

Providence To Pay \$100,000 & Implement Other Safeguards To Settle Civil Penalty Exposures Under HIPAA 1st-Ever Resolution Agreement and Corrective Action Plan Provides Insights For Covered Entities

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Seattle-based Providence Health & Services (Providence) has agreed to pay a **\$100,000** and to implement a detailed Corrective Action Plan to appropriately safeguard identifiable electronic patient information against theft or loss under a Resolution Agreement with the U.S. Department of Health & Human Services (HHS) Office For Civil Rights (OCR). Providence made the commitment in a Resolution Agreement with CMS designed to resolve Providence's exposure to civil penalties as a covered entity under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules arising from a loss of electronic backup media and laptop computers containing individually identifiable health information in 2005 and 2006, HHS announced July 17, 2008.

Following a series of announced criminal convictions under HIPAA in recent years, this **first-ever** announced Resolution Agreement and Corrective Action Plan is the latest in a series of HIPAA enforcement developments documenting the need for health care providers, health plans, and healthcare clearinghouses (covered entities) both to adopt the written policies and procedures required by HIPAA and also to continuously monitor and administer these safeguards to ensure their ability to demonstrate to Federal regulators the effectiveness of their HIPAA

compliance efforts. Covered entities should consider reviewing the adequacy of their current HIPAA Privacy and Security compliance practices in light of the Corrective Action Plan, published OCR enforcement noncompliance and enforcement statistics, their own and reports of other security and privacy breaches and near misses, and other developments to determine if additional steps are necessary or advisable.

The Privacy and Security Standards of HIPAA prohibit health care providers, health plans, and health care clearinghouses (covered entities) from using, accessing and disclosing individually identifiable health care information (PHI) except as allowed under the Privacy and Security Standards. Covered entities also are responsible for establishing and enforcing policies and procedures that safeguard protected health information against improper use, access or disclosure by employees, business associates, and other third parties. Noncompliance with the Privacy or Security Standards exposes a covered entity to criminal prosecution and penalties, civil penalties or both.

Providence Resolution Agreement History

The incidents giving rise to the Providence Resolution Agreement involved two entities within the Providence health system, Providence Home and Community Services and Providence Hospice

and Home Care. On several occasions between September 2005 and March 2006, backup tapes, optical disks, and laptops, all containing unencrypted electronic protected health information, were removed from the Providence premises and were left unattended. The media and laptops were subsequently lost or stolen, compromising the protected health information of over 386,000 patients. HHS received over 30 complaints about the stolen tapes and disks, submitted after Providence, pursuant to state notification laws, informed patients of the theft. The incident reportedly also triggered a number of privacy complaints under state law. Providence took steps to notify affected individuals and also reported the stolen media to HHS. OCR and CMS together focused their investigations on Providence's failure to implement policies and procedures to safeguard this information.

Under the Resolution Agreement, Providence agrees to pay a \$100,000 resolution amount to HHS and implement a robust Corrective Action Plan that requires: revising its policies and procedures regarding physical and technical safeguards (e.g., encryption) governing off-site transport and storage of electronic media containing patient information, subject to HHS approval; training workforce members on the safeguards; conducting audits and site visits of

facilities; and submitting compliance reports to HHS for a period of three years.

Providence Resolution Agreement Implications For Other Covered Entities

According to the HHS announcement, the Resolution Agreement with Providence marks the first time HHS has required a Resolution Agreement from a covered entity and allowed Providence and HHS to resolve this case “without the need to impose a civil money penalty” under HIPAA’s Privacy & Security Rules. HIPAA generally authorizes OCR to assess civil penalties of \$100 per violation (up to a maximum of \$25,000 per requirement violated) against covered entities that violate the Privacy Standards. Although HHS published its rules governing the enforcement and assessment of these civil penalties on February 16, 2006, it has not yet formally assessed penalties under these rules. Instead, it has continued to pursue resolution of compliance concerns informally. The lack of assessments has lead many covered entities and commentators to question the likelihood that violations will result in civil penalties.

After heavily emphasizing education for many years, recent developments document that the agencies charged with enforcement of the Privacy and Security Standards are now prepared to

enforce HIPAA against parties violating the Privacy or Security Standards. Over the past year, OCR officials have repeatedly stated that covered entities should not construe the absence of assessed penalties as indicating an unwillingness by OCR to pursue enforcement including the assessment of penalties. HHS affirmed its resolve to enforce the rule, including the assessment of penalties where warranted. The July 17 announcement of the Providence Resolution Agreement affirms that covered entities

Although criminal prosecutions under HIPAA to date remain infrequent, the April, 2008 plea agreement by nurse Andrea Smith for violating HIPAA’s Privacy Standards was the fourth criminal conviction reached under the HIPAA Privacy Standards.

The announcement of the Resolution Agreement coupled with recent announcements by the Justice Department of HIPAA Privacy Rule criminal prosecutions and convictions, and OCR announcements of enforcement statistics highlight the continuing need for health care providers, health plans and healthcare clearinghouses that are covered entities under the HIPAA Privacy Rule to continue to exercise diligence in their Privacy Rule compliance efforts. In light of these continuing enforcement activities, health care providers, health plans,

and health care clearinghouses should continue to monitor the adequacy not only of their written HIPAA privacy policies but also the adequacy of their HIPAA compliance efforts in operation. Kerry Weems, the acting administrator of CMS, affirmed this need in the July 17 announcement, stating, “This resolution confirms that effective compliance means more than just having written policies and procedures. To protect the privacy and security of patient information, covered entities need to continuously monitor the details of their execution, and ensure that these efforts include effective privacy and security staffing, employee training and physical and technical features.”

A copy of the Resolution Agreement is posted at <http://www.hhs.gov/ocr/privacy/enforcement/agreement.pdf>. For additional information about the Resolution Agreement or other assistance with monitoring, assessing, administering or defending the adequacy of your organization’s HIPAA or other compliance policies and controls, to arrange HIPAA or other compliance training, or for help with other compliance and risk management concerns, please contact Cynthia Marcotte Stamer at cstamer@solutionslawyer.net or via telephone at 972-419-7188.

About Cynthia Marcotte Stamer

Cynthia Marcotte Stamer, P.C., a member of the law firm of Glast, Phillips & Murray, P.C, has extensive experience advising, and representing health care providers, health plans healthcare clearinghouses and other health industry clients about HIPAA and other regulatory compliance, public policy, human resources, technology, privacy, licensing and credentialing, contracting, and other risk management and operational concerns. Her clients include hospitals, physicians, clinics, IPAs, PHOs, skilled nursing facilities, assisted living and home health, rehabilitation, imaging and other diagnostic services providers, DME, physician practice management companies and other management services organizations, health care technology, payers, employers, public health, school and other health involved governmental entities, and other health industry clients. Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on health care reimbursement and other health industry operational, regulatory, and public policy matters.

Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group and known for her practical, direct problem-solving approach, Ms. Stamer also applies her extensive industry experience in numerous professional and industry leadership roles. In addition to her ABA Health Law Section involvement, Ms. Stamer serves on the editorial advisory boards of and is a contributing author for the Bureau of National Affairs and other publications, served as the Compliance Committee Chair and a member of the Board of the

National Kidney Foundation of North Texas Board of Directors, serves on the continuing education and conference planning committees of the ABA Joint Committee On Employee Benefits (JCEB), the HFMA Lone Star Chapter, TAHFA, the IRS TEGE Advisory Council, and numerous other health industry groups. She also is the past-president of the Alliance for Health Care Excellence, and founder of its Health Care Heroes and Patient Empowerment Programs. She also is active in numerous other industry organizations including the American Health Lawyers Association, the Medical Group Management Association, the Alliance for Healthcare Excellence, the Dallas Bar Association Health Law Section,

Ms. Stamer also is a widely published author and highly sought-after speaker nationally and internationally sought out for her strategic knowledge and insights on operational and technical health care risk management and operational concerns, she frequently conducts workshops and other training activities on privacy and other compliance matters for health care providers, health plans, employers and other organizations. She also is the author of numerous highly regarded publications on HIPAA, FERPA, FACTA, FCRA and other privacy and data security rules including "Privacy and Securities Standards - A Brief Nutshell" published in the BNA Journal of Tax Management & Compensation, "Chapter 35, Medical Privacy" in ERISA Litigation (BNA), "Chapter 8, Other Liability-Tort & Regulatory," in E-Health Business and Transactional Law (BNA), "Cybercrime and Identity Theft: Health Information Security Beyond HIPAA," and various other privacy related publications for the American Bar Association, "Keeping

Lists in Line with the Law" and "Establishing a Data-Protection Policy" published by Western Association News, workshops on HIPAA and other privacy concerns in the public health, health plan, employer and other contexts presented to organizations such as the Association of State & Territorial Organizations (ASTHO), the Los Angeles Department of Public Health, and many others. A columnist for MD News and recurring author for various other health industry publications, Ms. Stamer's insights have been quoted by the Wall Street Journal, the Bureau of National Affairs (BNA), HIPAA Comply, Private Payer News, Modern Health Care, Managed Healthcare Executive, Health Leaders, Caring for The Elderly Magazine, For The Record, the Dallas Morning News, Spencer Publications, the Dallas Business Journal, the Houston Business Journal, and a various other national and local publications. Ms Stamer is the author of 100s of publications on health plan and health industry matters including numerous highly regarded works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, the Medical Group Management Association, Government Institutes, Inc., Decision Health, Loreman, Spencer Publications, and others.

For more information about Ms. Stamer, a listing of selected publications and other health industry links, information about workshops and other training and other health industry information and resources or other details about Cynthia Marcotte Stamer, P.C. and Glast, Phillips & Murray, P.C., see CynthiaStamer.com or contact Ms. Stamer.

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