

# SENATE BILL 903

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CF HB 892

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By: **Senator Hayes**

Introduced and read first time: February 14, 2019

Assigned to: Rules

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## A BILL ENTITLED

1 AN ACT concerning

2 **Health Information – Commercial Sale**

3 FOR the purpose of requiring a covered entity, business associate, or subcontractor to  
4 obtain authorization from an individual before engaging in the commercial sale of  
5 certain health information; requiring a covered entity, business associate, or  
6 subcontractor to inform an individual that the individual may elect to receive a share  
7 of any payment received by the covered entity, business associate, or subcontractor  
8 for the commercial sale of certain health information before the individual authorizes  
9 a certain sale; requiring that a certain authorization meet certain requirements;  
10 prohibiting a covered entity, business associate, or subcontractor from  
11 discriminating against or penalizing a certain individual for certain actions;  
12 authorizing the Maryland Department of Health to adopt regulations to carry out  
13 this Act; prohibiting the Department from taking certain actions on or before a  
14 certain date; providing for the construction of certain provisions of this Act; defining  
15 certain terms; and generally relating to the commercial sale of health information.

16 BY adding to

17 Article – Health – General

18 Section 4–501 to be under the new subtitle “Subtitle 5. Commercial Sale of Health  
19 Information”

20 Annotated Code of Maryland

21 (2015 Replacement Volume and 2018 Supplement)

22 Preamble

23 WHEREAS, The Health Insurance Portability and Accountability Act (HIPAA)  
24 protects the privacy and security of an individual’s protected health information and affords  
25 the individual with rights to access, amend, and obtain an accounting of disclosures of the  
26 individual’s protected health information; and

27 WHEREAS, HIPAA balances protections and individual rights with the need to

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 avoid the creation of unnecessary barriers to quality health care; and

2 WHEREAS, The Office of Civil Rights within the U.S. Department of Health and  
3 Human Services, the entity charged with enforcing HIPAA, has explained, “[r]eady access  
4 to treatment and efficient payment for health care, both of which requires use and  
5 disclosure of protected health information, are essential to the effective operation of the  
6 health care system. In addition, certain health care operations — such as administrative,  
7 financial, legal, and quality improvement activities — conducted by or for health care  
8 providers and health plans, are essential to support treatment and payment. Many  
9 individuals expect that their health information will be used and disclosed as necessary to  
10 treat them, bill for treatment, and, to some extent, operate the covered entity’s health care  
11 business. To avoid interfering with an individual’s access to quality health care or the  
12 efficient payment for such health care, the Privacy Rule permits a covered entity to use and  
13 disclose protected health information, with certain limits and protections, for treatment,  
14 payment, and health care operations activities.”; and

15 WHEREAS, Notwithstanding an individual’s expectations that protected health  
16 information will be used and disclosed as necessary to treat the individual, bill for the  
17 treatment, and, to some extent, operate the covered entity’s health care business, protected  
18 health information is often used for purposes unrelated to payment, treatment, health care  
19 operations of the covered entity, or other purposes as permitted under HIPAA; and

20 WHEREAS, Companies that provide services on behalf of covered entities that  
21 involve access to protected health information, known as business associations under  
22 HIPAA, and their contractors, known as subcontractors under HIPAA, routinely  
23 de-identify individuals’ protected health information in order to sell it to third parties in  
24 exchange for remuneration; and

25 WHEREAS, After protected health information has been de-identified, it is no longer  
26 protected by or subject to HIPAA; and

27 WHEREAS, The de-identification process itself is a use of protected health  
28 information that may be performed only under limited circumstances and for limited  
29 purposes under HIPAA; and

30 WHEREAS, An individual may authorize a use or disclosure of the individual’s  
31 protected health information when such use or disclosure is not otherwise permitted by  
32 HIPAA, such as for the de-identification of protected health information for the purpose of  
33 commercial sale; and

34 WHEREAS, The individual who authorizes the de-identification of the individual’s  
35 protected health information for the purpose of commercial sale should have the right to  
36 assert a property interest in the health information and have the option to receive  
37 remuneration in connection with the commercial sale of the individual’s information; now,  
38 therefore,

39 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,

1 That the Laws of Maryland read as follows:

2 **Article – Health – General**

3 **SUBTITLE 5. COMMERCIAL SALE OF HEALTH INFORMATION.**

4 **4-501.**

5 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS  
6 INDICATED.

7 (2) “BUSINESS ASSOCIATE” HAS THE MEANING STATED IN 45 C.F.R.  
8 § 160.103.

9 (3) (I) “COMMERCIAL SALE” MEANS THE DISCLOSURE OF HEALTH  
10 INFORMATION THAT IS OR WAS PROTECTED HEALTH INFORMATION, INCLUDING  
11 DE-IDENTIFIED HEALTH DATA, BY A COVERED ENTITY, BUSINESS ASSOCIATE, OR  
12 SUBCONTRACTOR FOR WHICH THE RECIPIENT PAYS FOR THE INFORMATION.

13 (II) “COMMERCIAL SALE” DOES NOT INCLUDE THE DISCLOSURE  
14 OF HEALTH INFORMATION THAT IS OR WAS PROTECTED HEALTH INFORMATION,  
15 INCLUDING DE-IDENTIFIED HEALTH DATA, BY A COVERED ENTITY, BUSINESS  
16 ASSOCIATE, OR SUBCONTRACTOR FOR:

17 1. PUBLIC HEALTH PURPOSES UNDER 45 C.F.R. §  
18 164.512(B);

19 2. RESEARCH PURPOSES UNDER 45 C.F.R. § 164.512(I)  
20 OR 45 C.F.R. § 514(E), IN WHICH THE ONLY PAYMENT RECEIVED IS A FEE TO COVER  
21 THE COST TO PREPARE AND TRANSMIT THE DE-IDENTIFIED DATA IN RELATION TO  
22 THE RESEARCH;

23 3. TREATMENT, PAYMENT, OR HEALTH CARE  
24 OPERATIONS UNDER 45 C.F.R. § 164.506;

25 4. THE SALE, TRANSFER, MERGER, OR CONSOLIDATION,  
26 OF ALL OR PART OF THE COVERED ENTITY, BUSINESS ASSOCIATE, OR  
27 SUBCONTRACTOR OR ANY RELATED DUE DILIGENCE;

28 5. SERVICES PERFORMED IN ACCORDANCE WITH AN  
29 AGREEMENT THAT MEETS THE REQUIREMENTS OF 45 C.F.R. § 164.502(E) OR 45  
30 C.F.R. 164.504(E) BETWEEN A COVERED ENTITY AND A BUSINESS ASSOCIATE OR A  
31 BUSINESS ASSOCIATE AND A SUBCONTRACTOR IF THE ONLY PAYMENT MADE IS FOR  
32 THE PERFORMANCE OF THE SERVICES;

- 1                                   6.     COMPLYING WITH THE LAW, AS AUTHORIZED UNDER  
2 45 C.F.R. § 164.512(A);
- 3                                   7.     HEALTH OVERSIGHT PURPOSES UNDER 45 C.F.R. §  
4 164.512(D);
- 5                                   8.     LAW ENFORCEMENT PURPOSES UNDER 45 C.F.R. §  
6 164.512(F);
- 7                                   9.     PREVENTING A SERIOUS THREAT TO HEALTH OR  
8 SAFETY UNDER 45 C.F.R. § 164.512(J);
- 9                                   10.    SPECIALIZED GOVERNMENT FUNCTIONS PURPOSES  
10 UNDER 45 C.F.R. § 164.512(K);
- 11                                  11.    WORKERS' COMPENSATION PURPOSES UNDER 45  
12 C.F.R. § 164.512(L); OR
- 13                                  12.    ADDRESSING FRAUD, SECURITY, OR TECHNICAL  
14 ISSUES WHEN THOSE ACTIVITIES ARE NECESSARY TO PROTECT THE COVERED  
15 ENTITY, BUSINESS ASSOCIATE, OR SUBCONTRACTOR, OR THE INDIVIDUAL WHOSE  
16 INFORMATION IS IN THE POSSESSION OF THE COVERED ENTITY, BUSINESS  
17 ASSOCIATE, OR SUBCONTRACTOR.
- 18                   (4)    "COVERED ENTITY" HAS THE MEANING STATED IN 45 C.F.R. §  
19 160.103.
- 20                   (5)    "HEALTH INFORMATION" HAS THE MEANING STATED IN 45 C.F.R.  
21 § 160.103.
- 22                   (6)    "PROTECTED HEALTH INFORMATION" HAS THE MEANING STATED  
23 IN 45 C.F.R. § 160.103.
- 24                   (7)    "SUBCONTRACTOR" HAS THE MEANING STATED IN 45 C.F.R. §  
25 160.103.
- 26           (B)   (1)   SUBJECT TO PARAGRAPHS (2) AND (3) OF THIS SUBSECTION, A  
27 COVERED ENTITY, BUSINESS ASSOCIATE, OR SUBCONTRACTOR SHALL OBTAIN  
28 AUTHORIZATION FROM AN INDIVIDUAL BEFORE ENGAGING IN A COMMERCIAL SALE  
29 OF THE INDIVIDUAL'S HEALTH INFORMATION OR PROTECTED HEALTH  
30 INFORMATION, INCLUDING DE-IDENTIFIED DATA.

1           **(2) BEFORE AN INDIVIDUAL AUTHORIZES THE SALE OF THE**  
2 **INDIVIDUAL'S HEALTH INFORMATION OR PROTECTED HEALTH INFORMATION**  
3 **UNDER PARAGRAPH (1) OF THIS SUBSECTION, A COVERED ENTITY, BUSINESS**  
4 **ASSOCIATE, OR SUBCONTRACTOR SHALL INFORM THE INDIVIDUAL THAT THE**  
5 **INDIVIDUAL MAY ELECT TO RECEIVE A SHARE OF ANY PAYMENT RECEIVED BY THE**  
6 **COVERED ENTITY, BUSINESS ASSOCIATE, OR SUBCONTRACTOR IN EXCHANGE FOR**  
7 **THE COMMERCIAL SALE OF THE INDIVIDUAL'S HEALTH INFORMATION OR**  
8 **PROTECTED HEALTH INFORMATION.**

9           **(3) THE AUTHORIZATION REQUIRED UNDER PARAGRAPH (1) OF THIS**  
10 **SUBSECTION SHALL MEET THE REQUIREMENTS OF 45 C.F.R. § 164.508.**

11           **(C) A COVERED ENTITY, BUSINESS ASSOCIATE, OR SUBCONTRACTOR MAY**  
12 **NOT DISCRIMINATE AGAINST OR PENALIZE AN INDIVIDUAL WHO, UNDER**  
13 **SUBSECTION (B) OF THIS SECTION:**

14           **(1) DOES NOT SIGN AN AUTHORIZATION; OR**

15           **(2) ELECTS TO RECEIVE COMPENSATION.**

16           **(D) THIS SECTION MAY NOT BE CONSTRUED TO APPLY TO:**

17           **(1) ANY STATE AGENCY OR POLITICAL SUBDIVISION OF THE STATE;**

18           **(2) ANY FEDERAL AGENCY; OR**

19           **(3) ANY COVERED ENTITY, BUSINESS ASSOCIATE, OR**  
20 **SUBCONTRACTOR THAT POSSESSES PROTECTED HEALTH INFORMATION THAT WAS**  
21 **CREATED, RECEIVED, TRANSMITTED, OR MAINTAINED ON BEHALF OF A STATE**  
22 **AGENCY OR POLITICAL SUBDIVISION OF THE STATE, OR A FEDERAL AGENCY.**

23           **(E) THE DEPARTMENT MAY ADOPT REGULATIONS TO CARRY OUT THIS**  
24 **SECTION.**

25           SECTION 2. AND BE IT FURTHER ENACTED, That the Maryland Department of  
26 Health may not take any action to enforce this Act on or before December 31, 2020.

27           SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect  
28 October 1, 2019.