December 2, 2014

Patrice Drew
Office of the Inspector General
Department of Health and Human Services
330 Independence Ave SW, Room 5269
Washington, D.C. 20201

Re: **Medicare and State Health Care Programs: Fraud and Abuse; Revisions to Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements and Gainsharing**

Dear Ms. Drew,

athenahealth, Inc. ("athenahealth") welcomes the opportunity to offer feedback on the Medicare and State Health Care Programs: Fraud and Abuse; Revisions to Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements and Gainsharing.

We appreciate that the Office of the Inspector General (OIG) is moving to make minor revisions to the Anti-Kickback Statute, to account for the increasing necessity of low-risk financial exchanges in the context of patient care that were not contemplated when the law was written. We encourage OIG to take this opportunity to make additional, much-needed changes to address over-broad application of the Anti-Kickback Statute that is impeding the bipartisan policy objective of creating information fluidity in healthcare. As you are aware, the federal government has already poured nearly $30 billion taxpayer dollars into efforts to achieve this objective, to little tangible result. This arguable waste of resources can, in our view, be directly attributed to overbroad application of the Anti-Kickback Statute.

In most every functioning marketplace across the economy from auto parts to banking, high-quality, curated data is treated as a valuable commodity. Market participants in need of data are able to pay fair market value for that data. Those payments are used, in part, to build and maintain the necessary technological infrastructure to enable the efficient, secure exchange of both information and compensation for information.

In healthcare, however, because the transfer of patient data occurs most frequently in the context of a care referral any accompanying transfer of value is deemed illegal remuneration under the Anti-Kickback Statute. As a result, in healthcare the owner/curator of quality data is obligated in effect to assume the cost of electronic transfer of information to a recipient. The beneficiary of the work and the infrastructure investment necessary to curate that data and enable its secure and efficient transfer—the recipient—is literally legally prohibited from paying fair market value for that work and investment. This paradigm, which forces the curator of data to pay for the privilege of sending it electronically to a recipient, operates as a very effective economic disincentive to information sharing in healthcare.

This reality has already been acknowledged and addressed on a bipartisan basis in the context of value-based provider and payment models such as Accountable Care Organizations (ACO). Recognizing that information sharing is crucial to successful care coordination, policymakers very deliberately created exemptions and safe harbors for the providers operating within those models to form the financial relationships necessary to share information and coordinate care without fear of prosecution. To enable information sharing and care coordination more broadly (which is, again, one of the few truly bipartisan objectives of "healthcare reform" of virtually any stripe), the same dispensations must be afforded.

Thank you again for the opportunity to comment on these proposed revisions to modernize the Anti-Kickback Statute. We are of course willing to discuss this issue further at your convenience.

Sincerely yours,

Dan Haley
Vice President, Government and Regulatory Affairs