CHIME Cheat Sheet – June 26, 2024
Information Blocking Provider Disincentives Final Rule

On June 24 2024, the Department of Health and Human Services (HHS) and other agencies – including the Centers for Medicare & Medicaid Services (CMS), the Office of the National Coordinator for Health IT (ONC), the Office of the Inspector General (OIG) – released a collaborative final rule establishing disincentives for healthcare providers that have committed information blocking.

The final rule establishes disincentives – financial penalties – for healthcare providers found by the HHS Office of Inspector General (OIG) to have committed information blocking. This implements the HHS Secretary's authority under section 4004 of the 21st Century Cures Act (Cures Act) to establish "disincentives" for providers who knowingly and unreasonably interfere with the access, exchange, or use of electronic health information (EHI) except as required by law or covered by a regulatory exception.

You can find the final rule here, the press release here, an overview fact sheet here, and common questions here. Additionally, you can find CHIME's comment letter on the proposed rule here.

This final rule and the disincentives are effective 30 days after publication in the *Federal Register*. However, the final rule states that OIG will not begin investigating healthcare providers until after the effective date of this final rule, and will exercise its enforcement discretion not to make any determinations regarding conduct occurring prior to the effective date of this final rule for information blocking disincentives.

Summary & Key Takeaways

The final rule establishes disincentives for healthcare providers that commit information blocking as determined through an investigation by OIG. You can find more information on who is considered a "healthcare provider" under information blocking regulations here. It is important to note that some healthcare providers that are subject to the information blocking regulations are not impacted by the programs under which HHS has established disincentives in this final rule.

HHS believes "optimal deterrence of information blocking calls for imposing appropriate disincentives on all healthcare providers determined by OIG to have committed information blocking." The proposed rule requested information about healthcare providers that HHS should prioritize when establishing additional disincentives, particularly disincentives that would apply to those that are not impacted by the disincentives in this final rule, and disincentives for these health care providers that can be established using authorities under applicable federal law. This final rule only establishes disincentives for healthcare providers using authorities for programs administered by CMS. Other agencies could establish disincentives through future notice, public comment, and rulemaking. However, at this time, HHS has not established a target date for any future rulemaking for when additional disincentives would be established.

The final rule describes the process by which OIG investigates a claim of information blocking by a healthcare provider, determines the healthcare provider has committed information blocking, and refers that healthcare provider to an appropriate agency to be subject to disincentives. The final rule also establishes sharing of information with the public about actors (including healthcare providers, health IT

developers of certified health IT, and health information exchanges and health information networks) that commit information blocking.

OIG will find that a practice – act or omission – by a healthcare provider constitutes information blocking if it finds that the healthcare provider ***"knows that such practice is unreasonable and is likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information"*** and the practice was neither required by law and does not meet an exception.

The legal threshold for information blocking differs for healthcare providers – in contrast from other actors such as health IT developers, health information networks and exchanges. The final rule complements OIG's final rule – Grants, Contracts, and Other Agreements: Fraud and Abuse; Information Blocking; Office of Inspector General's Civil Money Penalty Rules – which was published in July 2023 and established civil money penalties (CMPs) authorized for other actors that have committed information blocking.

The final rule states that OIG expects to use four priorities for enforcement when investigating information blocking practices by healthcare providers. OIG expects to prioritize practices that:

1) resulted in, are causing, or had 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, or other government or private entities.

OIG's expected priorities are informational only and are not binding on OIG decision making. The final rule notes OIG's complete discretion in choosing which complaints to investigate and OIG's expectation that the enforcement priorities will be used to make such decisions – which aims to ensure that resources are efficiently allocated to target claims that have the strongest negative outcomes. When investigating allegations of information blocking, OIG will have ongoing coordination with other agencies, including: 1) the ONC National Coordinator; 2) refer claims on information blocking related to health privacy and security to OCR; and 3) consult and coordinate with other federal agencies including CMS.

The final rule also details OIG's expected approach to referral upon conclusion of an investigation. If OIG has determined that a healthcare provider has committed information blocking, it is then required to send the information used to make this determination to an appropriate agency.

Following referral of a determination of information blocking by OIG, the final rule states that an appropriate agency that imposes a disincentive will send a notice to the provider subject to the disincentive or disincentives, via usual methods of communication for the program or payment system under which the disincentive is applied. A healthcare provider that is merely alleged to have committed information blocking but has not been investigated and determined by OIG to have committed information blocking, would not receive a notification.

Information Blocking Disincentives

In the final rule, HHS establishes the following disincentives for healthcare providers that have been determined by OIG to have committed information blocking and for which OIG refers its determination to CMS.

- ***Medicare Promoting Interoperability (PI) Program***
  Under the Medicare PI Program, an eligible hospital or critical access hospital (CAH) that commits information blocking will not be a meaningful electronic health record (EHR) user in an applicable EHR reporting period. The impact on eligible hospitals will be a reduction of three

quarters of the annual market basket update; for CAHs, payment will be reduced to 100 percent of reasonable costs instead of 101 percent.

- ***Quality Payment Program (QPP)***
  Under the Promoting Interoperability performance category of the Merit-based Incentive Payment System (MIPS), a MIPS eligible clinician that commits information blocking will not be a meaningful user of certified EHR technology in a performance period and will therefore receive a zero score in the Promoting Interoperability performance category of MIPS, if required to report on that category. Similarly, if a MIPS eligible clinician participating in group reporting is found to have committed information blocking, the individual will be subject to a referral by OIG, not the group. The Promoting Interoperability performance category score typically can be a quarter of a clinician or group's total MIPS score in a year.

- ***Medicare Shared Savings Program (MSSP)***
  Under the MSSP, an Accountable Care Organization (ACO), ACO participant, or ACO provider or supplier may 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; and in the instance where a healthcare provider is an ACO, this may prevent the ACO's participation in the Shared Savings Program. Restricting the ability of healthcare providers to participate in the Shared Savings Program for at least 1 year will result in these healthcare providers potentially not receiving revenue that they might otherwise have earned if they had participated in the Shared Savings Program. Prior to applying a disincentive under the Shared Savings Program, CMS will consider an OIG information blocking determination in light of the relevant facts and circumstances (such as the nature of the healthcare provider's information blocking, the healthcare provider's diligence in identifying and correcting the problem, the time since the information blocking occurred, whether the provider was previously subject to a disincentive in another program, and other factors).

HHS has finalized an approach to "provide transparency into the nationwide health IT infrastructure by making information available to the public about healthcare providers that have been determined by OIG to have committed information blocking and have been subject to an appropriate disincentive for information blocking, and about health IT developers of certified health IT and HIEs/HINs and that have been determined by OIG to have committed information blocking."

The following information will be posted to the ONC website: 1) the OIG determination of information blocking; 2) details on the provider; and 3) the disincentive(s) applied. HHS finalized a modification[1] to clarify that information will not be posted prior to the completion of any administrative appeals process pursued by the healthcare provider.

If you have any questions, reach out to the Public Policy team at policy@chimecentral.org.

[1] 45 CFR 171.1101(a)(2)