



May 6th, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Ms. Robinsue Frohboese
Acting Director and Principal Deputy
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Re: Proposed Modifications to the HIPAA Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement.

Submitted electronically to www.regulations.gov re: HHS0945-AA00

Dear Secretary Becerra and Acting Director Frohboese,

athenahealth, Inc. (“athenahealth” or “athena”) appreciates the opportunity to respond to the changes outlined in the Proposed Rule titled *Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement*.

Over the past 22 years, athenahealth has built a network of approximately 160,000 providers in both the ambulatory and acute settings. We provide electronic health record, practice management, care coordination, patient engagement, data analytics, revenue cycle management, and related services to physician practices and hospitals. More than 120,000 of our clinicians utilize our single instance, continuously updated, cloud-based platform. Since announcing a combination with Virence Health in early 2019, we also support on-premise software solutions. In both hosting paradigms, athenahealth seeks out and establishes connections with partners across the care continuum, enabling our clinicians to improve the quality of care they deliver. athenahealth’s vision is to create a thriving ecosystem that delivers accessible, high-quality, and sustainable healthcare for all.

The Department of Health and Human Services’ (HHS) Proposed Rule contains core principles and characteristics that, if properly implemented, will remove barriers to coordinated care, reduce burdens on providers and empower patients and their families to secure better health. We encourage HHS to exercise caution around regulation that unintentionally determines business models for the industry. athenahealth believes that market forces – not government mandates – are the most compelling and effective drivers for change. A strong business incentive to exchange information on a national scale will make both interoperability and patient access more abundant. Below please find our specific comments on the rule:

1) Support for Patient Right of Access

athenahealth commends HHS’s efforts to support individuals’ engagement in their care, remove barriers to coordinated care, and reduce regulatory burdens on the healthcare industry. Healthcare providers and health plans will better coordinate their shared care of individuals when covered entities response time is shortened and improved turnaround times are ensured. Furthermore, empowering patients to exercise control over their PHI and direct it to third parties engaged in their care is a welcome step to reduce obstacles that undermine the care of Americans, while boosting collaboration and care coordination to the nation’s benefit.

While athenahealth supports the proposed modifications, we seek clarification regarding the scope of the new requirements related to access fees. It remains unclear whether covered entities, as well as their business associates, are prohibited from charging a fee, beyond the cost-based fee, for directing an electronic copy of PHI in an EHR to a third-



party. Additionally, we request clarification on the applicability of fee limitations and distinctions when the request is from a patient versus a third-party. Given the complicated history regarding this issue, athenahealth requests the restrictions be further outlined, specifically with business associates in mind.

2) Modification to the Definition of Healthcare Operations

athenahealth applauds HHS's proposal to expand the definition of Healthcare Operations. HHS's modification to the definition of healthcare operations is a fundamental step towards improved care collaboration and patient centered thinking. Expanding the definition of healthcare operations to include individual-focused care coordination and case management will allow health plans to better serve the needs of their individual patients. We encourage HHS to look for similar opportunities to promote information exchange. Furthermore, we applaud the proposed exception to the minimum necessary standard for "disclosures to, or requests by, a health plan or a covered healthcare provider for care coordination and case management." This exception, coupled with greater ease of access to PHI by individuals, advances a patient-centric model that leverages technological innovation and aligns stakeholders along the care continuum.

3) Patient Safety Improvements and Synergy Among Agencies

athenahealth praises HHS's proposal to remove care coordination barriers which will allow for more rapid action in circumstances of threats of harm to self or others. By replacing the "serious and imminent threat" standard with a "serious and reasonably foreseeable threat" standard, HHS allows for covered entities to use or disclose PHI in a more pragmatic manner reflective of the complex clinical realities of medicine. These subtle but powerful changes in language remove the ambiguity around what it means to be imminent, better allowing providers to exercise professional judgement in the care of their patients. Furthermore, changing "imminent threat" to "reasonably foreseeable" mirrors language in the "21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program". The Preventing Harm exception allows an actor to hold a "reasonable belief" that the practice will substantially reduce a risk of harm. Consistent language and synergy between regulations provides clarity for EHR developers, providers and patients alike.

4) Sensible Changes to Balance Information Sharing with Provider Burden

athenahealth supports the HHS's proposal to eliminate a written acknowledgement of receipt of the Notice of Privacy Practices (NPP), and subsequent retention of documentation for six years. These antiquated policies and procedural requirements are no longer relevant in a modern interconnected world and should be removed to reduce cost, clinical and administrative burdens. These welcome changes further promote a more consistent, user-friendly system that appropriately balances information sharing with provider burden. We believe the rule will shift resources to tasks that better benefit patients while allowing for innovative solutions that ensure the spirit of HIPAA's promise of privacy and security endures.

In summary, athenahealth appreciates the opportunity to provide comments and input on the Proposed Rule. We trust that such input will be useful to the agency and encourage efforts to identify situations where provider burden can be reduced.

Please do not hesitate to reach out for further discussion.

Regards,

A handwritten signature in black ink that reads "J. Michaels".

Jennifer Michaels
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