



## RESTRICTIONS ON FEES UNDER THE PROPOSED RULE

Restrictions on Fees for Products or Services Used to Provide Access, Exchange or Use of EHI	Interoperability Elements Exception	Cost Recovery Exception	API Condition of Certification
<p><i>Reasonably Incurred.</i> The actor must base fee only on costs reasonably incurred to provide access, exchange or use of EHI.</p>		X	
<p><i>Cost-Based Fee Limitations.</i></p> <ul style="list-style-type: none"><li>• <i>Cost Recovery Exception Limit.</i> Fee 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 charged.</li><li>• <i>API Fee Limit.</i> Fee must be reasonably related to the API Technology Supplier's costs of supplying and, if applicable, supporting the API technology to, or at the request of, the API Data Provider to whom fee is charged.</li></ul>		X	X
<p><i>Profit Margin.</i> Any profit is reasonable.</p> <p>[Note: This restriction is based on ONC guidance in the Proposed Rule preamble.]</p>		X	
<p><i>Excluded Cost: Non-Standard Costs.</i> The actor must not recover costs incurred because the health IT was designed or implemented in non-standard ways that unnecessarily increase the complexity, difficulty or burden of accessing, exchanging or using EHI.</p>		X	
<p><i>Excluded Cost: Limit on Intangible Asset Costs.</i> The actor must not recover costs associated with intangible assets (including depreciation or loss of value), other than the actual development or acquisition costs of such assets.</p>		X	
<p><i>Excluded Cost: Opportunity Cost.</i> The actor must not recover opportunity costs, except for the reasonable forward-looking cost of capital.</p>		X	
<p><i>Excluded Cost: Privacy Rule Access Fee Limit.</i> The actor must not charge an access fee prohibited by § 164.524(c)(4) of the HIPAA Privacy Rule. The Privacy Rule provision permits recovery of only the costs of labor for copying Protected Health Information, supplies for creating the copy (e.g., flash drive or other electronic storage device), postage or preparation of an explanation or summary of the Protected Health Information. For further information on the Privacy Rule's limits on access fees, see <a href="#">OCR's interpretative guidance</a>.</p>		X	



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<i>Excluded Cost: Access Fees to Patients.</i> The actor must not base a fee in any part on the electronic access by an individual or the individual's personal representative, agent or designee to the individual's EHI.		X	
<i>Excluded Cost: Export Fee.</i> The actor must not charge a fee to perform an export of EHI via the capability of health IT certified to § 170.315(b)(10) for the purposes of switching health IT or providing a patient with the patient's EHI.		X	
<i>Excluded Cost: Export or Conversion Fee.</i> The actor must not charge 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.		X	
<i>Objective and Uniformly Applied Criteria.</i> The API Technology Supplier or other actor must base fee on objective and verifiable criteria uniformly applied for all substantially similar or similarly situated classes of persons or requests.	X	X	X
<i>Reasonable Cost Allocation Among Customers.</i> The API Technology Supplier or other actor must reasonably allocate the costs of supplying and, if applicable, supporting the API technology or other technology or service upon which it bases a fee among all customers to whom the technology or service is supplied, or for whom the technology or service is supported.		X	X
<i>Independent Value.</i> The royalty must be based solely on the independent value of the actor's technology to the licensee's products, not on any strategic value stemming from the actor's control over essential means of accessing, exchanging or using EHI.	X		
<i>Standards-Essential Technologies.</i> If the actor has licensed the interoperability element through a standards development organization (SDO) in accordance with such SDO's policies regarding the licensing of standards-essential technologies on reasonable and non-discriminatory terms, the actor may charge a royalty that is consistent with such policies.	X		



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<p><i>Pro-Competitive/Non-Discriminatory.</i></p> <ul style="list-style-type: none"><li>• <i>Blocking Exceptions' Limit.</i> The actor must not base fee on whether the requestor or other person is an actual or potential competitor or will be using the EHI in a way that facilitates competition with the actor.</li><li>• <i>API Fee Limit.</i> The API Technology Supplier must not base fee on whether the requestor or other person is a competitor or potential competitor, or will be using the API technology in a way that facilitates competition with the API Technology Supplier.</li></ul>	X	X	X
<p><i>Secondary Data Use.</i> The actor must not base fee on the sales, profits, revenue or other value that the requestor or other persons derive or may derive from the access to, exchange of, or use of EHI, including the secondary use of such EHI, that exceeds the actor's reasonable costs for providing access, exchange or use of EHI.</p>	X	X	X
<b>API-SPECIFIC FEE RESTRICTIONS</b>			
<p><i>Record-Keeping Requirements.</i> The API Technology Supplier must keep detailed records of any fees charged with respect to the API technology, the methodologies used to calculate such fees, and the specific costs to which it attributes such fees.</p>		X	X
<p><i>Fee Description Disclosure.</i> The API Technology Supplier must describe fees in detailed, plain language and with all material information, including, without limitation: persons or classes of persons to which the fee applies; the circumstances in which the fee applies; and the amount of the fee, which for variable fees must include specific variable(s) and methodology(ies) used to calculate fee.</p>		X	X
<p><i>Non-Discrimination.</i> The API Technology Provider must provide API technology to API Data Providers on terms no less favorable than the API Technology Provider provides to itself and its own customers, suppliers, partners and other persons with whom it has a business relationship.</p>		X	X



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<p><i>Non-Discrimination.</i> The API Technology Supplier must not offer different fees, other terms or services based on whether the API User with whom an API Data Provider has a relationship is a competitor or potential competitor, or will be using EHI obtained via the API technology in a way that facilitates competition with the API Technology Supplier.</p>			X
<p><i>Non-Discrimination.</i> The API Technology Supplier must not offer different fees, other terms or services based on the revenue or other value the API User with whom an API Data Provider has a relationship may derive from access, exchange or use of EHI obtains through API technology.</p>			X
<p><i>Openness.</i> The API Technology Supplier must not require a licensee fee, royalty, revenue sharing arrangement or other fee for granting API Data Providers and their API Users all rights reasonably necessary to access and use API technology in a production environment, including rights to:</p> <ul style="list-style-type: none"><li>• Develop products and services interoperable with the API Technology Supplier's owned or controlled health IT</li><li>• Market, offer and distribute interoperable products and services to potential customers and users</li><li>• Enable use of interoperable products or services in production environments, including accessing and enabling the exchange and use of EHI</li></ul>			X
<p><i>Three Permitted Fee Categories.</i> An API Technology Supplier must meet the general requirements set forth above and also not impose any fee associated with API Technology unless the fee fits into at least one of the three Permitted Fee categories below. The proposed rule prohibits all other fees associated with API Technology.</p>			X
<p><i>1. Permitted Fee for API Development, Deployment and Upgrades.</i> The API Technology Supplier may charge a fee to recover costs reasonably incurred by the API Technology Supplier to develop, deploy and upgrade API technology for the API Data Provider.</p>			X
<p><i>2. Permitted Fee for Supporting API:</i> The API Technology Supplier may charge a fee to an API Data Provider to recover the incremental costs reasonably incurred by the API Technology</p>			

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<p>Supplier to support use of API technology deployed by or on behalf of API Data Supplier, <i>excluding:</i></p> <ul style="list-style-type: none"><li>• Costs incurred by API Technology Supplier that facilitate patients' ability to access, exchange or use their EHI</li><li>• Costs associated with intangible assets (including depreciation or loss of value), except an asset's actual development or acquisition cost</li><li>• Opportunity costs, except for the reasonable forward-looking cost of capital</li></ul>		X	
<p><i>3. Permitted Fee for Value-Added Service.</i> The API Technology Supplier may charge fee to an API User for value-added services supplied in connection with software that can interact with the API technology, provided that such services are <i>not</i> necessary to efficiently and effectively develop and deploy the software.</p>		X	