

August 12, 2016

Office of the Insurance Commissioner
Bianca Stoner
P.O. Box 40258
Olympia WA 98504

Dear Ms. Stoner:

I am writing on behalf of a group of organizations involved in physical and mental health care, children's & school health, health care rights, and public health. We are responding to the Preproposal Statement of Inquiry regarding Insurance Commissioner Matter No. R 2013-11, which concerns a covered person's health information being made available to other household members without their consent. We appreciate the OIC's continued attention to this pressing matter, but we are disappointed about the lack of meaningful process to ensure confidentiality when accessing health care services in the more than three years since we requested that OIC initiate this rulemaking process.

We continue to be concerned about the inadvertent breach of the privacies afforded by HIPAA and WAC 284-04-510 that can occur when *Explanations of Benefits (EOB)* paperwork is issued or electronically recorded and the recipient of healthcare services is not the policy holder. This is an issue that gravely impacts patients' safety, discourages many to seek care, and prevents appropriate use of health insurance benefits. As you are aware, these issues affect not just minors seeking care at school-based health centers, but also adult spouses of any age whose partner holds the insurance policy and young adults (age 18-26) who remain on their parent's health insurance. In all cases, issues with domestic violence, abuse, or general privacy rights can be compounded through lack of confidentiality.

Our letter from July 2013 details some of our specific concerns. We write now with specific feedback regarding the July 6, 2016 stakeholder draft.

First, we appreciate the common goal of greatly improving the clarity and understanding in making requests to further suppress and protect health information. Creating a clear path for members and non-members to understand their rights and options to request protections will be a large step forward and ensure patients can more easily exercise their rights. However, we have several concerns about the path forward and request that the OIC address these in revisions to this rule. Specifically, rules should clearly include:

- Clarification that the new subsection, WAC 284-04-500(10), applies to requests for suppression authorized by WAC 284-04-510. We recommend the following revision (in bold):

- *(10) A licensee shall make the health information policies, standards, and procedures developed pursuant to this section and WAC 284-04-510 available to both members and non-members. This information must be . . .*

- A requirement that OIC review each issuer's website content related to the template provided by the OIC to ensure that members and non-members can easily access and interpret information required in WAC 284-04-500. Specifically, language should be added to Section 10(b)(iii) similar to the following:
 - *The webpage and linked material shall be submitted to the commissioner's office upon or prior to posting. The commissioner shall have thirty days to review the information to ensure the communication is clear and the process is easy for members to use. The commissioner shall provide approval or request revision within 30 days. If revision is requested, the carrier must respond with a revised policy within 14 days. Lack of response by the commissioner's office will imply approval of webpage content.*

- Explicit authorization for health care providers to request suppression on a member's behalf with only short verbal confirmation by the member of the authorization. Language should be added to Section (10)(b)(iv) similar to the following:
 - *Members allow agencies, such as health care providers, requesting reimbursement to request suppression of health information on their behalf. Carriers may request verbal confirmation from the member to verify identity.*

- A requirement that a common form for requesting suppression of EOBs be developed and utilized by all carriers to ensure ease of use by members and non-members. Although the OIC template for the webpage and potential request form is simple, if the implementation by carriers adds too many details, the intention of the template and form could be subverted. Therefore, the webpage and form should be approved by the OIC. Also, the form should not require the requester to specify details as to the reason for the request, which could complicate and slow requests and disclose protected health information needlessly. Recently, Oregon adopted a similar common form. Rule language should be added to Section (10)(c)(i), such as the following:
 - *The commissioner shall work with carriers to develop a single form that can be common to all carriers and used by any member. The form shall not require disclosure of protected health information beyond that needed to identify the member. At a minimum, the form must:*
 - *Inform the individual of the right to have protected health information sent to the individual and not disclosed to a policyholder or certificate holder;*

- *Allow an individual to indicate where to redirect protected health information, including mail, electronic mail, or telephone number;*
 - *Allow an individual to describe the type of services subject to nondisclosure;*
 - *Allow an individual to specify the identity or types of person with whom information should be withheld;*
 - *Allow an individual to provide a phone number or e-mail address where the individual may be reached if additional information or clarification is necessary to satisfy the request;*
 - *Include a disclaimer that it may take up to 20 days to process the confidential communications request but no EOBs or bills will be sent to the policyholder while the request is pending.*

- A requirement that the carrier provide positive written confirmation of every request for suppression. Even a verbal confirmation to a member is not sufficient to assuage fears of inadvertent disclosure. At a minimum, carriers should offer to email confirmation of the request, including the effective date and a description of the suppression (or direct link to webpage describing same). Suggested language:
 - *Licensees shall provide immediate written confirmation to the individual or person acting on behalf of the individual that the request has been received and is pending approval.*

- A prohibition on sending any EOB or bill to members related to services received by the requester from the day of the suppression request until the request has been processed. This stipulation is needed to ensure that a member can receive confidential services on the same day the member seeks the service and that delays in processing do not result in the information being disclosed. Suggested language:
 - *Licensees will place a temporary hold on disclosure of protected health information immediately upon receipt of confidential communications request.*

- A requirement that carriers to specify the mechanism by which their website or portal accounts can redirect protected health information, including EOBs and bills. In other words, if a carrier can offer the same protections by providing a member with a portal account, this mechanism should be noted on the same website noted in the preproposal.

In addition, our coalition would like to reiterate that **existing Washington rules require suppression of health information to a policy holder when a minor consents to certain services** (WAC 284-04-510 (3)(b)). This protection should extend to adverse benefit determinations when a claim is denied, in addition to the specific items currently in the regulation. ERISA does not override this provision of default privacy protection in this

circumstance. The benefit determinations required by ERISA extend to the “claimant,” a term that is defined broadly enough to include the covered member, not only the policyholder. Oregon’s recent law regarding confidentiality in health insurance supports this interpretation, and the CR-102 should similarly address this topic specifically.

Finally, we are concerned that carrier website changes and request processes may not offer the clarity and ease of access that stakeholders expect. We would therefore expect this change not to be a one-time fix, but instead a change that will need careful monitoring and ongoing discussions with carriers to improve visibility. We request that dedicated staff be assigned to this task and are empowered to take corrective action in the event of noncompliance with this rule and WAC 284-04-500 and -510. In addition, coalition and other represented organizations will do our best to communicate to patients and providers how to use websites and implement patient protections. Thank you for your work on this important rule.

Sincerely,

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