

113TH CONGRESS
1ST SESSION

S. 1685

To amend the Public Health Service Act and the Social Security Act to extend health information technology assistance eligibility to behavioral health, mental health, and substance abuse professionals and facilities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 12, 2013

Mr. PORTMAN introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Public Health Service Act and the Social Security Act to extend health information technology assistance eligibility to behavioral health, mental health, and substance abuse professionals and facilities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Behavioral Health In-
5 formation Technology Coordination Act of 2013”.

1 **SEC. 2. EXTENSION OF HEALTH INFORMATION TECH-**
 2 **NOLOGY ASSISTANCE FOR BEHAVIORAL AND**
 3 **MENTAL HEALTH AND SUBSTANCE ABUSE.**

4 Section 3000(3) of the Public Health Service Act (42
 5 U.S.C. 300jj(3)) is amended by inserting before “and any
 6 other category” the following: “behavioral and mental
 7 health professionals (as defined in section
 8 331(a)(3)(E)(i)), a substance abuse professional, a psy-
 9 chiatric hospital (as defined in section 1861(f) of the So-
 10 cial Security Act), a community mental health center
 11 meeting the criteria specified in section 1913(c), a residen-
 12 tial or outpatient mental health or substance abuse treat-
 13 ment facility,”.

14 **SEC. 3. EXTENSION OF ELIGIBILITY FOR MEDICARE AND**
 15 **MEDICAID HEALTH INFORMATION TECH-**
 16 **NOLOGY IMPLEMENTATION ASSISTANCE.**

17 (a) PAYMENT INCENTIVES FOR ELIGIBLE PROFES-
 18 SIONALS UNDER MEDICARE.—Section 1848 of the Social
 19 Security Act (42 U.S.C. 1395w-4) is amended—

20 (1) in subsection (a)(7)—

21 (A) in subparagraph (E), by adding at the
 22 end the following new clause:

23 “(iv) ADDITIONAL ELIGIBLE PROFES-
 24 SIONAL.—The term ‘additional eligible pro-
 25 fessional’ means a clinical psychologist pro-

1 viding qualified psychologist services (as
2 defined in section 1861(ii)).”; and

3 (B) by adding at the end the following new
4 subparagraph:

5 “(F) APPLICATION TO ADDITIONAL ELIGI-
6 BLE PROFESSIONALS.—The Secretary shall
7 apply the provisions of this paragraph with re-
8 spect to an additional eligible professional in
9 the same manner as such provisions apply to an
10 eligible professional, except in applying sub-
11 paragraph (A)—

12 “(i) in clause (i), the reference to
13 2015 shall be deemed a reference to 2019;

14 “(ii) in clause (ii), the references to
15 2015, 2016, and 2017 shall be deemed ref-
16 erences to 2019, 2020, and 2021, respec-
17 tively; and

18 “(iii) in clause (iii), the reference to
19 2018 shall be deemed a reference to
20 2022.”; and

21 (2) in subsection (o)—

22 (A) in paragraph (5), by adding at the end
23 the following new subparagraph:

24 “(D) ADDITIONAL ELIGIBLE PROFES-
25 SIONAL.—The term ‘additional eligible profes-

sional’ means a clinical psychologist providing qualified psychologist services (as defined in section 1861(ii)).”; and

(B) by adding at the end the following new paragraph:

“(6) APPLICATION TO ADDITIONAL ELIGIBLE PROFESSIONALS.—The Secretary shall apply the provisions of this subsection with respect to an additional eligible professional in the same manner as such provisions apply to an eligible professional, except in applying—

“(A) paragraph (1)(A)(ii), the reference to 2016 shall be deemed a reference to 2020;

“(B) paragraph (1)(B)(ii), the references to 2011 and 2012 shall be deemed references to 2015 and 2016, respectively;

“(C) paragraph (1)(B)(iii), the references to 2013 shall be deemed references to 2017;

“(D) paragraph (1)(B)(v), the references to 2014 shall be deemed references to 2018; and

“(E) paragraph (1)(E), the reference to 2011 shall be deemed a reference to 2015.”.

(b) ELIGIBLE HOSPITALS.—Section 1886 of the Social Security Act (42 U.S.C. 1395ww) is amended—

(1) in subsection (b)(3)(B)(ix), by adding at the end the following new subclause:

“(V) The Secretary shall apply the provisions of this subsection with respect to an additional eligible hospital (as defined in subsection (n)(6)(C)) in the same manner as such provisions apply to an eligible hospital, except in applying—

“(aa) subclause (I), the references to 2015, 2016, and 2017 shall be deemed references to 2019, 2020, and 2021, respectively; and

“(bb) subclause (III), the reference to 2015 shall be deemed a reference to 2019.”; and

(2) in subsection (n)—

(A) in paragraph (6), by adding at the end the following new subparagraph:

“(C) ADDITIONAL ELIGIBLE HOSPITAL.— The term ‘additional eligible hospital’ means an inpatient hospital that is a psychiatric hospital (as defined in section 1861(f)).”; and

1 (B) by adding at the end the following new
 2 paragraph:

3 “(7) APPLICATION TO ADDITIONAL ELIGIBLE
 4 HOSPITALS.—The Secretary shall apply the provi-
 5 sions of this subsection with respect to an additional
 6 eligible hospital in the same manner as such provi-
 7 sions apply to an eligible hospital, except in apply-
 8 ing—

9 “(A) paragraph (2)(E)(ii), the references
 10 to 2013 and 2015 shall be deemed references to
 11 2017 and 2019, respectively; and

12 “(B) paragraph (2)(G)(i), the reference to
 13 2011 shall be deemed a reference to 2015.”.

14 (c) MEDICAID PROVIDERS.—Section 1903(t) of the
 15 Social Security Act (42 U.S.C. 1396b(t)) is amended—
 16 (1) in paragraph (2)(B)—

17 (A) in clause (i), by striking “, or” and in-
 18 serting a semicolon;

19 (B) in clause (ii), by striking the period
 20 and inserting a semicolon; and

21 (C) by adding after clause (ii) the following
 22 new clauses:

23 “(iii) a public hospital that is prin-
 24 cipally a psychiatric hospital (as defined in
 25 section 1861(f));

1 “(iv) a private hospital that is prin-
2 cipally a psychiatric hospital (as defined in
3 section 1861(f)) and that has at least 10
4 percent of its patient volume (as estimated
5 in accordance with a methodology estab-
6 lished by the Secretary) attributable to in-
7 dividuals receiving medical assistance
8 under this title;

9 “(v) a community mental health cen-
10 ter meeting the criteria specified in section
11 1913(c) of the Public Health Service Act;
12 or

13 “(vi) a residential or outpatient men-
14 tal health or substance abuse treatment fa-
15 cility that—

16 “(I) is accredited by the Joint
17 Commission on Accreditation of
18 Healthcare Organizations, the Com-
19 mission on Accreditation of Rehabili-
20 tation Facilities, the Council on Ac-
21 creditation, or any other national ac-
22 crediting agency recognized by the
23 Secretary; and

24 “(II) has at least 10 percent of
25 its patient volume (as estimated in ac-

1 cordance with a methodology estab-
 2 lished by the Secretary) attributable
 3 to individuals receiving medical assist-
 4 ance under this title.”; and

5 (2) in paragraph (3)(B)—

6 (A) in clause (iv), by striking “and” after
 7 the semicolon;

8 (B) in clause (v), by striking the period
 9 and inserting “; and”; and

10 (C) by adding at the end the following new
 11 clause:

12 “(vi) clinical psychologist providing
 13 qualified psychologist services (as defined
 14 in section 1861(ii)), if such clinical psy-
 15 chologist is practicing in an outpatient
 16 clinic that—

17 “(I) is led by a clinical psycholo-
 18 gist; and

19 “(II) is not otherwise receiving
 20 payment under paragraph (1) as a
 21 Medicaid provider described in para-
 22 graph (2)(B).”.

23 (d) MEDICARE ADVANTAGE ORGANIZATIONS.—Sec-
 24 tion 1853 of the Social Security Act (42 U.S.C. 1395w-
 25 23) is amended—

1 (1) in subsection (l)—

2 (A) in paragraph (1)—

3 (i) by inserting “or additional eligible
4 professionals (as described in paragraph
5 (9))” after “paragraph (2)”; and

6 (ii) by inserting “and additional eligi-
7 ble professionals” before “under such sec-
8 tions”;

9 (B) in paragraph (3)(B)—

10 (i) in clause (i) in the matter pre-
11 ceding subclause (I), by inserting “or an
12 additional eligible professional described in
13 paragraph (9)” after “paragraph (2)”; and

14 (ii) in clause (ii)—

15 (I) in the matter preceding sub-
16 clause (I), by inserting “or an addi-
17 tional eligible professional described in
18 paragraph (9)” after “paragraph
19 (2)”; and

20 (II) in subclause (I), by inserting
21 “or an additional eligible professional,
22 respectively,” after “eligible profes-
23 sional”;

1 (C) in paragraph (3)(C), by inserting “and
2 additional eligible professionals” after “all eligi-
3 ble professionals”;

4 (D) in paragraph (4)(D), by adding at the
5 end the following new sentence: “In the case
6 that a qualifying MA organization attests that
7 not all additional eligible professionals of the
8 organization are meaningful EHR users with
9 respect to an applicable year, the Secretary
10 shall apply the payment adjustment under this
11 paragraph based on the proportion of all such
12 additional eligible professionals of the organiza-
13 tion that are not meaningful EHR users for
14 such year.”;

15 (E) in paragraph (6)(A), by inserting
16 “and, as applicable, each additional eligible pro-
17 fessional described in paragraph (9)” after
18 “paragraph (2)”;

19 (F) in paragraph (6)(B), by inserting
20 “and, as applicable, each additional eligible hos-
21 pital described in paragraph (9)” after “sub-
22 section (m)(1)”;

23 (G) in paragraph (7)(A), by inserting
24 “and, as applicable, additional eligible profes-
25 sionals” after “eligible professionals”;

1 (H) in paragraph (7)(B), by inserting
 2 “and, as applicable, additional eligible profes-
 3 sionals” after “eligible professionals”;

4 (I) in paragraph (8)(B), by inserting “and
 5 additional eligible professionals described in
 6 paragraph (9)” after “paragraph (2)”; and

7 (J) by adding at the end the following new
 8 paragraph:

9 “(9) ADDITIONAL ELIGIBLE PROFESSIONAL DE-
 10 SCRIBED.—With respect to a qualifying MA organi-
 11 zation, an additional eligible professional described
 12 in this paragraph is an additional eligible profes-
 13 sional (as defined for purposes of section 1848(o))
 14 who—

15 “(A)(i) is employed by the organization; or

16 “(ii)(I) is employed by, or is a partner of,
 17 an entity that through contract with the organi-
 18 zation furnishes at least 80 percent of the enti-
 19 ty’s Medicare patient care services to enrollees
 20 of such organization; and

21 “(II) furnishes at least 80 percent of the
 22 professional services of the additional eligible
 23 professional covered under this title to enrollees
 24 of the organization; and

1 “(B) furnishes, on average, at least 20
 2 hours per week of patient care services.”; and
 3 (2) in subsection (m)—

4 (A) in paragraph (1)—

5 (i) by inserting “or additional eligible
 6 hospitals (as described in paragraph (7))”
 7 after “paragraph (2)”; and

8 (ii) by inserting “and additional eligi-
 9 ble hospitals” before “under such sec-
 10 tions”;

11 (B) in paragraph (3)(A)(i), by inserting
 12 “or additional eligible hospital” after “eligible
 13 hospital”;

14 (C) in paragraph (3)(A)(ii), by inserting
 15 “or an additional eligible hospital” after “eligi-
 16 ble hospital” in each place it occurs;

17 (D) in paragraph (3)(B)—

18 (i) in clause (i), by inserting “or an
 19 additional eligible hospital described in
 20 paragraph (7)” after “paragraph (2)”; and

21 (ii) in clause (ii)—

22 (I) in the matter preceding sub-
 23 clause (I), by inserting “or an addi-
 24 tional eligible hospital described in

1 paragraph (7)” after “paragraph
2 (2)”;

3 (II) in subclause (I), by inserting
4 “or an additional eligible hospital, re-
5 spectively,” after “eligible hospital”;

6 (E) in paragraph (4)(A), by inserting “or
7 one or more additional eligible hospitals (as de-
8 fined in section 1886(n)), as appropriate,” after
9 “section 1886(n)(6)(A)”;

10 (F) in paragraph (4)(D), by adding at the
11 end the following new sentence: “In the case
12 that a qualifying MA organization attests that
13 not all additional eligible hospitals of the orga-
14 nization are meaningful EHR users with re-
15 spect to an applicable period, the Secretary
16 shall apply the payment adjustment under this
17 paragraph based on the methodology specified
18 by the Secretary, taking into account the pro-
19 portion of such additional eligible hospitals, or
20 discharges from such hospitals, that are not
21 meaningful EHR users for such period.”;

22 (G) in paragraph (5)(A), by inserting
23 “and, as applicable, each additional eligible hos-
24 pital described in paragraph (7)” after “para-
25 graph (2)”;

1 (H) in paragraph (5)(B), by inserting
 2 “and additional eligible hospitals, as applica-
 3 ble,” after “eligible hospitals”;

4 (I) in paragraph (6)(B), by inserting “and
 5 additional eligible hospitals described in para-
 6 graph (7)” after “paragraph (2)”; and

7 (J) by adding at the end the following new
 8 paragraph:

9 “(7) ADDITIONAL ELIGIBLE HOSPITAL DE-
 10 SCRIBED.—With respect to a qualifying MA organi-
 11 zation, an additional eligible hospital described in
 12 this paragraph is an additional eligible hospital (as
 13 defined in section 1886(n)(6)(C)) that is under com-
 14 mon corporate governance with such organization
 15 and serves individuals enrolled under an MA plan of-
 16 fered by such organization.”.

17 **SEC. 4. PROVIDING PROTECTIONS FOR CERTAIN PRO-**
 18 **VIDERS, VENDORS, AND USERS OF CERTIFIED**
 19 **EHR TECHNOLOGY.**

20 (a) COVERED ENTITIES.—

21 (1) COVERED ENTITIES.—For purposes of this
 22 section, a covered entity means, with respect to cer-
 23 tified EHR technology (as defined in section
 24 1848(o)(4) of the Social Security Act (42 U.S.C.
 25 1395w-4(o)(4))) and a year, any of the following:

1 (A) MEANINGFUL EHR USERS.—

2 (i) An eligible professional (as defined
3 in paragraph (5)(C) of section 1848(o) of
4 the Social Security Act (42 U.S.C. 1395w–
5 4(o))) determined to be a meaningful EHR
6 user under paragraph (2) of such section
7 for the EHR reporting period (as defined
8 in paragraph (5)(B) of such section) dur-
9 ing such year, or an additional eligible pro-
10 fessional (as defined in paragraph (5)(D)
11 of such section) determined to be a mean-
12 ingful EHR user pursuant to paragraph
13 (6) of such section for the EHR reporting
14 period (as defined in paragraph (5)(B) of
15 such section) during such year.

16 (ii) In the case of a qualifying MA or-
17 ganization (as defined in paragraph (5) of
18 section 1853(l) of such Act (42 U.S.C.
19 1395w–23(l))), an eligible professional de-
20 scribed in paragraph (2) of such section or,
21 as applicable, an additional eligible profes-
22 sional described in paragraph (9) of such
23 section of the organization who the organi-
24 zation attests under paragraph (6) of such

1 section to be a meaningful EHR user for
2 such year.

3 (iii) In the case of a qualifying MA
4 organization (as so defined), an eligible
5 hospital described in section 1853(m)(2) of
6 such Act (42 U.S.C. 1395w-23(m)(2)) or,
7 as applicable, an additional eligible hospital
8 described in section 1853(m)(7) of such
9 Act (42 U.S.C. 1395w-23(m)(7)) of the
10 organization which attests under section
11 1853(l)(6) of such Act (42 U.S.C. 1395w-
12 23(l)(6)) to be a meaningful EHR user for
13 the applicable period with respect to such
14 year.

15 (iv) An eligible hospital (as defined in
16 paragraph (6)(B) of section 1886(n) of
17 such Act (42 U.S.C. 1395ww(n)) deter-
18 mined to be a meaningful EHR user under
19 paragraph (3) of such section for the EHR
20 reporting period (as defined in paragraph
21 (6)(A) of such section) with respect to
22 such year, or an additional eligible hospital
23 (as defined in paragraph (6)(C) of such
24 section) determined to be a meaningful
25 EHR user under paragraph (7) of such

1 section for the EHR reporting period (as
 2 defined in paragraph (6)(A) of such sec-
 3 tion) with respect to such year.

4 (v) A critical access hospital deter-
 5 mined pursuant to section 1814(l)(3) of
 6 such Act (42 U.S.C. 1395f(l)(3)) to be a
 7 meaningful EHR user (as would be deter-
 8 mined under paragraph (3) of section
 9 1886(n) of such Act (42 U.S.C.
 10 1395ww(n))) for an EHR reporting period
 11 (as defined in paragraph (6)(A) of such
 12 section) for a cost reporting period begin-
 13 ning during such year.

14 (vi) A Medicaid provider (as defined
 15 in paragraph (2) of section 1903(t) of such
 16 Act (42 U.S.C. 1396b(t))) eligible for pay-
 17 ments described in paragraph (1) of such
 18 section for such year.

19 (B) HEALTH INFORMATION EXCHANGE
 20 ENTITIES.—Individuals and entities (other than
 21 States or State designated entities) which dur-
 22 ing such year are health information exchange
 23 contractors (consisting of technology providers),
 24 health information exchange participants (con-
 25 sisting of organizations providing supportive

technology to a health information exchange),
 and other users of health information exchanges
 (consisting of other entities that may be ex-
 changing clinical or administrative data). Man-
 ufacturers of electronic health record (EHR)
 software and other health information tech-
 nologies who participate in the reporting of ad-
 verse events or who otherwise contribute rel-
 evant patient safety work product under sub-
 section (b)(1).

(C) CERTAIN OTHER EHR USERS.—A
 health care professional who, during such
 year—

(i) is a user of such certified EHR
 technology;

(ii) is not eligible for incentive pay-
 ments based on meaningful use of such
 technology under title XVIII or XIX of the
 Social Security Act solely because the pro-
 fessional is not—

(I) an eligible professional (as de-
 fined in paragraph (5)(C) of section
 1848(o) of such Act (42 U.S.C.
 1395w-4(o)));

1 (II) an eligible professional de-
2 scribed in paragraph (2) of section
3 1853(l) of such Act (42 U.S.C.
4 1395w-23(l)) or, as applicable, an ad-
5 ditional eligible professional described
6 in paragraph (9) of such section, with
7 respect to a qualifying MA organiza-
8 tion (as defined in paragraph (5) of
9 such section);

10 (III) an eligible hospital de-
11 scribed in paragraph (2) of section
12 1853(m) of such Act (42 U.S.C.
13 1395w-23(m)) or, as applicable, an
14 additional eligible hospital described
15 in paragraph (7) of such section, with
16 respect to such a qualifying MA orga-
17 nization;

18 (IV) an eligible hospital (as de-
19 fined in paragraph (6)(B) of section
20 1886(n) of such Act (42 U.S.C.
21 1395ww(n)));

22 (V) a critical access hospital;

23 (VI) a Medicaid provider (as de-
24 fined in paragraph (2) of section

1 1903(t) of such Act (42 U.S.C.
2 1396b(t));

3 (VII) an additional eligible pro-
4 fessional (as defined in paragraph
5 (5)(D) of section 1848(o) of such Act
6 (42 U.S.C. 1395w-4(o))); or

7 (VIII) an additional eligible hos-
8 pital (as defined in paragraph (6)(C)
9 of section 1886(n) of such Act (42
10 U.S.C. 1395ww(n))); and

11 (iii) attests, to the satisfaction of the
12 Secretary of Health and Human Services,
13 that but for the reason described in clause
14 (ii), the professional would otherwise sat-
15 isfy criteria to be eligible for such incentive
16 payments during such year.

17 (b) IMPROVING PATIENT SAFETY THROUGH ERROR
18 REPORTING AND REMEDIATION, AND CLARIFICATION OF
19 AUTHORITY.—

20 (1) QUARTERLY REPORTING BY PATIENT SAFE-
21 TY ORGANIZATIONS.—Paragraph (1) of section
22 924(b) of the Public Health Service Act (42 U.S.C.
23 299b-24) is amended by adding at the end the fol-
24 lowing:

“(H) Not less than quarterly each year,
the entity shall submit to the Office of the Na-
tional Coordinator findings that—

“(i) exclude any individually identifi-
able information;

“(ii) are based on information sub-
mitted to the entity by covered entities (as
defined in section 4(a)(1) of the Behavioral
Health Information Technology Coordina-
tion Act of 2013);

“(iii) describe the number and nature
of EHR-related adverse events with respect
to certified EHR technology (as such
terms are defined in section 4(e) of such
Act) so reported; and

“(iv) for each such EHR-related ad-
verse event, identify the type event and the
type electronic health record involved.”.

(2) APPLICATION OF SAFETY ORGANIZATION
PRIVILEGE AND CONFIDENTIALITY PROTECTIONS.—

In the case of a covered entity that submits to a pa-
tient safety organization information on an EHR-re-
lated adverse event with respect to certified EHR
technology, and in the case of the collection and
maintenance of such information by a patient safety

1 organization, the provisions of section 922 of the
2 Public Health Service Act (42 U.S.C. 299b–22)
3 shall apply to such information and to the organiza-
4 tion and the entity in the same manner such provi-
5 sions apply to patient safety work product and a pa-
6 tient safety organization and provider under part C
7 of title IX of such Act (42 U.S.C. 299b–2 et seq.).

8 (3) CLARIFICATION OF AUTHORITY.—Certified
9 EHR technology shall not be considered to be a de-
10 vice for purposes of the Federal Food, Drug, and
11 Cosmetic Act (21 U.S.C. 301 et seq.).

12 (c) RULES RELATING TO E-DISCOVERY.—In any
13 health care lawsuit against a covered entity that is related
14 to an EHR-related adverse event, with respect to certified
15 EHR technology used or provided by the covered entity,
16 electronic discovery shall be limited to—

17 (1) information that is related to such EHR-re-
18 lated adverse event; and

19 (2) information from the period in which such
20 EHR-related adverse event occurred.

21 (d) LEGAL PROTECTIONS FOR COVERED ENTI-
22 TIES.—

23 (1) GENERAL.—For a covered entity described
24 in subsection (a), the following protections apply:

1 (A) ENCOURAGING SPEEDY RESOLUTION
2 OF CLAIMS.—

3 (i) GENERAL.—A claimant may not
4 commence a health care lawsuit against a
5 covered entity on any date that is 3 years
6 after the date of manifestation of injury or
7 1 year after the claimant discovers, or
8 through the use of reasonable diligence
9 should have discovered, the injury, which-
10 ever occurs first. This limitation shall be
11 tolled to the extent that the claimant is
12 able to prove—

13 (I) fraud;

14 (II) intentional concealment; or

15 (III) the presence of a foreign
16 body, which has no therapeutic or di-
17 agnostic purpose or effect, in the per-
18 son of the injured person.

19 (ii) TREATMENT OF A MINOR.—A
20 health care lawsuit by or on behalf of a
21 claimant under the age of 17 years at the
22 time the injury was suffered may not be
23 commenced after the date that is 3 years
24 after the date of the alleged manifestation
25 of injury except that actions by a claimant

1 under the age of 6 years may not be com-
2 menced after the date that is 3 years after
3 the date of manifestation of injury or prior
4 to the claimant's 8th birthday, whichever
5 provides a longer period. This limitation
6 shall be tolled for claimants under the age
7 of 17 years for any period during which a
8 parent or guardian and a health care pro-
9 vider or health care organization have com-
10 mitted fraud or collusion in the failure to
11 bring an action on behalf of the claimant.

12 (B) EQUITABLE ASSIGNMENT OF RESPON-
13 SIBILITY.—In any health care lawsuit against a
14 covered entity—

15 (i) each party to the lawsuit other
16 than the claimant that is such a covered
17 entity shall be liable for that party's sev-
18 eral share of any damages only and not for
19 the share of any other person and such
20 several share shall be in direct proportion
21 to that party's proportion of responsibility
22 for the injury, as determined under clause
23 (iii);

24 (ii) whenever a judgment of liability is
25 rendered as to any such party, a separate

1 judgment shall be rendered against each
2 such party for the amount allocated to
3 such party; and

4 (iii) for purposes of this subpara-
5 graph, the trier of fact shall determine the
6 proportion of responsibility of each such
7 party for the claimant's harm.

8 (C) SUBSEQUENT REMEDIAL MEASURES.—

9 Evidence of subsequent remedial measures to
10 an EHR-related adverse event with respect to
11 certified EHR technology used or provided by
12 the covered entity (including changes to the cer-
13 tified EHR system, additional training require-
14 ments, or changes to standard operating proce-
15 dures) by a covered entity shall not be admis-
16 sible in health care lawsuits.

17 (D) INCREASED BURDEN OF PROOF PRO-

18 TECTION FOR COVERED ENTITIES.—Punitive
19 damages may, if otherwise permitted by appli-
20 cable State or Federal law, be awarded against
21 any covered entity in a health care lawsuit only
22 if it is proven by clear and convincing evidence
23 that such entity acted with reckless disregard
24 for the health or safety of the claimant. In any
25 such health care lawsuit where no judgment for

1 compensatory damages is rendered against such
 2 entity, no punitive damages may be awarded
 3 with respect to the claim in such lawsuit.

4 (E) PROTECTION FROM LIBEL OR SLAN-
 5 DER.—Covered entities and employees, agents
 6 and representatives of covered entities are im-
 7 mune from civil action for libel or slander aris-
 8 ing from information or entries made in cer-
 9 tified EHR technology and for the transfer of
 10 such information to another eligible provider,
 11 hospital or health information exchange, if the
 12 information, transfer of information, or entries
 13 were made in good faith and without malice.

14 (e) DEFINITIONS.—In this section:

15 (1) CLAIMANT.—The term “claimant” means
 16 any person who brings a health care lawsuit, includ-
 17 ing a person who asserts or claims a right to legal
 18 or equitable contribution, indemnity, or subrogation,
 19 arising out of a health care liability claim or action,
 20 and any person on whose behalf such a claim is as-
 21 serted or such an action is brought, whether de-
 22 ceased, incompetent, or a minor.

23 (2) COMPENSATORY DAMAGES.—The term
 24 “compensatory damages” means objectively
 25 verifiable monetary losses incurred as a result of the

1 provisions of, use of, or payment for (or failure to
 2 provide, use, or pay for) health care services or med-
 3 ical products, such as past and future medical ex-
 4 penses, loss of past and future earnings, cost of ob-
 5 taining domestic services, loss of employment, and
 6 loss of business or employment opportunities, dam-
 7 ages for physical and emotional pain, suffering, in-
 8 convenience, physical impairment, mental anguish,
 9 disfigurement, loss of enjoyment in life, loss of soci-
 10 ety and companionship, loss of consortium (other
 11 than loss of domestic service), hedonic damages, in-
 12 jury to reputation, and all other nonpecuniary losses
 13 of any kind or nature. Such term includes economic
 14 damages and noneconomic damages, as such terms
 15 are defined in this subsection.

16 (3) ECONOMIC DAMAGES.—The term “economic
 17 damages” means objectively verifiable monetary
 18 losses incurred as a result of the provisions of, use
 19 of, or payment for (or failure to provide, use, or pay
 20 for) health care services or medical products, such as
 21 past and future medical expenses, loss of past and
 22 future earnings, cost of obtaining domestic services,
 23 loss of employment, and loss of business or employ-
 24 ment opportunities.

1 (4) CERTIFIED EHR TECHNOLOGY.—The term
2 “certified EHR technology” has the meaning given
3 such term in section 1848(o)(4) of the Social Secu-
4 rity Act (42 U.S.C. 1395w-4(o)(4)).

5 (5) EHR-RELATED ADVERSE EVENT.—The
6 term “EHR-related adverse event” means, with re-
7 spect to a provider, a defect, malfunction, or error
8 in the certified health information technology or
9 electronic health record used by the provider, or in
10 the input or output of data maintained through such
11 technology or record, that results or could reason-
12 ably result in harm to a patient.

13 (6) HEALTH CARE LAWSUIT.—The term
14 “health care lawsuit” means any health care liability
15 claim concerning the provision of health care items
16 or services or any medical product affecting inter-
17 state commerce, or any health care liability action
18 concerning the provision of health care items or
19 services or any medical product affecting interstate
20 commerce, brought in a State or Federal court or
21 pursuant to an alternative dispute resolution system,
22 against a health care provider, a health care organi-
23 zation, or the manufacturer, distributor, supplier,
24 marketer, promoter, or seller of a medical product,
25 regardless of the theory of liability on which the

claim is based, or the number of claimants, plaintiffs, defendants, or other parties, or the number of claims or causes of action, in which the claimant alleges a health care liability claim. Such term does not include a claim or action which is based on criminal liability; which seeks civil fines or penalties paid to Federal, State, or local government; or which is grounded in antitrust.

(7) HEALTH CARE LIABILITY ACTION.—The term “health care liability action” means a civil action brought in a State or Federal court or pursuant to an alternative dispute resolution system, against a health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product, regardless of the theory of liability on which the claim is based, or the number of plaintiffs, defendants, or other parties, or the number of causes of action, in which the claimant alleges a health care liability claim.

(8) HEALTH CARE LIABILITY CLAIM.—The term “health care liability claim” means a demand by any person, whether or not pursuant to alternative dispute resolution, against a health care provider, health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of

1 a medical product, including third-party claims,
 2 cross-claims, counter-claims, or contribution claims,
 3 which are based upon the provision of, use of, or
 4 payment for (or the failure to provide, use or pay
 5 for) health care services or medical products, regard-
 6 less of the theory of liability on which the claim is
 7 based, or the number of plaintiffs, defendants, or
 8 other parties, or the number of causes of action.

9 (9) HEALTH CARE ORGANIZATION.—The term
 10 “health care organization” means any person or en-
 11 tity which is obligated to provide or pay for health
 12 benefits under any health plan, including any person
 13 or entity acting under a contract or arrangement
 14 with a health care organization to provide or admin-
 15 ister any health benefit.

16 (10) HEALTH CARE PROVIDER.—The term
 17 “health care provider” means any person or entity
 18 required by State or Federal laws or regulations to
 19 be licensed, registered, or certified to provide health
 20 care services, and being either so licensed, reg-
 21 istered, or certified, or exempted from such require-
 22 ment by other statute or regulation.

23 (11) HEALTH CARE ITEMS OR SERVICES.—The
 24 term “health care items or services” means any
 25 items or services provided by a health care organiza-

tion, provider, or by any individual working under the supervision of a health care provider, that relates to the diagnosis, prevention, or treatment of any human disease or impairment, or the assessment or care of the health of human beings.

(12) MALICIOUS INTENT TO INJURE.—The term “malicious intent to injure” means intentionally causing or attempting to cause physical injury other than providing health care items or services.

(13) MEDICAL PRODUCT.—The term “medical product” means a drug, device, or biological product intended for humans, and the terms “drug”, “device”, and “biological product” have the meanings given such terms in sections 201(g)(1) and 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1) and (h)) and section 351(a) of the Public Health Service Act (42 U.S.C. 262(a)), respectively, including any component or raw material used therein, but excluding health care services.

(14) NONECONOMIC DAMAGES.—The term “noneconomic damages” means damages for physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic

1 service), hedonic damages, injury to reputation, and
2 all other nonpecuniary losses of any kind of nature.

3 (15) PATIENT SAFETY ORGANIZATION.—The
4 term “patient safety organization” has the meaning
5 given to such term in section 921 of the Public
6 Health Service Act (42 U.S.C. 299b–21).

7 (16) PUNITIVE DAMAGES.—The term “punitive
8 damages” means damages awarded, for the purpose
9 of punishment or deterrence, and not solely for com-
10 pensatory purposes, against a health care provider,
11 health care organization, or a manufacturer, dis-
12 tributor, or supplier of a medical product. Punitive
13 damages are neither economic nor economic dam-
14 ages.

15 (17) STATE.—The term “State” means each of
16 the several States, the District of Columbia, the
17 Commonwealth of Puerto Rico, the Virgin Islands,
18 Guam, American Samoa, the Northern Mariana Is-
19 lands, the Trust Territory of the Pacific Islands, and
20 any other territory or possession of the United
21 States, or any political subdivision thereof.

