

## The Comment Period Is Running On The Proposed HITECH Disclosure Rule

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In late May, the Department of Health and Human Services (“DHHS”) released a proposed rule modifying the accounting of disclosures of electronic health records required under the Health Information Technology for Economic and Clinical Health (“HITECH”) Act. (Federal Register, vol. 76, p. 31426.) These proposed rules would modify the current rules by (1) limiting the disclosure requirement to information contained in a “designated record set”, (2) creating two types of patient disclosure rights – the right to an access report and the right to an accounting of disclosures, (3) eliminating the exemption for disclosures to carry out treatment, payment and health care operations if the disclosure is through an electronic health record, and (4) reducing the time period for providing disclosures to three years, rather than six.

The current accounting provision (45 C.F.R. § 164.528) applies to disclosures of paper and electronic protected health information (“PHI”), regardless of whether the information is in a “designated record set” (“DRS”). A DRS generally consists of medical records and billing records about individuals. (For the full definition, see 45 C.F.R. § 164.501.) A disclosure is defined as “the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information.” (45 C.F.R. § 160.103.) For each disclosure, the accounting must include: (1) The date of the disclosure, (2) the name (and address, if known) of the entity or person who received the PHI, (3) a brief description of the information disclosed, and (4) a brief statement of the purpose of the disclosure (or a copy of the written request for the disclosure). (45 C.F.R. § 164.528(b)(2).) The current accounting provision makes an exception for disclosures of PHI for certain purposes, including to carry out treatment, payment and health care operations. (45 C.F.R. § 164.528(a)(1)(i).)

Under the proposed rule, the accounting provision would be revised to create two distinct but complementary rights – the right to an access report and the right to an accounting of disclosures – and limit these obligations to DRS information disclosed over the past three years.

The right to an access report would require provision of information about the identity of those who have accessed electronic PHI in a DRS set for any reason, including access for purposes of treatment, payment, and health care operations, and including electronic access by both workforce members and persons outside the covered entity. The notice explains, “The intent of the access report is to allow individuals to learn if specific persons have accessed their electronic DRS information (it will not provide information about the purpose of the person’s access).” The access report would identify the date, time, and name of the person (or name of the entity if the person’s name is unavailable) who accessed the information. The access report would also include a description of the PHI that was accessed and the user’s action, but only to the extent that such information is available. The right to an accounting would provide additional information about the disclosure of DRS information (hard-copy as well as electronic) to persons outside the covered entity and its business associates for certain purposes, including for public health activities (except those involving reports of child abuse or neglect), for judicial and administrative proceedings, for law enforcement activities, to avert a serious threat to health or safety, for military and veterans activities, for the Department

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## Avoiding Perception Of Bias In The Selection of Peer Review Hearing Officers

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This year marks an opportune time for providers to reevaluate their practices and procedures in selecting hearing officers to preside over administrative hearings involving physician peer review. Recent court decisions scrutinizing the fairness of administrative hearings have raised the stakes for providers to be more careful in selecting experienced and skillful attorneys to preside over administrative hearings. Failure to do so could taint the outcome of administrative hearings by making the hearing decision susceptible to being overturned on appeal, delaying a final determination regarding disciplinary action, and increasing the provider’s costs.

Historically, providers have selected hearing officers from a short list of preferred candidates, often relying on the same one or two individuals to serve as hearing officers for all of their administrative hearings. While experience is necessary and familiarity with the appointing institution is helpful, there are potential drawbacks to selecting someone who has served as a hearing officer for the same provider in the recent past or on multiple occasions over an extended period of time. Providers who select hearing officers with frequent ties to them may be found to have created the perception, if not the reality, of bias, which may open the hearing decision to attack.

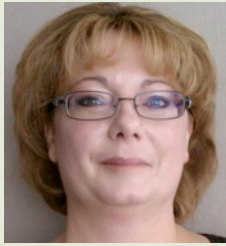
Recent court decisions have invalidated administrative hearing decisions where the perception of bias allegedly jeopardized the fairness and impartiality of the hearing process. In *Yaqub v. Salinas Valley Memorial Healthcare System, et al.*, 122 Cal. App. 4th 474 (2004), Dr. Yaqub challenged the outcome of an administrative hearing on the grounds that the provider deprived him of a fair hearing by selecting as the hearing officer someone who previously served as a mediator, arbitrator, and hearing officer in four cases where the provider was a party. Dr. Yaqub argued that the hearing officer had a “fatal appearance of bias” caused by a financial conflict of interest. Although there was no evidence of actual prejudice or of a direct financial interest in the outcome of the case, the appellate court nevertheless concurred with Dr. Yaqub and disqualified the hearing officer because of an economic conflict of interest.

In deciding Dr. Yaqub’s challenge, the appellate court relied on several earlier decisions, including a decision by the California Supreme Court. In *Haas v. County of San Bernardino, et al.*, 27 Cal. 4th 1017 (2002) the Supreme Court disqualified the county’s administrative hearing officer from a licensing matter because the county unilaterally selected the hearing officer, paid her, and expected to use her services again. The court agreed with the licensee’s claim that the hearing officer was biased since her future employment depended entirely on the county’s goodwill, which could be influenced by decisions favorable to the county. To avoid prejudice, the court held that the appointment of hearing officers should be made in such a way as to avoid the risk that favorable decisions will be rewarded with future remunerative work.

The appellate court also relied on *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81 (2003), and *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 81 (2003). In these cases, the courts found due process violations when attorneys who took significant and active roles in advising the appointing authority to bring charges also advised the hearing officers at the 996.012-1030657.1 administrative

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## HFMA NORTHERN CALIFORNIA - SPOTLIGHT ON A MEMBER



**TAMMY TROVATTEN**  
**Senior Reimbursement Analyst, Sutter Health**  
**Years in Healthcare: 10**  
**Years in HFMA: 4**

*"...I have made life-long friends and contacts throughout the United States through HFMA. I have access to phenomenal education in my field and other areas of interest at a reasonable cost."*

**How did you end up in Healthcare? Did you choose it or did it choose you?**

*It chose me. I was looking for a job after finishing my degree in Accounting and my first decent job offer came from Blue Cross Blue Shield of Montana as a Medicare Auditor. I stayed on the dark side as a Medicare Auditor for five years before following the force to the light side in a provider setting.*

**Tell us about yourself:**

*I was born and raised in Great Falls, Montana. I moved to Sacramento in late March of 2010, ready for some fun in the sun. My husband and I have been married for 4 years and have five children between us, most of them are out of the house for now. I was active in the Montana Chapter HFMA Board and wanted to get involved in the Northern California Chapter.*

**There's no right or wrong answer, but if you could be anywhere in the world right now, where would you be?**

*Cancun, Mexico. My husband and I honeymooned there, and I would love to go back.*

**What do you like to do for fun in your spare time?**

*I am a sports fanatic and love watching them live or on TV. I am a diehard University of Montana Grizzlies fan and will travel anywhere within a day's drive to see them, so I am excited that Cal Poly and UC Davis are joining the Big Sky Conference, which will give me more chances to see the Grizzlies*

*play here in California. My husband and I enjoy attending rock concerts along with fishing, camping and reading.*

**What's the last book you read?**

*Professionally - The Oz Principle: Getting Results Through Individual and Organizational Accountability by Roger Connors and Tom Smith.*

*Personally - The Last Symbol by Dan Brown*

**What would you do if you won the lottery?**

*I would give money to our children, invest some and donate quite a lot to charities. I can never pass up an opportunity to give back.*

**What is your greatest achievement outside of work?**

*My greatest achievement outside of work is raising my three children successfully as a single mom.*

**If you could be a superhero, who would you be and why?**

*Wonder Woman; she is a strong independent woman.*

**What's the best movie you've seen in the last three years?**

*Blind Side*

**Who are your heroes?**

*People who help others in life.*



**The best advice I ever had was**  
*To stay true to myself.*

**The best part of my job is**  
*I help hospitals get the reimbursement they deserve to continue saving lives and helping people in need.*

**My favorite food is**  
*Anything spicy - the hotter the better.*

**My first car was**  
*a 1982 Oldsmobile Delta 88*

**My favorite car is**  
*the purple 1970 Corvette that I will own someday.*

**Favorite Quote**  
*"Believe and you're halfway there" - Theodore Roosevelt*



## Welcome New Members!

- ✦ **Christina Beckwith** - Manager, Grant Thornton LLP
- ✦ **Sandra Bowen** - Chief Finance Officer, Prime Healthcare Shasta
- ✦ **Carl R. Bustos** - PAS Supervisor, ValleyCare Health System
- ✦ **Gertrudes Cary** - Controller, Daughters of Charity Health System
- ✦ **Gabrielle Changnan** - Legal Assistant, Law Offices of Stephenson, Acquisto & Colman
- ✦ **Debra Christian** - Senior Staff Accountant, Feather River Hospital
- ✦ **Don Clason**
- ✦ **Terry Copeland** - Controller, Mee Memorial Hospital
- ✦ **Terrence Cullen** - VP Finance, Affinity
- ✦ **Paul Fish** - Accounting Dept Manager, Southern Humboldt Community Healthcare District
- ✦ **Nancy Garcia** - Systems Manager, CHW
- ✦ **Sumit Garg** - Managing Partner, Globe Equity Partners
- ✦ **Kim Goodman** - Account Executive, Robert Half International
- ✦ **Linda A. Guinn** - President, C B Merchant Services
- ✦ **Hsinpei Gwo** - Financial System Manager, Stanford Hospital & Clinics
- ✦ **Kristin Hamann** - Genentech Incorporated
- ✦ **Adam Kessler** - Sr. Budget/Reimbursement Analyst, Marshall Medical Center
- ✦ **John M. Kinnaman** - Sr. Financial Analyst, Kaiser Permanente
- ✦ **Shulin Lin** - Senior Accountant, San Mateo Medical Center
- ✦ **Diane Mallett** - Director Patient Registration, Salinas Valley Memorial Hospital
- ✦ **Sophia Mammo** - Client Services, Law Offices of Stephenson, Acquisto & Colman
- ✦ **Julia Mathis** - Senior Accountant, University of California
- ✦ **Patrick B. Moran** - VP Sales and Marketing, SpendVU
- ✦ **Lauren Mullenix** - Sr. Consulting Data Analyst, Kaiser Permanente
- ✦ **Trish Newman** - PAS Manager, ValleyCare Health System
- ✦ **Megan M. Ostermeyer** - Supervisor Pre-Admitting Patient Access Services, ValleyCare Health System
- ✦ **Mahesh Rajasekharan** - Managing Partner, Globe Equity Partners
- ✦ **Walter Ray III** - Chief Finance Officer, San Joaquin Valley Pulmonary Medical Group, Inc.
- ✦ **Jeff Rogers** - Partner, Perry-Smith LLP
- ✦ **Paul G. Selivanoff** - Manager Financial Systems, Saint Helena Hospital
- ✦ **Kashmir Singh** - Manager, CHW
- ✦ **Susan Tatara** - HIM's Administrative Director, Stanford Hospital & Clinics
- ✦ **Helen Tran** - Kaiser Permanente
- ✦ **Megan Wiseman** - Consultant, PricewaterhouseCoopers

## Welcome Members Who Transferred In!

- ✦ **Harold W. Brockman** - Chief Financial Officer
- ✦ **Susan M. Childers, FHFMA, CPA, MHA** - Chief Finance Officer, Mee Memorial Hospital
- ✦ **Gary Hubschman** - Chief Finance Officer, Sutter Roseville Medical Center
- ✦ **Timothy R. Maurice, FHFMA, CPA** - Chief Financial Officer, UC Davis Health System
- ✦ **Kim A. Strange** - SVP/CFO, Children's Hospital & Research Center Oakland
- ✦ **Wade L. Sturgeon** - Chief Finance Officer, Biggs-Gridley Memorial Hospital

## HITECH Disclosure Rule ... continued from page 11

of State's medical suitability determinations, to government programs providing public benefits, and for workers' compensation. "The intent of the accounting of disclosures is to provide more detailed information (a 'full accounting') for certain disclosures that are most likely to impact the individual," according to the notice. The proposed rule would exempt from the accounting requirement impermissible disclosures in which the covered entity has previously provided breach notice.

In its notice of proposed rulemaking, DHHS explains that the proposed modifications are intended to provide information of value to individuals while placing a reasonable burden on covered entities and business associates.

If the rule becomes final in its current form, compliance would be mandatory 180 days after the effective date of the final regulation (i.e., 240 days after publication). For the access reports provision, compliance would be effective January 1, 2013, for electronic DRS systems acquired after January 1, 2009, and beginning January 1, 2014, for electronic DRS systems acquired prior to 2009.

DHHS is seeking comments from the public. Comments may be submitted through August 1, 2011. ☒

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hearings since the attorneys' roles of advocacy and decision making overlapped. With respect to Dr. Yaqub, the appellate court noted that the appointment of an attorney who advised the provider and medical staff to bring charges would "strain the bounds of due process" if permitted to serve as a hearing officer or advise the board during a hearing.

Since administrative hearings are time consuming and costly, providers should be mindful when selecting hearing officers to avoid situations that may create the perception or reality of bias, including situations where the attorney has advised the provider and medical staff regarding the charging document and/or has served as a hearing officer for the same provider recently or on multiple occasions over an extended period of time. Although untested, providers also may seek to obtain the physician's informed consent if the provider appoints a hearing officer with frequent ties to it or give the physician an opportunity to disqualify the hearing officer before the start of the administrative hearing. Following these guidelines should minimize the likelihood that a decision from an administrative hearing will be set aside for bias. ☒