

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Issued: February 22, 1999.

Michael J. Armstrong,

Associate Director for Mitigation.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

45 CFR Part 60

RIN 0906-AA42

National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners: Charge for Self-Queries

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Final rule.

SUMMARY: This final rule amends the existing regulations implementing the Health Care Quality Improvement Act of 1986 (the Act), which established the National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners (the Data Bank). The final rule amends the existing fee structure so that the Data Bank can fully recover its costs, as required by law. This rule removes the prohibition against charging for self-queries and, therefore, allows the Data Bank to assess costs in an equitable manner. This is consistent with both the Freedom of Information Act and the Privacy Act which allow the Government to charge fees for the reproduction of records. The Data Bank will continue its current practice of sending to the practitioner in whose name it was submitted—automatically, without a request, and free of charge—a copy of every report received by the Data Bank for purposes of verification and dispute resolution.

EFFECTIVE DATE: These regulations are effective March 1, 1999. The Department has announced a notice, published elsewhere in this issue, the actual fee and its effective date.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas C. Croft, Director, Division of Quality Assurance, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8A-55, 5600 Fishers Lane, Rockville, Maryland 20857; telephone: (301) 443-2300.

SUPPLEMENTARY INFORMATION: On March 24, 1998, the Secretary published a

Notice of Proposed Rulemaking (NPRM) (63 FR 14059) in order to remove the prohibition against charging practitioners a fee when they request information about themselves (self-query). The Department received four public comments opposing the provisions of this rule. The Secretary would like to thank the respondents for the thoroughness and quality of their comments. Among the four comments received, seven specific issues were raised. These seven issues and the Department's responses to these issues appear below.

One respondent mistakenly cited § 60.12 of the Data Bank regulations (45 CFR part 60) as a section of the legislation, the Health Care Quality Improvement Act of 1986, as amended, that led to the creation of the Data Bank. The respondent subsequently erroneously concluded that the Act prevents the Data Bank from establishing a fee for self-queries.

The Department would like to clarify that the Act does not preclude the Data Bank from charging a fee for self-queries. Section 427(b)(4) of the Act states:

The Secretary may establish or approve reasonable fees for disclosure of information * * *

It is the current regulatory language, which this Final Rule amends, that is preventing the Data Bank from charging a fee for self-queries.

Two respondents indicated that health care practitioners should not have to pay a fee in order to exercise their Privacy Act rights to view Data Bank information about themselves.

Section 522(f)(5) of the Privacy Act does allow for the imposition of fees for providing individuals copies of their own Federal records, such as those contained in the Data Bank. Nevertheless, the Department will continue to appropriately respond to its obligations under the Privacy Act and its own policy of fair information practice by proactively providing a copy to the practitioner in whose name it was submitted—free of charge—a copy of every report received by the Data Bank for purposes of verification and dispute resolution. However, the Department reiterates that the purpose of the great majority of the self-queries that the Data Bank receives is not about practitioners' exercising their Privacy Act rights to access to information about themselves. In conversations with practitioners who call for self-query assistance, nearly all indicate that they are acting under duress and in response to demands from licensing bodies and other entities to submit copies of their Data Bank records

as a condition of doing business. In exchange for these records, these practitioners expect to benefit by obtaining licenses to practice, membership in various organizations or, perhaps, malpractice insurance.

Two respondents questioned why the cost of self-queries should be shifted to the practitioners, when it is the licensing bodies and other entities that, by forcing practitioners to submit their self-query results in order to obtain licensure or membership, are creating the great increase in the volume of self-queries.

The Department encourages authorized queriers, such as licensing boards, to query the Data Bank directly to ensure they are getting accurate and complete information. However, since these organizations are not required by the Act to query, the Department has no way of mandating that they query the Data Bank directly, instead of requiring practitioners to provide self-query responses.

One respondent indicated that the Department should charge the entities, such as licensing bodies and malpractice insurers, that are forcing practitioners to provide their self-query responses in order to obtain licensure or malpractice insurance. The Department does not know which entities are requiring self-query responses, and has neither the legal authority to charge the entity nor any practical way to collect the fee from the entity.

One respondent indicated that the Department should focus its efforts on thwarting unauthorized entities, such as managed care organizations without formal peer review processes, who are "abusing the law" by requiring practitioners to submit their self-query results in order to obtain membership.

The Department shares these concerns about unauthorized entities obtaining Data Bank information. However, under current law, the Department cannot prosecute any act related to the use of Data Bank information other than unlawful disclosure. It is the Secretary's position that a practitioner's disclosure of his or her own Data Bank records is not unlawful disclosure. In other words, practitioners may give copies of self-query responses to anyone they choose.

One respondent asked that the Department take into account the financial burden the self-query fee would place on physicians, particularly young physicians as they apply for licensure and membership.

The Department will make every effort to ensure that the self-query fee is nominal and no more than is necessary to recover the costs of processing.

One respondent suggested that the Department should consider an on-line, Internet self-query system to minimize the cost of self-queries.

The Department is actively examining the feasibility of an Internet-based self-query process, but is concerned that the current technology may not provide a means of ensuring that a self-query submitted via the Internet is actually from the practitioner in whose name the query is made. If an Internet-based approach is ultimately implemented, cost savings would be passed along to queriers.

The Department also notes that individual practitioners have expressed almost no opposition to the imposition of a self-query charge. Indeed, the current self-query form, introduced in April of 1998, includes a field for the practitioner's credit card number. This field was included when other changes were made to the form so that the Data Bank could begin collecting the self-query fee, if ultimately imposed, without having to print another set of forms. Thus, practitioners who self-query have had constructive notice of the possibility of the imposition of a fee since April of this year. Despite the fact that the form does not list a specific charge, and the instructions clearly indicate that no charge is being imposed at this time, practitioners have willingly provided their credit card numbers on the new form. Furthermore, in conversations with practitioners who call the Data Bank for assistance in completing the self-query form, there have been no complaints about the possibility of paying a fee for self-query processing. The Data Bank, of course, has not actually charged for any self-queries. We believe that the fact that practitioners have willingly provided their credit card numbers on the new form without complaint is a very significant indication that there is little or no opposition by individual practitioners to imposition of a fee for the service of providing a self-query response.

Therefore, the change to remove the prohibition against charging practitioners a fee when they request information about themselves has been retained as proposed. The Department has amended § 60.12 by deleting the phrase "other than those of individuals for information concerning themselves" in the first sentence of paragraph (a).

A notice published elsewhere in this issue of the **Federal Register** announces the fee for self-queries and the effective date of the change. As with other changes, this fee will be subject to change as further costs may warrant.

Economic Impact

Executive Order 12866 requires that all regulations reflect consideration of alternatives, of costs, of benefits, of incentives, of equity, and of available information. Regulations must meet certain standards, such as avoiding an unnecessary burden. Regulations which are "significant" because of cost, adverse effects on the economy, inconsistency with other agency actions, effects on the budget, or novel legal or policy issues, require special analysis.

The Department believes that the resources required to implement the requirement in these regulations are minimal. Therefore, in accordance with the Regulatory Flexibility Act of 1980, the Secretary certifies that these regulations will not have a significant impact on a substantial number of small entities. For the same reasons, the Secretary has also determined that this is not a "significant" rule under Executive Order 12866.

Paperwork Reduction Act of 1995

The National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners regulation contains information collections which have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 and assigned control number 0915-0126. This amendment does not affect the recordkeeping or reporting requirements in the existing regulations.

List of Subjects in 45 CFR Part 60

Claims, Fraud, Health maintenance organizations (HMOs), Health professions, Hospitals, Insurance companies, Malpractice.

Dated: October 29, 1998.

Claude Earl Fox,

Administrator, Health Resources and Services Administration.

Approved: November 18, 1998.

Donna E. Shalala,

Secretary.

Accordingly, 45 CFR part 60 is amended as set forth below:

PART 60—NATIONAL PRACTITIONER DATA BANK FOR ADVERSE INFORMATION ON PHYSICIANS AND OTHER HEALTH CARE PRACTITIONERS

1. The authority citation for 45 CFR part 60 continues to read as follows:

Authority: Secs. 401-432 of the Health Care Quality Improvement Act of 1986, Pub. L. 99-660, 100 Stat. 3784-3794, as amended by sec. 402 of Pub. L. 100-177, 101 Stat. 1007-1008 (42 U.S.C. 11101-11152).

2. Section 60.12, is amended by revising the first sentence in paragraph (a) to read as follows:

§ 60.12 Fees applicable to requests for information.

(a) *Policy on Fees.* The fees described in this section apply to all requests for information from the Data Bank. * * *

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FEDERAL MARITIME COMMISSION

46 CFR Parts 502, 545 and 571

[Docket No. 98-21]

Miscellaneous Amendments to Rules of Practice and Procedure; Correction

AGENCY: Federal Maritime Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Maritime Commission published in the **Federal Register** of February 17, 1999, a final rule making corrections and changes to existing regulations to update and improve them, and to conform them to and implement the Ocean Shipping Reform Act of 1998. Inadvertently, § 545.1 was not amended as intended.

EFFECTIVE DATE: May 1, 1999.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol St., NW., Room 1046, Washington, DC 20573-0001, (202) 523-5725, E-mail: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION: The FMC published a final rule in the **Federal Register** of February 17, 1999, (64 FR 7804) which, among other changes, amended § 545.1. The FMC inadvertently omitted an intended correction to § 545.1, replacing the term "conferences," with "agreements between or among ocean common carriers."

In Docket No. 98-21, published on February 17, 1999, (64 FR 7804) make the following correction. On page 7813, in the first column, in paragraph (a) of § 545.1 *Interpretation of Shipping Act of 1984-Refusal to negotiate with shippers' associations*, replace the term "conferences" with "agreements between or among ocean common carriers."

Dated: February 24, 1999.

Bryant L. VanBrakle,

Secretary.

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