



Electronic Medical Records: a Bi-Partisan Goal and a Hospital/Physician Alignment Tool

By *Michele P. Madison*

President Obama continues to support President Bush's initiative for every American to have access to electronic medical records by 2014. In fact, the 2009 Stimulus package includes two billion dollars for the advancement of healthcare information integration and adoption of healthcare information technology. The 2009 Stimulus package, as passed by the House of Representatives, includes funding to the Office of National Coordinator for Health Information Technology (ONCHIT) to support electronic medical record integration and adoption. However, the Stimulus package's general provisions do not specify how the funds will be directly provided to hospitals and physicians and instead maintain the funding at the governmental level for grants and agency spending.

Notwithstanding the Stimulus package's lack of direct funding to providers, the House Ways and Means Committee passed a Bill which provides direct financial incentives to physicians that participate in Medicare and Medicaid and have a "meaningful use of certified electronic medical records".¹ Hospitals are also eligible for the potential financial incentives for similar "meaningful use."² However, this Bill is subject to further changes. In the meantime, hospitals and physicians should not wait for the specific funding, but instead should focus on how to utilize this national goal to align and structure a relationship that supports collaboration and the widespread adoption of electronic medical records.

Two challenges to this initiative are costs and regulations. Normally, the physician self-referral laws prohibit the exchange of remuneration or financial relationships between physicians and hospitals in order to avoid overutilization of services and to prevent fraud and abuse.³ However, the Physician Self-Referral Statute (commonly known as "Stark II"), the Anti-kickback Statute and the respective accompanying regulations were modified to permit hospitals and physicians to collaborate in obtaining electronic medical records.⁴ Specifically, the regulations permit individuals or entities that provide covered healthcare services to federal health care program beneficiaries and health plans to donate assistance to individuals or entities engaged in the delivery of healthcare. Therefore, the potential financial incentives may assist with the costs and the regulatory challenges are addressed provided the donation of assistance complies with the Stark II and the Anti-kickback specific requirements.

The Stark II exception and Anti-kickback safe harbor requirements are almost identical. The hospitals may donate funding toward the costs of the software that is "necessary and used predominantly" to create, maintain, transmit, or receive electronic health records. The software must also include an e-prescribing component. The donated funding may not be used for the purchase of hardware. The electronic medical record must be interoperable and the e-prescribing component must satisfy the e-prescribing standards set forth by the government agencies. It is important to note that the ONCHIT set forth a two-step process to certify the interoperability of electronic medical records.⁵

Prior to donating any assistance, the Hospital must ensure that it selects recipients based upon objective criteria that are not directly related to the volume or value of referrals or business generated from the recipient. Both Statutes and accompanying regulations permit entities to donate up to eighty-five percent (85%) of the costs for software and

¹ H.R. Bill 598, January 16, 2009

² Id.

³ See 42 U.S.C. § 1395nn; 42 U.S.C. § 1320a-7(b), *et seq.*

⁴ See 71 Fed. Reg. 45140 (Oct. 10, 2006) and 71 Fed. Reg. 45110 (August 8, 2006).

⁵ See www.hhs.gov/healthit

training associated with electronic medical records. The regulations also prohibit the donating entity from providing funding assistance or loans to the physician to pay for the physician's minimal contribution toward fifteen percent (15%) of the costs.

In addition to the healthcare regulations, on May 11, 2007, the Internal Revenue Services (IRS) published a memorandum to guide exempt organizations that donate electronic health records.⁶ The IRS indicated that it would not treat the benefits that a hospital provides to its medical staff physicians as potential private inurement if the benefits fall within the range of health information technology items and services that are permissible under the Department of Health and Human Services health record regulations and that the hospital operates in a particular manner. Specifically, to the extent permitted by law, the hospital may access all of the electronic medical records created by the physician using the health information technology items and services subsidized by the hospital. The hospital must ensure that the health information technology items and services are available to all of its medical staff physicians. The hospital must also provide the same level of subsidy to all medical staff physicians or various levels of subsidy by applying criteria related to meeting the health care needs of the community.

Accordingly, the Stimulus package and national goals should encourage hospitals and physicians to consider the regulatory framework and tax exempt guidance for adoption of electronic medical records. Moreover, in light of the potential direct financial incentives, hospitals and physicians should commence using electronic medical records in a "meaningful manner" as required by the stimulus package. Keep in mind the regulatory requirements and funding restrictions when evaluating vendors and service providers.

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⁶ See <http://www.irs.gov/pub/irs-tege/ehrdirective.pdf>