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## **New Privacy and Security Provision from HITECH Change the Landscape for Health Information Exchange**

If you are engaged in health information exchange or a vendor related to health information exchange you will want to follow the interpretations and rulemakings that flow from the HITECH privacy and security provisions. These overlap with current privacy and security regulations under state and federal law, including those under the Health Insurance Portability and Accountability Act. Here is the point. What was acceptable and without liability a year ago, may not be acceptable or without burden and new liabilities in the future. You should understand this landscape and how it might fit with other issues such as the new meaningful use incentives and restrictions under Stark and Anti-kickback laws.

Some issues to consider from the statute are listed below. You may want to participate in trying to influence federal interpretations through comments in rulemakings or simply want to understand these issues. At the Cogon Strategy Policy and Relations Group, we are following these changes to the landscape. We are in a position to offer expertise and help. Nandan Kenkeremath, Managing Principal, has 17 years on Capitol Hill, which include following and negotiating over these privacy and security provisions. He has worked in a federal Office of General Counsel and closely understands the rulemaking process. Nandan has been in the Privacy & Security Task Force for the Health Information Management Systems Society and has participated in numerous other calls and discussions about these provisions. He is leading an effort for a HIMSS white paper on Accounting for Disclosure provisions.

Our Insights:

### **Breach Notification (Sections 13400 and 13402)**

The provisions create a grey zone between discovery of breach, knowledge of a breach, and responsibility for breach notification. There may be many covered entities that participate in the same information exchange system. Many situations will involve data stored on several different servers/downloads to platforms located elsewhere in cyberspace. This may create obligations on numerous covered entities, create conflicts, and create confusion for patients and covered entities alike.

### **Business Associates (Sections 13404 and 13408)**

Many more requirements and liabilities apply to business associates and certain relationships are required to constitute business associates. This means contracts need to be revised and certain activities carry higher risk.

### **Minimum Necessary (13405(b))**

New requirements will spell out a new regime for what information may be transmitted between parties.

### **Accounting of EMR Disclosures (Subsection 13405(c))**

The provision requires providers that utilize electronic medical records to provide an individual, upon request, an accounting of disclosures of protected health information made within the past three years, including those made for the purposes of carrying out treatment, payment, or health care operations. Individual tracking system – which may be parts of separate departments – would then need to be consolidated into the accounting for disclosure data base in a way that each PHI disclosure for an individual would need to be consolidated.

### **Marketing and Health Care Operations (Section 13406(a))**

This section may require covered entities and their business associates to obtain authorization before making communications that patients find helpful and valuable to their care. This may be an issue in web-based communications with patients.

### **Clarification of Application of Wrongful Disclosures Criminal Penalties (Section 13409)**

What is a violation is already set out under the HIPAA regulations. New language stating that disclosure without authorization is deemed a violation is very confusing. It could also be suggesting a new level of consent or authorization where current law provides permission.

### **Enforcement by State Attorney Generals and Local Law Enforcement Agencies (Subsection 13410(e))**

This subsection authorizes the attorney general of any state or any local enforcement agency authorized by the attorney general or state law to prosecute violations of consumer protection laws to also enforce provisions of the HIPAA privacy and security rules on behalf of the residents of the agency's jurisdiction including to enjoin activities or obtain civil penalties that could be up to \$11,000 time the number of violations.

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**Cogon Systems, Inc. (COGON)** is a Pensacola, Florida - based health information technology and consulting firm with locations in Miami, Atlanta, and Washington, D.C that facilitates healthcare connectedness via value-driven innovations and comprehensive thought leadership.

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via value-driven innovations and comprehensive thought leadership.

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