

**21ST CENTURY CURES ACT:  
INTEROPERABILITY, INFORMATION BLOCKING, AND  
THE ONC HEALTH IT CERTIFICATION PROGRAM PROPOSED RULE**



# Information Blocking Exception for Recovering Costs Reasonably Incurred

## OVERVIEW

Under the proposed exception, it will not be information blocking for an actor to recover its reasonable costs of enabling access, exchange, or use of electronic health information (EHI).

The proposed exception does not prescribe the amount of fees that can be charged, but imposes conditions to ensure that an actor's method for recovering costs is reasonable and non-discriminatory.

The proposed exception does not apply to certain excluded costs.

**To qualify for this exception, an actor must ensure that:**

**Its method for recovering costs complies with certain conditions.**

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**It is not seeking to recover costs that are specifically excluded.**

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**It complies with the Conditions of Certification at § 170.402(a)(4) or § 170.404, and the fee limitations imposed on health IT developers of certified health IT, if applicable.**

### Objective



The proposed exception would enable actors to recover the costs reasonably incurred to develop technologies and provide services that enhance interoperability, while not protecting rent-seeking, opportunistic fees, and exclusionary practices that interfere with access, exchange, or use of EHI.

### “Actors” regulated by the information blocking provision:



- Health Care Providers
- Health IT Developers of Certified Health IT
- Health Information Exchanges
- Health Information Networks

## Conditions Applicable to Cost Recovery Method

### The method by which an actor recovers costs:

- (1) Must be based on objective and verifiable criteria that are uniformly applied for all substantially similar or similarly situated classes of persons and requests;
- (2) Must be reasonably related to the actor's costs of providing the type of access, exchange, or use to, or at the request of, the person to whom the fee is charged;
- (3) Must be reasonably allocated among all customers to whom the technology is supplied, or for whom the technology is supported;
- (4) Must not be based in any part on whether the requestor or other person is a competitor, potential competitor, or will be using the EHI in a way that facilitates competition with the actor; and
- (5) Must not be based on the sales, profit, revenue, or other value that the requestor or other persons may derive from the access, exchange, or use of EHI, including the secondary use of such information, that exceeds the actor's reasonable costs for providing access, exchange, or use of EHI.



## Costs Specifically Excluded

- (1) Costs that are 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 EHI.
- (2) Costs associated with intangible assets (including depreciation or loss of value), other than the actual development or acquisition costs of such assets.
- (3) Opportunity costs, except for the reasonable forward-looking cost of capital.
- (4) A fee prohibited by 45 CFR 164.524(c)(4).
- (5) A fee based in any part on an individual's electronic access to their EHI.
- (6) A fee to perform an export of EHI via the capability of health IT certified to 45 CFR 170.315(b)(10) for the purposes of switching health IT or to provide patients with their EHI.
- (7) A fee to export or convert data from an EHR technology, unless such fee was agreed to in writing at the time the technology was acquired.

### Interaction of Exception with Conditions of Certification

- If the actor is a health IT developer of certified health IT subject to the Conditions of Certification at proposed §170.402 (Assurances) or § 170.404 (Application Programming Interfaces), the actor must comply with all requirements of such conditions for all practices and at all relevant times.
- If the actor is a health care organization that deploys API technology (API Data Provider), the actor is only permitted to charge fees consistent with the permitted fees specified in § 170.404.