

## Federal EHR Incentive Program

On July 28, 2010, final regulations implementing electronic health record (“EHR”) incentive programs under the HITECH Act were published. These new regulations establish the requirements for hospitals, physicians and certain other health care providers to receive federal incentive funds for their purchase, implementation and use of EHR systems. These regulations supersede the interim and proposed rules that were published earlier this year regarding the EHR incentive programs, and in many cases, the new rules lessen some of the participation requirements. However, there still remain substantial hurdles for providers to jump in order to qualify for federal funds.

### What EHR Incentive Programs Are Available?

Under the final regulations adopted by the Centers for Medicare & Medicaid Services (“CMS”), EHR incentive funds are available under the Medicare and Medicaid programs.

An eligible professional may receive an annual payment equal to 75% of estimated allowable charges under the Medicare physician fee schedule for covered professional services provided by the professional in a given year. The total of all payments to a given professional is capped at \$44,000 under the Medicare program.

Eligible professionals with a sufficient Medicaid patient population can receive up to \$63,750 in payments under their State’s Medicaid program. Eligible professionals must choose to participate in either the Medicare or Medicaid incentive program and cannot receive funds in a given year under both programs. However, an eligible professional may make a one-time switch from one program to another.

Unlike eligible professionals, eligible hospitals may receive incentive funds under the Medicare and Medicaid programs in the same year as long as they meet the requirements for participation in both programs. The regulations describe the formulas under which a hospital’s incentive funds are calculated based on their annual number of patient discharges and other factors.

There are also special incentive programs for Critical Access Hospitals and participants in the Medicare Advantage program.

### What Professionals Are Eligible to Receive EHR Incentive Funds?

Under the Medicare program, eligible professionals include physicians, osteopaths, doctors of dental surgery or dental medicine, podiatrists, optometrists and chiropractors. In order to participate in the program, at least 50% of an eligible professional’s patient encounters must occur in a practice/location equipped with a certified EHR system.

Under the Medicaid program, physicians, dentists, nurse practitioners, certified nurse midwives and physicians assistants may participate. However, physicians assistants are only eligible to receive EHR funds if they practice in a Federally Qualified Health Center or Rural Health Clinic led by a physician assistant.

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Hospital-based professionals are not eligible to receive EHR incentive funds. A “hospital-based” professional is one who furnishes 90% or more of his/her Medicare covered professional services in a hospital setting.

### **What Are the Requirements for Receiving EHR Incentive Funds?**

Eligible hospitals or professionals must demonstrate that they are meaningful users of certified EHR technology. For participants in the Medicaid incentive program, States may adopt requirements for participation in addition to the CMS requirements.

Pursuant to regulations adopted by the Office of the National Coordinator for Health Technology (“ONC”), an EHR system must be certified by an independent body approved to review EHR systems and certify that the EHRs satisfy certain functional requirements. The ONC regulations describe detailed functional requirements for EHR systems which EHR vendors will need to demonstrate in order to obtain the certification of their systems.

In order to qualify for incentive funds, eligible hospitals and professionals must not only acquire certified EHR systems but also demonstrate to CMS that they are meaningful uses of the EHRs. The requirements for meaningful use are detailed in the regulations (including a helpful chart which summarizes the requirements). The regulations include thresholds for eligible hospitals and professionals to meet in order to demonstrate meaningful use of EHR functionality. For example, eligible professionals are initially required to demonstrate that more than 40% of all permissible prescriptions written by the professionals are transmitted electronically using the EHR. Other Stage 1 requirements concern the use of clinical order entry, active medication and allergy lists and other clinical application functions. CMS refers to the initial meaningful use requirements as Stage 1 requirements, and it intends to strengthen its meaningful use standards in phases over time by issuing Stage 2 and Stage 3 requirements.

### **When Can Eligible Hospitals and Professionals Receive Incentive Payments?**

Eligible professionals who are meaningful users of EHRs are eligible to receive Medicare payments in calendar years 2011 through 2015 according to payment schedules specified by the regulations. In order to receive Medicare payments, eligible professionals will be required to certify to CMS that they have met all of the requirements for incentive payments under the Medicare program on an annual basis. Payments will be made annually once the required certification are made, and payment amounts will depend on the first year in which an eligible professional becomes eligible for program participation.

Eligible Hospitals who are meaningful users will be eligible to receive Medicare payments in federal fiscal years 2011 through 2016, depending on when they first participate in the program.

For both eligible professionals and eligible hospitals, payments will be made on a rolling basis by a CMS contractor. A single annual payment will be made once an eligible hospital or professional has demonstrated meaningful use to CMS for a given year.

State Medicaid programs will establish their own payment mechanisms, and we expect that each State will issue its own implementing regulations regarding its EHR incentive program.

### **Can Eligible Professionals Reassign their Incentive Payments to their Employers?**

Yes, eligible professionals are permitted to reassign their incentive payments to their employers or to entities with which they have a contractual arrangement requiring the entity to bill for their professional services. Therefore, employers and entities that have such contracts with eligible professionals must make sure that the

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reassignment provisions cover the reassignment of EHR incentive payments. We can provide clients with a simple reassignment form for this purpose, upon request.

### **Are There Penalties for Hospitals and Professionals Who Fail to Become Meaningful EHR Users?**

Yes. Beginning in 2015, there will be Medicare payment reductions for eligible hospitals and professionals who are not meaningful EHR users. Eligible professionals who are not meaningful EHR users will receive a 1% reduction in Medicare physician fee schedule payments in 2015, a 2% reduction in 2016 and a 3% reduction in 2017 and annually thereafter. There is a mechanism for hardship exceptions in limited circumstances.

Hospitals who are not meaningful EHR users beginning in federal fiscal year 2015 will be subject to reductions in their market basket adjustments until they can demonstrate meaningful EHR use.

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If you have any questions regarding the EHR incentive programs or require any legal assistance, please contact a Garfunkel Wild attorney.

## About Garfunkel Wild, P.C.

Garfunkel Wild, P.C. was founded in 1980 with a single purpose in mind: to become a pre-eminent health care law firm attending to the unique business and legal needs of its clients. Since then, the firm has grown to over 75 attorneys devoted to addressing the complex legal, regulatory, business and financial needs of its diverse clients.

If you have any questions regarding this Legal Alert, please contact Patrick J. Monahan II, Esq. at (203) 316-0483.

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