

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Health Benefit Plans
Electronic Receipt and Transmission of Health Care Claims
Use of Clearinghouses in Electronic Transactions

Adopted Amendments: N.J.A.C. 11:22-3.2 and 3.8

Proposed: November 7, 2005 at 37 N.J.R. 4169(a)

Adopted: April 27, 2006 by Steven M. Goldman, Commissioner, Department of Banking and Insurance

Filed: April 27, 2006 as R. 2006 d 200, **with substantive and technical changes** not requiring additional public notice and comment (See N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17B:30-23.

Effective Date: June 5, 2006.

Expiration Date: April 26, 2011.

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance received timely written comments from: Emdeon Corporation (parent of WebMD Corporation), Health Net, Affiliated Network Services, LLC, National Electronics Attachment, Inc., and Kepa Zubeldia, MD.

COMMENT: Several commenters expressed their support for the Department's proposed amendments.

RESPONSE: The Department appreciates the commenters' support for this proposal.

COMMENT: One commenter stated that they support the Department's proposed amendments subject to the following:

- (a) That the Electronic Healthcare Network Accreditation Commission (EHNAC) is a national standards development organization as contemplated by the proposed rules and that EHNAC accreditation, in turn, meets and fully satisfies the criteria and requirements of the proposed rules;
- (b) That the proposed amendments are materially consistent with similar approaches toward accreditation in other states so that different and multiple approaches toward accreditation in the several states is avoided; and
- (c) That sufficient time will be allowed to permit clearinghouses, when applicable and justified by case-specific circumstances, to obtain accreditation.

The commenter stated that although compliance under the proposed amendments is not required until 180 days after the effective date of the amendments, some degree of flexibility should be allowed during the initial stages of the accreditation process so as to allow for a rational implementation of the proposed rules.

RESPONSE: The Department believes the Electronic Healthcare Network Accreditation Commission appears to be a national standards development organization that meets the criteria set forth in N.J.A.C. 11:22-3.8(b). The Department notes that while EHNAC may not be the only national standards development organization that meets the criteria for recognition, it appears that EHNAC has established criteria to judge the competency, assets, practices and procedures of a clearinghouse as required by N.J.A.C. 11:22-3.8(d). It also appears that EHNAC has been properly authenticated and registered with the Office of the United States Attorney General and Federal Trade Commission pursuant to the provisions of the National Cooperation Research and Production Act of 1993, 15 U.S.C. §4301 et seq. Therefore, assuming that EHNAC seeks recognition by this Department pursuant to N.J.A.C. 11:22-3.8(c), based upon the

foregoing it would appear to qualify for such recognition. Consequently, those clearinghouses that are accredited by EHNAC would not have to seek any other accreditation review.

Regarding accreditation conducted in other states, the Department does not seek to develop performance and/or accreditation standards separate and distinct from other states. The Department notes that at this point, it appears that only one other state has undertaken the review and accreditation of clearinghouse privacy and security. The Maryland Health Care Commission conducts its own inquiry and review process which is in some instances combined with the accreditation process undertaken by EHNAC. The Department seeks to ensure that there is independent verification of the privacy, security and performance standards that are required by the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191 (HIPAA). Thus, the Department will not directly accredit clearinghouses nor does it have any direct regulatory authority over those entities. Rather, these rules are directed toward healthcare payers and simply require that healthcare payers shall not employ the services of healthcare clearinghouses that are not properly accredited by a national standards development organization. The Department is not seeking to develop an individual State standard for judging the performance of clearinghouses, but rather links accreditation by a national standard development organization with the national accreditation criteria established by HIPAA.

Finally, the purpose of this amendment is to encourage clearinghouses to submit to independent verification of privacy and security standards that they should be observing pursuant to the provisions of HIPAA. Clearinghouses should already be complying with these requirements.

COMMENT: One commenter expressed concern with the proposed amendments' requirement that payers who elect to use clearinghouses for the handling of electronic transactions should only use clearinghouses that have been accredited by a national standard setting organization. The commenter stated that, in order to fulfill this requirement, national standard setting organizations would need to accredit clearinghouses which, according to the commenter, does not happen. The commenter stated that, generally, national standard setting organizations or "designated standard organizations" do not do the actual accreditation of clearinghouses, but partner with other groups who perform the actual function of accreditation. The commenter questioned if this separate organization, that actually does the accreditation, is a subcontractor for the national standard setting organization? The commenter stated that any clarification that the Department can provide in this regard will be beneficial.

RESPONSE: The Department disagrees with the commenter. The Department is aware of several national organizations that have highly detailed criteria for determining the privacy, security and operational efficiency of clearinghouses. Pursuant to N.J.A.C. 11:22-3.8(c), a national standard development organization seeking to accredit clearinghouses shall submit proof of its qualifications to the Department. The proof will include copies of the accreditation criteria or standards against which it measures the competency, assets, practices and procedures of the clearinghouses. The national standard development organizations shall also have to demonstrate that it is properly authenticated and registered with the U.S. Attorney General's Office and the Federal Trade Commission pursuant to Federal law. As a result of the foregoing, it will be the national standard development organization that will be conducting the process, and issuance of the certificate of accreditation.

COMMENT: One commenter stated that it receives attachments electronically from healthcare providers from across the country and New Jersey. The commenter stated that they are an internet company that has been doing this for several years and have received approximately seven million attachments electronically. The commenter stated that their attachments are all sent electronically by the providers into a specific payor's account. The payor simply looks into their network and sees the attachment (this could be an x-ray, doctor's notes, lab report, narrative, explanation of benefits (EOB), coordination of benefits (COB), etc.) The commenter stated that they have an outside consulting service that reviews their procedures, back-ups, loss prevention, etc., plus they occasionally have reviews by payors' audit teams. The commenter questions whether they fall under the Department's proposed amendments.

RESPONSE: The Department wishes to emphasize that these rules do not impose any obligation on clearinghouses directly but rather on healthcare claims payers that elect to employ the services of clearinghouses. Thus, the commenter's question can be answered by a two-part analysis of their business model. First, does the entity perform services that fit within the definition of a clearinghouse as set forth in N.J.A.C. 11:22-3.2. Secondly, the commenter should determine for whom it is working. If the commenter was hired by a medical provider to perform clearinghouse activities, these rules do not apply. If the commenter is performing defined clearinghouse activities on behalf of a healthcare claims payer, it need not seek accreditation pursuant to the rule. However, as amended, N.J.A.C. 11:22-3.8 provides that such a payer cannot utilize clearinghouses that are not properly accredited.

Summary of Agency-Initiated Changes:

The Department, in its Economic Impact statement, stated that these amendments do not require payers to use clearinghouses. The Department noted that these amendments do require payers that elect to use a clearinghouse ensure that the clearinghouse is properly accredited by a national standards setting organization. Therefore, the Department is amending N.J.A.C. 11:22-3.8(c) on adoption by changing the word “and” in this subsection to “which,” in order to clarify its intent regarding the applicability of the requirements listed in subsection (d) to the accreditation criteria or standards referenced in subsection (c).

Additionally, the Department is amending N.J.A.C. 11:22-3.8(e) on adoption to delete the reference therein to subsection (c). N.J.A.C. 11:22-3.8(e) begins by stating that “payers” shall not be required to comply with the provisions of (b) and (c).” N.J.A.C. 11:22-3.8(c) sets forth guidelines that apply to a national standards development organization (not “payers”) that desires to accredit clearinghouses. The Department noted in its Economic Impact that it does not regulate “clearinghouses.” Therefore, the cross-reference to subsection (c) in N.J.A.C. 11:22-3.8(e) is being deleted.

Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments do not exceed standards in HIPAA or any Federal requirements or standards.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

11:22-3.8 Use of clearinghouses in electronic transactions

(b) (No change from proposal.)

(c) A national standards development organization that desires to accredit clearinghouses in the manner provided in this section may submit proof of its qualifications to do so as set forth in (b) above and a copy of its accreditation criteria or standards, *[and]* ***which*** shall comply with the requirements set forth in (d) below.

(d) (No change from proposal.)

(e) Payers shall not be required to comply with the provisions of (b) *[and (c)]* above until *[(180 days after the effective date of these rules)]* ***December 2, 2006***.

DHT06-05/inoregs