Agenda

• Overview of Outsourcing
• Traditional Outsourcing Issues and HIPAA Wrinkles
• HIPAA-Specific Issues
Overview of Outsourcing
Introduction

• Outsourcing is more than just licensing of technology or procurement of services

• Outsourcing typically involves:
  – Divestiture of non-core business activity and purchase of services
  – A complex, evolving relationship
Introduction

- **IT Outsourcing**
  - Assets/staff/management of IT operations

- **Business Process Outsourcing**
  - Traditional: food service, janitorial, security
  - More recently: supply chain management, billing, coding, IT
Reasons for Outsourcing

• Financial
• Labor
• Strategic/operational

• HIPAA compliance does not usually make the list!
Risks in Outsourcing

• Traditional:
  – Loss of control
  – Managing costs
  – Labor and employment issues
  – Dependence on vendor and difficulty of reassuming responsibility
  – Financial stability of vendor

• HIPAA compliance?
The “Offshoring” Controversy

• New term
• Refers to outsourced jobs/services, particularly skilled/high tech labor, to foreign countries
  – E.g., India, China, Philippines, Ireland
• Red Hot Political Issue
  – 2/9/04 statement of Gregory Mankiw, the chairman of the White House Council of Economic Advisers
  – Lou Dobbs Report “Exporting America”
The “Offshoring” Controversy

• Also a real concern under HIPAA
  – "Your patient records are out in the open... so you better track that person and make him pay my dues."
    • SF Chronicle articles re: situation at UCSF with transcriptionist in Pakistan during summer 2003
  – Has generated…
    • Harsh editorials
    • Proposed CA law
    • Change in covered entities’ approach?
New HIPAA Wrinkles on Traditional Legal Issues
Labor and Employment Issues

• Traditional Issues:
  – Morale/culture shock issues
  – WARN Act
  – Unionized employees
    • Collective bargaining agreement issues/“Successor employer” issues
  – Employee benefits
  – Lay-off planning – potential for discrimination claims
Labor and Employment Issues

• The HIPAA Wrinkle? “Workforce”
  – Choose to treat as workforce even if employed by the vendor (if onsite)?
  – Discipline for privacy/security violations?
Assets

• Traditional Issues:
  – Assets to be transferred to vendor
    • Valuation of assets
    • Tax-exempt bond issues
    • Location of assets
  – Form of asset transfer
  – Asset refresh
  – Return of assets upon termination of relationship
Assets

• The HIPAA Wrinkle?
  – Now: What representations and warranties is the vendor going to require you to give about hardware and software that you’re transferring?
  – Later: What representations and warranties is the vendor willing to give about hardware and software that you’re getting back?
Third-Party Vendor Issues

- Traditional Issues:
  - Leased assets
  - Third party vendor consents
  - Continuing relationship

- The HIPAA Wrinkle?
  - Business associate subcontracting
  - Disclaimer of responsibility for anything provided by a third party
Service Level Agreements

• Traditional Issues:
  – What can provider manage?
  – How are they related to cost structure?
  – What to measure? (availability/uptime; response time; accuracy; customer satisfaction)
  – When to measure? (daily, weekly, monthly; ramp up)
  – Who measures?
  – How to measure?
Service Level Agreements

• The HIPAA Wrinkle?
  – Should you measure HIPAA compliance?
  – If so, how to measure HIPAA compliance?
Term and Termination

• Traditional Issues:
  – How long? (often 5 to 10 years, trend towards shorter terms)
  – Termination for convenience?
  – “Step-in” rights

• The HIPAA Wrinkle?
  – The Business Associate “terminate or report” provision
HIPAA-Specific Issues
HIPAA-Specific Issues

• Responsibility for Compliance
  – Particularly re: the Security Regulations and the TCS Regulations
  – Vendors often reluctant to take this on
  – If they don’t, can you?
  – Complaints, lawsuits, and HIPAA penalties
HIPAA-Specific Issues

• Security Compliance
  – Foundation of the Security Regulations is risk analysis and risk management
    • Is this part of your agreement?
    • If not, can you look to a change of law provision?
HIPAA-Specific Issues

- Security Compliance
  - Policy & procedure development and implementation
  - Physical safeguards
  - Technical safeguards
  - What about addressable items?
HIPAA-Specific Issues

• Other HIPAA Security Issues
  – Even if the vendor can and will do it, all of your ePHI may not be covered
  – Disaster Recovery
    • May be separated out but a critical HIPAA Security component
HIPAA-Specific Issues

• Business Associate Agreements
  – Can be straightforward
  – Typical issues:
    • “Battle of the Forms”
    • Termination
    • Indemnification
    • Need for greater specificity on Security or TCS compliance?
HIPAA-Specific Issues

• Trading Partner Agreements
  – Is the vendor your clearinghouse?
    • If so, need appropriate limitations on their ability to modify transaction formats and date code sets (per the Electronic Transactions & Code Sets (TCS) Regulations)
  – If not, what’s the vendor’s role in TCS?
HIPAA-Specific Issues

• Other Related Concerns
  – Use of subcontractors
    • See discussion of “offshoring above”
    • An issue even if done within the US – how to ensure privacy and security are protected?
• Other Related Concerns
  – Evolving Federal and State law
    • E.g., CA S.B. 1386
    • What state law governs? What laws apply?
    • Remember “Change of Law”
  – Other Laws can accelerate obligations
    • DoD Requirements
Summary

• Impact of HIPAA on Outsourcing
  – New wrinkles on traditional issues
  – New HIPAA-specific issues
  – Non-HIPAA privacy and security concerns on the rise

• Cannot consider HIPAA in a vacuum, but leave HIPAA out of the equation

• Need to carefully consider, and make appropriate allocation of, responsibility between covered entity and vacuum
The Impact of HIPAA Privacy and Security on IT and Business Process Outsourcing

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