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June 27, 2013

Pamela Lane
Director
California Office of Health Information Integrity
1600 9th Street, Room 460
Sacramento, CA 95814

Dear Director Lane,

The Center for Democracy & Technology ("CDT") is pleased to offer comments in response to the draft eHealth Patient Authorization Guidance Tool ("Tool").

CDT is a non-profit Internet and technology advocacy organization that promotes public policies that preserve privacy and enhance civil liberties in the digital age. As information technology is increasingly used to support the exchange of medical records and other health information, CDT, through its Health Privacy Project, champions comprehensive privacy and security policies to protect health data.

CDT promotes its positions through public policy advocacy, public education and litigation, as well as through the development of industry best practices and technology standards. Recognizing that a networked health care system can lead to improved health care quality, reduced costs and empowered consumers, CDT is using its experience to shape workable privacy solutions for a health care system characterized by electronic health information exchange.

In our experience, exchange of a patient's health information for even routine health care activities is often hindered by uncertainty about the laws that apply. This is particularly true with respect to the rules around when such exchange does, and does not, require patient consent. We believe the Tool has the potential to significantly reduce this uncertainty, and we appreciate the enormous amount of work that went into creating it. We commend CalOHII in particular for accurately capturing the many and complicated federal and state regulations governing health information exchange and patient authorization. We also applaud CalOHII for limiting the scope of the Tool to the sharing of PHI between providers for treatment purposes, which enhances both its value and utility.

Below we offer several recommendations for improving the Tool's effectiveness, specifically:

1. Reduce the amount of legal language throughout the Tool;
2. Reduce the number of conditional answers to the questions; and
3. Address the inconsistency in Question 7.

Employ Simpler, Less "Legal" Language

The Tool would be improved if the language used throughout relied less on legal jargon and was simpler and more straightforward. Some parts of the Tool achieve this goal, but in other parts - especially in Question #5 - the Tool heavily relies on legal citations, which have the potential to confuse and even frighten or deter its users. The audience for this Tool is providers unfamiliar with state and federal laws, meaning it should match that low level of legal sophistication.

Because it is electronic, the Tool has the capacity to contain multiple layers via additional links, and as a result any supporting legal documentation can live somewhere other than on the initial response page. Adding an additional background layer for the regulatory citations would make the Tool simpler and easier to understand.

Further, we recommend that CalOHII consider re-drafting the Tool so that the decision points are set-up in "traffic light" format. This would mean that when a user comes to the end of a branch in the decision tree, he or she would be given one of three responses:

1. A green light (indicating that authorization is not required);
2. A red light (indicating that authorization is required); or
3. A yellow light (indicating that authorization may be required, but in limited circumstances).

We note that this was a feature of an earlier draft of the decision tree, and we urge CalOHII to put this approach back on the table, given its potential for increased ease, simplicity and clarity.

Reduce the Uncertainty of Conditional Answers

To further decrease uncertainty, we recommend that that you minimize the number of conditional responses in the Tool. Currently, three of the eight possible end-points in the decision tree are conditional: i.e., the responses direct the user to a dense body of legal text where the "correct" answer depends on

several conditions (e.g. whether there is a "central registry, detoxification or treatment program less than 200 miles away").

Although we cannot change the complexity of the law, this type of response is not helpful to the intended audience. It is difficult for a health care provider unfamiliar with legal text to quickly and easily understand whether patient authorization in needed. Instead, we recommend that these conditional responses be replaced with "yellow lights," accompanied by a short and plain language explanation as to why the answer is conditional. As recommended above, the more thorough answer with legal citations can be supplied through an additional link.

Address Wording in Question 7

Finally, we noted a slight wording inconsistency in Question #7 ("Does it include results to an <u>HIV</u> test?") that we urge CalOHII to correct. When a user answers "Yes" to this question, the guidance provided is "Authorization not required for treatment purposes."
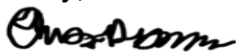
However, because the Tool specifically states at the beginning that it is developed "<u>for treatment purposes</u>", we suggest amending the response to Question #7 to simply state "Authorization not required," consistent with all other such responses.

Conclusion

CDT supports and appreciates CalOHII's thorough and careful work on this project. Patient authorization guidance for health care providers is an important and necessary step in reducing perceived barriers to health information exchange, and this Tool is a positive step toward improving providers' understanding of the complicated and nuanced legal landscape.

We would be happy to discuss any of the above recommendations further at your convenience.

Sincerely,

Christopher Rasmussen
Policy Analyst, Health Privacy Project

Cc: Deven McGraw, Director, Health Privacy Project
    Alice Leiter, Policy Counsel, Health Privacy Project