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LIMITATION ON MINIMUM NECESSARY STANDARD

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). Title XIII of the Recovery Act is known as the Health Information Technology for Economic and Clinical Health Act ("HITECH"). Among other provisions, HITECH makes several changes to the Privacy and Security Rules adopted pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Due to the significance of those changes, we will be issuing a series of Alerts providing an analysis of each of those changes. This is the fourth in a series of seven such Alerts.

Existing Minimum Necessary Standard

Prior to HITECH, HIPAA required covered entities when using or disclosing protected health information, or when requesting protected health information ("PHI") from another covered entity, to reasonably ensure that the covered entity limited the PHI to that which was reasonably necessary to accomplish the intended purpose. HIPAA did not define "minimum necessary" but did provide that the minimum necessary standard does not apply to:

- Disclosures or requests by a health care provider for treatment
- Uses or disclosures made to an individual who is the subject of the information
- Uses or disclosures made pursuant to an authorization
- Uses or disclosures required for compliance with HIPAA
- Uses or disclosures made to the Secretary of the Department of Health and Human Services ("Secretary") required for compliance with or enforcement of HIPAA
- Uses or disclosures that are required by law

New Minimum Necessary Standard

HITECH limits covered entities' discretion for determining what constitutes the minimum necessary and requires covered entities to initially limit the use, disclosure or request of PHI, to the extent practicable, to a limited data set or, if needed, to the minimum necessary to accomplish the intended purpose of such use, disclosure, or request. HITECH clarifies that the entity disclosing the PHI (as opposed to the requester) is responsible for making the minimum necessary determination. The Secretary is required to issue guidance on what constitutes minimum necessary no later than August 17, 2010. At such time, this requirement to use a limited data set, or if needed, the minimum necessary to accomplish the intended purpose will go away and uses, disclosures, or requests will have to comply with the new minimum necessary guidance to be issued by the Secretary.

What is a Limited Data Set?

A limited data set is PHI that excludes direct identifiers of the individual or the relatives, employers, or household members of the individual. Direct identifiers include names; postal address information other than town or city, state, and zip code; telephone numbers; fax numbers; electronic mail addresses; social security numbers; medical record numbers; health plan beneficiary numbers; account numbers; certificate/license numbers; vehicle identifiers and serial numbers (including license plate numbers); device identifiers or serial numbers; URL's; Internet Protocols (IP) address numbers; biometric identifiers (including finger and voice prints); and full face photographic images and any comparable images.

Thus, until the Secretary issues guidance on what constitutes minimum necessary, covered entities, to the extent practicable, must limit the use, disclosure, or request of PHI to a limited data set, which means removing all the identifiers stated above from the PHI. If that limitation is not practicable, the covered entity may limit the PHI to the minimum necessary to accomplish the intended purpose of such use, disclosure, or request, which means it may include some of the identifiers above, if needed. However, covered entities must be prepared to justify why the limited data set was not practicable in a particular case.

Next Steps

- While we cannot predict how restrictive the regulations defining minimum necessary will be, covered entities should start preparing by evaluating their existing minimum necessary policy and procedures and determining which identifiers are generally necessary for common requests for uses or disclosures of PHI and which identifiers can be eliminated.
- Covered entities should also begin to develop a process to be able to remove identifiers from PHI when responding to requests for uses and disclosures of PHI.
- Covered entities should anticipate revising their minimum necessary policy and procedures to comply with the regulations once issued in 2010.

If you have additional questions regarding the minimum necessary standard, please contact your Hall Render attorney or Charise R. Frazier at 317/871-6222 or cfrazier@hallrender.com.

This information is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.