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**HIPAA/Telemedicine and Electronic
Health Records
UPDATE
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REGULATORY

E-Prescriptions

On July 14th, Governor Blagojevich issued an executive order calling for all providers in Illinois to begin using "e-prescribing" by the year 2011. Governor Blagojevich claims a provider will be able to review the medication currently being taken by the patient and assess any allergic reactions or drug interactions. Governor Blagojevich also claims this will reduce the number of mistakes of the dispensing of wrong medicine to a patient. A participating pharmacist will receive the e-prescription through an e-mail or fax. In addition, the executive order creates a new Division of Patient Safety. This Division will monitor medical procedures to increase patient safety and to minimize medical errors.

CMS Might Seek to Promote Healthcare IT Through Legislation

Acting CMS Administrator Leslie Norwalk, in a keynote speech to the World Healthcare Innovation and Technology Congress on November 1st, said that without the enactment of legislation to promote health care information technology, CMS "might have to help forward health IT on a regulatory basis". CMS has taken regulatory action to exempt hospitals and health plans that donate health care IT hardware and software

to physicians from prosecution under anti-kickback laws. In addition, according to Norwalk, CMS might seek to promote health care IT through demonstration projects that test new forms of reimbursement and health care delivery and through Medicare Quality Improvement Organizations.

Norwalk said that since Medicare does not pay for IT services, CMS "may have to use things like demonstration authority or other approaches to help them pick up health IT." Norwalk also added that, while the Medicare program is not set up to pay for the adoption of health IT, it could be ultimately "set up to pay for performance. ... If health IT helps you get to determine what performance is relative to standard measures, then that's something that we'd like to move toward." Norwalk also discussed the need for interoperability standards to promote health care IT. "One of the things that can get in the way, of course, is ... if payers have all sorts of different standards across the board," she said, adding, "If we can help harmonize ... standards, it makes it easier for providers" (From *CQ HealthBeat*, 11/1).

Governors Look for Best Practices

On October 20th, the National Governors Association (NGA) announced that the NGA has received a \$1.99 million federal grant to help states develop consensus-based best practices for interoperable health information exchanges.

The Office of the National Coordinator for Health Information Technology within the Department of Health and Human Services awarded the grant to

the association's Center for Best Practices. The center will form a State Alliance for e-Health, bringing together government agencies, consumers, information technology vendors and other stakeholders. The alliance expects to tackle State-level issues under the one-year contract including privacy and security, barriers to the practice of medicine, governance, and funding of health information exchange organizations, and the role of insurers and integration of public health and benefit programs in such organizations.

AHIC Workgroup Wrestles with Security Issues

On October 10th, a federal advisory panel reported that they are leaning toward recommending a standard that would encourage doctors to verify patients face-to-face before allowing them access to secure messaging systems. The Confidentiality, Privacy and Security Workgroup of the Department of Health and Human Services (HHS) American Health Information Community (AHIC) met last week to hammer out details on potential recommendations to HHS on identity-proofing techniques and authentication as it applies to secure messaging between providers and their patients. The workgroup would like to make some recommendations to HHS by December.

CMS Posts New FAQ on Covered Entities Under HIPAA

On September 27th, The Centers for Medicare and Medicaid Services (CMS) posted a new Frequently Asked Question (FAQ) to the CMS web site. The FAQ asks if a health care provider receives health information electronically (e.g. an electronic remittance advice), but does not transmit any health information electronically, is the healthcare provider a covered entity under HIPAA. The answer states that if a healthcare provider only receives health information electronically in connection with standard transactions, but does not transmit, or use a third party to transmit, (including transmission within the healthcare provider organization) information in connection with a standard transaction electronically, the provider would not be a covered entity.

Kennedy Introduces Personal Health Records Bill

On September 29th, Rep. Patrick Kennedy (D-RI) introduced a bill to give physicians a financial incentive to create personal health records for their patients. Under the Personalized Health Information Act (HR 6289), physicians would receive \$2 for each patient for whom they build a personal health record listing the diagnoses they make and the medicines they prescribe. The idea is to jump-start the market for electronic health records by getting more physicians on board. The physicians do not have to invest \$20,000 or more to buy an advanced EHR system. Instead, they can buy a low-end product or sign up for one of the personal health record packages various insurers offer. The solution must include certain basic characteristics, however, according to the bill.

GAO Reports Find HHS Has IT, Privacy Issues

On September 15th, two reports were issued from the Government Accountability Office (GAO) – the audit, evaluation and investigative arm of Congress – criticizing Department of Health and Human Services' (HHS) efforts to promote the use of IT, improve patient safety, and protect patient privacy, reports Modern Healthcare. The GAO's report, "Information Security: Department of Health and Human Services Needs to Fully Implement Its Program," states HHS and the Centers for Medicare and Medicaid Services (CMS) systems and controls have significant weaknesses. In presenting the report to a House Subcommittee on September 1, the GAO director of IT management issues pointed out one of the problems the GAO found regarding health IT is that the effort is floundering without specific targets and benchmarks for success. The GAO's second report, "Privacy: Domestic and Offshore Outsourcing of Personal Information in Medicare, Medicaid, and TRICARE," found that more than 90% of federal contractors and state Medicaid agencies and 63% of TRICARE contractors reported domestic outsourcing of services involving the use of personal health

information. The report also found that while domestic outsourcing was widespread, there was very little offshore outsourcing. However, many of these contractors stated that they knew their domestic vendors outsourced work overseas.

Additionally, the report found that over 40% of the federal contractors and state Medicaid agencies surveyed had experienced a recent privacy breach involving personal health information. Because of the widespread use of outsourcing and the significant amount of privacy breaches reported, the GAO recommends that CMS require state Medicaid agencies and all Medicare contractors responsible for safeguarding personal health information to notify CMS of privacy breaches.

HHS Team Tackles Genetics, EHR Integration

The Department of Health and Human Services (HHS) is launching an effort to integrate genomics into clinical information systems so that a patient's genetic makeup can be considered in preventing, diagnosing, and treating disease. Announcing the initiative September 12th at the American Health Information Community (AHIC) meeting, HHS Secretary Mike Leavitt said he has "put together a team that is working together across HHS," with representatives from the National Institutes of Health, the Food and Drug Administration, the Centers for Medicare and Medicaid Services, and other health agencies. Leavitt said genomics will play an increasingly larger role in medicine, and now is the time to figure out how best to incorporate genetic information into e-health records, before multiple nonstandard approaches take hold.

HHS Announces IT Donation Rules

The Department of Health and Human Services (HHS) published two final rules on August 8th governing how hospitals and other entities can provide IT and related services to physicians, reports Health Data Management. The rules - one each from the Centers for Medicare and Medicaid Services (CMS) and HHS Office of Inspector General (OIG) - create exceptions to the Stark Act governing physicians' referrals and

provide federal "safe harbors" under anti-kickback statutes. In the rules, provisions permitting the donation of e-prescribing technology were finalized as proposed last October. But provisions addressing the donation of electronic health records (EHR) technology and services have been expanded beyond the proposed rules. Under the rules, hospitals and certain other groups can donate interoperable electronic health records software, hardware and training to physicians through the exceptions and safe harbors. The rules will sunset on Dec. 31, 2013, in line with the President's goal of adopting such technology by 2014.

House Approves IT Legislation

The US House on July 27th approved legislation designed to accelerate adoption of health IT. The bill, however, must be reconciled with separate health IT legislation that passed the Senate late last year. House-passed HR 4157 includes a provision requiring healthcare industry adoption of the ICD-10 diagnosis and procedure classification systems by October 1, 2010, though many in the industry support a 2012 deadline. Department of Health and Human Services (HHS) Secretary Leavitt on August 1 criticized the bill's treatment of health IT as if it does not need to be interoperable, saying that House and Senate conferees should "re-examine the bills and make interoperability a specific requirement."

Before final passage, and at the urging of the hospital industry, lawmakers deleted language that would have required hospitals to publicly report prices for inpatient and outpatient services. Provisions of the legislation include:

- Creating exceptions in federal anti-kickback and physician referral laws to enable hospitals and other entities to assist physicians in adopting I.T. The bill also permits the forming of consortiums of providers, payers, employers and others to collectively purchase and donate health I.T. to physicians.

- Mandating migration to version 5010 of the HIPAA transactions standards by April 1, 2009. The bill also authorizes an expedited process for amending or updating existing standards that will negate the need for proposed and final rules from the Department of Health and Human Services.
- Placing the position of national coordinator for health information technology in law and defining its responsibilities.
- Striking federal--and state--regulations requiring the maintaining of health information in paper form.
- Authorizing grant funds of \$15 million each for 2007 and 2008 for projects headed by delivery systems that demonstrate use of I.T. to improve coordination of care to certain patient populations such as the uninsured, underinsured and "medically underserved."
- Authorizing grant funds of \$5 million each for 2007 and 2008 for physician practices to demonstrate the challenges and benefits of adopting I.T.
- Requiring a study of the variation in federal and state laws pertaining to the privacy and security of health information.

CMS to Test Feasibility of E-Personal Health Records

The Centers for Medicare and Medicaid Services (CMS) announced July 25th that they are seeking proposals for a feasibility test to transport Medicare claims data information into personal electronic health records (EHRs) for its beneficiaries, reports Government Computer News. The feasibility test is a first step toward letting Medicare beneficiaries engage directly in their medical care through easy access to their medical information, CMS said in its request for proposals. Besides testing functionality, CMS also

wants to know about the business and operational aspects of data exchanges, including procedures for access, authorization for disclosures, authentication and reporting.

EMR Products Get Government Approval

The first electronic medical records (EMR) products to win government approval were announced July 21st, a step toward encouraging doctors to switch from paper systems, reports USA Today. The non-profit Certification Commission for Healthcare Information Technology (CCHIT) certified 20 EMR products from such companies as GE Healthcare and Allscripts. The certification of the companies' products means doctors buying the software can expect it to collect certain data, secure that data and work with other products so that records can eventually transfer among doctors, clinics and hospitals and other entities.

OCR Publishes Disaster Recovery Planning Tool

The Department of Health and Human Services (HHS) published June 29th a new web-based interactive decision tool designed to assist emergency preparedness and recovery planners in determining how to access and use health information about persons with disabilities consistent with the HIPAA Privacy Rule. The tool will guide emergency preparedness and recovery planners through a series of questions regarding how the HIPAA Privacy Rule applies to a particular disclosure. By helping users focus on the source of the information being disclosed, to whom it is being disclosed, and for what purpose, users will better meet the needs of the elderly or persons with disabilities in the event of an evacuation. While the tool's initial purpose focused on emergency planning for persons with disabilities, it is applicable to most emergency planning efforts. The intended audiences include covered entities as well as emergency preparedness and recovery planners at the local, state and federal levels.

Medical Privacy Law Nets No Fines

In the three years since Americans gained federal protection for their private medical information, the Department of Health and Human Services has received thousands of complaints alleging violations, but has not imposed a single civil fine and has prosecuted just two criminal cases, reported the Washington Post on June 5th. Of the 19,420 grievances lodged so far, more than 14,000 -- more than 73 percent of the cases -- have been "closed" by the government, either ruling that there was no violation, or allowing health plans, hospitals, doctors' offices or other entities simply to promise to fix whatever they had done wrong, escaping any penalty. Privacy advocates say the lack of civil fines has sent a clear message that health organizations have little to fear if they violate HIPAA.

22 States Join National Health Information Privacy and Security Collaboration

Twenty-two states have signed agreements as of May 25th to join a national collaborative effort to address the privacy, security, and exchange of health information between states and US territories. Twelve additional states and US territories are expected to sign agreements within two weeks. The privacy and security project is a component of the Department of Health and Human Services' (HHS) strategy to identify variations in privacy and security practices and laws affecting electronic clinical health information exchange, develop best practices and propose solutions to address identified challenges, and increase expertise about health information privacy and security protection in communities.

Report Calls for Universal E-Prescribing by 2010

A report released by the Institute of Medicine on July 20th called for the adoption of other forms of health information technology, including electronic medical records and personal health records, to reduce the high rate of medication errors in the U.S. The report, entitled "Preventing Medication Errors", found that medication errors injure at least 1.5 million Americans annually, costing the nation more than \$3.5 billion a year.

Nationwide, there is an average of one error per hospital patient per day. The report made a number of recommendations, including:

- All prescriptions should be written electronically by 2010
- The government should foster technology improvements so that myriad computer programs are compatible
- Health workers must fully inform patients about medication use, including checking every drug they use before prescribing a new one
- The U.S. should invest about \$100 million annually on research into drug errors and how to prevent them, including the impact of free drug samples, which often lack proper labeling on medication safety
- The FDA should improve the quality of drug information leaflets that accompany prescription drugs
- The government should establish national telephone hotlines to help patients unable to understand printed drug information because of illiteracy, language barriers or other problems

On a related note, GM, Ford and DaimlerChrysler announced on July 25th the immediate adoption of the Southeast Michigan e-Prescribing Initiative (SEMI) for an additional year. The program aims to reduce medication errors through the use of e-prescribing technology, as well as reducing drug costs through the increased use of generic medications.

President Requests \$169 Million in FY 2007 Budget for Health Information Technology

The President has requested \$698 billion as part of the FY 2007 budget to support the mission of the Department of Health and Human Services (DHHS). This request represents an increase of \$58 million from 2006, which is earmarked for Health Information Technology (HIT). The budget request for all planned HIT initiatives is \$169 million. The

Secretary of DHHS stated that funding in the area of HIT would be used to support public and private adoption of HIT. The budget also calls for expansion of the Office of the National Coordinator for Health Information technology, including adding up to 8 positions to the staff. There were several specific endeavors to be undertaken in FY 2007:

- Advancing the effort toward establishment of a nationwide health information network (NHIN) that protects the privacy and security of health records
- Developing personal health record architectures that would allow patients and families to manage their own versions of health records now controlled by medical professionals
- Developing and harmonizing standards required for health information data portability and creation of a process to maintain and update such standards
- Developing a certification process for health information technology hardware and software
- Evaluating variations in state law and organizational business policies concerning health data privacy and security requirements of HIPAA to incorporate “lessons learned” into the NHIN prototypes

CASE LAW

HIPAA and Mental Health Confidentiality Act Disclosure

Plaintiff alleged defendant hospital negligently failed to prevent a criminal attack by a patient. The Defendant brought an appeal of an order from the trial court to compel discovery concerning information about the patient. The Appellate Court held that the physician-patient privilege did not apply because³ the requested information was unrelated to medical treatment. The Medical Studies Act also did not apply because peer review information was not sought. The Appellate Court also held that HIPAA does not prevent disclosure because it does not preempt Illinois law. Finally, the Court found that the Mental Health and Developmental Disabilities Confidentiality Act only barred disclosure

of the patient’s identity as a recipient of mental health treatment. Therefore, information concerning the patient’s status as a mental health recipient was protected from disclosure, but other statutes did not bar the hospital from disclosing information. See Giangiulio v. Ingalls Memorial Hospital, 850 N.E.2d 249 (1st Dist. 2006)

Texas Appeals Court Rules State Public Information Laws Override HIPAA

State public information laws override federal healthcare privacy laws, a Texas appeals court ruled June 16th in a case being eyed by public information advocates across the country, reports the Associated Press. The case stems from complaints that HIPAA hampered journalists' pursuit of information that had previously been accessible under the state's public information law. The case developed after a request by the Austin American-Statesman for information from the Texas Department of Mental Health and Mental Retardation (MHMR) officials. The Department, believing the records were protected health information under HIPAA, refused the newspaper's request for assault statistics at MHMR facilities and requested an opinion from Texas Attorney General Greg Abbott. The Attorney General issued a letter ruling (Tex. Att’y Gen. LA-1451 (2004)), stating that the requested information was not excepted from the requirements of the Texas Public Information Act (TPIA) and must be released, since such information falls under an exception to HIPAA that allows the release of information without consent or authorization if the release is required by law and made in compliance with that law. The Department filed suit in district court challenging the Attorney General’s opinion. The Third Court of Appeals on June 16th upheld the Attorney General’s opinion, declaring that information already deemed public under state laws would remain that way. See Abbott v. Texas Dep’t of Mental Health, No. 03-04-00743-CV (Tex. Ct. App. June 16, 2006)