

Health Care

E-ALERT

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Health Information Technology Provisions in the Economic Stimulus Bill

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On February 17, 2009, President Obama signed into law the economic stimulus bill entitled the "American Recovery and Reinvestment Act of 2009." The legislation appropriates \$19 billion for health information technology ("health IT" or "HIT") and is intended to encourage the adoption of health information technology to reduce medical errors, reduce health care costs, and improve health care quality.

This alert summarizes the health IT provisions of the economic stimulus bill, referred to as the "Health Information Technology for Economic and Clinical Health Act" ("HITECH Act" or "Act"), which will likely be of interest to a range of stakeholders, including health care providers, employer health plans, state Medicaid agencies, technology providers, and drug and device manufacturers.

I. BACKGROUND

"Health information technology" is defined as hardware, software, integrated technologies or related licenses, intellectual property, upgrades, or packaged solutions sold as services that are designed for or support the use by health care entities or patients for the electronic creation, maintenance, access, or exchange of health information. The Act sets forth provisions related to promotion of health IT, funding to encourage the adoption of the health IT, and protection of identifiable health information through the expansion of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").¹

II. SUMMARY OF PROVISIONS

A. Promotion of Health IT

The legislation codifies the Office of the National Coordinator for Health Information Technology ("ONCHIT" or "Office"), an entity created by President Bush's Executive Order 13335, within the Department of Health and Human Services ("HHS"). The Office is responsible for developing a nationwide health information technology infrastructure that allows for the electronic use and exchange of health information² and is headed by a National Coordinator who is appointed by, and reports to, the Secretary of Health and Human Services.³

The Act provides that an initial set of national standards governing health IT will be in place by December 31, 2009 and sets forth a process for the development of those standards. The initial set of standards will address, among other things: technologies that protect the privacy and security of health information in an electronic health record and allow for the tracking of disclosures of electronic health information, and the use of certified electronic

¹ The changes to HIPAA are detailed in another Covington & Burling LLP Health Care E-Alert, available by clicking [here](#).

² The economic stimulus package appropriates \$2 billion for administration of ONCHIT's activities.

³ Dr. Robert M. Kolodner is currently the National Coordinator for Health Information Technology.

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health records (“EHR”) for each person by 2014.

The HITECH Act provides for two advisory committees: (1) the Health Information Technology Policy Committee (“HIT Policy Committee”), which will recommend and prioritize areas in which standards are needed for the electronic exchange and use of health information and (2) the Health Information Technology Standards Committee (“HIT Standards Committee”), which will develop those standards. Both committee processes provide for public comment, and the standards must be adopted through notice-and-comment rulemaking.

Compliance with national HIT standards will be mandatory for federal agencies and federal contractors, and will be voluntary for all other private entities. A process will be developed for compliance certification of health information technology.

B. Funding to Encourage Adoption of Health IT

The HITECH Act provides funding for health IT infrastructure, for training personnel in the use of health IT, for creating regional centers to provide technical assistance and to disseminate best practices, and for grants to States to facilitate and promote health IT. In addition, approximately \$17 billion is allocated to provide incentive payments to Medicare and Medicaid doctors, hospitals, and other providers to encourage the use of health IT to electronically exchange health information.

The Act also provides funding to reimburse Medicaid providers a percentage of the net average costs associated with adopting, implementing and upgrading certified EHR technology (and support services) as well as operating and maintaining health IT systems.⁴ Such reimbursement will be available for not more than six years.

The HITECH Act also establishes a schedule of Medicare bonus payments, beginning in 2011, which are paid to eligible physicians, hospitals, and Medicare HMOs affiliated with those entities, that adopt and use “qualified electronic health records.”⁵ The legislation provides that eligible physicians and hospitals may receive incentive payments for up to five and four years, respectively, but the payments for each qualified recipient decreases over time.

Bonus payments are restricted to “meaningful users” of EHR technology⁶ that: (1) use EHR technology certified compliant with national standards in a “meaningful manner,” (2) use certified EHR technology that provides, in accordance with applicable standards, for the electronic exchange of health information to improve health care quality, and (3) conduct reporting on clinical quality and other measures as required by the Secretary.

Beginning in 2015, hospitals, physicians, and Medicare HMOs (that operate hospitals or employ eligible physicians) that are not using qualifying health IT will suffer a percentage reduction in Medicare payments. The Secretary may exempt entities on grounds of

⁴ The maximum such reimbursement to an eligible provider is \$21,250 for adopting, implementing, and upgrading certified EHR technology (including support services) and \$8,500 per year thereafter (for up to five years) for operation and maintenance of health IT systems.

⁵ A qualified electronic health record means an electronic record of health-related information on an individual that includes demographic information about the patient and clinical health information such as medical history and problems. In addition, the qualified electronic record must have the capacity to: (1) provide clinical decision support, (2) support physician order entry, (3) capture and query information relevant to health care quality, and (4) exchange health information with, and integrate such information from other sources.

⁶ The following entities are eligible for consideration as “meaningful EHR users”:

- Doctors that participate in Medicare (excludes hospital-based physicians)
- Medicare Advantage plans that employ eligible physicians
- Eligible hospitals
- Medicare Advantage plans affiliated with eligible hospitals

significant hardship for up to five years.

C. Expansion of HIPAA Requirements

The legislation seeks to protect identifiable health information by expanding upon the existing requirements under HIPAA. Chief among these new requirements are: a new breach notification requirement triggered by impermissible disclosure of health information that is not encrypted, increased penalties for violations of HIPAA, additional resources to enforce the HIPAA privacy and security standards, new restrictions on the use of health information for marketing activities, and expanded obligations to account for disclosures of electronic health information. Further, the legislation extends privacy and security requirements (and the civil and criminal penalties for violating those standards), previously applicable only to health plans, health care providers, and health care clearinghouses, to business associates who process health information on their behalf.

If you have any questions concerning the material discussed in this client alert, please contact the following Covington attorneys:

Anna Kraus	202.662.5320	akraus@cov.com
Marty Hansen	202.662.5204	mhansen@cov.com
Bert Wells	212.841.1074	bwells@cov.com
Joan Kutcher	202.662.5206	jkutcher@cov.com
Holly Fechner	202.662.5475	hfechner@cov.com
Daniel Spiegel	202.662.5347	dspiegel@cov.com
Afia Asamoah	202.662.5467	aasamoah@cov.com

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