Final Guidance on 2014 Certified EHR Technology Requirements and Implementation of Stage 3 Meaningful Use Requirements

On September 4, 2014,[1] the Centers for Medicare & Medicaid Services ("CMS") and the Office of the National Coordinator for Health Information Technology ("ONC") issued a final rule (the "Final Rule") that adopts, without significant alteration, modifications to the Medicare and Medicaid Electronic Health Records ("EHR") Incentive Programs (the "EHR Incentive Programs") described in the May 23, 2014 proposed rule[2] (the "Proposed Rule").

The Final Rule specifically accomplishes the following: (i) grants providers flexibility to comply with the 2014 Certified Electronic Health Record Technology ("CEHRT") requirements and clarifies utilization of the new CEHRT flexibility provisions; (ii) delays implementation of Stage 3 requirements for the EHR Incentive Programs; (iii) modifies clinical quality measure ("CQM") reporting requirements to conform to the new CEHRT flexibility provisions; and (iv) makes certain technical changes to the definition of "certified electronic health record technology."

Flexibility in Compliance with 2014 CEHRT Requirements

CMS and ONC recognize that many health care providers have been unable to roll out 2014 Edition CEHRT in compliance with meaningful use requirements because EHR vendors were unable to timely develop EHR products that met the 2014 Edition of the EHR certification criteria. CMS and ONC therefore finalize the May 2014 proposal that eligible professionals ("EPs"), eligible hospitals ("EHs") and critical access hospitals ("CAHs") that are not able to fully implement the 2014 Edition CEHRT as a consequence of EHR product availability delays will be provided flexibility in complying with their meaningful use requirements. These providers will have three options when it comes to their 2014 meaningful use attestations:

> **Option 1: 2011 Edition CEHRT Only.** EPs, EHs and CAHs using only 2011 Edition CEHRT during the 2014 EHR reporting period must meet the meaningful use objectives and measures for Stage 1 that were applicable during the 2013 payment year, regardless of their current meaningful use stage.
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> **Option 2: Combination of 2011 and 2014 Edition CEHRT.** EPs, EHs and CAHs using a combination of 2011 Edition CEHRT and 2014 Edition CEHRT during the 2014 EHR reporting period may choose to meet the 2013 Stage 1 or 2014 Stage 1 objectives and measures. Alternatively, if providers are scheduled to begin Stage 2 in 2014, they could choose to meet the Stage 2 objectives and measures.
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> **Option 3: 2014 Edition CEHRT Only.** EPs, EHs and CAHs that are scheduled to begin Stage 2 for the 2014 EHR reporting period, but are unable to fully implement all the functions of their 2014 Edition CEHRT required for Stage 2 objectives and measures, may attest to the 2014 Stage 1 objectives and measures for the 2014 reporting period.

[1] An informal version of the final rule was released earlier on August 29, 2014.
[2] Ropes & Gray summarized the proposed rule in a prior Alert.

The above options are only available to providers that attest they are *"not able to fully implement"* 2014 Edition CEHRT as a result of *"delays in 2014 Edition CEHRT availability."* Recognizing the need for clarity regarding these two standards, CMS and ONC provide the following guidance in the Final Rule:

- **"not able to fully implement":** CMS and ONC explain that they intend the options described above to be broadly available to providers. The agencies therefore do not establish a specific definition for "not able to fully implement," but instead offer four non-exclusive scenarios, as examples, that would *not* constitute inability to fully implement 2014 Edition CEHRT: (i) financial issues, such as costs associated with implementing, upgrading, installing, testing or similar financial issues; (ii) with a limited exception related to technical requirements of the summary of care document measure, issues related to the meaningful use objectives and measures; (iii) personnel matters, including staff changes and turnover; and (iv) provider inaction or delay.
- **"delays in 2014 Edition CEHRT availability":** CMS and ONC also clarify that "delays in 2014 Edition CEHRT availability" refers specifically to one or more delays related to the development, certification, testing and release of an EHR product (including updates, software patches and other modifications required by the provider after rollout of the EHR product) by the EHR vendor or developer that resulted in an inability of the provider to fully implement 2014 Edition CEHRT for an EHR reporting period in 2014.

Providers that have fully implemented 2014 Edition CEHRT will not be able to avail themselves of the CEHRT attestation options described above. CMS and ONC intend to provide further guidance to auditors relating to these provisions, but state that no additional documentation will be required of providers. The above described modifications to meaningful use compliance will apply only to the 2014 reporting period. Providers must use 2014 Edition CEHRT for the EHR reporting periods in 2015 and in subsequent years, or until new certifications requirements are adopted pursuant to future rulemakings.

Modification to 2014 Clinical Quality Measure Requirement

CMS and ONC are finalizing, without modification, the proposed changes to the reporting options and methods for CQMs in 2014. The relevant requirements will depend on the CEHRT edition that a provider uses for its EHR reporting period in 2014.

> **2011 Edition CEHRT Only.** EPs that chose to use only 2011 Edition CEHRT for their EHR reporting period in 2014 are required to report CQMs from the set of 44 measures and according to the reporting criteria finalized in the Stage 1 final rule, subject to certain specifications (*i.e.*, 3 core/alternate core, 3 additional measures). EHs and CAHs that chose to use only 2011 Edition CEHRT for their EHR reporting period in 2014 must report all 15 measures finalized in the Stage 1 final rule.
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> **Combination of 2011 and 2014 Edition CEHRT.** If a provider elects to use a combination of 2011 Edition and 2014 Edition CEHRT, then the provider must decide whether to attest under the 2013 Stage 1 objectives and measures or the 2014 Stage 1 objectives and measures or Stage 2 objectives and measures.
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> If a provider attests to the 2013 Stage 1 objectives and measures for its EHR reporting period in 2014, the provider is required to report CQMs by attestation using the same measure sets and reporting criteria summarized above for providers that elect to use only 2011 Edition

CEHRT for their EHR reporting periods in 2014. Due to the differences in how CQMs are calculated and tested between 2011 and 2014 Editions of CEHRT, under the Final Rule, a provider could attest to data for the CQMs derived exclusively from the 2011 Edition CEHRT for the portion of the reporting period in which 2011 Edition CEHRT was being implemented.

If a provider chooses to attest to the 2014 Stage 1 objectives and measures or the Stage 2 objectives and measures, the provider will be required to submit CQMs in accordance with the requirements and policies established for CQM reporting for 2014 in the Stage 2 final rule and subsequent rulemakings.

Delay 2013 Stage 3 Meaningful Use Requirements

CMS and ONC also finalize the proposal to delay the January 1, 2016 deadline for implementation of Stage 3 meaningful use requirements for the first cohort of adopters to January 1, 2017. The delay is intended to give CMS and ONC the opportunity to focus on the successful implementation of Stage 2 requirements, including those of enhanced patient engagement, interoperability and health information exchange, as well as to utilize Stage 2 participation data to inform policy decisions regarding Stage 3.

Technical Changes to CEHRT Definition

Finally, CMS and ONC finalized a technical correction to the definition of CEHRT offered in the Proposed Rule that changes the federal fiscal year and calendar year cutoffs so that the CEHRT definition is consistent within CMS and ONC standards.

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We continue to monitor developments with respect to EHR Incentive Programs. Should you have questions regarding this alert of the EHR Incentive Programs generally, please contact your usual Ropes & Gray advisor.