

“What keeps you up at night?”

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Part 2: Economic stimulus act provides incentives to adopt electronic health records and other health information technology

By Scott D. Patterson and Karen L. Palestini

On February 17, 2009, President Obama signed into law the Health Information Technology for Economic and Clinical Health Act (“HITECH Act”), as part of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”). The HITECH Act is intended to promote the development of a national health information technology (HIT) infrastructure, and to incentivize healthcare providers to deploy HIT, particularly for electronic health records (EHRs).

This Alert summarizes some of the key sections of the HITECH Act, including provisions for the development of HIT standards and policies, significant Medicare/Medicaid incentives for hospitals and physicians, and multiple HIT assistance programs. HIPAA privacy and security “improvements” included in this legislation are covered in a previous Alert, which can be found at http://www.saul.com/common/publications/pdf_1875.pdf.

DEVELOPMENT OF HIT STANDARDS AND POLICIES

The HITECH Act formalizes and funds an Office of the National Coordinator for Health Information Technology, backed by a HIT Policy Committee and a HIT Standards Committee. The National Coordinator and HIT Committees are charged with developing standards, implementation specifications, and certification criteria for the electronic exchange and use of health information. The National Coordinator will certify specific technology as compliant, presumably following the model of the existing **Certification Commission for Healthcare Information Technology** (CCHIT), which certifies applications based on their demonstrated functionality, interoperability, and security. The HITECH Act also directs the HIT Standards Committee to follow standards recommendations of the existing **National eHealth Collaborative** (NeHC) until the HIT Policy Committee provides further direction.

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These standards and certifications will be “voluntary,” except as may be required by agency contracts with providers, insurers, and health plans. However, the Act provides financial incentives for “voluntary” compliance, and eventual reimbursement deductions for noncompliance. HIT vendors will unquestionably want their products certified as compliant, and HIT customers wishing to benefit from the incentives for adopting compliant technologies will insist that their vendors commit to continuing compliance.

The HITECH Act specifically requires the HIT Policy Committee to target several critical objectives for evaluation and policymaking, including:

- Development of a nationwide infrastructure for the use and exchange of electronic health information;
- Creation of a certified EHR for “each person in the United States by 2014”;
- Use of HIT to reduce medical errors and improve the quality and continuity of care;
- Privacy and security protection, including HIPAA compliance;
- Development of patient demographic data;

Discretionary areas for consideration include such topics as self-service technologies, telemedicine, and facilitation of home health care.

The HITECH Act also opens the door to the possibility of direct government development of certified EHR technology, which the National Coordinator could offer to users at a “nominal fee” in competition with commercial EHR vendors. This option is only foreclosed if HHS determines that “the needs and demands of providers are being substantially and adequately met in the marketplace,” a test that seems designed to encourage EHR vendors to offer low-cost options (akin to “basic cable”) for smaller, low-income, and rural providers.

MEDICARE/MEDICAID INCENTIVES FOR HOSPITALS AND PHYSICIANS

Approximately \$17 billion of the \$19 billion appropriated to fund the HITECH Act has been allocated to the Medicare and Medicaid

Programs for the purpose of providing increased reimbursement to hospitals and physicians. To qualify for the increased reimbursement, hospitals and physicians must be “meaningful EHR users” (see below). Hospitals and physicians who fail to achieve meaningful use of EHR after 2014 will begin to see their Medicare and Medicaid reimbursements reduced.

“Meaningful EHR User”

To be considered a meaningful EHR user, the eligible hospital or physician must meet the following requirements:

- Demonstrate that it/he/she is using certified EHR technology in a meaningful manner, which shall include electronic prescribing;
- Demonstrate that the certified EHR technology is connected in a manner that allows for the electronic exchange of health information to improve the quality of health care consistent with the criteria set forth in the Act; and
- Submit information on clinical quality measures and other measures in a form and manner as specified by the Secretary of Health and Human Services (“HHS”) in later communications/guidance.

Demonstrating meaningful EHR use can be accomplished in the following ways:

- An attestation;
- Submission of claims with appropriate coding (e.g., use of a code indicating that a patient encounter was documented using certified EHR technology);
- A survey response;
- Reporting as specified above;
- Other means as may be specified by the HHS Secretary.

The names and contact information of eligible hospitals and physicians that are meaningful EHR users will be posted on the Centers for Medicare and Medicaid Services (“CMS”) website. The Act also gives the HHS Secretary the discretion to post the names and contact information of group practices that have received incentive payments.

Incentive Payment Calculations and Payment Years

For both physicians and hospitals, 2011 is the first year for which incentive payments will be available. Reporting and payment information will be coordinated among the Medicare, Medicare Advantage and Medicaid Programs, so that duplicative qualifying criteria and remuneration do not occur.

Physicians who are meaningful EHR users will be paid an initial amount not to exceed \$15,000 for their first year of meaningful EHR use, with decreasing amounts over the succeeding four years of meaningful EHR use; after which time, no additional payments will be made. There are additional incentives for physicians whose first year of meaningful EHR use begins in either 2011 or 2012 (they are eligible for a first year payment of up to \$18,000) and for physicians serving in “health professional shortage areas” (their payments will be increased by 10%). There are also some disadvantages for physicians who delay or fail to implement meaningful EHR use (e.g., if the first year of meaningful EHR use is after 2014, the physician is only eligible for up to \$12,000; and no incentives will be paid after 2016). Notably, “hospital-based” physicians are not eligible for these incentive payments.

Hospitals that are meaningful EHR users will be paid an amount based on an equation that takes into account a base amount of \$2,000,000, plus an additional amount using a tiered discharge formula and a “transition” multiplier. Other factors, such as the ratios of charity care discharges to non-charity care discharges, will also impact the ultimate payment calculation. Hospitals delaying, or failing to achieve by 2015, meaningful EHR use will receive reduced payments (e.g., a hospital first achieving meaningful EHR use in 2014 will have a lower year one incentive payment than it would have if it had achieved meaningful EHR use before that time; and hospitals failing to achieve meaningful EHR use by 2015 will receive no incentive payment for that year or for any subsequent year).

HEALTH INFORMATION TECHNOLOGY ASSISTANCE PROGRAMS

The HITECH Act also provides for and funds a variety of federal assistance programs, including provisions for a HIT Extension Program, a HIT Research Center and HIT Regional Extension Centers, as well as funding of state grants and EHR technology loan funds. The Act also provides support for demonstration projects for use of certified EHR technology in the clinical education of health professionals, and for development of educational programs in medical health informatics, which will provide grant opportunities for universities and medical centers.

If you have any question about these requirements or any other provisions of the HITECH Act, please feel free to contact any of the Saul Ewing attorneys listed below.

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