

Health Insurance Portability and Accountability Act Enforcement: Civil HIPAA Can,
Indeed, Be Civil

The health care privacy portion of the federal Administrative Simplification Subtitle of the Health Improvement Portability and Accountability Act of 1996 (HIPAA) will revolutionize how patients are treated. Privacy and security of individually identifiable health information is going to be required, and penalties for violation of the new rules can be severe.

Because of the many changes in the delivery of health care services that the HIPAA law will require, lots of anxiety has been created about penalties. Certainly few areas of the HIPAA law are more important than the enforcement provisions and many doctors are concerned about how the law will be applied to them. But a careful reading of the HIPAA law regarding civil monetary penalties should provide comfort and encouragement that notwithstanding the hype, the enforcement procedure will not be so bad after all, for those who do their HIPAA in a timely and serious manner. Surely those doctors who study and learn will be prepared to meet the challenges of the HIPAA law; the others will have to pay the price of ignorance, which surely will not result in bliss.

In fact, the civil enforcement provisions of the HIPAA law evidence a Congressional mandate that civil sanctions – that is, monetary fines -- under the HIPAA law should, as and when appropriate, be imposed leniently and in a way that will encourage compliance and not make doctors feel as if they are being persecuted for inadvertent or unintended violations of the HIPAA law.

Although the federal Office for Civil Rights, to which the Department of Health and Human services has delegated the HIPAA enforcement responsibility for the final privacy rule under the HIPAA law, has not yet promulgated a proposed enforcement rule, the HIPAA law and the final privacy rule already provide a clear indication of Congressional intent regarding how enforcement should proceed under HIPAA.

These civil penalty enforcement provisions of the HIPAA law require the Secretary of the Department of Health and Human Services to impose a penalty of not more than \$100 for each such violation, except that the total amount imposed on the violator for all violations of the same parts of the law during a calendar year may not exceed \$25,000.

Surely, a series of individual penalty assessments surely can add up to a lot of money. But Congress provided for several lawful opportunities to avoid substantial penalties and possibly to avoid penalties altogether.

The civil penalty portion of the HIPAA law provides that a penalty may **not** be imposed if the alleged violator's act constitutes an offense punishable under the criminal provisions of the HIPAA law. So, at least as to HIPAA civil violations or crimes, it's one or the other: either a civil penalty or a criminal penalty. And of particular significance is that a penalty may **not** be imposed if it is established to the satisfaction of the Secretary that the alleged violator did **not** know, and by exercising reasonable diligence would **not** have known, that the violation had occurred.

So, if a doctor is able to satisfy the Office for Civil Rights that the doctor did not know, and by exercising reasonable diligence would not have known, that the doctor had violated the HIPAA law, it is likely that no penalty would be imposed.

And even if the doctor did know, or by exercising reasonable diligence would have known that the doctor would be violating the HIPAA law, the possibility of avoiding a penalty would still exist.

The HIPAA law provides that a penalty may **not** be imposed if the failure to comply with the law was due to reasonable cause and **not** to willful neglect; and the failure to comply is corrected during the 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred.

Accordingly, it is likely that no penalty would be imposed if a failure to comply with the HIPAA law that a doctor did, in fact, know would be a failure to comply was due to reasonable cause and not to willful neglect; and the failure is corrected within thirty days after the first date on which the doctor knew, or by exercising reasonable diligence could have known (whether or not, therefore, there was actual knowledge on the part of the doctor) that the failure occurred. So, after receiving a complaint from the Office for Civil Rights, the possibility exists that a doctor could promptly correct the problem and thereby avoid any penalties.

And even more opportunities will exist to have penalties abated. Under the HIPAA law, the thirty-day period for correction of any failure to comply **may be extended** as determined appropriate by the Secretary based on the nature and extent of the failure to comply. Furthermore, if the Secretary determines that a person failed to comply because the person was **unable** to comply, the Secretary may provide **technical assistance** to the person during the thirty-day period or an extension of that period .

So, the thirty-day correction period could be extended by the Office for Civil Rights and during that additional period, the Office for Civil Rights could provide

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Alan S. Goldberg HIPAA LOVES YOU article for Health Lawyers LTC SISLC periodical technical assistance. This could mean that the violation would be able to be corrected without any penalty being imposed

And finally, a penalty may be reduced by the Secretary. More particularly, in the case of a failure to comply which is due to ***reasonable cause*** and ***not*** to willful neglect, any penalty that is ***not*** entirely waived by the Secretary ***may be partially waived*** to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.

Thus even if is a large penalty was contemplated by the Secretary, the Office for Civil Rights could reduce the penalty to a magnitude that is not deemed to be excessive.

Thus, as this preliminary review of the enforcement part of the HIPAA law indicates, Congress would seem to have intended the enforcement procedure to be a conciliatory and encouraging process and not a process of persecution. Although we have not yet seen the preliminary enforcement rule that is being prepared by the Office for Civil Rights right now, we can hope that those working on the enforcement rule adhere to what Congress said in the HIPAA law.

So, the sooner doctors begin the process of getting ready for the HIPAA enforcement procedure, the better. The key to avoiding penalties will be having policies and procedures in place that evidence a good faith intention to endeavor to comply with the HIPAA law. Doctors must exercise reasonable diligence in endeavoring to observe the requirements of the HIPAA law and must not willfully neglect any requirements. Initiating a HIPAA corporate compliance plan meeting the US Department of Justice Sentencing Guidelines would be a good way to begin. Ignorance of the HIPAA law will not be bliss, and avoidance of the mandate to learn the law will not be blissful.

Instead, the only way to prepare for the HIPAA law is the old fashioned way: study it and learn it, and learn it well. Get help if you need it from those who know the law well. Patients will expect no less, and doctors surely will want to do even more than ever before to assure that their patients continue to receive both excellence in dental care and the privacy protections that their patients deserve -- and, indeed, under the HIPAA law, will soon be required to receive.

For copies of the HIPAA law and rules and other information regarding the new privacy requirements, visit <http://www.healthlawyer.com> on the Internet.

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