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To: House Committee on Judiciary
From: Kaili Kuiper, Staff Attorney, Office of the Health Care Advocate
Date: April 14, 2016

RE: S.155, Protected Health Information

The HCA supports S.155's prohibition on protected health information disclosures that violate the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), but the statute should include a private right of action for individuals whose protected health information has been used or disclosed. In an age where large amounts of private health information are stored and exchanged electronically, Vermonters need increased privacy protections.

Current protections for health care information are inadequate. In 2015, over a series of articles, Pro Publica and NPR detailed how the Office for Civil Rights (OCR), the federal agency responsible for enforcing HIPAA, has failed in its responsibilities. Between 2009 and 2015, over 181,000 breaches affecting fewer than 500 individuals were reported to OCR.¹ Yet, the OCR focuses its enforcement on breaches that affect at least 500 people.² This approach leaves rural areas such as Vermont largely unprotected. Among HIPAA complaints in Vermont to OCR between 2003 and 2014, OCR found violations in 84% yet only took corrective action for 23% of the complaints.³ Pro Publica explains, "Even when small privacy violations have real consequences, the [OCR] rarely punishes health care providers for them. Instead, it typically settles for pledges to fix any problems and issues reminders of what [HIPAA] requires."⁴ For example, when a doctor who was being sued by his patient's brother provided the patient's medical records to a private investigator to try to uncover negative information, the OCR simply provided the doctor with "guidance on how to comply with the privacy rules," and asked the doctor to provide the patient with free credit monitoring, which the doctor never provided.⁵ HIPAA violations have the potential to harm the most vulnerable members of our society, such as the alarming trend of workers at nursing homes and assisted-living centers sharing photos or videos of residents, some of whom were partially or completely naked, on social media.⁶

¹ Pro Publica, Small-Scale Violations of Medical Privacy Often Cause the Most Harm, Charles Ornstein, <https://www.propublica.org/article/small-scale-violations-of-medical-privacy-often-cause-the-most-harm>.

² Pro Publica, Few Consequences for Health Privacy Law's Repeat Offenders, Charles Ornstein and Annie Waldman, <https://www.propublica.org/article/few-consequences-for-health-privacy-law-repeat-offenders>.

³ U.S. Department of Health and Human Services, Health Information Privacy, Enforcement Results by State, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-results-by-state/index.html>.

⁴ Pro Publica, Small-Scale Violations of Medical Privacy Often Cause the Most Harm, Charles Ornstein, <https://www.propublica.org/article/small-scale-violations-of-medical-privacy-often-cause-the-most-harm>.

⁵ Id.

⁶ Pro Publica, Another Senator Calls for Action on Social Media Abuse of Nursing home Residents, Charles Ornstein, <https://www.propublica.org/article/another-senator-calls-for-action-social-media-abuse-nursing-home-residents>.

The HCA's proposed language for a private right of action incentivizes good privacy practices among health care entities and allows individuals who have been unreasonably harmed by HIPAA violations to collect damages. Our proposed language allows for a private right of action when an individual or entity has negligently caused harm by violating HIPAA or when an individual or entity has willfully, intentionally, or recklessly violated HIPAA. We include a minimum damage award of \$500 for all first time violations and \$1000 for subsequent violations that are willful, intentional, or reckless. Minimum awards are necessary for patient protection, because actual damages for privacy violations can be very difficult to calculate and prove.

In response to complaints that a private right of action under HIPAA could impose an unfair burden on health care entities, our proposed language would not punish innocent mistakes that could not have reasonably been prevented. The statute does not provide damages for an accidental HIPAA breach that does not rise to the level of negligence or for a negligent HIPAA breach that does not cause any harm.

Our suggested revisions are below. New text is underlined. No text has been deleted.

§ 1881. DISCLOSURE OF PROTECTED HEALTH INFORMATION PROHIBITED

(a) As used in this section:

- (1) "Covered entity" shall have the same meaning as in 45 C.F.R. § 160.103.
- (2) "Business Associate shall have the same meaning as in 45 C.F.R. § 160.103.
- (3) "Protected health information" shall have the same meaning as in 45 C.F.R. § 160.103.
- (4) "Use" shall have the same meaning as in 45 C.F.R. § 160.103.
- (5) "Disclosure" shall have the same meaning as in 45 C.F.R. § 160.103.

(b) A covered entity, its business associates, and its agents shall not use or disclose protected health information unless the use or disclosure is permitted under the Health Insurance Information Portability and Accountability Act of 1996 (HIPAA).

§ 1882. PRIVATE CAUSE OF ACTION

(a) Any individual aggrieved by a violation of this section may bring a civil action for damages. If it is found in a civil action that:

(1) A person or entity has caused harm by negligently violating this section, the person or entity is liable, for each violation, for:

- (a) The greater of actual damages or liquidated damages of \$500; and
- (b) Court costs and reasonable attorney's fees incurred by the person bringing the action;
- and
- (c) Such other relief, including injunctive relief, as the court may deem appropriate; or

(2) A person or entity has willfully or intentionally or recklessly violated this section, the person or entity is liable, for each violation, for:

- (a) The greater of actual damages or liquidated damages of \$500 for the first violation and \$1000 for each subsequent violation; and
- (b) Exemplary damages; and
- (c) Court costs and reasonable attorney's fees incurred by the person bringing the action;
- and
- (d) Such other relief, including injunctive relief, as the court may deem appropriate.

(b) Except as provided in subsection (c) of this section, this section shall not limit any other claims a person may have under applicable law.