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February 18, 2009

STIMULUS BILL CONTAINS THE HITECH ACT AND OTHER KEY HIT PROVISIONS

Yesterday, amidst considerable fanfare, President Obama signed into law a \$787 billion economic stimulus package that includes between \$19 and \$24 billion for Health Information Technology (HIT). At the signing ceremony here in Denver, Obama said that digitizing the health records of Americans was "long overdue" and would help eliminate duplication and save billions of dollars.

While estimates vary as to the rate and timing of expenditure for these funds, there is no doubt that this legislation will accelerate the nation's movement towards a National Health Information Network, grounded on a lowest common denominator of consistent federal standards and policies.

As noted by the Business Roundtable, "The inclusion of health IT in the stimulus plan means that our health system has officially entered the digital age and that health care providers will receive a down payment to help them effectively and rapidly adopt the technology, thereby reducing fatal medical errors and improving the quality of health care for Americans while lowering costs and creating jobs."

The key provisions of this HIT initiative are contained in three separate Titles of the American Recovery and Reinvestment Act (the "Act"). This HRO Alert identifies these three titled elements of the initiative, and highlights their principal provisions. In the coming weeks, we will issue additional alerts analyzing each of the three initiatives in greater detail, with an emphasis on those provisions with near term impact on healthcare providers, health information exchanges, and state government.

Title XIII – The Health Information Technology for Economic and Clinical Health Act

This Act, also called the HITECH Act, is the centerpiece of the Obama administration's HIT initiative, and is divided into four principal sections, as follows:

- Part A – re-establishes the Office of the National Coordinator for Health Information Technology (ONCHIT), this time as a sub-agency of the Department of HHS, with the National Coordinator reporting to the Secretary. ONCHIT's statutory responsibilities will include: standards development; oversight of mandated use of such standards by federal agencies and voluntary use by private entities; oversight of and interaction with new federal HIT Standards and HIT Policy Committees; and support of the development and certification of "qualified electronic health record technology." This Part also

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sets forth a statutory framework for the overall coordination of federal activities with uniform adopted standards, including a requirement that certain federal agencies require, in contracts with healthcare providers, health plans and other health insurance issuers, that HIT upgrades conform to standards and implementation specifications developed pursuant to the Act.

- Part B – directs coordination of testing of HIT standards and implementation specifications with the NIST; directs the NIST and the NSF to establish a grant-funded research program to assist universities (and others) to establish Multidisciplinary Centers for Healthcare Information Enterprise Integration and certain other HIT related research to be coordinated with the National Information Technology Research and Development Program.
- Part C – establishes new financial incentive programs to support the adoption and use of HIT, and authorizes appropriations “as necessary” for each of the fiscal years 2009 through 2013. The Secretary is directed to spend these appropriated funds through various federal agencies, including ONCHIT, HRSA, AHRQ, CMS, CDC and the Indian Health Service to support: development of the architecture for nationwide electronic exchange; development and adoption of “certified HER technology” (defined to require interoperability) by certain providers not otherwise eligible for such support under the Medicare or Medicaid Programs; training and dissemination of information on best practices; telemedicine infrastructure; interoperability of clinical data repositories; promotion of privacy and security; and expansion of PHS use of HIT. Of particular note:
 - The Secretary of HHS to support the development of HIT Regional Extension Centers, to be affiliated with US-based nonprofit organizations that apply for and are awarded financial assistance under this Part of the Act. This financial assistance may be awarded for up to four years and may not exceed 50 percent of the capital and annual operating funds required to create and maintain the Center. (The Secretary is directed to publish a draft description of this program within 90 days.)
 - The Secretary of HHS is directed to establish a program to provide planning grants and implementation grants to a state or “qualified state designated entity” for the purpose of advancing the interoperable use of EHRs across a broad list of more specific goals. These grants will require matching cash or in-kind contributions from the host state as follows: in 2011, \$1 state to \$10 federal; in 2012, \$1 state to \$7 federal; and in 2013 and thereafter, \$1 state to \$3 federal. The Secretary has discretion to require a state match for grants awarded prior to 2011.
 - ONCHIT may award competitive grants to states (and Indian Tribes) to seed “certified EHR Technology loan funds” for the purpose of facilitating the purchase and utilization of “certified EHR technology.” These grants will require private or state matching funds of not less than \$1 for every \$5 of federal funds.
- Part D – established “improved” privacy and security provisions and will be the subject of a separate HRO Alert over the next few weeks. Briefly, Part D provides for the following:
 - Extends certain HIPAA privacy rules to “business associates” and invokes civil and criminal penalties for violations,

- Extends certain HIPAA security and penalty provisions to “business associates” and invokes civil and criminal penalties for violations,
- Establishes new requirements for “breach notification,”
- Prohibits (with limited exceptions) the sale of “electronic health records” or “protected health information,”
- Redefines the term “healthcare operations” for purposes of determining what disclosures are statutorily “authorized,”
- Establishes “temporary” breach notification rules for vendors of “personal health records,”
- Establishes that RHIOs and other HIEs are “business associates” and must enter into BA Agreements with “covered entities,”
- Authorizes State AGs to sue individuals to enforce HIPAA medical privacy and security rules, and
- Reaffirms the application of HIPAA state law preemption provisions to the Act.

Title IV – Medicare and Medicaid Health Information Technology; Miscellaneous Medicare Provisions

Regarding Medicare. Title IV of the Act provides new Medicare incentives for both hospitals and “eligible professionals” to adopt and use “certified HER technology,” and will be the subject of a separate HRO Alert in the coming weeks. We note that, as with the HITECH Act, “certified HER technology” is defined to require interoperability.

Regarding Physicians and Certain Other Professionals. There are several current legislative and administrative initiatives to promote the use of HIT and EHRs in the Medicare program. The Medicare Modernization Act of 2003 established a timetable for CMS to develop e-prescribing standards. For example, CMS is administering a three-year, pay-for-performance demonstration in four states (AR, CA, MA, and UT) to encourage physicians to adopt and use EHRs. Physicians participating in this Medicare Care Management Performance demonstration receive bonus payments for reporting clinical quality data and meeting clinical performance standards for treating patients with certain chronic conditions.

Briefly, Title IV provides for the following:

- Medicare – For “eligible professionals” who show “meaningful use” of an EHR in 2011 or 2012 provides for “not to exceed” incentive payments of between \$15,000 and \$18,000 for the first payment year, and declining amounts in payment years two through five; provides no payment incentives after 2016; and does not provide incentive payments to eligible professionals who first adopt an EHR after 2014. This incentive provision excludes “hospital-based eligible professionals.” Incentive payments would be increased by 10 percent if the provider predominately serves beneficiaries in any area designated as a health professional shortage area. Payment adjustments (read reductions) for eligible professionals not demonstrating meaningful use of an EHR will begin in 2015. Special rules are established for “eligible professionals” affiliated with “qualified Medicare Advantage organizations.”

Regarding Certain Hospitals. Medicare pays acute care hospitals using a prospectively determined payment for each discharge. These payment rates are adjusted annually based in part upon the projected increase in the hospital Market

Basket (MB) index. Starting in 2007, hospitals that did not submit certain required quality data have had their applicable MB percentage reduced by two percentage points. Currently, these payments are not affected by the adoption (or failure to adopt) HER technology.

- Medicare – Beginning in 2011, incentives are established for "eligible hospitals" that are "meaningful EHR users." Briefly, each "qualified hospital" will receive an incentive calculated as the sum of a base amount (\$2,000,000), added to its "discharge related payment" and then multiplied by its Medicare share. These payments will be reduced over a four year transition period (using the by now familiar formula of 100 percent - 75 percent - 50 percent - 25 percent). Hospitals qualifying for incentive payments will be listed on the CMS website. On the flip side, starting in 2015, any "eligible hospitals" failing to turn in the required quality data will be subject to a 25 percent (not 2 percent) reduction in their annual update. Late amendments added critical access hospitals (CAHs) to the list, with a slightly different (more generous) formula for incentive payments.

Regarding Medicaid. Title IV of the Act amends the Medicaid Program to establish incentive payments to encourage the adoption and use by Medicaid providers of "certified EHR technology" in this case defined to mean compatible with state or federal administrative management systems. The provisions make fully reimbursable by the federal government any state spending for payments to providers for adoption and operation of certified EHR technology, including 90 percent of the state costs in administering the program, and make appropriations for such program.

Title IV of the Act also directs the Secretary of HHS to establish a grant program to enhance the meaningful use of certified electronic health records in nursing facilities, including payment incentives for meaningful use of certified EHR technology, and makes appropriations for such program.

Title VI – Broadband Communications

Title VI of the Act requires the National Telecommunications and Information Administration (NTIA) to develop and maintain a map showing where broadband service is deployed and available in each state and to make such map publicly available.

Perhaps of more interest, Title VI also provides for grants for wireless deployment and broadband deployment; requires the NTIA to develop and maintain a website to make publicly available information about such grants, and sets forth provisions concerning grant requirements, applications, and selection. It also requires reports from the NTIA, and requires the Federal Communications Commission (FCC) to report on a national broadband plan.

Upcoming HRO Alerts

Over the coming weeks, we will be developing additional HRO Alerts providing analysis, in greater depth, of some of the key provisions of Titles IV, VI and XIII of the President's stimulus bill. If you wish to receive an electronic copy of these alerts, you may do so by providing your e-mail address to Eric.Schwartz@hro.com or Michelle.Mulrooney@hro.com.

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