



**ACA**<sup>TM</sup>

INTERNATIONAL  
The Association of Credit  
and Collection Professionals

## White Paper

# **Applying HIPAA's Framework to the Sale and Purchase of Healthcare Receivables**

ACA International  
[www.acainternational.org](http://www.acainternational.org)  
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# Applying HIPAA's Framework to the Sale and Purchase of Healthcare Receivables

## I. About ACA

ACA International, the Association of Credit and Collection Professionals (“ACA”), is an international trade association of credit and collection professionals who provide a wide variety of accounts receivable management services. Members of ACA are dedicated to handling billing and collection matters in a respectful, responsible and lawful manner – at all times in accordance with detailed consumer protection laws and regulations. Most recently, on February 22, 2007, the ACA Board of Directors approved for its members the ACA Statement of Principles and Guidelines on Healthcare Collection, Servicing and Debt Purchasing Practices (“Principles and Guidelines”). The Principles and Guidelines memorialize ACA’s members’ commitment to handle billing, credit and collection matters in a respectful, responsible and lawful manner.

Of ACA’s over 5,700 members, most are engaged in billing and collections on behalf of healthcare providers. These billing and collection agencies are bound to comply with the Fair Debt Collection Practices Act,<sup>1</sup> the Fair Credit Reporting Act,<sup>2</sup> the Federal Trade Commission Act,<sup>3</sup> the Gramm-Leach-Bliley Act,<sup>4</sup> and the Privacy Rule promulgated under the Health Insurance Portability and Accountability Act of 1996 (the law and related regulations are referred to herein collectively as “HIPAA”).<sup>5</sup>

## II. Need For Clarification - The Issues

With increasing frequency, members of ACA International ask ACA for information addressing the impact of the HIPAA Privacy Rule on the purchase and sale of patients’ unpaid medical bills. Additionally, ACA members have commented healthcare providers are similarly expressing an interest in liquidating their patient accounts receivables by way of debt sale transactions. In response, ACA members, and in particular those members involved in ACA’s Healthcare Services Program and those who belong to ACA’s Asset Buyers Division, asked ACA to provide them with an explanation of the impact of HIPAA on a healthcare debt sale transaction as well as provide guidance on structuring a HIPAA-compliant healthcare debt sale transaction.

In order to provide its members with such guidance, ACA sought clarification from the U.S. Department of Health and Human Services (“HHS”), the recommendations of independent counsel and conducted its own internal legal analysis. The purpose of this document is to guide members through ACA’s analysis so they are well prepared to address the unique issues

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<sup>1</sup> 15 U.S.C. §§ 1692-1692p (2006).

<sup>2</sup> 15 U.S.C. §§ 1681-1681x (2006).

<sup>3</sup> 15 U.S.C. §§ 41-58 (2006).

<sup>4</sup> 15 U.S.C. §§ 6801-6809 (2006).

<sup>5</sup> “Privacy Rule” refers to Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Parts 160 and 164.

surrounding the use and disclosure of patient information if contemplating the sale and purchase of healthcare debt.

The information provided herein *does not* constitute legal advice upon which the reader may rely. Readers are encouraged to seek the advice of independent legal and tax counsel before engaging in a healthcare debt sale or purchase transaction.

### **III. HIPAA Permits the Sale of Healthcare Debt**

The answer to the question of whether HIPAA allows for the sale of healthcare debt lies squarely within the Preamble to the final version of the HIPAA Privacy Rule. In this Preamble, HHS stated “a covered entity health care provider may sell its accounts receivable to a collection agency for payment purposes.”<sup>6</sup>

In light of this statement, it would appear no further analysis of this issue is necessary. However, HHS’s statement above - which makes clear HIPAA permits the sale of healthcare receivables - includes two important terms. The first is the term “collection agency” and the second is “payment.” Both of these terms, as used in the HIPAA context, must be understood and the criteria for each must be satisfied as a condition of selling healthcare debt.

“Collection Agency” as Defined in HIPAA’s Privacy Rule: Although HIPAA does not define “collection agency,” it is clear from HHS’s guidance in the Preamble to the Privacy Rule that HHS views collection agencies as business associates who perform payment activities by or on behalf of healthcare providers. Instead of defining “collection agency,” HHS has noted a number of activities it considers payment activities a collection agency could undertake to satisfy the definition of a collection agency performing as a business associate for payment purposes (e.g., obtaining location information, credit reporting, contacting a patient or patient’s family to secure payment).

“Payment” as Defined in HIPAA’s Privacy Rule: As stated by HHS, one of the core functions of the healthcare system includes payment for the delivery of healthcare services to individuals. HIPAA, in turn, recognizes individuals expect their healthcare provider(s) to use their information in order to obtain payment in a variety of ways. In the Preamble to the final Privacy Rule, HHS stated

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<sup>6</sup> Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82461, 82514 (Dec. 28, 2000). A key threshold issue in an asset sale involving a provider is whether or not the transaction would be viewed from a HIPAA perspective as a standard or routine function or activity, or rather a more extraordinary one. If a “payment” activity as the Preamble to the Final Rule suggests, an asset sale viewed from the covered entity’s perspective as undertaken for “payment purposes” is routine if the purchaser is acquiring with the purpose of functioning as a collection agency. On its face then, HIPAA would not appear to expressly permit other types of sales of accounts receivable – meaning types of sales contemplated by the selling covered entity or the purchasing asset buyer for other “non-routine” purposes. As noted in the discussion of HIPAA’s definition of “marketing” in the Preamble to the Privacy Rule – if the sole motivation for the sale of accounts receivable was for a covered entity to receive remuneration for making the data available to allow a third party to encourage patients to purchase a good or service from the asset buyer or its affiliate, arguably HIPAA would require the selling covered entity to first obtain each patient’s permission before making any data available to the intended asset buyer. See 45 C.F.R. § 164.508(a)(3) (2007).

For individuals, **health care treatment and payment are the core functions of the health care system.** This is what they expect their information will be used for when they seek medical care and present their proof of insurance to the provider.<sup>7</sup> (emphasis added.)

Typically a covered entity healthcare provider will obtain payment for services by filing claims with third-party payors, requesting payment from the patient or the responsible party or accessing funds from patient financial assistance programs. These payment functions are either carried out directly by the healthcare provider or their business associates. More recently, covered entity healthcare providers have received payment for services through the sale of their accounts. The question therefore is whether the sale of a healthcare patient account constitutes a payment activity. HIPAA defines “payment” in relevant part as follows:

Payment means:

- (1) The activities undertaken by: ...
  - (ii) A covered health care provider or health plan to obtain or provide reimbursement for the provision of health care; and
- (2) The activities in paragraph (1) of this definition relate to the individual to whom health care is provided and include, but are not limited to: ...
  - (iii) Billing, claims management, collection activities, obtaining payment under a contract for reinsurance (including stop-loss insurance and excess of loss insurance), and related health care data processing; ... and
  - (vi) Disclosure to consumer reporting agencies of any of the following protected health information relating to collection of premiums or reimbursement:
    - (A) Name and address;
    - (B) Date of birth;
    - (C) Social Security number;
    - (D) Payment history;
    - (E) Account number; and
    - (F) Name and address of the health care provider and/or health plan.<sup>8</sup>

Based upon the foregoing, ACA members who perform debt collection activities on behalf of covered entities, including billing, credit reporting or other activities undertaken “to obtain reimbursement for the provision of health care,” are expressly included in HIPAA’s definition of “payment.” As long as a provider’s business associate arrangement with a collection agency/debt purchaser contemplates the collection of the receivables by the purchaser (or business associate of the collection agency who purchases the healthcare debt), on behalf of the provider, the provider may share protected health information (PHI) with the agency

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<sup>7</sup> Standards for Privacy of Individually Identifiable Health Information; Proposed Rule, 64 Fed. Reg. 59918, 59940 (Nov. 3, 1999).

<sup>8</sup> 45 C.F.R. § 164.501 (2007). Note that subsequent to the compliance deadline for HIPAA’s Privacy Rule, Congress amended the Fair Credit Reporting Act to synchronize it with the Privacy Rule as it relates to the credit reporting of medical information to assure that the privacy promises of HIPAA would not be undermined by credit reporting.

purchasing the patient accounts. Under this analysis, the collection agency/purchaser as well as its business associates are entitled to use and disclose patients' PHI for "payment" purposes notwithstanding who holds legal title to the account.

To the extent then, a healthcare provider determines the sale of its patient accounts receivable ("Accounts" or "Account" if referred to singly) for payment purposes to a collection agency meets its objectives for obtaining reimbursement for care, the collection agency/purchaser acts on behalf of the provider when seeking reimbursement for care and, provided HIPAA's other requirements are met, ACA, with the support of HHS, opines HIPAA permits the sale of Accounts under a business associate analysis.

#### **IV. Defining Accounts Subject to Sale**

To remain consistent with HIPAA (as well as various state laws describing the ownership of information in a patient's medical record) and the obligations it imposes on covered entities, it is essential to clarify what a covered entity would sell and transfer to an asset purchaser in a sale of its Accounts.

Relying upon the Uniform Commercial Code's definition of "account," a covered entity would sell and an asset buyer would purchase the following:

a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered.<sup>9</sup>

What is being purchased and sold, for "payment" purposes is the stream of income or the "right to payment of a monetary obligation." In short, what a purchaser acquires in the sale of a portfolio of healthcare accounts is the right to receive payment on those accounts and a qualified right to use data pertaining to those accounts (subject to HIPAA's minimum necessary standard) to do so.

Moreover, the transfer of all right, title and interest to use a patient's protected health information by a covered entity (except in the narrow circumstance in which the entity is selling or merging into a covered entity) to a non-covered entity and putting that information outside of HIPAA's standards and specifications would not be permitted under HIPAA unless the covered entity first obtained the authorization of each patient whose data was affected by the proposed sale and transfer.

#### **V. Designated Record Set Incidental to the Sale of Healthcare Accounts**

HIPAA generally describes the medical and billing records of a patient as the patient's "designated record set." HIPAA defines a "designated record set" as follows:

(1) A group of records maintained by or for a covered entity that is:

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<sup>9</sup> U.C.C. § 9-102(a)(2) (2007).

- (i) The medical records and billing records about individuals maintained by or for a covered health care provider;
  - (ii) The enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or
  - (iii) Used, in whole or in part, by or for the covered entity to make decisions about individuals.
- (2) For purposes of this paragraph, the term *record* means any item, collection, or grouping of information that includes protected health information and is maintained, collected, used, or disseminated by or for a covered entity.<sup>10</sup>

Covered entities have numerous responsibilities relative to each patient's designated record set.<sup>11</sup> Several provisions of HIPAA assure patients the right to request and receive access to all or a portion of the designated record set, the right to request an amendment to all or a portion of their designated record set, the right to request and receive an accounting of non-routine disclosures made of PHI in their designated record set, the right to request additional privacy or restricted communications about their PHI<sup>12</sup> and the right to complain to the provider or HHS about suspected misuses of PHI.<sup>13</sup> HIPAA also requires covered entities to ensure the documentation pertaining to the designated record sets of its patients is maintained for a minimum of six years, including the titles of the persons or offices responsible for receiving or processing requests for access, amendment and accountings by individuals.<sup>14</sup>

Even if a provider were to sell or transfer its interests in patient accounts receivable, a provider would remain responsible under HIPAA for respecting and addressing these critical patient rights. Moreover, in support of each of these rights, HIPAA imposes an ongoing documentation requirement (and related six-year retention requirement) on providers to track any such requests and detail the manner in which the provider handled such requests.<sup>15</sup> A collection agency/purchaser, for example, would therefore be required to recognize the various patients' rights enumerated in HIPAA and be prepared to properly coordinate with the selling covered entity on ongoing requests for access, amendment or accountings for disclosures. A collection agency buyer in its role as business associate could contract to handle these responsibilities directly and document these actions consistent with HIPAA – again as the covered entity is required to do so under HIPAA. The parties must bear in mind that covered entities remain responsible for handling patients who exercise their rights relative to information in their designated record.

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<sup>10</sup> 45 C.F.R. § 164.501 (2007).

<sup>11</sup> An interesting side question remains as to whether or not the ultimate debt buyer and/or servicer would develop information about particular patients that should properly be regarded as part of the "designated record set." Were that the case, a mechanism for assuring the exchange of information between debt buyer and/or servicer and originating provider would need to be structured into the deal to assure the key protected health information were consistently available to the provider. If the provider sells patient accounts receivable for recurring patients, the importance of this information exchange would be intensified. All this suggests that a debt buying transaction structured as a "walk away" for the originating provider or without a viable business associate arrangement between the parties would pose some insurmountable challenges.

<sup>12</sup> 45 C.F.R. § 164.522 (2007).

<sup>13</sup> 45 C.F.R. § 164.530(d) (2007).

<sup>14</sup> See 45 C.F.R. §§ 164.524(e), 164.530(j) (2007).

<sup>15</sup> 45 C.F.R. § 164.530(j) (2007).

While a covered entity's responsibilities under HIPAA with regard to the designated record sets of its patients are not alienable and cannot be transferred to another by contract, it is possible for a covered entity to contract to have its business associate provide its patients with access to their designated record sets or provide them with an accounting as permitted by HIPAA. This type of service arrangement is permitted so long as the protected health information held by the business associate and the functions it otherwise performs for a covered entity are consistent with the requirements of HIPAA.<sup>16</sup>

Just as care must be taken to limit the designated record set information shared by and between a covered entity and its business associates to that which is the minimum necessary, care must also be taken to similarly limit the designated record set information shared by and between a covered entity and the business associate who purchases its accounts receivables. Further, and subject to the minimum necessary standard, a collection agency that purchases the patient accounts receivable would be entitled, consistent with the terms and conditions of its business associate agreement, to use and disclose some of the patients' protected health information to collect the patients' payments for the accounts.

## **VI. Role of the Collection Agency Buyer**

For the sale of patient accounts receivable to fit within HIPAA's parameters, the entity acquiring a provider's accounts receivable must assure it is doing so in its capacity as a business associate, acting by or on behalf of the seller for "payment" purposes. Because HHS designed the Privacy Rule "to follow activities and functions, not titles and labels,"<sup>17</sup> ACA respectfully submits the sale of accounts to a collection agency is permissible if the following are true:

- A. The functions and activities the collection agency buyer embarks on are aligned with the covered entity/seller's payment purposes;
- B. The parties enter into and operate under a business associate arrangement memorialized by a HIPAA compliant servicing agreement (business associate agreement);
- C. The collection agency buyer makes no uses or disclosures of protected health information other than those the selling covered entity itself could make under HIPAA if it handled its payment activities on its own behalf;
- D. If conducting "data aggregation" services, the collection agency buyer assures it does so within the bounds of HIPAA;
- E. The collection agency buyer is competent to recognize assertions of patients' rights under HIPAA and promptly forwards these requests to the selling covered entity for proper processing (and if the collection agency buyer obtains or creates information that belongs in the patient's designated record set, there is an

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<sup>16</sup> See Health & Human Services Frequent Questions, Question 246 at [www.hhs.gov/hipaafaq/providers/business/246.html](http://www.hhs.gov/hipaafaq/providers/business/246.html).

<sup>17</sup> Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82461, 82471 (Dec. 28, 2000).

established means by which the collection agency buyer makes it available to the provider);

- F. The collection agency buyer allows the selling covered entity to take reasonable steps to investigate circumstances giving rise to concerns that the collection agency buyer has breached its business associate obligations, and, if a breach is detected, is prepared to respond by taking steps to cure the breach – but failing that, accepts the consequences that the selling covered entity could terminate the business associate arrangement if feasible, or report the problem to the Secretary of the U.S. Department of Health and Human Services;<sup>18</sup>
- G. The parties to the transaction – both the buyer and seller – foresee and document an ongoing relationship.

To assure the PHI associated with the accounts receivable being sold does not lose its character as PHI, the parties to a healthcare receivables purchase and sale transaction should not only enter into an agreement memorializing the terms and conditions of their purchase and sale but should also enter into a servicing agreement that forms a business associate arrangement between the seller and buyer to assure the protected health information is only used and disclosed consistent with HIPAA's controls and restrictions.

## **VII. Safeguarding PHI – Buyer's Accountability to Covered Entity Seller**

While HIPAA does not require a covered entity to actively monitor the activities of its business associates, it does hold a covered entity responsible for taking reasonable steps to investigate the activities of its business associates should circumstances arise that would lead the covered entity to believe that the purchaser is engaged in a pattern of activity or practices that violate HIPAA. Should a covered entity fail to investigate when suspicious circumstances arise, a covered entity itself is in breach of its obligations under HIPAA.<sup>19</sup> As discussed in more detail above, entering into a business associate arrangement will not excuse a covered entity from ignoring flaws in the privacy practices of its debt buyer/business associate.

The buyer of the accounts receivable must use appropriate safeguards to protect the integrity, availability and confidentiality of the information and must report to the covered entity seller any security incidents – or other circumstances under which the buyer becomes aware of any improper use or disclosure of the PHI. In addition, the buyer must be prepared to work with the covered entity to mitigate any harmful effects flowing from the incidents. If a buyer is unable or unwilling to cure breaches within a reasonable time frame or in a reasonable manner viewed from the covered entity's perspective, HIPAA would obligate the selling covered entity to terminate the business associate arrangement, if feasible, and obtain a return of the protected health information or report the situation to HHS.

## **VIII. Conclusion**

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<sup>18</sup> The parties could contemplate this eventuality to avoid having to reverse the sale by including in the business associate agreement a mechanism for agreeing upon a mutually acceptable "business associate" to step in should the covered entity reasonably determine a violation remains uncured.

<sup>19</sup> 45 C.F.R. §§ 164.502(e), 164.504(e)(1)(i) (2007).

Because HHS wrote, “a covered entity health care provider may sell its accounts receivable to a collection agency for payment purposes,”<sup>20</sup> ACA respectfully submits that under proper circumstances, a provider’s sale of accounts receivable to a collection agency is permitted by HIPAA. For the sale of patient accounts receivable to fit within HIPAA’s parameters, the following must be true:

- The functions and activities the collection agency buyer embarks on are aligned with the covered entity/seller’s payment purposes;
- The parties enter into and operate under a business associate arrangement memorialized by a HIPAA compliant servicing agreement;
- The collection agency buyer makes no uses or disclosures of protected health information other than those the selling covered entity itself could make if it handled its payment activities on its own behalf;
- If conducting “data aggregation” services, the collection agency buyer assures it does so within the bounds of HIPAA;
- The collection agency buyer is competent to recognize assertions of patients’ rights under HIPAA and promptly forwards these requests to the selling covered entity for proper processing (and if the collection agency buyer obtains or creates information that belongs in the patient’s designated record set, there is an established means by which the collection agency buyer makes it available to the provider); and
- The collection agency buyer allows the selling covered entity to take reasonable steps to investigate circumstances giving rise to concerns that the collection agency buyer has breached its business associate obligations, and, if a breach is detected, is prepared to respond by taking steps to cure the breach – but failing that, accepts the consequences that the selling covered entity could terminate the business associate arrangement if feasible, or report the problem to the Secretary of the U.S. Department of Health and Human Services.
- The parties to the transaction – both the buyer and seller – foresee and document an ongoing relationship.

As with other materials produced by ACA, distribution of the white paper to its membership does not establish an attorney client relationship. The information provided in this white paper does not constitute legal advice upon which you or any third party may rely. All members are expected to seek the advice of independent counsel as they analyze the impact of HIPAA on the sale and purchase of healthcare debt and any transactions to which they are a party. This information does represent the most current analysis by ACA International on this subject matter and is provided as a member benefit for your review and consideration.

Please be aware there may be other methods of analyzing the applicability of HIPAA on a healthcare debt sale transaction, but ACA believes the foregoing represents the most prudent course of action. Healthcare laws and regulations beyond HIPAA, such as the Medicare standards and regulations may also apply to these transactions. ACA has further research underway on issues related to Medicare’s standards and regulations. It is advisable that members consider the Medicare implications of a medical debt purchase transaction.

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<sup>20</sup> Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82461, 82514 (Dec. 28, 2000).

## IX. Related Materials

ACA Statement of Principles and Guidelines on the Collection, Servicing and Sale of Healthcare Debt

ACA E-Compliance Resources – Fastfaxes (title and document number) available at [www.acainternational.org](http://www.acainternational.org).

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