For a complex organization such as VO, it is imperative to perform a covered entity analysis before developing HIPAA policies and procedures.
- ◆ Don't maintain parallel HIPAA compliance efforts for various entities unless absolutely necessary.
- ◆ Use of HIPAA organizational principles can help a health plan simplify and better organize its compliance effort.

# The NPRM - Good News for Plans

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- ◆ Privacy Rule requires providers to obtain consent for uses and disclosures of PHI for TPO.
- ◆ NPRM: Direct treatment providers must exercise best efforts to obtain acknowledgement of Notice of Privacy Practices.
- ◆ Health plans are generally on the sidelines on this issue. They weren't required to obtain consent under Privacy Rule and typically didn't intend to do so.

## The NPRM - - Business Associates

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- ◆ CEs can operate under existing contracts w/o amending to include business associate provisions for up to one year (until April 14, 2004)
- ❖ Transition period is available if the contract is in writing and is not renewed or modified between the effective date of the NPRM and April 14, 2003

# The NPRM - Business Associates

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- ◆ Transition period for BA provisions doesn't mean that it's not prudent to get key contracts into compliance by April 2003.
  
- ◆ Health plan is still required to get cooperation of BAs for:
  - ❖ Disclosures to HHS to determine plan's compliance
  - ❖ Compliance with HIPAA patient rights.
  
- ◆ Is the BA maintaining a designated record set or other records critical to demonstrating plan's HIPAA compliance?

# The NPRM - Business Associates

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- ◆ Even if BA transition period is available, is it reasonable for a plan to fail to obtain basic privacy and security representations from a key vendor?
  - ❖ ASP example
  - ❖ At some point, a health plan is not meeting its essential obligations to safeguard PHI under HIPAA if it is subcontracting away critical functions without obtaining BA representations.



# The NPRM - Business Associates

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- ◆ Which health plan contracts may be amended to include BA provisions during the transition period?
  - ❖ Contracts that are:
    - Less significant to health plan operations
    - Do not involve maintenance of designated record sets
    - Do not involve significant risk of improper use or disclosure of PHI.
    - Possible examples: medical director agreements, arrangements with attorneys, consultants.

# The NPRM - Business Associates

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- ◆ Model BA contract language
  - ❖ For health plans, sticking to the required provisions may not always be enough.
  - ❖ “Optional” provisions that found their way into the NPRM model language:
    - Covered entity obligations (less favorable for plans).
    - Requirement for BA to jointly disclose to covered entity and HHS in the event of request from HHS (good for plans).

# The NPRM - Hybrid Entities

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- ◆ Privacy Rule had defined “hybrid entity” as an entity “primarily” engaged in non-covered functions.
- ◆ NPRM: Hybrid entity is any single legal entity that performs both covered and non-covered functions.
- ◆ Creates welcome flexibility for health plans and insurers.
  - ❖ Example: Health plan with small division offering workers’ comp benefits.

# Business Associate Negotiations

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- ◆ Key negotiation issues:
  - ❖ Audit and inspection rights.
  - ❖ Who is responsible for HIPAA patients rights obligations? (timing, reporting issues, etc.)
    - Who holds the designated record set?
    - Is the designated record set held by multiple parties?
    - For mental health records and other patient data subject to special legal requirements (HIV test results, substance abuse records, etc.), who's in the best position to understand and apply the state legal requirements?
    - Who pays for the cost of managing the designated record set?

# Business Associate Negotiations

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- ◆ More key negotiation issues:
  - ❖ Agreements with subcontractors and agents of the BA.
  - ❖ If BA retains PHI after termination of agreement, do BA indemnification provisions survive if BA engages in improper use or disclosure?

# Business Associates

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- ◆ It's important for health plans to know when a business associate agreement is NOT required:
  - ❖ Health plan jointly administering a government program (Medicare+Choice, Medicaid managed care plans)
  - ❖ Health plan providing benefits to group health plan beneficiaries (unless the health plan is also providing administrative services)
  - ❖ When are contracted plans in an “organized system of healthcare” organized health care arrangement?

# The Problem With Employers

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- ◆ Many employers still aren't aware of HIPAA's group health plan rules.
  - ❖ Contracted health plans often have to educate employers.
- ◆ Some employers understand all too well that, as employers, they are not covered entities.
  - ❖ Attempts to shift HIPAA compliance costs and obligations to contracted plans.

# The Problem With Employers

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- ◆ TCS compliance

- ❖ Enrollment and premium payment transactions are not required to be standard transactions.

- ❖ Employers may, but are not required, to use standard transactions.

- ◆ When standard transactions make business sense but are not required, who pays for data translation?



# Employers as Fiduciaries

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- ◆ When an employer/plan sponsor is also the plan administrator, the employer has a fiduciary duty under ERISA to ensure that the plan complies with applicable laws.
- ◆ Many employers are not yet sensitive to this issue.
- ◆ Some employers are likely to begin conducting due diligence regarding HIPAA compliance status of contracted plans to satisfy fiduciary duties.
  - ❖ Employers may ask TPAs to do this job.

# Transactions and Code Sets

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- ◆ December 27, 2001: President signs Administrative Simplification Compliance Act
  - ❖ Effectively delays compliance date for transaction standards to October 16, 2003
  - ❖ If CE files a compliance plan with HHS before October 16, 2002
- ◆ In our experience, virtually everyone is filing for an extension

# TCS Compliance Plans

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- ◆ Required elements of a compliance plan:
  - ❖ An analysis reflecting the extent of non-compliance and the reason for non-compliance
  - ❖ Budget, schedule and work plan for achieving compliance
  - ❖ Whether a contractor will be used
  - ❖ Time frame for transactions testing must begin no later than April 16, 2003
- ◆ Model form for extension requests was issued by HHS March 28, 2002

# TCS Compliance Plans

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- ◆ Filing TCS extension requests is causing providers to focus on TCS budgeting and implementation issues.
  - ❖ Health plans typically have the TCS standards well in hand.
- ◆ Can (or should) plans require participating providers to use standard transactions pre-compliance date?
- ◆ Plans may be ready for TCS, but is the provider community ready?

## TCS Extension

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- ◆ Is it advisable to file an extension for TCS compliance?
  - ❖ The answer will almost always be “Yes”
  
- ◆ Is a plan truly in compliance with the TCS standards if its trading partners are not using standard transactions by October 2002?
  - ❖ HHS FAQ response 15 (Jan. 2002) indicates plan may be compliant in 2002, even if its trading partners aren't.
  - ❖ Plain language of TCS regulations suggests otherwise.

## TCS Extension

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- ◆ Plans that don't file for extension may incur additional costs to retool when implementation guide addenda are published.
- ◆ No reason why plans can't use standard transactions pre-2003 if it makes business sense.
- ◆ Can't be liable for noncompliance with TCS standards pre-2003 if file extension.

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