

## Compliance Today – February 2024



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### The proposed information blocking provider enforcement rule

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The proposed enforcement rule for providers under the information blocking provisions of the 21st Century Cures Act was published in the *Federal Register* on November 1, 2023.<sup>[1]</sup> Under the proposed rule, the U.S. Department of Health and Human Services Office of Inspector General (OIG) will investigate allegations of potential information blocking by providers. Providers identified as guilty of information blocking will be referred to the Centers for Medicare & Medicaid Services (CMS) for disincentives to be applied against the provider. The disincentives will be tied to the Medicare Prospective Payment System (PPS), and the Merit-Based Incentive Payment System (MIPS), under which providers demonstrate meaningful use of certified health information technology solutions. Disincentives may also be associated with participation in Accountable Care Organizations (ACO).

PPS hospitals found guilty of information blocking will be subject to a 75% reduction of the market basket increase, implemented two years after the case is referred from OIG to CMS. The Office of the National Coordinator (ONC) calculated that the median disincentive would be approximately \$394,353.<sup>[2]</sup> Critical access hospitals would only receive 100% of reasonable costs—not 101%—implemented the year OIG refers the case to CMS.

For eligible professionals under the MIPS program, if found guilty of information blocking, this would equate to a finding that the provider was not meaningfully using their electronic medical records. Such a finding would be a 25% decrease in the MIPS score and an overall decrease in payments for the provider. ONC calculated the median disincentive would be \$686 per professional.<sup>[3]</sup>

The final proposed disincentive relates to participation in an ACO. A provider found guilty of information blocking would not be permitted to participate in such a program for one performance year starting the year after OIG referral to CMS. If the provider participates in more than one of the programs discussed, the disincentives for each could be applied.

If a provider does not participate in any of these programs, it is unclear what—if any—disincentive would be applied if they were found guilty of information blocking.

Of course, this is under a notice of proposed rulemaking, so we have yet to see what the final enforcement rule might bring.

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<sup>1</sup> 21st Century Cures Act: Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking, 88 Fed. Reg. 74,947 (Nov. 1, 2023), <https://www.federalregister.gov/documents/2023/11/01/2023-24068/21st-century-cures-act-establishment->

of-disincentives-for-health-care-providers-that-have-committed.

**2** Office of the National Coordinator for Health Information Technology and the Centers for Medicare & Medicaid Services, “Proposed Rule, 21st Century Cures Act: Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking,” accessed November 28, 2023,

[https://www.healthit.gov/sites/default/files/2023-](https://www.healthit.gov/sites/default/files/2023-11/IB%20Disincentives%20for%20Providers%20Info%20Session20231115_508.pdf)

[11/IB%20Disincentives%20for%20Providers%20Info%20Session20231115\\_508.pdf](https://www.healthit.gov/sites/default/files/2023-11/IB%20Disincentives%20for%20Providers%20Info%20Session20231115_508.pdf).

**3** Office of the National Coordinator for Health Information Technology and the Centers for Medicare & Medicaid Services, “Proposed Rule, 21st Century Cures Act: Establishment of Disincentives for Health Care Providers That Have Committed Information Blocking.”

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