



June 22, 2020

Christi A. Grimm
Principal Deputy Inspector General
Office of Inspector General
Department of Health and Human Services
330 Independence Avenue, SW
Washington, DC 20201

Re: Proposed Rule - Grants, Contracts, and Other Agreements: Fraud and Abuse; Information Blocking; Office of Inspector General's Civil Money Penalty Rules

Submitted Electronically via www.regulations.gov

Dear Deputy Inspector Grimm,

We appreciate the opportunity to provide comment on the *OIG Proposed Grants, Contracts, and Other Agreements: Fraud and Abuse; Information Blocking; Office of Inspector General's Civil Monetary Penalty Rules*.

Over the past twenty-two years, athenahealth has built a network of over 160,000 providers in both the ambulatory and acute settings. We provide electronic health record ("EHR"), 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. Interoperability is part of the athenahealth DNA and we integrate with more than 1,800 insurance payers, 122,000 lab and imaging centers, and 75,000 pharmacies in the U.S. Our mission is to create a thriving ecosystem that delivers accessible, high-quality, and sustainable healthcare for all.

The 21st Century Cures Act: Interoperability, Information Blocking, and the Health IT Certification Program Final Rule ("Final Rule") reflects more than a decade's worth of frustration from providers, health systems, policymakers, and EHR vendors at the pace of interoperability progress. We are optimistic for the future and believe the industry is committed to a health ecosystem where information exchange is the norm, not the exception. As we look forward, we must also recognize that the health industry is undeniably better connected today than it was yesterday – and certainly than it was ten years ago. As ONC has made a concentrated effort in the Final Rule to complement this progress, we urge OIG to support and promote this growth through the following specific recommendations for an effective enforcement program.

First, OIG must create an enforcement environment that addresses the most pervasive forms of information blocking behavior and educates regulated actors. To be effective, OIG must focus on business practices that have erected the historical barriers to information exchange. Most notably these practices include excessive and arbitrary costs, and business practices that restrict access,

exchange, and use of Electronic Health Information (“EHI”). As the Final Rule deliberately avoided creation of an information blocking safe harbor, OIG should be mindful of inadvertently creating a de-facto safe harbor that would allow information blocking behavior to evolve and persist in another form. A transparent enforcement process allows the industry to continue to innovate with the appropriate guardrails and patient protections in place.

As healthcare continues to move from a fee-for-service model to value-based care, the financial stakes for clinicians and health systems to access EHI at the time of care increase significantly. The government can help break down the remaining barriers to information access through enforcement and allow the technology developers in the private sector to partner with their clinician and health system customers to determine what effective information exchange looks like in the future. OIG should work to maintain consistency with the Final Rule’s intent to allow, and promote, innovative fee models for information exchange that will move information exchange beyond today’s status quo.

Second, OIG should coordinate with ONC to align effective dates of this rule with enforcement timelines from the ONC Information Blocking Final Rule. Since ONC has exercised enforcement discretion in response to the ongoing COVID-19 Public Health Emergency we encourage OIG to make the necessary and appropriate adjustments as the situation and healthcare industry response continues to evolve. Uncertainty and misaligned effective dates are a detriment to the intent of the rule and will slow the progress of other industry initiatives to promote meaningful information exchange.

Lastly, we know that the healthcare industry shares the goal of government in promoting a connected health ecosystem. athenahealth is fully supportive of an iterative and transparent enforcement process that encourages actors to adapt and proactively resolve scenarios where information may not be flowing as it should. Technology progress occurs at a rapid pace. There is no one-size-fits-all solution to interoperability or stopping information blocking behavior. Innovative care and fee models will emerge as a result of the Final Rule. OIG must utilize methods and techniques appropriately tailored to the facts and circumstances of each individual complaint. As important as it is for government to field complaints of information blocking behavior, the regulated actors must be able to properly investigate allegations internally and respond appropriately.

To allow regulated actors to respond and promote transparency with OIG, it is important that they know the identity of the actors involved in a complaint. The ONC Information Blocking Final Rule says “Section 3022(d)(2) of the PHSA exempts from public disclosure ‘any information that is received by the National Coordinator in connection with a claim or suggestion of possible information blocking and that could reasonably be expected to facilitate identification of the source of the information’ except as may be necessary to carry out the purpose of PHSA § 3022.” We request that OIG clarify and confirm that Health IT Developers are included in the public disclosure to ensure that regulated actors can do everything in their power to promote agreeable terms for information sharing.

athenahealth appreciates the opportunity to provide comment in this process and looks forward to engaging with the agency to further improve our nations healthcare system. Please do not hesitate to reach out directly.

Regards,

A handwritten signature in black ink, appearing to read "Greg Carey".

Greg Carey
athenahealth
Director, Government Affairs