

**U.S. Department of Health and Human Services
Office of the National Coordinator for Health Information Technology
Privacy and Security Tiger Team**

Virtual Hearing

**with participation from the
National Committee on Vital and Health Statistics
and the
U.S. Department of Health and Human Services, Office for Civil Rights**

**America's Health Insurance Plans
Written Statement**

September 30, 2013

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I. Introduction

America's Health Insurance Plans (AHIP) commends the U.S. Department of Health and Human Services, Office of the National Coordinator (ONC) for Health Information Technology (HIT) Privacy and Security Tiger Team, the U.S. Department of Health and Human Services Office for Civil Rights (OCR), and the National Committee on Vital and Health Statistics for participating in a public forum to further understand the practical ways that patients access their health information and learn more about how their health information may be used and disclosed to effectuate their health care services.

AHIP is the national trade association representing the health insurance industry. AHIP's members provide health and supplemental benefits to more than 200 million Americans through employer-sponsored coverage, the individual insurance market, and public programs such as Medicare and Medicaid. AHIP advocates for public policies that expand access to affordable health care coverage to all Americans through a competitive marketplace that fosters choice, quality, and innovation.

Our members are committed to ensuring the privacy and security of consumers' health information and have supported the Health Insurance Portability and Accountability Act (HIPAA) privacy and security requirements as a solid and effective legal framework. We also supported the enhanced protections created by the Health Information Technology for Economic and Clinical Health (HITECH) Act, and we were heavily involved in the policy discussions and legislative efforts as the HITECH Act was being developed and debated by Congress.

The virtual hearing is intended to explore ways that consumers can gain more transparency into the uses and disclosures of their health information. Several federal policy discussions and regulatory developments are concurrently evaluating the extent to which new electronic processes could make information more transparent to consumers.¹ We offer our written statement to inform these discussions, along with our recommendations for future work.

Our statement is based on our analysis of the technical, legal, and operational issues that are raised by the federal proposals for changing the ways that consumers access their health information through Accounting of Disclosures and Access Reports. Where applicable, we have provided data summaries to inform the federal proposals based on information that we compiled through a voluntary survey of our members.²

¹ 76 Fed. Reg. 31426. On May 31, 2011, OCR proposed regulations that sought to: (a) revise the existing regulatory requirements to expand the information that would be included in an individual's accounting of disclosures report; and (b) create a new right to an "access report" that indicates who has accessed information contained in an individual's electronic designated record set. AHIP submitted comments in response on August 1, 2011 which should be available via the federal regulatory portal, www.regulations.gov. In addition, the U.S. Department of Health and Human Services, Office of the National Coordinator for Health Information Technology has been exploring ways through which health information can be made available to consumers in electronic platforms, such as Electronic Health Records, when developing the HITECH's "meaningful use" requirements.

² In 2011, AHIP conducted a voluntary member survey to evaluate proposed regulations from OCR. The results of the initial survey were included in AHIP's response to the proposed rules. We recognize that the 2013 survey results may differ as: (a) the number and types of responding entities are different based on the survey year; and (2) the survey results are addressing a broader set of policy proposals that have developed since the OCR regulations were proposed. We offer the 2011 and the 2013 data summaries in comparison as a way to reference practical viewpoints evaluating the same set of federal regulatory proposals at two different points-in-time.

II. The Consumer Experience

Consumers have gained confidence in and reliance upon various health insurance plan processes and information technologies to access their health information. For example, some consumers rely on online health tools to compile health information. Other functionality includes accessing information about a specific disease or condition through health plan educational resources, using mobile applications, or leveraging health insurance plan wellness programs or discounts to promote healthy lifestyles. All consumers receive paper or electronic Explanations of Benefits to better understand the services they received and their financial responsibility (if any) in paying for those services. These capabilities, which may include online accounts and other electronic mediums, highlight the vehicles through which consumers currently access the information that is most relevant to them.

Before private entities and federal partners decide on ways to improve transparency about the uses and disclosures of health information, it is important to note the existing processes through which consumers can gain information about and an understanding of how their health information can be used and disclosed. HIPAA covered entities (which includes health insurance plans) spend significant efforts in educating consumers about the ways that their health information may be used and disclosed. Notices of Privacy Practices (NPPs)³ are routinely made available in print and electronically (e.g., via a website) and these documents are updated as material changes in processes or laws and

³ 45 C.F.R. §164.520. The NPPs are required by the Health Insurance Portability and Accountability Act Privacy Rule. In addition, the Gramm-Leach Bliley Act and various state laws require privacy notices.

regulations take place. NPPs provide sufficient and detailed information for consumers to learn about how health insurance plans use and disclose protected health information within their health care operations.

Health insurance plans have routine interactions with consumers and report that overall consumers are satisfied with their ability to access information that pertains to their health and care. There are three data sources that we believe help illustrate the consumer experience from the health insurance plan perspective: (1) the need for consumers to request and receive an Accounting of Disclosures report; (2) consumer concerns or complaints about the privacy and security of their health information; and (3) anecdotal information from direct customer interactions relating to the access, privacy, or security of health information.

The HIPAA Privacy Rule established the right of individuals to request an accounting of the disclosures of their personal health information,⁴ but did not require covered entities to report to consumers uses and disclosures of information (for treatment, payment, or health care operations).⁵ The HITECH Act further refined this right by allowing individuals to receive an accounting of all disclosures made through clinically-based Electronic Health Records (EHRs) systems.⁶ These requirements were primarily designed to complement the corresponding HITECH Act incentive program that was established to

⁴ As discussed in regulation 45 C.F.R. §164.512, these apply to certain disclosures for which an authorization or opportunity to agree or object is not required.

⁵ 45 C.F.R. §164.528.

⁶ Pub. L. No. 111-5, Division A, Title XIII. Note that some, but not all, HIPAA covered entities are eligible to receive financial incentives for adopting and using EHRs.

provide incentives to adopt EHRs and allow for “meaningful use” of these applications in a clinical setting.⁷

In practice, the majority of consumers do not request an accounting of disclosures. (Refer to Exhibit I) In addition, an informal query of our member companies evidenced that a very small number of consumers have filed complaints in 2013 relating to the privacy and security of their health information. (Refer to Exhibit II) Anecdotal information confirmed that of the consumers who filed a complaint, the majority were satisfied with the resolution.

Federal regulators and advising bodies should continue to evaluate consumers’ needs for health and related information. However, before acting upon a premise that consumers are seeking greater information transparency, we encourage HHS and related advisors to review the testimony and other information gathered from the virtual hearing. Our data and experiences indicate that consumers want access to certain kinds of information (e.g., such as online portals that detail benefits, coverage, claims status), but that no consumers are advocating for wide-spread enhancements to the accounting of disclosure requirements.

II. The Need for Cost-Benefit Analyses

Long-standing federal requirements, and Administration policies, have continually emphasized the need for federal agencies to propose or adopt regulations based on a

⁷ *Id.*

reasoned determination of whether the benefits justify the costs.⁸ To effectuate this long-standing requirement, federal regulations should be tailored to impose the least burden on affected entities, where practicable.

Since OCR issued regulatory proposals to change the existing Accounting of Disclosure requirements under HIPAA and to add new Access Reports under the HITECH Act in 2011, we recognized that electronic technologies and capabilities may have changed as new system solutions were developed and deployed. Health insurance plans and other key stakeholders often leverage new processes and solutions to make improvements that keep pace with consumers' expectations. It is also our experience that consumers want to see their health care dollars spent wisely.

With these concepts in mind, we recently re-assessed our members to validate whether business or technical infrastructures may have changed since the OCR regulatory proposals were issued, and whether cost-savings could be achieved if the requirements were to be currently implemented.⁹ The most-recent survey results (which are discussed in Exhibits III - V) support the conclusions that: (1) changes have not occurred within the health insurance plan environment that would alter prior estimates of the exorbitant cost of implementing the regulatory proposals; and (2) the expected costs to implement the regulatory proposals far outweigh the benefits to consumers.

⁸ See, Executive Orders 13563 and 13610.

⁹ Refer to Footnote 2.

Thus, any new federal information transparency proposals should: (a) be evaluated using a reasonable cost-benefit analysis; (b) avoid unnecessary, prescriptive, and costly requirements; and (c) provide consumers with assurance that if investments are being made in technology infrastructures that these changes are required and will be utilized by a majority of consumers.

IV. The Affordable Care Act is Changing the Health Insurance Marketplace and Consumer Experiences

It is also important to recognize that there are monumental changes taking place in health insurance plans across the nation as a result of the Affordable Care Act. As we engage consumers in new marketplaces for state and federal Exchanges and new program models (e.g., the changes taking place in Medicaid plans), these new venues need time to mature. In these contexts, consumers will continue to have access to a complete and transparent process that seeks to inform their health coverage and cost decisions. We have yet to realize the full effects of these changes. We expect that the strong privacy and security protections for health information will continue in these contexts. We remain open to exploring new ways to make pertinent information available to consumers, particularly as we engage consumers in these new ways.

Any new federal information transparency proposals should take into account the emerging ways that consumers are accessing information to make health insurance coverage decisions. We continue to emphasize the need for new or changing federal

policies and regulatory proposals to be weighed against the anticipated costs of implementing the requirements.

V. Congressional Intent for the HITECH Act Should Be Followed

Two of the key goals of the HITECH Act were facilitating information sharing and providing financial incentives to health care providers to use Electronic Health Record (EHR) technology to improve the quality of care. **We continue to assert that federal policies and actions should conform to the purposes intended by Congress in the HITECH statute rather than setting broad, new, and sweeping changes across all HIPAA-covered entities that were not envisioned by Congress when the HITECH Act was passed.**

One federal proposal of utmost concern from a legal perspective is the requirement for HIPAA-covered entities to produce Access Reports to consumers detailing permitted and routine internal access to electronic systems. The HITECH Act did not envision or require covered entities to produce Access Reports, and if implemented, the reports are expected to have several unintended consequences on consumers.

As health care providers, health insurance plans, and other entities increase the use of an individuals' health data to improve health outcomes, federal requirements should recognize the importance of enabling data at the point of care. The Access Report

proposal, however, is likely to decrease such data availability in an effort to limit its accessibility.

In addition, the current cost estimate for entities to produce Access Reports is varied and expected to involve millions of dollars per company. (See Exhibit III) The Access Reports are expected to contain voluminous and inconsequential routine business transactions that are unlikely to inform consumers about the uses or disclosures of their health information. **We continue to recommend that the Access Reports be withdrawn from future federal proposals and regulations.**

A second area where federal proposals have misinterpreted the HITECH Act requirements is with the revised Accounting of Disclosure requirements. Under the HITECH Act, the revised Accounting of Disclosure requirements were only intended to apply to EHR clinical systems used in direct patient care settings.¹⁰ Recent federal agency interpretations have attempted to expand the requirements to essentially any electronic system used by a HIPAA-covered entity. We continue to assert that any future changes to the Accounting of Disclosures requirements conform to the statute and Congressional intent.

¹⁰ Specifically, the provision in the HITECH Act that details the changes to the Accounting requirements for certain protected health information would apply “in the case that a covered entity uses or maintains an electronic health record.” In addition, the [HHS] Secretary shall promulgate regulations [and] . . . shall only require such information to be collected through an electronic health record in a manner that takes into account the interests of the individuals in learning the circumstances under which their protected health information is being disclosed and takes into account the administrative burden of accounting for such disclosures.

IV. There is a Need for Coordination Between Federal Agencies

Finally, there are different agencies and advisory bodies participating today that have different jurisdictional responsibilities and various objectives for making health information available to consumers. We all share the same goals of ensuring that: (a) consumers' health information is available for their health care; and (b) consumers understand and trust in the processes we utilize to protect the privacy and security of their health information. We encourage all federal partners to stay abreast of each others' work, and we encourage the HHS Office for Civil Rights to maintain the integrity of oversight for interpreting and promulgating HIPAA and the HITECH Act requirements.

As a point-of-reference, we offer the complete results of our 2013 voluntary member survey in Attachment A. (Refer to Exhibits VI- XI) We appreciate the opportunity to provide comments on this important topic.

**America's Health Insurance Plans
Member Survey of the Federal Regulatory Proposals to
Revise the HIPAA Privacy Rule
Accounting of Disclosures Requirements and
Create New Access Reports
Under the Health Information Technology for
Economic and Clinical Health Act**

The AHIP Survey

Source: AHIP Member Surveys July 2011
and September 2013

Overview

- To illustrate the expected impact of The U.S. Department of Health and Human Services Office for Civil Rights proposed regulations, in 2011 AHIP conducted a voluntary member survey to provide measurable data that illustrates:
 - the expected consequences of implementing the regulatory proposals;
 - the anticipated implementation costs;
 - historical experiences with making accountings of disclosures available for consumers upon request; and
 - anecdotal information that summarizes the priority concerns that business and compliance professionals have identified after reviewing the proposed regulations.
- In September 2013, AHIP conducted a second voluntary survey of our members to capture the most current snapshot of the data described above.
- What follows is a summary of both their 2011 and 2013 responses.

Source: AHIP Member Surveys July 2011
and September 2013

Survey Statistics

In 2011 ...

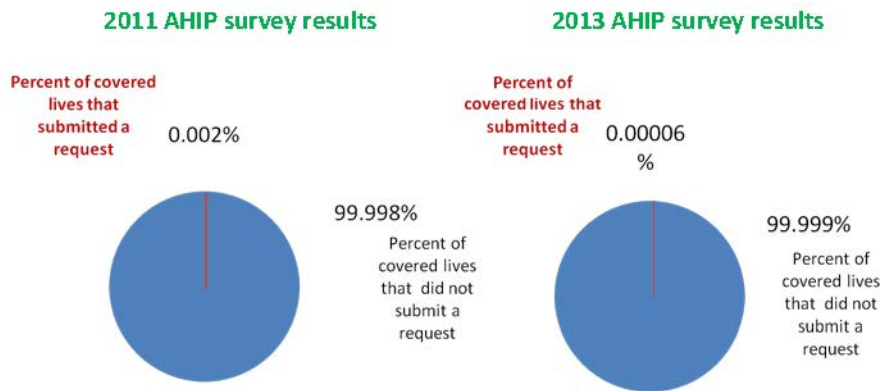
- **Millions of Consumers Are Represented by the AHIP Survey.** The survey respondents provide health insurance coverage to nearly 166 million individuals.
- **Diverse Types of Private Entities Participated.** The survey encompassed a wide range of organization types.
 - 19% of the survey respondents represented “local companies” (i.e., operating in no more than one state);
 - 44% of the survey respondents represented “regional companies” (i.e., operating in more than one state); and
 - 37% of the survey respondents represented “national companies” (i.e., operating in all 50 states).

In 2013 ...

- **Millions of Consumers Are Represented by the AHIP Survey.** The survey respondents provide health insurance coverage to nearly 80.5 million individuals.
- **Diverse Types of Private Entities Participated.** The survey encompassed a wide range of organization types.
 - 23% of the survey respondents represented “local companies” (i.e., operating in no more than one state);
 - 31% of the survey respondents represented “regional companies” (i.e., operating in more than one state); and
 - 46% of the survey respondents represented “national companies” (i.e., operating in all 50 states).

Source: AHIP Member Surveys July and September 2013

Exhibit I. Estimated average annual percent of covered individuals that submitted an “accounting for disclosure request”



Source: AHIP Member Survey July 2011

Exhibit II. Requests for privacy complaints received by insurance companies 2013 AHIP survey

66 Number of privacy complaints received so far during 2013

66.3M Number of covered individuals represented in the response

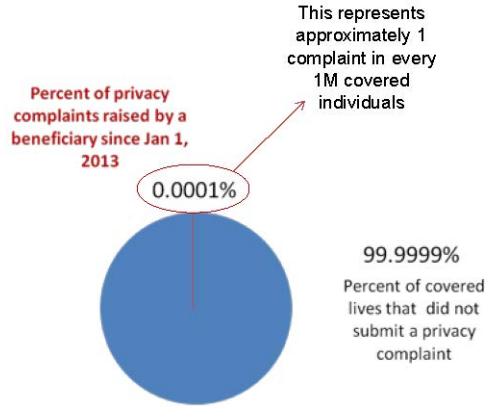


Exhibit IV. Estimated cost to change legacy information technology systems (pre 01/01/09)

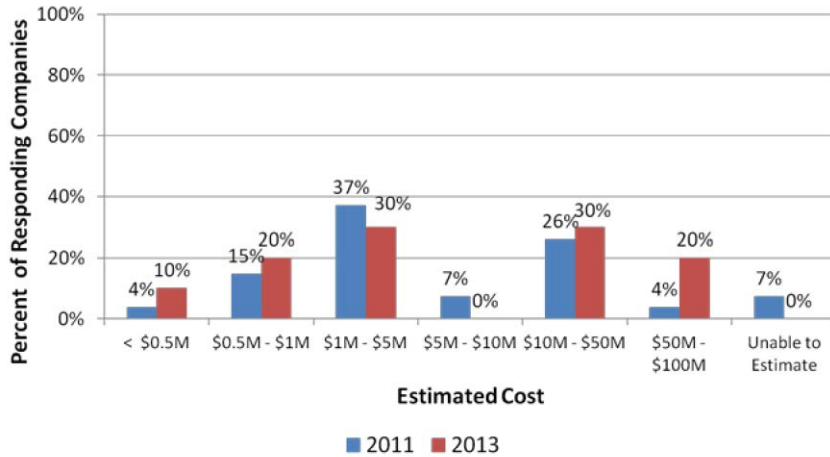
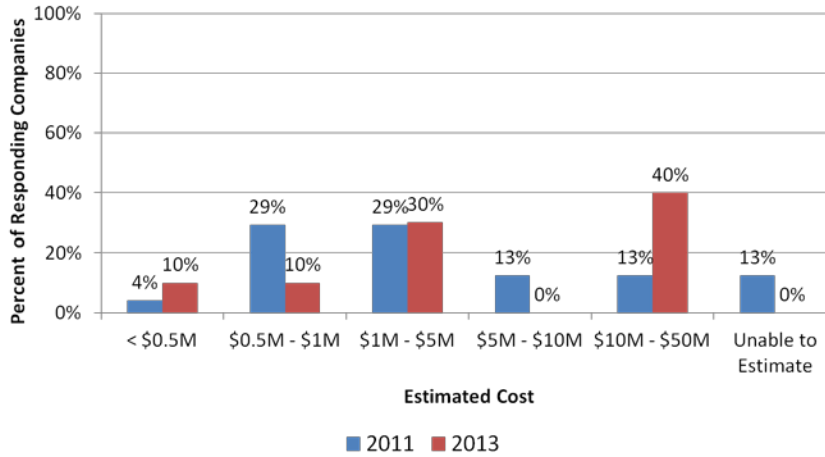
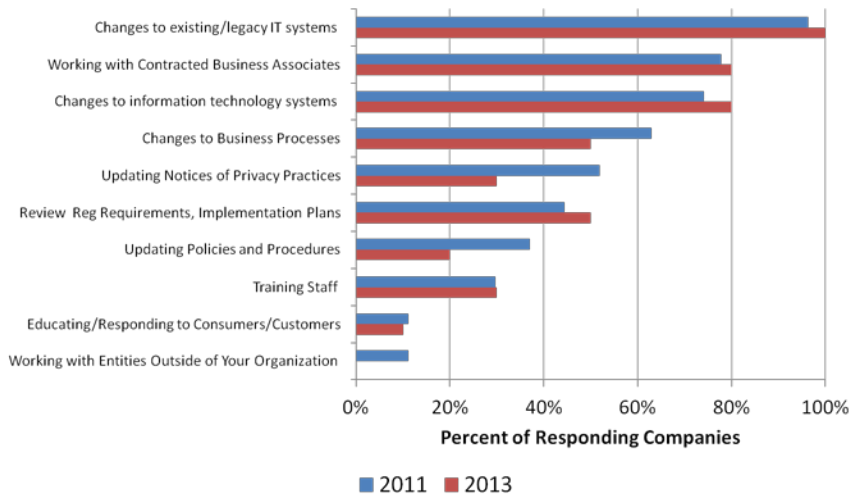


Exhibit V. Estimated cost to change newer information technology systems (post 01/01/09)



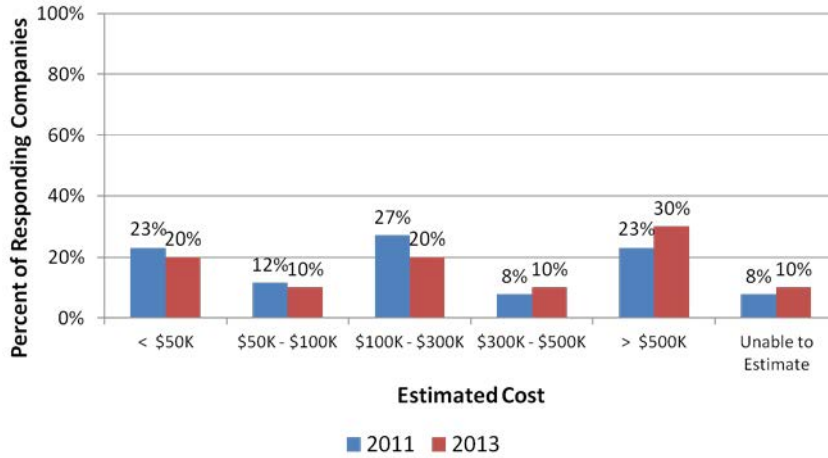
Source: AHIP Member Surveys July 2011 and September 2013

Exhibit VI. Primary factors used in formulating the costs to implement OCR regulations



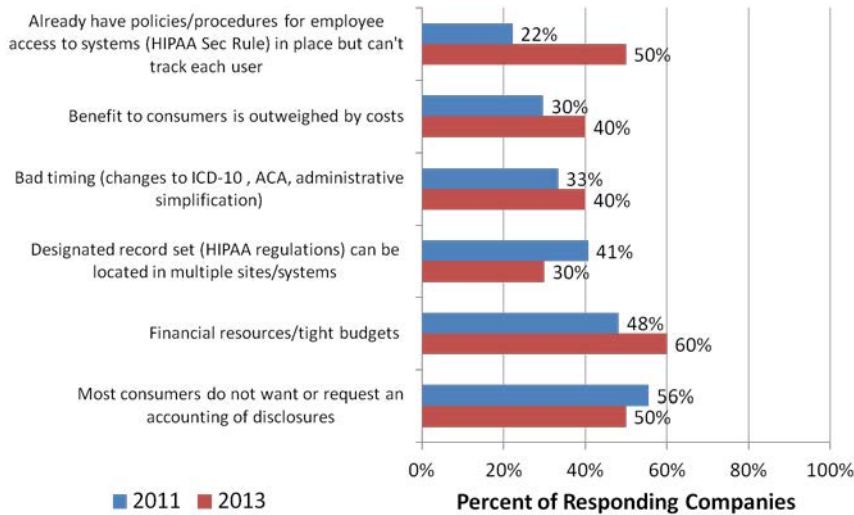
Source: AHIP Member Surveys July 2011 and September 2013

Exhibit VII. Estimated cost to update and issue notices of privacy practices



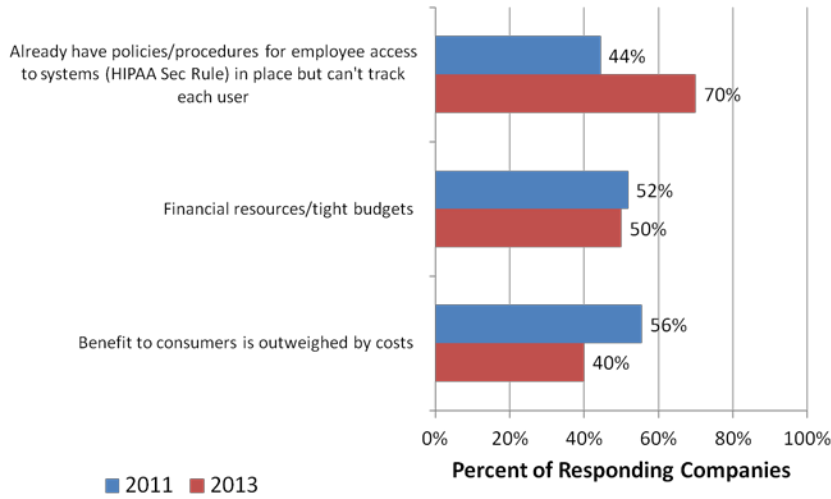
Source: AHIP Member Surveys July 2011 and September 2013

Exhibit VIII. Top concerns with implementing the new accounting for disclosures requirements



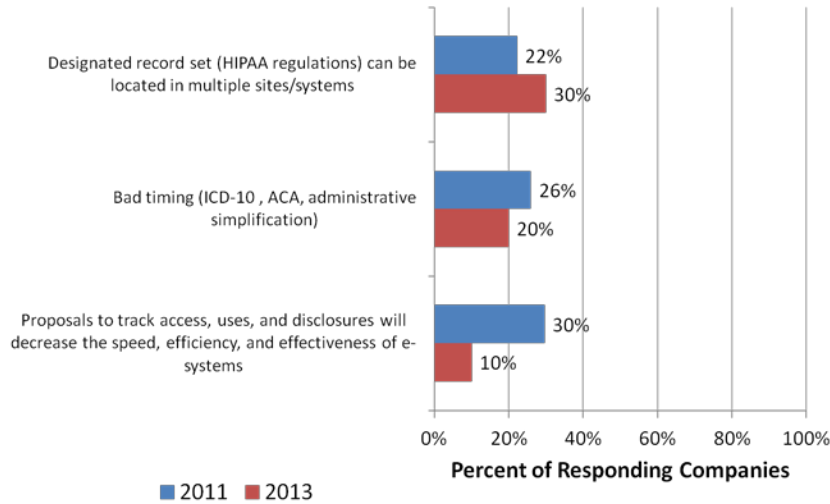
Source: AHIP Member Surveys July 2011 and September 2013

Exhibit IX. Top concerns with implementing the new access requirements (1 of 2)



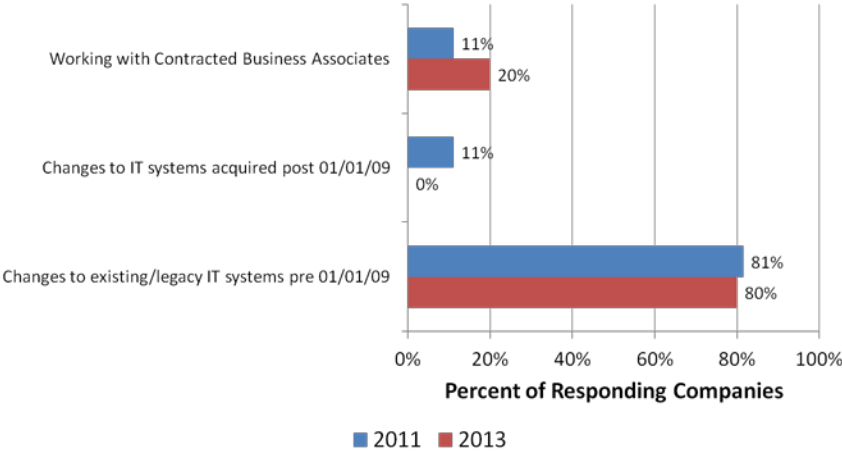
Source: AHIP Member Surveys July 2011 and September 2013

Exhibit IX (con't). Top concerns with implementing the new access requirements (2 of 2)



Source: AHIP Member Surveys July 2011 and September 2013

Exhibit X. Top concerns and challenges in implementing the new regulations if they are adopted as written?



Source: AHIP Member Surveys July 2011 and September 2013

Exhibit XI. Amount of time organizations think is adequate to comply with new requirements

2011

- 2 years (5% of companies)
- 3-5 years (82% of companies)
- > 5 years (14% of companies)

2013

- 3-5 years (25% of companies)
- >5 years (75% of companies)

Source: AHIP Member Surveys July 2011 and September 2013