

Analysis of the HIPAA Privacy Rule and Selected North Carolina Statutes: Background and Explanation

**Prepared by the
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**Approved for Public Distribution
December 11, 2001**

I. Introduction

The North Carolina Healthcare Information and Communications Alliance, Inc. (NCHICA) is a privately funded, nonprofit organization that actively promotes the advancement and integration of information technology into the healthcare industry. The NCHICA Board of Directors established several Focus Groups that are populated with member-affiliated and other individuals with an interest in particular NCHICA-related information or activities. One of these Focus Groups targets the important issues of health information privacy and confidentiality.

The Privacy and Confidentiality Focus Group is further subdivided into several “work groups.” One of these work groups – the State Law Work Group – was asked to prepare an analysis comparing the new HIPAA health privacy rule with North Carolina state statutes. The Work Group prepared the accompanying analysis in response to that request. This analysis is not intended to be a comprehensive legal review in that it covers only state statutes – it does not address administrative regulations or case law. Rather, it is intended to serve as a useful starting point for entities covered by the new HIPAA rule and their attorneys in evaluating the interaction of the HIPAA rule and state statutes.

This analysis represents many months of work both individually and collectively by Work Group members from a variety of different organizations and agencies.¹ It is important to note that this analysis is intended to reflect the conclusions of the Work Group as a whole and does not represent the opinions or conclusions of any of the organizations or agencies represented by individual members of the group.

II. Explanation of the Analysis

One of the challenges facing covered entities is gaining an understanding of how the new federal rule will affect existing state law. Every state – including North Carolina – has statutes on the books that relate to the use and disclosure of health information. HIPAA does not preempt all of these statutes relating to privacy and confidentiality – it only preempts *some* of them. The HIPAA statute specifies that the privacy rule shall “supersede any contrary provision of State law” subject to several exceptions.² For example, HIPAA will not preempt state laws that:

- Relate to the privacy of health information and are “more stringent” than the federal rule³
- Provide for the reporting of disease or injury, child abuse, birth or death⁴

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² See 42 U.S.C. § 1307d-7; 45 C.F.R. § 160.201 *et seq.*

³ 42 U.S.C. § 1307d-7(a)(2)(B); P.L. 104-191, S. 264(c)(2); 45 C.F.R. § 160.202 (definition of “more stringent”); 45 C.F.R. § 160.203(b).

⁴ 42 U.S.C. § 1307d-7(b); 45 C.F.R. 160.203(c).

- Provide for public health surveillance, investigation or intervention⁵
- The Secretary of the U.S. Department of Health and Human Services determines are necessary to prevent fraud and abuse or ensure appropriate State regulation of insurance and health plans.⁶

Given the wide range of laws that may *not* be preempted by HIPAA, it is critical that covered entities have a clear understanding not only of the new federal privacy rule but also all of the state statutes that will continue to be in effect after the rule's compliance date.

The goal of the State Law Work Group's analysis was to identify existing North Carolina statutes that relate to the use and disclosure of health information and compare those statutes to the HIPAA rule to determine whether and how the state statute was likely to be affected by the new federal rule. Due to limitations in time and resources, the Work Group limited the scope of its work to state statutes *only* – it did not review any federal laws (other than HIPAA) or any state regulations or court decisions. This is an important limitation – it means that this analysis is far from comprehensive. It is possible that statutes have been interpreted by courts or in regulations in ways that would change the Work Group's analysis and conclusions. Because of this limited scope, it is extremely important that readers use this analysis only as a starting point when conducting independent legal research – it should *not* be relied upon as a comprehensive review and analysis of state law.

The Work Group first reviewed the North Carolina General Statutes and identified those statutes that relate to the use or disclosure of health information.⁷ The Work Group did not identify *all* statutes that will potentially intersect with the HIPAA rule – only those that relate to use and disclosure of health information. For example, statutes relating to patient access to and amendment of medical records are not included in this analysis. In addition, the analysis does not identify all relevant definitions contained in state statute.

Group members summarized the identified statutes and then cross-walked the statutes to the relevant provisions of the HIPAA privacy rule.⁸ In most instances, the state statute intersected with more than one section of the HIPAA rule. In order to make the analysis as straightforward as possible, the Work Group decided to simplify the cross-walk in two ways. First, some of the state statutes intersect with more than one section of the HIPAA rule. For example, NC General Statute § 131E-117(5) provides (in general) that nursing home patient records are confidential and written consent is required to release them except:

- To family
- For patient transfer purposes
- When release is required by law, or
- When release is required by a third party payment contract.

Each of these four permitted disclosures intersects with a different provision of the HIPAA privacy rule. Rather than analyze each of these provisions together, the Work Group divided the statute into four separate pieces and analyzed them in conjunction with the section of the HIPAA rule that is most

⁵ 42 U.S.C. § 1307d-7(b); 45 C.F.R. § 160.203(c).

⁶ 42 U.S.C. § 1307d-7(a)(2); 45 C.F.R. § 160.203(a).

⁷ This analysis applies only to statutes effective as of June 1, 2001.

⁸ Because some of the statutes are summarized, readers must not rely on this analysis but should consult the original statutory language when conducting an independent legal review.

relevant to that piece.⁹ In those cases, the introductory language of the state statute is repeated with each piece of the statute (e.g., “nursing home patient records are confidential and written consent is required to release them except...to family”). The primary problem with this approach is that the reader is not able to review the statute as a whole. Often, reviewing the entire statute is necessary to fully comprehend its purpose and to interpret it appropriately. Therefore, readers should always consult the full text of the statute.

The second way that the Work Group simplified the cross-walk was to analyze each statute or statutory provision (if separated) side-by-side with only one section of the HIPAA rule. While the statute or statutory provision may, in fact, intersect with more than one section of HIPAA, the Work Group concluded that it would be both confusing and unwieldy to conduct each analysis independently. Instead, the Work Group attempted to identify the single section of the HIPAA rule that is *most* relevant to the analysis of the statute and present the analysis alongside that section. Therefore, in the analysis, the statutes are generally paired with most relevant section of the HIPAA rule and the narrative analysis begins with a discussion of that section. The narrative analysis goes further to discuss other HIPAA sections that may also be relevant and provides cross-references to those sections where appropriate.

Once the state statutes were divided as necessary and paired with the most relevant section of the HIPAA rule, the Work Group then analyzed the two laws to determine whether and how the state statute might be affected by the HIPAA rule. The analysis consists of two components: a narrative analysis and a summary conclusion. The narrative analysis is the most important part of this work product because it highlights the relevant sections of the HIPAA rule and discusses how those sections might intersect with the state statute. The summary conclusion is intended to provide general guidance as to whether the Work Group believes that the state statute and the HIPAA rule are potentially in conflict. The summary conclusions should not be relied upon in isolation, but should be read together with the narrative analysis.

The Work Group selected five different classifications for the summary conclusions. Each classification is defined below. The number in parentheses following the definition indicates the number of statutory provisions (not necessarily statutes) that fell within that classification.

- **Consistent** indicates that the state statute does not appear to directly conflict with HIPAA. In other words, covered entities will likely be required to comply with both HIPAA and the NC statute. (74 provisions)
- **Inconsistent** indicates that the state statute and the HIPAA rule appear to be in direct conflict. For example, the state statute may permit a disclosure that is not permitted under the HIPAA rule. Because the two provisions are in conflict, a legal opinion is necessary to determine which provision – the state law or the HIPAA rule (or perhaps both) – will remain in effect. (27 provisions)
- **Consistent in part** indicates that the state statute and the HIPAA rule appear to be consistent in part and inconsistent in part. In other words, only part of the statute appears to conflict with the HIPAA rule. (14 provisions)
- **Further analysis required** indicates that the Work Group could not reach a conclusion as to whether the state statute and HIPAA are consistent and that further information and/or analysis is required. Many of the state statutory provisions fall within this

⁹ Our provision-by-provision approach is also appropriate because HIPAA specifically preempts “provisions” of State law rather than entire statutes. See 65 Fed. Reg. 82,582 (Dec. 28, 2000).

category but for several different reasons. In some cases, for example, the statute is not clear on its face while in others, the conclusion will be different depending on the specific circumstances. The narrative attempts to provide guidance as to why further analysis is necessary. (98 provisions)

- **Beyond scope** indicates that the state statute does not appear to intersect with HIPAA. For example, the statute may relate only to a non-covered entity (e.g., Department of Insurance). The Work Group did not include *all* statutes identified that are beyond the scope of the HIPAA rule. The Group excluded several statutes from the analysis that were easily found to be “beyond the scope” but retained those that deserved particular consideration. (15 provisions)

It is important to note that the HIPAA rule only applies to three types of entities – health plans, health care providers and health care clearinghouses. Some state statutes are limited to one or more of these three covered entities (e.g., HMOs, hospitals, pharmacies). Others, however, are much more expansive. For example, NC General Statute § 130A-143 is a communicable disease statute that applies to all persons and entities. HIPAA will not affect how that statute applies to entities other than the three covered entities. Therefore, the conclusions of the Work Group only apply to the interaction of the state statute and the HIPAA rule *with respect to covered entities*.

There are three different versions of the analysis available.

- **Version A:** This version is sorted by sections and sub-sections of the HIPAA rule.
- **Version B:** This version is sorted by state statute.
- **Version C:** This version is sorted by the summary conclusion.

III. Conclusion

The State Law Work Group made every effort to conduct a thorough review of state statutes and provide thoughtful and reasoned analyses. The HIPAA privacy rule is, however, a brand new law – it has been in effect for less than a year. Guidance from the federal government has been quite limited thus far and courts have not had the opportunity to interpret a single provision of the rule as yet. This analysis is simply an initial step in what will certainly be a long process of interpretation, application, and revision of a very complex new federal law. The Group hopes that this analysis will be helpful to covered entities and their attorneys as they develop and implement HIPAA compliance plans.