21ˢᵗ CENTURY CURES ACT
SUMMARY FROM TOOLS OF PRACTICE

UNDERSTANDING:
The December 31, 2022 update deadline to the 21ˢᵗ Century Cures Act of 2016 has come and gone, physicians, hospitals and healthcare facilities should ensure they are in compliance with requirements.

The Cures Act is technology directed legislation that prohibits "information blocking". Information blocking is any practice that interferes with the access, exchange, or use of Electronic Health Information (EHI). The update deadline of December 31, 2022, states patients should have electronic access, free of charge, to their PHI through technology like an online patient portal or app.

When Congress prohibited information blocking it did not specifically mention patient portals. Nonetheless, the push for patient portals came about as paper medical records evolved to the more current electronic form. Even though the agency declined to mandate that providers proactively make data available to patients via patient portals, the agency said that if you delay making EHI available through technology, e.g., patient portal or a third party certified Application Programming Interface (API), this could be interpreted as a deviation from the act.

In the past, patients had limited portal access to their information. This limited access allowed individuals to book appointments, view test results, summary visit statements and more but complete notes from physicians were not visible. The December 31, 2022, update deadline expands a patient's access to their full record, in real time, making the use of portals the only real practical solution.

Simply, the Cures Act means patients have the right to obtain their EHI from physicians, hospitals, and healthcare facilities as quickly as possible. Technology like patient portals, permit patients to see their EHI as soon as they log in to the site. Consequently, patient portals have become a key tool in meeting this obligation. (It is important to note that the Cures Act does not apply to paper records.)

ENFORCEMENT:
Currently, if you do not use portals, there is no violation enforcement in place outside of direct patient complaints. Moreover, the proposed rule only addressed actions against health information exchanges and health information technology vendors, not against providers.

That said, providers will face enforcement of these rules. Data released by the government suggest that such enforcement may focus on patient complaints against providers not utilizing portals and/or alternatives. Eventually, if providers choose not to comply with these requirements, consequences could be significant according to HHS. Additionally, CMS, the largest payer and regulator of medical practices, has announced its interest in levying civil

monetary penalties for providers that improperly block the sharing of electronic health information.

In short, health care providers' efforts, whether through portals or alternatives, to give their patients better access to their information will be subject to increasing scrutiny for years to come.

INTERPRETATION:
- Currently, the Cures Act is in effect.
- Currently, use of portals is the recommended action to fulfill the necessary requirements.
- Currently, there are no portal police enforcing violation, this will change without notice.
- Currently, any actions against providers by HHS or CMS for information blocking will likely result from direct patient complaints.
- Currently, if a provider chooses not to implement patient portal access, the rationale must be based on one or more of the stated **8 Exclusions**. This rationale could be rejected and therefore deemed unacceptable if audited. There is no way of determining if your rationale will pass scrutiny as HHS stated each case is individual.

CONCERNS:
- Patients may receive bad news from a computer screen, rather than a professional.
- There could be privacy issues, particularly when dealing with adolescents.
- There could be security issues if patients allow others into their portal.
- Cost for upgrading to new technology.
- Records access while still in draft mode.
- Patient relations.

DO YOUR HOMEWORK:
- Check with your EHR vendor to determine if or when they plan to provide patient portal access either as part of the program or through an API?
- Confirm with your EHR system or API vendor that all required information could be accessed by your patients and review how that information will appear on their screens?
- What if you change EHRs and your portal is through your system, how will patients access their record?
- Does the portal reflect any changes to notes?
- Assess your current technology and determine if an upgrade is necessary?
- Ensure that your practice has the resources in place to support increased patient engagement. Have written policies and procedures to address?

OPTION 1:   NO TO PORTALS:
- Review the **8 Exclusions** allowed and clearly define a rationale and policy specific to your office, in writing, for not having the patient portals. Place the written rationale and policy in your Compliance Manual.
- Compete a written protocol for records request in the format requested by the patient and ASAP. Place the written rationale in your Compliance Manual.

OPTION 2:   YES TO PORTALS:

- Once installed, do not immediately announce to patients your portal capability. Trouble shoot your system for up to 6 months. If asked you will have the system in place for the single request.
- Once fully operational and all supportive procedures and protocols are in place, make the general announcement. Place in your Compliance Manual.
- Managing Open Notes in the EHR:
  1. Consider the health literacy of your patients. Use plain language in your documentation whenever possible. Avoid the use of jargon.
  2. Remember how you document can have an effect on your patient.
     - Be careful to not sound judgmental.
     - Avoid terms that may be offensive or emotionally charged. For example, "Patient reports they did not the take medications" vs. "noncompliant."
     - Use objective measures like BMI vs. "obese" or "overweight."
     - Document as though you are writing instructions: "Weigh yourself every morning" vs. "Patient needs to monitor weight."
     - Avoid using the copy and paste feature of your electronic record system. The information copied and pasted may be redundant, outdated, or inaccurate and could create the wrong perception about your records.
- Audit periodically to ensure efficiency and compliance.

Like practice itself, compliance is always a choice of risk and benefits. The above information allows you to be informed and decide based on the current information.

WWMAPD ?
(What would Mark and Paul do?)

We would personally incorporate use of portals at some point in the not too distant future but only make available upon request.
(for now)

As the regulations and enforcement unfold, direction on the degree and intensity for portals will become more evident.