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HHS Proposes Changes to HIPAA Rules on Accounting for Disclosures of Protected Health Information

HHS recently issued a proposed regulation that changes the requirements for providing individuals with an accounting of disclosures of their protected health information as mandated by HIPAA. The proposed regulation also implements and expands a provision of HITECH. Although the regulation is only proposed and will not be effective until after a final regulations is issued, plan sponsors would be well-advised to begin preparations for compliance.

Background

The Health Insurance Portability and Accountability Act (HIPAA) includes a Privacy Rule that requires covered entities to provide an individual with an accounting of certain disclosures of his or her protected health information (PHI) upon request. The requirement currently applies to paper and electronic disclosures made up to six years prior to the request. Disclosures in connection with treatment, payment, and health plan operations (TPO) have been exempt from the accounting requirements.

The Health Information Technology for Economic and Clinical Health Act (HITECH) expanded the HIPAA accounting requirement by extending it to TPO disclosures made through an electronic health record. (See our April 27, 2009 [For Your Information](#).) However, in contrast to the general requirement that an accounting include disclosures made within six years of the request, an individual is only entitled to an accounting of those TPO disclosures made during the three years prior to the request. In addition, HITECH requires the covered entity to provide either an accounting of disclosures made by a business associate or a list of all its business associates and their contact information.

On May 31, 2011, the Department of Health and Human Services (HHS) issued a proposed regulation that would modify the general accounting requirements under HIPAA and implement the requirements of HITECH.

Proposed Regulation

The [proposed regulation](#) provides individuals with two distinct, but in HHS's view complementary, rights. The first is the right to an accounting of disclosures of the individual's protected health information made in both paper and electronic form by the covered entity or its business associates. The second is the right to obtain an "access report" that indicates who has accessed the individual's electronic protected information. Both rights only extend to protected health information maintained in a designated record set. For this purpose, a designated record set

is the group of records maintained or used by the covered entity to make decisions about the covered individual, including medical and billing records as well as enrollment and claims adjudication records. The proposed regulation also requires a revision to the Notice of Privacy Practices to inform individuals of their new rights. HHS indicated that the intent of these changes is to balance the provision of information that will be of interest to the individual against the burden placed on covered entities in providing it.

The requirements of the proposed rule are described in more detail below.

Accounting

The proposed regulation affects the scope of the accounting requirements of the HIPAA privacy rules in several ways. The most significant changes are:

- An individual's right to an accounting is now limited to disclosures of protected health information maintained in a designated record set;
- The period for which an accounting of disclosures must be made is reduced from six years prior to the request to three years prior to the request. However, a copy of the accounting itself must still be retained for six years;

BUCK COMMENT. *The reduction of the accounting period to disclosures made within three years of the request is consistent with the HITECH requirement regarding disclosures of information held in an electronic health record. HHS also indicated that it believed people are most interested in more recent disclosures.*

- The accounting obligation is extended to disclosures made by a covered entity's business associate;
- The time frame for responding to a request for an accounting is reduced from 60 days to 30 days, with a possible 30-day extension; and
- The structure of the regulation is changed so that only specified types of disclosures are subject to an accounting. Previously, an accounting was required for all disclosures unless specifically exempted from the requirement.

The proposed regulation also makes some minor revisions to the required content of the accounting. For example, instead of providing a brief description of the PHI disclosed, the accounting may now simply include a description of the type of PHI disclosed. A covered entity will also be required to provide the individual with the option of limiting the accounting, such as to a specific time period or to certain types of disclosures. The covered entity must provide the accounting in the format requested by the individual if that format is readily available. If it is not, the covered entity may provide a hard copy or another format acceptable to the individual. Finally, the proposed regulation permits the covered entity to require that the request be in writing.

BUCK COMMENT. *The proposed regulation provides welcome news regarding the limitation on the amount of information for which an accounting is required. However, in light of the shorter time frame for responding to requests for an accounting and the specific requirement to include disclosures by business associates, plan sponsors should re-examine current policies and procedures to be sure that timely and complete responses to such requests can be made.*

Covered entities and business associates will be required to comply with the revised accounting of disclosure requirements 240 days after the final rules are published in the *Federal Register*.

Access Reports

The proposed regulation gives an individual the right to receive an “access report” indicating who accessed his or her PHI in an electronic designated record set up to three years before the request is made. Thus, the proposed regulation significantly expands the HITECH requirement to report disclosures of PHI in an electronic health record to cover all access to the designated record set (i.e., both uses and disclosures).

BUCK COMMENT. *While access reporting is a common information technology (IT) function in many organizations, it is not clear that this technology has been consistently employed in the area of employee benefit plan management. It will be crucial for benefit administrators to work with their organizations' IT resources to ensure that access reports are easily producible.*

The access report encompasses electronic systems of both the covered entity and its business associates. HHS expects that data from access logs or audit trails for all systems – the covered entity's as well as the business associates – would be aggregated into a single access report.

The access report must contain the following information:

- The date and time of access;
- The name of the person, if available, or, if not, the name of the entity;
- A description of the information, if available; and
- A description of the user's action such as creation, modification or deletion.

Other requirements for access reports are comparable to those proposed for the accounting of disclosures. For example, the covered entity must give the individual the option to limit the access report to a specific time period or person and may but is not required to permit the individual to limit the report to a specific organization. The covered entity must provide the access report within 30 days (with a possible 30-day extension) in an electronic form and must provide the report in the format requested by the individual, if readily producible in that format. If the access report is not readily producible in the requested format, it must be provided in an electronic form and format agreed to by the individual. The covered entity may require that the request be in writing.

BUCK COMMENT. *Participants of large employer-sponsored plans have rarely exercised their right to request an accounting of disclosures of PHI. It is not clear that this will be the case with respect to the right to request an access report. Covered individuals may consider this a first step in understanding how their information may be used, which in turn could generate additional requests. Plan sponsors will need to work with their business associates to be sure that the proper procedures are in place and reflected in their business associate agreements.*

HHS proposes that covered entities and business associates produce access reports upon request as follows:

- For those with electronic designated record set systems that were acquired after January 1, 2009, beginning January 1, 2013; and
- For those with electronic designated record set systems acquired on or before January 1, 2009, beginning January 1, 2014.

Privacy Notice

The current Privacy Rule requires covered entities to provide covered individuals with a Notice of Privacy Practices that describes how the covered entity may use or disclose an individual's PHI. HHS notes that the changes required by the proposed rule constitute a material change to those practices and, therefore, will require distribution of a revised notice.

BUCK COMMENT. *The changes are only in a proposed regulation and may be modified when final regulations are issued. In addition, regulators are still considering other changes to the notice rules at this time. Thus, absent other reasons to send out amended privacy notices, plan sponsors should hold off making amendments to privacy notices to comply with the proposed regulation.*

Conclusion

HHS has proposed significant changes to certain individual rights provided under HIPAA and HITECH. These changes will require examination of data systems and procedures by both covered entities and their business associates.

Buck's consultants are available to discuss the impact these rules will have on your plans and to assist you in revising policies and procedures as needed.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.