

## Report on Medicare Compliance Volume 31, Number 25. July 18, 2022 Monitoring for Information Blocking Rule Improved Note Sharing; Button Is Confusing

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By Nina Youngstrom

Despite the plain meaning of the word, clicking the “share” button in EPIC will not result in the sharing of progress notes and other electronic health information (EHI) with patients, two compliance professionals said. EHI by default lands in the patient portal, and physicians and other clinicians don’t have to lift a finger to comply with a core requirement of the information blocking regulation.<sup>[1]</sup> In fact, pressing the share button will have the opposite effect.

“It’s not the best title for that button,” said Terri Thompson, system director of privacy and privacy officer at The University of Kansas Health System. “It has caused misunderstanding. Staff thought clicking the button meant sharing the note.”

Fortunately, education and compliance monitoring have gone a long way to getting providers used to the idea that doing nothing is the right thing, said Christine Hogan-Newgren, chief compliance and internal audit officer at The University of Kansas Health System. With a tool it developed to monitor note sharing, the academic health system has seen an increase in note sharing, which is at the heart of compliance with the information blocking regulation, she said. The results of the ongoing monitoring of clinical departments are shared with physician and nursing leaders “so they are aware of the level of sharing and unsharing by people in their department,” Hogan-Newgren said. Their improvement is in black and white.<sup>[2]</sup>

It’s good timing. Starting Oct. 6, “the scope of EHI expands beyond the USCDI [United States Core Data for Interoperability]—to the entire electronic designated record set,” said attorney Adam Greene, with Davis Wright Tremaine in Washington, D.C. That means more data will appear on the portal.

The education and monitoring have put The University of Kansas Health System in a good position for the additional sharing of information, Hogan-Newgren said. “We have already built in that culture of sharing and monitoring it,” she explained.

### **Regulation Ensures Unfettered Access to EHI**

The information blocking regulation is intended to ensure patients have unfettered, real-time access to the EHI on their portals. According to the final regulation, which was published in the *Federal Register* May 1, 2020, by the HHS Office of the National Coordinator for Health Information Technology (ONC), any action or inaction that knowingly interferes with the access, exchange or use of electronic protected health information may lead to “disincentives” or penalties.<sup>[3]</sup> Information blocking won’t be tolerated unless a practice is required by law or falls into one of eight exceptions (e.g., sharing the information would cause patient harm).

The rules apply to three groups of “actors”: health care providers (e.g., hospitals and physicians), health information networks/health information exchanges, and developers of certified health information technology. The regulation took effect April 5, 2021, about 4 years after Congress introduced the idea in the 21<sup>st</sup> Century Cures Act.

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## Calculating the Percentage of Note-Sharing

To evaluate their compliance with the heart of the information blocking rule, the compliance team at The University of Kansas Health System developed its audit tool to calculate the percentage of physicians and other clinicians in every department who were unsharing notes that need to be shared “for whatever period of time the report is being run,” Hogan-Newgren said.

Unless a provider interferes by hitting the “share” button, almost all patient records, including progress notes and telephone encounters, migrate to the patient portal, she said. “They are programmed to go automatically to MyChart unless the button is hit to unshare the note,” Hogan-Newgren said.

On the tool, the numerator represents all the notes that were shared, and the denominator represents all the notes that should have been shared. The tool also reports the percentage of total notes shared. Some notes are not shared by default (e.g., research notes, sensitive notes).

The University of Kansas Health System also has an exceptions process for requests to not share notes with patients under certain exceptions to information blocking set forth in the regulation. For example, providers can justify practices that interfere with the access, exchange or use of EHI if they’re protecting patients and other persons against unreasonable risks of harm. Also, information may be blocked because of a privacy requirement, such as HIPAA or state medical privacy law, or to safeguard the confidentiality of EHI.

If providers don’t want to share a note with a patient, they can request an exception, which will be reviewed by the exceptions committee, Hogan-Newgren said. Mostly providers invoke the patient-harm exception to the information blocking rule. For example, in the labor and delivery area, when patients are having a difficult pregnancy, providers will meet to discuss their plan of care. “They don’t want that shared because there’s a lot of technical jargon. The patient may not understand everything, and it raises more questions,” she said. “The care hasn’t been delivered yet. It’s all preparation for what could be a very difficult delivery, so we vet that. If it turns out it wasn’t a progress note or anything like that, it doesn’t need an exception. It wasn’t getting shared anyway.”

## Education Sets the Stage

Before the compliance team did widespread education, it engaged in a lot of “prework” and “analysis” and looking at departments with low share rates, Thompson said. Then they got the message out writ large that providers should just ignore the button beckoning them to press.<sup>[4]</sup> Yes, it says share, but it means the opposite.

Thompson emphasized that compliance is “administrative people, report-writing people and technical people, and you really have to engage your users on what they’re doing step by step and make sure you’re not missing something in the process,” she said. Be careful “about knowing the exact workflow your users are going through.”

Meanwhile, on the enforcement front, there’s still no word on a regulation for providers, although the HHS Office of Inspector General (OIG) proposed an enforcement rule in April 2020 for health information technology developers and health information exchanges.<sup>[5]</sup> OIG has the authority to impose penalties of up to \$1 million per violation, Greene said. A final rule is listed in the HHS regulatory agenda for September 2022, with enforcement to begin no earlier than 60 days after the final rule comes out, he said.

An HHS agency (still TBD) will set forth “disincentives” or penalties for providers for any action or inaction that knowingly interferes with the access, exchange or use of EHI. “It seemingly only captures providers who receive federal reimbursement or have some other connection to federal programs,” Greene noted. Also, the expansion

of the scope of data subject to the information blocking rule will take effect before an enforcement mechanism is in place. “It doesn’t necessarily mean that entities have to proactively ensure that all the designated record set is in the patient portal, but it means to the extent any of that information is available to the patient, then doing anything to delay that information flowing to the portal and to the patient could create risk under the information blocking rule unless an exception applies,” he said.

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**1** Nina Youngstrom, “Hospitals Adapt to New World of Information Blocking Rule; No Delays Without an Exception,” Report on Medicare Compliance 30, no. 18 (May 10, 2021), <https://bit.ly/3PjbyMt>.

**2** Nina Youngstrom, “Tool to Monitor Note Sharing Under Information Blocking Rule/Tip Sheet,” *Report on Medicare Compliance* 31, no. 25 (July 18, 2022).

**3** 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 85 Fed. Reg. 25,642 (May 1, 2020), <https://bit.ly/32vJ6RI>.

**4** Nina Youngstrom, “Tool to Monitor Note Sharing.”

**5** Grants, Contracts, and Other Agreements: Fraud and Abuse; Information Blocking; Office of Inspector General's Civil Money Penalty Rules, 85 Fed. Reg. 22,979 (April 24, 2020), <https://bit.ly/3el1hM9>.

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