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## HITECH Health Reform

*Health IT Funding, HIPAA 2.0 and the Impact of the HITECH Act*

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While the debate heats up again in Washington D.C. over healthcare reform, those tracking developments in the health information technology space know that an initial wave of health reform arrived back in February. When President Obama signed the American Recovery and Reinvestment Act of 2009, including the Health Information Technology for Economic and Clinical Health (“HITECH”) Act provisions, the administration scored an initial victory in its efforts to reform the U.S. healthcare system.

The size and scope of the HITECH Act is striking. It will have significant impact on health care providers over the next 5 to 10 years, and beyond.

This article provides a brief overview of some of the key components of the HITECH Act which include funding for health information technology (“health IT”) and significant changes to HIPAA. Although the statutory provisions are far reaching, much remains to be developed through the rule making process. Up to date summaries of HITECH Act developments are available on our health law blog at [www.omwhealthlaw.com](http://www.omwhealthlaw.com).

### Billions of Dollars for Health IT

“How can a facility featuring state-of-the-art diagnostic equipment use less sophisticated information technology than my local sushi bar?” asks writer David Goldhill in a recent feature article in *The Atlantic* magazine about the U.S. healthcare system. Similar questions have been discussed by state and federal policy makers for some time. The problem, of course, is that talk is cheap while the cost of developing health IT infrastructure is significant.

Enter the new administration, an economic crisis of epic proportions, and the push to pass a federal economic stimulus at the beginning of 2009. Health information technology was positioned as a “shovel ready” project with the potential to create jobs and promote the dual goals of improving the quality of care while reducing costs.

At the end of the day, the HITECH Act was included as part of the stimulus bill with as much as **\$36.5 billion** in funding to create a nationwide network of electronic health records. Largely through enhanced Medicare and Medicaid payments, these funds will be distributed to qualifying providers over the next five to six years.

### Incentive Payments for Physicians and Hospitals

The HITECH Act provides incentive payments to hospital and physicians who implement and use qualifying electronic health record systems. Eligible physicians may receive up to \$44,000 over five years under Medicare or \$63,750 over six years under Medicaid. Eligible hospitals may receive up to four years of financial incentive payments under Medicare begin-

ning in 2011, and up to six years of incentive payments under Medicaid beginning in October 2010.

There are also a range of grants, loans and other funds available. For most providers, however, the incentive payments are the primary source of support for health IT projects.

### Carrots, Sticks and “Meaningful Use”

The key to unlocking the incentive payments is being able to show “meaningful use” of certified electronic health record systems. In other words, it’s not enough to simply acquire an electronic health record system, but instead providers must be able to demonstrate that they are using the system in a way that the government deems

meaningful.

Over this past summer, the newly formed Health IT Policy Committee met and considered various criteria that may ultimately make up the definition of meaningful use. At this point we are waiting for final recommendations to be considered by the Secretary of HHS and for a notice of proposed rule making to be issued. The final rules for meaningful use are not expected to be completed until Spring of 2010.

While the incentive funds represent a carrot to encourage the adoption of health IT, there is also a stick built into the statute in the form of penalties for hospitals and physicians who do not engage in meaningful use of certified electronic health records by 2015. For

larger institutions with established systems already in place, this may not be such a problem, but smaller organizations without existing IT infrastructure may be hard pressed to meet the deadlines and avoid the penalties.

### HIPAA 2.0

Along with the push to enhance the health IT infrastructure, new rules governing the privacy and security of health information were also included within the HITECH Act. Privacy advocates have long been working to fill perceived gaps in the original HIPAA rules. The HITECH Act addresses a number of open issues through a series of revisions to the HIPAA Privacy and Security Standards. In particular, healthcare providers should note

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the following changes:

- **Breach Notification Rule.** Effective September 23, 2009, a new federal standard requires notification to individuals, and in some cases the media, when the HIPAA is violated. Healthcare providers have 60 days from the date a breach is discovered to notify affected individuals. If more than 500 individuals are involved, notice must be provided to major media as well as the Department of Health and Human Services. These rules also require healthcare providers to adopt policies and procedures and train workforce regarding the new notification requirements.
- **Business Associate Agreements.** The updates to HIPAA include new obligations for business associates. For example, starting in February 2010, business associates are subject to civil and criminal penalties under HIPAA. A looming question related to these changes is whether all existing business associate agreements must be revised in order to meet the new requirements. We are anxiously awaiting guidance from HHS/OCR due out this Fall that will address this issue. In the meantime, it is advisable to amend forms and to add terms to all new

business associate agreements in order to track the HITECH Act provisions.

- **Penalties and Enforcement.** The revisions to HIPAA within the HITECH Act include significant revisions to the penalties and enforcement provisions. Changes include increased civil penalties, as well as the ability for state attorneys general to act on behalf of the government to enforce HIPAA and impose penalties. In addition, starting in 2012, individual victims will have the ability to share in civil penalties levied against those violating HIPAA.
- **Accounting of Disclosures.** Another notable change in HIPAA relates to a healthcare provider's obligation to account for disclosures of protected health information. Under the current HIPAA Privacy Standards, disclosures that are made for "treatment, payment, or healthcare operations purposes" are outside the scope of what must be tracked. Starting as early as January 2011, some providers will have to account for all disclosures of electronic protected health information, even if such disclosures are related to treatment, payment or healthcare operations. As with the other changes noted

above, we expect HHS to issue additional guidance over the coming months. Regardless, this is a significant change that will require provider organizations to implement technology solutions and other operational changes in order to ensure compliance.

### Are You HITECH Ready?

In light of the funding and changes to HIPAA within the HITECH Act, it is important that all information technology related transactions are reviewed to ensure compatibility with the HITECH Act. Whether it is concern over business associate agreements, or representations and warranties in a software license agreement to ensure the system will enable the provider to achieve meaningful use, careful consideration should be given to the impact of the HITECH Act now, and going forward.

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