



June 3, 2019

Don Rucker, M.D.
National Coordinator for Health Information Technology
U.S. Department of Health and Human Services
330 C St SW, Floor 7
Washington, DC 20201

Re: *RIN 0955-AA01, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program; Proposed Rule (Vol. 843, No. 42), March 4, 2019.*

Dear Dr. Rucker:

On behalf of the New Jersey Hospital Association (NJHA) and its over 400 hospital, health system, PACE and post-acute members, thank you for the opportunity to comment on the Office of the National Coordinator (ONC) for Health Information Technology's (IT) proposed rule on interoperability, information blocking and the ONC Health IT Certification Program.

NJHA applauds ONC for addressing the critical issue of interoperability. We support a number of the proposed rule's provisions, including the exchange of patient data and the agency's focus on ensuring certified health IT products can provide core interoperability capabilities. When patients have access to their health information they can engage more fully in their care and experience better outcomes.

Our members strongly support patients having easy access to their health information so that they can be partners in their care. **However, we do not believe that patients should have to sacrifice data protections and data privacy in order to receive easy access to their health information.** We are deeply concerned that third party applications and tools not governed by HIPAA are increasingly accessing patient data and using it in ways in which patients likely are unaware. Patients' data is their own, and no organization, whether regulated by HIPAA or not, should be allowed to capitalize and monetize their data without the patient fully understanding what is occurring and agreeing to it. **We urge ONC to consider the ramifications of its proposals and consider ways that we can help patients get easy access to their data without sacrificing their control or the protections HIPAA offers.**

In addition, we are extremely concerned about the agency's interpretation of what may be included in the definition of EHI, specifically regarding price information. It goes well beyond what Congress intended and would seriously harm patients, hospitals and other health care providers.

While access to EHI is an important goal, it is just as important to define EHI properly to reflect the intent of Congress and protect the legal rights and expectations of those affected by ONC's rules. NJHA believes that ONC's interpretation of what may be included in the definition of EHI goes well beyond what Congress intended and would seriously harm hospitals and other health care providers. **Specifically, we believe ONC lacks authority to include price information – a term it leaves undefined – in the definition of EHI for purposes of determining what constitutes information blocking.**

Interpreting the definition of EHI to include price information would have serious untoward – even perverse – consequences. It likely would disrupt the health care system in many anticipated and unanticipated ways. The Federal Trade Commission (FTC) has warned against “broad disclosures of bids, prices, costs and other sensitive information” noting “disclosing the terms of these health plan contracts might offer little incremental benefit to consumers, but could pose a substantial risk of reducing competition in health care markets.” Furthermore, hospitals and other providers consider price information confidential. Allowing health plans to have access to that information could seriously disrupt negotiations with plans.

NJHA is particularly troubled by the way in which ONC apparently would require the disclosure of price information: It is an end-run around both the controlling statute and Administrative Procedure Act (APA). If Congress had intended to allow ONC to require hospitals to disclose price information to avoid being sanctioned for information blocking, it would have said so. It did not.

ONC is not permitted to circumvent congressional intent and the language of the statute. Unless and until Congress acts, we urge ONC not to interpret the definition of EHI to include price information or undertake “subsequent rulemaking to expand access to price information” as it has suggested it may do.

While we appreciate the information blocking exception structure ONC has proposed, we are concerned that the burden of proof placed on hospitals and health systems to demonstrate that they did not information block when they, and their business associates, are trying to ensure that they are using and disclosing information only as they are legally permitted to do is much too great, and much too vague. **We ask ONC to provide significantly more detailed direction to hospitals and health systems and other HIPAA-covered entities about what documentation will be sufficient to demonstrate they did not engage in information blocking while they ensure that they remain in compliance with existing legal and regulatory obligations imposed by HIPAA and other laws.**

Moreover, **we are deeply concerned that the agency has proposed to make the information blocking provisions effective the day the rule is finalized.** This is impractical and leaves organizations no time to ensure they are in compliance, placing them in an inappropriately vulnerable position, for which noncompliance would have serious consequences.



NJHA sincerely appreciates your consideration of these issues. Additionally, NJHA wishes to register its support for the comments on this proposed rule submitted by the American Hospital Association, of which NJHA is a member. Please do not hesitate to contact me at (609) 275-4000 should you or a member of your team have any questions.

Sincerely,

Jonathan Chebra
Senior Director, Federal Affairs
Government Relations & Policy