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CMS Issues Proposed Rule for "Meaningful Use" of Electronic Health Records*

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Health care providers now have the opportunity to receive significant financial incentives for the adoption and use of electronic health records ("EHRs"). Pursuant to the Health Information Technology for Economic and Clinical Health ("HITECH") Act, the Centers for Medicare & Medicaid Services ("CMS") is authorized to provide an unprecedented $34 billion in financial incentives to physicians and hospitals that achieve "meaningful use" of certified EHR technology. On January 13, 2010, CMS published its much-anticipated meaningful use proposed rule, bringing the opportunity for financial incentives one step closer to hospitals and physicians. 75 Fed. Reg. 1844 (Jan. 13, 2010).

This article provides a general overview of the extensive proposed rule, which includes highly-detailed requirements for hospitals and physicians seeking to achieve "meaningful use" and qualify for Medicare and Medicaid incentive payments. Because this article provides only a brief overview of the nearly 170-page proposed rule, you are encouraged to contact an attorney for more information and guidance on how to prepare for the meaningful use requirements, obtain financial incentives, and avoid reimbursement penalties.

In addition, physicians should be mindful that if they accept donations from an entity to which they refer and that furnishes designated health services, such as a laboratory or hospital, for the cost of their EHRs, such donations must comply with the exception to the federal Stark statute (42 C.F.R. § 411.357(w)) and the safe harbor to the federal Anti-kickback statute (42 C.F.R. § 1001.952(y)). An article entitled "Regulatory Issues Related to a Physician's Adoption of an Electronic Health Records System" outlined such requirements and may be found in the Fourth Quarter 2009 issue of *NCMGM News*.

What is Meaningful Use?

To demonstrate meaningful use, physicians and hospitals must: (1) use certified EHR technology in a meaningful manner; (2) participate in the electronic exchange of health information to improve quality of care; and (3) submit information on specified clinical quality measures. Under the proposed rule, CMS will implement the meaningful use criteria in three stages. The proposed rule includes criteria for Stage 1, which begins in 2011. The Stage 2 and Stage 3 criteria will be proposed in future rulemaking by CMS.

The Stage 1 Meaningful Use Criteria

The Stage 1 criteria focus on: (1) electronically capturing health information; (2) communicating that information for care coordination purposes; (3) implementing clinical decision support tools; and (4) reporting clinical quality measures. For Stage 1, CMS has proposed 23 discrete objectives for hospitals, and 25 objectives for physicians, grouped into the following categories of health care goals:

• Improve Quality, Safety, and Efficiency, and Reduce Health Disparities
• Engage Patients and Families
• Improve Care Coordination
• Improve Population and Public Health
• Ensure Privacy and Security of Personal Health Information

Examples of the Stage 1 criteria include utilizing computerized physician order entry and electronic prescribing, providing patients with electronic access to health information, and exchanging clinical information among health care providers. The proposed rule includes lengthy, detailed requirements with regard to each of the Stage 1 criteria, and hospitals and physicians must meet all of the respective criteria to demonstrate meaningful use and thus qualify for financial incentives.

Eligibility for Meaningful Use Incentives

Under the proposed rule, "eligible professionals" ("EPs") that demonstrate meaningful use of EHR technology may receive a maximum of $44,000 in Medicare incentive payments. For purposes of the Medicare incentive program, EPs include doctors of medicine or osteopathy, doctors of dental surgery or dental medicine, podiatrists, optometrists, and chiropractors.

Alternatively, EPs may receive up to $63,750 in Medicaid incentive payments for demonstrating meaningful use. Under the Medicaid incentive program, EPs include physicians, dentists, certified nurse midwives, nurse practitioners, and physician assistants operating at federally qualified health centers or rural health clinics led by a physician assistant. In addition, Medicaid EPs must show that at least 30% of their patient encounters (or for pediatricians, 20%) over any continuous 90-day period in the preceding calendar year were attributable to Medicaid beneficiaries. EPs that qualify for both the Medicare and Medicaid incentive programs may only participate in one program; however, the proposed rule would allow EPs to make a one-time switch between incentive programs.

Hospital-based EPs are not eligible for Medicare or Medicaid incentive payments. An EP is considered "hospital-based" if more than 90% of his or her professional services are performed in the inpatient hospital, outpatient hospital, or emergency room setting. Under the Medicaid incentive program, hospital-based EPs practicing predominantly in federally qualified health centers or rural health clinics are not subject to the hospital-based EP exclusion.

Eligible hospitals may receive up to $7.2 million in Medicare incentive payments. Eligible hospitals may also receive payments under the Medicaid incentive program. Unlike physicians, hospitals that qualify for the Medicare and Medicaid incentive programs may participate in both programs. Under the Medicare incentive program, eligible hospitals include hospitals paid under the Medicare Inpatient Prospective Payment System and certain critical access hospitals. For purposes of the Medicaid incentive program, eligible hospitals include acute care hospitals with at least a 10% Medicaid patient volume, and children's hospitals.

Penalties for Failure to Achieve Meaningful Use

Physicians that fail to demonstrate meaningful use by 2015 will face reductions in their Medicare reimbursement rates; such physicians will receive 99% of the Medicare Physician Fee Schedule rates in 2015, 98% in 2016, and 97% in 2017 and subsequent years. Hospitals that fail to achieve meaningful use by 2015 will face reductions in their annual Medicare Inpatient Prospective Payment System market basket update.

The final meaningful use rule should be released in late June.