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Testimony of the American Psychiatric Association

Regarding "Cost and Confidentiality: The Unforeseen Challenges of Electronic Health Records in Small Specialty Practices"

Presented to the House Small Business Committee

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Members of the House Small Business Committee, I am Robert Plovnick, M.D., M.S., the Director of the Department of Quality Improvement and Psychiatric Services at the American Psychiatric Association (APA). My department oversees preparation of psychiatric practice guidelines, development and assessment of performance measures for psychiatric services, monitoring and participation in national activities on electronic health records, and APA activities in addiction psychiatry. It is an honor for the APA to present this testimony to the Committee regarding "Cost and Confidentiality: The Unforeseen Challenges of Electronic Health Records in Small Specialty Practices."

The APA is the nation's oldest medical specialty society representing more than 38,000 psychiatric physicians nationwide. Our members serve as clinicians, academicians, researchers, and administrators. They work within a variety of systems of care including multi-specialty groups, emergency departments, in-patient settings, and small private practices. The development of health information technology (HIT), and corresponding Federal and State laws and regulations involving the collection and transmission of health data, are a matter of great interest and concern to the APA, our members, and their patients. The APA has one committee of members solely focused on various aspects of electronic health records (EHRs) and educating members on this topic, and a second committee solely focused on privacy and confidentiality concerns.

Carefully structured, a nationally uniform HIT infrastructure has great potential to improve the overall quality of care provided to patients, inform health professionals of the latest standards of care, and improve efficiency in communicating important health care information. When used effectively, electronic health records can enable clinicians to enhance the quality and efficiency of health care through mechanisms such as reducing fragmentation and improving continuity of care across settings and conditions, improving access to information on prior treatment, and improving administrative efficiency.

However, there are two significant challenges to widespread adoption and implementation of EHR systems that the APA would like to highlight in our testimony today. As the assurance of confidentiality is at the core of any effective patient-physician relationship, it is essential to protect the privacy and security of individually identifiable health information. Electronic health information exchange could erode patient trust and impede clinical care if it facilitates dissemination of sensitive information without sufficient precautions being taken to protect privacy. Second, a significant percentage of APA members operate in solo, private practices in which the up front costs of implementing a health IT or EHR system present a considerable barrier to adoption.

Privacy Background

Protecting and strengthening the confidentiality of the patient-physician relationship is critical to providing the highest quality medical care. This is particularly true with respect to psychiatric care because of ongoing inequity in insurance coverage, employment discrimination, and social stigma for people with mental illness.

Both the Supreme Court and the U.S. Surgeon General have acknowledged this. In 1996, following a half century of discussion in the courts and the legal community, the Supreme Court, in Jaffee v. Redmond established an absolute privilege in federal courts for information disclosed by a patient to a psychotherapist. This privilege is similar in nature to the revered attorney-client privilege. In Jaffee, the Supreme Court held that "effective psychotherapy depends upon an atmosphere of confidence and trust...for this reason the mere possibility of disclosure may impede the development of the confidential relationship necessary for successful treatment." In 1999, explicitly citing the Jaffee decision, the U.S. Surgeon General in his report, "Mental Health: A Report of the Surgeon General," wrote, "the Court's language, in a decision creating a psychotherapist privilege in federal court, appears to leave little doubt that there is broad legal protection for the principle of confidentiality." The Surgeon General concluded, "People's willingness to seek help is contingent on their confidence that personal revelations of mental distress will not be disclosed without their consent." We believe any national HIT system must acknowledge these findings, and ensure confidentiality. The privilege established in Jaffee underlines the importance of the psychotherapist-patient relationship, encourages individuals struggling with mental health issues to seek treatment, and is therefore a fundamental and indispensable component of patient care. Additionally, among the most important provisions of the 1996 Health Insurance Portability and Accountability Act (HIPAA), is a non-preemption requirement that ensures that State laws which are more protective of privacy than HIPAA's basic requirement are not voided. The non-preemption protection is an essential feature of HIPAA. Any uniform federal standard should maintain all existing state protections in order to provide for the strongest possible protection of privacy and avoid any loss of privacy protections that currently exist.

In 2006, the U.S. Government Accountability Office (GAO) released a report, upon request of Senate Finance Committee Chairman Charles E. Grassley, highlighting "significant weaknesses in electronic access controls and other information system controls" within HHS and CMS. The report, entitled *Information Security: Department of Health and Human Services Needs to Fully Implement Its Program (GAO-06-267)*, concludes that the medical and financial privacy for Medicare, Medicaid, and other program enrollees is vulnerable to fraud and abuse. The report cites an insufficient information security program and inconsistent implementation as the key reasons for the security failures. This report underscores the need for strict safeguards and guidelines when implementing a national HIT infrastructure.

An unintended consequence of EHRs is that patients may be discouraged from seeking treatment or sharing information due to concerns that their information will be improperly disseminated. Effective treatment in behavioral health, as well as other disciplines of medicine, often requires patients to share sensitive information such as sexual history, drug use history, pregnancy history, and HIV status. If confidentiality cannot be assured, patients will be reluctant to share information that is critical for their care. According to HHS[1], two million Americans with mental illness do not seek

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[1] Federal Register. (December 28, 2000) Vol. 65, No. 250. Rules and Regulations 82779.

treatment due to privacy fears. A 2007 Harris Interactive Poll[2] found that 17 to 21 percent of patients withheld information from their health professionals because of worries the information might be disclosed. These rates are likely to be even greater if information exchange is electronically enabled and the confidentiality and security of health information cannot be assured. The trust required for a productive therapeutic relationship is undermined by accounts of healthcare workers who inappropriately view electronic records of celebrity patients, as well as by the loss or theft of laptops or CDs containing large quantities of health related information.

As already noted, breaches in the privacy of sensitive medical data, including that relating to mental health and substance use disorder treatment, can have significant personal and professional consequences for individuals. Even the possibility of privacy violations erodes an individual's expectation of confidentiality in medical encounters and undermines the sharing of medically essential information with one's physician. Apologizing and making improvements once data is lost is not a sufficient response. Rather, privacy and security provisions must be keystones to the development of a nationally uniform HIT infrastructure. As opposed to having to choose between making the entire record or none of the record available electronically, there are many approaches that could help protect the patient-physician relationship and optimize the advantages of the electronic health record environment. Examples include: ensuring that the strictest security protections and auditing are employed, providing transparency as to who has access to medical information, and giving patients and clinicians a degree of control as to who can access sensitive information. The APA applauds the leadership of the House Energy and Commerce Committee, particularly Chairmen Dingell and Pallone, Ranking Members Barton and Deal, and Representatives Waxman and Markey for incorporating several privacy and security provisions into their HIT legislation, H.R. 6357, the PRO(TECH)T Act. The APA remains concerned about S. 1693, the Wired for Health Care Quality Act in the Senate as it does not contain strong or consistent privacy and security provisions and may in fact inadvertently threaten privacy.

The Costs of Implementing Health Information Technology for Small Practices

Despite the widespread recognition of the potential health IT holds to increase efficiency and quality health care delivery, system adoption rates remain low. According to the Congressional Budget Office, only about 12% of physicians have adopted health IT systems. A recent study in the New England Journal of Medicine[3] found that only 4% of physicians had adopted fully functional EHRs, and those that had tended to be in larger practices. Consistently, cost is cited as the largest barrier to wider adoption. Although estimates vary widely, studies report that the total costs for implementing office-based EHRs range from $25,000 - $45,000 per physician. Subsequent annual costs for maintaining the system range from $3,000 to $9,000 per physician per year.[4] These

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[2] Harris Interactive Inc. (March 26, 2007). Poll #27.

[3] DesRoches CM, et al. "Electronic health records in ambulatory care -- a national survey of physicians" N Engl J Med 2008; 359: 50-60.

[4] Congressional Budget Office. (July 24, 2008). *Evidence on the Costs and Benefits of Health Information Technology*.

expenditures are amplified for smaller practices, which typically pay more per physician than larger offices where there are more physicians to share the costs. Psychiatrists involved in solo practice, a significant percentage of APA members, often have little or no administrative support staff, further increasing the physician's responsibilities with regards to selection, implementation and maintenance of the system, and decreasing the time available for clinical care.

Conclusion

The APA appreciates the efforts the Small Business Committee has made to address confidentiality concerns while developing an HIT infrastructure. A national HIT infrastructure offers a great potential to raise the overall quality of care provided to patients, increase patient safety, keep health professionals informed about the latest standards of care, and improve efficiency in communicating important health care information. These goals can be met without breaching privacy protections, and can assure patient trust if privacy is made a cornerstone of HIT development. The APA further recommends the use of financial incentives such as grants or other support to help practitioners in solo or small group practices cover the costs of hardware and software. Assurances that standards will be set prior to full implementation, so that physicians won't have to purchase new systems if the standards change, are also necessary.

Again, we thank you for the opportunity to testify today and we hope the members of the Committee will consider the APA as a resource as this process continues. I am happy to answer any questions.