August 25, 2014

The Honorable Sylvia Mathews Burwell
Secretary, Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: NCVHS Letter of May 15, 2014, regarding findings and recommendations on EFT and ERA

Dear Madam Secretary:

We, the undersigned organizations, are writing to you to convey our views and recommendations in response to recommendations made to you by the National Committee on Vital and Health Statistics (NCVHS) on May 15, 2014.[1]

At issue is a type of non-standard electronic funds transfer (EFT) transaction known as a "virtual card" payment. In a virtual card payment, a health plan or its vendor sends a single-use credit card number to a provider by mail, fax or email. This is known as a virtual card because a physical card is never created or presented to the provider. The provider must then manually enter the virtual card number into its Point-of-Sale (POS) processing terminal, and the card processing network provides an authorization for the payment. The provider then receives funds in the same way as for other card payments – via an Automated Clearing House (ACH) funds transfer from the POS merchant acquiring vendor to the provider's bank account.[2] For these virtual card payment authorizations, providers pay interchange fees of approximately 3 percent of the value of the payment (though anecdotally some providers have reported paying as much as 5 percent). Providers are unexpectedly losing income through these card fees, which essentially reduce the contracted fee rate that has been negotiated with the health plan for a particular service or services. Many providers are understandably opposed to incurring these fees, especially when they did not choose to use this payment method and when they are faced with a manual, burdensome opt-out process that further delays payment. In many cases, decision-makers in the provider's office only become aware of the incurred fees after receiving monthly statements from credit card merchants, as the virtual cards are processed by billing office staff without any strategic decision in the practice to accept this form of payment.

[1] Accessed at http://www.ncvhs.hhs.gov/140515lt2.pdf.
[2] Because of this, all providers that accept cards for payments can also receive an ACH deposit into a bank account.

NCVHS's Subcommittee on Standards has now conducted two hearings on the use of these non-standard EFT transactions, at which a number of organizations have testified on the impact the use of these transactions is having on providers.[3] In its letter of May 15, 2014, NCVHS's recommendation to you is as follows:

> **"To address the concerns raised by the health care industry regarding the use of credit cards, including virtual cards, for electronic fund transfer transactions, HHS should:**
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> - **explore the use of virtual credit card payments to determine if its use is compliant with the EFT standard and if providers are afforded the opportunity to use the HIPAA EFT standard rather than the virtual credit card;**
> - **work with the health care industry to be aware of the practices that exist to encourage the use of the standard for the EFT, instead of the virtual card; and**
> - **work with the health care industry to ensure greater transparency."**

Our organizations have several specific recommendations for you that would aid HHS in addressing the recommendations from NCVHS.

Compliance with the EFT Standard

The HIPAA standard transaction for EFT has been identified by HHS as NACHA's "CCD+ Addenda."[4] A virtual card payment, then, is a non-standard EFT transaction. As a practical matter, the virtual card payment method is not supported by the HIPAA standard transaction for Electronic Remittance Advice (ERA). Further, a virtual card payment cannot include within the transaction itself the required data that enable automated reassociation of EFT and ERA. Therefore, a virtual card payment results in additional manual processing for providers.

45 CFR §162.923(a) Requirements for covered entities, General Rules specifies that "if a covered entity conducts with another covered entity (or within the same covered entity), using electronic media, a transaction for which the Secretary has adopted a standard under this part, the covered entity *must conduct the transaction as a standard transaction."* (Emphasis added.) In identifying a HIPAA standard transaction for EFT, HHS issued commentary that explicitly contradicts this requirement. In promulgating a final rule, HHS regrettably included the statement that "Health plans are not required to send health care EFT through the ACH Network"[5] (i.e., the payment network that transmits the standard transaction). Predictably, this has been interpreted by many in the industry (including vendors, processors and clearinghouses) as an explicit opt-out for health plans from supporting the designated HIPAA standard transaction. This has led to many of the practices described below that discourage the use of the standard transaction and encourage the use of an alternative with a lopsided value proposition.

[3] February 19, 2014 (accessed at (http://www.ncvhs.hhs.gov/140219ag.htm); and June 10, 2014 (accessed at http://www.ncvhs.hhs.gov/140610ag.htm).
[4] Federal Register/Vol. 77, No. 6
[5] Federal Register/Vol.77, No. 6/Section II. G.5. page 1567

Practices that Discourage the Use of the EFT Standard; and Greater Transparency on Virtual Cards

Anecdotally, our organizations have received reports of health plans leading providers into accepting virtual card payments and discouraging the use of the standard transaction through the following methods:

- "Automatic opt-in" for virtual card payments, forcing the provider to opt out to receive payment by another method, including the HIPAA standard transaction;
- Informing providers wanting to opt out of virtual card payments that it takes up to 60 days to reissue the claims payment as either a check or ACH EFT payment;
- Creating unnecessarily burdensome processes for opting out of virtual card payments (e.g., no contact information provided with a virtual card number);
- Creating unnecessarily burdensome EFT enrollment processes and extra legal provisions for enrollment to deter use of the EFT standard transaction;
- Issuing false statements that a sophisticated treasury function is required to receive an electronic funds transfer via ACH (it is no harder for a provider to accept an ACH deposit than it is for an employee to get paid by Direct Deposit);
- Communicating inaccuracies about the safety of sharing banking information for use in the EFT standard transaction;
- Misrepresenting card system rules (e.g., informing providers that they must accept virtual cards for claims payment if they accept patient credit cards);
- Charging percentage fees to use the EFT standard transaction (i.e., the plan or the plan's vendor charging fees to a provider); and
- Requiring virtual card payments as part of provider contracting with health plans.

Our Recommendations

We recommend that HHS establish clear requirements for how virtual card payments can be used:

- Require an explicit opt-in for virtual card payments, by a provider or someone that has authority to make agreements for the provider;
- Require virtual card payment documents to contain clear instructions on how to opt out of receiving virtual card payments if the provider changes their mind on participation;
- Require virtual card payment documents to disclose to providers the full costs for processing the payment; and
- Prohibit the requirement that a provider accept virtual card payments as part of their contract with a health plan.

If virtual card payments have a value proposition for providers, these requirements will not deter providers from using them.

Finally, HHS should also ensure that health plans or payment solutions vendors are not engaged in practices that discourage provider adoption of EFT. Our organizations have received numerous reports of providers being charged percentage-based fees (usually 1.8%–1.9%) to

receive ACH EFT. CMS issued Frequently Asked Question (FAQ) 9778 on March 28, 2014, stating that "health plans may not: delay or reject an EFT or ERA transaction because it is a standard or charge an excessive fee or otherwise give providers incentives to use an alternative payment method to EFT via the ACH Network." HHS should determine what constitutes excessive fees charged by plans to providers to use the HIPAA standard transaction for EFT. Our organizations think that any fee charged by a plan to a provider to use a HIPAA standard EFT transaction is not justified. Further, we think that a fee based on the percentage of the value of the transaction (such as the 1.9 percent example above) is clearly excessive.

Conclusion

HHS should fully treat the HIPAA standard transaction for EFT as it does all other HIPAA standard transactions – as an actual standard – thereby eliminating ambiguity and the costs that are being imposed on providers. Alternatively, HHS should establish clear and explicit requirements regarding how virtual card payments can be used, with real disclosure and transparency. HHS needs to give meaningful and clear effect to providers' right to use the HIPAA standard transaction for EFT. When a provider chooses to use an alternative to the standard transaction, it should be only with the provider's explicit, informed, and advance agreement.

Thank you in advance for your consideration of these issues. Each of our organizations welcomes the opportunity to discuss these recommendations in greater depth and to address any questions or concerns that you may have. Please don't hesitate to contact any of the individuals listed below:

- George Arges, AHA, Senior Director Health Data Management, at garges@aha.org;
- Heather McComas, AMA, Director Administrative Simplification Initiatives, at heather.mccomas@ama-assn.org;
- Robert Tennant, MGMA, Senior Policy Advisor at rtennant@mgma.org; or
- Priscilla Holland, NACHA, Senior Director Healthcare Payments at pholland@nacha.org

Sincerely,

American Hospital Association (AHA)
American Medical Association (AMA)
Medical Group Management Association (MGMA)
NACHA, The Electronic Payments Association

cc: Dr. Larry A. Green, Chair NCVHS
Dr. Walter Suarez, NCVHS Standards Subcommittee Co-Chair
W. Ob Soonthornsima, NCVHS Standards Subcommittee Co-Chair