

## **Proposed Changes to the HIPAA Privacy, Security, and Enforcement Rules**

On July 14, 2010, the Department of Health and Human Services ("HHS") published proposed changes to the Health Insurance Portability and Accountability Act ("HIPAA") in the *Federal Register* ("Proposed Rule"). These proposed changes are part of the enactment of the Health Information Technology and Clinical Health Act ("HITECH"), which was included in the American Recovery and Reinvestment Act of 2009. The Proposed Rule is designed to strengthen the HIPAA Privacy, Security, and Enforcement Rules currently in effect and to improve the overall workability and effectiveness of these Rules.

Among other things, the changes contained in the Proposed Rule include the following:

- Extending HIPAA requirements directly to business associates and allowing civil and criminal penalties to be imposed on business associates for acts of noncompliance;
- Applying HIPAA obligations directly to subcontractors of business associates who create, receive, maintain, or transmit protected health information ("PHI") and placing the burden of ensuring compliance by such subcontractors on business associates;
- Expanding an individual's right to access PHI in an electronic format;
- Expanding an individual's right to restrict certain disclosures of PHI to health plans when the individual pays for the related services or items out of pocket;
- Reducing the instances in which PHI may be disclosed without patient authorizations for "health care operations";
- Prohibiting the sale of PHI without the valid authorization of the patient, except under limited circumstances;
- Allowing the use of a compound authorization for research purposes;
- Imposing new limitations on the use and disclosure of PHI for marketing and fundraising purposes; and
- Strengthening and expanding HIPAA's enforcement provisions.

In regard to the Proposed Rule, HHS Secretary Kathleen Sebelius stated in a press release that "[w]hile health information technology will help America move its health care system forward, the privacy and security of personal health data is at the core of all our work."

Georgina Verdugo, Director of the Office of Civil Rights, the HHS division that enforces the HIPAA Rules, stated that the "benefits of health IT can only be fully realized if patients and providers are confident that electronic health information is kept private and secure at all times." Verdugo further stated that the Proposed Rule "strengthens the privacy and security of health information, and is an integral piece of the administration's efforts to broaden the use of health information technology in health care today."

Pursuant to HITECH, some of the changes included in the Proposed Rule technically took effect on February 18, 2010. However, HHS stated in the Proposed Rule that it will provide a grace period of 180 days after publication of the Final Rule for entities to come into compliance with most of the changes enacted by HITECH and discussed in the Proposed Rule. Additional time will be available for revising existing business associate agreements in order to bring them into compliance. At this time, it is uncertain whether other enforcers of HIPAA and HITECH, such as state Attorney Generals, will abide by the enforcement delay.

The Proposed Rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-16718.pdf>. Comments to the Proposed Rule must be filed either electronically or by mail no later than September 13, 2010.

On a related note, in conjunction with publishing the Proposed Rule, HHS also launched a website allowing users to access information about HHS' privacy efforts. HHS stated that this "new resource provides Americans with confidence that their personal information is secure and underscores HHS' goal of greater openness and transparency in government." The HHS privacy website contains a number of resources and is available at <http://www.hhs.gov/healthprivacy/index.html>.



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