

**A BDMP White Paper**

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**Analysis of HITECH Provisions in the  
American Recovery and Reinvestment Act**

## Introduction

### Contents

Introduction.....	2
Defining and Promulgating EHR Standards.....	2
The Carrot and Stick – Incentives and Penalties .....	3
New Demands in HIPAA.....	4
Summary.....	6

## Defining and Promulgating EHR Standards

The American Recovery and Reinvestment Act (ARRA) signed into law by President Obama in February 2009 is a powerful notice to the healthcare industry to move past differing opinions and increase the use of Electronic Health Records (EHRs). Within the ARRA is the Health Information Technology for Economic and Clinical Health Act (HITECH Act) that includes approximately \$20 billion for states and healthcare organizations to put toward implementing EHR broadly across the industry.

This white-paper reviews the three main areas addressed in the HITECH Act, its implications to healthcare providers, and things that healthcare managers should consider as they evaluate how to implement HITECH and benefit from some of the opportunities included in the Act.

The first HITECH provisions address the administrative tasks for creating a foundation for EHR. It does this by creating the organizational structure and accountability for establishing and approving EHR standards, investing in research to improve EHR practices and technologies, and requiring adoption of EHR technologies by federal agencies.

### Organizational Structure

The most immediate result from HITECH is the creation of the Office of the National Coordinator for Health Information Technology (ONC) under the Department of Health and Human Services (HHS) and funding this office with \$2 Billion to support its efforts. The ONC will coordinate work related to implementing a nationwide health IT infrastructure that aligns with the federal health IT strategic plan that will also be created by the ONC.

This health IT strategic plan will include a number of objectives related to the secure and wide-spread use of electronic health data between healthcare organizations including such things as infrastructure, interoperability and data standards.

The ONC is supported in its efforts by the creation of two committees made up of a broad coalition of healthcare industry stakeholders. The HIT Policy Committee will make recommendations to the ONC on issues related to the health IT infrastructure. The HIT Standards Committee will make recommendations to ONC on standards, implementation specifications, and certification criteria for electronic health records in accordance with the infrastructure recommendations made by the HIT Policy Committee.

HITECH requires that HHS adopt an initial set of standards by December 31, 2009.

### Health IT Research, Development and Education

Some of the \$2 Billion will go toward private and public sector efforts to research and develop new technologies and approaches to utilizing electronic health information. Funds will also go toward educating the healthcare industry on issues related to health record security and privacy.

### Federal Adoption of Health IT

Finally, HITECH requires federal agencies to adopt new health IT standards and require non-federal organizations that interface with federal agencies to adopt health IT standards as one requirement for doing business with the federal

## The Carrot and Stick – Incentives and Penalties

government.

### Implications to healthcare providers

1. Healthcare organizations that have delayed implementing health IT technologies due to the lack of broad standards will soon have this barrier removed.
2. The requirement for federal agencies and those interfacing with them to implement health IT standards will drive implementation.

The second component of the HITECH Act addresses the distribution of funds to support and incentivize the implementation of EHR systems. HITECH makes use of different mechanisms for doing this including grants and loan programs, the establishment of an incentive program, and a penalty program for some providers after a certain date.

### Grants and Loans

HITECH intends that specific grants will go to states to support their broad based efforts to increase the use of EHR systems not specifically related to the actual implementation of such systems. A separate loan program will make funds available to qualified healthcare organizations to specifically fund efforts related to selecting and implementing new EHR systems or improving the performance of existing EHR systems.

### Incentive Systems

HITECH's primary instrument for "encouraging" the adoption of EHR systems is through the use of incentives to healthcare providers that will be made through the Medicare and Medicaid programs. While the incentives to individual doctors and healthcare organizations vary based on a number of factors, there is one over-riding criteria that incentive recipients be able to demonstrate that they have achieved "meaningful use" of an EHR

The definition for "meaningful use" is still not clearly defined. Currently, the general outline for "meaningful use" anticipates: 1) Use of e-prescribing 2) that electronic health records are being actively shared via a certified EHR system; and, 3) certain performance data is being reported to the HHS.

In reference to the second item above, the "certified EHR system", the specific criteria by which EHR systems would certified has yet to be determined. However, it is possible that the ONC may simply adopt existing standards such as those recommended by the Certification Commission for Healthcare Information Technology (CCHIT).

The actual incentive mechanisms also vary for different situations – particularly as it relates to where the incentive funds originate – Medicare or Medicaid. Some examples of incentives include:

- Medicare Physicians: Beginning in 2011, physicians who demonstrate "meaningful use" may receive an amount equal to 75% of the allowed charge for professional services up to an annual cap of \$18,000 for 2011 and 2012 and decreasing thereafter. All incentive payments in this category will end in 2016 and those who demonstrate meaningful EHR use after 2014 will not be eligible to receive any incentive payments. On

top of this, beginning in 2015, physicians who are NOT meaningful EHR users may find their Medicare reimbursements reduced by 1 – 3%, unless the physician is able to demonstrate the case for a waiver.

- Medicare hospitals: Beginning in 2011 and for the first five years, eligible hospitals may be compensated by on a formula based on the proportion of Medicare patients. Hospitals that begin after 2013 will have a lower-rate of incentives and those that begin after 2015 will receive no incentive payments.
- Medicaid providers: States may provide incentives up to 85% of net average allowable costs for certified EHR technology to eligible professionals who are not hospital based. Incentives are capped at \$25,000 in the first year (of which 2016 is as late as it can start) and decreasing annually with no payments beyond five years from start or 2021, whichever comes first.

A critical issue for everyone impacted by HITECH is the limited time within which these incentives may be taken - particularly for Medicare based incentives. Physicians and healthcare organizations have a narrow window of opportunity to demonstrate “meaningful use” and collect any available incentives.

#### **Implications to healthcare providers**

The HITECH incentives for “meaningful use” demonstrate a significant opportunity for organizations to recoup some of the costs related to EHR implementation. This will hopefully reduce overall EHR system costs as a barrier to implementation and incentivize organizations to move quickly to implement and begin using qualified EHR systems to maximize their incentive payments.

However, the rapid speed with which healthcare providers are being asked to demonstrate “meaningful use” will pose a significant challenge to EHR vendors and healthcare organizations implementing their systems.

As healthcare organizations begin the process of implementing EHR systems, they must proceed urgently and cautiously to avoid major missteps that could lead to significant cost and risk. Incentives are paid only to those providers that demonstrate “meaningful use” of a certified system. EHR implementations impact the entire organization and will test management’s skills in project management, organizational change management, and leadership.

## **New Demands in HIPAA**

Finally, the third set of HITECH provisions address significant expansions of the purview and oversight of HIPAA requirements. This will increase the cost and administrative burden of HIPAA compliance for current covered entities that already fall under HIPAA, organizations that may now be considered covered entities, and increase the expectations for Business Associates.. There are four main HIPAA issues that we believe healthcare organizations should understand.

#### **Expansion of HIPAA to Business Associates**

Previously, Healthcare Business Associates could cover their HIPAA requirements by signing a Business Associate Agreement and agreeing to comply with the HIPAA policies and procedures of the covered entity for which they were working. However, this has changed and Business Associates will now be required to independently comply with the HIPAA requirements in the same way

that Covered Entities do. At its simplest level, this means that Business Associates will need to have their own, internally developed and maintained HIPAA policies, procedures and related documentation. This will have a significant impact on the industry as Business Associate organizations must implement and maintain their own HIPAA programs.

#### **Clarification of Security Breach Notification Requirements**

Depending on the final standard that is defined over the coming months, the new HIPAA guidance around “unsecured” personal health information (PHI) may have a significant impact on what data should be secured and how it should be secured. HITECH requires that HHS issue guidance within six months of the Act (July) on technologies and methodologies that will render PHI identifiable health information unusable, unreadable or indecipherable to unauthorized individuals.

Buried within the Act is also the likelihood that the data that should be secured will be significantly expanded. In the past, released data was considered unauthorized if it included “sensitive” and uniquely identifying information such as Social Security numbers. However, moving forward, the releases of any unauthorized PHI may be considered a HIPAA violation.

#### **Restrictions on Information Disclosures**

HITECH outlines various requirements for how personal health data may or may not be used, shared, or made available to different groups for various reasons. Some examples include:

- Individuals may request that certain personal health data related to non-treatment procedures that were paid for out-of-pocket by the individual not be released to other healthcare organizations;
- Healthcare organizations must be able to provide individuals of a record of all personal health data that was disclosed and to whom. This includes all personal health data that may be disclosed by a business associate of the healthcare organization.
- Healthcare organizations are specifically restricted from sharing any health data in return for any remuneration.
- Healthcare organizations will have tighter restrictions on how personal health information is used in different types of communications.

#### **Penalties and Enforcement**

Finally, HITECH creates a new, tiered penalty structure for violations to HIPAA or the HITECH requirements. It particularly seeks to penalize those violators that are found to be willfully negligent in their adherence to these requirements. At the extreme end of the penalty scale, a willfully committed violation that is not corrected within 30 days may be penalized at least \$50,000 PER violation, not to exceed \$1.5 million per calendar year for all violations of an identical requirement or prohibition.

#### **Implications to healthcare providers**

It appears that HITECH is seeking to address many issues that have arisen since HIPAA was implemented in 1996. HITECH clarifies some definitions and tightens others in an effort to reduce confusion and close the loops for violators. HITECH also seeks to implement a more nuanced penalty system whereby violators must prove that they were not “willfully negligent” in their adherence to the HIPAA

## Summary

and HITECH requirements.

The implications to healthcare providers will be in the significant cost and effort related to updating their information systems to accommodate these new requirements and train their organizations. In particular, for those organizations with existing EHR systems, there is likely to be significant effort required to reconfigure these systems to address the new PMI disclosure requirements and related reports.

With the stroke of a pen, President Obama placed electronic health records firmly in the national spotlight when he signed the American Recovery and Reinvestment Act of 2009. President Obama's call to apply technology as one tool to help address spiraling healthcare costs and the allocation of critical incentives and focus will radically alter how EHR systems are adopted over the next few years.

However, this opportunity is fleeting and healthcare organizations that do not act quickly may find themselves hard pressed to find the expertise and resources needed to implement the ambitious goals. Organizations who act immediately to develop a healthcare technology strategy that considers such things as HIPAA compliance, technology infrastructure, organizational change management, and long-term strategic goals will be better positioned to take advantage of the incentives that will soon begin to make their way through the national healthcare network.