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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 412 and 495

CMS-3310 & 3311-F3

RINs 0938-AS26 and AS58

Medicare and Medicaid Programs; Electronic Health Record Incentive Program—Stage 3 and Modifications to Meaningful Use in 2015 through 2017; Corrections and Correcting Amendment

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

ACTION: Final rule; corrections and correcting amendment.

SUMMARY: This document corrects certain technical and typographical errors that appeared in the October 16, 2015 final rule with comment period titled "Medicare and Medicaid Programs; Electronic Health Record Incentive Program—Stage 3 and Modifications to Meaningful Use in 2015 through 2017."

DATES: This document is effective on [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2015-25595 of October 16, 2015 (80 FR 62762), in the final rule with comment period titled "Medicare and Medicaid Programs; Electronic Health Record Incentive Program—Stage 3 and Modifications to Meaningful Use in 2015 through 2017" (hereafter referred to as the 2015 EHR Incentive Programs final rule with comment

period) there were a number of technical errors that were identified and corrected in FR Doc. 2016-04785 of March 4, 2016 (81 FR 11447), titled "Medicare and Medicaid Programs; Electronic Health Record Incentive Program—Stage 3 and Modifications to Meaningful Use in 2015 Through 2017; Corrections and Correcting Amendment"¹. This document corrects additional technical and typographical errors that appeared in the 2015 EHR Incentive Programs final rule with comment period. The provisions in this correcting amendment are treated as if they had been included in the 2015 EHR Incentive Programs final rule with comment period.

II. Summary of Errors

A. Summary of Errors in the Preamble

We specified in the October 16, 2015 final rule (80 FR 62903-62905) that the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) (Pub. L. 114–10) amended section 1848(a)(7)(A) of the Social Security Act (the Act) to sunset the meaningful use payment adjustment for eligible professionals (EPs) at the end of calendar year (CY) 2018 and added section 1848(q) of the Act requiring the establishment of a Merit-based Incentive Payment System (MIPS), which would incorporate certain existing provisions and processes related to meaningful use. However, on the following pages, we made erroneous statements concerning a meaningful use payment adjustment for EPs under section 1848(a)(7)(A) of the Act in 2019:

- Page 62905, in our response to a public comment on the EHR reporting period for a payment adjustment year for EPs, we erroneously added a phrase stating that the

¹ We note that the name of the program was stated incorrectly in the title of the March 4, 2016 Corrections and Correcting Amendment (81 FR 11447).

90-day EHR reporting period in 2017 for Stage 3 would also apply for the purposes of avoiding the payment adjustment in 2019.

- Page 62906, in TABLE 18—EHR REPORTING PERIODS AND RELATED PAYMENT ADJUSTMENT YEARS FOR EPs, we incorrectly stated that, in 2017, the EHR reporting period for a payment adjustment year for Medicaid EP returning participants demonstrating Stage 3 is any continuous 90-day period in CY 2017 and applies to avoid a payment adjustment in CY 2019 if they successfully attest by February 28, 2018.

On page 62920, in TABLE 21—BURDEN ESTIMATES STAGE 3, we inadvertently included text that was proposed but not finalized which stated that, the EP, eligible hospital or CAH incorporates into the patient's record an electronic summary of care document "from a source other than the provider's EHR system". We are correcting this technical error to ensure that the language in the table is consistent with the language in the preamble and regulations text.

B. Summary of Errors in the Regulations Text

On page 62942, in paragraph (1)(ii)(C)(2) of the definition of "EHR reporting period for a payment adjustment year" at §495.4, we incorrectly established an EHR reporting period in CY 2017 for a payment adjustment year identified as the "FY 2019 payment adjustment year." As noted previously, the MACRA amended section 1848(a)(7)(A) of the Act to sunset the meaningful use payment adjustment for EPs at the end of CY 2018. Therefore, we are amending the definition of "EHR reporting period for a payment adjustment year" by removing and reserving paragraph (1)(ii)(C)(2) to correct this error.

On page 62952, in § 495.24(d)(7)(ii)(B)(2) (Stage 3 meaningful use objectives and measures for EPs, eligible hospitals, and CAHs for 2018 and subsequent years); we inadvertently included language for the eligible hospital or CAH measure that we did not include in the EP measure. We are correcting this technical error by revising the language to ensure that the regulations text for the eligible hospital or CAH measure is consistent with the regulations text for the EP measure.

III. Waiver of Proposed Rulemaking, 60-Day Comment Period, 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) of the Act 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 amendment does not constitute a rulemaking that would be subject to these requirements. This correcting amendment corrects technical and typographic errors in the preamble and regulation text included in the 2015 EHR Incentive Programs final rule with comment period. The corrections contained in this document are consistent with, and do not make substantive changes to, the policies that were adopted subject to notice and comment procedures in the final rule with comment period. As a result, the corrections made through this correcting amendment are intended to ensure that the 2015 EHR Incentive Programs final rule with comment period accurately reflects the policies adopted in that rule. 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 for EPs, eligible hospitals, and critical access hospitals to be advised, in a timely manner, of the meaningful use criteria and EHR reporting periods that they must meet in order to qualify for Medicare and Medicaid electronic health record incentive payments and avoid payment reductions under Medicare, and to ensure that the 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 due to the changes in the law made by the MACRA, under which the meaningful use payment adjustment for EPs under

section 1848(a)(7)(A) of the Act will sunset at the end of CY 2018. The statements identified above in the preamble and the regulations text concerning a payment adjustment in 2019 are moot as a result of those changes in the law. In addition, such procedures would be unnecessary, as we are not altering our policies; rather, we are simply implementing correctly the policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the 2015 EHR Incentive Programs final rule with comment period accurately reflects these policies. Therefore, we believe we have good cause to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. 2015-25595 of October 16, 2015 (80 FR 62762), we are making the following corrections:

1. On page 62905, first column, first partial paragraph, lines 7 through 10, the phrase "the payment adjustment in 2019 for returning participants and for the payment adjustment in 2018 for new participants" is corrected to read "the payment adjustment in 2018 for new participants".

2. On page 62906, in TABLE 18—EHR REPORTING PERIODS AND RELATED PAYMENT ADJUSTMENT YEARS FOR EPs, the entry for 2017 is corrected to read as follows:

2017			
	EHR reporting period for a payment adjustment year	Applies to avoid a payment adjustment in CY 2018	Applies to avoid a payment adjustment in CY 2019
EP new participants (including those demonstrating Stage 3 under Medicare or Medicaid)	Any continuous 90-day period in CY 2017.	Yes, if EP successfully attests by October 1, 2017.	N/A
EP returning participants	N/A	N/A	N/A

3. On page 62920, TABLE 21 —BURDEN ESTIMATES STAGE 3, third column, third full paragraph (Measure 2), lines 8 and 10, the phrase "an electronic summary of care document from a source other than the provider's EHR system." is corrected to read "an electronic summary of care document.".

List of Subjects in 42 CFR Part 495

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

As noted in section II.B. of this correcting amendment, the Centers for Medicare & Medicaid Services is making the following correcting amendments to 42 CFR part 495:

**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).

§ 495.4 [Amended]

2. In § 495.4, paragraph (1)(ii)(C)(2) of the definition of "EHR reporting period for a payment adjustment year" is removed and reserved.

§ 495.24 [Amended]

3. In § 495.24, paragraph (d)(7)(ii)(B)(2) is amended by removing the phrase "an electronic summary of care document from a source other than the provider's EHR system." and adding in its place the phrase "an electronic summary of care document.".

CMS-3310&3311-F3

Dated: May 25, 2016

Madhura Valverde,

Executive Secretary to the

Department,

Department of Health and Human

Services.

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