



# Overview of Key Health Information Technology and Privacy Aspects of the Stimulus Package

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# Today's Presenters



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## ARRA - HIT Basics

- American Recovery and Reinvestment Act of 2009
- \$17.2 Billion for Medicare and Medicaid Reimbursement
- \$2 Billion for Office of National Coordinator
- Incentives for Meaningful User of EHR





## Meaningful Use of EHR

- Hospital using a certified EHR technology in a meaningful manner
- EHR provides for electronic exchange of health information to improve the quality of health care such as promoting care coordination
- Submission of data on clinical quality measures selected by the Secretary



## Certified EHR

- Certified to meet standards adopted by the National Coordinator
- Patient demographic and clinical health information (e.g., medical history and problem lists)
- Ability to provide clinical decision support
- Support physician order entry
- Capture and query information relevant to health care quality
- Exchange electronic health information and integrate with other systems





## Hospital Incentive Payments

- Base amount of \$2 million, plus
- Discharge-related payment, multiplied by
- Medicare share, multiplied by
- Transition factor



## Hospital Incentive Payments (cont'd)

- Demonstrating Meaningful EHR Use
- Attestation
- Submission of claims with coding showing EHR use
- Survey response
- Reporting clinical quality using EHR
- Other means specified by Secretary





## Hospital Incentive Payments (cont'd)

- **Discharge Related Payment** - \$200 for each discharge paid under the inpatient prospective payment system (IPPS) starting with discharge number 1,150 through discharge number 23,000
- \$230,000 to \$4.6 million



## Hospital Incentive Payments (cont'd)

- **Medicare Share** - Formula based on inpatient bed days attributable to Medicare payments and the total number of inpatient bed days in the hospital adjusted by a hospital's share of charges attributed to charity care



## Hospital Incentive Payments (cont'd)

- 4 Year Transition Factor
  - 100% Year 1; 75% Year 2; 50% Year 3; 25% Year 4
- First Eligible Year 2011
- Phase down for 2014 and 2015
- No payments if EHR adopted after 2015
- May be single payment or installments
- EHR Users posted on Web site



## Hospital Incentive Penalties

- Loss of up to 75% of Market Basket Update Adjustment
- 2015 – one-third of 75%
- 2016 – two-thirds of 75%
- 2017 – entire 75%



## Medicaid Incentives

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- Does not state when funding begins, believed to be 2011
- Providers with certain patient volumes receiving assistance
- Children's hospital
- Acute care hospital
- 85% max contribution
- Does not provide for penalties

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## Medicaid Incentives (cont'd)

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- Payments to hospitals analogous to Medicare funding
- Base amount
- Amount related to discharges
- Patient share attributable to Medicaid
- No more than 50% of total in a year
- Spread over 3 years

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## Certified EHR

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- Meets standards adopted by the National Coordinator
- Patient demographic and clinical health information (e.g., medical history and problem lists)
- Ability to provide clinical decision support for physician order entry
- Capture and query information relevant to health care quality
- Exchange electronic health information and integrate with other systems

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## Incentives to Professionals

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- Based on the amount of Medicare-covered professional services furnished
- Payments decrease over time – 5 years, but no payments after 2016
- First year maximum payment of \$18,000 if meaningful EHR user in 2011 or 2012
- \$15,000 if implemented in 2013 or 2014
- No payment if implemented after 2014

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## Incentives to Professionals (cont'd)

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- Highest annual payment amount for subsequent years decreases each year to \$12,000, \$8,000, \$4,000, and \$2,000
- No payments being made after 2016
- Single consolidated payment or may be made in periodic installments
- Increased by 10% if predominately serves in health professional shortage area
- Not available to hospital-based professionals

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## Meaningful Use of EHR

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- Professional is using a certified EHR technology in a meaningful manner (can include the use of electronic prescribing)
- The EHR provides for the electronic exchange of health information to improve the quality of health care such as promoting care coordination
- Professional submits data on clinical quality measures selected by the Secretary

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## Meaningful Use of EHR (cont'd)

- Demonstrating Meaningful EHR Use
- Attestation
- Submission of claims with coding showing EHR use
- Survey response
- Reporting clinical quality using EHR
- Other means specified by Secretary



## Professional Penalties

- Professional fee schedule amount reduced
- 99% - 2015
- 98% - 2016
- 97% - 2017 and in each subsequent year



## Federal Stimulus Package Changes HIPAA

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- Health Information Technology for Economic and Clinical Health Act within the American Recovery and Reinvestment Act of 2009
  - Subtitle D---Privacy
    - Expansion of privacy and security requirements to forward adoption of EHRs
    - Impacts covered entities, business associates, and vendors not currently subject to HIPAA

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## Key Requirements

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- Security Breach Notification
- Heightened Enforcement
- Changes for Business Associates
- Accounting from EHRs
- Limited Data Sets/Minimum Necessary
- Changes to Right to Request Restriction
- Prohibition on Sale of EHR or PHI
- Conditions on Communications/Marketing
- Access to PHI in an HER
- Fundraising Opt-Outs
- Security Breach Notification for PHR Vendors

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## Security Breach Notification

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- Patients must be notified of any unauthorized acquisition, access, use or disclosure of their unsecured PHI that compromises the privacy or security of such information
- There are exceptions related to unintentional or inadvertent use or disclosure by employees or authorized individuals within the “same facility”



## Security Breach Notification (cont'd)

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- HHS is required to define the term “unsecured PHI” within 60 days
- If guidance is not issued, unsecured PHI is defined as any PHI that is not secured by a technology standard that renders it unusable, unreadable, or indecipherable to unauthorized individuals, and is developed or endorsed by a standards developing organization that is accredited by the American National Standards Institute



## Security Breach Notification (cont'd)

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- Timeliness and Content of Notification
  - Without unreasonable delay and in no case later than 60 calendar days after discovery of the breach
  - Brief description of what happened, types of unsecured PHI involved, steps individuals should take to protect themselves, brief description of what covered entity is doing to investigate the breach, mitigate harm, etc., and contact information



## Security Breach Notification (cont'd)

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- Methods of Notice
  - Individuals
    - Detailed requirements about how notification must be sent
  - Media
    - 500+ residents in area
  - Secretary
    - 500+ individuals—immediate notice (will be posted on HHS website)
    - Less than 500—annual log





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## Security Breach Notification (cont'd)

- Applies to disclosures and to unauthorized internal access
  - Employee “snooping” could trigger notification
  
- Applicability to Business Associates
  - Must report to covered entity—including identification of affected individuals



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## Security Breach Notification (cont'd)

- Effective Date
  - HHS to issue interim final regulations in 180 days
  
  - Effective 30 days after regulations issued



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## Heightened Enforcement

- Mandatory formal investigation and penalties for “willful neglect”
- Increased CMP amounts based on level of intent
  - Starts at \$100; can go as high as \$1.5 million
- Penalties will be used to fund OCR enforcement activities
  - Portion of penalties to ultimately go to patients

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## Heightened Enforcement (cont'd)

- State Attorneys General
  - Provided enforcement authority to bring actions on behalf of individuals
  - Courts can award damages, costs and attorney fees



## Heightened Enforcement (cont'd)

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- Business associates will be subject to criminal and civil penalties
- Employees of covered entities clearly subject to criminal liability



## Heightened Enforcement (cont'd)

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- Audits
  - Covered entities **and** business associates will be subject to periodic audits







## Heightened Enforcement (cont'd)

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### ■ Effective Date

- Most changes become effective immediately, with regulations to be issued



## Business Associates

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### ■ Will be directly subject to certain HIPAA provisions

- Security Rule's administrative, physical and technical safeguards (and policies and procedures)
- Business Associate Agreement requirements not just contractual any longer!
- New provisions under the HITECH Act
- Amendment of business associate agreements
- Effective in 12 months



## Accounting

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- Accounting Rules Change for EHRs
  - Must account for disclosures related to treatment, payment and health care operations (as well as all other accountable disclosures)
  - Three year period
  - Business Associates may be impacted
  - Regulations to be issued regarding the information that must be collected for an accounting

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## Accounting (cont'd)

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- Effective Date
  - Current users of EHRs: 1-1-14
  - Future users of EHRs (after 1-1-09): 1-1-11 or date EHR is acquired (whichever is later)

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## Limited Data Sets and Minimum Necessary

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- New layer to the minimum necessary standard
  - Must limit uses, disclosures, and requests to an LDS “to the extent practicable”
  - Becomes effective in 12 months. Will sunset upon issuance of HHS guidance on “minimum necessary” due within 18 months



## Right to Request Restriction

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- **Must** agree to requests that PHI not be disclosed to a health plan if:
  - Disclosure is not treatment-related; and
  - Services have been paid for out-of-pocket in full
    - Effective in 12 months



## Prohibition on Sale of EHR or PHI

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- Covered entities **and** business associates are prohibited from selling (i.e., receiving any direct or indirect remuneration) in exchange for an EHR or PHI, with some exceptions



## Exceptions to Sale Prohibition

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- Public health
- Research (price must be only for cost of preparation and transmittal)
- Treatment
- Sale, transfer, merger of a covered entity
- Pursuant to a BAA
- To provide a copy of PHI to the patient
- As determined by HHS
  - Regulations must be issued within 18 months and become effective 6 months after



## Conditions on Communications/Marketing

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- “Marketing” = Communication about a product or service that encourages recipient to purchase or use the product or service
  
- Exceptions:
  - Communication about own health care products or services
  - Treatment communications
  - Case management, care coordination, to recommend alternative therapies, etc.



## Conditions on Communications/Marketing

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- Under new rules:
  - Communication about a product or service that encourages recipients to purchase or use the product or service will not be considered a health care operations function unless:
    - It meets one of three exceptions listed above; and
  
    - No remuneration is involved



## Conditions on Communications/Marketing (cont'd)

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- Exceptions that would permit remuneration
  - Communication describes a previously prescribed or administered drug or biologic and amount of payment is reasonable
  - Communication is made pursuant to an authorization
  - Business associate makes the communication pursuant to a BAA
    - Effective in 12 months

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## Access to PHI in an EHR

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- If covered entity has an EHR, individuals have the right to obtain a copy of PHI in the EHR in electronic format
- Patients can designate 3<sup>rd</sup> parties to receive the electronic copies
- Fees cannot exceed labor costs
  - Effective in 12 months

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## Fundraising Opt-Outs

- Opt-out language must be “clear and conspicuous”
- Opt-outs must now be treated as a revocation of authorization
  - Effective in 12 months

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## Preemption

- HIPAA preemption rules remain unchanged
  - Will have to reconcile state security breach notification requirements with the new HIPAA requirements



## PHR Vendors Not Covered By HIPAA

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- PHR vendors are now subject to security breach notification requirements
  - Must notify U.S. citizens and the FTC
  - Violations are treated as unfair and deceptive trade practices in violation of the FTC Act
  - FTC to promulgate interim final regulations in 180 days. Becomes effective for breaches that occur 30 days after

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## Implementation of ARRA Passed Health Care Provisions

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- Health IT Provisions
  - HIT Policy Committee: Makes policy recommendations to the National Coordinator for Health IT relating to the implementation of a nationwide health IT infrastructure, including:
    - Where standards, implementation specifications, and certification criteria are needed
    - The collection of quality data and public reporting
    - Biosurveillance and public health
    - Drug safety
    - Technologies to improve quality and safety

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## Implementation of ARRA Passed Health Care Provisions (cont'd)

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- HIT Standards Committee: Recommends to the National Coordinator standards and certification criteria. Any current standards adopted before stimulus bill may be brought forward and applied. Must develop a schedule for assessing HIT Policy Committee recommendations and shall update the schedule annually
  - Requires the Office of the National Coordinator for Health IT (established in 2004) to appoint a chief privacy officer
- Memberships of Committees are key elements to decision making



## Implementation of ARRA Passed Health Care Provisions (cont'd)

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- HIPAA Provisions
- HHS Secretary's Annual Report to Congress on Complaint compliance report on Number/Nature of complaints, Audits, and Plans for Improved Compliance
  - HHS Secretary/FTC Study on Application of Health Information Privacy and security requirements to non-HIPAA covered entities and reports to Congress
  - HHS Secretary to issue guidance, within one year, on how best to implement the HIPAA privacy requirements for de-identifying PHI.
  - GAO report to Congress on best practices related to the disclosure of PHI among health care providers for the purpose of treatment and impact of all the provisions of the HITECH Act.
- Reporting and Study Requirements give Congress leverage to revise and revamp HIPAA provisions





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## Cautions on ARRA Health Care Provisions & Implementation

- Congressional/GAO/IG Oversight of Health IT Spending & Implementation
- State AGs and HIPAA Violations



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## Questions & Answers

## Contact Us

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