



The Honorable Chiquita Brooks-LaSure  
Administrator  
Centers for Medicare & Medicaid Services  
U.S. Department of Health and Human Services

Micky Tripathi, PhD, M.P.P.  
National Coordinator for Health Information Technology  
Office of the National Coordinator for Health Information Technology (ONC)  
U.S. Department of Health and Human Services

Dear Administrator Brooks-LaSure and Dr. Tripathi:

On behalf of the Healthcare Information and Management Systems Society ([HIMSS](#)), we are pleased to provide public comments on the **21st Century Cures Act: Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking** proposed rule.

HIMSS is a global advisor and thought leader and member-based society committed to reforming the global health ecosystem through the power of information and technology. As a mission-driven non-profit, HIMSS offers a unique depth and breadth of expertise in health innovation, public policy, workforce development, research, and analytics to advise global leaders, stakeholders, and influencers on best practices in health information and technology driven by health equity. Through our innovation engine, HIMSS delivers key insights, education and engaging events to healthcare providers, governments, and market suppliers, ensuring they have the right information at the point of decision. HIMSS serves the global health information and technology communities with focused operations across North America, Europe, the United Kingdom, the Middle East, and Asia Pacific. Our members include more than 120,000 individuals, 480 provider organizations, 470 non-profit partners, and 650 health services organizations. Our global headquarters is in Rotterdam, The Netherlands and our Americas headquarters is in Chicago, Illinois.

HIMSS supports regulatory frameworks that facilitate the seamless, secure, and ubiquitous data access and interoperable health information exchange to ensure the right people have the right access to the right health information in a usable format at the right time. Such a framework facilitates that all stakeholders, including patients, caregivers, and healthcare providers can find, store, use, reuse, send, and receive electronic health information in a manner that is appropriate, secure, timely and reliable to support health and wellness efforts for individual patients and population health.

HIMSS applauds the Department of Health and Human Services and CMS and ONC leadership for proposing a regulatory framework to facilitate appropriate access to electronic health information. We also recognize the delicate balance between generating disincentives to encourage participation in an interoperability ecosystem, and not creating burden that discourages providers from participating in Medicare. The following comments are intended to help ensure that balance is maintained, and we

continue our push to ubiquitous health information exchange as the standard in the United States.

## **Investigatory Process and Redress**

In discussing the proposed disincentives for information blocking for providers, HIMSS is concerned with the level of understanding within the provider community regarding the Office of the Inspector General's (OIG) process for investigating a claim of information blocking, the burden of proof providers will need to meet as part of the investigation, and avenues for redress following a determination of information blocking. The publication of the [OIG Information Blocking Final Rule](#) on July 3, 2023, was focused on the developer community and provides very little detail on how the investigatory process will occur for providers.

We found it very challenging to assess the potential disincentives for providers, hospitals, and ACOs without fully understanding the investigatory process and the framework OIG will use to assess if information blocking has taken place. Of those factors, a lack of clarity around the impact of intent as a factor in assessing the information blocking accusation echoed the loudest from the HIMSS membership. Prior to publication of a provider specific OIG final rule, HIMSS recommends HHS provide hospitals, providers, and ACOs tools and resources explaining the investigatory process and the framework for assessing the information blocking accusation.

## **Disincentives for Providers found to be Information Blocking**

HIMSS believes that the proposed disincentives for hospitals, providers, and ACO are consistent with the intent of the 21<sup>st</sup> Century Cures Act and HIMSS goals for appropriate and ubiquitous data access and interoperable health information exchange.

While we support HHS driving the movement to interoperable health information exchange, we would be remiss if we didn't share specific concerns levied by our diverse membership. Specific reactions to the proposed hospital, provider, and ACO disincentives for information blocking were varied across the broad scope of HIMSS membership. Some segments of HIMSS membership indicated that the penalties, particularly for smaller practices, were not significant enough to change information blocking behavior, particularly if there was a business case for that actor to participate in information blocking.

Other parts of the HIMSS community raised concerns regarding the redundancy of the financial disincentives with existing disincentives associated with failing to meet the current requirements for the Promoting Interoperability Program attestation for hospitals and the Promotion Interoperability component of the Merit-Based Incentive Payment System (MIPS) program. Many HIMSS members are concerned that, at a moment of time where there have been significant changes to the regulatory environment for healthcare, the additional layer of complexity and potential cost could drive providers out of Medicare incentive programs instead of promoting interoperable exchange of information. This concern from the provider community is exacerbated by dwindling incentives for meeting and exceeding baselines for Medicare incentive programs, particularly the MIPS program. There is a widespread perception that the cost of being a top performer in the MIPS program costs more than the incentive payments provided

for top performers. This issue needs to be addressed to continue to advance interoperability and improve care through the power of Health IT.

Accordingly, HIMSS recommends the following actions:

1. As the provider community, particularly small practices with limited resources for understanding policy requirements, learns the specific requirements to be compliant with interoperable health information exchange, there may be an opportunity for a tiered approach for disincentives. CMS could consider issuing the disincentive as a negative payment adjustment for the first offense, and then provide education and resources on how to be compliant with information sharing requirements in lieu of posting the party on the information blocking website. Given the two - year lag in impacting payment from CMS, this would allow providers acting in good faith to take corrective action and not lose their incentive payments.
2. HIMSS continues to encourage HHS to explore options for increasing incentive payments for organizations meeting top performance baselines in Medicare incentive programs. Additional incentives would encourage providers, particularly those who may not be fully committed to complying with the latest certification and information blocking requirements, to aspire to top performance.

### **Penalizing All Parties when One Actor Participates in Information Blocking**

HIMSS is concerned with the provisions in the proposed rule indicating that if a single provider within a sub-group or group reporting to the Quality Payment Program as a single TIN was found to be information blocking, the 0 score for the Promoting Interoperability group score would be applied to all the eligible clinicians (ECs) within the group. We are also opposed to an ACO being banned from the Medicare Shared Savings Program if a single provider within the ACO is found to be information blocking, especially if the action is inconsistent with documented policies and practices of the ACO or most physician groups operating within the ACO's scope. As currently drafted, the proposed rule will encourage providers to abandon group and subgroup reporting or participating in ACOs, a direction that runs contrary to CMS goal of increasing participation in value-based payment models.

With this provision, the only way groups and ACOs can mitigate disincentives is to have providers reporting to MIPS as individual ECs. Individual reporting will create significant additional administrative burden for multi-disciplinary group practices.

HIMSS encourages disincentives to be applied to individual providers unless the larger subgroup, group, or ACO has adopted enterprise-wide policies or taken actions as an enterprise that constitute information blocking.

### **Transparency through HealthIT.Gov**

HIMSS supports the ONC proposal to publish the name of health care provider found to be information blocking by OIG, the business address of the provider, the practices which were determined to constitute information blocking, the disincentives applied,

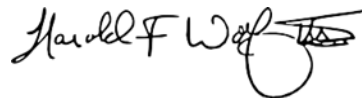
and where to find any additional information about the determination on a public website. These actions will help promote transparency for patients and better understanding throughout the healthcare community about information blocking practices and how they are assessed by HHS.

We are concerned that, without a substantive marketing campaign to promote the existence of the proposed website, patients may not have the knowledge to seek out information about information blocking practices in their community. HIMSS strongly encourages HHS to adopt a nation-wide marketing campaign to educate patients about information blocking practices and promote awareness of the information blocking website.

We look forward to the opportunity to discuss these issues in more depth. Please feel free to contact Jonathan French, Senior Director of Public Policy and Content Development, at [Jonathan.French@HIMSS.org](mailto:Jonathan.French@HIMSS.org) with questions or to request more information.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Harold F. Wolf III". The signature is fluid and cursive, with a large, stylized initial "H" and "W".

Harold F. Wolf III, FHIMSS  
President & CEO