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## OCR HIPAA PRIVACY RULE ENFORCEMENT STATISTICS & CRIMINAL CONVICTIONS HIGHLIGHT POTENTIAL HOT SPOTS FOR COMPLIANCE & REMIND HEALTH CARE PROVIDERS, HEALTH PLANS & CLEARINGHOUSES OF IMPORTANCE OF COMPLIANCE DILIGENCE

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Statistical data recently posted by the Department of Health & Human Services (HHS) Office of Civil Rights (OCR) provides insights for health care providers, employer sponsored and other health plans, and health care clearinghouses that are covered entities under the Privacy Standards promulgated under the Health Insurance Portability & Accountability Act (HIPAA) about the civil enforcement activities of OCR including areas of noncompliance uncovered in OCR Privacy Complaint investigations commonly resulting in corrective action.

Under HIPAA, covered entities risk criminal prosecution and civil sanctions if personal health information (PHI) is improperly used, accessed or disclosed, proper policies and practices are not established and administered to safeguard PHI from inappropriate access or destruction, rights guaranteed to individuals that are the subject of PHI are not honored, or other HIPAA requirements are not met. Covered entities that are health care providers or insurers that violate or employ employees or agents that violate these requirements also frequently face licensing board, peer review or other sanctions or reporting obligations. Although HIPAA requires covered entities to establish compliance policies and train workforce members and contract with business associates to promote compliance by their workforce members, employees and other business associates working in the work force of covered entities or other related parties are the most common sources of violations. At the same time, court decisions from 2007 document that the investigation and discipline of employees, business associates or other workforce members in connection with known or suspected Privacy Rule or other privacy violations must be carefully managed to minimize the risk that the investigation or discipline will create employment, contractual, privacy or other litigation brought by the investigated or disciplined workforce member.

According to data posted by OCR last week, impermissible uses and disclosures, inadequate safeguards, access, minimum necessary and notice violations ranked in order were the top five categories of Privacy Rule violations that necessitated corrective action by covered entities among the cases investigated and closed by OCR in 2007 under the HIPAA Privacy Rule. The top four of these categories of violations also occupied the same rank order among the cases OCR investigated and closed in its 2003-2006 enforcement years. The consistency of this ranking suggests that these are areas of compliance that covered entities should consider devoting special attention in their HIPAA Privacy Rule audit and compliance efforts.

The data about categories of violations resulting in corrective action is part of the statistical data that the OCR is providing about its HIPAA Privacy Rule enforcement activities in a new enforcement data section that OCR added to its Compliance and Enforcement Web Site on May 9. In addition to summary information about categories of violations, the new enforcement data section located at [www.hhs.gov/ocr/privacy/enforcement/data.html](http://www.hhs.gov/ocr/privacy/enforcement/data.html) also shares other statistics about several aspects of OCR's health information enforcement program including:

- Charts showing state-specific case investigation results;
- Calendar-year enforcement-results graphs and charts;

- A Calendar-year graph showing complaint receipts;
- Yearly variation in the issues in cases resolved through corrective action.

A review of these statistics reveals a consistent rise in both the number of HIPAA Privacy Rule complaints filed with OCR and a rise in the number of investigations of such complaints resulting in corrective action.

OCR's posting of its civil enforcement statistics follows the announcement last by the Department of Justice of its successful prosecution of a 25-year old Trumann, Arkansas licensed practical nurse, Andrea Smith, for violation of the Privacy Rule. Smith presently faces sentencing to up to 10 years in Federal prison, fines of up to \$250,000, or both after pleading guilty to wrongful disclosure of individually identifiable health information (PHI) for personal gain and malicious harm in violation of the Privacy Rules. The April plea agreement by Smith follows the prior HIPAA criminal conviction of Ferando Ferrer, Jr., and the guilty pleas of his co-conspirator, Isis Machado. In January 24, 2007, a Federal jury found Ferrer, the owner of a health claims administration company, guilty of 1 count of wrongful disclosure of PHI in violation of HIPAA and various other crimes after Ferrer and a Cleveland Clinic employee, Isis Machado, misappropriated the personal data of more than 1,100 patients of the Cleveland Clinic then used the misappropriated data to submit more than \$7 million in fraudulent Medicare claims. Machado, who was Ferrer's cousin, pled guilty on January 12, 2007 to conspiring with Ferrer to steal and misuse the data and testified against Ferrer at trial. The Justice Department also previously secured a guilty plea to violations of HIPAA from David Gibson, a clinic employee who admitted to using misappropriated charge card and other patient information to purchase items for his personal benefit.

Although criminal prosecutions under HIPAA to date remain infrequent, Federal officials caution covered entities and their employees and business associates against underestimating the Federal government's commitment to the enforcement of the HIPAA Privacy Standards. OCR officials have reported informally that more that it has sent more than 400 of the Privacy complaints for review by the Justice Department since the Privacy Rule took effect. While very few complaints have resulted in criminal prosecution to date, those that have provide mounting evidence both that OCR is willing to refer complaints to the Justice Department and that the Justice Department is willing to prosecute individual employees and business associates of covered entities for violations of HIPAA at least where the violation involves a misuse for personal benefit. This mounting data also reinforces the importance of covered entities taking prompt and appropriate action to prevent and redress violations. Because the HIPAA crimes involved in the criminally prosecuted cases thus far all involved felony violations by employees or agents using access granted by the covered entity for personal benefit, the covered entities employing these individuals incurred exposure to criminal liability under the Federal Sentencing Guidelines for the criminal activities by their former employees, in addition to civil claims brought by patients and others whose personal information was misappropriated.

Coupled with recent announcements by the Justice Department of HIPAA Privacy Rule criminal prosecutions and convictions, the OCR enforcement statistics posted last week highlight the continuing need for health care providers, health plans and healthcare clearinghouses that are covered entities under the HIPAA Privacy Rule to continue to exercise diligence in their Privacy Rule compliance efforts. In light of these continuing enforcement activities, health care providers, health plans, and health care clearinghouses should continue to monitor the adequacy not only of their written HIPAA privacy policies but also their operationalization and enforcement of compliance with these policies and those of the employees and business associates working for them.

For assistance with monitoring, assessing, administering or defending the adequacy of your organization's HIPAA or other compliance policies and controls, to arrange HIPAA or other compliance training, or for help with other compliance and risk management concerns, please contact Cynthia Marcotte Stamer at [cstamer@solutionslawyer.net](mailto:cstamer@solutionslawyer.net), 972-419-7188, or Heidi Kocher at [hkocher@solutionslawyer.net](mailto:hkocher@solutionslawyer.net), 972-419-7107.

#### *About Cynthia Marcotte Stamer & Heidi Kocher*

**Cynthia Marcotte Stamer**, P.C., a member of the law firm of Glast, Phillips & Murray, P.C, has more than 20 years experience advising and representing health care providers, health plans, health information technology providers, and other health industry clients about health care operations, reimbursement, regulatory and public policy, risk management, human resources, credentialing, technology, privacy, and other concerns. Her clients include hospitals, physicians, clinics, IPAs, PHOs, skilled nursing facilities, assisted living and home health, rehabilitation, imaging and other diagnostic services providers, DME, physician practice management companies and other management services organizations, health care technology, and other health industry clients. Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on health care reimbursement and other health industry operational,

regulatory, and public policy matters.

Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group and known for her practical, direct problem-solving approach, Ms. Stamer also applies her extensive industry experience in numerous professional and industry leadership roles. In addition to her ABA Health Law Section involvement, Ms. Stamer serves on the editorial advisory boards of and is a contributing author for the Bureau of National Affairs and other publications, served as the Compliance Committee Chair and a member of the Board of the National Kidney Foundation of North Texas Board of Directors, serves on the continuing education and conference planning committees of the ABA Joint Committee On Employee Benefits (JCEB), the HFMA Lone Star Chapter, TAHFA, the IRS TEGE Advisory Council, and numerous other health industry groups. She also is the past-president of the Alliance for Health Care Excellence, and founder of its Health Care Heroes and Patient Empowerment Programs. She also is active in numerous other industry organizations including the American Health Lawyers Association, the Medical Group Management Association, the Alliance for Healthcare Excellence, the Dallas Bar Association Health Law Section,

Ms. Stamer also is a widely published author and highly sought-after speaker nationally and internationally sought out for her strategic knowledge and insights on operational and technical health care risk management and operational concerns, she frequently conducts workshops and other training activities on privacy and other compliance matters for health care providers, health plans, employers and other organizations. She also is the author of numerous highly regarded publications on HIPAA, FERPA, FACTA, FCRA and other privacy and data security rules including "Privacy and Securities Standards - A Brief Nutshell" published in the BNA Journal of Tax Management & Compensation, "Chapter 35, Medical Privacy" in ERISA Litigation (BNA), "Chapter 8, Other Liability-Tort & Regulatory," in E-Health Business and Transactional Law (BNA), "Cybercrime and Identity Theft: Health Information Security Beyond HIPAA," and various other privacy related publications for the American Bar Association, "Keeping Lists in Line with the Law" and "Establishing a Data-Protection Policy" published by Western Association News, workshops on HIPAA and other privacy concerns in the public health, health plan, employer and other contexts presented to organizations such as the Association of State & Territorial Organizations (ASTHO), the Los Angeles Department of Public Health, and many others. A columnist for MD News and recurring author for various other health industry publications, Ms. Stamer's insights have been quoted by the Wall Street Journal, the Bureau of National Affairs (BNA), HIPAA Comply, Private Payer News, Modern Health Care, Managed Healthcare Executive, Health Leaders, Caring for The Elderly Magazine, For The Record, the Dallas Morning News, Spencer Publications, the Dallas Business Journal, the Houston Business Journal, and a various other national and local publications. Ms Stamer is the author of 100s of publications on health industry matters including numerous highly regarded works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, the Medical Group Management Association, Government Institutes, Inc., Decision Health and others.

**Heidi Kocher** has over 10 years experience in healthcare law, having represented many kinds of healthcare providers, from small DME companies to large national health care organizations. Prior to returning to private practice, Ms. Kocher was in-house at one of the largest national hospital companies. Her wide-ranging experience includes advising corporate and individual clients on the myriad federal and state fraud and abuse laws, such as Stark, the Anti-kickback statute, and False Claims Act, structuring mergers, acquisitions, joint ventures, employment agreements, and other deals, developing compliance programs and plans, interfacing with fiscal intermediaries, carriers, and other payers, resolving reimbursement issues, conducting investigations, assisting with preparing for and responding to JCAHO surveys, obtaining advisory opinions from the OIG, and representing providers in relation to federal and state agencies. She has worked with hospitals, physicians, mid-level practitioners, pharmacies, DME companies, LTACs, SNFs, home health and hospice agencies, inpatient rehab facilities, clinical laboratories, as well as allied health practitioners. She is active in the Health Care Compliance Association, and has written numerous articles and provided training on various healthcare law topics.

For more information about Ms. Stamer and Ms. Kocher, a listing of selected publications and other health industry links, information about workshops and other training and other health industry information and resources or other details about Cynthia Marcotte Stamer, P.C. and Glast, Phillips & Murray, P.C., see [CynthiaStamer.com](http://CynthiaStamer.com) or contact Ms. Stamer or Ms. Kocher.

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