SECTION 3: USES & DISCLOSURES OF PHI

3.6.  Marketing or Sale of PHI

POLICY

1. Uses and Disclosures for Marketing: The University of Florida (UF) will use and disclose protected health information (PHI) for marketing purposes only as permitted by the federal privacy regulations and relevant Florida laws.

2. Sale of Protected Health Information: UF will not sell PHI for any purpose except as allowed and in accordance with federal privacy and security regulations.

3. Marketing communications: must be reviewed by the UF Privacy Office before they are sent out. Marketing activities that do not meet the Privacy Requirements below must be approved by the Privacy Office.

4. Authorization for Marketing: is required from patients for all treatment and health care operations communications where UF or its business associates receive financial remuneration for making the communications from a third party whose product or service is being marketed, and for any other uses or disclosures of PHI which specifically qualify as marketing. The authorization must indicate that UF and/or the business associate will receive either direct or indirect remuneration for the provision of the PHI. The following activities are not subject to HIPAA regulations:
   a. Marketing activities that do not use PHI to target a specific group of individuals, including mass mailings and communications such as newsletters that do not use PHI to identify the recipients of the mailing;
   b. Communications promoting health in general and that do not promote a product or service from a particular provider, such as communications promoting a healthy diet or encouraging individuals to get certain routine diagnostic tests;
   c. Communications about government and government-sponsored programs, as there is no commercial component to communications about benefits through public programs.

5. Sale of PHI Prohibited: UF and its business associates may not sell PHI, including, but not limited to, lists of patients or enrollees, to any third party for that party’s marketing use without obtaining authorization from each patient or the patient’s legal representative. The authorization must indicate whether UF and/or the business associate will receive direct or indirect remuneration for the provision of the PHI. This is not a usual practice at UF.

DEFINITIONS

1. Face to face communications: Conversations in which two or more people are physically located in the same room; does not include any communications made over the phone, sent through the mail or via e-mail.

2. Financial Remuneration: Direct or indirect payment from or on behalf of a third party whose product or service is being described; does not include payment for treatment.
   a. Direct Payment: Financial remuneration that flows from the third party whose product or service is being described directly to CE.
   b. Indirect Payment: Financial remuneration that flows from an entity on behalf of the third party whose product or service is being described to CE.
3. **Marketing:** To make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service. See Requirements: Marketing Exceptions (No Authorization Required).

4. **Reasonable in Amount:** Remuneration must be reasonably related to CE’s cost of making the communication and limited to labor, supplies, and postage for the exception from marketing to apply.

5. **Sale of PHI:** For purposes of this policy, a disclosure of PHI by a CE or business associate, if applicable, where the CE or business associate directly or indirectly receives remuneration from or on behalf of the recipient of the PHI in exchange for the PHI.

6. **Subsidized Treatment Communications:** Communications specifically related to the treatment of a patient where the CE receives financial remuneration for making the communications from a third party whose product or service is being marketed.

**REQUIREMENTS**

1. Marketing – Florida Statutes: “Absent a specific written release or authorization permitting utilization of patient information for solicitation or marketing the sale of goods or services, any use of that information for those purposes is prohibited.” (F.S. 456.057(7)(b))

2. **General Rules:**
   a. Authorization is required for the use of Protected Health Information (PHI) in Marketing communications, unless an exception applies. In some cases, whether an exception will apply will depend on whether, and to what extent, UF has received remuneration in exchange for making the Marketing communication. See Appendix A for examples of Marketing and Remuneration.
   b. When required, written authorization shall be secured on an Authorization to Use or Disclose PHI for Public Activities form.
   c. Remuneration is a direct or indirect payment made to UF by a third party in exchange for recommending the third party’s product or service, regardless of whether the recipient of the communication ever uses the recommended product or service. Remuneration does not include payment for treatment of an individual.
   d. For example, an authorization would be required prior to UF using PHI to make a communication to its patients regarding the acquisition of new state-of-the-art medical equipment if the manufacturer of the medical equipment paid UF to make the communication.

3. **Marketing Exceptions (No Authorization Required):**
   a. Marketing does not include, and an authorization is not required, for the use or disclosure of PHI to make the following communications.
   b. Treatment and Health Care Operations Purposes. UF may make communications that encourage the recipient of the communication to purchase or use the product or service without authorization so long as UF does not receive direct or indirect payment in exchange for making the communication:
      i. For treatment of the individual by a health care provider, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual;
      ii. To describe a health-related product or service or payment for such product or service that is provided by, or included in a plan of benefits of UF. This includes communications about: the entities participating in a health care provider network or health plan network; replacement of,
or enhancements to, a health plan; and health-related products or services available to only a health plan enrollee that add value to, but are not a part of, a plan of benefits; or

iii. For case management or care coordination, contacting of individuals with information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.

iv. For example, UF could send flyers to its patients announcing the opening of a new wing where the funds for the new wing were donated by a third party, since the Financial Remuneration to UF from the third party was not in exchange for the mailing of the flyers.

c. Currently Prescribed Drugs or Biologics. UF may make communications regarding the generic equivalent of a currently prescribed drug, adherence communications that encourage an individual to take their prescribed medication, communications regarding all aspects of a drug delivery system relating to a currently prescribed drug or biologic, or refill reminders, in exchange for remuneration from a third party that would benefit from UF’s recommendation without authorization, so long as the amount of remuneration received by UF, if any, covers only the costs of labor, supplies, and postage to make the communication. If the remuneration received is in excess of these costs (i.e., generates a profit), UF must obtain the individual’s authorization prior to making the communication.

d. Face-to-face Communications and Promotional Gifts. Authorizations are not required for the use or disclosure of PHI to make the following types of marketing communications, regardless of whether UF receives remuneration:

i. A face-to-face communication made by UF to an individual, which may consist of either a spoken recommendation or written materials handed to an individual, but does not include telephone calls or mailings; or

ii. A promotional gift of nominal value provided by UF.

iii. For example, a clinical health care provider could, in a face-to-face conversation with the patient, recommend, verbally or by handing the patient written materials such as a pamphlet, that the individual take a specific alternative medication, even if the clinical health care provider is otherwise paid by a third party to make such communications.

e. Although HIPAA allows Staff to Market to patients in the above way, Staff should be aware that these actions may still violate the Anti-Kickback Statute and be prohibited by UF policies and ethical obligations. Before engaging in this type of marketing activity, Staff is encouraged to review applicable Conflicts of Interest and/or contact the Compliance Department for assistance.

4. **Sale of PHI**

a. A patient’s written authorization is required if PHI is sold and UF receives direct or indirect payment, in-kind, or nonfinancial benefits. Such authorization must state that the disclosure will result in remuneration to the CE.

b. The sale of PHI is only permitted with a patient’s written authorization. There are common circumstances that do not constitute sale of PHI and an authorization is not required. The following examples do not constitute a sale of PHI:

i. Disclosures to the patient;

ii. Disclosures required by law;

iii. Treatment and payment;
iv. Public health purposes;

v. Research purposes, as long as payment is reasonably related to the cost of preparing and transmitting the information. In other words, organizations cannot make a profit;

vi. Corporate transactions, such as the sale or merger of all or part of an entity;

vii. Disclosures to Business Associates;

c. UF Workforce members must contact the Privacy Office prior to any sale of PHI even if exempted as described above.

PROCEDURES

1. Use the Authorization to Use or Disclose PHI for Public Activities form (see Forms) to obtain written authorizations from patients prior to:
   a. Providing subsidized treatment communications to patients, if the communication will not be made face-to-face by someone from CE or does not consist of a promotional gift of nominal value provided by UF;
   b. Using or disclosing any information about or from the patient if the information will be used in or for marketing purposes, including, but not limited to, patient photographs and testimonials.
   c. Any sale of PHI for which CE receives direct or indirect payment, in-kind, or nonfinancial benefits.

2. Provide Authorization to Use or Disclose PHI for Public Activities forms (see Forms) as necessary for marketing activities. Maintain signed authorization forms from those persons who have specifically agreed to receive more specific marketing communications, based on their written authorization, for at least six years.

REFERENCES


2. Florida Statutes: 456.057(7)(b) Ownership and control of patient records: Marketing

3. HIPAA: 45 CFR §164.508(a)(4) Authorization required: Sale of protected health information

EXHIBITS


2. Marketing and Financial Remuneration Table (below).
## Marketing and Financial Remuneration Table

<table>
<thead>
<tr>
<th>Authorization Required</th>
<th>No Authorization Required (Not Marketing)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marketing communications made over the phone or by e-mail.</td>
<td>Communications for treatment, treatment alternatives, case management or care coordination.</td>
</tr>
<tr>
<td></td>
<td>Face-to-face communications or providing gifts of nominal value (i.e. free samples of a drug).</td>
</tr>
<tr>
<td>UF or its health care components receive payment from a company or vendor in exchange for making a marketing communication about the company’s or vendor’s product or service.</td>
<td>Communications that promote a government subsidized program, like Medicare.</td>
</tr>
<tr>
<td></td>
<td>Refill reminders or communications about a drug, biologic, or drug delivery system if any payments to UF are reasonable in amount.</td>
</tr>
<tr>
<td>Remuneration</td>
<td>Not Remuneration</td>
</tr>
<tr>
<td>UF receives payment for making a Marketing communication.</td>
<td>In-kind benefits.</td>
</tr>
<tr>
<td></td>
<td>Payments or funding for UF initiatives (i.e. to support the opening of a new clinical unit or wing).</td>
</tr>
<tr>
<td></td>
<td>Funding to inform patients about programs offered by UF that specifically encourages recipients to participate in the program.</td>
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</table>