

**Congress of the United States**  
**Washington, DC 20515**

July 11, 2013

Marilyn Tavenner  
Administrator  
Centers for Medicare and Medicaid Services  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Farzad Mostashari  
Director  
Office of the National Coordinator  
U.S. Department of Health and Human  
Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Administrator Tavenner and Dr. Mostashari:

We are writing to share our interest in reducing unnecessary barriers and obstacles to information sharing through electronic health records. Health information technology has the potential to reshape our country's health care delivery system, transitioning to a more coordinated structure where information can be easily transferred among patients and providers to support improved patient outcomes, quality of care and lower costs. To reach this shared goal, all providers, health systems, hospitals, and patients must have access to real-time, accurate, and actionable health information.

**Interoperability and Information Blocking**

Interoperability--the ability to electronically share information across healthcare systems, individual providers and patients – is critical to achieve this shared goal. Unfortunately, some have created artificial obstacles to achieving interoperability, which must be eliminated. One of the artificial obstacles to interoperability is a practice known as “information blocking,” where health care providers or electronic health record vendors have contracts that block information exchange between electronic health record systems. Information blocking occurs not because different technologies or standards prevent data transfer between electronic health records, but because some electronic health record vendors or health care providers engage in this activity as a business practice. If we are to better accomplish the aims of better, more efficient care while exercising responsible stewardship of taxpayer dollars, we hope you agree that these business practices should be eliminated in health programs subsidized by taxpayers.

**Stark Exception and Anti-Kickback Safe Harbor**

We are pleased that the Office of the National Coordinator for Health Information Technology (ONC) has made clear their intent to closely monitor progress in vendor-to-vendor exchange, and encourage the Department of Health and Human Services (HHS) to adopt additional policies that will address the problem of information blocking across the healthcare marketplace. We believe that the best policy lever to achieve this is through the Stark exception and anti-kickback safe harbor for donated electronic health records items and services.

Recently, the Centers for Medicare & Medicaid Services (CMS) and the HHS Inspector General proposed to extend and modify the Stark exception and anti-kickback safe harbor that permit certain arrangements involving interoperable electronic health records software or information technology and training services.<sup>1</sup> Both the exception and safe harbor include a condition that “the donor (or any person on the donor’s behalf) [...] not take any action to limit or restrict the use, compatibility, or interoperability of the items or services with other electronic prescribing or electronic health records systems.”<sup>2</sup>

## Recommendations

We believe that HHS should take this opportunity to expand upon the expiring Stark exception and anti-kickback safe harbor and move beyond the requirements of the final rule for Stage 2 of the Medicare and Medicaid Electronic Health Records Incentive Programs to ensure that health information technology systems are interoperable.

Specifically, HHS should:

- Expand the current condition to prohibit actions that limit or restrict the use, compatibility, or interoperability of the items or services with *other health information technology*. Expanding this language beyond electronic prescribing and electronic health records systems reflects the rapidly shifting nature of today’s technology to go beyond the care of an individual and manage quality and cost efficiencies across populations.
- HHS should also make clear that neither the donor nor donee can take any actions to limit the interoperability of donated health information technology. To this end, HHS should establish a new condition under the exception and safe harbor that clarifies the prohibition against data “lock-in” and require that any written agreement subject to the exception and safe harbor incorporate this new condition.

Thank you for your consideration of these important matters. We look forward to your timely response.

Sincerely,



Diane Black  
Member of Congress



Michael M. Honda  
Member of Congress

<sup>1</sup> “Medicare Program; Physicians’ Referral to Health Care Entities with Which They Have Financial Relationships: Exception for Certain Electronic Health Record Arrangements,” 78 Fed. Reg. 69 (April 10, 2013), pp. 21308-21314; *see also* “Medicare and State Health Care Programs: Fraud and Abuse; Electronic Health Records Safe Harbor Under the Anti-Kickback Statute,” 78 Fed. Reg. 69 (April 10, 2013), pp. 21314-21320.

<sup>2</sup> 42 CFR 357(w)(3); *see also* 42 CFR 1001.952(y)(3).