



2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

August 19, 2013

To: Tribal Health Clients
From: Hobbs, Straus, Dean & Walker LLP
Re: *HIPAA Compliance Deadlines Approaching; Tribal Technical Advisory Group to CMS Holds Monthly Call*

Upcoming Deadlines for HIPAA Compliance

We have attached to this report a detailed memorandum that you may have received on February 6, 2013 about major changes made to the regulations governing the Health Insurance Portability and Accountability Act (HIPAA). In that memorandum, we note that the revised regulations, known as the “HIPAA Megarule,” will require revisions to some of your HIPAA policies and procedures, Notice of Privacy Practices, and Business Associate Agreements.

We are writing to remind you that the ***deadline*** for implementing many of these changes – ***September 23, 2013*** – is fast approaching. We highlight here three of the requirements that must be met by that deadline. For more information, please see the attached February 6, 2013 memorandum.

- ***Notice of Privacy Practices.*** The HIPAA Megarule requires that new statements be added to every Covered Entity’s Notice of Privacy Practices pertaining to breach notification, the right to request restrictions on certain uses and disclosures, and when a patient’s written authorization is required, among other changes. Depending on each Covered Entity’s own circumstances, the Notice must also include new statements about fundraising activities and no use or disclosure of genetic information for underwriting. Once the required changes are made to the Notice of Privacy of Privacy Practices, they must be redistributed to patients.
- ***Breach Notification Policy.*** The HIPAA Megarule changed the way Covered Entities are supposed to examine a potential breach and determine whether to provide notice of the breach. Importantly, the Megarule established a presumption that there is a breach of PHI, which would stand unless the Covered Entity can demonstrate there is a “low probability that the [PHI] has been compromised based on a risk assessment.” There is no longer a “risk of

harm” element to the assessment. These changes will likely require that your breach notification policies be revised to reflect this new approach.

- ***Business Associate Agreements.*** The HIPAA Megarule broadened the definition of Business Associate and now makes Business Associates (and their subcontractors) directly liable for violations of HIPAA. The Megarule also changed several rules and requirements that must be addressed in a Business Associate Agreement (BAA). Every Covered Entity’s BAAs must be updated to reflect the new requirements by September 23, 2013, except there are grandfathering provisions for certain BAAs: BAAs in existence as of January 25, 2013 that (a) meet all of the HIPAA Security and Privacy Rule requirements, and (b) are not renewed or modified between March 26, 2013 and September 23, 2013, may have an additional year to comply – to September 22, 2014. You should have already received from us our own promises to you as your Business Associate consistent with these requirements, but you should be aware that you will need to update all of your other BAAs by these deadlines.

Additional changes to your HIPAA policies and procedures may be required to reflect the new requirements, depending on your own specific circumstances and the policies you have in place. These include the following topics, which are discussed in greater detail in our February 6, 2013 memorandum:

- An individual’s right to access his or her own PHI;
- Disclosure of immunization records;
- Disclosure of information about decedents;
- Patient requests for restrictions on use or disclosure of their PHI;
- Sale of PHI;
- Use of PHI for fundraising, marketing or research; and
- Use of genetic information by certain health plans.

CMS Tribal Technical Advisory Group Monthly Call

The Tribal Technical Advisory Group (TTAG) to the Centers for Medicare & Medicaid Services (CMS) held their monthly call on August 14, 2013. The TTAG used the call primarily to follow up on the status of several requests that the TTAG has made to CMS in earlier meetings and discussions. Valerie Davidson, Chair of the TTAG, noted that there are now fewer than 70 days until implementation of the Affordable Care Act (ACA) Health Insurance Marketplaces in October. Kitty Marx, Director of the CMS Tribal Affairs Group, was on the call representing CMS.

Health Insurance Marketplace Implementation. The TTAG first requested an update on

CMS's progress on "scripts" for the new Health Insurance Marketplace call center that was launched in June. The call center, which operates 24 hours per day, is intended as an outreach and education tool to answer questions for consumers and, beginning October 1, will help consumers in selecting and applying for health plans through the Marketplace. Ms. Marx said that between 12,000 and 15,000 employees will work in locations around the country answering phones for the call center. They will use pre-written scripts to answer consumer questions, and refer any questions they are unable to answer using the script to one of a small number of advanced-level managers on duty. The TTAG has been involved in reviewing the draft scripts to ensure that they sufficiently prepare call center employees to answer questions with regard to Indian health programs and benefits, and has submitted comments on the draft scripts. Ms. Marx said that CMS will have new scripts ready by the TTAG's ACA Policy Subcommittee call late next week, but that she views the Indian questions and scripts as something to be reviewed and revised on an ongoing basis. She also said that additional "Indian Health 101" training has now been held for call center employees to help them understand the Indian health system generally.

TTAG had also recommended that CMS create an "Indian Desk" at the call center so that consumers could speak with individuals with greater expertise in Indian health issues in the Marketplace. Ms. Marx reported that CMS leadership has determined that, due to the way the call center is structured, it will not be possible to have an Indian Desk as part of the call center. She said that the advanced-level managers may get additional training and that the CMS Tribal Affairs Group will attempt to work on that training. She also said that the CMS Native American Contacts ("NACs"), who already serve as a point of contact for individuals with questions about CMS programs, could serve a similar function, and that CMS is working to train NACs on Indian issues in the Marketplace.

The TTAG expressed concern that electronic verification of Indian status would not go into effect until some undetermined time after the Marketplaces become operational in October, 2013. Ms. Marx said that CMS is planning to hold tribal consultation on the verification of Indian status issue, but a date has not yet been set. TTAG has advocated use of the Indian Health Service database to verify Indian status.

Medicaid Expansion. As we have previously reported, states must submit State Plan Amendments (SPAs) to CMS implementing Medicaid Expansion or any other changes the state has chosen to make, and as part of that process states must consult with tribes on matters that will affect Indian health programs. Some TTAG members reported that they are starting to receive requests for consultation. However, TTAG members asked Ms. Marx what CMS would be doing to help tribes in states that have chosen not to participate in Medicaid Expansion. Lane Terwilliger of CMS said that CMS is progressing on templates for alternative Section 1115 waiver models, including the

“Arkansas model” which we have described in previous memoranda. She said that CMS is planning a “rollout” of these models to states that are not participating in Medicaid Expansion, and that CMS will have an outline to share with tribes at the upcoming National Indian Health Board conference. In response to questions about what tribes can do to entice or encourage states to adopt one of these alternative models, Ms. Marx noted that the uncompensated care model (often called the “Arizona model”) was replicated in several states after it met with success in one state, and it is possible that will happen again – however, states are not required to adopt any of these models.

Money Follows the Person Grants. Before the close of the call, a representative of CMS provided an update on the Money Follows the Person Tribal Initiative. She said that the grant opportunity is now posted on grants.gov as well as the Medicaid.gov website. These grants are intended to help States modify their Medicaid long-term care systems to include a greater focus on home and community-based services as opposed to institutional care. The Tribal Initiative is specifically intended to help state grantees and tribal partners implement community-based care tailored to American Indian and Alaska Natives who are currently receiving services in institutions. A notice of intent to apply is due on August 28, 2013, and the application is due on October 17. CMS plans to issue a notice of awards on November 14. The initial grant is for a five month period; however, additional funding would be included in the state’s MFP budget on an annual basis through 2016.

If you have any additional questions about any of the matters discussed in this report, please do not hesitate to contact either Elliott Milhollin (202) 822-8282 or emilhollin@hobbsstrauss.com; Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstrauss.com; or Starla Roels at (503) 242-1745 or sroels@hobbsstrauss.com.