

# Akerman Practice Update

HEALTHCARE

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## HHS Issues New Rules to Strengthen HIPAA Enforcement with Stiffer Penalties

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On October 30, 2009, the Secretary of Health and Human Services published an interim final rule which greatly increases the amount of civil money penalties that may be imposed for violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations which protect the confidentiality of patient health information. The rule also revised the circumstances under which the Secretary may exercise its authority to impose these penalties.

Congress expressed its clear intent to strengthen enforcement of the HIPAA rules in the Health Information Technology for Economic and Clinical Health Act ("HITECH"), which was enacted as part of the American Recovery and Reinvestment Act of 2009. The new rule was adopted to conform the existing agency enforcement regulations with Congress's intent.

Prior to HITECH, a civil money penalty imposed for each HIPAA violation was limited to \$100, and the total amount that could be imposed on a person for multiple violations of a single requirement or prohibition during a calendar year was limited to \$25,000. In addition to civil penalties, criminal penalties were and still are available.

The new rule changes the civil money penalty scheme by creating categories of violations, as well as tiered ranges of penalty amounts. For a violation where the person did not know, and by reasonable diligence would not have known that he violated a provision, the penalty range starts at \$100. For a violation where



it would have been unreasonable for the covered entity to comply with HIPAA, and the violation was not due to willful neglect, the penalties start at \$1,000. For a violation due to willful neglect (intentional or reckless failure to comply) and the violation was corrected within 30 days of the entity's knowledge of it, the penalties start at \$10,000. And for willful neglect violations that were not corrected within 30 days, the penalty is a flat amount of \$50,000. The maximum amount of a single penalty for any of these categories is the same - \$50,000. Also, the maximum amount for total identical violations in a calendar year remains the same - \$1,500,000. HHS will not impose the maximum penalty in all cases. The amount will be based upon the nature and extent of the violation, the nature and extent of the resulting harm, and the covered entity's history of compliance and financial condition, among other considerations.

**HIPAA Violations Fine Chart**

| Type of Violation  | Minimum Civil Penalty per Violation | Maximum Civil Penalty per Violation | Maximum Total Civil Penalty for Identical Violations During a Calendar Year |
|--|-------------------------------------|-------------------------------------|---|
| The covered entity did not know and by exercising reasonable diligence would not have know of the violation  | \$100                               | \$50,000                            | \$1,500,000   |
| The violation was due to reasonable cause and not to willful neglect   | \$1,000                             | \$50,000                            | \$1,500,000   |
| The violation was due to willful neglect and was corrected during the 30-day period beginning on the first date the covered entity liable for the penalty knew, or by exercising reasonable diligence would have known that the violation occurred | \$10,000                            | \$50,000                            | \$1,500,000   |
| The violation was due to willful neglect and was not corrected within 30 days  | \$50,000                            | \$50,000                            | \$1,500,000   |

The new rule also amends the affirmative defenses that are available to a covered entity faced with the threat of a civil money penalty. Prior to HITECH, a covered entity could assert an affirmative defense if it established, to the satisfaction of the Secretary, that it did not have knowledge of the violation and by exercising reasonable diligence would not have known. Under the new rule, a covered entity will not have this affirmative defense unless it also corrects the violation within 30 days or during the period determined to be appropriate by the Secretary.

The rule becomes effective on November 30, 2009, although the Secretary will receive and consider comments on the rule through December 29, 2009. The rule only applies to violations which occurred after February 18, 2009.

Michael Gennett is Of Counsel in the firm's Miami office and is Board Certified in Health Law by The Florida Bar. He represents both healthcare practitioners and institutional providers, with a focus on healthcare licensing, and Medicare and Medicaid compliance issues.

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