August 1, 2011

Georgina Verdugo, JD  
U.S. Department of Health and Human Services  
Office for Civil Rights  
Attention: HIPAA Privacy Rule Accounting for Disclosures  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Ms. Verdugo:

On behalf of children’s hospitals across the country, the National Association of Children’s Hospitals (N.A.C.H.) appreciates the opportunity to provide comments on the HIPAA Privacy Rule Accounting of Disclosures under the Health Information Technology for Economic and Clinical Health Act. We appreciate the Department of Health and Human Services’ Office for Civil Rights (OCR) reaching out to the provider community on the important topic of expanding accounting of disclosures of protected health information (PHI) for treatment, payment, and health care operations.

Children’s hospitals share the federal government’s commitment to using Health Information Technology (HIT) to improve clinical care, care coordination, quality of health care, and providing medical information to children and their families. Children’s hospitals also believe that patients’ PHI must be private and secure in order to obtain the public’s trust in the use of HIT. We agree that some of the proposed changes to the accounting of disclosure requirement could improve the value of information provided to individuals, while helping to reduce covered entities’ burden in providing information.

Specifically, N.A.C.H. supports OCR’s proposal to exempt the following disclosures:

- Related to reports of adult and child abuse and neglect, or domestic violence; (we especially applaud OCR for exempting reports of child abuse as it will protect many children at our hospitals);
- For research where an institutional review board or privacy board has waived the requirement to obtain individual authorization for the disclosure;
- About decedents to coroners, medical examiners and funeral directors; and
- About decedents for cadaveric organ, eye, or tissue donation.
When it comes to Electronic Health Record (EHR) systems, many children’s hospitals are in the forefront of EHR implementation and use. Based on the latest HIMSS Analytics EMR score data for 2010, children’s hospitals, which were identified as NACHRI members, had a significantly greater percentage of hospitals in the higher stages of the HIMSS EMR model compared to the rest of the industry. The higher stages are comprised of stages 4-7 where children’s hospitals had 54 percent of their hospitals in these latter stages compared to 19 percent for the rest of the hospitals. This is an extraordinary achievement that highlights the commitment of children’s hospitals to improving care through better technology. Based on this experience, children’s hospitals are very aware of EHR privacy and disclosure issues. Although many children’s hospitals have robust EHR systems, we do have some specific concerns with the proposed rule.

N.A.C.H. respectfully requests that the OCR review and strongly consider the following points:

- The accounting of disclosure requirements as currently written would be a significant administrative burden for children’s hospitals and other covered entities to comply with and is a privacy right that few individuals use or value. Children’s hospitals believe that requiring covered entities with electronic health records to have the capacity to produce an accounting of disclosures of protected health information from an electronic health record for treatment, payment, and health care operations reflects an unrealistic sense of the ability of children’s hospitals and other covered entities to track and compile this information. Each request requires significant time and resources for staff to produce a readable and useable report for the individual. Moreover, shortening the time period for covered entities to produce such a report from 60 days to 30 days will only add to the administrative burden.

- In addition, it is important to point out that the systems in place today in most covered entities are not mature enough for the requirements of accounting disclosures for health care operations, treatment and payment. The OCR assumes that producing an access report is merely a byproduct of having the technical capability within an electronic information system to create an audit log and print or display the results of that log. A typical children’s hospital has multiple enterprise information systems, databases and applications that contain electronic protected health information, as well as smaller departmental systems and applications. Although most of these systems have audit log capabilities, they are not designed to track disclosures as required by the expanded accounting of disclosures requirements. Oftentimes, these systems do not “talk” to each other so in order to comply with the expanded disclosure accounting requirements, there will have to be significantly more resources employed in order to piece through the different audit logs to compile a report that can be easily used and understood.

In other words, compiling an accounting of disclosures from every electronic system cannot be accomplished easily. Instead, it would require extensive
professional time to identify which electronic systems may have been accessed. It will take more time to collect and review any information that might be relevant from each of those systems and create one single report that presents the information to the patient in a useful way.

In addition, complying with an expanded accounting of disclosures for treatment, payment and health care operations of an electronic health (or medical) record will be problematic because there is no clear definition of what comprises a legal electronic health record. Therefore, having a practical definition for a legal electronic medical record for institutions with multiple systems is essential in making sure hospitals are compliant. N.A.C.H. urges the OCR to reconsider this approach, and at the very least, the OCR should provide a clear definition of an EHR.

- As currently written, the proposed rule requires an accounting of disclosures to include name, and if known, the address of the recipient, a brief description of the type of PHI disclosed, and a brief statement of the purpose of the disclosure. There is significant concern expressed by employees of children’s hospitals with the requirement that the name and address of people accessing records will have to be disclosed. N.A.C.H. requests the OCR clarify what the current rule means by “address of the recipient.” Does this mean that the covered entity will have to disclose the actual address of the person that accessed the record or does this mean a more general location (i.e. the accounting department)? To comply with these obligations, hospitals will have to disclose the identity of employees, and it is difficult to understand exactly what privacy benefit patients receive from supplying employees’ names in these circumstances. Moreover, in some circumstances, disclosing the identity of employees could have potential employee safety concerns.

- Complying with these expanded auditing requirements with the current technology in place will significantly drive up costs. These additional costs are not consistent with intent of the EHR incentive payment programs.

- We strongly advocate for patients’ rights to access their data in an electronic health record and to see whom this data is released to by their providers. For pediatric patients, these rights must also be extended to parents/guardians at the younger ages. Older adolescent patients should have more privacy extended to them with regards to disclosure of data. Patients and parents/guardians must be educated on their right to access this information, but given the reasons mentioned in this letter we believe their query must be specific in order to provide a focused report for them. We are attaching a paper titled “Whose Personal Control? Creating Private, Personally Controlled Health Records for Pediatric and Adolescent Patients” that provides good guidelines on disclosures by age group.
• We would also like to comment on OCR’s question about the current accounting for research disclosures to individuals. N.A.C.H. supports the Institute of Medicine’s (IOM) conclusion that the privacy rule’s current accounting provision for research disclosures places a heavy administrative burden on health systems and health services research but achieves little in terms of protecting privacy. We agree with the IOM’s report that recommends the Department revise the privacy rule to exempt disclosures made for research from the Privacy Rule’s accounting requirement.

• We commend the OCR for decreasing the length of time required to store disclosures from six years to three years for access reports. However, N.A.C.H. is concerned about OCR’s proposal to make access reports available upon request beginning Jan. 1, 2013 for any designated record set (DRS) acquired after Jan. 1, 2009 and beginning Jan 1, 2014 for any DRS acquired before Jan. 1, 2009. We strongly believe that these deadlines are not feasible.

In conclusion, expanding auditing of disclosures for treatment, payment and health care operations as proposed is too broad and unworkable with present EHR capabilities at children’s hospitals. We appreciate the opportunity to provide information on the HIPAA Privacy Rule Accounting of Disclosures under HITECH. For additional information please contact Allan Castro acastro@nachri.org or 703/797-6077 or Liz Parry at lparry@nachri.org or 703/797-6192.

Sincerely,

Lawrence A. McAndrews
President and Chief Executive Officer
National Association of Children’s Hospitals