

“Who Goes to Jail?”
A Guide for HIPAA Privacy Officers

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HIPAA Protects Individually
Identifiable Health Information
(45 C.F.R. §§ 164.500, 164.501,
164.514)

- Protected Health Information (PHI)
- Individually Identifiable Information

HIPAA Prohibits Disclosure of PHI

- Basic standard – covered entities may not use or disclose PHI, except as specifically permitted or required by the regulations
- Minimum necessary requirement

Who Is Subject To HIPAA'S Privacy Regulations? (C.F.R. §§ 160.102, 160.103)

- Covered entities
- Business associates

The Enforcement Provisions: 42 U.S.C. §§ 1320d-5 & 1320d-6

- 42 U.S.C. § 1320d-5 covers civil violations
- 42 U.S.C. § 1320d-6 covers criminal violations
- These sections are not found in the HHS Regulations, rather they are Congressionally promulgated statutes found in the U.S. Code.

General Penalty for Failure To
Comply With Requirements And
Standards:
U.S.C. § 1320d-5
(Civil Violations)

- Punishes any violation of regulations
- Maximum penalty of \$100 per violation
- Cap of \$25,000 per calendar year for each provision of the regulations that are violated

Wrongful Disclosure of
Individually Identifiable Health
Information:
42 U.S.C. § 1320D-6(a)
(Criminal Violations)

- Violation of federal law
- Violations must be committed “knowingly”

MENS REA And Use Of The Word “Knowingly”

- A person commits an act “knowingly” when it is done purposefully; that is, the act is a product of a conscious design, intent or plan that it be done. Horne v. State of Indiana, 445 N.E.2d 976 (1983).

Three Ways To Violate 42 U.S.C. § 1320d-6

- Knowingly and in violation of the regulations using or causing to be used a unique health identifier;
- Knowingly and in violation of the regulations obtaining individually identifiable health information relating to an individual; and
- Knowingly and in violation of the regulations disclosing individually identifiable health information to another person.

Criminal Penalties For Violating § 1320d-6

- Maximum penalties are set forth in §1320d-6(b)
- Actual sentencing is determined according to the Federal Sentencing Guidelines.

Maximum Penalties

(42 U.S.C. § 1320d-6(b)(1))

- Any violation:
 - \$50,000 fine, one year imprisonment, or both.

Maximum Penalties

(42 U.S.C. § 1320d-6(b)(2))

- If offense is committed under under false pretenses:
 - \$100,000 fine, 5 years imprisonment, or both.

Maximum Penalties

(42 U.S.C. § 1320d-6(b)(3))

- If the offense is committed with the intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm:
 - \$500,000 fine, 10 years imprisonment, or both.

Other Statutes That Could Lead To Further Criminal Or Civil Liability For Violating HIPAA

- Wire and Mail Fraud Statutes, 18 U.S.C. §§ 1341 & 1343
- False Claims Act, 31 U.S.C. § 3729

Potential Bases For Criminal Liability

- Employee liability for employee's own conduct
- Liability of privacy officers
- Corporate liability for acts of employees
- Concurrent liability of employees and corporation

The Federal Sentencing Guidelines

- Determining the offense level
- Determining criminal history category
- Determining the sentence
- Probable sentencing for violations of 42 U.S.C. § 1320d-6

Sentencing Table

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37

Minimizing Corporate Exposure To Civil And Criminal Liability By Conducting Internal Investigations

- Reasons for conducting an internal investigation
- Costs and risks associated with conducting an internal investigation
- Conducting the internal investigation so as to maximize benefits and minimize risks

Reasons For Conducting An Internal Investigation

- Ensuring compliance with the regulations
- Information gathering - determining the facts and available defenses
- Use in negotiation with the government
- Use at sentencing
- Public relations

Costs And Risks Associated With Conducting An Internal Investigation

- Expense
- Disclosure of information
- Triggering enforcement actions
- Triggering collateral litigation

Best Practices – Conducting Internal Investigations So As To Maximize Benefits And Minimize Risks

- Inside v. outside counsel
- Maintaining confidentiality - cloak investigation with privilege
- Document review
- Witness interviews
- Dealing with a simultaneous government investigation
- Using experts
- Representing employees - conflict concerns
- Preparing the investigative report
- Benefits of disclosure of the results of an investigation
- Risks of disclosure of the results of an investigation

Application To A Hypothetical Situation
