

United States Senate

WASHINGTON, DC 20510

February 9, 2010

Secretary Kathleen Sebelius
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Sebelius:

We write to express our disappointment related to the Notice of Proposed Rule Making (NPRM) by the Centers for Medicare and Medicaid Services (CMS) on Section 4101 of the American Recovery and Reinvestment Act (ARRA, P.L. 111-5). CMS's interpretation of section 4101(a)(C)(ii) disregards our clear intent to ensure that provider-based entities—including some of the nation's highest quality providers—are eligible for incentive payments for Electronic Medical Record (EMR) investments under this section.

Excluding provider-based entities would penalize some of the nation's pioneers of EMR use. These early adopters have invested millions of dollars in EMRs, electronic prescribing systems, patient registries, and other technologies in order to improve patient care. These investments have been made to benefit patient care and are mostly without reimbursement by any payer, private or public.

As you know, Congress provided \$19 billion for investment in EMR systems in ARRA. Congress was careful not to provide EMR bonus payments to "Hospital Based Eligible Professionals," or physicians who furnish substantially all of their services in a hospital setting "...such as a pathologist, anesthesiologist, or emergency physician." The purpose of Section 4101(a)(C)(ii) was to prevent physicians from "double dipping" and receiving payments when their practice is primarily in the hospital setting.

To ensure that Section 4101(a)(C)(ii) would not be misconstrued to preclude some of the nation's leading integrated health providers from receiving the HIT bonus payments because they are classified as "provider-based" entities, we added language to clarify our intent to exclude provider-based entity physicians that are providing ambulatory care services from the term "Hospital-Based Eligible Professionals." The new language states:

The determination of whether an eligible professional is a hospital-based eligible professional shall be made on the basis of the site of service (as defined by the Secretary) and without regard to any employment or billing arrangement between the eligible professional and any other provider.

The ARRA Conference Report also included additional explanatory language regarding provider-based entities' eligibility for EMR incentive payments under Section 4101:

The conference agreement, like the House and Senate-passed bills, prohibits payments to hospital-based professionals (because such professionals are generally expected to use the EHR system of that hospital). This policy does not disqualify otherwise eligible professionals merely on the basis of some association or business relationship with a hospital. Common examples of such arrangements include professionals who are employed by a hospital to work in an ambulatory care clinic or billing arrangements in which physicians submit claims to Medicare together with hospitals or other entities. The change in the conference agreement clarifies that this test will be based on the setting in which a provider furnishes services rather than any billing or employment arrangement between a provider and hospital or other provider entity.

Finally, there has been substantial input from Congress. Senate Finance Committee Chairman Max Baucus and Senator Debbie Stabenow engaged in a February 5, 2009 colloquy discussing the need for Congress to ensure that physicians providing ambulatory care services in provider-based entities would be eligible for EMR incentive payments. Additionally, several Senators and Representatives submitted letters to CMS supporting congressional intent on this matter.

Despite these efforts, CMS did not follow our clear intent. The NPRM specifically states that it would exclude provider-based entities from receiving EMR funds. This disregard for statutory language, conference report language, the congressional record, and letters of support is startling and will be devastating for our nation's providers.

We hope you will instruct CMS to follow clear congressional intent in the final rule. We thank you for your attention to this issue, which is critically important to our states as well as these early champions of EMR systems.

Sincerely,

Debbie Stabenow

Alyson S. Snow

John F. Kerry

Kent Conrad

Carl Levin

Mark R. Warner

Allen Speer

Sherrill Byrum

Herb Kohl

James Feinstein

Al Fraker

Ang Klobuchar

Barbara Byrnes

Jim Buckley

Edward L. Ferguson

Bob Carey, Jr.

Al Otisell
