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MORE HIPAA! HITECH ACT EXPANDS HIPAA PRIVACY AND SECURITY REQUIREMENTS

Just when health care providers and patients were becoming accustomed to the Health Insurance Portability and Security Act ("HIPAA") Privacy and Security requirements, the federal government has passed legislation expanding HIPAA and imposing additional requirements on providers. Buried in the recently passed federal stimulus bill is Title XIII, known as the "Health Information Technology for Economic and Clinical Health Act" or "HITECH Act." The HITECH Act contains significant expansions of HIPAA and makes changes that will impact the healthcare industry.

Some of the provisions of the HITECH Act are fairly detailed and will require further review. Nevertheless, in order to get you started, we have summarized the new provisions in the list below.

- 1. Business Associates will be subject to HIPAA security provisions and to sanctions for violation of business associate requirements.** Business Associates will now be subject to direct regulation, rather than indirect regulation only through the business associate agreements. The HIPAA requirements for administrative, physical, and technical information safeguards and written policies and procedures will apply directly to Business Associates, as will the penalties for violations. This will affect billing companies, attorneys and other businesses that routinely deal with protected health information ("PHI")
- 2. Covered Entities will now be required to provide notification to patients and the Secretary of HHS of data breaches of 'unsecured' PHI.** "Unsecured" PHI is PHI that is not protected by "technologies and methodologies that render PHI unusable, unreadable, or indecipherable to unauthorized individuals." In other words, it is basically PHI which is not encrypted. The new rules require Covered Entities to notify individuals within 60 days of a breach and provide notice to the Secretary of HHS. The notification to HHS must take place immediately if it involves more than 500 people. Otherwise, the Covered Entity may maintain a log of breaches involving less than 500 individuals and provide the log to the Secretary of HHS annually.
- 3. Individuals must be given a right to opt-out of receipt of Covered Entity's fundraising communications.** Under the new rule, fundraising is still considered a permitted 'operational' use of PHI. However, Covered Entities must now provide individuals, in a "clear and conspicuous manner," with a right to opt-out of receiving further fundraising communications.

4. **Covered Entities are required to accept certain requests for restrictions on disclosures.** Currently, an individual has a right to request restrictions on disclosure of his/her PHI, but a Covered Entity is not required to grant that request if it would be unduly burdensome to do so. Under the HITECH Act, a Covered Entity is *required* to agree to an individual's request for restrictions on disclosures of PHI for payment or healthcare operations *if* the information pertains *only* to a healthcare item or service that the individual has paid for out of pocket in full, *unless* disclosure is otherwise required by law or is for treatment purposes.

5. **"Minimum necessary" standard defined.** Currently, Covered Entities are required to limit uses and disclosures for non-treatment purposes to the "minimum necessary" to achieve the purpose for which the information is needed. What constituted the "minimum necessary" was left to the discretion of the Covered Entity. Under the HITECH Act, a Covered Entity must limit its requests for and use or disclosures of PHI to a "Limited Data Set" to the extent practicable. The term "Limited Data Set" currently has no meaning outside of the research context, so the Secretary of HHS is directed in the law to issue guidance on what constitutes the minimum necessary 'limited data set' within 18 months of enactment.

6. **Accounting of disclosures required for treatment, payment and healthcare operations for Covered Entities using electronic health records ("EHRs").** Currently, HIPAA does not require Covered Entities to provide accountings of disclosures for treatment, payment, or healthcare operations. Under the HITECH Act, the exception is eliminated for Covered Entities that use EHRs, with this requirement phased in beginning in 2011.

Effective Date: Most of the provisions of the HITECH Act become effective 12 months after enactment. However, there are some provisions that have their own specified effective date.

The list above is just a summary of some of the more significant provisions of the HITECH Act. As guidance and regulations are released by the Secretary of HHS, more information about the impact that these changes will have on hospitals and other healthcare providers will become evident. Healthcare personnel need to be aware of this new develop and establish policies and procedures to ensure compliance by the effective dates. For specific questions regarding the information in this Advisory, please contact Cori Loomis, 405-234-3832, Karen Rieger, 405-235-7788, or any Crowe & Dunlevy attorney who typically handles your legal issues.

This client advisory is published by Crowe & Dunlevy P.C. to inform our clients and friends of important developments in the healthcare industry. The content is informational only and does not constitute legal or professional advice. We encourage you to consult an attorney in the Crowe & Dunlevy healthcare law group if you have specific questions or concerns relating to any of the topics discussed herein.
