

CLIENT ALERT

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2009 HITECH Act

Hospital Clients

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A major component of the recently enacted, much ballyhooed Recovery and Reinvestment Act of 2009 (i.e., the federal "stimulus package") is Title XIII, the Health Information Technology for Economic and Clinical Health Act (the "HITECH Act," or the "Act"). The HITECH Act includes numerous provisions designed to accelerate health care providers' adoption of electronic health records ("EHRs"). In particular, the Act provides for (i) substantial changes to the privacy and security rules under the Health Insurance Portability Act ("HIPAA"); and (ii) certain Medicare and Medicaid payment incentives for hospitals that adopt EHRs. This Memorandum is focused on these HIPAA changes and Medicare and Medicaid incentives.

I HIPAA Changes

(a) Business Associates

The HITECH Act ratchets up substantially the potential exposure of "business associates" with respect to the HIPAA security and privacy rules. Previously, the privacy and security rules required a covered entity to enter into written agreements with its business associates (i.e., organizations that created, received, maintained or transmitted electronic protected health information, or "PHI") that complied with certain regulatory requirements.

Under the HITECH Act, the HIPAA security rules, as well as the security and privacy rules incorporated in the Act, apply to a business associate in the same manner as a covered entity. Moreover, if a business associate uses or discloses PHI other than in compliance with all the privacy requirements imposed with respect to a business associate agreement, it will be deemed to have violated the HIPAA privacy rules. In either case, whereas the exposure of a business associate in connection with HIPAA violations previously was limited to whatever contractual protections a covered entity retained in the business associate agreement, the HIPAA security and privacy rules now may be enforced *directly* against the business associate.

Similarly, the HITECH Act applies the civil monetary and other penalties under HIPAA (which, as discussed below, have been increased) to business associates in the same manner as covered entities.

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(b) Notification of HIPAA Violations

Previously, HIPAA did not specifically require covered entities to make disclosures of privacy or security breaches. The HITECH Act mandates that, in the event a covered entity discovers (or reasonably believes) that one or more individuals' unsecured PHI has been accessed, acquired or disclosed as the result of a breach of the HIPAA privacy or security requirements, the entity must notify all the affected individuals. The notice must include certain information prescribed in the Act, and must be given "without reasonable delay," but in no event later than sixty (60) days after discovery. The notice generally must be sent by first-class mail. However, if more than five hundred (500) individuals are affected by the breach, the notice must be published in prominent print or broadcast media. The foregoing notice requirements will take effect following adoption of implementing regulations, probably this Fall.

Significantly, the notice requirements imposed by the Act apply only with respect to disclosures of "unsecured" PHI. PHI is "unsecured" if it is not secured by encryption technologies and methodologies prescribed by DHHS. (In other words, covered entities and business associates that adopt the particular encryption technologies and methodologies specified by DHHS will *not* be subject to the Act's notice requirements.) The Act requires DHHS to prescribe the particular encryption technologies and methodologies that will render PHI *not* "unsecured" within 60 days and to update them annually.

(c) Vendors and Other Organizations

The Act clarifies that health information exchange organizations, regional health information organizations and other organizations that transmit PHI on behalf or with respect to covered entities, as well as "any *vendor* that contracts with a covered entity to allow that covered entity to offer a personal health record to patients as part of its electronic health record" (emphasis added), will be treated as business associates for HIPAA purposes. Note, however, that Internet service providers and other incidental, "conduit" transmitters of PHI are not business associates.

(d) Penalties for HIPAA Violations

The HITECH Act also provides for strengthened enforcement in the event of a HIPAA violation. For example, the Act provides that, unless a HIPAA violation is corrected within 30 days after discovery, the Department of Health and Human Services ("DHHS") Office of Civil Rights ("OCR") may impose on the violator a civil monetary penalty ("CMP") in the amount (per violation) of (i) not less than \$100, but not more than \$25,000, in the event the violator "did not know" of the violation; (ii) not less than \$1,000, but not more than \$50,000, in the event the violation was due to "reasonable cause," and not "willful neglect;" and (iii) not less than \$10,000, but not more than \$50,000, in the event the violation was due to willful neglect. The Act also expands HIPAA criminal penalties to all individuals, not just employees of covered entities.

In addition, the HITECH Act authorizes state attorneys general to pursue certain civil remedies for HIPAA violations that occur within their jurisdictions. Moreover, the Act requires that DHHS, in conjunction with the Government Accountability Office,

establish, within three years, mechanisms whereby harmed individuals may recover a percentage of CMPs imposed by OCR.

(e) Accountings of Disclosures

Previously, HIPAA entitled an individual to compel a covered entity to provide an accounting for the entity's disclosures of the individual's PHI, but the accounting did not have to include disclosures for treatment, payment or health care operations (i.e., most disclosures). Under the HITECH Act, if the covered entity uses or maintains an EHR, the entity must provide, on request, an accounting for *all* disclosures made during the three (3) years immediately preceding the request.

Note, however, that, for a hospital that has already implemented an EHR, the above disclosure requirements will not take effect until 2014. For a hospital that has not implemented an EHR, the requirements will take effect on the later of the date the hospital implements an EHR or January 1, 2011.

(f) Minimum Necessary Disclosures

HIPAA generally limits permitted uses and disclosures of PHI to the "minimum necessary" information. The Act tasks DHHS to issue guidance to define "minimum necessary." Until such guidance is issued (probably in the Fall), the Act limits permissible uses and disclosures of PHI to the "limited data set," as defined in the HIPAA privacy rules (i.e., not including name, address, social security number or other direct identifiers).

(g) Patient Restrictions

The HITECH Act requires that a covered entity comply with a request from an individual not to disclose PHI to a health plan for purposes of payment and/or health care operations, but only if the individual has made such payment in full, out of pocket.

(h) Disclosures to Patients

The HITECH Act entitles an individual to compel a covered entity to provide the individual's PHI in electronic format to the individual or, at the individual's request, to a third party.

II MEDICARE AND MEDICAID PAYMENT INCENTIVES TO CERTAIN HOSPITALS FOR ADOPTING EHR

Under the HITECH Act, beginning in 2011 and continuing through 2015, acute care prospective payment system ("PPS") hospitals and critical access hospitals will be eligible, for up to four (4) years, for certain incentive payments from Medicare or Medicaid that can demonstrate that they are "meaningful users" of "certified EHR technology." A hospital would meet this standard if it (i) can demonstrate to DHHS that it is using certified EHR technology in a meaningful manner (including implementation of e-prescribing); (ii) can demonstrate to DHHS that such technology is connected in a manner that provides for the electronic exchange of health information to improve the

quality of health care (consistent with applicable law and standards); and (iii) submits information to DHHS on clinical-quality and other prescribed measures. In order to be "certified," EHR technology will have to comply with standards and specifications adopted by DHHS.

(a) Medicare Incentives

The annual incentive payments will be computed by applying the following formula:

$$(\$2,000,000 + \text{"Discharge Amount"}) \times \text{"Medicare Share"} \times \text{"Transition Factor"}^{1}$$

Each year, in addition to the baseline \$2,000,000, Medicare will pay an eligible hospital (subject to reduction based on the Medicare Share and Transition Factor, as described below) a "Discharge Amount" equal to \$200 for each discharge by the hospital during the year, beginning with its 1,151st discharge for the year and ending with its 23,000th.

The "Medicare Share" for a given year is equal to (i) the estimated number of Medicare Part A inpatient bed days, plus the estimated number of Part C inpatient days, during the year; divided by (ii) the estimated total number of inpatient bed days during the year; multiplied by (iii) the hospital's "Charity Factor." The hospital's "Charity Factor" is equal to (i) the hospital's estimated total charges, less charges attributable to charity care, for the year; divided by (ii) the estimated total charges.

The effect of the "Transition Factor" is that, beginning with the second annual incentive payment, the amount of the annual payments will be reduced by twenty-five percent (25%) each year, or twenty-five percent (25%) in the second payment year, fifty percent (50%) in the third payment year, seventy-five percent (75%) in the fourth payment year and one hundred percent (100%) in the fifth payment year. Consequently, eligible hospitals will not receive more than four (4) annual incentive payments from Medicare.

Conversely, beginning after 2015, Medicare will reduce three-quarters (3/4) of the Medicare market basket adjustment percentage for any acute care PPS or critical access hospital that is *not* a meaningful user of EHR by one-third (1/3) for 2015, two-thirds (2/3) for 2016 and completely for 2017. The AHA Advisory includes an illustration of the application of this rule.

(b) Medicaid Incentives

The HITECH act also authorizes states to make incentive Medicaid payments to children's hospitals and certain acute care hospitals that treat patients at least ten percent (10%) of whom are Medicaid patients. States may make these incentive payments

¹The American Hospital Association ("AHA") has prepared a *Legislative Advisory* dated February 20, 2009 (the "Advisory") that provides a detailed explanation of the mechanics for determining the Medicare incentive payments, along with illustrative calculations. AHA members may access the Advisory through the AHA website, www.aha.org.

beginning in 2011 through 2020. Only hospitals that do not receive Medicare incentive payments are eligible, however, and eligible hospitals may only receive payments for up to five (5) years. The Act authorizes states to make incentive payments in amounts up to fifty percent (50%) (but only up to an aggregate of ninety percent (90%), for any two-year period) of the applicable “hospital EHR amount,” multiplied by the applicable “Medicaid share.” For this purpose, the Act provides that (i) the hospital EHR amount will be determined in the same manner as the Medicare incentive payment applicable to the hospital, except that the calculation must assume that the hospital’s Medicare share is 1; and (ii) the Medicaid Share will be determined in the same manner as the Hospital’s Medicare Share (see the AHA Advisory), except that the numerator, instead of take into account the number of individuals enrolled in Medicare, must take into account the estimated inpatient-bed-days attributable to Medicaid patients.