On June 1, 2005, the Office of the Principal Deputy Assistant Attorney General of the U.S. Department of Justice (“DOJ”) issued a memorandum limiting the application of the criminal penalty provision set forth in the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) to covered entities, including health plans, health care clearinghouses, health care providers, and Medicare prescription drug card sponsors. The memorandum clarifies that criminal liability may be imputed to directors, officers, and managerial-level employees of covered entities, but not to non-managerial level employees, such as secretaries, clerks, and technicians.

In HIPAA, Congress directed the Secretary of the Department of Health and Human Services (“HHS”) to adopt regulations governing the privacy and security of health information, standard transactions and code sets, unique health identifiers, electronic signatures, and the transfer of information among health plans (collectively, the “Regulations”). Congress limited the application of the Regulations to “covered entities,” initially defined to include all health plans, all health care clearinghouses, and certain health care providers. In the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Congress extended the application of the Regulations to Medicare prescription drug card sponsors.

Congress also established civil and criminal penalties for violations of the Regulations. The civil penalty provision provides that HHS shall impose on any “person” who violates the Regulations a penalty of not more than $100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000. The criminal penalty provision provides that a “person” shall be subject to one of three levels of criminal penalties if the person violates the Regulations by wrongfully using a unique health identifier, obtaining individually identifiable health information relating to an individual, or disclosing individually identifiable health information to another person.

Unfortunately, neither HIPAA nor the Regulations identify which individuals and organizations constitute “persons” to whom the civil and criminal penalty provisions apply. Some have argued that the term “persons” includes only those individuals who, and organizations that, constitute health plans, health care clearinghouses, health care providers, and Medicare prescription drug card sponsors. Others have argued that the term includes not only such covered entities but also all of their employees, including secretaries, clerks, and technicians.

On June 1, the DOJ concluded that HIPAA’s criminal penalty provision applies to individuals who, and organizations that, constitute covered entities and that criminal
liability may be attributed to individuals who have managerial roles within covered entities:

We conclude that health plans, health care clearinghouses, those health care providers specified in the statute, and Medicare prescription drug card sponsors may be prosecuted for violations of [the statutory criminal penalty provision set forth at 42 U.S.C.] section 1320d-6. In addition, depending on the facts of a given case, certain directors, officers, and employees of these entities may be liable directly under section 1320d-6, in accordance with general principles of corporate criminal liability, as these principles are developed in the course of particular prosecutions. Other persons may not be liable directly under this provision. The liability of persons for conduct that may not be prosecuted directly under section 1320d-6 will be determined by principles of aiding and abetting liability and of conspiracy liability.14

[W]e recognize that, at least in limited circumstances, the criminal liability of the entity has been attributed to individuals in managerial roles, including, at times, to individuals with no direct involvement in the offense. Consistent with these general principles, it may be that such individuals in particular cases may be prosecuted directly under section 1320d-6.15

The result of the DOJ’s memorandum is that non-managerial level employees of covered entities are not subject to criminal penalties for their inappropriate use or disclosure of individually identifiable health information or other behavior that violates the Regulations.

The DOJ’s memorandum is controversial. Emily Langlie, a spokeswoman for U.S. Attorney John McKay in Seattle, stated, “As prosecutors in the field, we’re disappointed with the opinion.”16 In August 2004, McKay obtained a guilty plea from Richard Gibson, a non-managerial level employee of the Seattle Cancer Care Alliance, after Gibson used a cancer patient’s personal information to obtain credit cards in the patient’s name.17 In light of the DOJ’s memorandum, reporters are speculating that Gibson might attempt to withdraw his plea or that a federal judge might intervene in the case.18 Peter Swire, a law professor at Ohio State University who served as Chief Counselor for Privacy under former President Bill Clinton, called the DOJ’s memorandum “bad law and public policy.”19 Robert Gellman, a data privacy consultant, believes that health care providers’ employees, not health care providers themselves, are responsible for the majority of privacy breaches. Accordingly, Gellman disagrees with the DOJ’s decision to limit application of the criminal penalty provision to non-managerial level employees: “Under this decision, a tremendous amount of conduct that is clearly wrong will fall outside the criminal penalties of the statute.”20 Officials at the DOJ and HHS have declined to respond to these comments.21
Notwithstanding the DOJ’s memorandum, non-managerial level employees of covered entities still can face criminal penalties under state and federal laws relating to identity theft and fraudulent use of computers, as well as damages resulting from civil lawsuits filed by patients, if they wrongfully use or disclose patients’ individually identifiable health information.

1 Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, U.S. Department of Justice, to Alex M. Azar II, General Counsel, Department of Health and Human Services, and Timothy J. Coleman, Senior Counsel to the Deputy Attorney General (June 1, 2005) [hereinafter Memorandum], available at http://www.worldprivacyforum.org/pdf/hipaa_opinion_06_01_2005.pdf.


3 Pub. L. 104-191, 110 Stat. 2029, § 264 (“If legislation governing standards with respect to the privacy of individually identifiable health information . . . is not enacted . . . the Secretary of Health and Human Services shall promulgate final regulations containing such standards . . . ”).


5 Id. § 1320d-2(a), (c).

6 Id. § 1320d-2(b).

7 Id. § 1320d-2(e).

8 Id. § 1320d-2(f).

9 Id. § 1320d-1(a).

10 Pub. L. No. 108-173, 101(a)(2), 117 Stat. 2071, 2144 (codified at 42 U.S.C. 1395w-141(h)(6) (“For purposes of the program under this section, the operations of an endorsed program are covered functions and a prescription drug card sponsor is a covered entity for purposes of applying part C of title XI and all regulatory provisions promulgated thereunder . . . ”)).


12 The three levels of penalties include: (1) a base-level fine of not more than $50,000, imprisonment for not more than one year, or both; (2) if the offense is committed under false pretenses, a second-level fine of not more than $100,000, imprisonment for not more than five years, or both; and (3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, a third-level fine of not more than $250,000, imprisonment for not more than ten years, or both. Id. § 1320d-6(b).

13 Id. § 1320d-6(a) and (b).

14 Memorandum, supra note 1, at 1.

15 Id. at 9.


18 Sherman, supra note 16.

19 Id.

20 Id. at 1-2; Robert Pear, Ruling Limits Prosecutions of People Who Violate Law on Privacy of Medical Records, N.Y. TIMES, June 7, 2005, available at http://www.nytimes.com/auth/login?URI=http://www.nytimes.com/2005/06/07/politics/07privacy.html&OQ=thQ26emcQ3Dh&OP=38de5a5dQ2F230k25XQ22DtXXqQ242Q24YYQ5E2Y12Y2mXQ3CQ7DqQ7DQ22D2YjmtQ7DAQ5BQ22TaOqBQ3CH.

21 Sherman, supra note 16; Pear, supra note 20.