

JULY/AUGUST 2009

STIMULUS BILL EXPANDS HIPAA

In February, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA). The ARRA includes the Health Information Technology for Economic and Clinical Health Act (HITECH Act) – the largest and most significant expansion of the federal privacy and security rules since the implementation of the HIPAA privacy rules. These changes affect most healthcare providers and any employer with an employer-sponsored health plan.

SECURITY PROVISIONS

New Breach Notification Requirements to the Patient

For the first time, covered entities will be required to provide specific notification to individuals if they discover a breach of protected health information. Written notification must be provided by first-class mail within 60 calendar days after the discovery of the breach. If the covered entity lacks sufficient contact information for 10 or more individuals affected by the breach, notification must also be made on the home page of the covered entity's website, or in major print or broadcast media. If the breach involves more than 500 residents of a state or jurisdiction, then notification must also be made to prominent media outlets in that location.

The notice must contain: (1) a brief description of what happened, including the date of the breach (if known); (2) the steps the individual should take to protect themselves from potential harm resulting from the breach; and (3) a brief description of what the covered entity is doing to investigate the breach, mitigate losses, and to protect against further breaches.

It is important to note that a "discovery" of the breach occurs not only when the covered entity knows of the breach, but when the breach should reasonably have been known to the covered entity.

New Breach Notification Requirement to HHS

Covered entities must provide notice to HHS of all breaches. This notice can take the form of a log of breaches that is submitted annually to HHS. However, if the breach involves 500 or more persons, notice to HHS must occur immediately.

Technology Safeguard Guidance

Currently, the HIPAA security regulations do not mandate use of any particular technology system or safeguard. The HITECH Act mandates that the Department of Health and Human Services (HHS) issue guidance on an annual basis on the "most effective
(Continued on back side)

Change Required In Nurse Practitioner Standard Care Agreement

Effective July 15, 2009, the Advanced Practice Nurse (APN) Formulary was revised to combine the columns labeled "Physician Initiated (PI)" and "Physician Consult (PC)" into one column titled "Physician Initiated OR Physician Consult." The change is intended to allow each APN/MD practice to decide how to handle the PI/PC drugs based on individual practice considerations. These considerations may include the APN's years in practice and comfort level with the collaborating physicians.

In order to be compliant with the Board of Nursing laws and rules, an APN/MD practice must address the "Physician Initiated OR Physician Consult" issue in its Standard Care Agreement ("SCA") if it uses drugs in this category.

Each practice utilizing an APN must review all PI and PC medications in order to determine how these medications will be handled in the practice and revise the SCA accordingly.

In order to update the SCA, one of the following sentences should be added to the section relating to the APN's prescriptive authority:

1. All drugs/drug categories listed in the "physician initiated OR physician consult" category of the formulary will be considered physician consult.
2. All drugs/drug categories listed in the "physician initiated OR physician consult" category of the formulary will be considered physician initiated.
(Continued on back side)

REGULATORY UPDATE

Stimulus Bill Expands HIPAA (continued)

and appropriate technical safeguards for use in carrying out” the HIPAA security standards.

In addition, the HITECH Act requires HHS to issue guidance specifying the technologies and methodologies that renders protected health information (PHI) unusable, unreadable or indecipherable to unauthorized individuals. PHI that is secured utilizing technology and methodologies prescribed by HHS is not considered “unsecured protected health information.” This provides tremendous incentive for covered entities to utilize HHS prescribed technology.

PRIVACY PROVISIONS

Disclosure Accounting Expanded For Providers Utilizing an Electronic Medical Record

The current HIPAA privacy rules do not require a covered entity to provide an individual with information regarding disclosures of PHI made for treatment, payment and healthcare operations. The HITECH Act eliminates this exception for covered entities utilizing an electronic medical record and will require these providers to provide an individual with information regarding disclosures made for treatment, payment and healthcare operations.

Mandatory Granting of Restriction Requests

Under current HIPAA privacy rules, a covered entity was not required to grant an individual’s request for restrictions on the use and disclosure of PHI about that individual beyond the HIPAA requirements. The HITECH Act provides a patient with the right to demand that information regarding a service that was paid out of pocket in full not be disclosed to the patient’s health

plan or insurance.

Patient Access to Electronic Health Record

The HITECH Act mandates that if a covered entity utilizes an electronic medical record, then an individual has the right to receive a copy of the PHI maintained in the electronic health record in an electronic format.

IMPACT ON BUSINESS ASSOCIATES

The HITECH Act extends many HIPAA security and privacy rules to Business Associates of HIPAA covered entities who were previously only required to implement safeguards that “reasonably and appropriately” protect PHI. All Business Associate Agreements must be revised to reflect these new requirements.

Change Required In Nurse Practitioner Standard Care Agreement (continued from front page)

3. All drugs/drug categories listed in the “physician initiated OR physician consult” category of the formulary will be considered physician consult unless otherwise included in the attached addendum to this document.
4. All drugs/drug categories listed in the “physician initiated OR physician consult” category of the formulary will be considered physician initiated unless otherwise included in the attached addendum to this document.

If you chose an option that requires the attachment of an addendum, I recommend that the addendum be dated and signed by both parties.

To view the new formulary, go to:



RECEIVE THIS NEWSLETTER VIA E-MAIL BY CONTACTING
ORUMBERG@SMRSLAW.COM

SMR&S Health Care Update is published monthly by the law firm of Schwartz Manes Ruby & Slovin for its clients and other interested parties. Since this information may be of a generalized nature, no final decisions should be made on this information without first seeking professional advice for your specific circumstances.

Visit the **SMR&S Health Care Practice Group Website** at <http://www.smrslaw-healthlaw.com> to view back issues of articles.

If you have questions or comments about the topics in this newsletter or wish to be added or removed from the mailing list, please contact Orly Rumberg, the chairman of the Health Care Law Practice Group, at 513-345-1416 or orumberg@smrslaw.com.

© 2009, Schwartz Manes Ruby & Slovin, A Legal Professional Association. All rights reserved. Distribution of the SMR&S Health Care Update is encouraged but full credit to the original source should be given.