

CURES ACT

The Effect on Health IT

Author: Alex Ealy, JD
Senior Risk Resource Advisor

*If you have questions on this topic,
please contact Mallory Earley at 888-
877-4498, extension 4789, or email
MalloryEarley@ProAssurance.com.*



The 1996 Health Insurance Portability and Accountability Act (HIPAA) gave patients a right to view and request corrections to their medical records. In the intervening years, the widespread adoption of electronic health records (EHR), patient portals, and smartphone applications have led to an increase in patients accessing their medical records electronically. The digital evolution of the medical record has prompted a number of healthcare professionals and patient safety advocates to promote quicker access to information stored in the EHR.

The [21st Century Cures Act \(Cures Act\)](#), passed by the U.S. Congress in 2015, provides new regulation on a variety of healthcare concerns including funding, research, access to new and experimental drugs, telehealth, and interoperability of health information technology (health IT). Authors of the Cures Act introduced a new phrase to the health care community related to the interoperability of health information technology: “information blocking.”

Information Blocking: Defined

“Information blocking” is defined by the Cures Act and paraphrased by HIT.gov as: “a practice by a health IT developer of certified health IT, health information network, health information exchange, or healthcare provider that, except as required by law or specified by the Secretary of Health and Human Services as a reasonable and necessary activity, is likely to interfere with access, exchange, or use of electronic health information (EHI).”¹

While information blocking can occur when a healthcare provider intentionally restricts access to the patient’s medical record, it can also occur unintentionally as a byproduct of health IT.

Physicians, like patients, can also experience information blocking. For example, information blocking can occur when physicians move from one EHR to another, or when they try to access a patient’s medical record held by another physician. Information blocking can also happen when physicians try to connect EHRs to local information exchanges.²

However, simple interference with the access, exchange, or use of EHI, may not automatically constitute a violation of the Cures Act. To constitute a violation, actors, such as physicians, must have *knowledge and intent* to interfere with the access, exchange, or use of EHI.³ Essentially, provisions within the Cures Act seek to

CURES ACT: The Effect on Health IT

discourage physicians and entities from *knowingly* interfering with or discouraging access to a patient's EHI. Healthcare providers found to be engaging in the practice may be subject to monetary penalties or reimbursement disincentives from federal healthcare programs, like Medicare and Medicaid.

Open Notes: When to Share

The information blocking provisions of the Cures Act are often colloquially referred to as “open notes.” Healthcare providers who do not make clinical notes open and available for their patients are engaging in the practice of information blocking, unless one of the Cures Act's regulatory exceptions applies.

The [OpenNotes organization](#)—a group of clinicians and researchers committed to increasing patient access to their medical records—states that sharing medical notes can improve accuracy and patient safety, improve medication adherence, foster stronger relationships and better engagement, improve chronic care management, support care partners, and promote efficiencies.⁴

The Cures Act references [eight types of clinical notes](#) that must be made open to patients, including:

- Consultation note
- Discharge summary note
- Procedure note
- Progress note
- Imaging narrative
- Lab report narrative
- Pathology report narrative
- History and physical⁵



Cures Act Violations

The American Medical Association has provided examples of potential violations of the Cures Act including:

- **Formal restrictions:** A provider or office policy requires staff to obtain a patient's written consent before sharing any EHI with unaffiliated providers for treatment purposes.
- **Technical limitations:** A physician disables the use of an EHR capability that would enable staff to share EHI with users at other systems.
- **Isolated interferences:** A physician has the capability to provide same-day EHI access in a format requested by an unaffiliated provider—or by their patient—but takes several days to respond.⁶

Cures Act Exceptions to Information Blocking

While providers may read the requirements of the Cures Act and believe them to be burdensome, the information blocking rule contains exceptions for flexibility in operation. Knowing how the Cures Act differs from HIPAA is also helpful to understanding the scope of the act. HIPAA's regulations affirmatively and specifically state what types of EHI can be shared with other providers, patients, and third parties. The Cures Act information blocking rule directs the providers to release records to patients and other providers in nearly all instances where an exception does not exist.

The two categories of exceptions to information blocking within the Cures Act provide flexibility to healthcare providers and organizations without burdening them with administrative rigidity.

- The first category involves not fulfilling requests for access. These exceptions include preventing harm to the patient or another, protection of health information privacy, protection of health information security, infeasibility, and health IT performance.
- The second category are those that involve procedures used for fulfilling requests. The exceptions in the procedures category include limitation in content and manner, reasonable fees, and licensing.

CURES ACT: The Effect on Health IT

Risk Management Considerations

With enforcement provisions of the Cures Act expected to be announced in the near future, it is important to train staff in sound documentation practices to help manage risk. Be mindful of the following as more and more patients expect instant access to their medical records:

- Assume all notes will be read by the patient.
- Complete documentation in a timely manner.
- Avoid abbreviations that may be standard in the healthcare community, but not easily interpreted by the patient.
- Avoid the use of pejorative terms such as “malingering”; instead, use factual observations in the chart.
- Use plain language and focus on clarity, for the benefit of the patient as well as other healthcare providers.
- Avoid copying and pasting from other sources.
- Before documenting difficult situations, attempt a conversation with the patient first.

Conclusion

It is important to note that the Cures Act’s information blocking rule does not override existing state and federal rules protecting patient confidentiality. Compliance with state and federal laws that require patient consent before production of medical records would likely not constitute information blocking. For example, a state may require certain conditions be met before releasing certain classes of EHI, such as HIV status or adolescent mental health information. In these instances, physicians should not release that EHI without first obtaining consent from the patient.⁷

The compliance date for healthcare providers to meet the Cures Act information blocking requirements was April 5, 2021. Healthcare providers will need to make the same information available on patient third-party applications by October 6, 2022 to not be engaged in information blocking.⁸

The good news for physicians is that although the date for Cures Act compliance has passed, the final rule went into effect without applicable enforcement provisions—which means physicians still have time to bring their EHR systems and procedures into compliance. With proper planning and training, physicians and their organizations should be able to implement minor procedural changes to comply with Cures Act requirements.

Contact us with questions about the Cures Act or information blocking at 844-223-9648 or email RiskAdvisor@ProAssurance.com.

Resources:

- <https://www.healthit.gov/topic/information-blocking>
- <https://www.healthit.gov/curesrule/resources/information-blocking-faqs>
- <https://www.ama-assn.org/system/files/2021-01/information-blocking-part-1.pdf>
- <https://www.ama-assn.org/system/files/2020-11/info-blocking-compliance.pdf>
- <https://www.ama-assn.org/system/files/2020-10/onc-final-rule-ama-summary.pdf>
- <https://www.opennotes.org/opennotes-for-health-professionals/>

Endnotes

- 1 <https://www.healthit.gov/topic/information-blocking>, emphasis added accessed March 18, 2021.
- 2 <https://www.ama-assn.org/system/files/2021-01/information-blocking-part-1.pdf> accessed March 18, 2021.
- 3 Ibid.
- 4 <https://www.opennotes.org/opennotes-for-health-professionals/> accessed March 18, 2021.
- 5 <https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi> accessed March 18, 2021.
- 6 <https://www.ama-assn.org/system/files/2021-01/information-blocking-part-1.pdf> accessed March 18, 2021.
- 7 <https://www.ama-assn.org/system/files/2021-01/information-blocking-part-1.pdf> accessed March 18, 2021.
- 8 <https://www.opennotes.org/onc-federal-rule/> accessed March 18, 2021.

Medical Risk Resource Advisor is published by ProAssurance's Risk Resource department.

Phone: **844-223-9648**

Email: RiskAdvisor@ProAssurance.com

This newsletter is not intended to provide legal advice, and no attempt is made to suggest more or less appropriate medical conduct.

Policyholders may find Risk Resource articles and information archived on our website: ProAssurance.com/Newsletters.



PROASSURANCE
Treated Fairly

Copyright © 2021 by ProAssurance Corporation.
M5272