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Healthcare Update

HITECH Incentives for Electronic Health Records: Updated Definition of “Hospital-Based” and Continued Concerns about Aggressive Timelines and Unreasonable Measurements of Meaningful Use

Under the Health Information Technology for Economic and Clinical Health Act (HITECH Act), the Centers for Medicare & Medicaid Services (CMS) is authorized to provide federal incentive payments to eligible hospitals, eligible professionals and qualifying Medicare Advantage organizations for the “meaningful use” of “certified” electronic health record (EHR) technology. After 2015, the incentives are phased out and the HITECH Act provides for reduced reimbursement for providers who do not adopt EHR technology and achieve meaningful use.

Continuing Extension Act of 2010 Revision to Definition of “Hospital-Based Eligible Professional”

The Continuing Extension Act of 2010, signed into law by President Obama on April 15, 2010, revises the definition of “Hospital-Based Eligible Professional” in the HITECH Act. Previously, hospital-based physicians were excluded from eligibility for EHR incentive payments. Under the revised definition, hospital-based physicians practicing in outpatient settings are eligible to receive EHR incentive payments under the Medicare and Medicaid programs.

Proposed Meaningful Use Rule and Proposed Standards and Certification Criteria

CMS released a proposed rule containing the initial definition of “meaningful use” and the Office of the National Coordinator (ONC) for Health Information Technology issued an interim final rule on an initial set of standards, implementation specification and certification criteria for EHR technology. Both rules were open for public comment until March 15, 2010, and are now subject to potential revision. Final rules are anticipated by June 2010.

To qualify as a meaningful user, an eligible hospital or professional will have to demonstrate that all of the objectives and associated measures that have been set forth as indicators of the criteria have been met. Criteria to measure “meaningful use” will be phased in across three stages. Beginning in 2011, Stage 1 criteria will focus on electronically capturing health information in a coded format, using that information to track key clinical conditions, communicating that information for care coordination purposes, implementing clinical decision support tools to facilitate disease and medication management and initiating the reporting of clinical quality measures and public health information. For Stage 1, there are 23 objectives/measures for eligible hospitals and 25 objectives/measures for eligible professionals that must be met to be deemed a meaningful EHR user. Stage 1 incentive payments could begin to be paid as early as October 1, 2010.

Comments to Proposed Meaningful Use Rule Indicate Concern with Aggressive Stage 1 Timeline and “All-or-Nothing” Approach to Incentive Payments

Ungaretti & Harris was among the submitters of over 190 comments on meaningful use criteria, many of them indicating that the timeline for adoption, implementation and meaningful is too aggressive and that the achievement of all of the objectives and measures in Stage 1 is unreasonable.

American Hospital Association

The American Hospital Association (AHA) submitted a 62-page comment letter to CMS outlining its concern that the current proposed definition and “high bar” for achieving meaningful use would discourage those hospitals that have not yet begun to adopt EHR technology. In the letter, the AHA suggests an alternate approach to defining meaningful use that it believes would allow more hospitals to adopt EHR in a workable timeframe.

In particular, the AHA believes that requiring hospitals to meet all 23 objectives and measures should be the goal by the end of Stage 3 (scheduled to take effect October 1, 2014) rather than the initial goal of Stage 1 because the proposed objectives “describe an EHR system that is beyond the capabilities of any vendor product currently available in the marketplace.” In addition to more achievable objectives and timelines, the AHA urges CMS to redefine “hospital” so that each hospital within a system would be eligible for incentive payments (under the proposed rule, a hospital is distinguished by the provider number on the cost report (the CMS certification number, or CCN), meaning that a hospital system may receive only one incentive payment for all of its hospitals if all hospitals use the same CCN). The AHA also supports including critical access hospitals in the incentive program.

American Medical Association

The American Medical Association (AMA), along with 95 state and specialty medical societies, submitted formal comments to CMS indicating that the aggressive criteria under Stage 1 of the meaningful use proposed rule could “unreasonably punish” physicians who undertake to achieve meaningful use but do not receive incentive payments because the criteria are “overly complex and unattainable.”

The AMA proposed revisions to the proposed rule to make it easier for physicians to adopt EHR and achieve meaningful use, including requiring physicians to meet 5 of the proposed 25 objectives and measures instead of all 25, reducing the number of quality measure reporting requirements to allow physicians to identify only 3 clinically relevant measures and eliminating objectives and measures that do not apply directly to EHR adoption, such as checking insurance eligibility electronically.

Recommendations for Implementing EHR Technology

In implementing an EHR system and seeking incentive payments under either the Medicare incentive program or the Medicaid incentive program, hospitals and eligible professionals will want to make sure that the EHR system is capable of meeting the final meaningful use objectives and measures and final certified technology standards. These capabilities should be incorporated in appropriate representations and warranties in the EHR agreement. We will provide additional alerts on the final rules once they are promulgated.

Comments Sought on HITECH Expansion of Accounting of Disclosures

In addition, the U.S. Department of Health and Human Services Office for Civil Rights (OCR) seeks comments to inform its proposed rulemaking on the expansion of accounting of disclosures for treatment, payment and healthcare operations if the disclosures are made through an EHR. Please see <http://www.uhlaw.com/ocr-requests-comments-on-expansion-of-accounting-of-disclosures/> for additional details.

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For assistance with seeking incentive payments, negotiating vendor agreements for EHR technology or additional information on Stage 1 objectives and measures and certification standards, please contact Julie E. Treumann at 312.977.4145, Valerie Breslin Montague at 312.977.4485 or any member of the Ungaretti & Harris LLP healthcare team.

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Ungaretti & Harris' Healthcare Department remains devoted to meeting the changing needs of the healthcare industry. Our firm of 100-plus lawyers devotes a substantial portion of its firm-wide practice to the legal needs of healthcare providers and other related clients.

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