

CLIENT ADVISORY

IRS ISSUES ELECTRONIC HEALTH RECORDS GUIDANCE

INTRODUCTION

On May 11, 2007, the United States Internal Revenue Service (“IRS”) issued Guidance (the “Guidance”) in the form of a memorandum to exempt organizations addressing circumstances in which hospitals may provide physicians with financial assistance to acquire and implement software that is used predominantly for creating, maintaining, transmitting or receiving electronic health records (“EHRs”) for their patients. The Guidance comes almost a year after final regulations were issued by the United States Department of Health and Human Services (“HHS”) regarding the support of physician adoption of electronic prescribing (“e-prescribing”) and EHR technology. This Client Advisory provides an overview of the Guidance.

HHS REGULATIONS

The Medicare Modernization Act of 2003 (“MMA”), created Medicare Part D, the Prescription Drug Benefit. In order to improve patient care and control health care costs, Section 101 of the MMA directed the Secretary of HHS to establish regulations that permit certain arrangements to foster the adoption of e-prescribing technology. In response to Section 101, Secretary Michael Leavitt of HHS directed the Centers for Medicare and Medicaid Services (“CMS”) and the Office of Inspector General (“OIG”) to draft regulations to enable hospitals and other health care organizations to provide physicians with hardware, software and technical training necessary to support e-prescribing and EHRs. As the benefits of EHRs are similar to the benefits of e-prescribing in terms of reducing medical errors, coordinating care and improving efficiency, Secretary Leavitt decided to broaden the scope of the mandate of Section 101 to allow hospitals and health care organizations to also provide physicians with the support necessary to adopt EHRs.

The final regulations for the EHRs, which create both an exception to the Stark Law and a safe harbor under the Anti-Kickback Statute, permit hospitals and other health care organizations to provide physicians with non-monetary remuneration consisting of items and services in the form of software information technology and training services necessary and used predominantly to create, maintain, transmit or receive EHRs, provided certain provisions are met. These provisions include, but are not limited to, the following

- The items and services are provided by an organization to a physician;

- Before receipt of the items and services, the physician pays 15% of the donor's costs for the items and services. The donor does not finance the physician's payment or loan funds to be used by the physician to pay for the items and services;
- The donor does not take any action to limit or restrict the use, compatibility, or interoperability of the items or services with other e-prescribing or electronic health records systems;
- Neither the physician, nor the physician's practice, makes the receipt of items or services, or the amount or nature of the items or services, a condition of doing business with the donor
- Neither the eligibility of a physician for the items or services, nor the amount or nature of the items or services, is determined in the manner that directly takes into account the volume or value of referrals or other business generated between the parties.
- The provision of items or services is deemed not to directly take into account the volume or value of referrals or other business generated between the parties if any one of the following conditions is met: (i) the determination is based on the total number of prescriptions written by the recipient; (ii) the determination is based on the size of the recipient's medical practice; (iii) the determination is based on the total number of hours that the recipient practices medicine; (iv) the determination is based on the recipient's overall use of automated technology in his or her medical practice; (v) the determination is based on whether the recipient is a member of the donor's medical staff; (vi) the determination is based on the level of uncompensated care provided by the recipient; or (vii) the determination is made in any reasonable and verifiable manner that does not directly take into account the volume or value of referrals or other business generated between the parties;
- The electronic health records software contains e-prescribing capability;
- The arrangement is set forth in a written agreement;
- The donor does not shift the cost of the items or services to any federal health care program; and
- The items and services do not include staffing of physician offices and are not used primarily to conduct personal business or business unrelated to a physician's medical practice, the electronic health record software contains electronic prescribing capabilities.

Perhaps the most notable provision contained within the regulations for EHRs is the requirement that physicians pay fifteen percent of the donor's costs for the items and services. The preamble to the regulations states that this cost-sharing provision is entitled to encourage "prudent and robust electronic health records arrangements without imposing a prohibitive financial burden on physicians."

IRS GUIDANCE

The recently released Guidance from IRS acknowledges that many 501(c)(3) hospitals intend to establish interoperable EHR systems to improve the effectiveness and efficiency of medical care and to reduce medical errors. The Guidance references the HHS EHR Regulations and states that the IRS "will not treat the benefits a hospital provides to its medical staff physicians as impermissible private benefit or inurement in violation of Section 501(c)(3) of the Code if the benefits fall within the range of Health IT Items and Services that are permissible under the HHS EHR Regulations."

The Guidance states that in "Health IT Subsidy Arrangements", which are arrangements between a hospital and its medical staff physicians for the provision of Health IT Items and Services at a discount, both the hospital and the participating physicians must comply with the HHS EHR Regulations "on a continuing basis." Furthermore, Health IT Subsidy Arrangements must permit a hospital to access all of the EHRs created by a physician, to the extent provided by law, using the Health IT Items and Services subsidized by the hospital. The Guidance states that if a hospital decides to enter into Health IT Subsidy Arrangements, it must ensure that the Health IT Items and Services are available to all of its medical staff physicians and that the same level of subsidy is provided to all of the hospital's medical staff physicians or the letter of subsidy is varied "by applying criteria related to meeting the health care needs of the community."

CONCLUSION

The Guidance is clearly intended to support 501(c)(3) hospitals in their efforts to adopt EHRs. The critical issue from the IRS perspective is for hospitals to structure EHR arrangements in such a manner as to not result in impermissible private benefit of inurement. It is the recommendation of The Rogers Law Firm that any consideration to provide physicians with EHR technology be reviewed by our office so that we may appropriately structure an arrangement that meets the final regulations of HHS and the Guidance. Similarly, although the Guidance is silent with respect to e-prescribing, it is our recommendation that The Rogers Law Firm review any proposed arrangement to provide physicians with e-prescribing technology.