

Health Law and Health Information Technology Alert: Electronic Health Record Legislation Passed As Part of President's Stimulus Package

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Today, the United States Senate passed an economic stimulus bill that includes provisions related to health care information technology ("Health IT") and reserves over \$19 billion to support the adoption of Health IT.¹ On January 28, 2009, the United States House of Representatives reserved over \$20 billion of its own stimulus bill to support the adoption of Health IT.² These bills dovetail with President Barack Obama's ambitious goal of the utilization of an electronic health record (EHR) for each person in the United States by the year 2014. The Senate and House will enter into negotiations on a final compromise bill that President Obama expects to sign into law this month.

Under the House bill, the Secretary of Health and Human Services must invest in the infrastructure necessary to allow for and promote the electronic exchange and use of health information for each individual in the United States. The Office of the National Coordinator for Health Information Technology ("ONC"), established under President Bush for the purpose of coordinating federal Health IT policies and programs, is charged with developing a strategic plan setting forth the goals and strategies that will direct the investment. Specifically, the House bill provides for investment in the architecture and integration of Health IT that will support the nationwide electronic exchange and use of health information in a secure, private, and accurate manner. The House bill also includes investment in the training on and publication of best practices to integrate Health IT and the promotion of the interoperability of clinical data.

The legislation provides much needed stimulus to the Health IT sector. President Obama strongly believes that the legislation will allow the U.S. to improve the quality of health care while simultaneously driving down the cost of health care by both cutting administrative costs and by helping to prevent costly medical errors caused by incorrect or incomplete information. As health care costs continue to grow as a percentage of the U.S. GDP, the federal government and states could realize a significant return on investment through EHR adoption.

For IT providers, the EHR Plan creates a "Man to the Moon by the end of this decade" challenge and opportunity. The EHR initiative will require new technologies and the service providers needed to implement and manage EHR systems. Virtually every sector of the IT world will be called upon to assist in this development effort, from servers to data storage to encryption and other security and privacy technologies. Similarly, the opportunity for new software applications for researchers mining this trove of data will be very significant and has the potential to revolutionize the field of medical research.

Benefits of Electronic Health Records

Obama's core reasons for promoting widespread adoption of EHRs are to improve the quality of health care and lower health care costs. EHRs permit multiple providers to access one medical record for one patient at the same time and allow for better coordination of the care delivered by multiple providers. Some have asserted that EHRs would also:

- reduce medical errors;
- prevent providers from repeating services unnecessarily; and
- improve the overall quality and efficiency of patient care.

In addition, patient claims data will be recorded in a compatible standardized electronic format that would increase billing accuracy and accessibility by patients. EHR adoption is also expected to encourage prevention of certain illnesses and provide meaningful clinical data to medical researchers. Ideally, EHRs will eventually have built-in intelligence capabilities that provide reminders and medical alerts, such as the recognition of abnormal test results or potential life-threatening drug interactions.

Despite the many benefits associated with EHRs, their widespread adoption will require providers to overcome significant challenges including the interoperability of various EHR systems, the standardization of data, and the integration into EHRs of robust privacy and security safeguards to protect patients' personal health information.

Privacy Issues

A patchwork of laws currently governs electronic health care information and some types of health care information are more vulnerable than others. The Health Insurance Portability and Accountability Act (HIPAA), for example, established rules governing the storage and transmittal of electronic health records with its passage in 1996. Yet, the HIPAA privacy rule covers only certain "covered entities," such as providers, health plans, and health care clearinghouses. Private companies, such as Google Health, Microsoft HealthVault, and others are not covered by HIPAA. Patients and providers must determine which existing and proposed rules, if any, might apply to their health care information and decipher the types of protections available to them.

Congress has attempted to address the privacy concerns in the stimulus package bills currently under consideration. The House bill, for example, requires the creation of a new committee, the Health Information Technology Standards Committee ("HIT Standards Committee"), which would propose to the ONC standards, implementation specifications, and certification criteria for the electronic exchange and use of health information. A fundamental duty of the ONC is to ensure that each patient's health information is secure and protected.

Further, the House and Senate bills include nearly identical privacy provisions designed to provide the following:

- greater protection against the sale and marketing of personal health information;
- a federal, individual right to be notified of any security breaches exposing personal identifiable information;
- easier access by patients to electronic copies of their records; and
- improved enforcement of health privacy rules.

At the same time, greater privacy protections could mean new burdens for providers. Notably, the House bill expands patients' rights to receive an accounting of disclosures of protected health information held by covered entities. Under HIPAA, patients do not have a right to an accounting of treatment-related disclosures. Yet, the House bill removes treatment and other disclosure exceptions related to EHR, which will create a dramatically different disclosure burden on providers than that imposed by HIPAA.

Interoperability and Standardization

The widespread adoption of EHRs will also require the development of a nationwide health information technology infrastructure that enables the interoperability of systems so that data can flow between various health care providers, government agencies, and other data users. System designs must also meet regulatory requirements without hindering access by those with legitimate rights to the information. Several other issues relate to interoperability and must be addressed: the need for standardization of terminology, the development of EHR standards that enable the exchange of clinical content, and the adoption of and adherence to those EHR standards.

To promote the interoperability of systems and standardization of EHR standards, the House bill requires the Director for the National Institute for Standards and Technology in coordination with the HIT Standards Committee to establish infrastructure for the pilot testing of standards and implementation specifications. The development of the testing infrastructure may include a program to accredit independent, non-federal laboratories to perform testing. The House bill also provides for assistance to institutions of higher education, including non-profit entities, to establish Centers for Health Care Information Enterprise Integration. The mission of the centers would be to generate innovative approaches

to health care information enterprise integration by conducting research in areas such as the development of software that improves interoperability and connectivity of health information systems.

Additional Challenges

Among the other barriers to the widespread adoption of EHRs are the challenges faced by health care professionals including the general resistance to new technology and need for training on EHR systems. A major concern for physicians is the capital investment required to acquire and implement EHR systems, as well as the continuing costs associated with their proper use and maintenance. The House bill has attempted to address some physician concerns by providing phased payment incentives to physicians that use certified EHR technology in a meaningful way starting in 2011.

While the challenges for the EHR initiative may be significant, the initiative offers a tremendous opportunity for the Health IT industry. We will continue to track further developments as the bill is finalized and when it is approved.

Endnotes

¹ A link to the Senate's version of the stimulus package is available at <http://appropriations.senate.gov>.

² American Recovery and Reinvestment Act of 2009, available at http://www.rules.house.gov/111/LegText/111_hr1_text.pdf.

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