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HOUSE BILL NO. 1039

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Education and Health
on February 18, 2010)

(Patrons Prior to Substitute—Delegates Byron and Nixon [HB 525])

A BILL to amend the Code of Virginia by adding a section numbered 32.1-127.1:05, relating to notification of breach of medical information.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 32.1-127.1:05 as follows:

§ 32.1-127.1:05. Breach of medical information notification.

A. As used in this section:

"Breach of the security of the system" means unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security, confidentiality, or integrity of medical information maintained by an entity. Good faith acquisition of medical information by an employee or agent of an entity for the purposes of the entity is not a breach of the security of the system, provided that the medical information is not used for a purpose other than a lawful purpose of the entity or subject to further unauthorized disclosure.

"Encrypted" means the transformation of data through the use of an algorithmic process into a form in which there is a low probability of assigning meaning without the use of a confidential process or key, or the securing of the information by another method that renders the data elements unreadable or unusable.

"Entity" means any authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.

"Medical information" means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a resident of the Commonwealth, when the data elements are neither encrypted nor redacted:

1. Any information regarding an individual's medical or mental health history, mental or physical condition, or medical treatment or diagnosis by a health care professional; or

2. An individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history, including any appeals records.

The term does not include information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public.

"Notice" means:

1. Written notice to the last known postal address in the records of the entity;

2. Telephone notice;

3. Electronic notice; or

4. Substitute notice, if the entity required to provide notice demonstrates that the cost of providing notice will exceed \$50,000, the affected class of Virginia residents to be notified exceeds 100,000 residents, or the entity does not have sufficient contact information or consent to provide notice as described in subdivisions 1, 2, or 3 of this definition. Substitute notice consists of the following:

a. E-mail notice if the entity has e-mail addresses for the members of the affected class of residents;

b. Conspicuous posting of the notice on the website of the entity if the entity maintains a website; and

c. Notice to major statewide media.

Notice required by this section shall include a description of the following:

(1) The incident in general terms;

(2) The type of medical information that was subject to the unauthorized access and acquisition;

(3) The general acts of the entity to protect the personal information from further unauthorized access; and

(4) A telephone number that the person may call for further information and assistance, if one exists.

"Redact" means alteration or truncation of data such that no information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis or no more than four digits of a health insurance policy number, subscriber number, or other unique identifier are accessible as part of the medical information.

B. If unencrypted or unredacted medical information was or is reasonably believed to have been

60 accessed and acquired by an unauthorized person, an entity that owns or licenses computerized data
61 that includes medical information shall disclose any breach of the security of the system following
62 discovery or notification of the breach of the security of the system to the Office of the Attorney General
63 and any affected resident of the Commonwealth without unreasonable delay. Notice required by this
64 section may be reasonably delayed to allow the entity to determine the scope of the breach of the
65 security of the system and restore the reasonable integrity of the system. Notice required by this section
66 may be delayed if, after the entity notifies a law-enforcement agency, the law-enforcement agency
67 determines and advises the entity that the notice will impede a criminal or civil investigation, or
68 homeland or national security. Notice shall be made without unreasonable delay after the
69 law-enforcement agency determines that the notification will no longer impede the investigation or
70 jeopardize national or homeland security.

71 C. An entity shall disclose the breach of the security of the system if encrypted information is
72 accessed and acquired in an unencrypted form, or if the security breach involves a person with access
73 to the encryption key.

74 D. An entity that maintains computerized data that includes medical information that the entity does
75 not own or license shall notify the owner or licensee of the information of any breach of the security of
76 the system without unreasonable delay following discovery of the breach of the security of the system, if
77 the medical information was accessed and acquired by an unauthorized person or the entity reasonably
78 believes the medical information was accessed and acquired by an unauthorized person.

79 E. In the event an entity provides notice to more than 1,000 persons at one time, pursuant to this
80 section, the entity shall notify, without unreasonable delay, the Office of the Attorney General of the
81 timing, distribution, and content of the notice.

82 F. This section shall not apply to (i) a person or entity who is a "covered entity" or "business
83 associate" under the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d et
84 seq.) and is subject to requirements for notification in the case of a breach of protected health
85 information (42 USC 17932 et seq.), or (ii) a person or entity who is a non-HIPAA-covered entity
86 subject to the Health Breach Notification Rule promulgated by the Federal Trade Commission pursuant
87 to 42 USC § 17937 et seq.

88 G. An entity that complies with the notification requirements or procedures pursuant to the rules,
89 regulations, procedures, and guidelines established by the entity's primary or functional state or federal
90 regulator shall be in compliance with this section.

91 **2. That the provisions of this act shall become effective on January 1, 2011.**