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THE UNITED STATES DEPARTMENT OF JUSTICE – SCOPE OF ENFORCEMENT FOR HIPAA VIOLATIONS

Summary of the Proposed Enforcement Rule

The United States Department of Health and Human Services (“HHS”) published the proposed HIPAA enforcement regulations (the “Enforcement Rule” or “Rule”) in the Federal Register on April 18, 2005¹. This modified version of the previously issued Rule (published in 2003) now extends the scope of the Enforcement Rule, making it applicable to the HIPAA Administrative Simplification Regulations (“HIPAA”). Both civil and criminal penalties are provided for by the Enforcement Rule. Civil penalties are administered by the Office of Civil Rights of HHS (“OCR”) while criminal penalties are handled by the United States Department of Justice (“DOJ”).

Until recently, there were many questions surrounding the imposition of criminal penalties for violations of HIPAA by the DOJ. Prior to the issuance of a Memorandum Opinion on June 1, 2005 (the “Memorandum”), covered entities were uncertain as to whether the DOJ would attempt to impose criminal penalties on covered and non-covered entities alike for violations of HIPAA. The Memorandum issued by the DOJ’s Office of Legal Counsel clarified the DOJ’s interpretation of its enforcement authority pursuant to HIPAA by stating that the Enforcement Rule only authorizes the DOJ to seek the imposition of penalties on covered entities for HIPAA violations. However, the DOJ also stated that under applicable principles for aiding and abetting liability and/or conspiracy liability it was authorized to impose criminal penalties on individuals or entities that are not covered entities. Essentially, the Memorandum asserts that while only covered entities can be prosecuted pursuant to the Enforcement Rule, non-covered entities could be subject to prosecution pursuant to other applicable legal theories.

In addition to issuing clarification with respect to the imposition of criminal penalties, the Memorandum also sets forth the proper interpretation of the “knowingly” element of the Enforcement Rule, stating that “knowingly” refers only to the knowledge of the facts that constitute the offense. The Enforcement Rule provides, in relevant part, “a person who *knowingly* and in violation of [HIPAA] ... uses or causes to be used a unique health identifier... obtains individually identifiable health information relating to an individual; or discloses individually identifiable health information to another person, shall be punished...” (emphasis added). The DOJ rejected the theory that “knowingly”

¹ A more detailed analysis of the modifications and additions to the initial Enforcement Rule is discussed in our Client Update dated June 16, 2005.

referred to knowledge of the facts that comprised the offense and knowledge that the conduct violated HIPAA. Therefore, covered entities can be prosecuted for HIPAA violations in instances in which their knowledge is limited to the facts surrounding a violation regardless of whether or not they actually had knowledge that such circumstances constituted a violation of HIPAA.

Conclusion

In many instances covered entities and non-covered entities must readjust their operations in light of the Memorandum. With respect to covered entities, the DOJ's interpretation of the "knowledge" element will make prosecuting HIPAA violations easier since the DOJ has stated that a covered entity's knowledge of the facts that constitute an offense are sufficient to satisfy the "knowledge" element of the Enforcement Rule. With respect to non-covered entities, while unable to prosecute them pursuant to the Enforcement Rule, the DOJ has expressed that it may use other legal theories, namely aiding and abetting liability and conspiracy liability to impose criminal penalties on non-covered entities for activities that would constitute HIPAA violations if engaged in by covered entities. As a result, covered entities and non-covered entities may want to consider implementing new, or enhancing existing, training initiatives to further educate their workforce members as to what functions and activities are and are not permissible pursuant to HIPAA.

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