The Centers for Medicare and Medicaid Services has proposed two new significant hardship exemptions from the Medicare payment penalties under the Medicare Electronic Prescribing Incentive Program that would allow physicians who are not successful electronic prescribers under the program to avoid the penalties by adopting Certified Electronic Health Record (EHR) Technology and registering for the Medicare and Medicaid EHR Incentive Program and/or by achieving meaningful use under the EHR Incentive Program.

On July 6, 2012, the Centers for Medicare and Medicaid Services (CMS) proposed two additional “significant hardship” exemptions from the Medicare payment penalties for a physician or other eligible professional (EP) who fails to be a successful electronic prescriber under the Medicare Electronic Prescribing (eRx) Incentive Program. The proposed exemptions, which were included as part of the calendar year (CY) 2013 Medicare Physician Fee Schedule (MPFS) proposed rule, address the challenge of meeting the overlapping eRx requirements of the eRx Incentive Program and the Medicare and Medicaid Electronic Health Record (EHR) Incentive Program, and recognize that there is little, if any, added benefit to the Medicare program when an EP meets both programs’ eRx measures.

This On the Subject provides an overview of the eRx Incentive Program and discusses the two proposed additional hardship exemptions from the eRx penalties.

Overview of eRx Incentive Program
The Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) established the five-year eRx Incentive Program beginning in 2009 to encourage electronic prescribing by paying incentive payments to EPs (or their group practices) who successfully e-prescribe for covered professional services furnished to Medicare beneficiaries (and reimbursed under the MPFS). EPs are physicians and certain other professionals with prescribing authority for whom office visits, eye exams, psychotherapy or certain other services listed in the CMS eRx measure specifications represent at least 10 percent of their Medicare charges.

To be a successful electronic prescriber for 2012 and receive a 2012 eRx incentive payment, an EP must generate and transmit at least one electronic prescription during at least 25 unique office visits (or other services listed in the CMS eRx measure specifications) during 2012 and report those eRx events by using the eRx G-code, G8553, on the EP’s Medicare Part B claims. If an EP is a successful electronic prescriber in 2012 and 2013, the MPFS amount for covered professional services furnished by the EP during the year will be greater than the amount that would otherwise be payable by 1 percent for 2012 and 0.5 percent for 2013.

Beginning in 2012, MIPPA requires a penalty phase for EPs who are not successful electronic prescribers during 2012, 2013 and 2014. If an EP is not a successful electronic prescriber for the applicable year, the MPFS amount for professional services furnished by such EP will be lowered by 1 percent for 2012, 1.5 percent for 2013 and 2 percent for 2014.

To avoid eRx penalties in CY 2013, an EP must report the eRx G-code for an electronic prescription (during a service listed in the eRx measure specification) at least 10 times for the January 1, 2012, through June 30, 2012, reporting period on the EP’s Medicare Part B claims or qualify for one of the hardship exemptions.

Under the hardship exemptions, CMS may, on a case-by-case basis, exempt an EP from the requirement to be a successful electronic prescriber and from the eRx penalties, if CMS determines, subject to annual renewal, that meeting the requirement would result in a significant hardship for the EP. In the CY 2012 MPFS final rule, CMS finalized the following four circumstances under which an EP or group practice may request consideration for a significant hardship exemption for the 2013 and 2014 eRx penalties:

- The EP or group practice practices in a rural area with limited high-speed internet access.
- The EP or group practice practices in an area with limited available pharmacies for electronic prescribing.
- The EP or group practice is unable to electronically prescribe due to a local, state or federal law or regulation.
- The EP or group practice generates fewer than 100 prescriptions during a six-month reporting period.

Proposed eRx Penalty Hardship Exemptions

The two proposed additional hardship exemptions to the eRx penalties for the 2013 and 2014 payment adjustments are discussed below. CMS has specifically requested public comments on these two proposed exemption categories. Comments
are due by September 4, 2012.

**EP Achieves Meaningful Use**

Since an EP also must meet an e-prescribing measure to demonstrate meaningful use of Certified EHR Technology (as defined below) and receive EHR incentives payments under the EHR Incentive Program, CMS has proposed for the 2013 and 2014 eRx payment penalties, that an EP (or group practice) who demonstrates meaningful use during certain eRx payment penalty reporting periods would qualify for a significant hardship exemption. Specifically, individual EPs (and EP members of a group practice) would need to achieve meaningful use for a continuous 90-day EHR reporting period (as defined for the EHR Incentive Program) that falls within the six-month reporting period (January 1 to June 30, 2012) for the 2013 eRx payment adjustment, or the 12- or six-month reporting periods (January 1 to December 31, 2012, or January 1 to June 30, 2013, respectively) for the 2014 eRx payment adjustment to be eligible to request a significant hardship exemption. CMS also proposes that for purposes of the 2013 and 2014 eRx penalties the hardship exemption category would apply to individual EPs and group practices (that is, EP members of the group) that instead achieve meaningful use for an EHR reporting period that is the full CY 2012.

Certified EHR Technology is EHR technology that has been certified as meeting the U.S. Department of Health and Human Services Office of the National Coordinator of Health Information Technology’s technological capability, functionality and security requirements for supporting the achievement of meaningful use under the EHR Incentive Program. For more information on how EHR technology is certified, see McDermott’s *White Paper* “**Final Rule Establishes Permanent Certification Program for EHR Technology.**”

**EP Demonstrates Intent to Participate in EHR Incentive Program**

For the 2013 and 2014 eRx payment penalties, CMS has also proposed a significant hardship exemption category for EPs or group practices that have registered to participate in the EHR Incentive Program and adopted Certified EHR Technology prior to application of the respective payment penalties. CMS stated that this new hardship exemption is intended to reflect that adoption and implementation of Certified EHR Technology requires “installation, configuration, customization, training, workflow redesign and the establishment of connectivity with entities that facilitate electronic health information exchange (such as for electronic prescriptions).”

CMS stated that this proposal would be limited to EPs and group practices (1) that have not previously adopted Certified EHR Technology or received an incentive payment under the Medicare or Medicaid EHR Incentive Program, and (2) who attempt to participate in the Medicare and Medicaid EHR Incentive Program from January 2, 2012, through October 15, 2012, or the effective date of the final MPFS rule (which includes the six-month 2013 eRx penalty reporting period of January 1 to June 30, 2012) for the 2013 eRx penalties, or during the six-month eRx penalty reporting period for the 2014 eRx penalties (January 1 through June 30, 2013).
Proposed Deadlines and Procedures for Requesting Significant Hardship Exemptions

CMS proposes the following procedures and deadlines for requests for significant hardship exemptions from the 2013 and 2014 eRx penalties under the two proposed new exemption categories.

Process and Deadlines for 2013 eRx Penalties

CMS proposes that, in order to request a significant hardship under the two proposed significant hardship exemption categories for the 2013 eRx payment adjustment, CMS would analyze the information provided to it in the Registration and Attestation System under the EHR Incentive Program to determine whether the EP or group practice (that is, EP members of the group practice) has either (1) achieved meaningful use under the EHR Incentive Program during the applicable reporting periods discussed above, or (2) registered to participate in the EHR Incentive Program via the Registration and Attestation system for the EHR Incentive Program (accessible here) and adopted Certified EHR Technology, or both, if applicable.

EPs would be required to submit a significant hardship exemption request by October 15, 2012, or the effective date of the final rule for this provision, whichever is later, under both of the proposed exemptions. For those EPs who request a significant hardship exemption based on achieving meaningful use under the EHR Incentive Program during the 12- or six-month reporting periods for the 2013 eRx penalties, CMS also proposes that the EP would be required to have attested to meaningful use under the EHR Incentive Program by October 15, 2012 (or if later, the effective date of the final rule), in order to qualify for a significant hardship exemption to the 2013 eRx penalties. An EP requesting a significant hardship exemption for the 2013 eRx penalties under the second proposed significant hardship exemption category would be required to register for the EHR Incentive Program and adopt Certified EHR Technology by October 15, 2012 (or if later, the effective date of the final rule).

Process and Deadlines for 2014 eRx Penalties

CMS proposes to require 2014 eRx penalty exemption requests under the two proposed significant hardship exemption categories to be submitted via the communication support page (which is the method established for submitting the current significant hardship exemption categories) by June 30, 2013, which is also the submission deadline for the current exemption categories. Under the first proposed new exemption category, an EP or group practice (that is, all EP members of the practice) that achieves meaningful use under the EHR Incentive Program during the six- or 12-month reporting periods for the 2014 eRx penalties would be required to attest by June 30, 2013. EPs requesting a significant hardship exemption for the 2014 eRx penalties under the second proposed significant hardship exemption category would also be required to register for the EHR Incentive Program and adopt Certified EHR Technology by June 30, 2013, in order to qualify for a significant hardship exemption.
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