

**The Health Information Technology for Economic and Clinical Health Act
“HITECH Act” of 2009**

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The Federal government's stimulus package—the American Recovery and Reinvestment Act of 2009 — provides many benefits and some new restrictions on physicians, hospitals, nursing facilities, educational institutions, business associates, and vendors. The legislation includes the Health Information Technology for Economic and Clinical Health Act or “HITECH” Act. The Act provides some new sources of funding and support for health information technology (“HIT”). The Act provides incentive payments to physicians, hospitals, and nursing facilities for the adoption and implementation of HIT, including electronic health records (“EHRs”), and also some disincentives down the line for those slow to adopt HIT. To balance this push for HIT, the Act increases privacy and security protections for health information and entities that may use or access such information.

Health Information Infrastructure

First, EHRs and HIT are to be promoted by the Office of the National Coordinator for Health Information Technology (“National Coordinator”). The Office of the National Coordinator previously was created by Executive Order under the Bush Administration. The National Coordinator is to oversee HIT Policy and Standards Committees. Its duties include the integration of HIT and the utilization of EHRs for each person in the United States by 2014.

The Secretary of Health and Human Services (“Secretary”) is to invest in the infrastructure necessary to promote and allow for the electronic exchange and use of health information.

The Secretary may award grants to States to facilitate and expand the electronic exchange and use of health information. Grants may also be made for loans to healthcare providers to purchase or enhance EHRs or train personnel.

Education

Assistance will be provided to institutions of higher learning through designated research centers and a HIT extension program. HIT regional extension centers are to provide technical assistance and information obtained from the research centers to support regional efforts.

The Secretary may award grants to develop academic curricula integrating certified EHRs into clinical education of health professionals.

Separately, the Secretary is to provide assistance to higher education institutions to establish or expand medical health informatics programs, including certification, undergraduate, and masters degree programs for both healthcare and IT students.

EHR Incentive Payments

Incentives will be provided under the Medicare program for the adoption and meaningful use of certified EHRs. The incentive is to be paid to an eligible healthcare provider, including physicians, Medicare Advantage providers, hospitals, Medicaid providers, and nursing facilities. Payment is made only for the "meaningful" use of an EHR, which includes e-prescribing; connection with other EHRs; and reporting of clinical quality measures.

Privacy and Security

The HITECH Act also introduces revisions and additions to privacy and security requirements. Although the framework of the Health Insurance Portability and Accountability Act ("HIPAA") has been retained, the Act creates broader coverage and increased burdens.

The Act requires business associates to comply with certain privacy and security standards and business associate terms under HIPAA. Civil and criminal

penalties shall apply to business associates in the same manner as covered entities.

The Act also imposes a heightened notification requirement in the event of a breach of unsecured protected health information. The previous standard of mitigation under HIPAA has been strengthened and broadened. Thus, the covered entity must now notify each individual of a breach. Business associates must notify covered entities of breaches, including the identity of any individual involved. There are specific requirements relating to the notice process. When 500 or more individuals are involved, the covered entity is required to notify major media outlets and immediately notify the Secretary. If fewer than 500 individuals have been affected by a breach, then the covered entity still must report all breaches to the Secretary, but it may be in the form of a log on an annual basis.

The Act creates a laundry list of additional security and privacy requirements. For example, new restrictions are imposed on certain disclosures and sales of protected health information (“PHI”). If an individual requests a restriction on the use or disclosure of his or her PHI, the covered entity must comply in certain circumstances. Certain communications by a covered entity or business associate about a product or service now will be considered marketing. In addition, a covered entity or business associate may not receive direct or indirect payment in exchange for making any marketing communication without a valid authorization.

The Act also focuses on personal health records (“PHRs”), which means an electronic record of health information on an individual that can be drawn from multiple sources and that is managed, shared, and controlled by or for the individual. Restrictions are imposed on PHR vendors and other non-HIPAA covered entities. Those entities must notify individuals of breaches and also notify the Federal Trade Commission.

Any entity that provides data transmission of PHI that requires access on a routine basis to such PHI—such as a health information exchange organization, regional health information organization, e-prescribing gateway, or each vendor under contract with a covered entity to maintain or support a PHR,

is required to enter into a business associate agreement and will be treated as a business associate.

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