

# **HIPAA Rules: Changes On The Horizon**

CtHIMA

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# Today's Program

Today's program covers

- Overview of pandemic-related HIPAA rule changes
- Discussion of the intersection between Information Blocking Rule (IBR) and HIPAA
- Review of proposed HIPAA rule changes

# COVID-19 and HIPAA

HHS temporarily modified a handful of  
HIPAA rules to accommodate providers' response  
to the pandemic

# HIPAA and COVID-19 Issues

Per notice, the federal government made a few HIPAA modifications, effective during the public health emergency, and opined on several related privacy and security issues:

- OCR will use enforcement discretion flexibility *during the public health emergency* on various issues, including relaxing some HIPAA Security requirements for telehealth and online scheduling systems, and relaxing HIPAA requirements related to community based testing sites
- Public Health Activities promoted and made (slightly) more flexible
- How to contact patients about therapies clarified
- Rules for first responder/workforce exposure (and disclosure of patient status) clarified
- Aggressive reminder about NOT allowing film crews and media onsite
- If you are relying on regulatory flexibility – be sure to document, particularly if it is misaligned with your policies and procedures (follow the notices carefully, these are not broad or global changes)

# Information Blocking and HIPAA are Interconnected

Information Blocking only applies to instances when you do not fulfill a request from a requester who **would be allowed access [including under HIPAA]**

# Information Blocking Theme

**An Actor is “Information Blocking” if it has practices that are: “likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information”**

***By anyone* legally allowed to access the data – not just patients**

# HIPAA Still Plays Key Role in Release Decisions

Every time a provider/Actor creates a barrier -- does **something** -- that makes it harder for a valid requester to access, exchange or use EHI, or discourages the requester from seeking or obtaining access, the Actor is suspect as potentially Information Blocking

**Valid requester includes a requester that has a HIPAA-compliant pathway to access the record**

# Interference

The “**something**” that creates the interference could be, for example:

- Technical barriers (hardware, software, technical specs and information)
- Administrative barriers (fees, forms, consents, policies)
- **Failure to allow access when HIPAA would allow access**



# “Actors” are Subject to Information Blocking

“Actor” means any of the following:

- Health Care Provider: entities that provide treatment services (without regard to HIPAA status)
  - **Note: Health Insurers and coverage programs are HIPAA Covered Entities, but are not IBR “Actors”**
- Health Information Network/Health Information Exchange
- Certified Health IT

## Examples of *Possible* Information Blocking

- A provider requires patients **to sign a written consent** before sharing routine treatment information with another treater, but the same provider shares with treaters in the provider's own health system without requiring patient consent.
- A health system requires that community providers use the health system's EHR platform as the **only** easy method to access patient records.
- A provider's EHR platform can be set to provide real-time exchange with health apps or other platforms that meet the same or similar technological standards, **but the provider picks and chooses which apps to allow** based on the provider's preference and familiarity with the app.

## Examples of *Possible* Information Blocking

- Provider (*incorrectly*) asserts that “**HIPAA doesn’t allow me to share**” with the requesting entity. For example, refusing a request from an ambulance company for patient outcome data about a common patient.
- Provider has **strict security measures in place**, with multiple standards that **exceed what would be required for HIPAA Security compliance**. The provider cites to those enhanced security measures as a blanket reason to deny other providers’ electronic access to patient information.
- BA with **significant market power** makes it difficult for its covered entity customers to exchange EHI, maintained by the BA, with health care providers that use an EHR system of one of the **BA’s competitors**.

# Information Blocking -- Eight Exceptions

Five exceptions that might excuse failure to allow access, exchange or use:

- Preventing Harm Exception
- Privacy Exception
- Security Exception
- Infeasibility Exception
- Health IT Performance Exception

Three exceptions that allow modification or additional features (i.e., some interference) when providing access, exchange or use:

- Content and Manner Exception
- Fees Exception
- Licensing Exception

Detailed commentary and explanations in May 1, 2020 Federal Register on pages 25820-25900:

- <https://www.govinfo.gov/content/pkg/FR-2020-05-01/pdf/2020-07419.pdf>

# Information Blocking Concepts

Goals of the Information Blocking Rule include:

- To change thinking to favor flow of data, and to promote routine sharing of data, when it's not prohibited by law
- To stop the (incorrect) perception that providers own the data
- To de-emphasize the idea that you should aggressively protect data instead of seek legitimate pathways to exchange
  - To increase the types of exchange consistent with current technologies and make them routine
  - **Very different from HIPAA; HIPAA Privacy Rule includes a focus on stopping unauthorized access, which favors limiting flow of data**

# \$64,000 Question

Why aren't Information Blocking Rules and HIPAA better aligned?

December 10, 2020 proposed rule release tried to bridge the gap.

# Major HIPAA Rules That Might Be Changing

## These are *proposed only* (so far)

- 30 days to 15 days for maximum time to fulfill request (paper and electronic)
- Free copies for direct patient requests
- Posting of copy fees schedule in advance
- Estimate of actual fees on demand
- Patients must be allowed to take notes or photographs of their records
- Patients must be allowed in-person records inspection
- Clarifies patient rights to direct release to HIPAA entities and other third parties
- New NOPP rights must be listed, including rights to copies and to direct disclosures
- Clarifies health insurer obligations to allow record access and process disclosure requests
- Eliminates NOPP acknowledgement requirement
- Clarifies use of existing rule on disclosures made to avert a serious health threat
- Expands some “good faith” data uses by covered entities
- Revises the minimum necessary standard and definition of healthcare operations to allow for expanded uses of care coordination and case management
- Clarifies and expands existing military services uses

# Key Takeaways, While We Await Final Rule Changes

- OCR, CMS, ONC are moving toward free (or mostly free) records, and will make it harder to charge fees
- Perception is that 30 days is too long to wait
- Burdensome “acknowledgement” process may be dropped
- Emphasis on “minimum necessary” scrutiny for data uses may complicate other release decisions
  - In trying to expand allowed uses for care and case management, the rules may have unintended consequences



# More Questions Than Answers

- No clear timeline for when “final rules” will be available, and no clear indication of timeline for adjusting compliance practices
- Even if every one of the proposed HIPAA rules changes are adopted, there will still be an unworkable tension between information blocking and HIPAA
- Technology can solve for many things in healthcare, but it cannot automate privacy effectively
- We are still waiting for previously announced Cares Act alignment between HIPAA and 42 CFR part 2

Q & A



# Tools & Resources

- [Guidance Materials | HHS.gov](#)

COVID-19 and OCR:

- <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html>

ONC Information Blocking Final Rule:

- <https://www.healthit.gov/curesrule/>
- <https://www.healthit.gov/sites/default/files/cures/2020-03/InformationBlockingExceptions.pdf>