Meeting Notes

Health Information Technology Advisory Committee
Information Blocking Task Force
Workgroup 3: Conditions and Maintenance of Certification
March 14, 2019, 4:00 p.m. – 6:00 p.m. ET
Virtual

The March 14, 2019, meeting of the Information Blocking Task Force Workgroup 3: Conditions and Maintenance of Certification of the Health IT Advisory Committee (HITAC) was called to order at 4:00 p.m. ET by Lauren Richie, Designated Federal Officer, Office of the National Coordinator for Health IT (ONC).

Roll Call

MEMBERS IN ATTENDANCE

Michael Adcock, Co-Chair, Individual
Andrew Truscott, Co-Chair, Accenture
Aaron Miri, Member, The University of Texas at Austin, Dell Medical School, and UT Health Austin
Sasha TerMaat, Member, Epic
Denise Webb, Member, Individual

MEMBERS NOT IN ATTENDANCE

Lauren Thompson, Member, DoD/VA Interagency Program Office
Sheryl Turney, Member, Anthem

ONC STAFF

Cassandra Hadley, HITAC Backup/Support
Penelope Hughes, ONC Staff Lead
Mark Knee, ONC Staff Lead
Lauren Richie, Branch Chief, Coordination, Designated Federal Officer
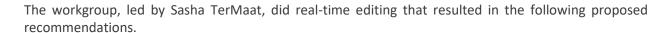Lauren Wu, ONC SME

Call to Order

Lauren Richie called the meeting to order, conducted roll call, and turned the meeting over to Michael Adcock, co-chair.

Michael Adcock reviewed the agenda noting that the group will be reviewing the draft recommendations in preparation for the HITAC meeting on March 19-20.

The workgroup, led by Sasha TerMaat, did real-time editing that resulted in the following proposed recommendations.

Revisit outstanding issues

Assurances

Proposal: ONC should retain records on the Certified Health IT Product List (CHPL) indefinitely for ongoing reference of which products were certified over which time period (as it does today).

- **Lauren Wu** noted that the CPHL can currently accommodate this, but filters need to be updated to display inactive. She also noted that not everything is public facing on the CHPL.

Communications

Proposed recommendation: Adjust definitions to clarify that administrative functions of HIT could be "non-user facing aspects" based on the assessment that those communications are not matching the purpose described in 21st Century Cures and also a limited set of users.

Possible recommendation: ONC should draw a distinction around purpose of use in relation to "fair use" of screenshots, with the intention that the disclosure is responsible for ensuring the appropriateness of the purpose.

Proposed recommendation: Unintended consequences of "fair use" and other usages should be further explored by ONC. There are concerns about risks to vendor intellectual property that the IB TF wishes to be sensitive to; we do not wish to impinge upon innovation.

Proposed recommendation: (D)(2)(iii) should be amended to a list of which third party content might appear in a screen. Enumerating elements per screen is not feasible.

Proposed recommendation: ONC should revise estimate in Regulatory Impact Analysis. Effort for notice and contracting is underestimated at 40 hours for clerk. More roles are involved than clerks, including work involved on the part of the recipients.

Proposed recommendation: Amend (b)(2)(i) and (b)(2)(ii) as proposed in underlines (or better drafted regulatory language achieving the same goal, at ONC's discretion):

(b)(2)(i) A health IT developer must not establish, renew, or enforce any contract or agreement that contravenes paragraph (a) of this section.

(b)(2)(ii) If a health IT developer has a contract or agreement in existence at the time of the effective date of this final rule that contravenes paragraph (a) of this section, then the developer must in a reasonable period of time, but not later than two years from the effective date of this rule, agree with the relevant client on a plan to amend the contract or an agreement to remove or void the contractual provision that contravenes paragraph (a) of this section.

(b)(2)(iii) The plan required by paragraph (ii) of this section must be completed within five years of the effective date of this rule.

Request for Comment – Communications

Proposed recommendation: ONC should add a category of communications titled "Unprotected Communications" to their framework. Communications in this category would not be extended these protections, including communications such as false communications, communications protected by attorney-client privilege, etc. "Unprotected Communications" should not receive unqualified protection or necessitate permitted restrictions.

- **Mark Knee** asked for clarification about the necessity of a third category.
- **Sasha TerMaat** noted that she didn't think there was anything to protect things like attorney-client privilege. Due to this discussion, the sentence highlighted in red was added.

ONC review of certified health IT or a health IT developer's actions

Proposed recommendation: ONC should use both email and certified mail for notices of initiating direct review, potential non-conformity, non-conformity, suspension, proposed termination, termination and ban.

Proposal and request for comment on public listing of certification bans and terminations

Lauren Wu was asked to provide more detail regarding the ban during the last meeting. She shared that today if the developer seeks remediation that information would no longer be on the CHPL. Essentially, only the current status is listed on the CHPL.

Proposed Recommendation: Indefinite communication of past records (ban with start and end date, if lifted) seems appropriate.
- There was discussion around the timing, but the workgroup ultimately agreed that indefinite communication was appropriate.

Proposed Recommendation: We do not recommend establishing a minimum time period over which a ban must last, even if the health IT developer is a repeat offender.

Request for comment on application of Conditions and Maintenance of Certification to self-develope

Proposed Recommendation: Call out an exception to (a)(2)(ii)(A) for self-developed systems, so that communications by health IT users aren't restricted by virtue of being employees of the same company doing the development.

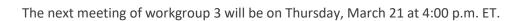**Lauren Richie** opened the lines for public comment.

Public Comment
There was no public comment.

Next Steps and Adjourn
Michael Adcock thanked the workgroup for all their work and efficiency to get to the current draft of the recommendations. He also thanked Sasha TerMaat for all her help scribing the recommendations real-time during the meetings.

The next meeting of workgroup 3 will be on Thursday, March 21 at 4:00 p.m. ET.

Lauren Richie adjourned the meeting at 4:50 p.m. ET.