

## USE AND DISCLOSURE OF PHI FOR MARKETING

**Policy Number:** [Enter]

**Effective Date:** [Enter]

### **I. Policy:**

#### **A. Purpose**

This policy establishes guidelines for *[Organization]*'s workforce to follow regarding the use or disclosure of PHI for marketing purposes.

#### **B. Policy Implementation**

*[Organization]* may use and disclose PHI for marketing purposes only in accordance with the HIPAA Regulations, applicable state law, and this Policy.

##### **1. Authorization for use or disclosure of PHI for marketing**

Except as provided in section 2 of this policy, *[Organization]* must obtain a valid HIPAA authorization, as defined by the Regulations, from the patient or a personal representative prior to any use or disclosure of PHI for "marketing" as defined in section 3 of this policy. The authorization required by this section must be a signed document that meets the requirements of 45 C.F.R. § 164.508 and Policy number [Enter], Authorization for Use and Disclosure of PHI.

In addition, if the marketing involves "financial remuneration" from or on behalf of a third party, the authorization must state that such remuneration is involved. Information on what constitutes "financial remuneration" is included in section B.3, below.

**The Minnesota Health Records Act requires "consent" for the disclosure of a patient's health records for marketing. An authorization for marketing that meets the requirements of the HIPAA Regulations will satisfy the consent requirements under the Minnesota Health Records Act. However, a consent that satisfies the Minnesota Health Records Act may not necessarily include all of the elements required for a valid HIPAA authorization required to permit uses and disclosures of PHI for marketing.**

##### **2. Exceptions to the authorization requirement**

*[Organization]* need not obtain the patient's authorization if the communication is:

- a. A face-to-face communication made by *[Organization]* to an individual; or
- b. A promotional gift of nominal value provided by *[Organization]*.

##### **3. "Marketing" defined**

- a. Except as provided in paragraph (2) of this definition, *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.
- b. *Marketing* does not include a communication made:
  - i. 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 [Organization] in exchange for making the communication is reasonably related to [Organization]'s cost of making the communication.
  - ii. For the following treatment and health care operations purposes, except where [Organization] receives financial remuneration in exchange for making the communication:
    - (1) 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;
    - (2) To describe a health-related product or service (or payment for such product or service) that is provided by [Organization]; or
    - (3) 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" in the Regulations.

Authorization is not required for these uses unless [Organization] receives "financial remuneration" in exchange for making the marketing communication and the remuneration is provided by or on behalf of the entity whose product is being described. The term "financial remuneration" means direct or indirect payment from or on behalf of a third party whose product or service is being described. The term does not include any payment for treatment of an individual. To trigger the authorization and disclosure requirements described in this policy, the financial remuneration [Organization] receives from a third party must be for the purpose of making a communication and such communication must encourage individuals to purchase or use the third party's product or service.

Thus, for example, an authorization is required if [Organization] intends to make a communication to its patients regarding the acquisition of mammography screening equipment if the equipment manufacturer paid [Organization] to send the communication. An authorization is not required, however, if a local charitable organization, such as a breast cancer foundation, funded [Organization]'s mailing to patients about the new equipment. Similarly, if a third party provides financial remuneration to [Organization] to implement a program, such as a disease management program, [Organization] could provide individuals with communications about the

program without obtaining an authorization as long as the communications are about *[Organization]*'s program itself, and not about encouraging individuals to use or purchase the third party's product or service.

**The consent requirements of the Minnesota Health Records Act are pertinent to the types of disclosures described in section 3(2) even though those disclosures are excluded from HIPAA's definition of marketing. However, the language used by health care providers in consent forms will often be sufficiently broad to encompass the types of disclosures described in that section within the scope of what is otherwise permitted under the consent. *[Organization]* should confirm that its approach to obtaining consent sufficiently addresses disclosures of health records for any activities described in section 3(2).**

#### 4. Business Associates

If *[Organization]* contracts with a business associate to assist it in the use or disclosure of PHI for marketing, *[Organization]* must have a business associate agreement consistent with Policy number [Enter], Disclosing Information to Business Associates, with the business associate that addresses these activities. The business associate agreement should ensure that the business associate's use or disclosure of PHI for marketing purposes is consistent with this policy. In addition, business associates may not use or disclose PHI from *[Organization]* to engage in marketing on behalf of the business associate itself, unless the patient has signed an authorization for this activity that meets the requirements of Policy number [Enter], Authorization for Use and Disclosure of PHI.

## II. **Procedure:**

- A. Prior to using PHI for marketing purposes, *[Organization]*'s Privacy Official or designee must:
1. Determine whether the proposed communication at issue is "marketing" as defined in Section 3 of this policy.
  2. If the proposed communication is not marketing, determine whether *[Organization]*'s consent form is sufficient to permit any disclosure of health records for the communication.
  3. Verify that a consent has been obtained, if it is determined that a consent is needed;
  4. If the communication is marketing, determine if an authorization is required for the use or disclosure of the PHI;
  5. Verify that a valid authorization has been obtained, if it is determined that an authorization is needed;
  6. Verify that the other requirements described in this policy have been met.