

## FACT SHEET

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### ACEP Responds to Major Rules Regarding Health Information Technology

On May 31, 2019, ACEP responded to a long-awaited set of proposed rules released by the Centers for Medicare & Medicaid Services (CMS) and the Office of the National Coordinator (ONC) for Health Information Technology that address interoperability, information blocking, and patient access to data and electronic health record (EHR) certification criteria.

The CMS Interoperability and Patient Access Proposed Rule outlines opportunities to make patient data transparent, useful, and transferable through secure and standardized formats. In this rule, CMS includes several major proposals that have significant implications for health information technology (HIT) stakeholders, including emergency physicians and the patients we serve.

The ONC proposed Interoperability, Information Blocking and ONC Health IT Certification Program Proposed Rule details proposals that further advance interoperability and patient access to health information. This rule implements certain provisions of the 21<sup>st</sup> Century Cures Act, including definitions for activities that do not constitute information blocking.

To see ACEP's full response to the CMS rule, please click [here](#).

To see ACEP's full response to the ONC rule, please click [here](#).

Key provisions of the rules and ACEP's responses to them are below.

#### **Overall Approach to Responses**

The CMS and ONC proposed rules, if finalized, would have a significant impact on all major health care stakeholders, including EHR vendors, health care plans, hospitals, and providers. ACEP supports the goal of improving access to data but is very concerned about the additional pressure being placed on providers to invest in data sharing technology and the speed at which providers would be required to implement these new technologies. **Given the magnitude of changes encompassed in these rules, we believe that CMS and ONC should publish interim final rules rather than final rules to allow additional opportunity for stakeholder comment. We also recommend that CMS and ONC delay any disincentives and/or penalties until two years after implementation of the rule to allow all stakeholders to have time to address any unforeseen challenges.**

#### **CMS Rule Response**

- ◆ **New Medicare Condition of Participation**— CMS is proposing to add a new Medicare Condition of Participation (CoP) that would require hospitals, including psychiatric and critical access hospitals, to send an electronic notification when a patient is admitted, discharged, or transferred (ADT).

ACEP Response:

- Do not support the proposal to add a new Medicare CoP for hospitals, although we acknowledge that ADT notifications can help improve care and lower costs by helping health care providers better manage patients with significant acute or chronic diseases.

- Instead, urge CMS to make ADT notifications voluntary. There are already existing provider-led initiatives to share data and coordinate care, such as the Collective Medical Technologies' (CMT) EDIE™.
- Ask that CMS consider implementing a pilot or demonstration under the Center for Medicare & Medicaid Innovation (CMMI). During the phase-in period or demonstration, CMS could test the effectiveness of hospitals sending additional notifications, especially around ED visits.

- ◆ Patient Access to Information Using Application Programming Interface (APIs)— CMS is proposing that health plans must make certain health information available on open APIs within one business day after such information is received by the plans.

ACEP Response:

- Express concern that health plans will impose short, unrealistic turn-around times for providers to retrieve the information. This could potentially increase administrative costs for providers, who would be required to update their systems to comply with the demands of the health plans. Furthermore, if providers cannot comply with payers' new contractual requirements around submitting claims and encounter data, they may be forced out-of-network. Narrow networks can make it difficult for patients to access the care they need.
- Strongly urge CMS to prohibit payers from using this new requirement as an excuse to place additional contractual demands on clinicians.
- Recommend that CMS relax the timeline for health plans to put encounter data and claims on open APIs. Quick deadlines could lead to mistakes and inaccurate information being sent to the plans. While we understand the need to get information to consumers as quickly as possible so that they can make more informed decisions about their health care, what is even more important is that the information they are receiving is accurate.

- ◆ Provider Information Directory— CMS is proposing to require health plans to make provider directories available on open APIs.

ACEP Response:

- Support this proposal and urge CMS to require all payers to update their provider directories in real-time, correcting errors as soon as possible.
- Request that CMS implement strong penalties for payers that do not comply with these requirements.

## **ONC Rule Response**

- ◆ Privacy and Security of Data— ONC proposes a broad definition of electronic health information that can be made available on open API.

ACEP Response:

- Support strong privacy and security standards for data that is retrieved off of APIs by third-party applications (such as mobile apps). As more and more third-party applications obtain data from open APIs, we need to think extremely carefully about how to ensure patient information is protected and that these third-parties do not engage in any deceptive practices that could potentially jeopardize the privacy and security of the data. Some third-party applications are not covered entities under the Health Insurance Portability and Accountability Act (HIPAA). Therefore, they are regulated by the Federal Trade Commission (FTC), which has the authority to investigate and take action against unfair or deceptive trade practices. Even though the electronic health information may not be under the control of a HIPAA-covered entity, it deserves at least the same protections as it receives under HIPAA.
- Encourage the FTC to put out strong guidance or regulations clearly articulating what are and are not acceptable uses of the data, using HIPAA privacy and security rules as a guiding benchmark. ONC should also commit to working with the FTC on that additional guidance.
- Request that ONC go even further to ensure that consumers are protected and that they truly understand

how their data are being used. ONC should consider requiring EHR vendor’s APIs to answer basic questions about how the third-party application plans to use the data. Consumers should have access to the answers on this questionnaire before using the third-party application. That way, even if the third-party application has a data use agreement that they require consumers to agree to, there will be another mandatory safeguard in place to ensure that consumers understand all the potential uses of their data once a third-party application retrieves all of it from the EHR vendor’s API.

- ◆ **Information Blocking**— The 21st Century Cures Act defines practices that constitute information blocking when conducted by a health care provider or a health information technology developer, exchange, or network. The Act also calls on the Secretary of the Department of Health and Human Services (HHS) to identify, through notice and comment rulemaking, “reasonable and necessary” activities that do not constitute information blocking. In this rule, ONC proposes reasonable and necessary activities that would qualify as exceptions to the information blocking definition.

ACEP Response:

- Request that ONC simplify the information-blocking exception requirements and not set up a system that could potentially penalize clinicians who are using their best clinical judgment and acting in good faith to protect their patients’ rights to privacy. The proposed exceptions are confusing and complicated and it will be extremely burdensome to make sure physicians are covering all of their bases to defend themselves in any type of information blocking claim against them.
- Ask ONC to remove the burdensome requirements for physicians to document their decision-making associated with qualifying for information blocking exceptions or sub-exceptions.

- ◆ **Price Transparency and Surprise Billing**— ONC seeks comment on the implications of including price information within the scope of electronic health information for purposes of information blocking. If price information is eventually included in electronic health information, ONC asks whether that information would be useful in subsequent rulemaking that HHS may consider in order to reduce or prevent surprise medical billing.

ACEP Response:

- Discuss the unique nature of emergency care and our obligations under EMTALA.
- Point to ACEP’s [framework](#) for protecting patients when emergency care is out-of-network. Our framework suggests a number of ways to expand patient protections in order to truly take patients out of the middle of billing disputes between payers and providers.
- Present compelling arguments against possible proposals to bundle payments together for all health providers involved in an emergency episode or require health care providers in an in-network facility (i.e., a hospital) to charge the in-network rate.