

Chart A: Models for Determining Who Qualifies for a CMP/Settlement Payment Distribution

Proposal	Description	Types of Persons Who Would Potentially Be “Harmed” Under Standard	Potential Distribution Methods (from Chart B)	Advantages	Disadvantages
Actual Injury Model	Drawing on the language of standing, which is used most often to address whether something is an injury or not, the agency could require a prospective civil monetary penalty (CMP) or settlement payment recipient to demonstrate that s/he has suffered a concrete, particularized injury, i.e., something has happened to him/her and it has had an impact on him/her. These types of injuries fall into two categories – objective injuries and subjective injuries. The	<p>Objective Injuries</p> <p>Individuals who have suffered economic loss as a result of a breach of PHI caused by a HIPAA violation (i.e., fraudulent credit card charges or medical bills, costs incurred to restore one’s credit)</p> <p>Workforce members who have been fired in retaliation for good faith whistleblowing (i.e., lost wages)</p> <p>Subjective Injuries</p> <p>Individuals suffering emotional distress (or severe emotional distress) as a result of having</p>	Harm Tiers Case by Case Basis Even Distribution	Limiting CMP/settlement payment distribution to actual, objective injuries would help ensure that CMP/settlement payment distribution reaches individuals who were harmed by a HIPAA violation.	The agency would need to establish a procedure to receive and evaluate claims from individuals who have suffered an actual injury, and a means for determining whether the individual qualifies. This could be difficult for the agency, particularly if subjective injuries are included.

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	agency could elect to award just objective injuries or elect to award both injury types.	PHI shared with unauthorized persons (e.g., medical bills, lost wages)			
Risk-Of-Injury Model	The agency could limit penalty distribution to persons who are “subjected to” a HIPAA violation and therefore are at a risk of injury. Under this standard, proof of actual damages would not be required.	Any individual whose PHI has been breached as a result of a HIPAA violation (regardless of whether there has been injury)	Harm Tiers (tiered by the type of violation) Even Distribution	Many HIPAA violations do not result in objective injury to individuals. This standard would allow individuals whose privacy had been violated by a Covered Entity to still share in the penalty distribution even if they did not suffer measurable damages, such as lost wages or medical bills. Easier for the agency to administer, as they	Arguably undervalues the claims of individuals who were actually injured by the HIPAA violation. Could significantly expand the number of individuals – which will be more difficult to administer and will decrease the amount received by each eligible person.

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				would ostensibly determine who was subjected to the violation during its investigation of the violation.	
Defined Injury Model	The agency could limit penalty distribution to persons who suffer specific concrete injuries it would define through regulation. The agency could also place these injuries into tiers, awarding a higher percentage of CMPs and settlements for higher tiered injuries.	For example: <ul style="list-style-type: none"> • Individuals whose PHI has been sold, or used for marketing purposes without authorization • Workforce members who have experienced retaliation • Individuals who have actually suffered identity theft as a result of a breach due to a HIPAA 	Harm Tiers Even Distribution (at least among injury classifications)	This method would allow the agency to constrain the types of injuries that warrant recovery to a manageable number, focusing on the types of HIPAA violations that cause the most consumer harm	The agency would still need to establish a procedure to determine who has suffered a defined injury as a result of a HIPAA violation.

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		violation			
Qui Tam Model	The agency could limit penalty distribution to persons who: 1) suffered some form of <i>direct injury</i> or <i>risk-of-injury</i> (see above) as a result of a Covered Entity or Business Associate’s HIPAA violation; <i>and</i> 2) elected to report non-compliance to the agency <i>before</i> a certain point of the agency’s investigation (e.g., prior to initiating the investigation, or prior to OCR first contacting the CE or BA about the violation).	See above descriptions of potential injuries under the <i>direct injury</i> and <i>risk-of-injury</i> models. This model would just limit the recovery to those individuals who suffer such an injury <i>and</i> file a complaint with the agency.	Harm Tiers Case by Case Basis Even Distribution	Easy method of determining the population of individuals who may receive penalty distribution Incentivizes complainants to report violations to the agency	Individuals who have been harmed by the HIPAA violation but don’t elect to complain to the agency would not be able to obtain any penalty distribution. May encourage the submission of frivolous complaints to the agency. Arguably increases the risk that HIPAA would be militarized in a way that would impede the actual goals of the statute, a fear vocalized in the legislative history. The chief benefit— an incentive to

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					<p>report—is not the objective of the HITECH provision (at least that’s the sense that one gets from the legislative history).</p>