

**American Recovery and Reinvestment Act:
HEALTH INFORMATION TECHNOLOGY FOR
ECONOMIC AND CLINICAL HEALTH ACT
(the “HITECH Act”)**

As part of the massive economic stimulus package signed into law by President Obama on February 17, 2009, the federal government will provide nearly \$20 billion for the development and implementation of health information technology (“Health IT”). Signaling its intention to take a leadership role in the development of a national Health IT infrastructure, the government will provide financial incentives through the Medicare and Medicaid programs to physicians and hospitals to adopt Health IT and will establish the administrative and regulatory structure to help promote the success of its efforts. The recently enacted HITECH Act codifies this structure and reflects a federal goal of having all hospitals and physicians implement electronic health record (“EHR”) technology by 2015.

While the main focus of the HITECH Act is on the establishment of Health IT infrastructure and the incentives for health care providers to come on board, a significant portion of the Act relates to health information privacy and security issues in recognition of the increased threat to health information privacy and security inherent in a far-reaching electronic health information network. The Act has broadened many of the privacy and security provisions of the Health Information Portability and Accountability Act (“HIPAA”) by imposing expanded notification and disclosure accounting requirements and a tiered and more stringent penalty scheme while, at the same time, extending its provisions directly to business associates who until now were subject to HIPAA’s privacy and security requirements only by contract. The privacy and security requirements of the HITECH Act are likely to result in substantial cost to HIPAA covered entities and business associates as well.

Health IT Regulation & Development

The HITECH Act assigns administrative responsibility for the regulation and development of a Health IT infrastructure to the Office of the National Coordinator for Health Information Technology (“National Coordinator”) which is permanently established in the Department of Health and Human Services. The National Coordinator, working with other newly created federal committees, has been allocated \$2 billion to develop a federal Health IT strategic plan for the establishment of a nationwide infrastructure that, among other things, “ensures that each patient’s health information is secure and protected,” “improves health care quality, reduces medical errors, reduces health disparities, and advances the delivery of patient-centered medical care,” “reduces health care costs resulting from inefficiency, medical errors, inappropriate care, duplicative care, and incomplete information,” and “provides appropriate information to help guide medical decisions at the time and place of care.” A portion of the \$2

billion will also be made available for grants and loans to develop Health IT in underprivileged areas.

The Act also creates a HIT Policy Committee and a HIT Standards Committee to recommend areas in which standards, implementation specifications and certification criteria are required for the electronic exchange of health information. The National Coordinator is directed to work with the National Institute of Standards and Technology to develop a program for the certification of Health IT as compliant with the standards developed by the various committees and adopted by the Department of Health and Human Services through the rulemaking process.

The balance of the Health IT stimulus allocation – \$17 billion – will be used to provide incentive payments to hospitals and physicians participating in the Medicare and Medicaid programs that are or become “meaningful EHR users” beginning in 2011. Meaningful use of EHR technology would include e-prescribing, electronic exchange of clinical information with other providers and reporting on clinical quality measures. Physicians who become meaningful users of EHR technology starting in 2011, 2012 or 2013 will receive incentive payments through the Medicare program of up to \$44,000 over a 5-year period depending on when they adopt EHR technology. No incentive payments will be available to physicians who begin meaningful use of EHR technology after 2015. Beginning in 2016, physicians who do not demonstrate that they are meaningful users of EHR technology will see their Medicare payments reduced. Incentive payments are also available through the Medicaid program. Financial incentives are also available to hospitals that are using EHR technology that is certified as meeting appropriate standards for interoperability, security and clinical functionality. As with physician incentives, no incentives will be available to hospitals that begin meaningful use of EHR after 2015 and similar reductions in Medicare payments will be assessed.

Privacy & Security Provisions

The HITECH Act substantially expands the privacy and security provisions of HIPAA. Significantly, the Act applies the requirements of HIPAA and the penalties for violation of HIPAA directly to business associates. Prior to adoption of the HITECH Act, business associates were only required to comply with the HIPAA privacy and security requirements to the extent such requirements were incorporated into a business associate agreement between business associates and covered entities. Accordingly, while a business associate could be liable for damages for breach of contract if it violated a provision of the business associate agreement, it would not be subject to an enforcement action and penalties under HIPAA. The HITECH Act has changed this by making business associates subject to HIPAA directly. This means that business associates will be subject to the security requirements of HIPAA and will have to put in place the same type of security policies and procedures as covered entities. In addition, business associates will now be subject to civil and criminal penalties for violation of HIPAA. Finally, the enhanced privacy and security requirements to which business associates are now subject

must be incorporated into the business associate agreement by and between a business associate and a covered entity.

The HITECH Act also broadens the notification requirements for a security breach and imposes new requirements for accounting for disclosures of protected health information. Whereas HIPAA does not require notice to an individual of a security breach with respect to that individual's protected health information, the HITECH act requires notification to individuals whose "unsecured protected health information has been, or is reasonably believed by the covered entity to have been, accessed, acquired, or disclosed as a result of [a security] breach." The Act requires the Department of Health and Human Services to define "unsecured PHI" for purposes of triggering the Act's notification requirement. In addition, if a security breach involves the protected health information of more than 500 individuals in a state, media outlets in the state must be notified. Business associates must also notify covered entities of any breach of which they become aware, but the responsibility for notifying the individual of a security breach remains with the covered entity.

Covered entities will be subject to increased requirements to account for disclosures of health information under the HITECH Act. Under HIPAA, covered entities are not required to account for disclosures for treatment, payment and health care operations. Under the HITECH Act, however, if a covered entity maintains electronic health records, the covered entity will have to account for all disclosures from the electronic health record for three years.

Yet another expansion of HIPAA relates to an individual's request that a covered entity restrict disclosures it makes of protected health information for treatment, payment or health care operations. Under HIPAA, a covered entity does not have to accede to such requests. Under the HITECH Act, if an individual requests a restriction on the disclosure of protected health information to a health plan for payment or health care operations for treatment or services for which the individual has paid out-of-pocket, the covered entity must honor the request.

Reference should be made to the full text of the Act for changes to the HIPAA provisions concerning the use of protected health information for marketing and fund-raising activities.

The HITECH Act also serves to put some real teeth into HIPAA enforcement with a new penalty structure. Under HIPAA, the focus was on compliance and corrective action; therefore, penalties were not assessed if a problem was corrected within 30 days or was not discoverable with reasonable diligence. The HITECH Act assesses minimum penalties for any violation, with a tiered penalty system depending on the severity of the violation. In addition, state attorneys general are now authorized to bring enforcement actions on behalf of individuals, a notable change to HIPAA, and courts are authorized to award damages, costs and attorneys fees for violations of HIPAA

A final note. The provisions of the HITECH Act will take effect over a period of several years, including the privacy and security regulations. For instance, while the enhanced penalties

for HIPAA violations take effect immediately, the security provisions applicable to business associates will not take effect until February of 2010. Reference should be made to the full text of the Act for further detail concerning effective dates.

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This article is only intended to summarize some of the more salient considerations related to the recently adopted Health Information Technology for Economic and Clinical Health Act. Specific client needs and circumstances require a more detailed and intensive factual and legal examination. This article is not to be construed as legal advice. If you have any questions about anything you read in this article or any other issues related to health care law or regulations, please contact:

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