

Health Information Compliance Alert

EHR Penalties: CMS Proposes 4 Additional Exemptions to Help You Avoid EHR Penalty

The agency is accepting comments on the proposal through July 25.

Hoping to avoid a one percent hit to your Part B pay next year? CMS may be making that a little bit easier. As you are probably aware, starting in 2012, you may be subject to a one percent payment adjustment on your Part B pay if you don't successfully participate in e-prescribing this year. In 2013, that payment adjustment will go up to 1.5 percent, and in 2014 it will rise to two percent. Although CMS previously announced ways that practitioners could avoid the penalty, physician practices complained that the exemptions were too limited and did not cover all of the realistic scenarios. To that end, CMS proposed four additional ways that eligible professionals (EPs) can potentially avoid the adjustment next year.

The imminent penalty for physicians who don't e-prescribe "has created quite a bit of concern about circumstances where doctors will potentially be penalized, not necessarily because of failure to electronically prescribe, but more so because of some complexities with regard to the measurement," said **Michael Rapp, MD, JD**, director of the quality measurement and health assessment group at CMS, during a May 26 CMS open door forum. "We have carefully considered the comments and input that we received, and having done so, the agency has decided to propose a modification to the circumstances where the negative payment adjustment would apply with respect to 2012 going forward," he said.

Previously, physicians could apply for a hardship exemption only if they could prove a lack of access to the Internet in their area or limited access to pharmacies that accepted electronic prescribing. But under the new proposal, EPs would be eligible to request a hardship exemption that CMS would determine on a case-by-case basis if they meet one of the following additional four criteria, Rapp said:

1. Registration in the Medicare or Medicaid EHR Incentive Programs With Intended Adoption of Certified EHR Technology

Practitioners who intend to start participating in the EHR Incentive Program might still be getting their technology in place, so they may not have e-prescribed ten times within the first six months of 2011, as is required to avoid the penalty. The new proposal aims to offer those practices a potential exemption.

"Many physicians, we've been informed, intend to participate in that [program] but may not necessarily have gotten the certified EHR that they need to, and since they don't have to begin to participate until Oct. 1 to take advantage of the 2011 program, they may not get their equipment until then," Rapp said. "So one of the hardships that physicians could apply for [under the proposal] would be those who register to participate in the Medicare EHR incentive program and intend to participate and have obtained or have access for immediate use to the certified EHR technology," he said.

2. Prescribing Medications That Legally Cannot Be Electronically Transmitted

Many state, local, or federal regulations prohibit EPs from electronically prescribing certain medications, such as narcotics -- but practices that prescribe large quantities of these drugs (for instance, some pain management physicians) may find that they can't electronically prescribe even if they'd like to participate in the incentive program.

"Many physicians, so we're told, principally prescribe narcotics, and there is no way that they can effectively prescribe narcotics using electronic prescribing in their circumstances, and that would create a hardship for those doctors," Rapp said during the call.

3. Limited Prescribing Activity

Some practitioners may appear to be eligible for the e-prescribing penalty because they perform enough office visits to meet the threshold, but in reality, those physicians may not prescribe medications for various reasons. CMS reps have gotten calls from doctors who say, "Even though we have those types of visits that I bill for, I don't really prescribe at all," Rapp noted.

"If you don't prescribe, it would be unfair to require you to just do some prescribing which you wouldn't otherwise do, so now we're proposing that physicians and other eligible professionals can request a hardship exemption on that basis."

4. Insufficient Opportunities to Report the E-prescribing Measure Due to Limitations in the Measure's Denominator

Issues persist that are inherent to the measure denominator under the program, Rapp acknowledged. "The denominator is limited to certain billing codes, so even though the person electronically prescribes, the physician does it in circumstances other than those that are billed for," Rapp said. For instance, a surgeon may electronically prescribe, but the prescriptions aren't associated with the types of visits included in the e-prescribing measure's denominators.

Heed Oct. 1 Deadline

Under the proposal, EPs would have until Oct. 1, 2011 to request a hardship exemption, which should include the following information:

- Identifying information such as the TIN, NPI, name, address, and email address of all affected EPs
- The hardship exemption categories that apply
- A justification statement describing how the e-prescribing requirement would create a significant hardship
- An attestation of the accuracy of the information.

CMS will determine exemptions on a case-by-case basis, and the exemptions only apply to penalties that would be imposed in 2012 -- not subsequent years, Rapp noted. You can comment on the proposal for the additional four exemptions through July 25 by visiting www.regulations.gov, clicking "submit a comment," and entering the ID "CMS-3248-P."

To read the complete proposal, visit www.ofr.gov/OFRUpload/OFRData/2011-13463_PI.pdf.