December 9, 2010

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building, Room 445-G
200 Independence Avenue, SW
Washington, DC 20201

Re: 2012 and 2013 Medicare e-prescribing penalty program detailed in the final rule on payment policies under the physician fee schedule and other revisions to Part B for CY 2011

Dear Secretary Sebelius:

The undersigned organizations strongly urge the Department of Health and Human Services (HHS) to intervene and require the Centers for Medicare & Medicaid Services (CMS) to revise its policy using e-prescribing activity during the first six months of 2011 as the basis for imposing e-prescribing penalties in 2012 (entire 2011 calendar year for 2013[1]). We strongly oppose basing the 2012 and 2013 e-prescribing penalties on e-prescribing activity that occurs during 2011. At the very minimum, CMS should extend the reporting period so that physicians have more time to comply. The law that established the Medicare e-prescribing program, the "Medicare Improvements for Patients and Providers Act of 2008" (MIPPA) (P.L. 110-275), clearly supports delaying penalties against physicians who do not e-prescribe to 2012. To avoid penalties in 2012, CMS is requiring that an eligible physician report the e-prescribing G-code, G8553, at least ten times for applicable Medicare office visits and services for the January 1, 2011 through June 30, 2011 reporting period. We urge HHS and CMS to revise the 2012 and 2013 penalty criteria. **Financial penalties should only be levied in 2012 and 2013 against Medicare eligible physicians who fail to qualify for an exemption and fail to e-prescribe ten permissible prescriptions by the end of 2012 or by the end of 2013.**

The most pressing concern regarding CMS' policy is the timing and messaging of the e-prescribing penalty program. Throughout the year, CMS along with other key stakeholders have been educating physicians on the various Medicare incentive programs and how they intersect with each other.

CMS' on-line Q&A on the Medicare e-prescribing incentive program states:

> Q: If I am receiving payments under the CMS Electronic Prescribing (eRx) Incentive Program, can I also receive Medicare and Medicaid Electronic Health Record (EHR) incentive payments?

[1] CMS may revisit the 2013 penalty criteria in future rulemaking.

A: If the eligible professional (EP) chooses to participate in the Medicare EHR Incentive Program, they cannot participate in the eRx Incentive Program in the same program year.[2]

Consistent with CMS' stance above on participation limitations, CMS and other educators have indicated to physicians across the country that they will not be able to receive incentives from both the Medicare e-prescribing and Medicare EHR incentive programs simultaneously. Therefore, in 2011, 2012, and 2013, physicians should choose to only participate in one of these programs. Many physicians who have not yet purchased an e-prescribing or an EHR system have decided to forego the e-prescribing incentives and invest in a comprehensive EHR. Now, at the eleventh hour through the November publication of its 2011 Final Fee Schedule Rule, CMS has significantly changed its policy and decided to penalize physicians who choose to only take part in the Medicare EHR incentive program and adopt a comprehensive EHR within the next few years that does more than just enable e-prescribing. We are also disappointed that CMS decided to require claims-based reporting and did not come up with any options for physicians to use a qualified registry or EHR to report e-prescribing activity to avoid penalties. This means that physicians who use a qualified registry or EHR will also have to submit claims with the G code in order to avoid a penalty.

CMS' sudden change to the program requirements that takes effect on January 1, 2011, does not allow enough time to educate physicians on the need for them to take part in the 2011 e-prescribing incentive program to avoid e-prescribing penalties in 2012 and 2013. In recent years, physicians have faced significant challenges successfully participating in some of CMS' programs, such as the Physician Quality Reporting System (formerly PQRI). How CMS handles the education, implementation, and administration of its programs greatly affect whether the policy that CMS is trying to implement is embraced by the physician community. Such a significant last minute policy change could substantially hurt the overall move to e-prescribing and EHR adoption.

It is also unfair and unreasonable to penalize physicians who are working in good faith to adopt a certified EHR product for participation in the Medicare EHR incentive program. Physicians who are or plan to participate in the EHR incentive program will now face separate, duplicative e-prescribing reporting requirements. CMS' last minute decision to require e-prescribing in 2011 forces physicians to spend additional financial and administrative resources to purchase, implement/train staff on, and use e-prescribing software or applications that most of them will end up discarding when they transition to a complete EHR. And, it will delay physicians' efforts to adopt a complete EHR. Intensifying these concerns is the 25 percent Medicare payment cut that physicians will face if Congress does not come up with a long term payment fix before January 1, 2011.

In these hard economic times, it is inconceivable to force physicians to purchase and use a stand-alone e-prescribing program during the initial months of 2011 to avoid penalties

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that by law are not even required to be imposed until 2012. Anticipating that issues may come up that would warrant exemptions from the e-prescribing penalty, Congress rightfully authorized the Secretary of HHS to develop categories for exempting eligible physicians and other health care professionals from penalties. In the proposed rule, CMS encouraged commenters to come up with recommendations for exception categories. CMS' decision to only accept its own proposed exception categories and dismiss all of the exception categories recommended by commenters is unacceptable. **HHS and CMS now have an opportunity to minimize the financial and administrative hardships created by the various, overlapping Medicare incentive and penalty programs by establishing additional exemption categories from penalties.**

In the final rule, CMS acknowledged that many commenters strenuously objected to the imposition of e-prescribing penalties on successful meaningful users. They urged the agency to synchronize the various, overlapping Medicare incentive programs so that, for example, eligible physicians who receive Medicare EHR incentives will be exempt from the Medicare e-prescribing penalties. Nonetheless, CMS decided that because these incentive programs are governed by different parts of the agency, it will administer them separately because it is easier for CMS to do so. With all the changes that physicians are confronting, HHS and CMS have an obligation to do a better job of coordination and reducing administrative burdens. CMS indicated in the final rule that they would make an effort to study possible methods of aligning these programs in the future. **Efforts must be made now, not later, to align these programs in order to alleviate confusion and the imposition of unjustified financial and administrative burdens on physician practices. Although we strongly oppose basing the 2012 and 2013 e-prescribing penalties on e-prescribing activity that occurs during 2011, we urge at the very minimum, the following immediate actions:**

- **CMS extend the reporting period so that physicians can report the e-prescribing G-code, G8553, at least ten times for applicable Medicare office visits and services during the first ten (not six) months of 2011 (January 1, 2011-October 31, 2011) to avoid penalties in 2012; and**

- **CMS add more exception categories consistent with recommendations made by commenters in response to the proposed rule so that more physicians and other health care professionals will be eligible for an exemption from e-prescribing penalties in 2012. For example, physicians who attest to meaningful use in 2011 or 2012 should be exempt from e-prescribing penalties.**

These immediate steps will allow CMS and others more time to educate physicians on the e-prescribing penalty program and to come up with better solutions, including additional exemption categories. We urge HHS and CMS to make these necessary changes to the e-prescribing penalty program immediately. Should you have questions about these comments, they can be directed to Mari Savickis at mari.savickis@ama-assn.org or 202-789-7414.

Sincerely,

Academy of Pharmaceutical Physicians and Investigators
AMDA – Dedicated to Long Term Care Medicine
American Academy of Dermatology Association
American Academy of Family Physicians
American Academy of Home Care Physicians
American Academy of Neurology
American Academy of Ophthalmology
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American Psychiatric Association
American Society for Gastrointestinal Endoscopy
American Society for Radiation Oncology
American Society for Surgery of the Hand
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American Society of Anesthesiologists
American Society of Cataract and Refractive Surgery
American Society of Clinical Oncology
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American Urological Association
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College of American Pathologists
Congress of Neurological Surgeons
Heart Rhythm Society

Infectious Diseases Society of America
Joint Council of Allergy, Asthma and Immunology
Medical Group Management Association
Renal Physicians Association
Society for Cardiovascular Angiography and Interventions
Society for Vascular Surgery
Society of American Gastrointestinal and Endoscopic Surgeons
Society of Gynecologic Oncologists
The Endocrine Society
The Society of Thoracic Surgeons

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