



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 17, 2000

U.S. Department of Health and Human Services
Assistant Secretary for Planning and Evaluation
Attention: Privacy-P, Room G-322A
Hubert Humphrey Building
200 Independence Avenue SW
Washington, D.C. 21201

Dear Sir or Madam:

The Federal Trade Commission (the Commission or FTC) is pleased to offer comments on the proposed privacy standards pursuant to Section 262 of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").⁽¹⁾ HHS has proposed a Rule ⁽²⁾ to protect the privacy of individually identifiable "health information"⁽³⁾ maintained or transmitted electronically. It proposes standards for: the privacy rights of individuals who are the subject of this information; procedures for the exercise of those rights; the authorized uses of this information; and required disclosures concerning such use. The Rule applies to health plans, health care clearinghouses, and certain health care providers.

The Commission strongly supports the Rule's proposed "individual authorization," or "opt-in," approach to the ancillary use of individually identifiable health information for purposes other than those for which the information was collected. Our comments also suggest that HHS may wish to consider suggestions to improve the disclosure requirements in two proposed forms -- the General Notice and the Model Authorization forms.

A. Interest and Expertise of the Federal Trade Commission

The FTC is a law enforcement agency whose mission is to promote the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and to increase consumer choice by promoting

Further, the Commission has brought enforcement actions under Section 5 of the Federal Trade Commission Act to address deceptive online information practices.⁽⁹⁾

The Commission in its 1998 Report documented the widespread collection on the Internet of personal information from young children, and recommended that Congress adopt legislation setting forth standards for the online collection of personal information from children. Just four months after the 1998 Report was issued, Congress enacted the Children's Online Privacy Protection Act of 1998 ("COPPA").⁽¹⁰⁾ As required by the Act, on October 20, 1999, the Commission issued a final *Children's Online Privacy Protection Rule*, which implements the Act's fair information practice standards for commercial Web sites directed to children under 13 and Web sites that knowingly collect personal information from children under 13.⁽¹¹⁾

B. Individual Authorization: The Proposed "Opt-in" Approach Protects Consumer Privacy

Section 164.508(d)(ii) of the proposed Rule requires only that a covered entity's request for individual authorization to permit ancillary uses of health information contain "[a] description of the purpose(s) of the requested use or disclosure."⁽²⁴⁾ This limited disclosure may not adequately inform consumers of the actual, intended use of the information. By contrast, Section 164.512(d) requires that the General Notice of information practices must describe the intended uses and disclosures "in sufficient detail to put the individual on notice of the uses and disclosures expected to be made of his or her protected health information."⁽²⁵⁾ This latter standard helps ensure that individuals understand what uses and disclosures will be made of their sensitive health information. Such understanding is crucial to ensure that individuals make informed choices about how their health information is used.

In its current formulation, Section 164.508(d)(ii) might encourage or permit covered entities to use broad or vague language to describe the purpose of a requested use or disclosure. For example, an intended marketing use of individual health information might be described with the phrase "to provide you with information about your health care," which tells the patient little about the actual intended use of the information. HHS may wish to consider applying to authorizations required by the proposed Rule the "in sufficient detail" standard now applied to the required

Conclusion

We are pleased to submit these comments. Please contact Matthew Daynard, at (202) 326-3291, if there are questions about our comments or additional assistance that we may provide in your efforts in this important matter.

By direction of the Commission.

Endnotes:

1. Public Law 104-191 (August 21, 1996).

2. 64 FR 59918 (Nov 3, 1999).

3. "Health information" is defined in HIPAA as "any information, whether oral or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual." Section 160.103.

4. 15 U.S.C. § 45(a).

5. The Commission does not have criminal law enforcement authority. Further, certain entities, such as banks, savings and loan associations, and common carriers, as well as the business of insurance, are wholly or partially exempt from Commission jurisdiction. See Section 5(a)(2) of the FTC Act, 15 U.S.C. § 45(a)(2), and the McCitit>>BDf- ()Tj Tf 9-0 0 9

23. HHS may wish to remain flexible regarding the requirement that individual authorization be "written." New technology options, such as using digital signatures to verify identity, may become widely available in the near future that would be less costly to implement.

24. *Id.* at 60056.

25. *Id.* at 60059.

26. *Id.*

27. *Id.*

28. *Id.* at 60049.

29. *Id.* at 60065.