

Understanding U.S. Year 2000 Disclosure Legislation and the Implications for Canadian Hospitals

By Alan Gahtan

The *Year 2000 Information and Readiness Disclosure Act* (S-2392) was signed into law in the United States in October 1998. The act is intended to promote the voluntary sharing of Year 2000 information by limiting the extent to which Year 2000 statements can be used as the basis for liability claims. It is also intended to prevent certain evidentiary uses against the "maker" of a subset of such statements.

Most Canadian hospitals have by now received Year 2000 statements from U.S.-based vendors of products used in their institutions. In many cases, such statements may be found to be subject to Canadian law, and the U.S. vendor may be subject to the jurisdiction of Canadian courts. In such cases, the U.S. act may be of little or no consequence in protecting vendors against liability. However, in other cases the vendor may be able to use the act as a shield against liability arising from inaccurate Year 2000 statements.

DEFINING

YEAR 2000 STATEMENTS AND READINESS DISCLOSURES

The Year 2000 act protects good-faith sharing of two kinds of Year 2000 information: a broad category called "Year 2000 statements" and a narrow subcategory called "Year 2000 readiness disclosures." The term "Year 2000 statement" is meant to cover any communication which assesses a firm's Year 2000 processing capabilities or its plans to verify Year 2000 processing capabilities. It would also cover statements concerning the testing of products, or services either utilizing products or relating to Year 2000 processing. The statements may be in any format, oral or written. The Year 2000 act applies to any Year 2000 statement made on or after July 14, 1998 and no later than July 14, 2001.

The primary effect of the act is to protect a maker of a Year 2000 statement against liability under U.S. law. For instance, the act will provide protection for U.S. medical-device manufacturers against legal actions based on the making of a Year 2000 statement that is alleged to have been false, inaccurate or misleading. However, there is an exception to the foregoing protection if the maker made the Year 2000 statement (a) with actual knowledge that the Year 2000 statement was false, inaccurate or misleading; (b) with intent to deceive or mislead; or (c) with a reckless disregard as to the accuracy of the Year 2000 statement.

A more limited form of additional protection is provided by the act for "Year 2000 readiness disclosures." In order to benefit from the additional protection provided for in a "Year 2000 readiness disclosure," a statement must (in the language of the act) be in writing, be clearly identified on its face as a Year 2000 readiness disclosure, be inscribed in a tangible medium or stored and retrievable in perceivable form, and have been issued or published by or with the approval of a person or entity regarding the Year 2000 processing of that person or entity, or of products or services offered by that entity. Certain previously issued Year 2000 statements may be retroactively designated as Year 2000 readiness disclosures and receive the protections applicable to Year 2000 readiness disclosures under the act. The additional protection is an evidentiary exclusion which precludes the admissibility of such statements against the persons making them to prove the accuracy or truth of their contents. This additional protection in this instance is not expected to be of much benefit to a vendor that makes a Year 2000 statement that its product is compliant which later turns out to be false.

It can be expected that many vendors will misunderstand the scope of the additional protection to be gained by designating Year 2000 statements

as readiness disclosure (or will just want to get every bit of protection possible). Therefore, it is likely that many hospitals will start to see new Year 2000 statements labeled as "Year 2000 readiness disclosures." Some vendors will also attempt to avail themselves of the provisions in the act which permit them to retroactively designate Year 2000 statements issued after January 1, 1996 (but before October 19, 1998) as Year 2000 readiness disclosures. Such retroactive designation must have been done no later than December 3, 1998. In some cases such a designation can be done by posting it on a World Wide Web site, in other cases personal notification may be required.

IMPLICATIONS FOR HOSPITALS

Hospitals that receive a notice advising them that a previously issued Year 2000 statement is being designated a Year 2000 readiness disclosure can avoid the application of the designation if they can prove (by clear and convincing evidence, which is a high standard to prove) that they relied upon the Year 2000 statement prior to the designation and would be prejudiced by the designation, and provide notice of their objection within a specified time period to the party attempting to retroactively designate the Year 2000 statement as a Year 2000 readiness disclosure.

The act is also intended to encourage the use of the Internet to provide notice of all matters relating to Year 2000 processing problems and solutions. Subject to certain exceptions, the use of an Internet web site to provide Year 2000 information is deemed adequate notice in any litigation in which the adequacy of notice is at issue.

HOW TO RESPOND

To the extent that it is now more difficult for a hospital to rely on Year 2000 assurances provided by U.S. vendors, (1) hospitals will need to focus even more on obtaining contractual warranties of compliance (both in agreements for new acquisitions and from existing vendors of high risk equipment); (2) hospitals will need to rely even more on conducting their own testing (and therefore ensuring that they can get access to adequate information required to conduct such testing); (3) hospitals should attempt to negotiate provisions in new agreements which permit them to rely on Year 2000 statements made by the vendor; and (4) hospitals that receive Year 2000 assurances from a U.S. parent of a Canadian vendor should take steps to ensure that the parent's assurances are adopted by the Canadian subsidiary. 



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