



## Client Alert

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### **Stimulus Package Will Have Significant Impact on Health Care Industry**

The federal stimulus package, officially known as the American Recovery and Reinvestment Act of 2009 (the "Act"), signed into law on February 17, 2009, contains a number of healthcare provisions that will affect private insurance beneficiaries as well as Medicare and Medicaid providers. In addition to the billions of dollars in new appropriations, some of the more significant healthcare provisions covered by the Act include i) additional state Medicaid funding and Medicare payments for teaching hospitals, hospices, and long term care hospitals; ii) funding for comparative effectiveness research, and iii) a combination of incentives and penalties to encourage the use of health information technology and electronic health records by healthcare providers.

#### **Medicare and Medicaid Payment Provisions**

The stimulus package will mean an additional \$86.6 billion to increase the federal government's contribution for Medicaid costs and help states close their budget gaps. The Act provides for the additional funding to States beginning October 1, 2008 through December 31, 2010 by providing an across-the-board increase in the Federal Medical Assistance Percentage of 6.2%. To further assist states that are already experiencing significant budget shortfalls and cannot fully fund their Medicaid programs, a bonus structure will decrease each state's financial obligations to Medicaid as that state's unemployment rate rises.

The Act also calls for the following significant changes in the Medicaid add Medicare payment system:

- Increases Disproportionate Share Hospital (DSH) payments by 2.5% for fiscal years 2009 and 2010. After fiscal year 2010, the annual DSH allotments would return to 100% of the annual DSH allotments, as determined under current law.
- Extends the moratoria on Medicaid regulations for targeted case management, provider taxes, and school-based administration and transportation services through June 30, 2009.
- Adds a moratorium on the Medicaid regulation for hospital outpatient services through June 30, 2009.
- Extends Transitional Medical Assistance (TMA) beyond the current expiration date of June 30, 2009, to December 31, 2010, at an estimated cost of \$1.3 billion.
- Extends the qualified individual program, which assists certain low-

income individuals with Medicare Part B premiums, through December 31, 2010, at an estimated cost of \$550 million.

## **Funding Comparative-Effectiveness Research Provision**

The Act will authorize \$1.1 billion to compare the effectiveness of drugs, medical devices, surgery, and other ways of treating specific conditions. The Act creates a council of up to 15 federal employees to coordinate the research and advise President Obama and Congress on how to spend these funds. This provision has raised concerns about the use of “comparative-effectiveness” research and whether such research would be used to drive coverage decisions by government or private insurers. While the stimulus bill does not direct the 15-member council to dictate coverage, the council will make recommendations about what to study and coordinate research between the Agency for Healthcare Research and Quality, the National Institutes of Health and the Department of Health and Human Services (DHHS).

## **Incentives for the Use of Health Information Technology, Including Electronic Health Records**

Perhaps the most significant impact of the stimulus package will be the growth of health information technology, via a system of incentives and penalties designed to encourage the wide spread usage of health information technology and Electronic Health Records (“EHR”), throughout the health care industry. According to the Congressional Budget Office, approximately 90% of physicians and 70% of hospitals will be using comprehensive electronic health records within the next decade as a result of the health information technology measures included in the economic stimulus package.

To effectuate this policy goal, the economic stimulus package includes provisions titled the Health Information Technology for Economic and Clinical Health Act (“HITECH Act”). The HITECH Act will do the following:

- Spend approximately \$19.1 billion to create a nationwide system of electronic medical records, with about \$300 million to be used as grants to support regional health-information exchanges.
- Establish a HIT Standards Committee and a HIT Policy Committee to assist the Office of the National Coordinator for Health Information Technology (part of DHHS) in adopting a nationwide health information technology infrastructure, including standards and programs for certification of health information technology
- Beginning in 2011, physicians would get bonuses of up to \$44,000 over five years, and hospitals would get on average several million dollars, if they can demonstrate that they have adopted computerized patient records and have become “meaningful users” of such technology;
- Physicians who primarily furnish services in a “health professional shortage area,” as designated under section 332(a)(1)(A) of the Public Health Service Act, would receive an additional 10% bonus in addition to the standard incentives;
- Incentive payments would not be made to “hospital-based eligible professional” as defined by the Act.
- For those providers who have not adopted electronic medical records by 2014, Medicare payment

penalties would apply beginning in 2015, with a one percent decrease in the eligible professional's reimbursement rate per year up to a cumulative rate reduction of five percent by 2019.

- The Act does provide for a "hardship case" exception, where an eligible professional may, on a case-by-case basis, seek an exemption from these requirements for being a "meaningful" EHR user if they would result in a significant hardship, such as in the case of an eligible professional who practices in a rural area without sufficient Internet access. However, in no case may an eligible professional be granted an exemption under this subparagraph for more than 5 years.

As currently written, there are several portions of the HITECH Act that will require further scrutiny and likely impact the delivery of medical services. The definitions of "meaningful user" (defined, in part as a "professional ...using certified EHR technology in a meaningful manner") will require further regulations and guidance from the Secretary of DHHS. Significantly, the current act states that shall be no administrative or judicial review of determinations for such important elements of HITECH as the i) the methodology and standards for determining payment amounts; (ii) the methodology and standards for determining a "meaningful EHR user"; (iii) eligibility for the hardship exception from the HER requirements; and (vi) the methodology and standards for determining whether a physician is a "hospital-based eligible professional" who is not eligible for the EHR incentives.

There are a number of additional provisions included in the stimulus package that will significantly impact the way health care provider utilize electronic medical records and that will require modification of these entities' patient record policies and procedures. AGG will continue to update our clients with information on compliance, guidance issued by the Secretary of DHHS, and relevant implementation dates in the coming months.

The full text of the American Recovery and Reinvestment Act of 2009 can be found here: <http://www.gov-track.us/congress/bill.xpd?bill=h111-1>

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