“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:
(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 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 Statues, 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

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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