

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Benjamin de Luna
Associate Area Counsel (Manhattan, Group 3)
(Large & Mid-Size Business)

from: Peter D. Devlin /s/
Deputy Assistant Chief Counsel
(Collection, Bankruptcy and Summonses)
([Office Name])

subject:

This memorandum responds to your request that we review and comment on a proposed disclosure agreement (the "Agreement") submitted by the taxpayer, _____, whereby the taxpayer would turn over to the Service, in lieu of a summons, certain billing records that contain protected health information that is otherwise subject to statutory disclosure restraints set forth in the privacy regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹ As discussed below, we are opposed to the Service entering into this or any other similar agreement for the production of documents because: (1) it is legally unnecessary, (2) it conflicts with statutorily imposed disclosure and or document retention rules, and (3) it will create bad precedent for future audits that require production of protected health information.

Background

¹ The proposed Agreement arose under the Service's audit of the _____ and _____ tax years. After requesting CBS' comments, however, the Service closed that audit and initiated a new audit of the same issues for _____ and _____. Although the current Agreement is moot, the Service believes _____ will raise the same HIPAA concerns and seek substantively the same agreement when information is requested in the current audit. We provide this response so you may consider CBS's views at that time.

. These contracts generally require to provide the insurance company a discount when the insurance company pays its client's bill. These discounts are referred to as "contractuals" since they arise under the contract agreement.

The Service is currently investigating the propriety of the various methods uses to calculate its contractuals.

. Accordingly, the Service sought to audit the discount claimed on its and tax returns.

The Service attempted to obtain de-identified information for the audit. However, after reviewing the information provided, the Service determined that it could not proceed without information that identifies specific health care recipients. is willing to release the protected health information but only if the Service enters into a contractual agreement.

Discussion and Analysis:

Congress passed the Health Insurance Portability and Accountability Act of 1996 in part to provide protection for the privacy interest of health care patients. Pursuant to the authority granted in HIPAA, regulations were promulgated authorizing and/or prohibiting disclosure of certain information. See 45 C.F.R. §§ 164.102-164.534 (effective April 14, 2003). The rules have the effect of restricting the Service's information gathering authority by imposing civil and criminal penalties on "covered entities" for unauthorized disclosure of medical information that identifies a particular person ("protected health information"). There is no dispute that is a covered entity and that the Service is requesting protected health information. Thus, unless one of the exceptions to HIPAA's bar to production applies, the Service is not entitled to the requested information.

The Agreement proposed by is fashioned after HIPAA's rules for the exchange of information between a "covered entity" and a "business associate."² Business associates are defined in HIPAA and include entities that assist covered entities in performing health services (e.g. a consultant or a lawyer). 45 C.F.R. § 160.103. In auditing , the Service is performing a tax oversight role mandated by Congress; it is

² The rules permit releasing protected health information to a business associate as long as the covered entity and the business associate enter into an agreement that assures the business associate will safeguard the information. 45 C.F.R. § 164.502(e).

requires disclosure of return information that the Agreement restricts. Additionally, executing agreements with taxpayers that bind the Service requires a delegation of authority. [REDACTED]

For the forgoing reasons, the Service should not enter into this Agreement or any other contract to secure information from a covered entity that is subject to HIPAA in lieu of a summons. Even if any specific concerns we might have to the provisions in the Agreement are addressed, the concern remains that entering into an agreement with [REDACTED] is legally unnecessary, contravenes current policy, and raises the specter of preferential treatment. If you have any questions in this matter, please call me at 202-622-3600.