

July 8, 2013



To: Health IT Stakeholders
From: Sharon Canner, Sr. Director of Public Policy, CHIME
Re: 2014 Reporting Period Extension, *Policy Brief #2*

This memo addresses concerns about potential legislative barriers to a plan proposed by CHIME to extend the EHR reporting period in 2014 for Stage 2 of Meaningful Use by six or twelve months of 2015. Brief #1 outlines the CHIME proposals.

Legislative Barriers

Concerns have been raised that the language of the statute (the HITECH Act) that established the Medicare EHR Incentive Program would preclude CMS from implementing the policy options CHIME has proposed. Our reading of the statute is that CMS has the discretion to adopt and implement a policy to modify the reporting periods for both 2014 and 2015 to accommodate the extensions proposed by CHIME as well as to use different reporting periods for purposes of the incentive payments and the payment adjustment (penalty).

Discussion

The HITECH Act vests in CMS enormous discretion in the implementation of the Medicare and Medicaid EHR Incentive Programs. The statute sets forth basic program parameters but leaves to CMS the authority to specify implementation requirements. For example, the statute requires the following for the Medicare EHR Incentive Program:

- (1) Demonstration of meaningful use; (2) electronic exchange of health information; and (3) reporting of clinical quality measures
- Meaningful Use (MU) measures must become more stringent over time
- The periods for which incentive payments are available (beginning 2011) and for when payment adjustments are required (beginning 2015).
- An annual assessment of an eligible professional (EP), eligible provider (EH) or critical access hospital (CAH) to qualify for incentive payments for a given payment year.

Incentive Payments

The length of EHR reporting periods is not set in statute; CMS has already exercised discretion in establishing them. For example, in the first year in which a provider seeks to demonstrate meaningful use for a particular MU stage, CMS requires only a 90-day EHR reporting period for the payment incentive year involved. Subsequent reporting periods for that MU stage last for the entire year. The HITECH Act does not specifically prohibit CMS from using one EHR reporting period for multiple payment incentive years; thus, CMS could modify the EHR reporting periods it established under rulemaking to implement the CHIME proposal. Further, while the law directs CMS to conduct a yearly assessment of meaningful use, it does not prohibit CMS from creating reporting period options that span more than one year for a specific incentive year as long as each year includes an assessment. Thus, we believe CMS

may extend EHR reporting periods by one, two, three or all four quarters in 2015 to determine meaningful use achievement in 2014 for the incentive payment.

Payment Adjustments

The structure of the HITECH Act separates the rules for the payment incentives and the payment adjustments; they are in different places of title XVIII of the Social Security Act. The statute fails to directly link the reporting periods used for these two aspects of the Medicare EHR Incentive Program by cross-reference or other means. Thus, we believe that CMS may use a different EHR reporting period for purposes of the payment adjustment than it used for purposes of the payment incentive for a provider. Further, the language of the statute for the payment adjustment does not specify which EHR reporting period applies to determine a payment adjustment for a provider for a particular year; CMS under rulemaking established the two-year “look back” policy. Nothing in the language of the HITECH Act precludes CMS from applying an EHR reporting period for some or all of 2015 for purposes of the payment adjustment for 2015; likewise, CMS is not precluded from making payment adjustments retroactive to the start of a penalty year, for example during cost report settlement. Thus, under the CHIME policy proposal, CMS would not be required to impose a payment adjustment for 2014 for a provider that waited until 2015 to demonstrate meaningful use for 2014.

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