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HHS Proposes Disincentives for Providers Who Violate the Information Blocking Rule

Insight — November 15, 2023

The U.S. Department of Health and Human Services (HHS) released a proposed rule that establishes disincentives for healthcare providers¹ who violate the Information Blocking Rule (IBR) under the 21st Century Cures Act ("Cures Act"). As discussed in our prior alert, the IBR prohibits certain "actors" (i.e., healthcare providers, health information exchanges (HIE), health information networks (HIN), and developers of certified health information technology (Health IT developers) from knowingly and unreasonably interfering with the access, exchange, or use of electronic health information except as required by law or covered by a regulatory exception.² Earlier this year the OIG finalized a rule that subjects HIEs, HINs, and Health IT developers to a fine of up to \$1,000,000 for Information Blocking Rule violations. HHS's proposed rule sets forth the penalties for IBR violations by providers:

- Under the Medicare Promoting Interoperability Program, an eligible hospital or critical access hospital (CAH) would not be a meaningful electronic health record (EHR) user in an applicable EHR reporting period. The impact on eligible hospitals would be the loss of 75 percent of the annual market basket increase; for CAHs, payment would be reduced to 100 percent of reasonable costs instead of 101 percent.
- Under the Promoting Interoperability performance category of the Merit-based Incentive Payment System (MIPS), an eligible clinician or group would not be a meaningful user of certified EHR technology in a performance period and would therefore receive a zero score in the Promoting Interoperability performance category of MIPS, if required to report on that category. The Promoting Interoperability performance category score typically can be a quarter of a clinician's or group's total MIPS score in a year.
- Under the Medicare Shared Savings Program, a healthcare provider that is an Accountable Care Organization (ACO), ACO participant, or ACO provider or supplier would be deemed ineligible to participate in the program for a period of at least one year. This may result in a healthcare provider being removed from an ACO or prevented from joining an ACO.

Providers and other actors can learn more about the IBR [here](#), the OIG's penalties [here](#), and the HHS proposed rule [here](#). Public comments on the HHS proposed rule are due January 2, 2024. HHS is specifically requesting information from the public on disincentives that could be

established in the future for healthcare providers.

¹ “The term 'healthcare provider' includes a hospital, skilled nursing facility, nursing facility, home health entity or other long term care facility, healthcare clinic, community mental health center ... , renal dialysis facility, blood center, ambulatory surgical center ..., emergency medical services provider, Federally qualified health center, group practice, a pharmacist, a pharmacy, a laboratory, a physician [including MDs, DOs, dentists, podiatrists, optometrists, and chiropractors], a practitioner [including physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, certified nurse midwives, clinical social workers, clinical psychologists, and registered dietitians], tribal organization, a rural health clinic, ... an ambulatory surgical center, ... a therapist and any other category of healthcare facility, entity, practitioner, or clinician determined appropriate by the Secretary.” (42 U.S.C. § 300jj; 45 C.F.R. § 171.102).

² For more information on these exceptions, see Healthcare Providers: Beware New Information Blocking Rule, Holland & Hart, Aug. 26, 2020, available here.

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