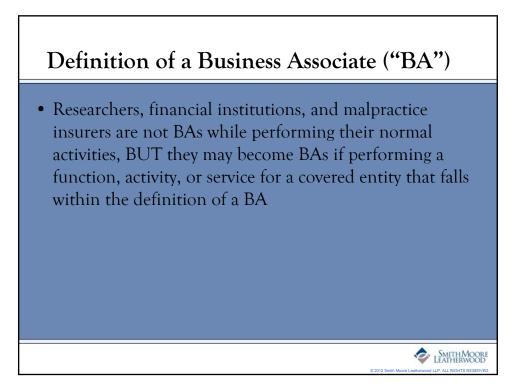
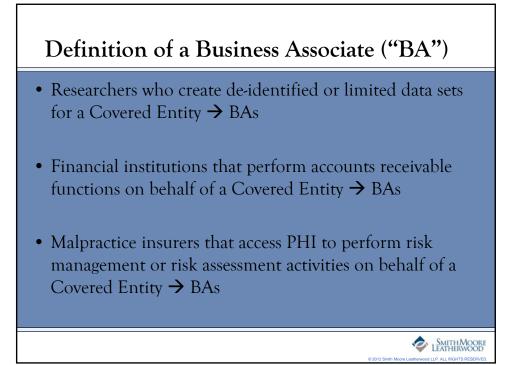
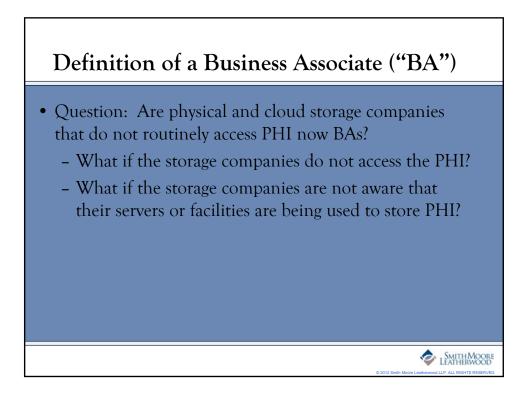


Definition of a Business Associate ("BA")

- Does not include government agencies that receive PHI for the purpose of either determining eligibility for or enrollment in a government health plan administered by another government agency or collecting PHI for such purposes
 - Social Security, Medicare, Medicaid, TRICARE are these kinds of entities
 - Recall that disclosures to the government to determine compliance were exempted originally from HIPAA restrictions



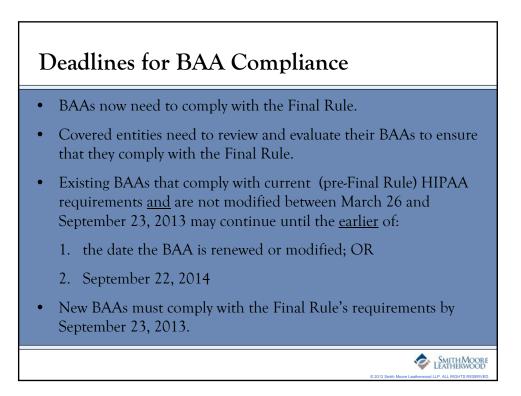


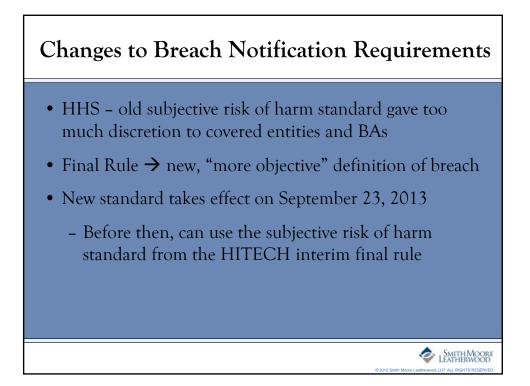


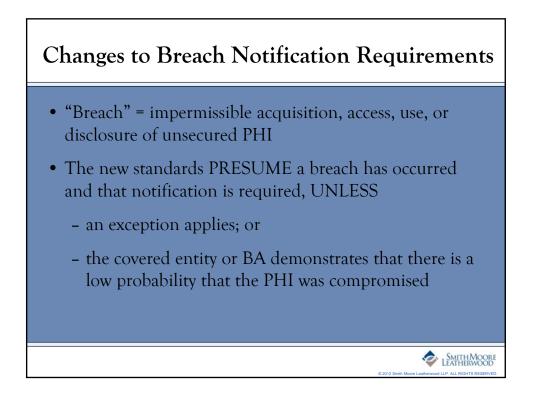
Compliance Obligations of Business Associates

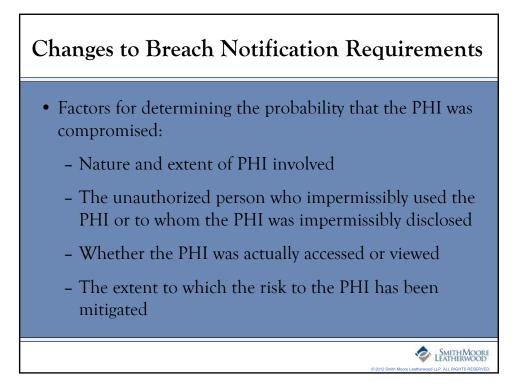
- The Final Rule confirms that <u>both</u> (1) BAs and (2) BAs' subcontractors who use PHI in performing services for those BAs may be <u>directly liable</u> for complying with many of the HIPAA privacy and security requirements and subject to penalties for noncompliance.
- Compliance down the contractual chain Covered Entity with BA, BA with subcontractor, subcontractor with its subcontractor, etc.
 - But covered entities do not have to enter BAAs with their BAs' subcontractors
 - Covered entities must determine the level of supervision they want to dedicate to BA activities.

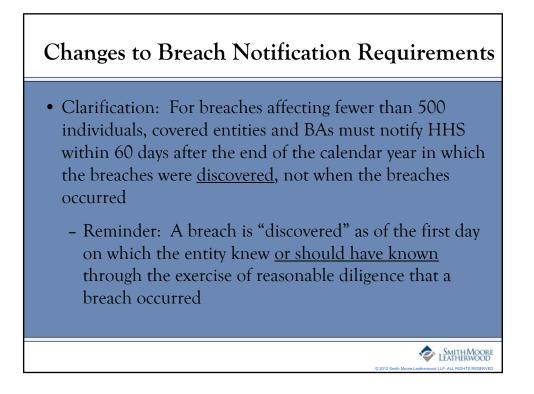
SMITH MOORE LEATHERWOOD







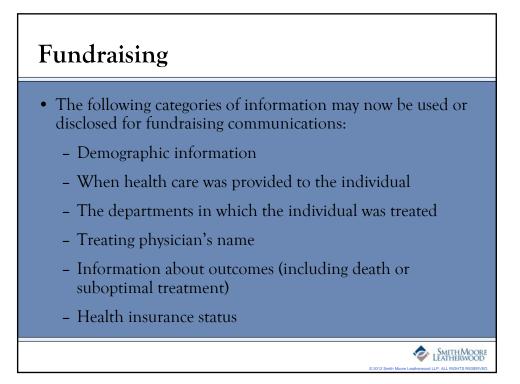


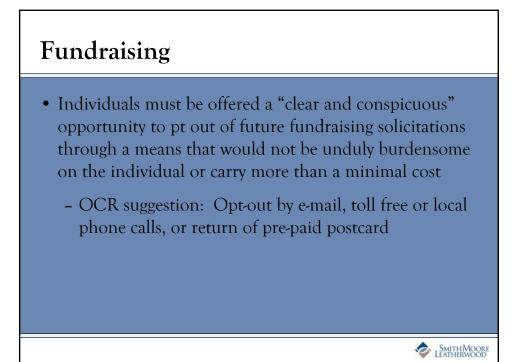


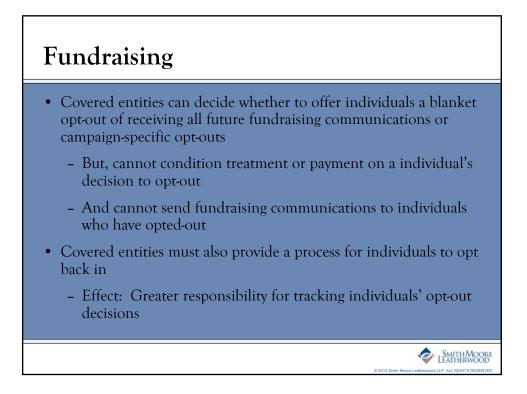
Changes to the Privacy Rule

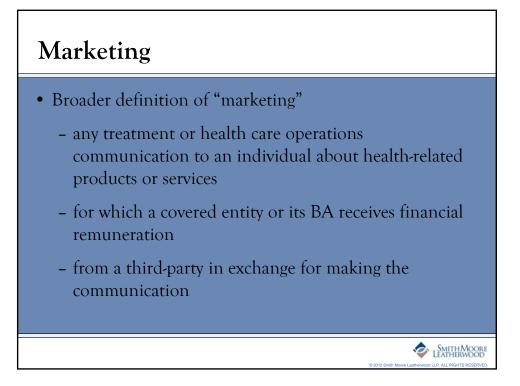
- Fundraising
- Marketing
- Sale of PHI
- Research
- Right to Access Copies of Electronically Stored PHI
- Right to Request Restrictions on Uses and Disclosures

- Notice of Privacy Practices
- Decedents
- Immunization Records





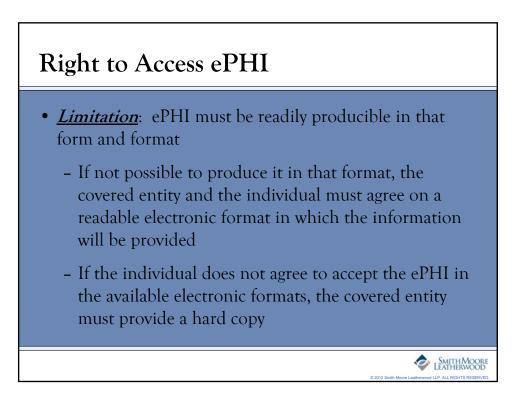






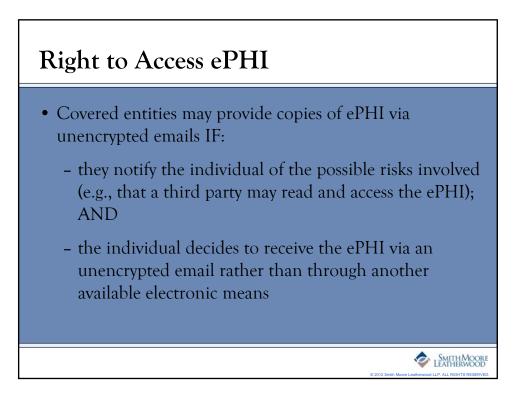


• If an individual requires an electronic copy of PHI that the covered entity maintains electronically in one or more designated record sets ("ePHI"), the covered entity must provide access to the ePHI in the electronic form and format sought by the individual



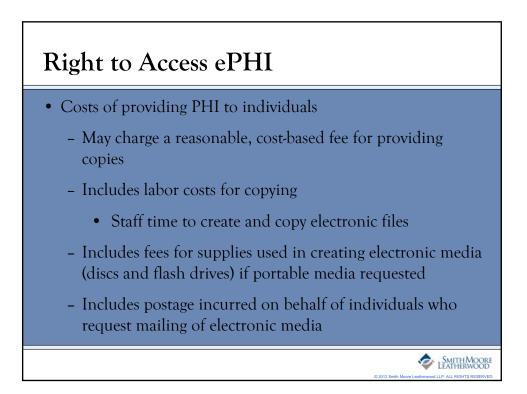
Right to Access ePHI

- No requirement that covered entities purchase new systems or software to provide ePHI in a form or format that is not readily producible
 - However, covered entities whose systems cannot produce ePHI in any electronic form may need to purchase software or hardware to allow them to offer some form of an electronic copy
- Covered entities that maintain hybrid records do not have to scan paper documents in order to provide electronic copies of those records



Right to Access ePHI

- If requested by a individual, a covered entity must transmit a copy of PHI directly to a third party.
 - Request must:
 - Be signed;
 - Clearly identify the third party; and
 - Clearly identify where to send the information

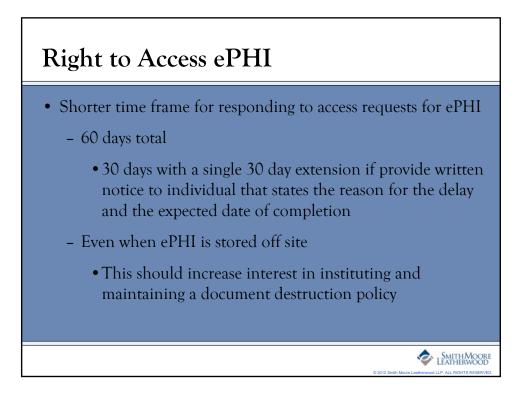


Right to Access ePHI

- Fees cannot include:
 - Costs for maintaining systems or new technology
 - Retrieval fees for electronic copies (also not permitted for paper copies)
- Remember, cannot charge more than state law allows
 - No connection between the typical "per page" charge state statutes have and these new concepts

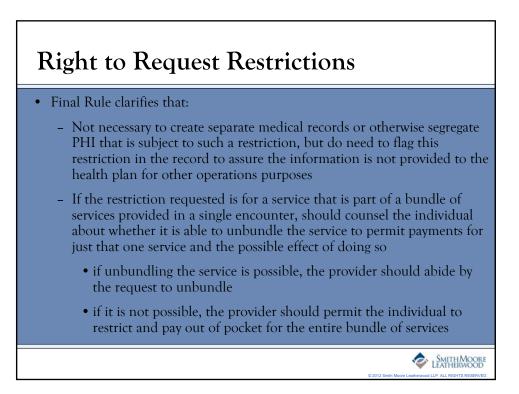
SMITH MOORE

- Assume each "page" of data is a printed page unless guidance to the contrary is received



Right to Request Restrictions

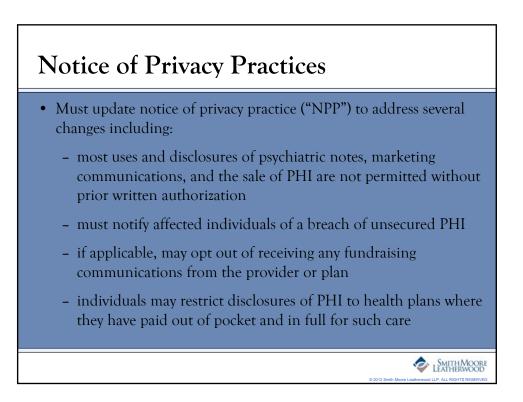
- HITECH requires covered entities to agree to an individual's request to restrict uses and disclosures of his/her PHI related to a treatment or service IF:
 - The request is to restrict disclosure of information to the individual's health plan for payment or health care operations purposes AND
 - The individual agrees to pay the covered entity for the treatment out of pocket and in full



Right to Request Restrictions

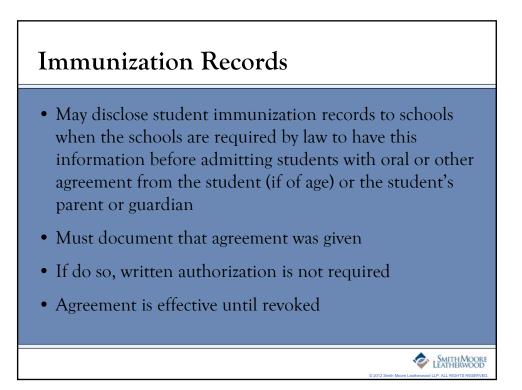
- Final Rule clarifies that:
 - No obligation to inform downstream providers of a restriction, but covered entities are encouraged to counsel patients to request a restriction and pay out of pocket with downstream providers
 - Providers within an HMO who cannot by law accept payment from an individual in excess of the individual's cost-sharing amount *may counsel individuals to use an out-of-network provider to obtain items or services about which the individual wishes to restrict PHI from disclosure*
- The Rule specifically sanctions behaviors that used to indicate benefit fraud how will this affect the life insurance industry?

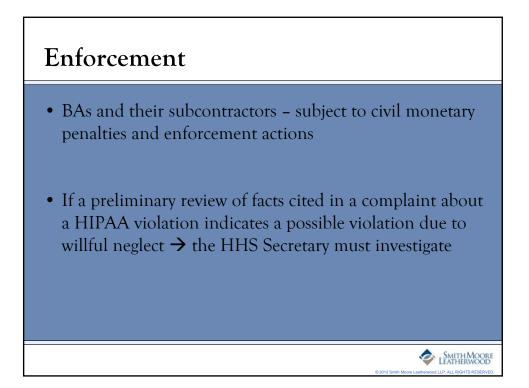
SMITH MOORE LEATHERWOOD

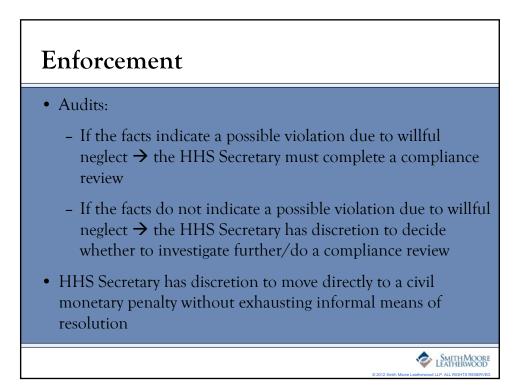




- Definition of PHI excludes information for individuals who have been dead more than 50 years
- Can disclose a decedent's PHI to family members or others who were involved in the decedent's care or payment for that care before the decedent's death
 - Unless the disclosure would be inconsistent with a preference expressed by the decedent to the covered entity before death
 - Disclosure of PHI limited to what is relevant to the person's involvement in the decedent's care or payment for the care







Enforcement

Penalties

- Implements HITECH's tiered civil monetary penalty structure for violations occurring <u>on or after February 18, 2009</u>:
- \$100 to \$50,000 per violation and up to \$1.5 million for identical violations occurring during a calendar year
- Sanctions depend on
 - whether "willful neglect" is present
 - whether the covered entity or BA "did not and, by exercising reasonable diligence, would not have known that a violation occurred"

