Legal Opinion Letter

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DOJ PROSECUTION GUIDANCE IMPACTS HEALTH CARE BUSINESSES

by
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The Department of Justice ("DOJ") recently issued important guidance on two aspects of the criminal enforcement provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as set forth in 42 U.S.C. § 1320d-6. In a June 1, 2005 memorandum from its Office of Legal Council, the DOJ indicated that it would only prosecute "covered entities" under the section, and it interpreted the "knowingly" element of the offense to mean "with knowledge of the facts that constitute the offense."[1]

Under HIPAA, covered entities include health plans, health care clearinghouses, health care providers that transmit certain information electronically, and Medicare prescription drug card sponsors. 42 U.S.C.S. §§ 1320d-1(a), 1395w-141(h)(6) (2005). The Administrative Simplification subtitle of the Act provides for standards and requirements applicable to these entities aimed at facilitating the electronic exchange of information, while safeguarding the privacy of individuals whose information is collected.

Section 1320d-6 provides for fines and/or imprisonment of "[a] person who knowingly and in violation" of the Administrative Simplification subtitle of HIPAA (1) uses or causes to be used a unique health identifier; (2) obtains individually identifiable health information; or (3) discloses individually identifiable health information. Penalties vary with the egregiousness of the offense. At the high end, a fine of $250,000, a prison sentence of ten years, or both, may be imposed when the violation occurs "with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm." 42 U.S.C.S. § 1320d-6(b) (2005). If the violation occurs under false pretenses, the maximum fine is $100,000 and the prison sentence is limited to five years. *Id*. In all other cases the fine and prison term cannot exceed $50,000 and two years, respectively. *Id*.

The DOJ opinion limited the scope of potential defendants who may be directly prosecuted under § 1320d-6, but acknowledged the possibility of reaching others under various theories of indirect liability. DOJ Memorandum, pt. IIA. Prior to this guidance, at least some federal prosecutors had deemed the scope of the provision to be wider. In fact, the only criminal conviction under HIPAA involved an employee of a covered entity and not the entity itself. In August 2004, Richard Gibson, a technician at a cancer clinic in Seattle, pled guilty to a criminal violation of HIPAA and was sentenced to 16 months in prison. Press Release, United States Attorney's Office Western District of Washington (Aug. 19, 2004), http://www.usdoj.gov/usao/waw/press_room/2004/aug/gibson.htm. He had been charged under §1320d-6 for using a patient's name, date of birth, and social security number to obtain several credit cards that he used to

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[1]Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6, Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Council, to the General Council, Department of Health and Human Services and the Senior Counsel to the Deputy Attorney General (June 1, 2005), http://www.usdoj.gov/olc/hipaa_final.htm [hereinafter DOJ Memorandum].

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make over $9,000 in purchases. *Id*. Under the recent guidance, persons such as Mr. Gibson would not be subject to prosecution.

According to the DOJ opinion, covered entities may be directly prosecuted and, if the covered entity is not an individual, general principles of corporate criminal liability would determine the entity's liability. DOJ Memorandum, pt. IIA. These general principles usually entail that a corporation may be held liable for acts of its agents if three conditions are met: (1) the acts were performed within the scope and nature of the agent's employment; (2) the acts were done, at least in part, to benefit the corporation; and (3) intent can be imputed to the corporation. Kendel Drew and Kyle A. Clark, *Twentieth Survey of White Collar Crime: Corporate Criminal Liability*, 42 AM. CRIM. L. REV. 277, 279 (Spring, 2005).

The opinion also states that certain individual directors, officers, and employees of covered entities may additionally be prosecuted in line with general principles of corporate criminal liability. DOJ Memorandum, pt. IIA. Generally, a director or officer of a corporation is not liable for an offense of the corporation unless he or she participated in the illegal act as a principal, aider, abettor, or accessory. 18B AM. JUR. 2D. CORPORATIONS § 1893. However, as the DOJ opinion mentioned, in limited circumstances, an individual in a managerial role may be liable even without direct involvement in the violation.

This narrowing of the prosecution scope of HIPAA's criminal enforcement provision places additional pressure on covered entities to take aggressive compliance measures. Not only are the entities now the primary focus of possible prosecutions under the provision, the limitation of the potential for individual criminal liability reduces the pressure on employees for strict compliance with HIPAA. Thus, it will be all the more important for covered entities to ensure appropriate on-going training on HIPAA requirements, maintenance of internal compliance policies, and active enforcement of them in the event of violations. Moreover, such compliance measures would assist a covered entity in showing that an employee was not acting within the scope of employment, in the event of prosecution based on an employee's actions.

While non-covered entities no longer need to worry about being prosecuted directly for a HIPAA criminal violation, care is still required to avoid potential indirect criminal liability. Conduct not prosecutable directly under § 1320d-6 may be reached, for example, under the federal aiding and abetting statute and the conspiracy statute. Under the former, a person may be punishable as a principal for aiding, abetting, counseling, commanding, inducing, procuring, or otherwise willfully causing the commission of an offense. 18 U.S.C.S. §2 (2005). Under the conspiracy statute, a person may be punished when two or more persons conspire to commit a criminal offense and at least one of them acts to further the goal of the conspiracy. 18 U.S.C.S. § 371 (2005).

Employees working for a covered entity, as well as parties engaging in business with covered entities, must consider whether their actions could subject them to liability under one of these theories of indirect liability. Such businesses include suppliers — such as pharmaceutical, biological, and device manufacturers — as well as service providers to covered entities. Thus, these entities must continue to be sensitive to HIPAA's requirements.

Although the DOJ opinion restricted the scope of persons subject to direct prosecution for violations of HIPAA, it made it easier for prosecutors to bring charges against those who qualify as covered entities. The DOJ opinion interpreted the "knowledge" requirement of §1320d-6 to require that the government prove only that a defendant had knowledge of the facts that constitute the offense. This guidance answered a question of whether the provision also required proof that the defendant knew that the act violated the law, which is the standard that must be met to impose penalties under HIPAA's civil enforcement provisions. Thus, the standard specified by the DOJ for §1320d-6 would make it easier for the government to establish the knowledge element under the Act's criminal provisions compared to its civil provisions. However, DOJ opinions are not, of course, binding on federal judges; a judge interpreting the same language may arrive at a different conclusion. Even if federal judges accept the comparatively low standard for the knowledge element specified in the DOJ opinion, the likely overall effect of the opinion is to limit the number of criminal convictions under HIPAA by focusing direct prosecutions on covered entities.

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