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By Nina Youngstrom

Information blocking will take a bite out of a provider’s reimbursement under a final rule on “disincentives” released June 24 by CMS and the Office of the National Coordinator for Information Technology (ONC).¹¹ But the HHS Office of Inspector General (OIG), which investigates complaints, must prove the provider had the intent to commit information blocking—in other words, to interfere with the access, exchange or use of electronic health information (EHI).

“For many of the penalties, there is an all-or-nothing approach,” said attorney Sean Sullivan with Alston & Bird. CMS will cut into a provider’s Medicare reimbursement for a certain time period unrelated to the severity of the information blocking. For example, hospitals will lose most of their market basket update, and physicians will get a zero score for the promoting interoperability category under the Merit-based Incentive Payment System (MIPS).

The final rule is very similar to the proposed rule. “The primary change from the proposed rule is that CMS and ONC are allowing greater flexibility for enforcement of information blocking” with accountable care organizations (ACOs), he said. “They can penalize ACOs or not based on the circumstances.” Sullivan also thinks it’s possible ACOs could be “double penalized” for information blocking “because they could be subject to disincentives” under MIPS and kicked out of the Medicare Shared Savings Program (MSSP).

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