



Meeting Notes

Health Information Technology Advisory Committee

Information Blocking Task Force

Workgroup 2: Exceptions

March 8, 2019, 2:30 p.m. – 4:30 p.m. ET

Virtual

The March 8, 2019, meeting of the Information Blocking Task Force Workgroup 2: Exceptions of the Health IT Advisory Committee (HITAC) was called to order at 2:30 p.m. ET by Cassandra Hadley, Designated Federal Officer, Office of the National Coordinator for Health IT (ONC).

Cassandra Hadley conducted roll call.

Roll Call

MEMBERS IN ATTENDANCE

Andrew Truscott, Co-Chair, Accenture

Michael Adcock, Co-Chair, Individual

Valerie Grey, Member, New York eHealth Collaborative

Anil Jain, Member, IBM Watson Health

Steven Lane, Member, Sutter Health

Arien Malec, Member, Change Healthcare

ONC STAFF

Cassandra Hadley, HITAC Backup/Support

Mark Knee, Staff Lead

Morris Landau, ONC Backup/Support

Lauren Richie, Branch Chief, Coordination, Designated Federal Officer

Elise Sweeney Anthony, Executive Director, Office of Policy

Lauren Wu, ONC SME

Cassandra Hadley called the meeting to order and turned the meeting over to Andy Truscott.

Andy Truscott reviewed the agenda and then began the discussion of exceptions for recovering costs reasonably incurred.

§ 171.204 Exception – Recovering costs reasonably incurred

- **Arien Malec** shared that his impression that the pricing exceptions are tuned toward cases where there is some rent seeking behavior that is secondary to installed use of an electronic health record (EHR). He emphasized his concern that there could be unintended consequences for providers.



- Many organizations price in terms of operating expense, revenue, or other tiering as a proxy for organizational size (e.g., Manifest MedEx, CommonWell)
- Uniform pricing limits commercially reasonable pricing flexibility (e.g., offering entry-level pricing or trial memberships, “freemium” models, negotiated discounts, volume discount tiering) are all common ways of offering pricing flexibility that could be interpreted as in violation of § 171.204.
- Value-based pricing is a natural approach to pricing; early in the development of a product, or as an early stage startup, the sustained cost model is uncertain and changing constantly; value-based pricing is the only reasonable way to test product-market fit. Later in product evolution, forbidding value-based pricing has the unintended consequence of setting the price too high for certain segments of the market that are more price sensitive.
- Many/most organizations do not have the ability to minutely track product-based cost structures or allocate costs by customer. Compliance with this provision will create a significant operational burden for finance/accounting, technical accounting, pricing, legal, etc. The likely consequence of substantial price regulation is that prices will go up not down.
- Recommend to distinguish pricing where rent seeking behavior is problematic versus pricing where there is no appearance of rent seeking behavior.
- **Mark Knee** noted that ONC tried to integrate text that provides flexibility, but if rent-seeking and promoting innovation are not properly covered he emphasized the importance of commenting. If a reasonable profit being allowed isn’t enough, the workgroup should comment on this.
- **Anil Jain** commented that profits should be made off of additional services or enhanced services, as opposed to sharing what the patients are. The goal is not to allow a profit.
- **Mark Knee** pointed the group to preamble language that describes that the patient has a stake in the data. If it isn’t clear the workgroup should comment.
- **Arien Malec** shared that it was confusing when § 171.206 and § 171.204 are applicable and when both could be applicable together.
- **Arien Malec** provided an example of an open source component (no intellectual property (IP) licensed), not sure if licensing something under § 171.206, but offering a valuable service that could apply to § 171.204.

(b)(5) Must not be based on the sales, profit, revenue, or other value that the requestor or other persons derive or may derive from the access to, exchange of, or use of electronic health information, including the secondary use of such information, that exceeds the actor’s reasonable costs for providing access, exchange, or use of electronic health information.

- **Arien Malec and Andy Truscott** felt that the clause (highlighted in red and struck) should be removed if ONC is seeking to ensure that profits are not made from use.

(c) Costs specifically excluded

(1) Costs that the actor incurred due to the health IT being designed or implemented in non-standard ways that unnecessarily increase the complexity, difficulty or burden of accessing, exchanging, or using electronic health information;

- **Lauren Wu** noted that this is about an actor that is broader than just health IT.
- **Mark Knee** noted that it applies throughout.
Andy Truscott suggested removing “the” in front of health IT, noted in red and struck above.



(2) Costs associated with intangible assets (including depreciation or loss of value), other than the actual development or acquisition costs of such assets;

- **Arien Malec** questioned (c)(2), he noted the intent seems to be that you can't use IP as part of the cost considerations, but it is the use of precise accounting technologies that trip him up.
 - **Mark Knee** noted that he will follow-up.
- **Andy Truscott** suggested tweaking to focus on product acquisition versus mergers and acquisitions.

(3) Opportunity costs, except for the reasonable, forward-looking cost of capital

- **Arien Malec** suggested removing forward-looking (as noted above).

(5) A fee-based in any part on the electronic access by an individual or their personal representative, agent, or designee to the individual's electronic health information

- **Mark Knee** noted that the intent was not to conflict with HIPAA, but if something appears to, the workgroup should comment.

(7) A fee to export or convert data from an EHR technology Health IT, unless such fee was agreed to in writing at the time the technology was acquired.

- **Andy Truscott** suggested replacing EHR technology with Health IT (as noted above).
- **Arien Malec** suggested rewording to the sentiment that this is to prevent vendors from charging to convert data into/from health IT standard formats
- **Valerie Grey** suggested removing this

§ 171.207 Exception - Maintaining and Improving health IT Performance

- **Arien Malec** suggested updating to be clear that this doesn't override contractually agreed upon service level agreements (SLAs).
- The workgroup will work on updating this language for clarity.

Cassandra Hadley opened the lines for public comment.

Public Comment

There was no public comment.

Comments in the public chat

Steven Lane: Can we take a moment and define the term "rent seeking behavior"?

Arien Malec: <https://en.wikipedia.org/wiki/Rent-seeking>

Steven Lane: thanks

Next Steps and Adjourn

Cassandra Hadley adjourned the meeting at 4:20 p.m. ET