



Via USPS Certified Mail
Return Receipt Requested

October 22, 2020

Dr. U. Phillip Igbinalolor
U. Phillip Igbinalolor, D.M.D. & Associates, P.A.

2416 West Sugar Creek Rd.
Charlotte, NC 28262

701 E. Roosevelt Blvd., Building 800-B
Monroe, NC 28112

OCR Transaction Number: 16-225168

NOTICE OF PROPOSED DETERMINATION

Dear Dr. Igbinalolor:

Pursuant to the authority delegated by the Secretary of the United States Department of Health and Human Services (HHS) to the Office for Civil Rights (OCR), I am writing to inform you that OCR is proposing to impose a civil money penalty (CMP) of \$50,000 against U. Phillip Igbinalolor, D.M.D. & Associates, P.A. (UPI).

This proposed action is being taken under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), § 262(a), Pub.L. 104-191, 110 Stat. 1936, as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act, Public Law 111-5, Section 13410, *codified* at 42 U.S.C. § 1320d-5, and under 45 C.F.R. Part 160, Subpart D.

I. The Statutory Basis for the Proposed CMP

The Secretary of HHS is authorized to impose a CMP (subject to the limitations set forth at 42 U.S.C. § 1320d-5(b)) against any covered entity or business associate, as described at 42 U.S.C. § 1320d-1(a), that violates a provision of Part C (Administrative Simplification) of Title XI of the Social Security Act. *See* HIPAA, § 262(a), as amended, 42 U.S.C. § 1320d-5(a). This authority includes violations of the applicable provisions of the Federal Standards for Privacy of Individually Identifiable Health Information and the Security Standards for the Protection of Electronic Protected Health Information (45 C.F.R. Parts 160 and 164, Subparts A, C, and E, the Privacy and Security Rules) and the Breach Notification Rule (45 C.F.R. Parts 160 and 164, Subpart D), pursuant to Section 264(c) of HIPAA. The Secretary has delegated enforcement responsibility for the HIPAA Rules to the Director of OCR. *See* 65 Fed. Reg. 82,381 (Dec. 28, 2000) and 74 Fed. Reg. 38630 (July 27, 2009). OCR is authorized under the HITECH Act,

Section 13410, 42 U.S.C. § 1320d-5(a)(3), to impose CMPs for violations occurring on or after February 18, 2009, of:

- A minimum of \$100 for each violation where the covered entity or business associate did not know and, by exercising reasonable diligence, would not have known that the covered entity or business associate violated such provision, except that the total amount imposed on the covered entity or business associate for all violations of an identical requirement or prohibition during a calendar year may not exceed \$25,000.
- A minimum of \$1,000 for each violation due to reasonable cause and not to willful neglect, except that the total amount imposed on the covered entity or business associate for all violations of an identical requirement or prohibition during a calendar year may not exceed \$100,000. Reasonable cause means an act or omission in which a covered entity or business associate knew, or by exercising reasonable diligence would have known, that the act or omission violated an administrative simplification provision, but in which the covered entity or business associate did not act with willful neglect.
- A minimum of \$10,000 for each violation due to willful neglect and corrected within 30 days, except that the total amount imposed on the covered entity or business associate for all violations of an identical requirement or prohibition during a calendar year may not exceed \$250,000.
- A minimum of \$50,000 for each violation due to willful neglect and uncorrected within 30 days, except that the total amount imposed on the covered entity or business associate for all violations of an identical requirement or prohibition during a calendar year may not exceed \$1,500,000.
- As required by law, for violations occurring after November 2, 2015, OCR will adjust the CMP ranges and calendar year cap for each penalty tier for inflation.¹ Because the impermissible disclosure violation occurred before November 2, 2015, no such adjustment is necessary.

OCR is precluded from imposing a CMP unless the action is commenced within six years from the date of the violation.²

II. Findings of Fact

1. UPI is a “covered entity” within the definition set forth at 45 C.F.R. § 160.103, and, as such, is required to comply with the requirements of the HIPAA Privacy, Security and Breach Notification Rules.

¹ See *Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*, Sec. 701 of Public Law 114-74.
² 45 C.F.R. § 160.104

2. UPI is incorporated under the laws of North Carolina and engaged in the practice of dentistry. UPI has two facilities, one in Charlotte, North Carolina, and another in Monroe, North Carolina.
3. UPI creates, maintains, receives, and transmits protected health information (PHI) related to its patients who receive health care services from UPI.
4. On or about October 2013 and March 2014, Complainant visited UPI's office in Charlotte, North Carolina for dental treatment.
5. On or about September 28, 2015, Complainant posted a negative review of UPI on UPI's Google page using a pseudonym, so as not to reveal his real name.
6. On or about September 28, 2015, UPI posted a response on its Google page to Complainant's negative review and impermissibly disclosed Complainant's name and PHI. In its response, UPI stated:

It's so fascinating to see [Complainant's full name] make unsubstantiated accusations when he only came to my practice on two occasions since October 2013. He never came for his scheduled appointments as his treatment plans submitted to his insurance company were approved. He last came to my office on March 2014 as an emergency patient due to excruciating pain he was experiencing from the lower left quadrant. He was given a second referral for a root canal treatment to be performed by my endodontist colleague. Is that a bad experience? Only from someone hallucinating. When people want to express their ignorance, you don't have to do anything, just let them talk. He never came back for his scheduled appointment Does he deserve any rating as a patient? Not even one star. I never performed any procedure on this disgruntled patient other than oral examinations. From the foregoing, it's obvious that [Complainant's full name] level of intelligence is in question and he should continue with his manual work and not expose himself to ridicule. Making derogatory statements will not enhance your reputation in this era [Complainant's full name]. Get a life.

7. On November 15, 2015, Complainant filed a complaint with OCR alleging that UPI had violated the HIPAA Privacy Rule by impermissibly disclosing his PHI. OCR reviewed the allegations in Complainant's complaint and notified UPI of its investigation on July 21, 2016.
8. On July 21, 2016, OCR, in its initial Data Request, requested: 1) a copy of UPI's policies and procedures with respect to responding to patients' reviews on online platforms; 2) a copy of UPI's policies and procedures with respect, generally, to uses and disclosures of PHI; 3) a copy of UPI's policies and procedures with respect to safeguarding PHI; 4) documentation of any HIPAA training conducted by UPI prior to, and in response to, the incident described in the complaint.

9. In its July 26, 2016, response to OCR's Data Request, UPI acknowledged that it responded to Complainant's negative review posted to UPI's Google page on or about September 28, 2015. Additionally, UPI presented to OCR its Notice of Privacy Practices, but no policies and procedures or documentation of training was provided.
10. On August 22, 2016, in a telephonic communication with OCR, OCR informed UPI that its response to the negative review constituted an impermissible disclosure of PHI, and UPI should remove its response promptly. Further, OCR also informed UPI that it should, if it did not currently have such, develop policies and procedures related to the disclosures of PHI and more specifically with regard to disclosures of PHI on social media.
11. On April 3, 2017, via email, OCR requested UPI's policies and procedures regarding disclosures of PHI on social media and the removal of UPI's response to the negative review on UPI's Google page.
12. On April 14, 2017, in its response, UPI provided an Acknowledgment of Training, which did not contain any documents about the contents of the training (e.g., PowerPoint slides). UPI did not remove the PHI from its Google page, and the response remains public as of the date of this Notice. Further, no social media policies and procedures or any policies and procedures regarding disclosures of PHI were provided.
12. UPI's response to Complainant's negative review contained information that constitutes PHI as defined at 45 C.F.R. § 160.103.
13. UPI's disclosure of Complainant's PHI was not permitted or required by the Privacy Rule, and, as a result, UPI impermissibly disclosed PHI when it posted a response with Complainant's PHI on its Google page on or about September 28, 2015.
14. In determining the amount of any CMP, OCR considers, among other factors, the financial condition of the covered entity, whether the covered entity has financial difficulties that may affect its ability to comply, whether the imposition of a CMP would jeopardize the ability of the covered entity to continue to provide, or to pay for, health care, and the size of the covered entity, pursuant to 45 C.F.R. § 160.408.
15. On September 27, 2017, OCR sent UPI an email requesting its financial statements and federal tax returns.
16. On September 28, 2017, UPI responded to OCR and stated that it will not provide the requested documents because they "do not relate to HIPAA."
17. On September 29, 2017, OCR sent UPI another email explaining the relevance of the requested documents.

18. On September 29, 2017, UPI refused to provide the data that OCR requested and responded, in pertinent part, “I will see you in court.”
19. As set forth in 45 C.F.R. § 160.310(b), a covered entity must cooperate with OCR, if OCR undertakes an investigation or compliance review of the policies, procedures, or practices of the covered entity to determine whether it is complying with the applicable HIPAA provisions.
20. On November 30, 2017, OCR served UPI with an administrative subpoena via a process server. The subpoena directed UPI to produce its policies and procedures related to the HIPAA Privacy Rule including, but not limited to, “social media” and uses and disclosures of PHI; documentation of any training related to the HIPAA Privacy Rule; and income statements, balance sheets, statements of cash flow, and federal tax returns.
21. To date, UPI has not responded or objected to the November 30, 2017, administrative subpoena.
22. UPI failed to cooperate with OCR’s investigation to determine whether UPI is complying with the applicable HIPAA provisions, specifically with regard to its HIPAA policies, procedures, and practices.
23. On August 22, 2019, OCR mailed a Letter of Opportunity to both of UPI’s locations; one copy was received on August 23, 2019, and the second copy was received on August 26, 2019. A copy was also sent electronically to uphillip@upidental.com on August 22, 2019.
24. The Letter of Opportunity informed UPI that OCR’s investigation indicated that UPI failed to comply with the Privacy Rule and that this matter had not been resolved by informal means despite OCR’s attempts to do so. The letter stated that pursuant to 45 C.F.R. § 160.312(a)(3), OCR was informing UPI of the preliminary indications of non-compliance and providing UPI with an opportunity to submit written evidence of mitigating factors under 45 C.F.R. § 160.408 or affirmative defenses under 45 C.F.R. § 160.410 for OCR’s consideration in making a determination of a CMP pursuant to 45 C.F.R. § 160.404. The letter stated that UPI could also submit written evidence to support a waiver of a CMP for the indicated areas of non-compliance. Each act of noncompliance was described in the letter.
25. UPI did not submit a response to the August 22, 2019, Letter of Opportunity or any other written evidence of mitigating factors under 45 C.F.R. § 160.408 or affirmative defenses under 45 C.F.R. § 160.410 for OCR’s consideration in making a determination of a CMP pursuant to 45 C.F.R. § 160.404. UPI also did not submit any

written evidence to support a waiver of a CMP for the indicated areas of non-compliance.

26. OCR obtained the authorization of the Attorney General of the United States prior to issuing this Notice of Proposed Determination to impose a CMP.

III. Basis for CMP

Based on the above findings of fact, we have determined that UPI is liable for the following violation of the HIPAA Rules and, therefore, is subject to a CMP.

1. UPI impermissibly disclosed Complainant's PHI in violation of 45 C.F.R. § 164.502(a). OCR has determined that the appropriate penalty tier for this violation is willful neglect not corrected.

Number of individuals whose PHI was impermissibly disclosed in 2015 – one (penalty of not less than \$50,000).

Total: \$50,000

IV. No Affirmative Defenses

By its letter of August 22, 2019, OCR offered UPI the opportunity to provide written evidence of mitigating factors or affirmative defenses and/or its written evidence in support of a waiver of a CMP within thirty (30) days from the date of receipt of that letter. UPI did not submit any written evidence of mitigating factors under 45 C.F.R. § 160.408 or affirmative defenses under 45 C.F.R. § 160.410 for OCR's consideration in making a determination of a CMP pursuant to 45 C.F.R. § 160.404.

V. Factors Considered in Determining the Amount of the CMP

In determining the amount of the CMP, OCR considered the following factors in accordance with 45 C.F.R. § 160.408: 1) the nature and extent of the violation; 2) the nature and extent of the harm resulting from the violation; 3) the history of prior compliance; 4) the financial condition of the covered entity, and; 5) such other matters as justice may require.

Here, UPI impermissibly disclosed the PHI of one individual, revealing his name, medical history, and the nature of his medical treatment. Despite repeated notice of this impermissible disclosure, UPI has not demonstrated any effort to mitigate any potential harmful effects of the impermissible disclosure or to come into compliance with the applicable provisions of the Privacy Rule by removing the PHI from its Google page. With regard to history of prior compliance with HIPAA, OCR's system of record does not show any prior complaints against, or compliance reviews of, UPI.

While UPI has not provided any evidence of its financial situation, OCR has learned, through public information, that UPI is comprised of a solo dental practitioner who has two locations. In

consideration of all the factors cited above, OCR proposes that the penalty amount of **\$50,000.00**.

VI. Waiver

UPI presented no evidence that the payment of the CMP would be excessive relative to the violations found here and described in OCR's letter to UPI of August 22, 2019. OCR has determined that there is no basis for waiver of the proposed CMP amount for the Impermissible Disclosure – (45 C.F.R. § 164.502(a)) violation as set forth at 45 C.F.R. § 160.412.

VII. Amount of CMP

A. Amount of CMP Per Violation

Based on the above factors, OCR finds that UPI is liable for the following CMP for each violation described in Section III:

1. Impermissible disclosures – (45 C.F.R. § 164.502(a)): The CMP is \$50,000 (see attached chart at Appendix A). This CMP amount is based on 45 C.F.R. § 160.404(b)(2)(iv).

B. Total Amount of CMP

The total amount of CMPs OCR could impose on UPI liable with regard to the violations described is **\$50,000.00**. (See attached chart.)

VIII. Right to a Hearing

UPI has the right to a hearing before an administrative law judge to challenge these proposed CMPs. To request a hearing to challenge this proposed CMP, you must mail a request, via certified mail with return receipt request, under the procedures set forth at 45 C.F.R. Part 160 within 90 days of your receipt of this letter. Such a request must: (1) clearly and directly admit, deny, or explain each of the findings of fact contained in this notice; and (2) state the circumstances or arguments that you allege constitute the grounds for any defense, and the factual and legal basis for opposing the proposed CMPs. See 45 C.F.R. § 160.504(c). If you wish to request a hearing, you must submit your request to:

Karen Robinson, Esquire
Chief, Civil Remedies Division
Departmental Appeals Board, MS 6132
330 Independence Ave, SW
Cohen Building, Room G-644
Washington, D.C. 20201
Telephone: (202) 565-9462

Copy to:
Serena Mosley-Day, Senior Advisor
Office for Civil Rights
200 Independence Avenue, SW
Suite 523E
Hubert H. Humphrey Building
Washington, D.C. 20201
Telephone: (404)-562-7864

A failure to request a hearing within 90 days permits the imposition of the proposed CMP without a right to a hearing under 45 C.F.R. § 160.504 or a right of appeal under 45 C.F.R. § 160.548. If you choose not to contest this proposed CMP, you should submit a written statement accepting its imposition within 90 days of receipt of this notice.

If UPI does not request a hearing within 90 days, then OCR will notify you of the imposition of the CMP through a separate letter, including instructions on how you may make payment, and the CMP will become final upon receipt of such notice.

If you have any questions concerning this letter, please contact Vaniecy Nwigwe at (214)-767-4054 or via email at Vaniecy.Nwigwe@hhs.gov.

Sincerely,



Marisa M. Smith, Ph.D.
Regional Manager

Enclosure – CMP Penalty Chart