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Health IT on the Move: Logjam on Patient Privacy Breaks

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Health information technology (health IT) – such as the adoption of electronic health records that can be accessed and shared electronically, e-prescribing (where doctors can prescribe pharmaceuticals electronically), and electronic test ordering – can prevent medical errors, increase the quality and effectiveness of care, and lower costs. Federal legislation promoting the adoption and use of health IT has been slowed down to address concerns that there may not be adequate patient privacy protections. However, the privacy logjam has finally broken and health IT legislation may well pass in the next month or two.

Almost a year ago, on June 27, 2007, the Senate Health, Education, Labor, and Pensions (HELP) Committee passed Senator Kennedy's Wired for Health Care Quality Act (S. 1693). Due to a number of concerns, especially Senator Leahy's charge that the bill does not adequately protect patient privacy, the bill has not been brought to the Senate floor for a vote. But last week Senators Kennedy and Leahy reportedly reached agreement on privacy language. Apparently, there are still some other holds on the legislation. As soon as those remaining issues are resolved, the bill is expected to be considered on the Senate floor – possibly under expedited procedures. However, Senator Kennedy's recent hospitalization may delay this schedule.

On the House side, Energy and Commerce Chairman Dingell is likely to release a discussion draft of his health IT legislation this week. The discussion draft is rumored to have broad bipartisan support and is expected to move through the legislative process quickly. The bill will likely include many of

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the concepts that are in the Kennedy bill, as well as comprehensive patient privacy and data security provisions.

The bill that was passed by the Senate HELP Committee would:

- require the federal government to create a strategic plan for the use of a nationwide interoperable health IT system;
- provide federal funding (three matching grants) to promote the use of health IT;
- speed the development of standards for health IT so that systems and devices can communicate with each other;
- develop and utilize quality and efficiency measures; and
- provide technical assistance and best practice support.

The privacy provisions would reportedly:

- require the Secretary of Health and Human Services to submit a report to Congress recommending privacy and security standards for personal health records;
- ensure that patients have electronic access to their own medical records;
- require providers to disclose privacy policies;
- eliminate loopholes that currently allow certain health care providers to use or disclose patient health records for marketing purposes;
- require that patients be notified if the privacy of the records has been breached; and
- require entities to demand privacy protections when work is outsourced.

There are other pieces of federal legislation moving in the next month that also could include Health IT language. The Medicare package, which is expected to pass in June, might require physicians to e-prescribe in the Medicare program. Congressional leadership is negotiating how to pay for the Medicare package which will reportedly cost \$15 billion-\$19 billion. Because the e-prescribing provisions would save an

estimated \$3 billion, they present an attractive option. But they have hit their own privacy snag. Privacy advocates, such as the Coalition for Patient Privacy, are asking Congress not to pass the provisions unless they include a minimum of 11 patient privacy protections.

Manatt will continue to monitor the status of these bills.

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