

Panel Discussion: Will There Be an  
Industry-Wide Train Wreck on  
October 16, 2003?

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September 15, 2003

9:15 a.m. to 10:30 a.m.



## Introducing Our Panel

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- Wes Rishel, Gartner Healthcare Research
- Kepa Zubeldia, Claredi
- Steven Lazarus, Boundary Information Group
- Lisa Miller, Washington Publishing Company
- Maria Ward, PricewaterhouseCoopers
- Gary Beatty, EC Integrity
- Richard Marks, Davis Wright Tremaine, LLP



## Audience Representation

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1. Provider
2. Health Plan
3. Clearinghouse
4. Business Associate
5. Government, not covered entity
6. Other



## What Do You Think Will Happen October 16, 2003?

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1. Train wreck – there will be industry-wide cash flow problems
2. A few derailments, some (10%) will have noticeable cash flow problems
3. Very minor, short-term issues
4. No perceived change in cash flow through a multi-month transition
5. No opinion



## The July 24, 2003 Transactions Guidance

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1. Provides no help
2. Provides some flexibility that will help
3. Avoids the cash flow and operational problems projected for October 16, 2003
4. No opinion



# HIPAA Readiness Gartner Survey August 2003

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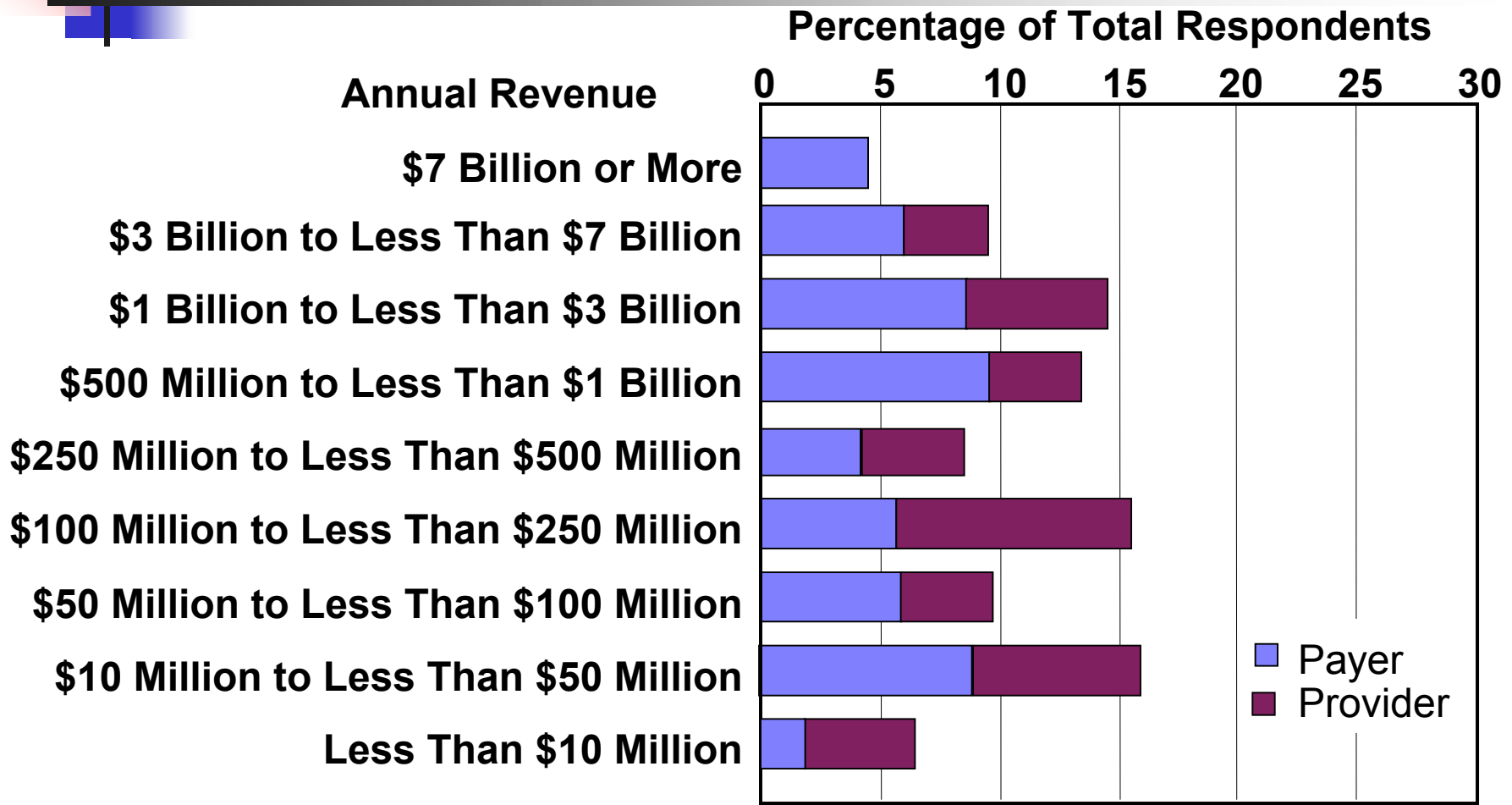
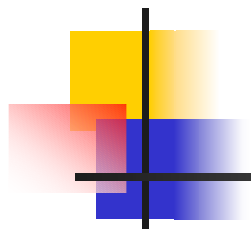
Wes Rishel

Gartner

(510) 522-8135

[Wes.rishel@gartner.com](mailto:Wes.rishel@gartner.com)

# Gartner August 2003 Survey HIPAA TCS Compliance





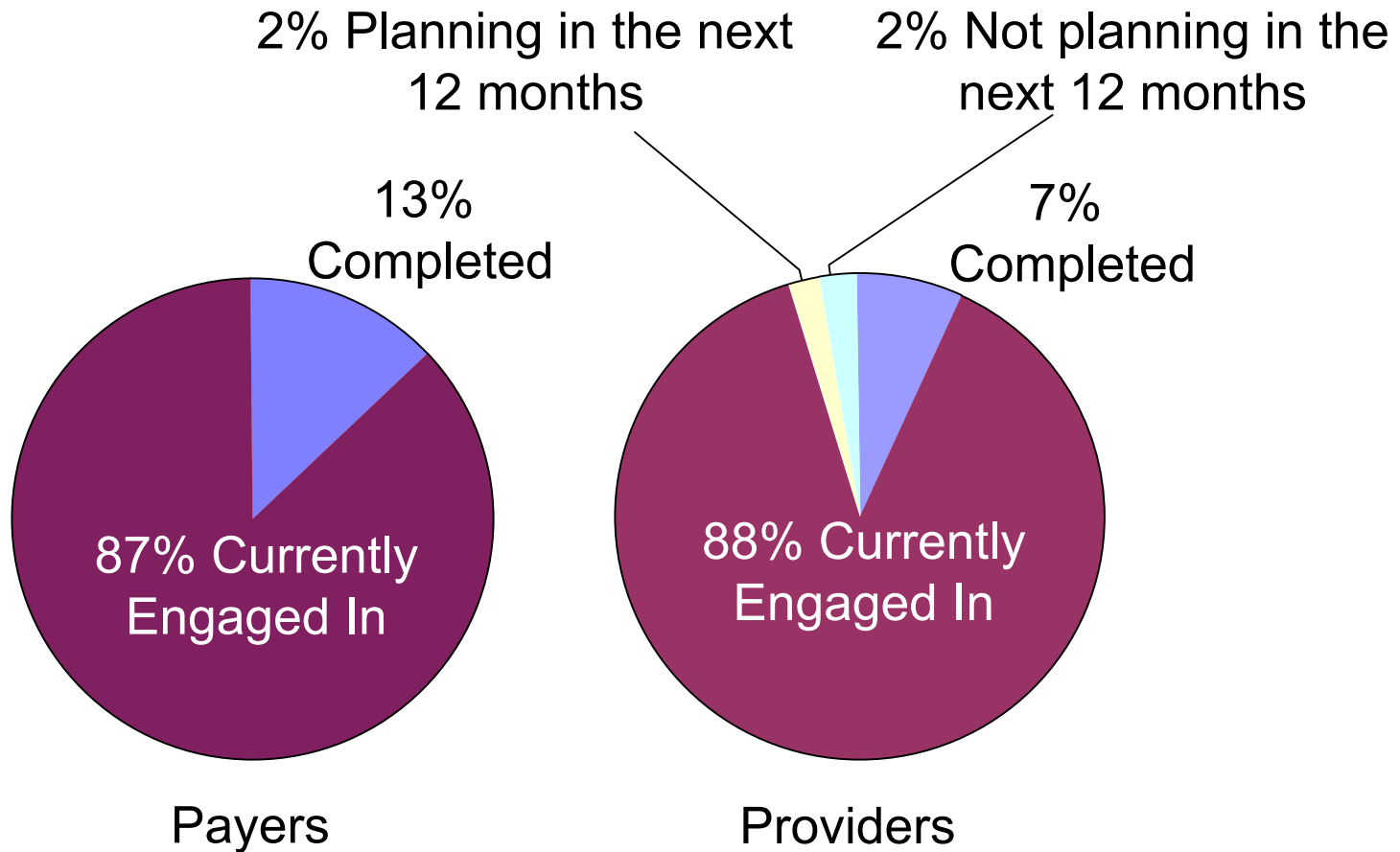
## Methodology

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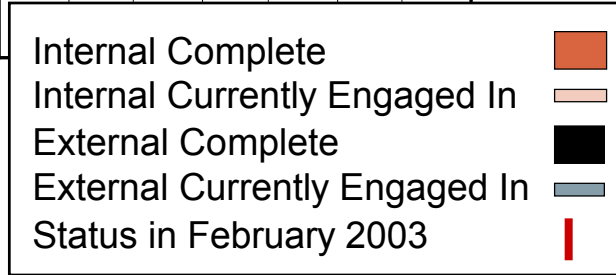
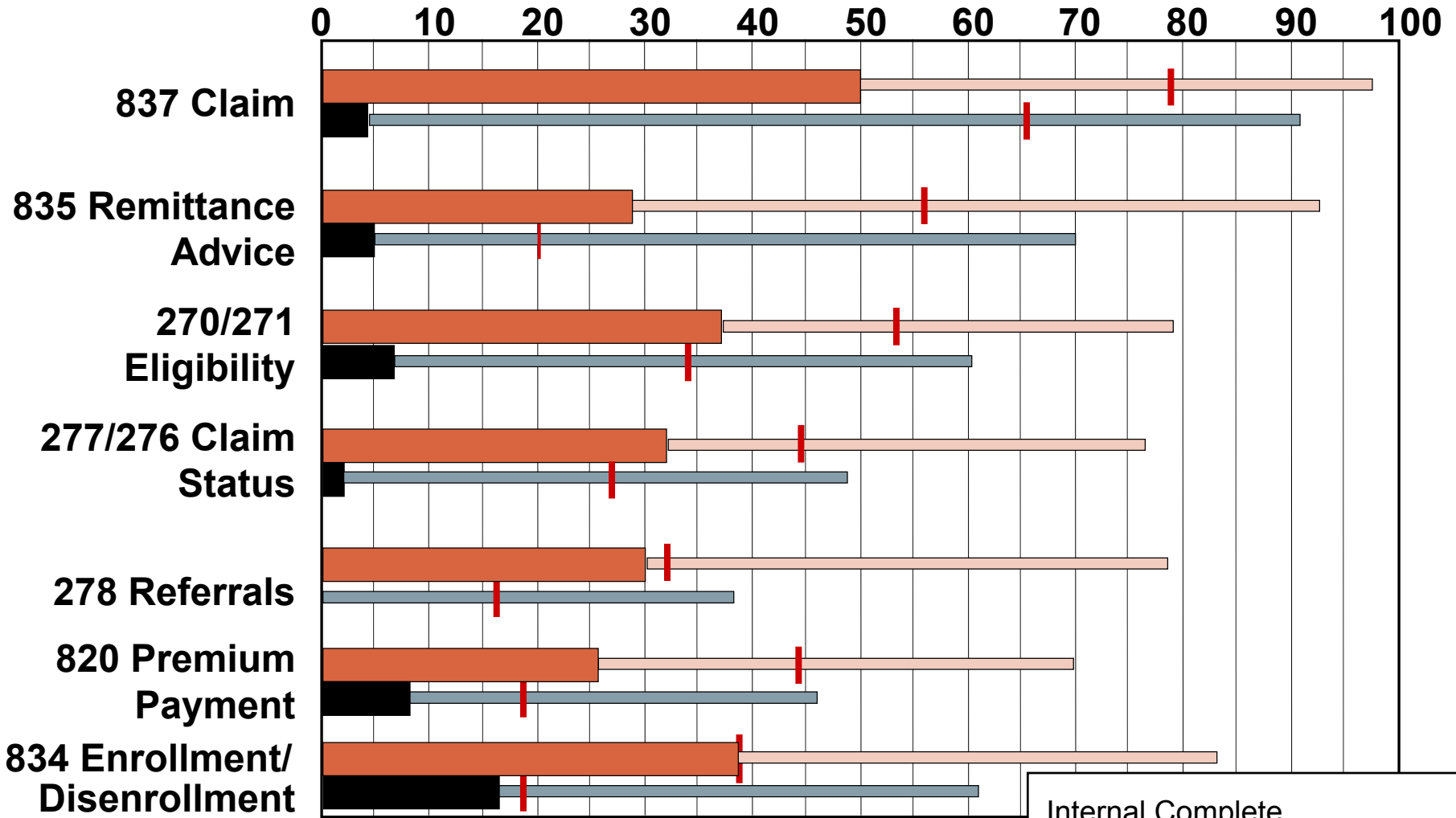
- Randomly Selected — Unbiased
- Responsible for Compliance
- Three-Year Commitment to Ongoing Surveys
- Equal Representation — Entire Industry except small practices



## Have you implemented and tested system modifications, interfaces and conversions for HIPAA compliance? (August 2003)

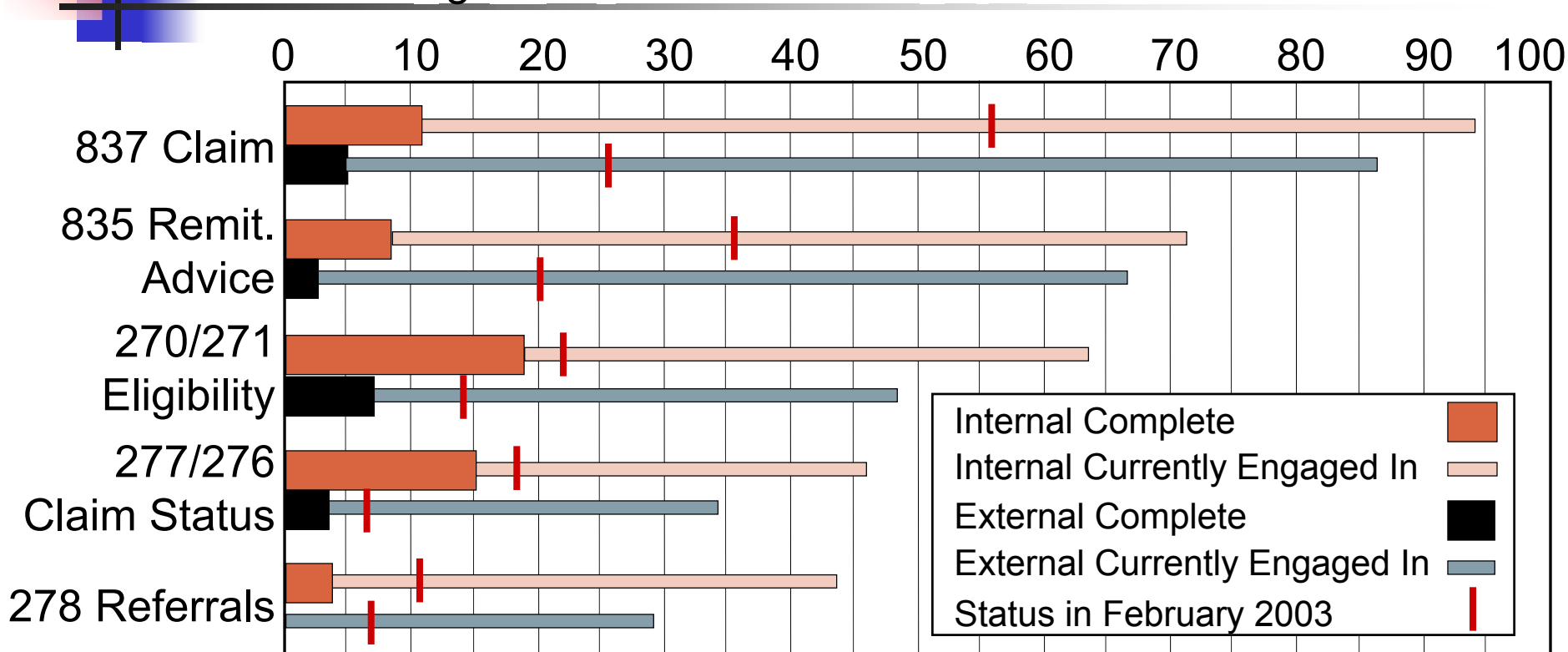


# What is your testing status for these HIPAA transactions, internally or with trading partners? (August 2003 - Payers)

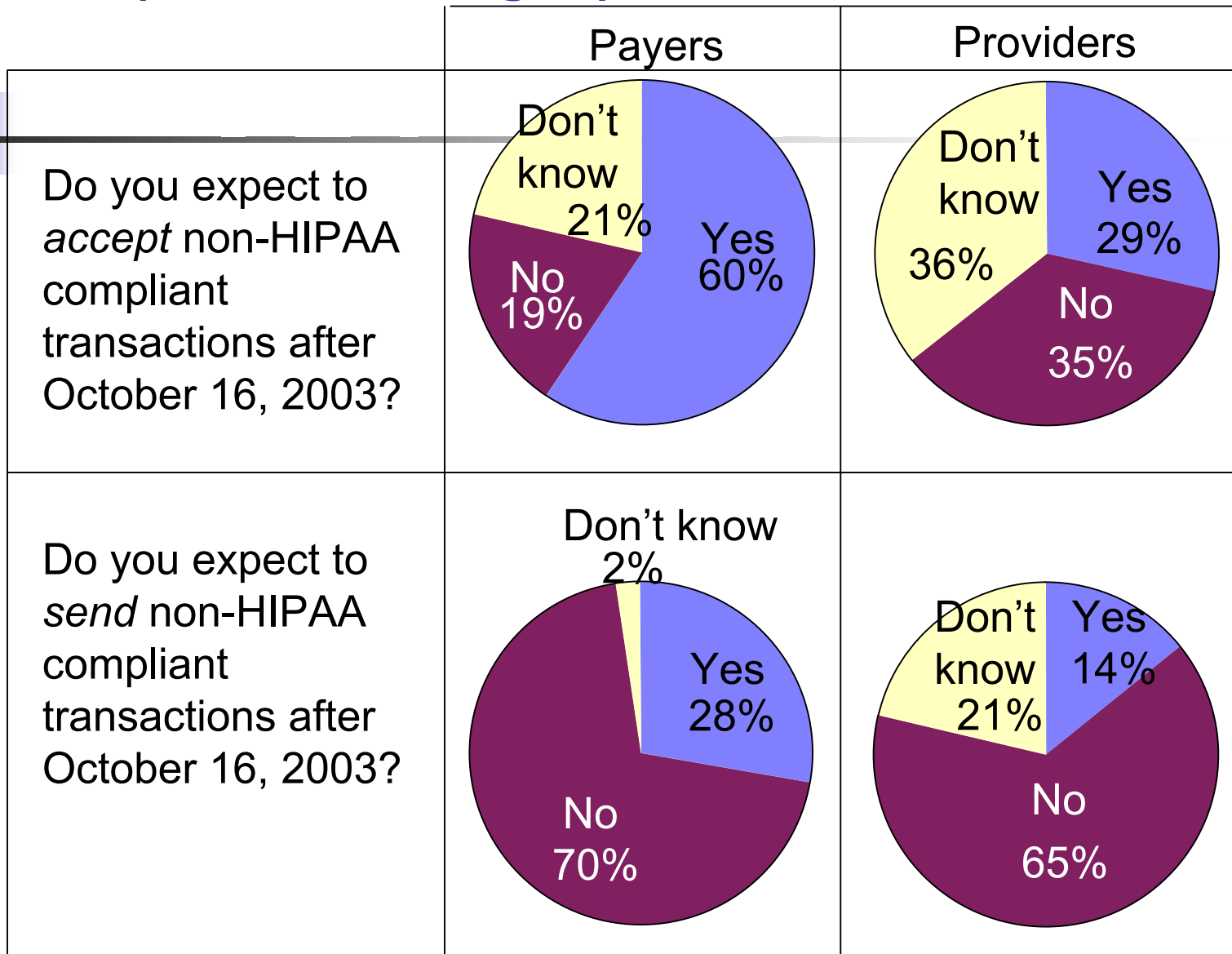


**What is your testing status for these HIPAA transactions, internally or with trading partners?  
 (August 2003 - Providers)**

Percentage of Providers



# Accept or Send Legacy Format?





# WEDI's Approval to Mitigating the Train Wreck

Steven S. Lazarus, PhD, FHIMSS  
President

Boundary Information Group

Past Chair, WEDI

(303) 488-9911

[sslazarus@aol.com](mailto:sslazarus@aol.com)



## WEDI Role as Industry Consultant to HHS

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- Identified train wreck potential (December 2002)
- Board committee developed recommendations to avoid or minimize the train wreck
- April 15, 2003 letter to Secretary Thompson and posting on WEDI's website
- NCVHS testimony in March and May 2003
- Several provider and health plan positions were consistent with WEDI's recommendations



## WEDI's Recommendations to HHS (cc: NCVHS)

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1. Permit compliant covered entities to use HIPAA TCS standard transactions without all of the required data elements, if they can be processed to completion by the receiving entity
2. Permit compliant covered entities to establish a brief transaction period to continue using the current electronic transactions in lieu of paper
3. Request timely guidance from HHS (June 2003)



## NCVHS Advice to HHS

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- June 25, 2003 letter to Secretary Thompson and posted on NCVHS website
- Heard testimony from CMS and the industry in March and May, 2003
- May, 2003 testimony represented many health care industry constituencies





## NCVHS Advice to HHS

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- Found overall agreement that HHS should permit operational compliance for a limited period after October 16, 2003
  1. Deadline should remain as October 16, 2003, no more delays
  2. Provide flexibility in enforcement during a transition period, not to extend beyond April 16, 2004
    - A compliant payer could accept standard claims, but with only the data elements needed for adjudication
    - A compliant payer permits use of pre-HIPAA electronic formats currently in use



## NCVHS Advice to HHS

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3. Provide guidance on:
  - Resolve ambiguities and uncertainties regarding interpretation
  - Clarify treatment of “legacy claims”
4. Intensity outreach efforts



# Standard Transactions: Implementation Today, Tomorrow and Beyond within the 'Forgotten Sectors'

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Lisa Miller

COO

Washington Publishing Company

(425) 831-4999

[lisa@wpc-edi.com](mailto:lisa@wpc-edi.com)



## The Forgotten?

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- Many areas of HealthCare are not 'mainstream' nor are their patients/clients/consumers
- Primary focus is taking care of their patients
  - Public Health Sector
    - Substance Abuse
    - Mental Health
    - Outreach
- Many are not required to implement HIPAA but chose to do so



## Problems

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- These implementation are problematic.
  - Mixed CE model
  - Business process does not necessarily fit into the HIPAA model well
  - Not enough available codes to support the business requirements
  - Downstream trading partners are not ready
  - Cash flow may be interrupted
- Not well represented within the HIPAA standards process



## Today

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- Moving towards HIPAA but with difficulty
  - Seeing potential benefits
    - Adjudication and cash flow from the payer CE perspective
    - Better accountability
  - Concerns
    - Trading partners not ready
    - Interruption of cash flow
    - Use of proprietary transactions, codes, business process



## Tomorrow and Beyond

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- What will happen on October 16th?
  - Health care as we know it today will cease to exist?
  - The sky will fall in
  - HIPAA will go away
  - Business will continue.
- What is next?
- How do we plan?
- How can we make this better?



## Conclusion

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- There is no magic that will make this happen on October 16
- Business will continue
- More involvement
- Influence change for the future



Maria Ward

Pricewaterhouse Coopers, LLP

Healthcare Consulting Practice

Co Chair, HL7 Attachments SIG

Immediate Past Chair, DSMO Steering  
Committee

Member, NUCC

(312) 298-2586

[Maria.t.ward@us.pwc.com](mailto:Maria.t.ward@us.pwc.com)



# As October 16<sup>th</sup> approaches what keeps you up at night?

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## ■ Payers

- ✓ Ability to receive / adjudicate an 837
  - ✓ (e.g.some Medicaid??)
- ✓ Relying on vendors / clearinghouse
- ✓ % of testing completed
- ✓ Supporting multiple formats
- ✓ Some also implementing new claims systems
- ✓ Receiving data they don't need / want
- ✓ Issues with elimination of local codes

# As October 16<sup>th</sup> approaches what keeps you up at night?

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## ■ Providers

- ✓ Am I going to get paid?
  - ✓ What are contingencies?
- ✓ My vendor / clearinghouse isn't ready
  - ✓ Or hasn't tested **my** data with my payers
  - ✓ % of testing completed
- ✓ Data requirements that I can't meet
  - ✓ e.g. other subscriber DOB (not just a vendor issue)
- ✓ No way to know which payers will apply a "strict compliance" vs. "operationally compliant" approach
- ✓ Supporting multiple formats (*when direct*)



## So now what???

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- Keep communicating with your trading partners
  - ✓ Providers should try to learn how their major payers are going to respond (strict vs. operationally compliant)
  - ✓ Payers should get a feel for their providers readiness for X12 transactions
  - ✓ Identify data problems and discuss with your trading partners
    - ✓ Is there an acceptable “default” for something like other subscribers DOB?
  - ✓ Make an effort to learn about how others are handling the same issues
  - ✓ If you’re not prepared begin preparing your compliance plan but don’t stop working toward your goal
  - ✓ It’s unlikely that the sky will fall – it’s going to be overcast with a chance of storms for a while but it will gradually become clearer



# Standard Transactions: October 16 Survival Strategies

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Richard D. Marks  
Davis Wright Tremaine LLP  
Washington, DC  
(202) 508-6611

[richardmarks@dwt.com](mailto:richardmarks@dwt.com)



## **What is “Compliance”?**

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- **What do the statute and TCS rules specify?**
  - **Implementation Guides (part of rules – and therefore part of the “law” – by incorporation)**
  - **Maximum data sets**
  - **Minimum data sets**
- **What do the IGs say?**
  - **IGs make clear that (if prescribed formats and code sets are used) errors in submissions are not a violation**
  - **But HHS has been silent (maybe because of how Medicare computers are programmed) – silence is unjustifiable**
  - **Specter of batch rejects for minor errors in a few transactions**



## **HHS's July 24 Guidance**

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- **Enforcement is a complaint-driven process**
  - **What about unhappy trading partners and disgruntled employees?**
- **Enforcement will consider good-faith efforts not due to “willful neglect”**
  - **No cases on willful neglect in the context of ASCA or HIPAA**
  - **What were you doing all last year?**

## HHS's July 24 Guidance

- **CMS will not impose penalties on CEs “that deploy contingencies (in order to ensure the smooth flow of payments) if”:**
  - **CE made reasonable and diligent and reasonable efforts to become compliant**
  - **For health plans, made reasonable and diligent efforts to facilitate trading partners’ compliance**
    - **If plan can demonstrate active outreach/testing efforts, it can continue processing payments to providers**
    - **Inference – legacy systems may be OK**
- **Good faith determination – HHS will place strong emphasis on sustained actions and demonstrable progress**
  - **What were you doing all last year?**





## TCS FAQ 33, September 8

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### **What is an acceptable contingency plan?**

**An acceptable contingency plan is whatever is appropriate for the individual plan's situation in order to ensure the smooth flow of payments. *Health plans will need to make their own determinations* regarding contingency plans based on their unique business environments. *A contingency plan could include, for example, maintaining legacy systems, flexibility on data content* or interim payments. Other more specific contingency plans may also be appropriate. For example, a plan may decide to continue to receive and process claims for supplies related to drugs using the NCPDP format rather than the 837 format currently specified in the regulations. The appropriateness of a particular contingency or the basis for deploying the contingency will not be subject to review.**

**[Emphasis added; note that maintaining legacy systems doesn't rule out using a clearinghouse.]**

## TCS FAQ 37, September 8



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### **What will Medicare's contingency plan be?**

**Medicare's contingency would be *to continue to accept and send transactions in legacy formats* – in addition to HIPAA compliant transactions - while trading partners work through issues related to implementing the HIPAA standards. The contingency plan will be the same for all Medicare's fee-for-service contractors. *A decision on whether to deploy a contingency will be made by September 25, 2003.* Medicare will continue its active outreach and testing efforts to bring its trading partner community into compliance with the HIPAA standards.**

**[Emphasis added; the classic trial balloon?]**



## Effect of Guidance and FAQs

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- **Functional extension of deadline?**
  - Essence of TCS is not using legacy systems.
  - Consistent with ASCA? Probably not.
  - Binding on agency under *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001)? (See also *Chevron U.S.A. Inc. v. Echazabal*, 122 S.Ct. 2045, 2048 (2002); *Edelman v. Lynchburg College*, 122 S.Ct. 1145, 1150 (2002).) Probably not.
- **A defense to:**
  - Federal criminal prosecution?
  - State law claims?
- **Better than nothing, but good enough?**



## **Criminal Prosecution**

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- **Any use of non-HIPAA standard formats or codes starting Oct. 16 carries the potential for criminal prosecution**
  - **Includes “legacy” formats**
  - **There are no cases, so nothing’s certain**



# Criminal Prosecution

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§1320d-6. Wrongful disclosure of individually identifiable health information

(a) Offense

A person who knowingly and in violation of this part [Part C, Admin. Simp.] --

- (1) uses or causes to be used a unique health identifier;
- (2) obtains individually identifiable health information relating to an individual; or
- (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section.

(b) Penalties

A person described in subsection (a) of this section shall--

- (1) be fined not more than \$50,000, imprisoned not more than 1 year, or both;
- (2) if the offense is committed under false pretenses, be fined not more than \$100,000, imprisoned not more than 5 years, or both; and
- (3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than \$250,000, imprisoned not more than 10 years, or both.

## **HHS's Informal View of HIPAA Criminal Prosecutions for TCS**

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- **HHS doesn't believe criminal penalties apply to TCS – HHS says they just apply to privacy**
- **DOJ not considering criminal prosecutions for TCS (HHS-DOJ consultations)**
- **Spreading fear – unwarranted**



## Contingency Planning

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- **Despite HHS's view, there is plenty to worry about**
- **Options to continuing legacy formats and codes:**
  - **Clearinghouses – statutory safety valve**
  - **Negotiated interim payments**
- **In the post-Enron, Sarbanes-Oxley world, ask: are the risks worthwhile?**
  - **HHS's approach should be evaluated by counsel independently and with great care, especially if the client is publicly traded**
  - **"First Energy" – with political pressure, DOJ and HHS may turn on a dime, and look for opportunities to show vigorous enforcement**
  - **The bet – how much disruption?**