

New HIPAA Rules Mean New Burdens and Opportunities for Lenders

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As an increasing number of health care providers move to electronic health record systems, patient privacy is becoming a serious concern. On January 25, 2013, new regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") were issued to strengthen protections for the privacy of health information and increase the penalties for violating those protections. (78 Fed. Reg. 5,565).

Many of the services lenders provide to customers are exempt from HIPAA, including payment processing, auditing, transferring receivables for payment, resolving customer inquiries or disputes, reporting to consumer reporting agencies, responding to subpoenas, or complying with the law. When a lender's services extend beyond statutorily approved activities, however, the lender must comply with HIPAA. Therefore, lenders must understand how new HIPAA compliance requirements affect them and their borrowers.

Health information that is identified to a particular individual is referred to as "protected health information" ("PHI"). Those entities primarily responsible for protecting PHI are referred to as "covered entities." Covered entities include health care clearinghouses, health plans, and health care providers that transmit PHI in electronic form.

A company that creates, receives, maintains, or transmits PHI on behalf of a covered entity is known as a business associate. A covered entity and its business associate must execute a written "business associate agreement" before the business associate may have access to PHI.

Under the new rules, the definition of a business associate includes subcontractors. Thus, a business associates must now enter into business associate agreements with subcontractors.

In a typical health care transaction, the parties often share PHI during the due diligence period. The exchange of PHI in the event of a sale, transfer, merger, or consolidation of all or part of a covered entity falls within an exception to HIPAA. (45 C.F.R. § 164.501). The exception applies to the covered entity and the entity that will become a covered entity after the transaction. Thus, a buyer and a seller may share PHI during the due diligence period without executing a business associate agreement. A lender that will have access to PHI for non-exempt purposes must execute a business associate agreement,

because it will not be a covered entity before or after the sale. The lender must also execute a business associate agreement with those subcontractors who will have access to PHI.

All business associates must comply with HIPAA security requirements designed to protect electronic PHI. These requirements include:

1. Training employees to properly handle PHI;
2. Reviewing and updating business associate agreements;
3. Executing new business associate agreements;
4. Reviewing internal policies and procedures;
5. Performing a risk analysis;
6. Setting up auditing and monitoring procedures;
7. Establishing a breach response plan; and
8. Reporting any security breach.

These new rules provide opportunities for lenders. Because they are well-versed in data privacy and security, lenders can offer to identify and implement security protections that are too difficult or expensive for customers to provide on their own. Experienced regulatory and lending counsel can help lenders navigate the regulatory complexities involved in offering these services. As health care delivery becomes increasingly seamless, lenders prepared for the transition to electronic health information technology will find new opportunities to offer services to customers.



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