
Reprint

Texas Medical Privacy Act: A Wolf in Sheep's Clothing?

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Anyone who is even a casual reader of **Pharma Marketing News** knows that I support consumers' right to privacy and believe that pharmaceutical marketers need to beef up their privacy policies if they hope to improve consumer trust. So it may surprise you when I say that a new Texas privacy law goes too far in its apparent zeal to protect patients' privacy. In fact, I believe that this law's real purpose is to limit the ability of pharmaceutical companies and their agents to communicate product information directly to consumers in Texas.

The privacy law I am talking about is the Texas Medical Privacy Act (SB 11). SB 11 is known in some quarters as "super HIPAA" because it applies super-stringent HIPAA-like privacy regulations to pharmaceutical companies, their advertising/ marketing agencies and other entities – even individuals. A covered entity under SB 11 is "any person who assembles, collects, analyses, uses, evaluates, stores, or transmits protected health information." The law becomes effective in Texas September 1, 2003.

Protected Health Information

Although the Texas Medical Association (TMA), which strongly endorses SB 11 and even had a role in its crafting, maintains that the goal of SB 11 is to prevent "patients' medical information" from being used for marketing purposes, SB 11 is not limited to "patient information" in the way that HIPAA is. According to HIPAA, *protected health information* (PHI) is health information created or maintained by "covered entities," which HIPAA defines as healthcare providers, health plans and employers. This is what most of us would consider "patient medical information." SB 11, however, defines protected health information as individually identifiable health information, including demographic information collected from an individual by *anyone*, not just "covered entities" as defined by HIPAA. So, even if you are not a healthcare provider, health plan or employer, if you collect PHI from a Texas citizen, you are a covered entity as far as SB 11 is concerned.

Examples of pharmaceutical company activities in TX that may involve PHI:

- Maintaining a website that collects health information from an individual
- Research-related activities
- Rebate agreements
- Patient assistance/support programs
- Disease management programs
- Marketing activities
- Pharmacy compliance programs

In many cases, these activities do NOT involve “patient medical information” as we would commonly define it or even as HIPAA defines it. To characterize SB 11 as protecting only patient medical information is ingenuous at best and deceptive at worst. So why is it portrayed this way?

Is SB 11 a wolf in sheep’s clothing?

The TMA might say that it is protecting the patient-physician relationship, but I believe that the real goal is to limit the ability of pharmaceutical companies to do direct-to-consumer (DTC) marketing, especially where that marketing is personalized and targeted to specific patients. Here’s how it works (and it’s a formula that can be used in any state):

1. craft a new privacy law to make it practically impossible for pharmaceutical companies or their agents to comply and market to patients in Texas;
2. make it extremely palatable to voters and their state legislators by cloaking it as a “patients’ privacy law”

SB 11 is a perfect storm among privacy laws as far as pharmaceutical companies and other healthcare marketers are concerned.

First, it defines marketing much more broadly than does HIPAA. According to SB 11, marketing is “the promotion or advertisement, by a covered entity, of specific products or services if the covered entity receives, directly or indirectly, a financial incentive or remuneration for the use, access, or disclosure of protected health information.”

Second, as I pointed out above, anyone – pharmaceutical companies included – who collects or uses personal health information is a covered entity and subject to the law.

Third, personally identifiable health information does not have to originate with covered entities to be “protected health information.” Suppose a Texas consumer visits your website and provides you with his or her own personally-identifiable health information in order to receive a personalized newsletter. Under SB 11, you have collected PHI and you are now a covered entity.

Under SB 11, pharmaceutical companies must obtain authorization from data subjects (the consumers who supply data to them via Web sites, 1-800 numbers, BRCs, etc.) before they can use it for marketing purposes. Prior authorization is not the real problem – pharma marketers should do this anyway as a best practice. What makes it so difficult to comply with SB 11 are the provisions that require covered entities to provide consumers with access to their data and the right to have their data removed from ALL databases within 5 days!

It is practically impossible for pharmaceutical companies to comply with the access and removal provisions because pharma companies maintain myriad databases that are “siloes” within different functional areas. It is a weakness that is being exploited by SB 11 and its proponents. Pharma companies would be advised to better manage consumer data if they truly wish to be consumer-friendly. This is a good selling point for customer relationship management consultants, but I seldom hear it mentioned in their presentations.

How to Fix SB 11

In my opinion, SB 11 should be changed to adopt HIPAA’s definition of covered entity and protected health information. That way it is really living up to it’s goal of protecting patient information. Changing the law – at least the provisions affecting marketing – before it becomes effective may be difficult. The Texas legislature meets every two years and it will be in session only from January to March 2003, during which time it will likely review thousands of bills!

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