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Testimony before the Senate Committee on Judiciary

RE: Section 1 of S.155

January 6, 2016

Good morning. I am testifying on behalf of the physician members of the Vermont Medical Society (VMS) in opposition to Section 1 of S.155. The provision would create a new state-based private right of action against physicians and other covered entities for HIPAA violations. This would enable patients who believe that their health information was disclosed inappropriately to file a law suit in Vermont Superior Court.

The bill provides for damages - including automatic damages and punitive damages - and for costs and attorney's fees for inappropriate disclosures. It authorizes the court to award actual damages to patients or automatic damages of \$500.00 for the first violation and \$1000.00 for any subsequent violation, **whichever is greater**. The bill does not require that inappropriate disclosures of health information be "willful" or "intentional" to qualify for punitive damages lowering the standard for punitive damages and making punitive damages easier to obtain. Under Vermont case law, "actual malice" is required to allow a punitive claim to proceed.

With attorney's fees, punitive damages, and automatic damages, this bill creates incentives for patients and lawyers to take cases for HIPAA violations to court, regardless of whether the violation is small or large or caused harm to the patient. In the case of a breach involving multiple patients, the potential awards could be enormous.

HIPAA is a federal law and the Office of Civil Rights (OCR) within HHS enforces it. Federal law includes very significant penalties which increase dramatically when inappropriate disclosures are willful, intentional or made with the intent to sell the health care information. HIPAA establishes a tiered civil penalty structure and the range of possible federal penalties includes civil penalties, criminal fines and imprisonment (up to 10 years) and begins at \$100 per violation if the provider did not know (and with reasonable diligence would not have known) that he or she violated HIPAA and increases to \$250,000 per violation when the disclosure is made with intent to sell the information.

As of February 18, 2009, the HITECT Act granted State Attorneys General the authority to enforce HIPAA rules by bringing civil actions on behalf of state residents in federal district court. At a 2013 convention of the International Association of Privacy Professionals, Vermont Attorney General William Sorrell was introduced as one of the earliest AGs that have exercised their enforcement under HIPAA. Attorney General Sorrell was quoted as saying: "We're not at all reluctant to bring an enforcement action – (1) to serve as an example to other companies and (2) to have a relatively equal playing field."

The Office of Civil Rights' priority is to ensure that covered entities come into compliance with the law. Before seeking penalties or imprisonment, OCR works to resolve cases by obtaining voluntary compliance, by requiring corrective action or by entering a resolution agreement. VMS believes that working to obtain voluntary compliance before moving to penalties is the best way to enforce a highly complex and detailed law like HIPAA.

Section 1 of S.155 moves in the opposite direction, subjecting physicians and other covered entities, including those who take corrective action, to damages, automatic damages, punitive damages, attorneys' fees and costs. Since the bill does not include a negligence standard, or any other threshold, the physician and other covered entities could be sued for a disclosure completely outside their control, such as hacking by an outside organization.

The risk of these severe financial consequences, even for unintentional actions that do not cause harm, could add to an already stressful practice environment for physicians in Vermont. A lost laptop with data from many patients could result in millions of dollars of damages.

Vermont, unlike its neighbors does not have any meaningful tort reform, a factor seriously considered by physicians who are deciding whether to come to Vermont or whether to leave Vermont. Maine, New Hampshire and Massachusetts all have malpractice screening panels that reduce the time to resolve cases.

Passing Section 1 of S.155 and thereby creating a new private right of action against physicians and other covered entities for HIPAA violations would send exactly the wrong message as Vermont seeks to recruit and retain physicians to care for an aging population.

In addition, passing the section could create great inconvenience for Vermont patients. As one family physician wrote: "[O]ne of the consequences will be patient care issues cannot be discussed over the phone. Patients would be informed this is no longer possible as information could be overheard by others. Patients will have to come to the office to discuss any issues in a room face to face only with the exam door closed."

On behalf of the VMS, I respectfully request that Section 1 of S.155 be deleted and I would be happy to answer any questions.