

PRIVACY 15.0

USE AND DISCLOSURE OF PHI FOR MARKETING

Scope: All **workforce** members (employees and non-employees), including employed medical staff, management, and others who have direct or indirect **access** to patient **protected health information (PHI)** created, held or maintained by any subsidiaries of Universal Health Services, Inc., including facilities and UHS of Delaware Inc. (collectively, “UHS”), including UHS **covered entities** (“Facilities”).

Purpose: Identifies when Facilities may **use** and **disclose PHI** for marketing purposes.

Definitions:

Terms not defined in this Policy or the *HIPAA Terms and Definitions* maintained by the UHS Compliance Office will have the meaning as defined in any related State or Federal privacy law including the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (“HIPAA”) and regulations promulgated there under by the U.S. Department of Health and Human Services (“HHS”) at 45 CFR Part 160 and 164, Subparts A and E (“Privacy Regulations” or “Privacy Rule”) and Subparts A and C (“Security Regulations” or “Security Rule”), the Health Information Technology for Economic and Clinical Health Act (“HITECH”) privacy and security provisions of the American Recovery and Reinvestment Act (Stimulus Act) for Long Term Care, Public Law 111-5, the American Recovery and Reinvestment Act of 2009 (“ARRA”), Title XIII and related regulations.

Policy:

Facilities will not use or disclose PHI for “marketing” purposes unless they have obtained a valid written authorization signed by the patient or patient’s representative.

Procedure:

Facilities will obtain a valid written authorization signed by the patient or patient’s representative prior to any use or disclosure of PHI for “marketing,” except that the following two types of communications do not require an authorization. In addition, the communications described below in the section titled “*Certain communications are not ‘marketing’*” are not considered to be marketing (such as refill reminders), and these communications do not require that an authorization be obtained.

- A face-to-face communication made by a Facility to an individual (note: a telephone contact is not a “face-to-face” communication) does not require an authorization; and
- A promotional gift of nominal value provided by the Facility (e.g., a pen or coffee cup with the Facility's name, infant formula, etc.) does not require an authorization.

UHS Acute Facilities with questions regarding marketing should contact the Corporate Marketing Department and the UHS Corporate Compliance Office. UHS Behavioral Health Facilities with questions regarding marketing should contact Business Development and the UHS Corporate Compliance Office.

The Authorization: When required, the individual’s [authorization](#) will be obtained as described in the UHS HIPAA Policy *Use and Disclosure Requiring Authorization*. If the Facility will receive either direct or indirect payment (whether in the form of cash or any other item or thing of value) from or on behalf of a third party whose product or service is being described, this fact will be prominently included on the authorization provided to the patient or patient representative to sign. The scope of the authorization can apply broadly to subsidized communications generally, rather than being confined to the products or services of a particular third party, as long as the authorization adequately describes the intended purposes of the requested uses and disclosures, and meets the other requirements for authorization under the Privacy Rule and as described in the UHS HIPAA Policy *Use and Disclosure Requiring Authorization*.

When is a communication “marketing”? Under Federal law, “**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 includes communications made by the Facility or on its behalf, such as where a business associate contacts patients for a Facility. As described below, whether a communication is viewed as “marketing” will depend on the content of the communication and whether the Facility receives “financial remuneration” for the communication.

What is “financial remuneration”? “[Financial remuneration](#)” means direct or indirect payment from (or on behalf of) a third party whose product or service is being described. This does not include payments for [treatment](#) of an individual.

- Financial remuneration for marketing purposes occurs when the payment is for the purpose of and in exchange for making a communication that encourages individuals to purchase or use the third party’s product or services. If the remuneration is not for this purpose, then the authorization for marketing would not be required.
- 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 authorization as long as the communications are about the Facility’s program itself and do not encourage individuals to use or purchase the third party’s services or products.

Certain communications are *not* “marketing:”

Marketing *does not* include a communication made:

- To provide refill reminders or otherwise communicate about a drug or biologic that is currently being prescribed for the individual (including the drug-delivery system, if applicable, such as insulin pumps), but only if any financial remuneration received by the covered entity in exchange for making the communication is reasonably related to the covered entity's cost of making the communication (permissible costs include only the costs of labor, supplies and postage to make the communication and exclude profits), or
- For the following treatment and health care operations purposes, except where the covered entity receives financial remuneration in exchange for making the communication:
 - (a) for **treatment** of an **individual** by a healthcare 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**;
 - (b) 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 **covered entity** making the communication, including communications about: the entities participating in a **health care provider** network or **health plan** network; replacement of, or enhancements to, a **health plan**; and 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; or
 - (c) 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.

For example, marketing does not include communications promoting health in general that do not promote a product or service from a particular provider, such as communications promoting a healthy diet or encouraging individuals to get certain routine diagnostic tests, such as annual mammograms. In addition, marketing does not include communications about government and government-sponsored programs, such as using PHI to communicate with individuals about eligibility for Medicare or Medicaid without obtaining individual authorization first.

If an authorization for use or disclosure that was in place prior to the effective date of this Policy does not contain all of the information required under this Policy, the Facility should contact the UHS Corporate Compliance Office prior to relying on the existing authorization, in order to determine whether the authorization can be utilized under the transition provisions in the Federal regulations, as provided at 45 C.F.R. §§ 164.508 and 164.532.

All hospital marketing initiatives involving patients or PHI should be directed to the Facility Marketing Director or the UHS Compliance Office.

References

45 C.F.R. §§ 164.501, 164.508(a)(3), and 164.532.

Related UHS Policies:

UHS Privacy 3.0 *Use and Disclosure Requiring Authorization*

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Reviewed and Approved by:

UHS Compliance Committee