



HEALTHCARE PRIVACY UPDATE

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Congress Significantly Expands Federal Laws Regarding Privacy and Security of Health Information and Electronic Medical Records And Adds Substantial Medicare/Medicaid Incentives Tied To Electronic Health Records

As a component of the Stimulus Bill, known as the American Recovery and Reinvestment Act (the Act), signed into law on February 17, 2009, Congress adopted the Health Information Technology for Economic and Clinical Health Act (HIT), which includes provisions that significantly broaden existing federal health privacy and security requirements. HIT represents the most significant change in federal health privacy and security law since the passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Stimulus Bill also adds significant Medicare and Medicaid Incentives designed to encourage electronic health record (EHR) technology. While many of these changes become effective February 17, 2010 or later, others will go into effect within a much shorter time frame.

HIT significantly expands the categories of entities subject to HIPAA; increases the obligations of such entities; increases resources and methods of enforcement; and increases penalties for noncompliance. In sum, these changes present an enormous compliance challenge for entities in the health care sector and for entities that do business with them.

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Congress included in HIT several notable provisions:

Focus on Privacy and Security

- Imposition of considerable new restrictions on “business associates”;
- Subjecting business associates to the civil and criminal penalties currently applicable to covered entities;

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- Requiring that patients be notified of any breaches of the patient's protected health information that are discovered by covered entities, business associates or "vendors" that maintain personal health records;
- Narrowing the scope of marketing communications that may be made without HIPAA authorizations;
- Addressing certain privacy implications of EHRs;
- Calling for more vigorous enforcement of HIPAA by expanding the resources of the Office of Civil Rights (OCR) of the Department of Health and Human Services (HHS);
- Increasing the penalties for violations of HIPAA and enabling state attorneys general to pursue actions on behalf of their citizens; and
- Allowing payments to individuals harmed by HIPAA violations, although there still is no private right of action under HIPAA.

Initiatives to Develop Electronic Health Records (EHR)

- Establishing a goal of an EHR for each person in the U.S. by 2014;
- Initiatives to develop and implement health information technology standards, as well as funding and logistical support to encourage dissemination of EHR technology;
- Ensuring that EHRs include not only patient demographic and clinical history, but also order entry and integration with other systems;
- Establishing a National Coordinator for health information technology who, among other tasks will be responsible for overseeing the distribution of grants and loans to states and others that will encourage the development and certification of EHR technology; and
- Requiring HHS to provide training and assistance with the implementation, use, upgrading, and ongoing maintenance of EHR systems.

Medicare/Medicaid Incentives to Encourage the Use of EHRs

- Establishing positive and negative incentive payments for Medicare health care providers, Medicare Advantage plans, and hospitals to encourage early adoption and meaningful use of certified EHR technology; and
- Establishing incentives for states to encourage Medicaid providers to become early adopters and meaningful users of certified EHR technology.

The impact of these changes is quite sweeping and deserves the attention of every health care entity or company whose business involves health care-related activities or relationships. Organizations will need to closely scrutinize these changes and take steps to ensure appropriate compliance with these new laws. In particular, organizations will need to update their privacy and data security protocols, and compliance plans, to ensure effective implementation of the new requirements. In addition, there are significant opportunities for businesses in this field to take advantage of the statutory incentives for use of EHRs. Finally, affected organizations should consider monitoring, and perhaps participating, in the regulatory development process that will be undertaken quickly by the Department of Health and Human Services and the Federal Trade Commission.

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