

HIPAA PRIVACY BULLETIN

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INTRODUCTION

HIPAA provides penalties that may be imposed upon covered entities that misuse individually identifiable health information. The purpose of the penalties is to establish accountability for the misuse and improper release of protected health information. HIPAA provides for both civil monetary penalties for violations of HIPAA standards and criminal penalties for “knowingly” using or disclosing health information. Although the Department of Health and Human Services, Office of Civil Rights, has been charged with the enforcement of the HIPAA standards, it has yet to issue a rule regarding the enforcement and penalty provisions of HIPAA. The Department has indicated, however, that it intends to issue such a rule in the future.

WHAT ARE THE CIVIL MONETARY PENALTIES FOR VIOLATIONS OF THE HIPAA STANDARDS REGARDING THE USE OF PROTECTED HEALTH INFORMATION?

Health plans, providers and clearinghouses that violate the HIPAA standards regarding the use of protected health information may incur civil monetary penalties in the amount of \$100 per violation. This penalty may not seem substantial; however, the penalty can increase quickly as covered entities accumulate multiple violations. An individual or single organization that violates the standards may be liable for up to \$25,000 per year for each requirement or prohibition violated.

Section 1128A(1) of the Social Security Act, which applies to imposition of the civil monetary penalties under HIPAA, provides that a principal is liable for penalties for the actions of an agent acting within the scope of their agency. Therefore, a covered entity generally will be responsible for the actions of its employees where, for example, the employee discloses protected health information in violation of the HIPAA regulations.

WHAT ARE THE CRIMINAL PENALTIES FOR VIOLATIONS OF THE HIPAA STANDARDS REGARDING THE USE OF PROTECTED HEALTH INFORMATION?

Criminal penalties were established to punish knowing violations of patient privacy. An individual who wrongfully obtains or discloses individually identifiable health

may be subject to a fine of up to \$50,000 and one year of imprisonment. An individual who obtains or discloses individually identifiable health information under false pretenses may be subject to a fine of up to \$100,000 and up to five years of imprisonment. An individual who obtains or discloses individually identifiable health information with the intent to sell, transfer or use such information for commercial advantage, personal gain or malicious harm may be subject to a fine of up to \$250,000 and up to ten years of imprisonment.



WHAT ISSUES DOES THE DEPARTMENT INTEND TO ADDRESS IN THE ENFORCEMENT RULE?

The Department plans to issue an Enforcement Rule that applies to all of the regulations that the Department issues under the Administrative Simplification provisions of HIPAA. This regulation will address the imposition of civil monetary penalties and the referral of criminal cases where there has been a violation of the HIPAA standards. Specifically, the Department has stated that the Enforcement Rule will address issues such as the computation of penalties for multiple violations as well as the consideration of aggravating and mitigating factors in determining the amount of civil monetary penalties and the gravity of criminal penalties, and factors which the Department will consider when determining whether a covered entity should suffer civil or criminal penalties for a violation.

HOW WILL THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF CIVIL RIGHTS, ENFORCE COMPLIANCE WITH THE HIPAA STANDARDS?

In general, any person who believes that a covered entity is not in compliance with the HIPAA standards may file a written complaint with the Department within 180 days of the time at which that person knew or should have known of the non-compliance. It is important to note that any person, not just the person who was the subject of the protected health information, may file a complaint. The Department may waive this time limit if the person filing the complaint demonstrates good cause for the late filing. The Department then may investigate the complaint or conduct a compliance review of the covered entity. Covered entities must cooperate with such investigations or reviews, including providing on-site access, and may need to submit compliance reports to the Department.

If the Department discovers a compliance violation it will notify the covered entity and the complainant, when appropriate. The Department will then attempt to resolve the matter informally with the covered entity. If HHS determines that the matter cannot be resolved informally it may issue written findings of non-compliance.

In situations where the Department cannot achieve voluntary compliance by a covered entity, HHS may seek to impose civil monetary penalties upon the non-compliant covered entity and may make referrals to the Department of Justice for criminal prosecution if there is evidence of intentional misuse of protected health information.



WILL THE DEPARTMENT IMPOSE CIVIL MONETARY PENALTIES UPON NON-COMPLAINT COVERED ENTITIES OR REFER HIPAA VIOLATORS TO THE DEPARTMENT OF JUSTICE FOR CRIMINAL PROSECUTION SOLELY BECAUSE THE COVERED ENTITY VIOLATED THE HIPAA STANDARDS?

A covered entity will not necessarily suffer a penalty solely because an act or omission by that entity violated the rule. The Department has stated that it will exercise discretion in its decisions to impose civil monetary penalties or refer the entity to the Department of Justice for criminal prosecution. In exercising its discretion, the Department will consider the harm resulting from the violation, and the willingness of the covered entity to achieve voluntary compliance. HIPAA also permits the Department to consider the cause of the violation in imposing civil monetary penalties. For example, if the violation was not due to reasonable cause and not willful neglect, the Department may delay the imposition of a penalty to allow the entity an opportunity to correct the violation.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie, P.C. *HIPAA Privacy Bulletin* invite you to submit general questions you may have dealing with HIPAA issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to address issues of common interest.

Send questions to:

L. Jane Charlton (ljc@trc-law.com)
William James Rogers (wjr@trc-law.com)

Thomson, Rhodes & Cowie, P.C.
Two Chatham Center, Tenth Floor
Pittsburgh, PA 15219

Phone: 412-232-3400

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Prior issues are available on request. Please direct inquiries to L. Jane Charlton or William James Rogers, Thomson, Rhodes & Cowie, P.C., Two Chatham Center, Tenth Floor, Pittsburgh, Pennsylvania 15219, (412) 232-3400.