



# Pledge to resist regulation by pledge!

By Dan Haley | June 17, 2016

Consider: Beyond some very narrow, Congressionally-delegated authority, the Office of the National Coordinator for Health IT (ONC) – the federal actor with the most direct authority over the health information technology industry – is not actually a regulator. Whether one believes ONC should have regulatory authority is beside the point. It presently does not.

Unfortunately, some at ONC are now trying a work-around approach: quasi-regulation by loyalty pledge. The phenomenon is well-established, and its effects are increasingly pernicious.

This all started, from what I can tell, in 2011, with ONC's "Blue-Button Pledge." Best known via the blue button icon that has become almost ubiquitous in health IT, the initiative encouraged stakeholders to pledge to make health data available to patients and their caregivers – and more specifically, to enable patients to "view, download, and transmit" their own health data (ideally by click of the aforementioned button).

In response, hundreds of stakeholders dutifully signed up and pledged to put healthcare in a time machine back to 1999, when the ability to download vast quantities of un-curated, unintelligible data was somewhat revolutionary.

**"Nearly everyone wonders why healthcare lags a decade or more behind the rest of the information economy"**

Following that rousing success, we saw the Interoperability Pledge, which required health IT vendors to promise to do what they should already have been doing to achieve the most core, basic functionality of information technology – enabling access to and exchange of information.

And now comes the Transparency Pledge, requiring adherents first to promise to provide the free market with accurate and transparent pricing and functionality information; and second, to bury market-facing communications in mandatory disclosures intended to vindicate that first part.

In each instance, stakeholders are presumably free to participate – or not – as dictated by interest or conscience. My company, athenahealth, chose to participate in both the Blue Button initiative and the Interoperability Pledge (with some reservations), but has declined to sign on to the Transparency Pledge. And that's where the pernicious effect of this variety of quasi-regulation starts to become evident.

The “voluntary” nature of these initiatives notwithstanding, one of these pledges now comes with a punitive element, in the form of public shaming of non-participants. The implication is clear: Companies, like mine, that decline to participate are presumed to be against the intent of the initiative, in this case “transparency.”

The fallacy at work here is evident. Declining to participate in this particular initiative no more means a stakeholder is “against transparency” than my decision not to bend personal eating habits to the dictates of the USDA’s latest healthy eating “challenge” means I’m against healthy eating. But the implication is there, and it has consequences both explicit (harm to reputation) and implicit (undefined, lasting effects of having poked the eye of a would-be regulator).

Even worse, though, are the deleterious impacts to the system. Return to the Blue Button Initiative and ponder again the “ask” of participants: to enable a capability (‘view, download, and transmit’ static data) that has been absolutely commonplace outside of healthcare for nearly two decades.

I am happy to report that five years into the life of the effort, the Blue Button Initiative is still encouraging voluntary time travel, with self-satisfied health IT vendors happily engineering to the demands of the late 20th century, and the government proudly awarding gold stars for their accomplishments. A similar criticism has been leveled at the low bar of the Interoperability Pledge. Poke around the ONC’s

Transparency Portal and drop me a line if you discern any meaningful “transparency.”

Meanwhile, nearly everyone wonders why healthcare lags a decade or more behind the rest of the information economy, and patients continue to die – literally – for want of accurate and timely clinical information.

I certainly don’t mean to suggest that patient access to data, healthcare interoperability, or vendor transparency aren’t worthy efforts, or that the hard-working folks at ONC aren’t doing the best they can to solve thorny problems with the limited resources at their disposal. But more progress has been made toward solutions to those problems in the last three years than in every previous year combined – and virtually none of that progress can be fairly attributed to a corresponding government loyalty pledge.

On the flip side, we can only guess what degree of devolution can be attributed to the negative impacts of those various pledges.

The health IT industry is either going to quietly acquiesce to de-facto regulation-by-pledge, or we aren’t. In light of the available evidence and the government’s increasing affinity for such tactics, it might be time to draw a line by taking a Pledge Against Pledges.

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