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SECTION: HIPAA

AREA: HIPAA PRIVACY/SECURITY POLICIES

SUBJECT: USE OF PHI FOR MARKETING

PURPOSE

To establish guidelines and restrictions for the use and disclosure of Protected Health Information (“PHI”) by the University of Arkansas for Medical Sciences (“UAMS”) in connection with Marketing activities.

SCOPE

The UAMS Workforce.

DEFINITIONS

Business Associate shall mean a person or entity who is not a member of the UAMS Workforce, and who performs or assists in the performance of a function or activity *for or on behalf of UAMS* which involves disclosures that are regulated and permitted by HIPAA and which involve the creation, use or disclosure of Protected Health Information by the Business Associate.

Marketing shall mean communications about a product or service that encourages recipients of the communication to purchase or use the product or service. Marketing also includes any arrangement between UAMS and another party in which UAMS discloses PHI for the other party to make a communication about the other entity’s own product or service that encourages recipients of the communication to purchase or use that product or service.

Protected Health Information (“PHI”) shall mean information that is part of an individual’s health information that identifies the individual or there is a reasonable basis to believe the information could be used to identify the individual, including demographic information, and that (i) relates to the past, present, or future physical or mental health or condition of the individual; (ii) relates to the provision of health care services to the individual; or (iii) relates to the past, present, or future payment for the provision of health care services to an individual. This includes PHI which is recorded or transmitted in any form or medium (verbally, or in writing, or electronically). PHI excludes health information maintained in educational records covered by the federal Family Educational Rights Privacy Act and health information about UAMS employees maintained by UAMS in its role as an employer and health information regarding a person who has been deceased for more than 50 years.

UAMS Workforce shall mean physicians, employees, volunteers, residents, students, trainees, visiting faculty, and other persons whose conduct, in the performance of work for UAMS, is under the direct control of UAMS, whether or not they are paid by UAMS.

To access any other terms or definitions referenced in this policy, go to the UAMS HIPAA Office website at hipaa.uams.edu.

POLICY

UAMS may not use or disclose a patient's PHI for Marketing purposes without a signed HIPAA Authorization from the patient, **except** as allowed by federal and state law, including the Federal HIPAA Privacy Regulations. Any PHI that is used or disclosed by UAMS in compliance with this Policy will be limited to the minimum necessary to achieve the purpose of the use or disclosure.

PROCEDURE

A. General Rule for Marketing Requires Prior Patient Authorization

- 1. General Rule.** If UAMS makes a communication about a product or service that encourages recipients of the communication to purchase or use the product or service, UAMS must first obtain the individual's authorization, unless an exception applies to the requirement to obtain an authorization. UAMS will obtain the patient's authorization in writing, using a UAMS Authorization form, prior to using or disclosing a patient's PHI for Marketing purposes. See *Administrative Guide Policy Use and Disclosure of PHI and Medical Records Policy, 2.1.13* for the required elements of a HIPAA compliant authorization. An Authorization form that complies with HIPAA is available on the UAMS HIPAA website at hipaa.uams.edu. If the Marketing involves direct or indirect remuneration to UAMS from a third party, the Authorization must clearly state that such remuneration is involved. An example of Marketing that requires prior authorization is a communication from UAMS informing former patients about a cardiac facility that is not part of UAMS that can provide a baseline EKG for \$39 when the communication is not for the purpose of providing treatment advice.
- 2. Another entity using UAMS PHI for Marketing of its products or services.** Patient authorization is also required prior to the use or disclosure of PHI made in connection with any arrangement between UAMS and another entity whereby UAMS discloses PHI to the other entity in exchange for direct or indirect remuneration for the other entity or its affiliate to make a communication about its own product or service that encourages recipients of the communication to purchase or use that product or service. If a company seeks access to a list of UAMS patients or any other PHI which the company will use for its own Marketing activities, regardless of whether the company will use the PHI on behalf of UAMS as well, and seeks to do so under the guise of a Business Associate relationship or agreement, prior patient Authorization is required. UAMS may not sell lists of patients to third parties without obtaining authorization from each person on the list. This would include these examples: (1) UAMS sells a list of its patients to a company that sells blood glucose monitors, which intends to send UAMS patients brochures on the benefits of purchasing and using the monitors. Each individual patient must authorize these Marketing communications before they can occur. (2) A drug manufacturer receives a list of patients from UAMS and provides remuneration, then uses that list to send discount coupons for a

new anti-depressant medication directly to the patients. Each individual patient must authorize these Marketing communications before they can occur.

B. Communications which are NOT Marketing: The following types of communications made by UAMS to an individual are not considered Marketing for purposes of this policy, and therefore, no prior patient authorization is required:

1. Communications by UAMS to an individual for the purpose of describing to that individual a health-related product or service that is provided by UAMS, or included in a UAMS plan of benefits, do not meet the definition of Marketing. This exception to the Marketing definition permits communications by UAMS about its own products or services. For example, under this exception, it is not “marketing” when UAMS uses its patient list to announce the arrival of a new specialty group or the acquisition of new x-ray machine or magnetic resonance image machine through a general mailing or publication.
2. A communication is not Marketing if it is made for treatment of the individual. For example, under this exception, it is not “marketing” when UAMS mails prescription refill reminders to patients. It is not Marketing when a primary care physician refers an individual to a specialist for a follow-up test. It is not Marketing when a physician provides free samples of a prescription drug to a patient.
3. A communication is not Marketing if it is made for case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual. For example, under this exception, it is not “marketing” when an endocrinologist shares a patient’s medical record with several behavior management programs to determine which program best suits the ongoing needs of the individual patient. It is not Marketing when a UAMS hospital social worker shares medical record information with various nursing homes in the course of recommending that the patient be transferred to a nursing home.

C. Prior Patient Authorization NOT Required for Limited Marketing Communications: A communication does not require an authorization, even if it is Marketing, if it is in the form of a face-to-face communication made by UAMS to an individual, or a promotional gift of nominal value provided by UAMS. For example, no prior authorization is necessary when UAMS provides a free package of formula and other baby products to new mothers as they leave the Labor and Delivery Unit.

D. Business Associate Agreement Required: If UAMS intends to disclose PHI to a third party for the purpose of the third party communicating with individuals about the products or services of UAMS, such disclosure does not constitute Marketing communications and does not require patient Authorization. Prior to disclosing PHI to a third party acting on behalf of UAMS, UAMS is required to enter into a written agreement with the third party restricting the third party’s use of the PHI to communications on behalf of UAMS and UAMS’ own products and services. The agreement will be a Business Associate Agreement (*Administrative Guide Policy Business Associate Policy, 2.1.18*) as defined under the HIPAA regulations and approved by UAMS.

In situations involving a company that seeks to use UAMS PHI for its own Marketing activities to promote its own products or services, a patient authorization is required. No Business Associate Agreement is required if the company is Marketing its own products and services and not communicating with individuals about UAMS products or services. If the company is using UAMS PHI to market its own product and services and also communicate with individuals about UAMS products and services, a Business Associate Agreement is required related to UAMS products and services, and a patient authorization must be obtained specific to the company Marketing its own products and services. Note: a Business Associate Agreement will not take the place of a patient Authorization in situations involving a company using UAMS PHI for Marketing its own products or services.

- E. **Minimum Necessary**: Any and all uses or disclosures of PHI for Marketing purposes in compliance with this Policy will be limited to the minimum necessary to achieve the purpose of the use or disclosure. *Administrative Guide Policy Minimum Necessary Policy, 2.1.10.*

SANCTIONS

Violation of this Policy will result in disciplinary action, in accordance with *Administrative Guide Policy 4.4.02, Employee Discipline* and *Administrative Guide Policy 2.1.42, HIPAA Sanctions Policy*.

Signature:  _____

Date: September 22, 2021