



CMS Finalizes Electronic Prescribing Incentive Program Rule

The Centers for Medicare & Medicaid Services (CMS) announced the release of the [Electronic Prescribing Incentive Program \(eRx Incentive\) Final Rule](#) on August 31, 2011. The Final Rule is intended to align the eRx Incentive with the Medicare and Medicaid incentive program for the meaningful use of electronic health record (EHR) technology (Meaningful Use Incentive) and to expand the categories for significant hardship exemptions. A prescriber who is not a successful electronic prescriber is subject to a penalty unless CMS grants a hardship exemption. The Final Rule allows prescribers to apply for a hardship exemption until November 1, 2011.

Background

The Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) required the Secretary of the Department of Health and Human Services (HHS) to establish a new reporting program for eligible professionals who are successful electronic prescribers, beginning on January 1, 2009. The eRx Incentive program is similar in structure and processes to the Physician Quality Reporting System (formerly the Physician Quality Reporting Initiative, or PQRI); however, the eRx Incentive is a separate program with distinct reporting requirements and associated incentive payments and penalties.

In addition to the eRx Incentive, MIPPA called for a penalty that will apply beginning in January 2012 to

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eligible professionals who are not successful electronic prescribers. For eligible professionals who are subject to the 2012 eRx penalty, the fee schedule amount for covered professional services furnished by eligible professionals during the calendar year will be 1 percent less than the fee schedule amount that would otherwise apply for 2012. The potential penalties in the future are 1.5 percent for 2013 and 2 percent for 2014. For example, for an eligible professional who is not a successful electronic prescriber and anticipates annual Medicare payments of US\$300,000, the penalties in 2012, 2013 and 2014 would be US\$3,000, US\$4,500 and US\$6,000, respectively.

eRx Penalty Avoidance

An "eligible professional" will not be subject to the 2012 penalty if one of the following applies:

- The eligible professional is not a physician (MD, DO or podiatrist), nurse practitioner or physician assistant as of June 30, 2011;
- The eligible professional has fewer than 100 cases containing an encounter code in the electronic prescribing measure's denominator;
- The eligible professional's allowed charges for covered professional services submitted for the electronic prescribing measure's denominator codes are less than 10 percent of the eligible professional's total 2011 Medicare Part B Physician Fee Schedule allowed charges;
- The eligible professional reports a significant hardship code, CMS determines that the hardship code applies and he/she is granted an exemption; or
- The eligible professional becomes a successful electronic prescriber by reporting the electronic prescribing measure via claims for at least 10 unique electronic prescribing events for patients in the denominator of the measure between January 1, 2011 and June 30, 2011.

A "group practice" that is participating in the 2011 eRx group practice reporting option will not be subject to the 2012 penalty if one of the following applies:

- The group practice reports a significant hardship in its 2011 self-nomination letter for participation in the eRx Incentive program group practice reporting option and is granted an exemption; or

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- The group practice becomes a successful electronic prescriber. The group practice becomes a successful electronic prescriber by reporting the electronic prescribing measure via claims for between 75 and 2,500 unique electronic prescribing events (depending on the group practice size) for patients in the denominator of the measure between January 1, 2011 and June 30, 2011.

Changes in the Final Rule

The Social Security Act permits the Secretary of HHS, on a case-by-case basis, to exempt an eligible professional from the penalty if the Secretary determines, subject to annual renewal, that compliance with the requirement for being a successful electronic prescriber would result in a significant hardship. Prior to the Final Rule discussed here, CMS established the following two significant hardship exemptions for purposes of the 2012 penalty:

- Eligible professionals practicing in a rural area without sufficient high-speed Internet access
- Eligible professionals practicing in an area without sufficient available pharmacies for electronic prescribing

In order to request consideration for an exemption from the 2012 penalty via one of the two significant hardship exemptions, the eligible professional must report a specified code at least one time on a claim between January 1, 2011 and June 30, 2011. A group practice participating in the eRx group practice reporting option for 2011 must have requested the significant hardship exemption at the time the practice self-nominated to participate.

Additional Significant Hardship Exemptions

In response to public comments raising concerns that the eRx Incentive program did not align with the Meaningful Use Incentive program as well as requests for additional significant hardship exemption categories, CMS, by this Final Rule, implements the following changes:

- Modifies the existing 2011 electronic prescribing measure to address uncertainties related to the technological requirements of the eRx Incentive program. The existing 2011 electronic prescribing measure is revised to indicate that a qualified electronic prescribing system includes certified

EHR technology under the Meaningful Use Incentive program.

- Provides additional significant hardship exemption categories for purposes of the 2012 penalty. The eligible professional or group practice must demonstrate that it has one of the following:
 - Eligible professionals who register to participate in the Meaningful Use Incentive program and adopt certified EHR technology;
 - An inability to prescribe electronically due to local, state, or federal law or regulation;
 - Limited prescribing activity; or
 - Insufficient opportunities to report the electronic prescribing measure.
- Extends the deadline for requesting significant hardship exemptions to November 1, 2011. This extended reporting deadline would apply to the two established significant hardship exemptions as well as the additional significant hardship exemption categories above.
- Requires submission of significant hardship exemption requests for the 2012 eRx penalty via a Web-based tool for individual eligible professionals and via a mailed letter for group practices that are participating in the 2011 eRx group practice reporting option.

Squire Sanders lawyers have significant experience in health information technology, including assisting physicians in obtaining incentive payments for being successful eRx prescribers and assisting clients in achieving Meaningful Use Incentives including registration with CMS and preparation of the required attestations. We continue to monitor the implementation of this Final Rule and are available to assist clients with the CMS reporting requirements for the eRx Incentive. For more information, please contact one of the lawyers listed in this Alert.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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