HHS to Delay Stage 2 of Meaningful Use

Late last month (November 30), as part of its efforts to increase healthcare providers’ adoption of health information technology (“IT”), the Department of Health and Human Services (“HHS”) announced that it will give doctors and hospitals additional time to meet certain requirements necessary to qualify for health IT related incentive payments. In brief, providers and hospitals must demonstrate “meaningful use” of certified electronic health record (“EHR”) technology in order to receive incentive payments under the Medicare and Medicaid EHR Incentive Program. HHS will delay Stage 2 “meaningful use” compliance for one year for providers and hospitals “attesting” to Stage 1 compliance during 2011. Thus, Stage 2 compliance for those providers and hospitals will now be required in 2014 instead of 2013 as originally set forth.

A. The Health Information Technology for Economic and Clinical Health Act

Created in the 2009 Health Information Technology for Economic and Clinical Health (“HITECH”) Act, the Medicare and Medicaid Electronic Health Records (“EHR”) Incentive Programs provide incentive payments to eligible providers (“EPs”) and hospitals for the adoption and meaningful use of certified EHR technology. To qualify for these payments, an EP or hospital must do both - adopt certified EHR technology and demonstrate meaningful use of this technology.

EPs and hospitals may qualify for incentive payments from either the Medicare or Medicaid Incentive Payment Program. While EPs can participate in only one program and must choose between them, hospitals may participate in both simultaneously. Ultimately, HHS could make approximately $27 billion in incentive payments to medical providers over ten years. Eligible medical professionals may receive as much as $44,000 under Medicare and $63,750 under Medicaid, and hospitals may receive millions of dollars for implementation and meaningful use of certified EHRs under both Medicare and Medicaid.[1]

[1] Under the Medicare program, incentives payments to EPs are available for “physicians” only. Physicians, for these purposes are limited to: doctors of medicine; doctors of osteopathy; dental surgeons; doctors of dental medicine; podiatrists; optometrists; and chiropractors. Under the Medicaid program, though, incentive payments to EPs are available to a more expansive range of professionals, including: physicians; dentists; certified nurse midwives; nurse practitioners; and physician assistants practicing in a federally qualified health center, or rural health clinic led by a
Meaningful use requirements are set forth in three stages over a multi-year period, phasing in additional requirements meant to improve performance on health IT and quality objectives over time. Under Stage 1, an EP or hospital requesting incentive payments will be considered a meaningful user of EHR during a specified period if it meets a number of criteria focusing on:

- Electronically capturing health information in a structured format;
- Using that information to track key clinical conditions and communicating that information to enable coordination of care;
- Implementing clinical decision support tools to facilitate disease and medication management; and
- Using EHRs for reporting clinical quality measures and public health information.\(^2\)

Thus, meaningful use involves more than just adopting an EHR system. Providers must use the technology in a manner consistent with the objectives and measures set forth in the HHS regulations.\(^3\)

physician assistant, with some additional qualifying criteria. Under both programs, “hospital-based” providers are excluded from participation. A hospital-based provider is an individual who provides substantially all (at least 90 percent) of his or her covered professional services in an inpatient or outpatient hospital setting, utilizing the equipment and facilities of the hospital. Medicaid providers practicing predominantly in a federally qualified health center or a rural health clinic are not subject to the hospital-based exclusion.

Under the Medicare program, eligible hospitals are “subsection (d) hospitals” that are paid under the hospital inpatient prospective payment system. Subsection (d) hospitals are hospitals located in the 50 states or the District of Columbia, but not Puerto Rico or the territories. Hospitals and hospital units that are excluded from participation are psychiatric, rehabilitation, long-term care, children’s, and cancer hospitals. Under the Medicaid program, only acute care hospitals, with 10% Medicaid volume, and children’s hospitals, with no volume requirement, qualify for the incentive program. In addition to subsection (d) hospitals, critical access hospitals also qualify for incentive payments, provided they are meaningful users of certified EHR technology during an EHR reporting period for a cost reporting period beginning during a payment year after fiscal year 2010, but before fiscal year 2016.

\(^{2}\text{75 Fed. Reg. at 44321.}\)

\(^{3}\text{“Certified EHR Technology” means a complete EHR or a combination of EHR Modules, each of which:}\)

- Meet the requirements included in the definition of a Qualified EHR; and
- Has been tested and certified in accordance with the certification program established by the National Coordinator as having met all applicable certification criteria adopted by the Secretary.

A “Qualified EHR” is an electronic record of health-related information on an individual that:

- Includes patient demographic and clinical health information such as medical history and problem lists;
- Provides clinical decision support;
As it was under the existing timeline contained in the HHS program regulations, EPs and hospitals attesting to Stage 1 compliance in 2011 would be required to attest to Stage 2 compliance in 2013. Alternatively, EPs and hospitals that waited to attest to Stage 1 until 2012 would be permitted to wait until 2014 to attest to Stage 2 compliance.

Last summer, the Health IT Policy Committee made substantive recommendations on the Stage 2 meaningful use standards, including a recommendation to extend Stage 1 through 2013 for all providers given that the new standards for Stage 2 are not yet proposed. Final rules for Stage 2 and Stage 3 requirements have not been promulgated.^[4]

B. Stage 2 Meaningful Use One Year Delay

With last month’s announcement, HHS specified its intent to delay compliance with the Stage 2 meaningful use requirements until 2014 through its Stage 2 meaningful use Notice of Proposed Rulemaking ("NPRM"), which is scheduled to be published in February 2012. The anticipated release of the Final Rule for Stage 2 is June 2012. HHS also clarified that those first attesting to meaningful use in 2011 by February 28 can qualify for 2011 as well as 2012 incentive payments.

Therefore, if the Final Rule is promulgated as proposed in the NPRM, eligible providers who attest to Stage 1 meaningful use in 2011, will not be required to meet Stage 2 meaningful use standards in 2013, but will have until 2014 to meet the those thresholds and receive incentive payments. Additionally, providers who adopted Health IT in 2011 will receive three years of incentive payment for demonstrating Stage 1 meaningful use. Essentially, these eligible professionals and hospitals would receive the majority of the maximum incentive payout while meeting only Stage 1 standards.

However, HHS’ announcement did not include any extension of Stage 2 for those providers who begin participation in 2012 - providers attesting to Stage 1 meaningful use in 2012 will begin Stage 2 in 2014 as planned. Thus, the extension of Stage 2 implementation will affect only those providers who attest to Stage 1 in 2011. Also, the announcement did not postpone the date upon which Medicare penalties go into effect for those providers not using a certified EHR.

- Supports computerized physician order entry ("CPOE");
- Captures and queries information relevant to health care quality; and
- Exchanges electronic health information with, and integrates such information from, other sources.

See 45 C.F.R. s. 170.102.

^[4] In Stage 2, the meaningful-use criteria are expected to encourage the use of health IT for continuous quality improvement at the point of care and the exchange of information in the most structured format possible, such as electronic transmission of orders entered using computerized provider order entry and electronic transmission of diagnostic test results. Stage 3 is expected to focus on promoting improvements in quality, safety, and efficiency, focusing on decision support for national high priority conditions, patient access to self management tools, access to comprehensive patient data, and improving population health.
Beginning in 2015, Medicare eligible providers who fail to successfully demonstrate meaningful use will receive a downward adjustment to their Medicare reimbursement. The adjustment starts at a one percent reduction and increases each year meaningful use is not successfully demonstrated, with a maximum reduction of five percent.

C. Agency Rationale

HHS stated that the proposed delay in Stage 2 is meant to make it easier to adopt health IT, which can improve access and coordination of care and reduce costs. Secretary Sebelius stated that “[w]hen doctors and hospitals use health IT, patients get better care and we save money … we’re making great progress, but we can’t wait to do more.”[5] The Centers for Disease Control and Prevention released data, showing the percentage of physicians who have adopted EHRs has doubled since 2008. In giving qualified healthcare providers until 2014 to implement Stage 2 meaningful use requirements, HHS wants to encourage more professionals and facilities to implement EHRs and benefit from the Incentive Programs as well as the Health IT.

HHS has seemingly acknowledged that the implementation of a complete EHR technology involves complicated questions of systems integration, workflow changes, and human engineering, with changes or additions to an established EHR technology both time and labor intensive. The original timetable would have required EHR vendors to design, develop and release new computer systems, and for eligible hospitals to upgrade, implement and begin using the new systems by the beginning of the reporting year in October 2012 (FY 2013). The delay in Stage 2 will allow vendors adequate time to develop EHR technologies that comply with the Stage 2 certification requirements. HHS believes such a delay will also give providers time to certify and implement the necessary software to meet the challenges of Stage 2.

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This Member Alert provides general information and not legal advice or opinions on specific facts.

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rural health clinic led by a physician assistant, with some additional qualifying criteria. Under both programs, “hospital-based” providers are excluded from participation. A hospital-based provider is an individual who provides substantially all (at least 90 percent) of his or her covered professional services in an inpatient or outpatient hospital setting, utilizing the equipment and facilities of the hospital. Medicaid providers practicing predominantly in a federally qualified health center or a rural health clinic are not subject to the hospital-based exclusion.

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access to comprehensive patient data, and improving population health.

5 HHS Press Office, “We Can't Wait: Obama Administration takes new steps to encourage doctors and hospitals to use health information technology to lower costs, improve quality, create jobs,” November 30, 2011. 