Discussion of the HITECH Privacy and Security Provisions

Presented by

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Regulatory Context

American Reinvestment and Recovery Act (ARRA) (Feb 17, 2009)

Health Information Technology for Economic and Clinical Health (HITECH) Act

Subtitle D: Privacy and Security
Provisions of the ARRA

Tax Cuts and Credits

- Tax credits for individuals
- Alternative Minimum Tax
- Expanded Child Credit
- Expanded Earned Income Credit
- Homebuyer Credit
- Home Energy Credit
- Unemployment Benefits
- Bonus Depreciation
- Money Losing Companies
- Government Contractors
- Energy Production
- Taxes on Merged Banks
- Bonds
- Auto Sales
Provisions of the ARRA (cont.)

Spending

- Aid to low income workers and the unemployed
- Direct cash payments (Social Security)
- Infrastructure

- Health care
- Education
- Energy
- Homeland security
- Law enforcement
Where is the money going?

Source: http://www.recovery.gov/?q=content/investments
## Investments by Agency (Partial)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Available $ (Thousands)</th>
<th>Paid Out $ (Thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Education (ED)</td>
<td>$55,124,668</td>
<td>$12,397,257</td>
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<tr>
<td>Department of Health and Human Services (HHS)</td>
<td>$41,796,221</td>
<td>$25,856,312</td>
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<tr>
<td>Department of Labor (DOL)‡</td>
<td>$23,868,953</td>
<td>$13,864,891</td>
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<td>Department of Transportation (DOT)</td>
<td>$23,359,369</td>
<td>$1,146,688</td>
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<tr>
<td>Social Security Administration (SSA)</td>
<td>$13,112,531</td>
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<td>Department of Energy (DOE)</td>
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<td>Department of Housing and Urban Development (HUD)</td>
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<td>Environmental Protection Agency (EPA)</td>
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<td>Department of Agriculture (USDA)</td>
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<td>Department of Justice (DOJ)</td>
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<td>Department of Defense (DOD)</td>
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<td>General Services Administration (GSA)</td>
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<td>Department of Commerce (DOC)</td>
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<td>US Army Corps of Engineers (USACE)</td>
<td>$907,392</td>
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<td>Department of Homeland Security (DHS)</td>
<td>$694,600</td>
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<tr>
<td>Department of Veterans Affairs (VA)</td>
<td>$577,245</td>
<td>$468,629</td>
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</tbody>
</table>

*Source: [http://www.recovery.gov/?q=content/investments-agency](http://www.recovery.gov/?q=content/investments-agency)*
Breakdown for healthcare

- $86.6 B - Medicaid
- $24.7 B - COBRA subsidies
- $19 B - HIT
- $11.1 B - Research and NIH
- $1.3 B - Military Service members’ care

- $1 B – Wellness and Prevention
- $1 B - VHA
- $2 B – Community Health
- $500 M – Training
- $500 M – Indian Health Service

Source: http://en.wikipedia.org/wiki/American_Reinvestment_and_Recovery_Act
Major HITECH Provisions

- Establishes an Office of the National Coordinator for Health Information Technology (ONCHIT);
- Establishes HIT Policy and Standards Committees;
- Requires HHS to develop initial HIT standards by 2010;
- Establishes incentives for the broad adoption of electronic health records;
- Improves and expands federal privacy and security protections for health information.

$19 B for health information technology
Subtitle D: Privacy and Security

- HIPAA privacy and security regulations expanded and applied directly to business associates;
- Defines breach of unsecured PHI and notification requirements;
- Modifies patient rights for requests for restrictions, access to medical records, and accounting of disclosures;
- Updates rules around marketing and the use of PHI;
- Increases civil monetary penalties for HIPAA violations.
Regulatory Timeline

February 17, 2009
- ARRA signed
- State Attorney General enforcement

April 18, 2009
- HHS issues guidance regarding secured and unsecured data

August 19, 2009
- HHS and FTC issues interim regulations for breach notification

September 23, 2009
- Final breach notification requirements become effective
Regulatory Timeline

February 18, 2010
- HIPAA Privacy and Security provisions extended to business associates
- Patient rights modified for restrictions and access to medical records
- Provisions modified for marketing and fundraising

January 1, 2011
- Patient right modified for accounting of disclosures

February 17, 2011
- Regulations established around sale of PHI
- Revised civil monetary penalties
Breach Notification

- **Highlight**
  - Guidance provided in April 2009 on methods to make PHI “unreadable” or “unusable”;
    - Use of encryption for electronic PHI;
    - Shredding or destruction for paper or electronic media;
  - Notification must occur in the event of a breach of “unsecured” PHI
    - Written notice must be provided to affected the individual(s) within 60 days;
    - HHS must be notified immediately for breaches involving 500 or more individuals; and, annually for all other breaches.

- **Impact/Risk**
  - Defining “breach” and “discovery”;
  - Record keeping of breach activity;
  - Publicity/Trust
  - Identification of risk areas; cost to mitigate risk
Business Associates

- **Highlight**
  - HIPAA Privacy and Security regulations, penalties and sanctions applied directly to Business Associates;

- **Impact/Risk**
  - Contract or BAA updates
  - BA compliance programs
Request for Restrictions

- **Highlight**
  - Individuals may request restrictions [with which the covered entity must comply] on disclosure of PHI to a health plan if the provider has been paid by the individual;
  - Exceptions include disclosures required for treatment or required by law.

- **Impact/Risk**
  - Flags for disclosure restrictions
  - Process impacts
Access to Medical Records

- **Highlight**
  - Individuals may request copies of records be provided in electronic format;

- **Impact/Risk**
  - EHR technology
  - Define “electronic” (e.g., CD, DVD, messaging, etc.)
  - Potential breach risks if not tightly controlled
Accounting of Disclosures

- **Highlight**
  - Must log disclosures for treatment, payment, and operations for prior 3 years and make available upon request by the patient;

- **Impact/Risk**
  - Effective dates impacted by date of EHR acquisition
  - Logging processes and data storage
Civil Monetary Penalties

- Highlight
  - Increased/tiered minimum penalties;
    - From $100 to $50,000 (per)
    - Total penalties max out between $25,000 and $1,500,000 depending on knowledge and/or intent;
  - Funds retained and/or provided to complainants to further enforce privacy and security requirements;
  - State Attorney General can now bring civil actions;

- Impact/Risk
  - Increased enforcement activity/auditing
  - Enhances current requirements, such as risk assessment
  - Patients could address concerns both at state or federal levels
Notable Events

- Increased federal funding for privacy and security audits;
- Security Rule administration and enforcement authority delegated to the OCR from OESS;
- Hiring of federal privacy staff;
- Involvement of FTC in publishing breach notification rules for PHR vendors.
Recommended next steps

- Conduct organizational awareness of ARRA and HITECH;
- Conduct a HIPAA v. HITECH regulatory gap analysis;
  - Current state v. required state;
  - Prioritize updates based on timetable;
    - Coordinate and implement policy and procedure updates;
    - Identify and coordinate technical updates;
- Conduct audit following major timetable milestones to assess compliance.
Wrap-Up

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