

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Healthcare IT Spending In The Economic Stimulus Bill: Incentive Payments May Be Available To Some Healthcare Providers

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Members of the health information technology ("HIT") industry, as well as physicians and other professionals, have advocated for the widespread use of electronic health record ("EHR") technology as a tool to drive health reform. Health care professionals express the need for synchronization of information from different sources as an efficient and necessary way to improve the accuracy of patient records, reduce medical errors, and cut down on health care costs by improving billing accuracy. Recent legislation has responded to industry's call for increased HIT spending to the tune of nearly \$21 billion, set aside in the federal economic recovery package.

The HITECH Act

On January 28, 2009, the House passed H.R. 1, entitled "American Recovery and Reinvestment Act of 2009" (the "Act"). The Act makes supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and state and local fiscal stabilization for fiscal year ending September 30, 2009. The Senate is currently considering the Act.

Title IV of the Act, entitled "Health Information Technology for Economic and Clinical Health Act" or "HITECH Act," authorizes nearly \$21 billion in grants, loans, and incentive payments for promoting the use of HIT. The HIT provisions formally establish an Office of the National Coordinator for Health Information Technology within the Department of Health and Human Services ("HHS") and require HHS to develop clear standards for interoperability by the end of 2009. In addition, the Act allows the National Coordinator to distribute various grants and loans to states as well as incentive payments to individual physicians and hospitals who can demonstrate their use of EHR technology.

Available Grants and Loans to Promote HIT

The Act authorizes the National Coordinator to disburse \$2 billion of the HIT funds for state grants and other loans for promoting and implementing EHR technology use. Grants are available to states directly or through state-designated entities, which are defined as nonprofit entities dedicated to improving HIT quality. A state or state-designated entity may apply for a grant by submitting an application to the Secretary of HHS, acting

through the National Coordinator. The state or state-designated entity which receives a grant must consult with health care providers and other health care organizations to consider recommendations for carrying out use of funds. In general, grants should be dedicated to the following goals: promoting use of EHR; promoting effective strategies to adopt and utilize HIT; providing technical assistance to providers implementing EHR; and complementing federal grants. Beginning in 2010, the National Coordinator may also award competitive grants to states and other entities to provide loans to health care providers for purchasing EHR technology, training personnel to use technology, and enhancing utilization of technology.

In addition, the Act authorizes the creation of Health Information Regional Extension Centers ("regional centers") to provide technical assistance and other information to support and encourage the implementation of HIT. These regional centers will provide assistance to providers in the applicable region, prioritizing direct assistance to entities in the following order: (1) Public or nonprofit hospitals or critical access hospitals; (2) Federally-qualified health centers; (3) Entities in rural or underserved areas; and (4) Individual and small group practices focused on primary care.

Payments to Medicare-Participating Hospitals and Physicians

The Act allots \$18 billion for incentive payments to eligible physicians and hospitals that participate in the Medicare program. While Medicare Part A providers such as nursing homes, home health agencies, skilled nursing facilities, and other long term care facilities are included in the definition of "health care provider" in the HITECH Act, they are not eligible for individual incentive payments, except under certain limited circumstances, such as if the entity employs physicians and bills for physician services under Medicare Part B.¹ Such entities, however, may be eligible for payments under the Medicaid provisions of the HITECH Act as described below.

Incentive Payments for Physicians

Beginning in 2011, physicians² participating in the Medicare program would be eligible for incentive payments if they are "meaningful EHR users," meaning they can demonstrate to the Secretary of HHS the use of certified EHR technology in a meaningful manner as well as submit quality measures and other reporting information on the use of EHR technology. For each eligible physician, the incentive payment is capped at \$15,000 for the first year of participation; \$12,000 for the second year; \$8,000 for the third year; \$4,000 for the fourth year; \$2,000 for the fifth year, and \$0 for any succeeding years. The incentive payments remain the same for physicians whose first payment year runs through 2013, but are reduced to \$0 if the first payment year for which a physician is eligible is 2015 or later.

¹ The Act states that the incentive payments are paid to the eligible professional using EHR, "or to an employer or facility in the cases described in clause (A) of section 1842(b)(6)" of the Social Security Act. The referenced clause of the Social Security Act states that no payment may be made under Medicare Part B to anyone other than the physician who provided the service, except that a payment may be made "to the employer of such physician or other person if such physician or other person is required as a condition of his employment to turn over his fee for such service to his employer, or where the service was provided under a contractual arrangement between such physician or other person and an entity" if, under the contractual arrangement, the entity bills for the service under Medicare Part B.

² Note that the definition of "eligible professional" in the HITECH Act literally encompasses only individual physicians and not physician groups as entities.

Professionals billing Medicare Part B for services have a further incentive to implement EHR technology within the next few years. The HITECH Act states that for professionals who are not meaningful EHR users by the year 2016, the Medicare fee schedule amount is reduced to 99 percent beginning in 2016, 98 percent in 2017, and 97 percent for each subsequent year. Thus, the HITECH Act provides a "stick" in addition to the "carrot" of incentive payments under the Medicare program.

Incentive Payments for Hospitals

The HITECH Act also provides incentive payments for hospitals demonstrating the meaningful use of EHR, such payments to be calculated according to a formula using the hospital's Medicare share.³ A hospital qualifying for payments beginning in fiscal year 2011 would receive the full amount of this calculated incentive payment in the first year, 75 percent of the amount in its second payment year, 50 percent of the amount in its third payment year, and 25 percent of the amount in its fourth payment year, according to the HITECH Act.

Like eligible physicians, hospitals must begin the meaningful use of EHR before 2015 in order to qualify for these incentive payments. Similarly, for hospitals that have not implemented the use of EHR before 2016, Medicare payments will be reduced for each year that the hospital is not a meaningful EHR user. Thus, the HITECH Act provides a "stick" in addition to a "carrot" for hospitals as well as for physicians.

Funding under Medicaid

Incentive Payments to Nursing Homes

Although they are not eligible for Medicare incentive payments in most circumstances, nursing homes may receive funding for EHR use under the Medicaid Nursing Home Grant Program. This provision of the HITECH Act establishes a grant program specifically promoting the meaningful use of certified EHR technology in nursing facilities, for which the incentive payment structure will be "similar to those specified" for eligible professionals under Medicare, as described above. However, incentive payments to each facility are capped at 90% of the costs of adopting and implementing EHR technology at that nursing facility.

According to this provision, the National Coordinator will award funds to no more than 10 states to implement the grant program, the total amount under the Medicaid Nursing Home Grant Program to be capped at \$600 million. Each participating state will be required to: (1) provide payment incentives to nursing facilities contingent on the demonstration of meaningful use of EHR, (2) require participating nursing facilities to engage in quality improvement programs for the use of EHR, and (3) provide for training of appropriate personnel. States will be required to target nursing facilities with a significant percentage, not less than average in that state, of the patient volume attributable to individuals receiving Medicaid assistance. The National Coordinator will give priority to states with a high proportion of total national nursing facility days paid under Medicaid.

³ The HITECH Act states that the incentive payment for an eligible hospital is equal to the product of the following: (1) the sum of a \$2 million base amount plus the discharge-related amount for a 12-month period selected by the Secretary; (2) the Medicare share for the hospital, which is calculated based on the proportion of inpatient-bed-days attributable to individuals for whom payment is made under Medicare part A compared to the total number of inpatient-bed-days for that hospital during the 12-month period; and (3) a transition factor, which is calculated based on how many payment years a hospital has received incentive payments.

Incentive Payments to Other Medicaid Providers

Incentive payments are available sooner than the above-described Medicare payments to Medicaid-certified enrolled providers if they waive their right to incentive payments under the Medicare program for the use of EHR. The HITECH Act allots \$40 million per year for these Medicaid incentive payments for fiscal years 2009 through 2015, and \$20 million for each succeeding year until 2019. The term "Medicaid provider" includes the following: a physician who is not hospital-based and has at least 30 percent of the professional's patient volume attributable to individuals receiving Medicaid assistance; a children's hospital; an acute care hospital that has at least 10 percent of the hospital's patient volume receiving assistance under Medicaid; and a Federally-qualified health center or rural health clinic that has at least 30 percent of the center or clinic's patient volume attributable to individuals who are receiving medical assistance under Medicaid. Such entity will only qualify as a Medicaid provider if it has waived incentive payments for the use of EHR under the Medicare program; further, the Secretary of HHS will oversee coordination of the payment programs to ensure that duplicate payments are not made to providers.

Under this provision, Medicaid providers who are meaningful EHR users are eligible to receive funds from the State, the amounts to be calculated based on a provider's Medicaid share.⁴ The aggregate allowable funds for the implementation and the use of EHR are capped at \$25,000 for the initial purchase and implementation of EHR technology and \$10,000 per year for maintenance and support associated with the technology. Payments are limited to a period five years, and aggregate costs for each provider may not exceed \$75,000.

HIPAA Provisions

In addition to promoting the development of HIT, the HITECH Act tightens the privacy and security provisions of the Health Insurance Portability and Accountability Act ("HIPAA") by applying certain HIPAA provisions to business associates in the same manner as they apply to covered entities, imposing requirements for disclosure and notification of breaches, and increasing civil monetary penalties for HIPAA violations. Experts have warned that the HITECH Act must adequately provide for the privacy and accuracy of maintaining electronic health records or else efforts to advance EHR use will fail. For example, the HITECH Act provides for notifications in the case of certain security breaches, requires an accounting of disclosures for covered entities utilizing EHR technology, and prohibits the sale of EHRs or protected health information unless a valid authorization is obtained or certain exceptions are met.

Some members of the HIT industry are critical of the provisions that apply to business associates certain HIPAA privacy and security regulations that are currently only required of covered entities. In addition, the HITECH Act applies civil and criminal penalties to business associates for violations of HIPAA privacy and security provisions in the same manner that penalties apply to covered entities. According to critics, these measures could potentially cost millions of dollars in administrative and accounting burdens for small health care companies who work with hospitals, physician practices, and insurance companies. Specifically, these measures could mean increased costs and liability for HIT vendors who work with covered entities.

⁴ The HITECH Act states that the Medicaid share is calculated in the same manner as the Medicare share, described above.

Conclusion

The Act is currently before the Senate for consideration and President Obama is pushing for speedy passage. If you have any questions regarding this Health Law Update, or would like assistance in applying for any of the incentive payments or grants under the HITECH Act, please contact any of the attorneys in our Healthcare Industry Practice Group listed on the following page.

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