Mental Health Liaison Group

April 26, 2002

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Privacy 2
Hubert H. Humphrey Building, Room 425A
200 Independence Avenue, SW
Washington, DC 20201

Re: Proposed Rule—Modifications to Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14776 et seq., March 27, 2002

To The Department of Health and Human Services:

The Mental Health Liaison Group ("MHLG"), a coalition of organizations representing consumers, families, advocates, professionals and providers dedicated to ensuring and improving our nation's mental health care, provides the following comments regarding the March 27, 2002 (67 Fed. Reg. 14776) proposed modifications to the standards for the privacy of individually identifiable health information ("privacy rule"). While the Department of Health and Human Services ("HHS") purports that the modifications will maintain strong protections, clarify misinterpretations, and address unintended negative effects, we find that the proposed elimination of the patient consent provision and modifications to the marketing provision will seriously undermine the privacy of patient records.

We are extremely concerned that the proposed elimination of the existing right of consent (§164.506) will impair access to quality mental health care. We urge that patient consent for use and disclosure of records remain in the rule and that its proposed elimination be rejected.

The right of consent is perhaps most important for those persons seeking and receiving mental health and substance abuse services. Mental health and substance abuse records contain particularly sensitive and potentially stigmatizing patient information. Considering the sensitivity of these records, patients should have the right to consent to their use and disclosure to insurers and other third parties.

The Supreme Court has found (in *Jaffee v. Redmond*, 518 U.S. 1 (1996)) that as a matter of federal common law, patients receiving mental health therapy have a right to not have therapist-patient communications used or disclosed without their consent. The Supreme Court determined that the "reason and experience" of the nation, reflected in state laws and ethical standards of medical practice, show that effective mental health therapy depends on "an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." This essential relationship simply cannot exist if the patient is deprived of the power to control the use and disclosure of sensitive mental health information.

We urge that the modification for patients to "opt-in" for marketing communications be included in the final privacy rule (§164.508). The narrowing of the "marketing" definition, however, should be rejected (§164.501).

We are pleased to see that HHS proposes to require that covered entities obtain patient authorization

prior to using individually identifiable information for marketing purposes. As the MHLG has recommended to HHS in recent correspondence (which is available at our website at www.mhlg.org/12-17-01.pdf), this "opt-in" requirement is much stronger than the authorization currently required in the privacy rule and should be included in the final rule.

Unfortunately, HHS proposes in these modifications to so narrowly define "marketing" as to exclude most communications to patients that are financially motivated, so long as they are related to treatment or health care operations. Patients would also lose the protection afforded by the rule to block these marketing communications. For example, drug companies could pay pharmacies to mail patients letters encouraging them to switch medication brands without any patient authorization, and consumers would not have the right to stop these communications.

As mentioned above, mental health and substance abuse records are particularly sensitive to release and disclosure, due in part to the unfortunate stigmatization of mental health and substance abuse that continues to pervade society. In the example above a patient might not want his or her employer, family, neighbors, or even postman to see a letter suggesting that he or she is on psychotropic medication. Such communications could undermine mental health and substance abuse care, as patients may avoid or delay care in order not to receive them. We therefore urge rejection of the narrowing of the marketing definition to exclude communications that are financially motivated.

We note that minor modifications to the "minimum necessary" requirement preserve the provision. Any future modifications or interpretations of this provision by HHS should ensure that the provision is interpreted most favorably to the patient.

In our recent correspondence to HHS (referenced above), we stated that the "minimum necessary" requirement is of essential importance to the privacy of patient records. In essence, the privacy rule legitimizes a myriad of uses and disclosures for "treatment, payment, and health care operations" purposes beyond the patient and his or her direct treating providers. The minimum necessary requirement balances such broad access by ensuring that for these purposes, the minimum amount of patient information will be disclosed in each instance. While we do not attempt here to offer specifics on the minimum necessary requirement, we believe that insurers should not request information for treatment, payment, or health care operations purposes absent a showing that they are requesting the minimum amount necessary for the purpose of their request.

We appreciate the opportunity to voice our strong views of the modifications proposed by HHS to the privacy rule. In particular, we urge that patient consent be retained in the rule. Please call Doug Walter, Legislative and Regulatory Counsel, American Psychological Association Practice Organization, regarding questions or follow up to our comments at (202) 336-5889.

Sincerely,

Alliance for Children and Families
American Academy of Child and Adolescent Psychiatry
American Association for Geriatric Psychiatry
American Association for Marriage and Family Therapy
American Association of Children's Residential Centers
American Association of Private Practice Psychiatrists
American Counseling Association
American Family Foundation
American Group Psychotherapy Association
American Mental Health Counselors Association

American Orthopsychiatric Association
American Psychiatric Association
American Psychiatric Nurses Association
American Psychoanalytic Association
American Psychological Association
Anxiety Disorders Association of America
Association for the Advancement of Psychology
Association for Ambulatory Behavioral Healthcare
Bazelon Center for Mental Health Law
Clinical Social Work Federation
Employee Assistance Professionals Association
Federation of Families for Children's Mental Health
NAADAC — The Association for Addiction Professionals
National Alliance for the Mentally Ill (NAMI)
National Association of Anorexia Nervosa and Associated Disorders -- ANAD
National Association of County Behavioral Health Directors
National Association of Protection and Advocacy Systems
National Association of School Psychologists
National Association of Social Workers
National Coalition of Mental Health Professionals and Consumers
National Depressive and Manic-Depressive Association
National Mental Health Association
National Network for Youth
Tourette Syndrome Association