TEXAS MEDICAL ASSOCIATION

Physicians Caring for Texans

December 20, 2023

Micky Tripathi, PhD, MPP
National Coordinator for Health Information Technology
Office of the National Coordinator for Health Information Technology
U.S. Department of Health and Human Services
Mary E. Switzer Building, Mail Stop: 7033A
330 C. Street SW
Washington, DC 20201

RE: Comments on 21st Century Cures Act: Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking Proposed Rule

Dear Dr. Tripathi,

On behalf of the Texas Medical Association (TMA) and our more than 57,000 physician and medical student members, we thank the Office of the National Coordinator for Health Information Technology (ONC) for the opportunity to comment on the proposed rule that would implement the provision of the 21st Century Cures Act specifying disincentives for physicians and other health care providers who are determined to be information-blockers.

TMA is a private, voluntary non-profit association and is the largest state medical society in the nation. It was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its vision is "improving the health of all Texans."

Overarching Comments

A three-day pause on delivery of sensitive test results
TMA agrees that patients should have prompt access to most of their electronic health information upon request. **However, we remain concerned that patients are receiving sensitive test results, such as for cancer diagnosis, before their physician has a chance to review the results.** Cancer-related test results can be confusing, scary, and life-changing. Physicians are trained to convey such information in a timely, informative, and supportive manner so patients understand not only what the test means, but also what options they have. This is an opportunity to offer hope and reassurance to the patient. We realize this proposal is not about the impact of the information-blocking laws and rules, but **TMA asks ONC to consider allowing actors at least three days to respond to a request for cancer and genetic test results, as this brief safe-harbor period would give the physician time to convey the results to the patient in a supportive way.**

No Retroactive Investigations
The proposal did not address whether the Office of Inspector General (OIG) would begin investigations once the proposed regulation is finalized or when the information-blocking rule went into effect. **TMA believes investigations should not begin until this proposed rule is finalized, and the physician and other provider communities have been notified of the changes and the appeals process.**

Appropriate Disincentives
Summary
The Centers for Medicare & Medicaid Services (CMS) and ONC propose that physicians and other providers determined to be information-blockers have their Merit-Based Incentive Payment System (MIPS) Promoting Interoperability score set to zero. This will impact 25% of the total MIPS score. Depending on the score in the Quality, Cost, and Improvement Activities categories, physicians could see penalties of up to 9% of their Medicare fee-for-service payments for the impacted year(s). The year of the determination is the physician's MIPS "performance year," which impacts payment two years later. For example, a November 2024 determination impacts payments for all of 2026.

TMA Response
TMA encourages CMS to avoid imposing any financial penalties but rather take the approach of education and correction. While TMA understands CMS and ONC are required to impose disincentives as required by the Public Health Services Act, we are concerned that any additional Medicare penalties will further drive physicians away from Medicare exacerbating patient access to care. Medicare already does not keep up with inflationary rates on physician payment, and this proposal intensifies the issue. **TMA encourages CMS and ONC to consider an alternative by offering a corrective action option that allows physicians to immediately course correct and avoid any penalties or other disincentives.**

Shared Savings Program Regulations
Summary
CMS proposes to revise the Medicare Shared Savings Program (MSSP) by preventing a physician or other health care provider determined to be an information-blocker from participating in MSSP for a period of one year. Further, CMS proposes to screen accountable care organizations (ACOs), ACO participants, and ACO providers/suppliers for an OIG determination of information blocking, and to deny the addition of such a health care provider to an ACO's participation list for the period of at least one year. If an ACO is a health care provider, CMS proposes to deny the ACO's application to participate in MSSP for the period of at least one year. CMS would notify an ACO if one of its participants or suppliers is determined to be an information-blocker so that participant can be removed from the ACO participant list. CMS would terminate an ACO participation agreement if the ACO failed to comply with MSSP requirements.

TMA Response
While TMA agrees with CMS that information blocking runs contrary to the care coordination goals of MSSP, we are concerned the proposed disincentives are inappropriately harsh. ACOs have made significant infrastructure investments to participate in value-based care programs. They are made with a certain expected return that, if not met, could jeopardize the future of the ACO and its participants. This could result in the unintended consequence of discouraging participation in shared savings programs – especially ACOs in rural areas and those treating dual-eligible and special-needs patients.

Moreover, most small, low-revenue, physician-led ACOs depend on each participant's Medicare attribution for participation. This is especially true in areas where Medicare Advantage enrollment exceeds traditional Medicare enrollment. Medicare Advantage market penetration in some areas of Texas is up to 70%. Losing even one participant (TIN) could shut down the entire ACO. This punishes not only the offender, but also all ACO participants and most importantly, the patients who benefit from care coordination activities.

Further, this proposal does not clarify how it would impact physicians who participate in an MSSP ACO but do not meet the Advanced Alternative Payment Model threshold for exemption from the MIPS program. Would these individuals be removed as an ACO participant and be subject to MIPS-related disincentives?

TMA recommends that ACOs be allowed to take remedial action against offending information-blockers while allowing them to participate in MSSP. This could include a probation period, reduction or withhold of earned shared-savings incentives, and mandatory continuing education on information blocking.

Approach to Determination of Information Blocking and Application of Disincentives

Summary

For investigations of physicians and other health care providers, OIG expects to use the following four priorities when determining which cases to investigate:

1. Resulted in\are causing, or have the potential to cause patient harm;
2. Significantly impacted a provider's ability to care for patients;
3. Were of long duration; and
4. Caused financial loss to federal health care programs.

TMA Response

TMA agrees with OIG's stated priorities when determining which information-blocking cases to investigate. Additionally, TMA appreciates that OIG will coordinate with other Department of Health and Human Services (HHS) agencies to avoid levying duplicate penalties against physicians and other providers.

Appeals

Summary

The proposal states that following the application of a disincentive, a health care provider may have the right to administratively appeal a disincentive if the authority used to establish the disincentive provides for such an appeal. It goes on to say that any right to administratively appeal a disincentive, if available, would be provided under the authorities used by the HHS secretary to establish the disincentive through notice and comment rulemaking.

TMA Response

TMA encourages ONC and CMS to ensure a fair and equitable appeals process. It is simply not right for physicians to lose hard-earned dollars without having a way to appeal in the event of an error.

Additionally, TMA recommends ONC and CMS consider a tiered approach for physicians when informing the physician of an information-blocking determination.

1. Correct: Give the opportunity to treat the determination as a learning experience for the physician. If the physician takes immediate corrective action, then the disincentive should not apply.
2. Appeal: Ensure a fair, impartial, and equitable appeals process.
3. Finalize: The determination and any related disincentives are finalized.

TMA believes appeals should be handled by an impartial agency apart from the agency making the determination and administering the disincentive.

Public Posting

Summary

It is proposed that physicians and other providers deemed to be information-blockers will have their information publicly posted on ONC's website.

TMA Response

While we appreciate ONC's transparency, we do not believe it is necessary to publicly shame information-blockers. If ONC does proceed with this public shaming, TMA appreciates the inclusion of a mechanism for physicians to review and appeal their information before posting. ONC should consider adding an end or removal date so patients and physicians know the admonishment is temporary and when to expect to have their information removed.

Request for Information

Summary

It is noted the disincentives in the proposed rules apply only to a subset of health care providers. HHS believes it is important for the agency to establish disincentives that would apply to all health care providers and seeks input on additional appropriate disincentives.

TMA Response

ONC currently makes available information on submissions received through the information-blocking portal, which allows anyone to make an information-blocking complaint. The data is available on this webpage: https://www.healthit.gov/data/quickstats/information-blocking-claims-numbers.

While ONC does a good job of providing at-a-glance information, it would be helpful to be able to drill down into the data. For example, the breakdown for "Claims Counts by Potential Actor" lists "health care provider" as one of the potential actors. **It would be helpful if this were further broken down by health care provider types such as hospitals, physician practices, non-physician practitioners, laboratories, pharmacies, and any other actors.**

It would also be helpful to have more detail on what triggered the information-blocking complaint to better understand the types of issues encountered when trying to retrieve information. ONC should post data by state and specialty, which allows professional associations such as TMA to educate its members and help prevent further information blocking. Having this information could help inform disincentives for provider types not impacted by the disincentives proposed in this rule.

In summary, TMA recommends CMS and ONC take a commonsense approach to imposing information-blocking disincentives by:

- Allowing actors at least three days to fulfill a request for the release of sensitive test results;
- Not investigating claims retroactively to the published date of the final rule;
- Allowing for a corrective action option to avoid penalties; and
- Providing for a fair and equitable appeals process.

TMA appreciates the opportunity to provide feedback on the proposed disincentives for information blocking. Any questions may be directed to Shannon Vogel, associate vice president of health information technology, by emailing shannon.vogel@texmed.org or calling (512) 370-1411.

Sincerely,

Richard W. "Rick" Snyder, II, MD
President
Texas Medical Association