

University of California Policy



HIPAA Uses and Disclosures for Marketing

Responsible Officer: Senior Vice President/Chief Compliance and Audit Officer

Responsible Office: Ethics, Compliance and Audit Services

Effective Date: September 13, 2010

Next Review Date: September 1, 2013

Who is Covered: All UC HIPAA workforce members

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Policy Summary

HIPAA imposes strict constraints on the use of Protected Health Information (PHI) for marketing purposes. This policy describes the circumstances and conditions under which PHI may be used for these purposes.

Policy Definitions

Refer to the document entitled "UC HIPAA Glossary".

Policy Text

There are two, distinct, definitions of “marketing”:

- **First Definition of Marketing:** To make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.
- **Second Definition of Marketing:** An arrangement between the UC Single Health Care Component (SHCC) or Single Health Plan Component (SHPC) and any other entity whereby (1) the SHCC or SHPC sells or otherwise receives indirect or direct remuneration for disclosing PHI to the other entity; and (2) the other entity or its affiliate(s) uses the PHI to make a communication about its own product or service that encourages recipients of the communication to purchase or use that product or service.

As a general matter, if a communication falls within either definition of marketing, the SHCC or SHPC must obtain a written prior Authorization, and the prior Authorization must state whether the marketing involves direct or indirect remuneration to the SHCC or SHPC from a third party.

However, if the marketing communication falls into either of the following categories of communication, prior Authorization is **not** required:

- The marketing activity occurs in a face-to-face encounter between the SHCC or SHPC and the individual (a face-to-face encounter is not: telephone, mail, fax or the internet); or
- The marketing activity involves a promotional gift of nominal value, such as:
 - a) Free package of formula and other baby products; or
 - b) Free pharmaceutical samples, regardless of their value, to the extent dispensing such samples complies with the *UC Health Care Vendor Relations Policy*.

Health Care Communications That Do Not Qualify as Marketing

The following health care communications do not qualify as “marketing” and are, therefore, permitted in the absence of a prior Authorization as long as the covered component has not received direct or indirect payment for making the communication:

- Communications to describe a health-related product or service (or payment for such product or service) that are provided by, or included in a plan of benefits of, the covered entity making the communication, including communications about: the entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits.
- For treatment of the individual; or
- For case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.

If the covered component receives direct or indirect payment for the above communications, the communications are only permitted when one of the following three scenarios applies:

- Scenario 1:
 - (i) the communication describes only a drug or biologic that is currently being prescribed for the recipient of the communication; and
 - (ii) any payment received by such covered component in exchange for making a communication described in clause (i) is reasonable in amount;¹ or
- Scenario 2:
 - (i) the communication is made by the covered component; and
 - (ii) the covered component making such communication obtains, from the recipient of the communication, a valid HIPAA Authorization with respect to such communication; or
- Scenario 3:
 - (i) the communication is made by a business associate on behalf of the covered component;
 - (ii) the communication is consistent with the business associate agreement between such business associate and the covered component; and
 - (iii) the communication does not involve the use of PHI to promote an activity or product of the business associate or another third party.

The SHCC or SHPC and covered individual providers must be mindful that communications to an individual to recommend, purchase or use a product or serve as part of treatment, case management or care coordination could be considered a violation of other statutes or regulations administered by the Department of Health and Human Services, the Department of Justice or other federal agencies if the provider uses his or her relationship with individuals to systematically market the goods and products of third parties (e.g., recommending home health nurses or durable medical equipment providers). Nothing in the Privacy Rule can be construed as amending, modifying or changing any rule or requirement related to any other federal or state statutes or regulations, the anti-kickback statute, safe harbor regulations, *Stark law* and the HIPAA statute on self-referral.²

Although individuals may request confidential forms of communication of PHI to prevent such practices, the SHCC or SHPC should make it routine practice not to send health care communications that may include a patient's PHI, test results, or appointment reminders (when those reminders include specific diagnoses) on a post card or by fax to an unsecured³ location.

¹ For example, health care providers may send patients prescription refill reminders, regardless of whether a third party pays or subsidizes the communication, as long as the payment or subsidy is reasonable in amount.

² OCR Privacy Rule December 2002 Guidance, p. 75.

³ E.g., a fax number for which the sender can't verify whether individuals other than the intended recipient might view the fax, or a number that has not been specifically provided by the individual for personal communications.

Approval Authority

Implementation of the Policy: Senior Vice President/Chief Compliance and Audit Officer
Revisions to the Policy: Senior Vice President/Chief Compliance and Audit Officer
Approval of Actions: not applicable

Compliance and Reporting

N/A

Implementation Procedures

UC Organizational Units subject to HIPAA are responsible for implementation.

Related Documents

45 CFR 164.508 and 164.514

Frequently Asked Questions

FAQs may be found on the UC HIPAA website.

Revision History

HIPAA Privacy Rule: University of California Systemwide Standards and Implementation Policies (System Standards), April 2003.