Pierce & Mandell, P.C.

Attorneys at Law
11 Beacon Street, Suite 800
Boston, MA 02108-3002
(617) 720-2444 Fax: (617) 720-3693
www.piercemandell.com

CLIENT ALERT **October 1, 2010**

Federal Stimulus EHR Incentive Payments
Final "Meaningful Use" Regulations

On July 13, 2010 CMS issued its final regulations (Final Rule) defining "Meaningful Use" for hospitals and Eligible Professionals (EPs, which includes physicians) to qualify for EHR incentive payments to under the HITECH Law provisions of the federal stimulus act (American Reinvestment & Recovery Act, Public Law 111-5). The Final Rule (published at 75 Federal Register 443130) provides greater flexibility and allows for individual design in meeting the Meaningful Use requirements through a phased-in approach than did CMS' proposed rule issued in January of this year. The initial phase (for 2011-2102) is called Stage 1. The incentive payments are made under the Medicare and Medicaid programs. EPs can receive up to $44,000 under Medicare over five years, or up to $63,750 under Medicaid over six years (they must elect the program to be paid under, and may not be paid under both). Hospitals are paid according to formulas based on their Medicare or Medicaid patient volumes; hospitals may receive payments under both programs.

Key provisions of the Final Rule are as follows:

- The Final Rule divides the objectives for demonstrating Meaningful Use into a "*core*" group of fourteen (14) required objectives for hospitals and fifteen (15) required objectives for EPs, and a "*menu set*" of ten (10) procedures from which providers may choose to implement five (5) in 2011-2012, and defer the remaining five (5) for subsequent compliance in the later program Stages.

- The required **core group** consists of: record patient demographics; record vital signs and chart changes; maintain up-to-date current and active diagnosis problem list; maintain active medication list; maintain active medication allergy list; record smoking status; provide patients with clinical summaries of office visits (EPs), provide electronic discharge summaries on request (for hospitals); provide patients with electronic copy of health information on request; generate and transmit permissible prescriptions electronically (not applicable to hospitals); CPOE for medication orders; implement drug-drug and drug-allergy interaction checks; implement capability to electronically exchange key clinical information among providers and patient-authorized entities; implement one clinical decision support rule and ability to track compliance; implement systems to

protect privacy and security of patient data in the EHR; report clinical quality measure to CMS or states.

- The **menu set** covers drug formulary checks, clinical lab results, patient lists by specific conditions, patient-specific education resources, medication reconciliation between care settings, summary of care record for referred or transitioned patients, electronic immunization data submittal, electronic syndromic surveillance data submittal, record advance directives (for hospitals), submittal of electronic data on reportable lab results (for hospitals), reminders to patients for preventive and follow-up care (for EPs), timely electronic access for patients to their health information (for EPs).

- The core group and menu set selections must be achieved in payment years 2011 and 2012. The remaining menu set tasks will be subject to a timetable to be determined subsequently by CMS.

- The Final Rule confirms that eligible hospitals will be identified based on their individual CMS Certification Number (CCN); payments will thus be based on the CCN rather than location.

- The Final Rules clarifies that EPs who practice in ambulatory settings (e.g., outpatient and clinic practice) are eligible to qualify for the incentive payments; only those hospital-based EPs who provide 90% or more of their covered professional services in inpatient or emergency settings (as defined by HIPAA billing codes POS 21 and 23) are not eligible for the payments. So long as HPS does not use these codes for site of service, its physicians would be eligible; indeed, given HPS' operation as a group medical practice, its physicians would be eligible and HPS could through assignment from the physicians receive the payments, even though HPS is a hospital-controlled entity.

- For Medicare, qualifying eligible hospitals and EPs must also qualify in each subsequent year in order to receive the maximum total payments. For Medicaid, eligible providers may qualify in non-consecutive years, except that for hospitals, starting in 2016, incentive payments must be made every year in order to continue receiving payments.

- Reporting: The Final Rule limits the number of reportable clinical quality measures for hospitals to fifteen (15); EPs are required to report on a total of six (6) clinical quality measures using certified EHR technology. Providers will use an attestation methodology to submit information to CMS in 2011. Electronic submittal of clinical quality data is planned for subsequent years.

- Concurrently with the Final Rule, the Office of National Coordinator for Health Information Technology (ONC) issued a complementary final rule on certification criteria, so that providers can be assured that the certified EHR technology they adopt will be capable of performing the required functions for achieving Meaningful Use.

- ONC projects that certified EHR software will be available for purchase by Fall 2010.

- Registration of eligible hospitals and EPs for the EHR incentive program will begin in January 2011. Attestations for Medicare may be made starting in April 2011 for both eligible hospitals and EPs, with Medicare incentive payments beginning in mid-May 2011. States will initiate their Medicaid incentive programs on a rolling basis, subject to CMS approval of the state HIT plan for the incentive program.

- A CMS slide presentation on the Final Rule can be found at http://www.cms.gov/EHRIncentivePrograms/Downloads/EHR_Incentive_Program_Agency_Training_v8-20.pdf

- The Massachusetts e-Health Institute has announced a schedule of Regional Extension Center summits for providers about the incentive program from August-November, including dates for Fitchburg (November 3 – Fitchburg State College) and Brockton (October 7 – Good Samaritan MC). The AMA also plans to host a free webinar on Meaningful Use for physicians in the coming weeks.

If you have any additional questions or would like us to assist your organization with any of the steps to comply with these new regulations, please do not hesitate to contact William W. Mandell, Esq. at bill@piercemandell.com or Dean P. Nicastro, Esq. at dean@piercemandell.com at Pierce & Mandell, P.C. (617-720-2444).