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STIMULUS BILL ALERT

Economic Growth and Development Team

HEALTH CARE IT PROVISIONS IN THE STIMULUS BILL

Part A, Title XIII

One of the most developed sets of provisions in the American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill") is Part A, Title XIII that addresses the topic of health information technology. The health information technology provisions of the Stimulus Bill are specifically called: "The Health Information Technology for Economic and Clinical Health Act" (the "HITECH Act").

Initially, the legislation codifies the existing position in the Department of Health and Human Services ("HHS") of the Office of National Coordinator for Health Information Technology ("National Coordinator"), that was created on April 27, 2004 by President Bush's Executive Order 13335. In fact, the Stimulus Bill largely adopts and codifies the existing program being conducted by HHS through its National Coordinator office. Indeed, a review of the actual provisions of the Stimulus Bill reveals that the baseline for this effort is essentially the Strategic Plan issued by Robert M. Kolodner, M.D., the current National Coordinator in June, 2008.

For example, the Stimulus Bill creates a formal process to harmonize existing Health Information Technology ("HIT") standards and identify and establish standards necessary to fill gaps in the existing standards to permit the development, implementation and maintenance of a nationwide, interoperable HIT system in the public and private sectors.

Similarly, the existing HIT advisory groups will be replaced by a HIT Policy Committee and a HIT Standards Committee that will report to the National Coordinator. Both of these committees will be subject to the Federal Advisory Committee Act.

The Stimulus Bill also requires federal agencies that implement, acquire or upgrade HIT systems to use HIT standards adopted under the provisions of the Stimulus Bill. In addition, the Stimulus Bill requires health care payers and providers that contract with the federal government to use HIT systems and products that meet the HIT standards adopted under the Act.

The Stimulus Bill expressly provides that the National Institute for Standards and Technology ("NIST") will test new HIT standards and support the establishment of a voluntary testing program by accredited testing laboratories. In addition, the Stimulus Bill requires NIST to award competitive grants to universities (or research consortia) to establish "Centers for Health Care Information Enterprise Integration". The Centers will be designed to generate innovative approaches to developing a fully interoperable national health care infrastructure as well as develop and use HIT.

Subtitle C of Title XIII of the Stimulus Bill sets forth various incentive programs for the development and implementation of HIT. Although no specific amounts are appropriated for the various programs described below, the Stimulus Bill provides that funds will be appropriated to make these HIT investments during the time period of Fiscal Year 2009 through Fiscal Year 2014.

The Stimulus Bill provides that the Secretary of HHS is to begin to expend funds on various aspects of the HIT program, advised by various agencies with relevant experience such as the National Coordinator, AHRQ, CMS, CDC and the Indian Health Services. These funds are to be used for: (i) HIT architecture to support secure data exchange; (ii) electronic health records not eligible for Medicare/Medicaid HIT incentive payments; (iii) training and dissemination of information on best practices to integrate HIT into health care delivery; (iv) telemedicine; (v) interoperable clinical data repositories; (vi) technologies and best practices for protecting health information; and (vii) use by public health departments. The implementation of these projects is to be conducted in accordance with the National Coordinator's strategic plan.

A second category of funding is designed to create a HIT "extension program" to assist providers in adopting and using certified electronic health record technology. This program will largely be conducted through the creation of a HIT Research Center, together with HIT Regional Extension Centers. These Regional Centers must be affiliated with nonprofit organizations and are designed to provide HIT assistance to providers in their region. The Regional Centers will be eligible for grants for up to 4 years of funding covering up to 50% of their annual operating and maintenance expenditures.

The Stimulus Bill also provides the National Coordinator authority to award planning and implementation grants to states or qualified state-designated entities to facilitate and expand electronic health information exchange. These grants will be awarded annually by the National Coordinator to undertake activities consistent with the National Coordinator's strategic plan.

Similarly, the National Coordinator is empowered to award competitive grants to states or Indian Tribes to establish loan programs for health care providers to purchase and/or upgrade to certified EHR technology, train personnel for the use of the technology and to improve the secure exchange of health information. Any approved loan program must contain matching funds, and provide that the loans to providers will be repaid within 10 years.

The Stimulus Bill contains a provision authorizing the Secretary of HHS to create a demonstration program for awarding competitive grants to medical, dental and nursing schools designed to integrate HIT into the clinical education of health care professionals. A separate education grant program allows the Secretary, in consultation with the Director of the National Science Foundation to provide funds to universities to establish or expand medical informatics programs.

Finally, the Conference Report on Part A, Title XIII of the Stimulus Bill specifically notes that Congress expects that nonprofit organizations will be organized solely to participate in HIT activities. Consequently, the Report notes that the IRS should deem these activities as fulfilling the statutory requirements of being a Section 501(c)(3) organization.

Part B, Title IV

In addition to the foregoing incentive programs, the Stimulus Bill contains additional incentives to providers to embrace HIT through the Medicare and Medicaid programs. These incentive provisions largely build upon the previously existing legislative and administrative efforts, such as the Medicare Modernization Act of 2003.

In addition, the Center for Medicare and Medicaid Services ("CMS") already administers a number of other programs to facilitate the adoption of electronic health records ("EHR"). For example, bonus payments are available to physicians participating in the Medicare Care Management Performance demonstration project for using certified EHR and reporting clinical performance data electronically.

Incentives for Professionals

In the Stimulus Bill, health care professionals who participate in the Medicare program can qualify for EHR incentive payments of up to $18,000 upon demonstration that the professional is a "meaningful user" of EHR technology, as defined in the Stimulus Bill. These incentive payments will be available during the period 2011-2016, and will vary based upon a variety of factors including the amount of treatment provided to Medicare beneficiaries by the professional. Moreover, an additional 10% incentive will be available to professionals located in health professional shortage areas.

These payments will not be available to hospital-based professionals because it is assumed that they will use their hospital's EHR. Similarly, there are significant limitations in the Stimulus Bill on professionals associated with Medicare Advantage plans from qualifying for these incentives.

Incentives for Hospitals

Subject to certain limitations, each hospital that participates in Medicare's inpatient prospective payment system ("IPPS") will be eligible for EHR incentives beginning in Fiscal Year 2011. To be eligible, an IPPS hospital must meet the statutory and administrative definitions of a "meaningful" EHR user.

The payment calculations are the sum of a base amount ($2 million) added to its discharge payment, which would then be multiplied by its Medicare share. In addition, the "Medicare share" will be calculated pursuant to another specific formula that takes true "charity care" into consideration. A qualifying hospital would receive 100% of the incentive payment in the first year it qualifies as a "meaningful" EHR user; 75% in the second year; 50% in the third year; and, 25% in the fourth year.

The Stimulus Bill provides that there is to be no administrative or judicial review of the determination of an incentive amount. The Stimulus Bill also provides for significant penalties to be assessed to IPPS hospitals that have not succeeded in meeting the "meaningful" EHR user standard, in the absence of a significant, demonstrated hardship.

Contrary to IPPS hospitals, critical access hospitals ("CAH") that are currently paid by Medicare on a "cost-plus" basis, will not be eligible for these incentive payments. However, a CAH will be eligible for a separate bonus payment program if it meets the test of a "meaningful" EHR user.

Similarly, hospitals associated with Medicare Advantage plans will not qualify for the IPPS incentive payments, and will have a more limited opportunity to obtain incentive payments under a different set of calculations.

Medicaid Provisions

Finally, it is important to note that health care providers (hospitals and professionals) who provide significant amounts of care and treatment under the Medicaid programs, will be eligible for EHR incentive payments. These payments will generally be in lieu of the EHR incentive payments available to providers in the Medicare program.

Accordingly, availability of these Medicaid payments will largely be limited to those professionals and hospitals that do not regularly treat Medicare patients such as childrens hospitals and pediatricians.

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