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BENEFITS BRIEF

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The Department of Health and Human Services Issues HPID "Non-Enforcement" Policy

On October 31, 2014, the Department of Health and Human Services ("HHS") announced a non-enforcement policy "until further notice" regarding the HIPAA Health Plan Identifier ("HPID") requirement that otherwise would have gone into effect November 5, 2014. The HIPAA HPID rules required all covered entity health plans, as defined under the HIPAA privacy rules, such as employer group health plans and health insurance issuers to register for a unique identifier number. (Available at: http://www.cms.gov/Regulations-and-Guidance/HIPAA-Administrative-Simplification/Affordable-Care-Act/Health-Plan-Identifier.html.)

The announcement indicated that the non-enforcement policy is to allow HHS to consider comments from the National Committee on Vital and Health Statistics ("NCVHS") regarding a lack of benefit and value in using the HPID, along with a recommendation that HHS clarify in future rulemaking when and how the HPID will be used and whether all covered entity health plans are required to obtain an HPID (regardless of whether they conduct standard transactions).

In light of this announcement and pending further guidance from the agencies, health plans that have not yet obtained an HPID should not need to do so until further notice from HHS. Health plans that have obtained an HPID also do not need to take any further action at this time.

The comments from NCVHS are significant because Congress specifically directed HHS to establish rulemaking for the HPID based on the input of the NCVHS and assigned the organization a "significant role" in the adoption of HIPAA standards and code sets. 74 Fed. Reg. 22950, 22955 (April 17, 2012).
In a letter to HHS dated September 23, 2014, NCVHS summarized findings from an industry hearing regarding the HPID, noting:

- the lack of a clear business need and purpose for using the HPID;
- confusion about how the HPID would be used in standard transactions;
- the utility of an HPID for a group health plan that does not conduct HIPAA standard transactions; and
- the costs to health plans, clearinghouses and providers if software has to be modified to account for the HPID.

Specifically, NCVHS made two recommendations to HHS.

1. NCVHS recommended that HHS provide in future rulemaking that all current and future health plans, providers and trading partners may not use an HPID in "administrative transactions," which are transactions between a provider and the appropriate payer (in most cases the health insurance issuer or third party administrator for a self-funded group health plan) based on concerns that the HPID will be confused with a payer ID that is currently being used.

2. NCVHS recommended that HHS clarify in the "Certification of Compliance" final rule when and how the HPID would be used in health plan compliance certification and if there will be a connection between the HPID and federally-facilitated exchanges.

Groom Observation: As we noted in a February 4, 2014 Client Alert, the Affordable Care Act mandates that health plans file two one-time certifications with the Secretary of HHS attesting that the plan is in compliance with certain HIPAA standard transaction requirements. (Available at: http://www.groom.com/media/publication/1363_New_HIPAA_Certification_Requirement.pdf) HHS released proposed regulations on January 2, 2014 and we are waiting for final regulations. The first certification is required by December 31, 2015. Significantly, in the preamble to the proposed rule, HHS stated it will use the HPID to identify plans that have not filed the certification.

Where do health plans go from here...

The HPID rules introduce two new terms for defining health plans: "controlling health plan" and "sub-health plan." Essentially, a "controlling health plan" is a health plan that controls its own business activities, actions, or policies OR is controlled by an entity that is not a health plan. A sub-health plan is a health plan whose business activities, actions, or policies are directed by a "controlling health plan." There has been significant confusion on how the HPID will be used in standard transactions and how the "controlling health plan" and "sub-health plan" concepts apply to the many ways in which employer group health plans are structured. These issues have been addressed in a series of Frequently Asked Questions that the Centers for Medicare and Medicaid Services has published, but many questions remain. This non-enforcement policy is helpful in that it signals the agencies willingness to respond to industry concerns and perhaps, provide some relief on the HPID requirement – particularly for plans that do not conduct standard transactions, such as employee assistance plans.

Health Plan "To Do" Tasks

- ☐ Health plans should continue to review their services agreements and business associate agreements with third parties that conduct standard transactions on their behalf to ensure that business associates are contractually required to comply with the existing rules. Plans may also want to update these representations to require the business associate to provide any necessary information or to perform any necessary testing in order for the health plan to meet the certification requirement.

- ☐ If a health plan has obtained an HPID, it should maintain a record of the HPID that has been assigned to the health plan and document the plans it considers 'controlling health plans' and 'sub-health plans.' In the event HHS addresses this concept in future rulemaking, the plan may need to re-evaluate these determinations.

- ☐ Health plans should watch for final rules on the certification process and attestation. The first certification is currently required by December 31, 2015, so plans that are creating a 2015 planning calendar should build in

a place holder for the certification, keeping in mind that the organization may have to work with third parties to conduct standard transactions on their behalf and obtain certification from a senior official that the plan is compliant with HIPAA Privacy & Security rules. In this regard, plans should be sure that they are up-to-date with regards to HIPAA compliance, such as privacy and security training, business associate agreements and the HIPAA security risk assessment.