Summer Reading: Skimming the New ARRA-HITECH Regulations

By Dan Rode, MBA, CHPS, FHFMA

In July the Department of Health and Human Services (HHS) ended the waiting game for the HITECH privacy and security regulations, the meaningful use final rule, and the final rule on standards and certification.

HIM professionals and their organizations, anxious to familiarize themselves with each rule, had their summer reading cut out for them. The meaningful use and standards and certification rules are final, but organizations can comment on the privacy and security regulations. Comments are due by September 13, 2010.

This column offers an overview of selected provisions within the privacy rule and lists AHIMA resources on all three rules.

The Privacy and Security NPRM

The notice of proposed rulemaking (NPRM) for the HITECH privacy and security provisions was published in the July 14 Federal Register.

The NPRM covers more than the modifications to HIPAA mandated under HITECH. The Office for Civil Rights, which authored the rule, also included additional changes and updates it has been compiling over the years. The rule also provides additional detail on OCR's approach to HIPAA investigations and penalties, following up on last November's interim final rule on enforcement.

Business associates are now covered by some of the HIPAA privacy, security, and enforcement provisions. BAs must review this section in order to comply with the new rules, and organizations may wish to reach out to their BAs to ensure they are aware of the changes. The rule adds entities such as health information exchanges and patient safety organizations to the list of possible BAs.

It is clear OCR struggled to apply the HITECH legislation to the current healthcare environment. Throughout the rule OCR asks for industry input, and it is very important that covered entities and BAs respond. As noted, comments are due by September 13; instructions for submitting comments are included at the beginning of the rule.

Right to Request Restriction

HITECH grants patients new rights to request restriction of use and disclosure of their protected health information (PHI), which requires a revision to the HIPAA privacy rule. An individual may request that a service or item not be billed to his or her health plan and that no information be sent to the health plan that would indicate the service or item was provided. The individual must pay the provider for the service beforehand.

The NPRM suggests that a provider should not be able to require the individual pay for the entire encounter or admission, which might make this process a little easier. OCR suggests that the provider could counsel the individual on the potential impact of making such a request.

HIM professionals will recognize just how hard this provision will be to implement because of the need to segregate the information in future exchanges with health plans. OCR asks a variety of questions on the proposal, and covered entities should ensure OCR is fully aware of the operational challenges involved in meeting this requirement.

Access of Individuals to PHI

HITECH's provisions on access to information present some difficult requirements given the current technology available to covered entities and consumers. The provisions add to requirements under HIPAA and maintain most of the previous requirements.

However, in addition to delineating requirements related to electronic PHI, the section also has requirements related to the time necessary to respond to such requests and what costs can be recovered through fees. The legislation failed to recognize that an EHR is not necessarily a single system and that the release of information is not centralized in many organizations.

The proposed regulation on fees does not recognize the cost of acquiring and consolidating the information, nor a provider's ability to certify it. Likewise, there is no recognition that this section's fee provision may conflict with a state's fee requirement. HIM professionals and their organizations should ensure OCR fully understands the current challenges.

Notice of Privacy Practices for PHI

With all the changes in the NPRM, the notice of privacy practices will require modification. OCR is aware of this requirement, and it suggests a number of ways the notice can be updated and provided to patients. Again, OCR requests comments on the expected impact of the change.

Business Associates

As noted, the NPRM contains considerable discussion on the impact of including BAs and subcontractors under HIPAA. These changes cover modifications to a number of HIPAA sections. BAs and covered entities should review the rule carefully, because while it adds many new responsibilities for BAs, it does not relieve covered entities of all responsibility regarding their BAs.

OCR recognizes that covered entities may have hundreds of BA agreements and will require time to consider how they will implement the changes. For this reason, the office indicates a deadline extension is possible for this provision.

OCR also notes that comments on this section can be in the form of a question.

Disclosure of Student Immunizations to Schools

Schools often have had a difficult time obtaining student immunization information from providers under the HIPAA rules. The NPRM attempts to correct this problem, especially in states that require schools receive this information annually before a child is allowed to enter school. HIM professionals should review this section and provide feedback on whether the new HIPAA language will improve this situation.

Authorizations for Research

Research has also proven to be a difficult issue under HIPAA, and OCR is attempting to correct some of the problems with proposed changes to several sections of HIPAA. HIM professionals that have encountered problems with this issue in the past will be especially interested in reviewing and responding to the proposed changes.

Minimum Necessary

HITECH required HHS to provide guidance on "minimum necessary" this summer. Although OCR included a section in the NPRM, it essentially repeats what is known on the topic and asks questions on what guidance is required.

In the past AHIMA has recommended that the record steward, often an HIM professional, be responsible for determining the minimum necessary to release under the law and maintaining the confidentiality of health records appropriately. Comments at this time will give the profession an opportunity to further define the release of information role.

Resources and Next Steps

The privacy rule affects all covered entities, whether they currently manage health information on paper, in electronic systems, or with a hybrid of the two. The rule has an impact on the organization's relationship with individuals (e.g., patients, clients, subscribers), business associates and subcontractors, and current or future electronic systems.

Once the final rule is issued covered entities and BAs will have 180 days to become compliant, with the exception of updating BA agreements.

The final rules on meaningful use and EHR certification standards were published on July 28 in the Federal Register (www.access.gpo.gov). While there is some additional flexibility in the rules and a number of the quality measurement reporting requirements have been reduced, the final rules largely echo the proposed rules from January.

Note that these rules apply to an incentive program and do not at this time become requirements for all Medicare and Medicaid providers. This will change in a few years as we move into the penalty phase of meaningful use.

AHIMA's ARRA Web page www.ahima.org/advocacy/arrahitech.aspx offers resources on these rules, including an outline of the rules and an analysis. AHIMA's ARRA white paper series, which review both the meaningful use and the certification standards rules, have been updated to reflect the final rules.

The AHIMA Body of Knowledge at www.ahima.org offers a rich resource of interpretation and guidance on the HIPAA privacy and security rules.

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