HIPAA PRIVACY RULE & GROUP HEALTH PLANS

The Health Insurance Portability and Accountability Act of 1996, or HIPAA, has been in the news for the past several years. Much of the attention to date has focused on the Standards or Privacy of Individually Identifiable Health Information, or the HIPAA Privacy Rule.

The Privacy Rule restricts the use and disclosure of health information by health care providers, health plans, and health care clearinghouses. In this context, "health plan" includes health insurance issuers, HMOs, and even group health plans.

As a health plan regulated by HIPAA, the VLCT Health Trust, Inc. ("Trust") is obligated to comply with the Privacy Rule, and has taken necessary steps to achieve that compliance. For example, the Trust mailed a Notice of Privacy Practices to appropriate persons in April 2003. (You may have received a copy!)

For Trust members, the decision as to whether or not they must comply with the Privacy Rule is more complicated. Ultimately, it is a decision that each member must research and make on its own. We address this issue in more detail below.

DEFINING A GROUP HEALTH PLAN

Generally, a group health plan is any employee welfare benefit plan (as that term is defined in the Employee Retirement Income Security Act of 1974, or ERISA) that provides or pays for medical care (as defined under another federal law, the Public Health Service Act), to employees or their dependents, directly or through insurance, reimbursement or otherwise. A plan is not a HIPAA group health plan, however, unless it has 50 or more participants (another ERISA term) *or* is administered by an entity other than the employer that established and maintains the plan. In other words, even a very small plan, with only a few participants, can still be subject to the Privacy Rule. For example, a medical plan with only three participants that is administered by a third party administrator is very likely a "group health plan" under the Privacy Rule.

Even plans that fall outside of ERISA coverage are subject to the Privacy Rule (at least that is the best thinking on this issue to date). Medical, drug, dental, vision, flexible spending, and certain long-term care benefits are typically considered covered as "group health plans." In addition, employee assistance programs, and possibly even wellness programs, may, depending on the circumstances, be considered group health plans under the Privacy Rule.

Technically, the Privacy Rule does not regulate the "employer" that sponsors a group health plan, but rather, regulates the group health plan itself. In the ERISA context, an employee welfare benefit plan is considered a separate and distinct legal entity from the employer that sponsors it. In the non-ERISA context, this distinction does not exist, leading to some confusion for employers that sponsor non-ERISA plans in determining the true focus of the compliance efforts.

All group health plans are covered by the Privacy Rule. However, there can be lesser obligations for those group health plans that provide benefits solely through an insurance contract with a health insurance issuer or HMO, and that only create or receive very minimal amounts of health information. Self-insured group health plans seem to have the full gamut of compliance responsibilities, including the designation of a Privacy Official, the creation and distribution of a Notice of Privacy Practices, and the creation and implementation of detailed policies and procedures designed to comply with the myriad obligations created by the Privacy Rule.

DEADLINE APPROACHING

The Privacy Rule compliance date for "small health plans" is April 14, 2004. "Non" small health plans had to comply with the Privacy Rule by April 14, 2003. A "small health plan" is one that had less than five million dollars in receipts for its last full fiscal year before April 14, 2003. (In this regard, "receipts" are measured by the total amount of premiums paid for a fully-insured plan,

the total claims paid for a self-insured plan, and by a combination of both for those plans that combine full and self-insured elements.)

THE BOTTOM LINE VIS-À-VIS THE TRUST

As explained at its recent HIPAA educational sessions, the Trust has attempted to ascertain whether Privacy Rule compliance obligations for Trust plans should rest solely with the Trust, or whether the Trust members have their own independent obligations with respect to those plans. In that regard, a central question is determining whether the Trust, following ERISA principles, acts as the "employer" that "established or maintained" the plans that might be considered "group health plans" under the Privacy Rule. In short, we believe there are good arguments that would support the conclusion that the compliance obligations for those plans that were established or maintained by the Trust, for the benefit of its members and member employees, should rest with the Trust, and not its members. However, because of the complexity of the legal and factual issues involved, and the lack of clear guidance from the federal government, we cannot offer any guarantees in this regard, and thus cannot provide assurances that each individual member will not have separate compliance obligations for Trust plans.

Of course, the argument that Privacy Rule compliance obligations should exist at the Trust level, and not at the individual member level, only applies with respect to Trust plans. As a result, a Trust member may have significant compliance obligations with respect to any plan that was established or maintained outside of the Trust.

Further, some members may offer their employees additional benefits, such as the reimbursement of a deductible or a co-pay. As we explained at the sessions, these additional benefits, which are not part of the Trust programs, may create significant obligations under the Privacy Rule. The argument that compliance obligations should exist at the Trust level will likely be of little assistance to those members offering such benefits, at least with respect to such benefits.

As a courtesy to its members, the Trust made available at its recent HIPAA educational sessions form policies and procedures to those members who will pursue compliance with the Privacy Rule. (Editor's Note: Attorney Frank Fontana is updating these policies and procedures, and asks that those who received the previous version utilize the revised documents, which he will make available at the workshop mentioned below, or via individual request. You can contact Attorney Fontana at ffontana@drm.com. The materials will be available within the next one to two weeks). The Trust will also offer a workshop for those members, in the event they desire general guidance in customizing those policies and procedures for a specific use. Please watch this newsletter and the VLCT Web site (www.vlct.org) for more information about this upcoming workshop.

- Frank Fontana, Esq., Director, Downs Rachlin Martin, PLLC

VLCT News, February 2004