

## CMS and ONC Issue Criteria and Timeframes for Demonstrating Meaningful Use and EHR Functionality

On December 30, 2009, the Centers for Medicare and Medicaid Services (CMS) and the Office of the National Coordinator for Health Information Technology (ONC) each issued a long-anticipated regulation relating to how health care providers can demonstrate “meaningful use” of electronic health record (EHR) technology in order to qualify for incentive payments and avoid penalties under the American Recovery and Reinvestment Act of 2009 (Recovery Act). ONC’s regulation sets forth the standards, specifications and certification criteria that EHR technology must satisfy in order to become certified. CMS’s regulation sets forth which providers may qualify for incentive payments and the criteria governing what constitutes “meaningful use” of certified EHR technology.

The EHR certification regulation is subject to a 60-day public comment period, but will go into effect 30 days after its official publication in the Federal Register. The meaningful use regulation is subject to a 60-day public comment period, after which a final regulation will be issued.

### What Incentives are Available

Incentive payments are available to eligible providers through the Medicare and Medicaid programs. Each program has separate eligibility criteria and payment methodologies.

### Which Providers Are Eligible

**Hospitals.** Hospitals eligible for incentive payments under the Medicare program are hospitals that receive payment under the hospital inpatient prospective patient system (IPPS) (e.g., acute care hospitals). Critical access hospitals (CAHs) are also eligible under the Medicare program. Hospitals ineligible for Medicare incentive payments include psychiatric, rehabilitation, long-term care, children’s and cancer hospitals. Under the Medicaid incentive program, children’s hospitals and acute care hospitals that meet certain Medicaid patient volume requirements are eligible. Hospitals otherwise eligible for incentive payments under both the Medicare and Medicaid programs may receive payments under both programs.

**Physicians and Other Professionals.** Doctors of medicine or osteopathy, dentists, podiatrists, optometrists and licensed chiropractors are considered “eligible professionals” under the Medicare incentive programs, while physicians, dentists, certified nurse-midwives, nurse practitioners and certain physician assistants that meet Medicaid patient volume requirements are considered “eligible professionals” under the Medicaid program. Eligible professionals are prohibited from receiving incentive payments under both the Medicare and Medicaid programs. An eligible professional must elect one program at the outset and may change that election only once provided such change occurs before 2015.

**Hospital-Based Eligible Professionals Are Generally Excluded.** One area of likely controversy relates to “hospital-based eligible professionals” who are expressly precluded from incentives under both the Medicare and Medicaid programs (other than those practicing in Federally Qualified Health Centers and Rural Health Clinics). Hospital-based eligible professionals are those professionals providing at least 90% of their Medicare-covered professional services in a hospital setting, including an inpatient hospital setting, outpatient hospital setting, or emergency room. The definition focuses on site of service and disregards

billing and employment relationships. One concern likely to be raised in the public comments is the scope of the term hospital-based eligible professionals which may extend beyond the traditional understanding of hospital-based physicians/departments.

### What Constitutes EHR Certified Technology

To qualify for incentive payments, EHR technology must be certified. The regulation establishes minimum certification criteria intended to correspond directly to the definition of “meaningful use” described below. These criteria fall into four general categories: vocabulary, content exchange, privacy and security, and transport. The regulation also sets forth formats and standards necessary to (i) record clinical summaries and prescriptions; (ii) describe clinical problems, procedures, laboratory tests, medications and allergies; and (iii) secure the transmission of this information using the Internet. Of particular interest to EHR technology vendors, the regulation provides that the organization(s) responsible for certifying EHR systems will be determined in future rulemaking.

### What Constitutes “Meaningful Use” — A Three-Stage Approach

In an effort to ensure that the meaningful use criteria keep pace with innovations in technology, CMS proposes to define “meaningful use” in three stages. Meaningful use criteria for Stage 1 are included in the proposed regulation and are described below. Criteria for Stages 2 and 3 will be developed through future rulemaking.

Stage 1 criteria will focus on:

- recording health information in a coded format;
- using the information to track conditions and communicating the information to coordinate care;
- implementing clinical decision support tools to facilitate disease and medication management; and
- reporting clinical quality measures and public health information.

CMS has proposed 25 objectives/measures for eligible professionals and 23 objectives/measures for eligible hospitals that must be met to be deemed a meaningful EHR user. Given their number and complexity, Stage 1 meaningful use criteria are certain to be the subject of substantial public comment. For example, under the proposed regulations, the standards for demonstrating meaningful use do not vary by physician specialty.

CMS’s goal for Stage 2 is to improve quality of care through exchange of information in a coded format. For Stage 3, CMS’s goal is to improve quality, safety and efficiency through decision-support tools and patient self-management tools. CMS expects to roll out Stage 2 by the end of 2011 and Stage 3 by the end of 2013.

As proposed, in order to receive incentive payments eligible providers must demonstrate satisfaction of Stage 1 meaningful use criteria by attesting that they have used certified EHR technology (specifying the technology used) and that they have satisfied each of the applicable meaningful use objectives and associated measures. The means for submitting the attestation during the first year have not yet been determined. For 2012 and beyond, meaningful use will be reported through electronic attestation. In addition, clinical quality measures will need to be electronically reported.

### Carrot or Stick? – Incentives Will Be Greater for Early Achievers of Meaningful Use, with Substantial Penalties for Those Who Fail to Implement by 2015

**Amounts Available for Early Adopters of Certified EHR Technology.** As proposed, incentive payment amounts decrease over time in order to encourage providers to become early meaningful users of certified EHR technology. In general, eligible professionals who are early adopters can qualify for up to \$44,000 in the aggregate over five years

under the Medicare program or \$63,750 over six years under the Medicaid program. Click [here](#) to view the payment scenarios applicable to eligible professionals under the Medicare and Medicaid programs.

For hospitals, payments under the Medicare program and Medicaid program are available for up to four years and six years, respectively, and are a function of, among other things, the total number of discharged patients, the number of Medicare/Medicaid inpatient bed days, charges attributable to charity care and the year of the payment. In contrast, because qualified CAHs are reimbursed for costs under the Medicare program, CAHs can receive incentive payments in amounts designed to offset a portion of the costs to acquire certified EHR technology and the implementing hardware and software. In order to receive incentive payments under the Medicaid program in the first year, eligible providers need only demonstrate that they have engaged in efforts to “adopt, implement, or upgrade certified EHR technology.”

**Timing for Incentive Payments.** Incentive payments under the Medicare incentive program will begin in October 2010 for hospitals and January 2011 for professionals. Under the Medicaid program, payments will be available on a state-by-state basis following development, implementation and, where appropriate, approval of a qualified program. In general, states are encouraged to align the timing of the particular state’s Medicaid payments with the Medicare program.

**Penalties for Providers Not Using Certified EHR Technology by 2015.** Under the Medicare program, no incentive payments may be made to eligible providers whose use of certified EHR begins after 2015. In addition, professionals and hospitals otherwise eligible for incentive payments under Medicare who fail to become meaningful users of certified EHR technology by 2015 will be subject to payment penalties or “downward adjustments” to their Medicare payments.

Specifically, beginning in 2015, for Medicare-covered professional services furnished by a non-qualifying eligible professional, payment for such services will equal the product of the “applicable percent” and the Medicare physician fee schedule amount for such services. As set forth in the regulations, the applicable percent will be 99 percent, 98 percent or 97 percent depending upon the specific circumstances and year.

Eligible hospitals that are not meaningful users by 2015 will be subject to a reduced update to the IPPS standardized amount which reduction will apply to three-fourths of the percentage increase otherwise applicable. The proposed reductions are 33.3 percent in 2015, 66.6 percent in 2016, and 100 percent in 2017. Under the Recovery Act, the IPPS applicable percentage increase may also be reduced for a hospital’s failure to submit data on quality measures in the amount of one-fourth the applicable market basket update.

## Next Steps

CMS is expected to receive numerous comments in response to the proposed meaningful use regulation from providers, vendors and other stakeholders. In the interim, providers should use the proposed standards to assess their own organization’s readiness for demonstrating meaningful use of certified EHR technology.

## Webinar On January 20, 2010

We invite you to attend a webinar we are hosting on Wednesday, January 20 from 1:00 - 2:00 pm (ET). The webinar will address in more detail the available EHR incentive programs; payments for which you or your organization may be eligible; how “meaningful use” is defined and measured; other program requirements such as deadlines, standards, criteria and reporting obligations; and the future federal payment consequences of the failure to make “meaningful use” of certified EHR technology. You can register for the webinar by clicking [here](#).

If you have any questions about the proposed regulations, please do not hesitate to contact your regular Ropes & Gray contact.