American Society of Anesthesiologists

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May 7, 2012

Marilyn B. Tavenner
Acting Administrator and Chief Operating Officer
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201

Re: CMS-0044-P, RIN 0938-AQ84, Medicare and Medicaid Programs; Electronic Health Record Incentive Program Stage 2

Dear Ms. Tavenner:

On behalf of over 48,000 members of the American Society of Anesthesiologists (ASA), I would like to thank you for the opportunity to comment on the Electronic Health Record Incentive Program Stage 2 Proposed Rule (hereafter referred to as "Stage 2 Proposed Rule") that was published in the *Federal Register* on March 7, 2012. ASA remains supportive of the general goals of the EHR Incentive Program that was included as part of the American Recovery and Reinvestment Act. We strongly believe in the value of having EHRs, and particularly Anesthesia Information Management Systems (AIMS), in as many areas of care as possible, including the perioperative setting. Unfortunately, as currently structured, the EHR Incentive Program and the Stage 2 Proposed Rule severely limits the ability of anesthesiologists to participate.

After several years of attempting to seek appropriate modifications to the measures and regulations implementing the incentive program so that anesthesiologists can actively participate and demonstrate success, we are strongly disappointed by the Stage 2 Proposed Rule. Many anesthesiologists typically rely on hospitals and Ambulatory Surgery Centers (ASCs) to provide the anesthesia electronic health record, much like the facility provides other essential equipment. As a result, Congress intended to exempt anesthesiologists from the program because they were deemed a hospital-based eligible professional. Section 1848(o)(1)(C)(ii) of the law defines the term "hospital-based eligible professional" as "an eligible professional, such as a pathologist, **anesthesiologist**, or emergency physician, who furnishes substantially all of such services in a hospital setting (whether inpatient or outpatient) and through the use of the facilities and equipment, including qualified electronic health records, of the hospital." However, because the regulations implemented the definition of "hospital-based eligible professional" at a high threshold of 90% of services performed within the inpatient setting, the overwhelming majority of anesthesiologists are eligible for the program. More troubling is the fact that the overwhelming majority of anesthesiologists are also subject to the eventual payment adjustments, which could amount up to 5% annually.

Despite being deemed eligible by regulations finalized by the Centers for Medicare and Medicaid Services (CMS), many anesthesiologists have not been able to successfully participate in this incentive program during Stage 1. In fact, according to the data set "CMS Medicare and Medicaid EHR Incentive Program, electronic health record products used for attestation" (accessed via www.data.gov on April 20, 2012), only 398 anesthesiologists from across the country have been able to successfully attest.

In the Stage 2 Proposed Rule, CMS has still not addressed ASA's repeated requests for appropriate modifications to the criteria so that the program is applicable to anesthesiologists (see attached recommendations grid previously submitted to CMS). **If our concerns are not adequately addressed by CMS, most anesthesiologists will eventually face penalties due to Stage 1 and 2 criteria that were neither intended for anesthesiologists, nor prove helpful to their patients. These criteria have kept the overwhelming majority of anesthesiologists from receiving any Stage 1 incentive payments.**

We have repeatedly brought this issue to the attention of CMS and the Office of the National Coordinator (ONC) in our direct conversations and formal communications. In a letter dated March 15, 2010, we outlined many of our concerns with the Stage 1 requirements for meaningful use. In the March 15, 2010 letter we requested that CMS add a separate definition of hospital-based eligible professionals specifically for anesthesiology that would expand the place of service codes that would qualify. We proposed that CMS add the following language: "Anesthesia professionals (as determined by Medicare specialty designation), who provide substantially all of their covered services in an inpatient, outpatient, ambulatory surgery center or emergency department (POS codes 21, 22, 23, and 24 respectively) will be considered hospital-based eligible professionals." Alternatively, we stated that CMS could deem all Medicare professionals with an anesthesia-related specialty designation, such as "anesthesiology" to be hospital-based.

In a letter dated February 18, 2011, we proposed a specific path forward to ensure that the majority of anesthesiologists eligible for the incentive program have relevant and applicable criteria for which they can demonstrate compliance. **Regrettably, CMS has not addressed these suggested modifications. Therefore, anesthesiologists face significant regulatory barriers when attempting to earn the incentive payment, and face penalties as high as 5% beginning in 2015 if they do not comply.**

Another approach would be to allow anesthesiologists to seek a hardship exemption under a prospective fourth hardship exemption category. We support the hardship exemptions for eligible professionals that lack internet access, are newly practicing or face extreme circumstances. A carefully crafted fourth hardship exemption could relieve the regulatory burden for anesthesiologists that are, thru no fault of their own, unable to demonstrate meaningful use. Hospital-located eligible professionals who do not have any influence over

technology acquisitions and/or the data they have access to, and who are otherwise not supported by their hospitals, should be able to apply for a hardship exception. Additionally, eligible professionals should be able to apply for the exemption for five years, as outlined in the statute, instead of the two years discussed by CMS. Finally, a fourth exemption category should not include the "no face-to-face" and "no follow-up" prerequisite.

We request a specific meeting with CMS and ONC to review the list of Stage 1 and 2 criteria that are not applicable to a practicing anesthesiologist. We want to identify an achievable roadmap to encourage EHR adoption among our 48,000 members.

Congress correctly concluded that anesthesiologists should be deemed a hospital-based professional. We strongly urge CMS to modify the criteria so that the program is applicable to anesthesiologists or deem anesthesiologists as hospital-based professionals in the final rule. We look forward to constructively working with CMS to address this issue.

If you have any questions please feel free to contact Grant Couch (g.couch@asawash.org), Federal Affairs Associate or Jason Byrd (j.byrd@asawash.org), Director of Practice Management, Quality and Regulatory Affairs in our Washington office via email or by phone at 202-289-2222.

Sincerely,

Jerry A. Cohen, M.D.
President
American Society of Anesthesiologists

cc: Farzad Mostashari, MD, ScM