



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 495

[CMS-1656-F2]

RIN-0938-AS82

Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Procurement Organization Reporting and Communication; Transplant Outcome Measures and Documentation Requirements; Electronic Health Record (EHR) Incentive Programs; Payment to Nonexcepted Off-Campus Provider-Based Department of a Hospital; Hospital Value-Based Purchasing (VBP) Program; Establishment of Payment Rates under the Medicare Physician Fee Schedule for Nonexcepted Items and Services Furnished by an Off-Campus Provider-Based Department of a Hospital; Correcting Amendment

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Correcting amendment.

SUMMARY: In the November 14, 2016 issue of the **Federal Register** (81 FR 79562), we published a final rule with comment period entitled “Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Procurement Organization Reporting and Communication; Transplant Outcome Measures and Documentation Requirements; Electronic Health Record (EHR) Incentive Programs; Payment to Nonexcepted Off-Campus Provider-Based Department of a Hospital; Hospital Value-Based Purchasing (VBP) Program; Establishment of

Payment Rates under the Medicare Physician Fee Schedule for Nonexcepted Items and Services Furnished by an Off-Campus Provider-Based Department of a Hospital” that made changes to the demonstration of meaningful use criteria under §495.40. This correcting amendment corrects a technical error in §495.40 resulting from an error in that final rule with comment period.

DATES: This correcting amendment is effective on [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT:

Electronic Health Record (EHR) Incentive Programs, contact Kathleen Johnson (410) 786-3295 or Steven Johnson (410) 786-3332.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2016–26515 of November 14, 2016 (81 FR 79562), “Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Organ Procurement Organization Reporting and Communication; Transplant Outcome Measures and Documentation Requirements; Electronic Health Record (EHR) Incentive Programs; Payment to Certain Off-Campus Outpatient Departments of a Provider; Hospital Value-Based Purchasing (VBP) Program; Establishment of Payment Rates Under the Medicare Physician Fee Schedule for Nonexcepted Items and Services Furnished by an Off-Campus Provider-Based Department of a Hospital” (hereinafter referred to as the CY 2017 OP/ASC final rule with comment period), there was a technical error in the regulations text that is identified and corrected in this correcting amendment. The provisions of this

correcting amendment are treated as if they had been included in the CY 2017 OPPS/ASC final rule with comment period.

II. Summary of Error in the Regulations Text

On page 79892 of the CY 2017 OPPS/ASC final rule with comment period, we made a technical error in an amendatory instruction. Accordingly, we are revising §495.40(b)(2)(i)(G) to accurately reflect the language we previously included in the CY 2017 OPPS/ASC final rule with comment period (81 FR 79892), but which was not codified in the Code of Federal Regulations. Specifically, paragraph (b)(2)(i)(G) specifies that for CY 2018, an eligible hospital or critical access hospital (CAH) must satisfy certain required objectives and associated measures if an eligible hospital or CAH attests to CMS or to a State for the Medicaid Electronic Health Record (EHR) Incentive Program.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA, and section 1871(e)(1)(B)(i) mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date APA requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment

period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process are impracticable, unnecessary, or contrary to the public interest. In addition, both section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rulemaking that would be subject to these requirements. This correcting document corrects a technical error in the regulations text included in the CY 2017 OPPS/ASC final rule with comment period but does not make substantive changes to the policies that were adopted in the final rule with comment period. As a result, the corrections made through this correcting document are intended to ensure that the information in the CY 2017 OPPS/ASC final rule with comment period accurately reflects the policies adopted.

In addition, even if this were a rulemaking to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule with comment period or delaying the effective date would be contrary to the public interest because it is in the public's interest to ensure that the CY 2017 OPPS/ASC final rule with comment period accurately reflects our policies as of the date they take effect and are applicable.

Furthermore, such procedures would be unnecessary, as we are not altering our policies, but rather, we are simply correctly implementing the policies that we previously

proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the CY 2017 OPPS/ASC final rule with comment period accurately reflects these policies. For these reasons, we believe we have good cause to waive the notice and comment and effective date requirements.

List of Subjects in 42 CFR Part 495

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Health professions, Health records, Medicaid, Medicare, Penalties, Reporting and recordkeeping requirements.

Accordingly, 42 CFR part 495 is corrected by making the following correcting amendment:

**PART 495—STANDARDS FOR THE ELECTRONIC HEALTH RECORD
TECHNOLOGY INCENTIVE PROGRAM**

1. The authority citation for part 495 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. Amend §495.40 by revising paragraph (b)(2)(i)(G) to read as follows:

§ 495.40 Demonstration of meaningful use criteria.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(G) For CY 2018:

(1) For an eligible hospital or CAH attesting to CMS, satisfied the required objectives and associated measures under §495.24(c) for meaningful use.

(2) For an eligible hospital or CAH attesting to a State for the Medicaid EHR Incentive Program, satisfied the required objectives and associated measures under §495.24(d) for meaningful use.

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CMS-1656-F2

Dated: April 3, 2017

Ann C. Agnew,
Executive Secretary to the
Department,
Department of Health and Human
Services.

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