



OCR Announces Intention to Move Forward With Development of Methodology to Distribute Enforcement Funds to Victims of HIPAA Violations

Prepared by:
Lynn Sessions and Kathryn Carey
Baker & Hostetler LLP

LORMAN[®]

Published on www.lorman.com - September 2018

OCR Announces Intention to Move Forward With Development of Methodology to Distribute Enforcement Funds to Victims of HIPAA Violations

©2018 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ✓ Unlimited Live Webinars - 120 live webinars added every month
- ✓ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ✓ Videos - More than 1300 available
- ✓ Slide Decks - More than 2300 available
- ✓ White Papers
- ✓ Reports
- ✓ Articles
- ✓ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

OCR Announces Intention to Move Forward With Development of Methodology to Distribute Enforcement Funds to Victims of HIPAA Violations

*Written by **Lynn Sessions** and **Kathryn Carey** – 6/15/18*

The Office for Civil Rights (OCR) updated its agenda, outlining proposed and final rules as well as pre-rule document releases for 2018. A notable, and highly anticipated, advance notice of proposed rulemaking included on the agenda indicates OCR will seek comments on establishing a way to distribute funds collected from Health Insurance Portability and Accountability Act (HIPAA) enforcement actions to individuals harmed by the underlying incident. This would fulfill a long-awaited and overdue requirement included in the Health Information Technology for Economic and Clinical Health (HITECH) Act, which required OCR to issue regulations about this methodology within three years of HITECH's 2009 enactment date. The agenda indicates this advanced notice of proposed rulemaking will be released sometime in November 2018.

This announcement is quite promising, but leaves many unanswered questions in its wake, especially as to the impact

on covered entity healthcare organizations and business associates. Such an undertaking will present a number of challenges, including how to define “harm” to an individual for purposes of receiving part of any financial settlement. The current regulations do not give much guidance on defining who has suffered a harm and how to financially value that harm. Oftentimes, HIPAA violations involve only medical information, of varying degrees of sensitivity. Very rarely can individuals prove any actual harm from these incidents. Instead, with medical diagnoses and treatment information, any harm is highly personal, speculative and difficult to value using any sort of standard that would be necessary to fairly distribute and compensate victims of data breaches, absent a finding by a jury. Any methodology for disbursement of settlement funds would need to account for the potential harm an individual whose HIV status was released would suffer, and how that relates to the potential harm suffered by an individual struggling with infertility. To have all victims share equally is another option, but that poses its own challenges and questions of fairness.

Additionally, it is hard to believe that this rulemaking and proposed methodology will not have some impact on the size of fines and settlements imposed on covered entities and business associates from OCR enforcement. While arguably not the intention of the law or proposal, it certainly offers a different

lens for OCR and the public to see these enforcement actions through.

OCR's agenda is, of course, silent on how these challenges may be addressed. Should the proposed rulemaking move forward at the end of this year, it will be interesting to see the proposal from OCR, as well as the comments from members of the healthcare community on said proposal. The impact could pit healthcare organizations against the patients and health plan members they serve in yet another arena, and make HIPAA penalties arising from data breaches more attractive to OCR and the general public.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.