



AMERICAN COLLEGE OF PHYSICIANS  
INTERNAL MEDICINE | *Doctors for Adults*

July 25, 2011

Donald Berwick, MD  
Administrator  
Centers for Medicare & Medicaid Services  
Department of Health & Human Services  
P.O. Box 8013  
Baltimore, MD 21244-8013

**Re: Medicare Program; Proposed Changes to the Electronic Prescribing (eRx) Incentive Program [CMS-3248-P]**

Dear Dr. Berwick:

The American College of Physicians (ACP) appreciates this opportunity to comment on the above referenced Medicare Electronic Prescribing (eRx) Proposed Rule. ACP is the largest medical specialty society and second largest physician membership organization in the United States, representing 132,000 internal medicine physicians who specialize in primary and comprehensive care of adolescents and adults and medical students who are considering a career in internal medicine.

### **Overall Comment**

**The College continues to oppose and requests modification of the regulation in the current eRx Medicare rule, finalized as part of the 2011 CY Physician Fee Schedule final rule with comment period, which establishes a payment adjustment (penalty) on eligible professionals (EP) and group practices (GP) in 2012 that is based on eRx activities from 1/2011 to 6/2011.**

**However, the College does support the following basic elements of this proposed rule, which modifies and improves other provisions of the current eRx Medicare rule.**

- **It aligns the eRx incentive program and penalty with the Electronic Health Record (EHR) Meaningful Use Incentive Program,**
- **Provides additional significant hardship exemption categories for EP and GP to request an exemption during 2011 for the 2012 eRx payment adjustment due to a significant hardship, and**

- **Extends the deadline for submitting requests for consideration for the two significant hardship exemption categories for the 2012 eRx payment adjustment that were also finalized in the CY 2011 Medicare Physician Fee Schedule (PFS) final rule with comment period.**

**In addition to these changes, the College urges CMS to implement a hardship exemption, previously requested by the American Medical Association, for EP close to retirement age.**

The following discusses each element of the above general comment in greater detail:

- ***Continued Dissatisfaction with the 2012 Medicare eRx Rule*** – Under the current Medicare eRx rule finalized in the CY 2011 Medicare Physician Fee Schedule (PFS) final rule with comment period, eligible professionals and GP accrue a 1 percent payment adjustment (penalty) on total allowed 2012 Medicare Physician Fee Schedule charges if they did not report (via claims) at least 1 prescription for Medicare Part B patients created during an encounter that was generated and transmitted electronically using a qualified electronic prescribing system at least 10 times during the 6-month payment reporting period from January 1, 2011 to June 30, 2011. The College continues to oppose this regulation and requests relief. Many willing practices did not have enough time to implement eRx within the specified time period, particularly given that the final rule was not released until late 2010. This was a particular hardship on small practices, which are already struggling to meet many federal requirements (e.g. implementation of the 5010 Communication platform; adjusting to the new Face to Face requirement for home care recommendations) while providing effective, quality care to their patients. To rectify this situation, **the College urges CMS to add an additional reporting period in 2012 to provide physicians with more time to meet the required reporting requirement to avoid the 2012 eRx penalty. More specifically, the College urges CMS to establish an additional reporting period in 2012 (e.g., January 1, 2012 – June 30, 2012) to avoid the 2012 eRx penalty.**
- ***Aligning the eRx incentive program and penalty with the Electronic Health Record (EHR) Meaningful Use Incentive Program---*** Under the current 2012 Medicare eRx regulations, EP who participated in the Medicare or Medicaid EHR Incentive program cannot qualify for an eRx incentive payment, but remain vulnerable to receiving a payment adjustment if they did not meet the reporting requirements to avoid the penalty under the eRx program. Besides being quite confusing to our members, this situation adds an unnecessary burden on EP since both the EHR and eRx programs require the demonstration of eRx capability. If an EP is displaying this functional capability for eRx within the EHR program, they should not have to demonstrate it again through an entirely different reporting mechanism to avoid the eRx penalty. This is clearly not consistent with President Obama's July 11, 2011, Executive Order calling on federal agencies to reassess and streamline regulations. The proposed rule rectifies this situation by:

- recognizing EHR technology certified under the Medicare/Medicaid EHR incentive program as a qualifying system under the eRx incentive and penalty programs, and
- adding a hardship exemption for EPs who register **to participate in the Medicare or Medicaid EHR Incentive Programs and adopt Certified EHR Technology by October 1, 2012.**

**The College strongly supports both proposed changes to the 2012 eRx regulations that serve the purpose of improved alignment of the eRx incentive program and penalty with the Electronic Health Record (EHR) Meaningful Use Incentive Program.**

- ***Providing additional significant hardship exemption categories for eligible professionals and GP to request an exemption during 2011 for the 2012 eRx payment adjustment due to a significant hardship---***The proposed rule adds the following three hardship categories for EP and GP to request an exemption during 2011 for the 2012 eRx payment adjustment.
  - An exemption to EP and GP due to the inability to electronically prescribe due to local, state, or federal law or regulation.
  - An exemption to EP who have prescribing privileges but who do not prescribe or prescribe only on a limited basis (i.e. prescribed fewer than 10 prescriptions between January 1, 2011 and June 30, 2011).
  - An exemption to EP and GP who have insufficient opportunities to report the eRx measure due to program limitations (e.g., a surgeon who e-prescribes but does not frequently use the service codes allowed under the program).

**The College strongly supports the addition of each of these hardship categories, as they make the requirements of the 2012 eRx incentive and penalty program more consistent with real world eRx use limitations.**

- ***Hardship Exemption Request Process and Deadlines*** – The proposed rule allows EP and GP until October 1, 2011 to submit a request for a hardship exemption from the 2012 eRx penalty either by mail or a proposed web-portal tool. This deadline also covers the two hardship exemptions included in the **CY 2011 Medicare Physician Fee Schedule (PFS) final rule with comment period**, which were for:
  - an EP or GP in a rural area with limited high speed Internet access; and
  - an EP or GP in an area with limited available pharmacies for eRx.

In addition, the proposed rule states that to the extent the final rule is not effective by October 1, 2011, then CMS proposes that the EP or GP must submit the hardship request by no later than 5 business days after the effective date of the final rule.

**While the College is not necessarily opposed to the October 1, 2011 submission deadline, we want to ensure that EP and GP who qualify for one of these new**

**and existing hardship categories have sufficient time to learn the details related to qualifying and requesting these exemptions. Thus, we suggest that the request deadline be at least 30 days following the effective date when this proposed rule is finalized. Furthermore, the College strongly supports the creation of the proposed web-portal to make exemption requests. If such a portal is not available during the reporting period, the College requests that in addition to making exemption requests via mail, the GP and EP should also be able to request these exemptions by phone. The goal should be to make these requests as minimally burdensome as possible. In addition, while the College believes that the information being requested by CMS to apply for these exemptions is appropriate and reasonable, we urge CMS to establish an appeals process for EPs and GP whose request for a significant hardship exemption is denied in order to insure the validity of the determination,**

- ***Exception for EP close to retirement---***The American Medical Association (AMA), in previously submitted comments related to the eRx incentive and penalty program, proposed the addition of a hardship exemption for physicians who are currently eligible for Social Security benefits or will be eligible for Social Security benefits by 2014. It is economically burdensome for many of these physicians who intend to retire in the next several years to install and use an eRx system. The AMA further expressed the concern that many of these physicians may decide to close their Medicare fee-for-service panels or opt out of Medicare to avoid penalties during the end stage of their clinical careers, which would adversely affect access to care for our nation's elderly and disabled. The College supports this recommendation. More specifically, **the College urges the addition of a hardship exemption category for physicians who are currently eligible for Social Security retirement benefits or will be eligible for Social Security retirement benefits by 2014.**

The College commends CMS' efforts to improve the 2012 eRx incentive and penalty program through the modifications included in this proposed rule. We believe the additional recommendations made by the College complement and extend these improvements. Please contact Neil Kirschner at 202 261-4535 or [nkirschner@acponline.org](mailto:nkirschner@acponline.org) if you have any specific questions regarding these comments.

Respectfully,



Donald Hatton, MD, FACP  
Chair, Medical Practice and Quality Committee (MPQC)