

**The 2009 Economic Stimulus Package's
Health Information Technology for Economic and
Clinical Health Act: The Cure For Modernizing the
Healthcare Industry and Its Many Side Effects**

By M. Todd Gerber & Tara Chadbourn

Signed into law on February 17, 2009, the Health Information Technology for Economic and Clinical Health Act, or HITECH Act, is poised to bring significant change to the healthcare industry. Under this Act, the U.S. healthcare system, which is arguably one of the largest remaining paper-based industries in the country, would be digitalized and networked through a national health information network (NHIN). Conceptually isolated repositories of paper health records are to be replaced by a single, nationwide interoperable infrastructure linking state, federal, and private health provider networks together such that each patient has a comprehensive electronic medical record. Undeniably, the Act has important consequences for patients, healthcare providers, business associates of healthcare providers, and vendors of information technology alike.

The HITECH Act was passed as part of the American Recovery and Reinvestment Act of 2009. The Act continues the federal government's efforts in modernizing the healthcare industry that President Bush initiated in 2004 when he set the aggressive goal of providing every American with an electronic health record ("EHR") by 2014.

It is important to note that implementing the HITECH Act network standards is "voluntary" for private entities. However, a provision of the act allows government agencies that contract with private health care providers, health plans, and health insurance issuers to require them to meet the HITECH standards as the providers, plans, and clearinghouses "implement, acquire[], or upgrade" their health information technology systems.

Although the Act does not specify whether this provision extends to Medicare and Medicaid participants, there are important financial incentives and consequences for physicians and hospitals that participate in Medicare. Eligible physicians and hospitals that qualify as "meaningful EHR users" will be eligible for significant Medicare incentive payments starting in 2011 and ending in 2015. Physicians and qualified hospital that do not satisfy the "meaningful EHR user" criteria until 2014 will not receive any incentive payments. Significantly, physicians and hospitals that fail to meet the criteria for a "meaningful EHR user" criteria by 2016 will receive reduced Medicare payments with the amount of reduction to be clarified through regulation.

In general, to qualify as a "meaningful EHR user," the provider must adopt a health information technology system, or Health IT system, that meets the Secretary of the Department of Health and Humans Services (HHS) standards, demonstrate that it engages in the exchange of health information to promote quality of care and coordination of care, and meet reporting

requirements. Physicians that meet the criteria by 2011 can receive up to \$44,000 for the first year and reduced yearly payments until 2015. Hospitals that meet the criteria by 2011 will receive a base payment of \$2,000,000 plus additional payments based on the hospital's discharge related amount and Medicare share. The incentive payments to hospitals will be reduced over the four year period between 2011 and 2015 in 25% increments.

Regarding Medicaid, the HITECH Act allocates some funding to states and qualifying providers to develop Health IT systems.

Implementing Health IT will involve significant cost, education, and training for entities that have not implemented any Health IT to date. There could also be significant change for those entities that have already implemented Health IT, in whole or in part. Existing Health IT systems may not meet the HHS Secretary's standards and specifications or, due to a vendor's proprietary design, it may not properly communicate with other networks on the NHIN. Purchasing, implementing the new technology, and training all authorized users may be entirely cost-prohibitive to many affected entities. Fortunately, the Act anticipates this financial blow and provides for financial aid through state grants. States interested in obtaining this funding must formulate and submit a plan, as well as an application, to HHS. States that receive grants will also be required to match some portion of the funds.

Important Legal Issues For All Entities in the Healthcare Industry:

The pros and cons of Health IT have been heavily debated so they will just be mentioned briefly. HHS claims that implementation of Health IT will improve the quality of care, prevent medical errors, reduce health care costs, increase administrative efficiencies, decrease paperwork, expand access to affordable health care, and improve medical research. While these are unarguably laudable goals, Health IT presents notable threats that cannot be ignored.

One primary concern is the security and privacy of health information which would be available on a nationwide electronic network. In that regard, the HITECH Act greatly expands the Health Insurance Portability and Accountability Act, or HIPAA, and its accompanying Privacy Rule. Under the revisions, all business associates are now required to comply with HIPAA's privacy and security rules. This means that accountants, lawyers, clearinghouses, and others that support physicians and have access to health information have liability exposure for privacy violations. The number of potentially liable entities under HIPAA is significantly expanded. Similarly, enforcement and civil penalties are increased. The Act also creates a data breach notification system whereby entities must notify affected individuals and, in some cases, the media and the HHS Secretary. Below is a summary of the major changes to HIPAA:

1) Breach Notification:

The HITECH Act creates a breach notification system. If a security breach is discovered, a covered entity or business associate must notify the individual within sixty days. If there is a breach involving 500 or more residents of a state or jurisdiction, the covered entity or business associate must also notify a major media outlet and the HHS Secretary, who will, in turn, list the name of the entity on the HHS website.

The HIPAA revisions also place the burden of proof on the covered entity or business associate to show that all notifications were made as required.

2) Tattle-Tale system expanded:

Under the prior HIPAA Privacy rule, only covered entities— health care providers, health plans, and health care clearinghouses— were required to take action if they discovered that a business associate was violating privacy standards. Covered entities were required to take steps to cure the violation or, if not possible, terminate the contract with the business associate or notify the HHS Secretary. Under the HIPAA revisions, now business associates will be required to take the same actions if it discovers that the covered entity is not following privacy standards. This new provision could lead to extensive litigation between covered entities and business associates.

3) Business Associates now liable:

Before the HITECH ACT, business associates of covered entities were not subject to liability for HIPAA violations. Now business associates can be directly liable for violations.

4) Increased enforcement and penalties:

Enforcement is greatly increased under the HITECH Act. In addition to administrative enforcement from the HHS, state attorney generals will now have HIPAA enforcement powers and authority to bring class action suits if deemed necessary.

The new legislation significantly increases the existing civil monetary penalties for each violation. Civil penalties will now range from \$100 to \$50,000 per violation, with caps of \$25,000 to \$1.5 million for all violations of a specific requirement per calendar year. The violator's knowledge determines the penalty severity.

Conclusion

Given the broad scope of the HITECH Act, there will be significant consequences for patients, healthcare providers, business associates of healthcare providers, and vendors of information technology alike. THE HITECH Act requires the Secretary of the HHS to act quickly in developing regulations and implementing the Act. To stay abreast of these developments and learn more about the HITECH Act, a good starting point for information is the HHS website- www.hhs.gov/healthit.