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Washington, DC 20548

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August 9, 2010

The Honorable Kathleen Sebelius
Secretary of Health and Human Services

Subject: *Models for the Distribution of Civil Monetary Penalties*

Dear Madam Secretary:

The Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act of 2009, strengthened requirements for the protection of health information and included provisions to improve enforcement.¹ Among other things, it required the Secretary of Health and Human Services to establish a methodology under which an individual who is harmed by a violation of requirements related to the privacy and security of health information may receive a percentage of any civil monetary penalty collected or of any monetary settlement.² It also required the Comptroller General to submit recommendations for such a methodology to the Secretary.³ In response to this requirement, we identified several models that may inform the design of a methodology for the distribution of civil monetary penalties or monetary settlements to aggrieved individuals. These models are discussed below.

BACKGROUND

In 1996, Congress passed the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which contained provisions to improve the efficiency and effectiveness of the health care system by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.⁴ To this end, these

¹ Pub. L. No. 111-5, div A., title XIII, §§ 13400-13411, 123 Stat. 115, 226, 258-276 (Feb. 17, 2009). The HITECH Act is located at title XIII of division A and title IV of division B of the American Recovery and Reinvestment Act.

² Sec. 13410(c)(3), 123 Stat. at 272.

³ Sec. 13410(c)(2), 123 Stat. at 272.

⁴ Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936, 2021-2034 (Aug. 21, 1996) (adding new sections 1171 through 1179 to the Social Security Act, *codified at* 42 U.S.C. §§ 1320d-1320d-7 (2006)).

“administrative simplification” provisions required the Secretary of Health and Human Services (HHS) to adopt national standards governing the privacy and security of individually identifiable health information.⁵ The Privacy Rule generally prohibits covered entities⁶ from using or disclosing protected health information unless authorized by the patient or the rule.⁷ The Security Rule requires covered entities to maintain administrative, technical, and physical safeguards to ensure the confidentiality, integrity, and availability of electronic protected health information; to protect against any reasonably anticipated threats or hazards to the security or integrity of such information; and to protect against any reasonably anticipated unauthorized uses or disclosures of such information.⁸ The Privacy Rule became effective for most covered entities in 2003 and the Security Rule became effective in 2005. In addition, HIPAA provided for the imposition of criminal and civil monetary penalties for violations of the HIPAA standards.⁹ Civil monetary penalties were limited to \$100 for each violation, and the total amount imposed on a person for all violations of an identical requirement or prohibition during a calendar year could not exceed \$25,000. HIPAA also imposed substantive limitations on the Secretary’s authority.¹⁰ For example, penalties could not be imposed for violations due to reasonable cause and not willful neglect that were corrected within 30 days of discovery. There is no private right of action for violations of HIPAA standards.¹¹

The HITECH Act made a number of changes to the HIPAA framework for the protection of health information, including the provisions related to civil monetary penalties. Among other things, the Act establishes categories of violations that reflect increasing levels of culpability, and prescribes tiers of increasing penalty amounts that establish, by reference, the range of the Secretary’s authority to impose civil monetary penalties.¹² As a result, civil monetary penalties range from \$100 to \$50,000 per violation with the total penalties for all violations within a calendar year ranging

⁵ Section 262 directed the Secretary to develop standards to protect the security of health information. Sec. 262(a), 110 Stat. at 2025-26 (*codified at* 42 U.S.C. § 1320d-2(d) (2006)); section 264 required the Secretary to promulgate standards relating to the privacy of individually identifiable health information if legislation imposing such standards was not enacted within a certain time frame. Sec. 264(c)(1), 110 Stat. at 2033 (*codified at* 42 U.S.C. § 1320d-2 note (2006)). Congress did not pass health privacy legislation within the requisite time frame.

⁶ Covered entities include health care providers who transmit health information in electronic form in covered transactions, health plans, and health care clearinghouses. 45 C.F.R. § 160.103 (2009).

⁷ 45 C.F.R. § 164.502 (2009).

⁸ 45 C.F.R. § 164.306 (2009).

⁹ 42 U.S.C. §§ 1320d-5(a), d-6(a) (2006). The criminal penalties apply to those who knowingly, and in violation of the “administrative simplification” provisions of HIPAA, use a unique health identifier or obtain or disclose individually identifiable health information.

¹⁰ 42 U.S.C. § 1320d-5(b)(2) (2006).

¹¹ *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006); *Johnson v. Quander*, 370 F. Supp. 2d 79, 100 (D.D.C. 2005), *aff’d*, 440 F.3d 489 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 945 (2006).

¹² Sec. 13410(d), 123 Stat. at 272-74 (to be codified at 42 U.S.C. § 1320d-5).

from \$25,000 to \$1,500,000.¹³ In addition, the civil monetary penalty provisions, as amended, require the Secretary to base a determination of the amount of the penalty on the nature and extent of the violation and the nature and extent of the harm resulting from the violation.¹⁴

The HITECH Act provided for those adversely affected by privacy and security violations to share in the civil monetary penalties or monetary settlements obtained by the Secretary. However, the Act did not prescribe the amount or percentage of the civil monetary penalties to be provided to affected individuals. Rather, the Act required the Secretary to establish by regulation a methodology under which an individual harmed by offenses punishable under the privacy provisions of the HITECH Act or the HIPAA provisions related to privacy and security may receive a percentage of any civil monetary penalty or monetary settlement collected.¹⁵ The HITECH Act directed the Comptroller General to submit recommendations to the Secretary for such a methodology. Because the sharing of civil monetary penalties with harmed individuals is uncommon, we looked broadly at models for distributing amounts to aggrieved individuals to inform the design of a methodology in this context. We also reviewed treatises and other legal sources that discussed theories of damages. Although privacy laws provide examples of distribution methodologies, we did not focus on those substantive matters and include them for illustrative purposes only.

DISCUSSION

We identified three models that the Secretary may find instructive when establishing a methodology for distributing a percentage of the civil monetary penalty or monetary settlement collected to an individual harmed by a violation of applicable statutory and regulatory provisions. These models involve distribution of amounts based on individualized determinations of harm, distribution of fixed amounts established by law that vary little among the aggrieved, and distribution of amounts based on a combination of those two methods. These models are discussed below.

Individualized Determination Models

Individualized determinations of harm occur in private civil actions. In such actions, the plaintiff typically has the burden of providing evidence that he was harmed, that the defendant is liable, and the nature and extent of harm suffered—that being the

¹³ *Id.*

¹⁴ *Id.* As amended in 2006, HHS regulations provide that the Secretary may consider as aggravating or mitigating factors the nature of the violation; the circumstances, including consequences of the violation (such as physical or financial harm); and any history of compliance or noncompliance by the covered entity, among other things. 45 C.F.R. § 160.408 (2009).

¹⁵ Sec. 13410(c)(3), 123 Stat. at 272. Subject to these regulations, civil monetary penalties or monetary settlements collected in connection with these offenses are to be transferred to the Office of Civil Rights within HHS for purposes of enforcing the privacy provisions of the HITECH and the Privacy and Security Rules. Sec. 13410(c)(1), 123 Stat. at 272.

recovery to which the individual believes he is entitled.¹⁶ To prove the extent of damages, the plaintiff may introduce evidence such as expert testimony, receipts, records, and photographs. In addition to such compensatory awards, attorneys' fees, litigation costs, and punitive awards may be granted in certain circumstances.¹⁷

Though many private actions are settled without trial, in those that proceed, juries frequently make the determination of liability and calculate the amount of compensation for the individual harmed. In this regard, courts and treatises note that translating legally recognized harm into monetary awards is peculiarly a function of the jury, especially where intangible, noneconomic losses are at issue;¹⁸ such injuries are not readily quantified as they lack mathematical or financial standards.¹⁹ Typically, the trial court instructs the jury as to the elements to be considered when determining the award amount. In cases involving privacy torts, for example, the jury may be instructed to consider evidence presented on past and future injury to reputation; loss of associates or friends; emotional distress, wounded feelings, and humiliation; harm to the plaintiff's interest in privacy resulting from the invasion of privacy; physical pain or illness resulting from injury to feelings; and out-of-pocket expenses such as hospital, doctor or counseling bills, lost wages, or earning capacity.²⁰

Class actions are an exception to the traditional model for private civil litigation: the individual action by an aggrieved party. The class action is a procedural device for joining multiple parties into a single suit under which one or more members of a class may sue as representative parties on behalf of all members.²¹ Among other things, class actions require a determination that questions of law or fact are common to the class and that the representative parties will fairly and adequately protect the interests of the class.²² Class action suits "are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of

¹⁶ See, e.g., *Prosser and Keeton on Torts* § 30 at 164-65 (5th ed. 1984).

¹⁷ Restatement (Second) of Torts §§ 908, 914 (1979). Punitive awards generally do not serve to compensate the aggrieved, but instead are imposed to deter or penalize wrongful activity. 5 Marilyn Minzer et al., *Damages in Tort Actions* §§ 40.10-12 (1991). Because of the reference in the HITECH Act to individual harm, the focus of this discussion is on the distribution of awards purporting to compensate individuals for harm suffered. Therefore, we did not focus on the availability of punitive awards, attorneys' fees, or other amounts.

¹⁸ *Trull v. Volkswagen of America, Inc.*, 320 F.3d 1 (1st Cir. 2002) (citing *Smith v. Kmart Corp.*, 177 F.3d 19, 29 (1st Cir. 1999)); 22 Am. Jur. 2d *Damages* § 781 (2010); 6 Marilyn Minzer et al., *Damages in Tort Actions* § 53.61 (1991).

¹⁹ Stanley Ingbar, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Calif. L. Rev. 772, 778 (1985).

²⁰ E.g., Colorado Jury Instructions for Civil Trials § 28:14 (2010); California Jury Instructions, Civil: Book of Approved Jury Instructions § 7.26 (9th ed. 2003). There are four common law invasion of privacy causes of action: (1) unreasonable intrusion upon the seclusion of another, (2) appropriation of name or likeness, (3) unreasonable publicity of private facts, and (4) publicity that unreasonably places a person in a false light before the public. Restatement (Second) of Torts § 652A (1976).

²¹ Federal Rules of Civil Procedure § 23(a) (2010).

²² *Id.*

numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.²³ They promote judicial economy by avoiding multiple adjudications of the same questions of law or fact and afford injured parties a remedy when it may not be economically feasible to pursue relief as individuals.²⁴

Frequently, the resolution of class actions by means of settlement is preferable to trial.²⁵ In federal class actions, the settlements negotiated by the parties are subject to court approval.²⁶ If the court determines that the settlement terms are fair, adequate, and reasonable, the award is divided among the class in a manner agreed to by the parties. Typically lump sum settlement distributions are made on the basis of a formula or available records to those who file claims detailing their losses or those who do not exclude themselves.²⁷ Similarly, individual damages may be distributed to class members where the plaintiff prevails at trial on the basis of the defendant's records or public data.²⁸ Where such evidence is not readily available, amounts may be distributed on a *per capita* basis, or, if necessary, based on individual claims.²⁹ Depending on the size and complexity of the matter, a committee of counsel or special master may be used to verify claims or make factual findings necessary for the distribution of damages.³⁰

Federal agencies may also seek redress for individuals under various federal statutes.³¹ The Federal Trade Commission's (FTC) enforcement of the Fair Credit Reporting Act (FCRA)³² provides an example.³³ The purpose of the FCRA is to require

²³ Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, § 2(a), 119 Stat. 4 (Feb. 18, 2005).

²⁴ 59 Am. Jur. 2d *Parties* § 56 (2010).

²⁵ Alba Conte and Herbert Newberg, *Newberg on Class Actions*, § 9.56 (4th ed. 2002).

²⁶ Federal Rules of Civil Procedure § 23(e) (2010).

²⁷ Conte and Newberg at § 11:17. In cases where the class is so large and the potential recovery per class member so small that the cost of administering a single claim would exceed the benefit to any individual, the settlement may include the distribution of the award to charitable organizations or injunctive relief. Barbara J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 2nd ed., pp. 17, 29 (Washington, D.C.: Federal Judicial Center, 2009).

²⁸ Conte and Newberg at § 10.12.

²⁹ *Id.*

³⁰ *Id.*

³¹ These statutes may also provide for private rights of action.

³² Pub. L. No. 91-508, 84 Stat. 1114, 1128 (Oct. 26, 1970) (*codified, as amended, at 15 U.S.C. §§ 1681-1681x*).

³³ The Sarbanes-Oxley Act of 2002 provides an example of individualized recoveries of civil penalties as a result of government action. Under that Act, the Securities and Exchange Commission may combine civil penalties collected for violations of federal securities laws with funds disgorged as ill-gotten profits to reduce losses to injured parties. See Pub. L. No. 107-204, § 308, 116 Stat. 745, 784-85 (July 30, 2002) (*codified at 15 U.S.C. § 7246(a)* (2006)). Distribution of these awards must be "fair and reasonable"—the same standard that

consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit and other information in a manner that is fair and equitable to the consumer.³⁴ Among other things, the FCRA identifies the circumstances under which consumer reporting agencies may furnish consumer reports and provides that they may only do so under the enumerated circumstances.³⁵ It also requires them to maintain reasonable procedures to limit the furnishing of consumer reports to permissible purposes, including making reasonable efforts to verify the identity of each new prospective user and the uses of such information.³⁶ Further, the FCRA provides that a violation shall constitute an unfair or deceptive act in commerce under section 5 of the FTC Act subject to action under that section.³⁷ Under the FTC Act, the FTC may seek consumer redress through a civil action, as well as seek other administrative and judicial remedies.³⁸ Specifically, where the FTC prevails in a suit in federal court for a violation of the FTC Act, the court may “grant such relief as the court finds necessary to redress injury to consumers.”³⁹

In 2006, FTC filed suit against ChoicePoint Inc. alleging that the consumer data broker violated the FCRA and FTC Act by, among other things, providing credit histories in instances where there was no authorized purpose for doing so because it had failed to maintain reasonable efforts to identify those seeking credit histories and the purpose for which the reports were sought.⁴⁰ ChoicePoint agreed to pay \$10 million in civil penalties and \$5 million in consumer redress.⁴¹ The settlement required court approval, but distribution of the \$5 million to affected consumers was left to the discretion of FTC.⁴² FTC was required to identify those harmed and determine the amount or percentage of the settlement each individual would receive. According to an agency official, FTC identified those harmed using information provided by law enforcement regarding cases of identity theft related to ChoicePoint and distributed funds for out-of-pocket expenses and time spent rectifying the breach based on information submitted by the individuals. The agency official also said that FTC established ceilings for these awards: \$1,500 for out-of-pocket expenses and

previously had been applied to the distribution of disgorged profits among injured investors. See *Official Committee of Unsecured Creditors of WorldCom, Inc. v SEC*, 467 F.3d 73, 82 (2d Cir. 2006).

³⁴ 15 U.S.C. § 1681(b) (2006).

³⁵ 15 U.S.C. § 1681b(a) (2006).

³⁶ 15 U.S.C. § 1681c(a) (2006).

³⁷ 15 U.S.C. § 1681s(a) (2006).

³⁸ 15 U.S.C. §§ 45; 57b (2006).

³⁹ 15 U.S.C. § 57b(b) (2006).

⁴⁰ *United States v. ChoicePoint Inc.*, 1:06-CV-0198, (N.D. Ga. filed Jan. 30, 2006), complaint, pp. 7-8.

⁴¹ *United States v. ChoicePoint Inc.*, 1:06-CV-0198 (N.D. Ga. entered Feb. 15, 2006), stipulated final judgment, pp. 4, 17.

⁴² *Id.* at 18.

\$3,060 for time lost, using a Department of Labor average rate of pay for 160 hours.⁴³ The settlement provided for the return to the Treasury of any funds not used for equitable relief.

Fixed Recovery Models

Fixed recovery models may also be instructive when developing a methodology for distributing a percentage of civil monetary penalties or monetary settlements to harmed individuals. As the name implies, a fixed recovery does not reflect an individualized determination of harm. Rather, for those eligible, the award is established by law, and amounts are distributed solely on that basis.

The Black Lung Benefits Act (BLBA) and the Federal Employees' Compensation Act (FECA) provide examples of the fixed recovery model. The BLBA provides for benefits, including monthly payments, to coal miners and their surviving dependents for total disability or death from pneumoconiosis (black lung disease) arising from employment in or around coal mines.⁴⁴ Establishing eligibility for payments requires the presentation of relevant evidence of a miner's physical condition, including medical evidence, and in this respect is similar to a private action.⁴⁵ By statute, however, monthly payments for eligible miners and their survivors are determined with reference to the monthly salary of a federal government employee. Specifically, miners totally disabled by black lung disease are paid at a rate equal to 37 1/2 percent of the monthly pay rate for federal employees at GS-2, step 1.⁴⁶ The BLBA provides for additional payments for dependents and for reduced benefits if the miner receives certain other compensation, such as worker's compensation.⁴⁷ Although BLBA payments are only made for those determined to be totally disabled or to have died as a result of black lung disease, the payments do not reflect individualized determinations of the associated economic and noneconomic harm as in the types of actions discussed above. Instead, the amount of the monthly payment is formulaic and varies for awardees only by the number of their dependents, the amount of their other compensation, and the current annual rate of pay for the requisite grade and step.

⁴³ By providing for an individualized determination within fixed amounts, this settlement is an example of a hybrid of the two methodologies. See *infra* pp. 9–10.

⁴⁴ Pub. L. No. 91-173, title IV, 83 Stat. 792 (Dec. 30, 1969) (*codified, as amended, at* 30 U.S.C. §§ 901–44 (2006)). The statutory provisions referred to as the BLBA were originally enacted as part of the Federal Coal Miners Health and Safety Act of 1969. Medical benefits and vocational rehabilitation also may be provided to certain BLBA beneficiaries. 20 C.F.R. §§ 725.701, 725.711 (2010).

⁴⁵ 30 U.S.C. § 923(b) (2006).

⁴⁶ 30 U.S.C. §§ 922(a)(1), 932(d) (2006). Claims filed after 1973 are to be processed under applicable state workers' compensation laws approved by the Secretary of Labor. 30 U.S.C. § 931 (2006). To date, no state workers' compensation program has been approved by the Secretary. 20 C.F.R. § 722.4 (2010).

⁴⁷ 30 U.S.C. §§ 922(b), 932(g) (2006).

Like the BLBA, FECA provides for the award of fixed amounts determined with reference to a statutory formula to eligible individuals. FECA provides civilian federal employees who sustain occupational illnesses or injuries in the performance of their duties with benefits, which include wage-loss benefits for total or partial disability, monetary benefits for permanent loss of use of a body part, and survivor benefits to eligible dependents if the injury causes the employee's death, subject to statutorily established maximum and minimum levels.⁴⁸ For example, for a temporary or permanent total disability, an employee without dependents is entitled to monthly compensation of 66 2/3 percent of monthly pay.⁴⁹ Similarly, federal employees who are partially disabled receive monthly compensation equal to 66 2/3 percent of the difference between the employee's monthly pay and his or her monthly wage-earning capacity after disability for the period of the partial disability.⁵⁰ In both cases, payments are augmented for one or more dependents.⁵¹ Generally, the monthly rate of compensation for disability may not exceed 75 percent of the monthly pay of the maximum rate of basic pay for GS-15 and, in the case of total disability, may not be less than the lower of the minimum rate of basic pay for GS-2 or 75 percent of the monthly pay of the employee.⁵²

The federal False Claims Act (FCA) also provides for a fixed recovery and, in this regard, provides an incentive for individuals to seek redress on behalf of the government. The FCA⁵³ generally assigns civil liability to those who knowingly present false or fraudulent claims to the United States government.⁵⁴ The Attorney General or a private person, known as a *qui tam* relator, may sue a person for submitting false or fraudulent claims and the person exposing violations in this manner may share in the resulting proceeds or settlement.⁵⁵ The government's participation in the action affects the amount of the award the person bringing the action may receive. After a person files a false claims action, the government may elect to assume primary responsibility for the action.⁵⁶ If the government proceeds with the action and prevails, the person who initiated the action shall receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement,

⁴⁸ 5 U.S.C. §§ 8101 *et seq.* (2006). FECA also provides for medical services and supplies, vocational rehabilitation services, funeral expenses, and additional compensation for the services of attendants or for the purpose of maintenance to those undergoing vocational rehabilitation, in certain circumstances. 5 U.S.C. §§ 8103-04, 8111, 8134.

⁴⁹ 5 U.S.C. § 8105 (2006).

⁵⁰ 5 U.S.C. § 8106 (2006).

⁵¹ 5 U.S.C. § 8110 (2006).

⁵² 5 U.S.C. § 8112 (2006).

⁵³ 31 U.S.C. §§ 3729-33 (2006).

⁵⁴ Those who are found liable are subject to civil penalties from \$5,000 to \$10,000, adjusted for inflation, treble damages, and the costs of the civil action. 31 U.S.C. § 3729(a) (2006).

⁵⁵ 31 U.S.C. § 3730(b)-(d) (2006).

⁵⁶ 31 U.S.C. § 3730(b)(2) (2006).

depending upon the individual's contribution to the prosecution of the action.⁵⁷ Where the government does not assume responsibility, the person who initiated the action shall receive from 25 to 30 percent of the proceeds or settlement.⁵⁸

Hybrid Models

Some awards are made under a hybrid framework, that is, one that combines an individualized determination of harm with a fixed recovery. This approach may reflect uncertainty as to the extent to which those harmed may be able to present evidence of damages. Notably, statutes designed to protect individual privacy reflect this approach in distributing awards to aggrieved individuals.

The Privacy Act of 1974 (Privacy Act) prohibits federal agencies from disclosing records on individuals from a system of records without the consent of the individuals to whom the records pertain, except as provided by statute.⁵⁹ The Act authorizes private rights of action, including actions for certain violations resulting in adverse effects on an individual.⁶⁰ When the court finds in connection with such actions that an agency acted in a manner which was willful or intentional, the United States is liable to the affected individual for actual damages, but in no case less than \$1,000.⁶¹ Under these circumstances, an individual thus can produce evidence of damages in excess of \$1,000. If the individual demonstrates quantifiable harm in an amount less than \$1,000,⁶² a fixed amount, \$1,000, is awarded.⁶³

⁵⁷ Where the court finds the action to be based primarily on specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media, the court may make awards at its discretion, but in no case more than 10 percent of the proceeds. 31 U.S.C. § 3730(d)(1) (2006).

⁵⁸ 31 U.S.C. § 3730(d)(2) (2006). FCA also provides for the award of reasonable expenses plus attorneys' fees and costs to *qui tam* relators. 31 U.S.C. § 3730(d)(1-2).

⁵⁹ 5 U.S.C. § 552a(b) (2006).

⁶⁰ 5 U.S.C. § 552a(g)(1) (2006).

⁶¹ 5 U.S.C. § 552a(g)(4) (2006). The Privacy Act also provides for the award of reasonable attorneys' fees and costs. *Id.*

⁶² Plaintiffs must present evidence of actual damages in order to receive the \$1,000 minimum. *Doe v. Chao*, 540 U.S. 614, 627 (2004).

⁶³ The Cable Communications Policy Act of 1984 (CCPA), is analogous to the Privacy Act in the type of information it protects and in its framework for remedies. Pub. L. No. 98-549, 98 Stat. 2779 (Oct. 30, 1984) (*codified, as amended, at* 47 U.S.C. § 551 (2006)). The CCPA generally prohibits cable operators from disclosing personally identifiable information concerning any subscriber without the subscriber's consent and requires operators to take actions to prevent the unauthorized access to such information. 47 U.S.C. § 551(c). As under the Privacy Act, a court may award actual damages or a statutory minimum—liquidated damages of \$100 a day for each day of violation or \$1,000, whichever is higher—to an aggrieved individual for violations of the CCPA. 47 U.S.C. § 551(f).

Actions under the Privacy Act may be brought as class actions as well. In either a class or individual action, the parties may settle for amounts less than the statutory minimum. A 2009 settlement of a Privacy Act class action involving the Department of Veterans Affairs provides an illustration. In 2006, a group of veterans filed a class action alleging a violation of the Privacy Act by the Department of Veterans Affairs after an agency computer containing personal information on more than 26.5 million individuals was stolen from an employee's home. The parties reached a settlement of \$20 million to be distributed to class members submitting claims showing objective proof of injury for reasonable out-of-pocket expenses. However, rather than the statutory minimum of \$1,000, the settlement provided for a minimum payment of \$75 and a maximum of \$1,500, after deduction of attorneys' fees and expenses.⁶⁴

CONCLUSIONS

Distributing a portion of a civil monetary penalty or monetary settlement to an individual harmed by a violation of requirements designed to protect individually identifiable health information may serve various laudable policy objectives. Among other things, it may provide some measure of compensation to those harmed, encourage the reporting of violations, and improve compliance. When establishing the methodology for distributing penalties or settlements as required by the HITECH Act, the Secretary may wish to consider the models and examples discussed above and assess their relative advantages and disadvantages in light of these and other policy objectives.

A methodology that relies on fixed awards may offer the advantages of ease of administration and equity. This approach would not require an infrastructure for hearing individual claims and could allow awards to be distributed to aggrieved individuals with lower cost and greater efficiency than other methods. While fixed awards, like awards under the BLBA and FECA, would require an individualized assessment for eligibility purposes, they would require little additional analysis, avoiding the difficulty inherent in calculating the monetary value of intangible harm. In this respect, the approach may encourage the reporting of violations and, thus, foster greater compliance with applicable requirements. Such a method would arguably provide for equitable results as each individual harmed would receive the same award.

Conversely, distributing amounts based on individualized determinations of harm may be more likely to provide adequate compensation to the extent each individual could present evidence demonstrating the harm suffered as a result of the violation for which a penalty was imposed. In that sense, such an approach could be viewed as more equitable than an approach involving awards of fixed amounts. However, the use of civil monetary penalties, which are by definition fixed in amount,⁶⁵ would

⁶⁴ *In Re Dept. of Veterans Affairs Data Theft Litigation*, 1:06-MC-0506-JR (D.D.C. filed Jan. 27, 2009), settlement agreement, pp. 9-13.

⁶⁵ Though the BLBA and FECA provide for payments of fixed amounts, there is no cap on the total amount that may be paid like the statutory cap on civil monetary penalties that may be assessed for violations. Under BLBA, coal mine operators are generally liable for the payment of benefits to disabled miners. 30 U.S.C. § 932(b) (2006). FECA awards are financed by the Employees'

necessarily limit the amount of the award and, thus, may not be fully consistent with the concept of individualized compensation for actual harm.⁶⁶ Hybrid methods we identified have the same advantages and disadvantages of the approaches they combine. A hybrid method may hold appeal, however, given the potential for individual harm as a result of violations of requirements for the protection of individually identifiable health information, and the limited amounts—that is, civil monetary penalties—available for distribution.

We hope you find this information useful in discharging HHS's responsibilities under the HITECH Act.

Sincerely yours,

A large black rectangular redaction box covers the signature area.

Lynn H. Gibson
Acting General Counsel

Compensation Fund, which consists of appropriations and amounts contributed by federal agencies commensurate with awards. 5 U.S.C. § 8147 (2006).

⁶⁶ The use of some portion of penalties or settlements for enhanced enforcement efforts as contemplated by the HITECH Act may further limit the amounts available for victim compensation. *See supra* note 15.