

**LOUISIANA STATE UNIVERSITY
HEALTH CARE SERVICES DIVISION
BATON ROUGE, LA**

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CATEGORY: HIPAA Policies

CONTENT: Use and Disclosure of Protected Health Information for Marketing Purposes
- **Authorization for Use and Disclosure of Protected Health Information for Marketing Purposes - Attachment A**

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INQUIRIES TO: **LSU HCSD
Compliance Section
Post Office Box 91308
Baton Rouge, LA 70821
225-354-4840**

Note: Approval signatures/titles are on the last page

**LOUISIANA STATE UNIVERSITY
HEALTH CARE SERVICES DIVISION
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Use and Disclosure of Protected Health Information for Marketing Purposes

I. SCOPE

This policy is applicable to all workforce members of the LSU Health Care Services Division facilities, including employees, physician/practitioner practices, vendors, agencies, business associates and affiliates.

II. PURPOSE

To provide guidance to the health care facilities and providers affiliated with the LSU HCSD on the requirements of the Health Insurance Portability and Accountability Act, Standards for Privacy of Individually Identifiable Health Information (HIPAA Privacy Regulations) for using or disclosing an individual's Protected Health Information for marketing purposes.

III. POLICY

All LSU HCSD facilities and providers must obtain an individual's signed authorization before using or disclosing the individual's Protected Health Information for marketing purposes as defined in this policy.

All LSU HCSD facilities and providers are referred to in this policy as "Facility or Clinic."

IV. Definitions

1. **Protected Health Information (sometimes referred to as "PHI")** – for purposes of this policy means individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. It includes demographic data that relates to that relates to:
 - a) The individual's past, present, or future physical or mental health or condition;
 - b) The provision of health care to the individual; or
 - c) The past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. PHI includes many common identifiers such as name, address, birth date, social security number, etc.
2. **Authorization** – A written document completed and signed by the individual that allows use and disclosure of PHI for purposes **other than treatment, payment or health care operations**.
3. **Designated Record Set** – is a group of records maintained by or for Facilities and Clinics that is:

- The medical records and billing records about individuals maintained by or for Facilities and Clinics ; or
 - Any records used, in whole or part, by or for the Facilities and Clinics to make decisions about individuals.
 - Any record that meets this definition of Designated Record Set and which are held by a HIPAA Business Associate of Facilities and Clinics are part of Facilities and Clinics' Designated Record Set.
 - The term *record means* any item, collection, or grouping of information that includes PHI and is maintained, collected, used or disseminated by or for Facilities and Clinics.
 - The term *record* also includes patient information originated by another health care provider and used by Facilities and Clinics to make decisions about a patient.
 - The term *record* includes tracings, photographs, and videotapes, digital and other images that may be recorded to document care of the patient.
- 4. Psychotherapy Notes** – means notes recorded by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint or family counseling session and that are separated from the rest of the individual's record. Psychotherapy notes does not include: medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.
- 5. Marketing** – Except as provided below, marketing means to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.
- Marketing does not include a communication made in the following circumstances.
- a. To provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual, only if any financial remuneration received by the facility in exchange for making the communication is reasonably related to the facility's cost of making the communication.
 - b. For the following treatment and health care operations purposes, except where the facility receives financial remuneration in exchange for making the communication
 - i. For treatment of an individual by a health care provider, including 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;
 - ii. To describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the facility making the communication, including communications about
 - The facility's participation in a health care provider network or health plan network;
 - Replacement of or enhancements to a health plan;
 - 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.

- iii. For case management or care coordination, contacting of individuals with information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.

6. Financial Remuneration – means direct or indirect payment from or on behalf of a third party whose product or service is being described. Direct or indirect payment does not include any payment for treatment of an individual.

V. Procedure

Authorization Required for Use & Disclosure of PHI for Marketing

1. The facility must obtain a patient's or personal representative's prior authorization for any use and disclosure of PHI for marketing purposes except as specified in the sections below, Authorization Not Required for Use & Disclosure of PHI for Marketing Communications and Clarifications Related to Financial Remuneration. An authorization must be specific as to the use and disclosure being requested and is not to be written in such a manner that it might be interpreted as a blanket authorization for the use and disclosure of PHI for marketing. A blanket marketing authorization is invalid.
2. To be valid, an authorization must include:
 - a. All of the core elements and required statements as detailed in the HIPAA Authorization Policy (7501)
 - b. If the marketing involves direct or indirect remuneration to the facility from a third party, the authorization must also state that such remuneration is involved.
 - c. The authorization must make it clear that the individual may revoke the authorization at any time he/she wishes to stop receiving the marketing material.
3. For further guidance on authorizations, see HIPAA Authorization policy (7501) for information on:
 - a. The steps for responding to and processing of authorizations for use and disclosure of PHI;
 - b. The patient's right to revoke an authorization;
 - c. Authorization and revocation documentation and retention requirements;
 - d. The prohibition on conditioning of authorizations; and
 - e. Other requirements related to authorizations for use and disclosure of PHI.
4. Business Associates – The facility may not disclose PHI to third parties for marketing purposes without authorization from the patient, even if the third party is acting as the business associate of the facility.

Authorization Not Required for Use & Disclosure of PHI for Marketing Communications

1. The facility may use or disclose PHI for marketing without an authorization only if the communication is made in the form of:
 - a. A face-to-face communication made by a covered entity to a patient or personal representative; or
 - b. A promotional gift of nominal value provided by the facility.
 - c. Exceptions provided for in the definition of “marketing”.
 - d. Communications promoting health in general and that do not promote a product or service from a particular provider.
 - e. Communications about government and government-sponsored programs. The facility may communicate with individuals about eligibility for programs, such as Medicare and Medicaid, or State Children’s Health Insurance Program, without obtaining individual authorization.

Clarifications Related to Financial Remuneration

1. Direct payment means financial remuneration that flows from the third party (whose product or service is being described/marketed) directly to the facility.
2. Indirect payment means financial remuneration that flows from an entity on behalf of the third party (whose product or service is being described/marketed to the facility).
3. Where a Business Associate (including a subcontractor), as opposed to the facility itself, receives financial remuneration from a third party in exchange for making a communication about a product or service, such communication also requires prior authorization from the individual.
4. Financial remuneration does not include non-financial benefits, such as in-kind benefits, provided to a facility in exchange for making a communication about a product or service. Financial remuneration only includes actual financial payments made in exchange for making such communications.
5. For a financial remuneration to be a consideration for this rule, the payment has to be for a communication that encourages individuals to purchase or use the third party’s product or service. If the financial remuneration is for any purpose other than for making the communication, then this marketing provision does not apply. For example, if a third party provides financial remuneration to a facility to implement a disease management program, the facility could provide individuals with communications about the program without obtaining individual authorization as long as the communications are about the facility’s disease management program.

Responsibilities

1. The facility Privacy Officer is responsible for evaluating certain types of communications to patients and determining whether the communication meets the definition of “marketing” and therefore requires obtaining the patient’s or personal representative’s authorization for the marketing communication or purpose.

Note: Many communications with patients are for purposes other than marketing and it is not intended that this review process introduce any obstacles or hardships as it relates to treatment of the patient or access of the patient to quality health care.

2. The facility HIM Director or designee is responsible for obtaining authorizations from patients for use and disclosure of PHI for marketing purposes.
3. The facility Privacy Officer, is responsible for determining whether a “promotional gift is of nominal value”.
4. The facility must obtain business associate contracts with any business associates involved in the production, distribution, or processing of marketing communications if patient PHI is used.

Special Considerations

1. Facility’s Own Uses - The facility may use PHI to communicate with individuals about the facility’s own health-related products or services, the patient’s treatment, or case management or care coordination for the individual, and may make the communication itself or use a business associate to do so.
2. Notice of Privacy Practices – The facility Notice of Privacy Practices must contain a statement indicating that disclosures of protected health information for marketing purposes, and disclosures that constitute a sale of protected health information require individual authorization.
3. PHI is Not for Sale - Patient medical information should not be a commodity in the marketplace, and should not be made available for purchase or sale by any patient or entity.
4. Communications Promoting Health – A communication that merely promotes health in a general manner and does not promote a specific product or service from a particular provider does not meet the general definition of “marketing.” Such communications may include population-based activities to improve health or reduce health care costs as set forth in the definition of “health care operations”. Therefore, communications such as mailings reminding women to get an annual mammogram, providing information about how to lower cholesterol, advising of new developments in health care, health or ‘wellness’ classes, support groups, and health fairs, are permitted, and are not considered marketing.

5. Newsletters – The facility may make communications in newsletter format without authorization so long as the content of such communication is not “marketing” as defined for purposes of HIPAA.

REFERENCES:
45 C.F.R. 164.508

Attachment A: Authorization for Use and Disclosure of Protected Health Information for Marketing Purposes

Patient Identification

Printed Name: _____ Date of Birth: _____

Address: _____

Social Security #: _____ Telephone: _____

Information To Be Released – Covering the Periods of Health Care

From (date) _____ to (date) _____

Please check type of information to be released:

Purpose of Request

▪ Marketing purposes as described here: _____

Payments to Facility

This marketing activity involves direct or indirect compensation/payment from a third party to **Name of Facility** for this use of protected health information. **Check One:** Yes No _____ **Initials**

Person Authorized to Receive Information

Name: _____

Address: _____

Drug and/or Alcohol Abuse, and/or Psychiatric, and/or HIV/AIDS Records Release

I understand that if my medical or billing record contains information in reference to drug and/or alcohol abuse, psychiatric care, sexually transmitted disease, Hepatitis B or C testing, and/or other sensitive information, I agree to its release. **Check One:** Yes No _____ **Initials**

I understand that if my medical or billing record contains information in reference to HIV/AIDS (Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome) testing and/or treatment, I agree to its release.

Check One: Yes No _____ **Initials**

Time Limit & Right to Revoke Authorization

Except to the extent that action has already been taken in reliance on this authorization, at any time I can revoke this authorization by submitting a notice in writing to the facility Health Information Manager at *[location & mailing address]*. **I understand that I can revoke this authorization at any time, and this revocation means that I will not receive any additional marketing materials from (name of Hospital).** Unless revoked, this authorization will expire on the following date or event _____ . If no expiration date is set forth this authorization will expire 180 days from date of signature.

Re-disclosure

I understand the information disclosed by this authorization may be subject to re-disclosure by the recipient and no longer be protected by the Health Insurance Portability and Accountability Act of 1996. The facility, its employees, officers and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized herein.

Signature of Patient or Personal Representative Who May Request Disclosure

I understand that *[Name of Facility]* may not condition my treatment on whether I sign this authorization form unless specified above under Purpose of Request. I can inspect or copy the protected health information to be used or disclosed. **I authorize _____ to use and disclose the**
(Name of Facility or Provider)
protected health information specified above.

Signature: _____ **Date:** _____

Authority to Sign if not patient:

Identity of Requestor Verified via: **Photo ID** **Matching Signature** **Other, specify**

Verified by: _____

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Committee / Policy Team: Main Policy Team

Owner/SME: Simien, Tammy
Staff Attorney

Manager: Reeves, Rebecca


Approver(s): Buie, Lanette
HCSD Deputy Chief Executive Officer

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