

## **HEALTH CARE CLIENT ALERT**

### **HHS PROPOSES HIPAA RULE REGARDING ACCOUNTING OF ELECTRONIC PHI DISCLOSURES**

The Department of Health and Human Services (HHS) published a proposed rule last month on accounting of disclosures of electronic health records (EHRs) as required by the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH), which amended the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The proposed rule governs a covered entity's and a business associate's response to an individual request for an accounting of disclosures of electronic medical records under HIPAA.

Under current HIPAA regulations, covered entities are required to maintain an accounting of certain disclosures of protected health information (PHI) for the prior six years, but disclosures of PHI related to treatment, payment, and healthcare operations (TPO) are exempt. HITECH modified these rules by creating an exception that, while disclosures of PHI relating to TPO are generally exempt, both covered entities and business associates must account for TPO disclosures if such disclosures were made through an EHR during the prior three years.

Although subject to change, the proposed rule includes the following modifications to the existing accounting of disclosure requirements:

- The proposed rule sets forth two distinct rights to individuals:
  - (1) It authorizes an individual to obtain an "access report," akin to a credit report, which would include, at a minimum, the date, time and name of persons or entities who accessed the individual's electronic health information in a designated record set during the prior three years. The access report applies to all electronic PHI in a designated record set, not just EHRs, and exceptions for TPO will not apply. (The "designated record set" is either (a) that group of records maintained by or for a covered entity that is used, in whole or in part, to make decisions about individuals, and/or (b) an individual's medical and billing records.)
  - (2) The proposed rule modifies the existing HIPAA rules relating to accounting of disclosures by requiring such disclosures that HHS anticipates are most important or relevant to individuals. For example, individuals will be entitled to know who accessed a record and for what purpose, including all disclosures made for law enforcement purposes and those relating to public health activities. Further, the time period covered by a request for an accounting is shortened to three years for all PHI, regardless of whether the records are paper or electronic.
- Under the existing HIPAA Security Rule, covered entities are required to record and examine activities in their information systems and to regularly review records of such activities. To a large extent, therefore, access reports under the proposed rule would contain information that covered entities are already required to collect.

- Covered entities and business associates will need to modify their notice of privacy practices to include information on an individual's right to receive an access report and an accounting of certain disclosures.

HHS is accepting comments on the proposed rules that are submitted on or before August 1, 2011. Comments may be submitted online at:

<http://www.regulations.gov/#!documentDetail;D=HHS-OCR-2011-0011-0001>

A copy of the proposed rules is available at the following link:

<http://www.gpo.gov/fdsys/pkg/FR-2011-05-31/pdf/2011-13297.pdf>

Please contact Attorney Anjali Waikar ([awaikar@kb-law.com](mailto:awaikar@kb-law.com)) with any questions or concerns about the proposed rules.