

Ober|Kaler Healthcare Information Privacy, Security and Technology Bulletin



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Electronic eRx Hardship Exemption Request Deadline Extended to Midnight November 8

In response to provider complaints regarding its web-interface, CMS has extended the deadline to electronically file hardship exemption requests from the 2012 payment adjustment of the eRx Incentive Program (the “Program”). In a statement on a [CMS website devoted to the payment adjustments](#), CMS explained, “**The Communication Support Page will remain available for eligible professionals to submit their 2012 eRx Payment Adjustment Significant Hardship Exemption Request until November 8, 2011 at 11:59:59 PM EST.**” It is through the Communication Support Page (“CSP”) and only through the CSP that individual eligible professionals (as opposed to group practices) may file electronic requests for exemption from the pending 2012 “payment adjustment” (a 1% decrease in all 2012 Part B professional services paid under the Medicare Fee Schedule). “Eligible Professionals” who are subject to the requirements of the eRx Program and who failed to qualify as “successful electronic prescribers” by June 30, 2011 should immediately take steps to assess, and, as necessary, request a hardship exemption from the 2012 payment adjustments.

The eRx Program follows a “carrot and stick” structure. The Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), Pub. L. 110-275, authorized eRx. In 2009, CMS promulgated regulations implementing the eRx program, which (first) offers incentive payments to providers that are “successful electronic prescribers” using “qualified” eRx technology. For providers that are successful electronic prescribers during

the 2011 reporting period, for instance, the eRx program offered an incentive of 1% of the provider's estimated Medicare Part B allowed charges for professional services furnished during the year.

Beginning during 2011, however, the Program's "stick" also began to fall – eligible professionals who failed to submit claims data indicating a minimum number of electronic prescriptions during the "2012 payment adjustment reporting period" (which ran from January 1 through June 30, 2011) will be penalized 1% of their Part B professional fees for the entire 2012 year. Penalties will increase by a half percentage for both 2013 (1.5%) and 2014 (2%) for professionals who fail to report a sufficient number of electronic prescriptions during the reporting periods for those years.

At least initially, program penalties were to apply without exception; if an eligible professional failed to become a successful electronic prescriber within the designated time, his or her payments would be reduced. As 2011 is drawing to a close, however, CMS was urged to (and did) provide for several categories of exemptions which were made available (but not guaranteed) for professionals for whom complying with program requirements would pose a "hardship." Initially, only two exemption categories were created (for rural providers without highspeed internet access and providers who practiced in an area without sufficient pharmacies to make electronic prescribing practical) and professionals who wished to request an exemption were required to do so by reporting certain G-codes. More recently, [CMS issued a final rule \[PDF\]](#) creating several additional exemption categories and requiring that exemption requests from individual professionals be submitted through an [online utility](#). For "Eligible Professionals" who are subject to the eRx Program requirements but failed to report a sufficient number of electronic prescriptions by June 30, 2011, filing a hardship exemption request is the only possible way to avoid the 2012 payment adjustment.

Eligible Professionals may now submit requests for hardship exemptions if they fall into any one (or more than one) of the following categories:

- The Professional adopted Certified EHR Technology and has registered to participate in the 2011 program year of the Medicare or Medicaid EHR Incentive Program;
- The Professional is unable to electronically prescribe as a result of local, state, or federal law or regulation;
- The Professional has limited prescribing activity;
- The Professional had insufficient opportunities to report the electronic prescribing measure;
- The Professional practices in a rural area without high speed internet access;
- The Professional practices in an area with an insufficient number of pharmacies that accept electronic prescriptions.

Exemption requests must be [filled out and electronically submitted](#) by the Eligible Professional requesting the exemption. Unlike other programs (such as the EHR Incentive Program, or “Meaningful Use”) CMS will not permit office or administrative staff to fill out or execute exemption requests on behalf of the subject professionals. CMS has provided a [website with links to guidance documents and the request form itself](#). With the deadline now extended, the form must be completed and submitted before midnight eastern standard time on Tuesday, November 8, 2011. Exemption requests will be reviewed on a “case-by-case” basis by CMS and professionals are not guaranteed an exemption simply by properly filling out and submitting the request form. That being said, for professionals who failed to meet program requirements by June 30, 2011, there is little to be lost in truthfully requesting an exemption (and 1% of 2012 professional fees to be gained).

Ober|Kaler's Comments

Professionals concerned that they might face a 2012 payment adjustment should first determine whether they are, in fact, an “Eligible Professional.” Eligible Professionals are defined in the regulation to include physicians, nurse practitioners, and physician assistants who meet certain requirements. If a professional is “eligible” as described by the regulations, and have not reported the electronic prescribing measure as required, they should quickly take steps to investigate their eligibility for a hardship exemption.

The eRx Program currently provides several subjective paths to an exemption. Importantly, the [Program regulations](#) providing for the hardship exemption requests do not explain the required elements of each category of exemption. Eligible Professionals who intend to claim an exemption would be well served to take the time, between now and November 8, to review the [preamble to the final rule \[PDF\]](#) to be certain that A) they actually meet the requirements of the exemption category they intend to claim and B) they sufficiently demonstrate that they have met the requirements in the exemption request form. A condensed version of these requirements is also available in a [“Quick Reference Guide” \[PDF\]](#) provided on the CMS eRx Program website. Since exemption requests decisions will not be appealable, it is essential that professionals fill out the request forms accurately, completely, and with reference to the applicable exemption request standards CMS describes in the preamble to the final rule. Even then, exemptions will not be guaranteed, but professionals who fail to review the standards described in the preamble may lose an exemption they in fact deserved.

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