

## Calendar No. 185

114TH CONGRESS }  
1st Session }

SENATE

{ REPORT  
{ 114-106

---

---

### ELECTRONIC HEALTH FAIRNESS ACT OF 2015

---

JULY 30, 2015.—Ordered to be printed

---

Mr. HATCH, from the Committee on Finance,  
submitted the following

### R E P O R T

[To accompany S. 1347]

The Committee on Finance, to which was referred the bill (S. 1347) to amend title XVIII of the Social Security Act with respect to the treatment of patient encounters in ambulatory surgical centers in determining meaningful EHR use, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

#### I. LEGISLATIVE BACKGROUND

##### *Background and need for legislative action*

The Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009 authorized Medicare and Medicaid incentive payments to promote the use of electronic health record (EHR) technology. Physicians and other professionals, collectively referred to as “eligible professionals”, and eligible hospitals qualify for incentive payments under the HITECH Act if they become meaningful users of certified EHR technology (CEHRT). In order to demonstrate meaningful EHR use, participants must attest to using their EHR systems to meet a series of objectives (and associated measures); for example, capturing and sharing patient data, electronic prescribing, and exchanging summary of care information with other health care providers.

Eligible professionals who demonstrate meaningful CEHRT use can receive up to \$43,720 in Medicare incentive payments over five years. Beginning in 2015, eligible professionals who do not successfully demonstrate meaningful use will be subject to a payment adjustment which reduces their Part B reimbursement for covered professional services furnished for the year; payment reductions

can range from 1 percent to 5 percent. Through The Medicare Access and CHIP Reauthorization Act of 2015 (MACRA), the existing Medicare meaningful use payment adjustments for eligible professionals who fail to meaningfully use CEHRT, sunset in 2018. The payment adjustment remains unchanged for hospitals. Thereafter, meaningful use will be used as one of the components of the composite score under the Merit-based Incentive Payment System (MIPS) program established by MACRA.

To qualify for Medicare EHR incentive payments, the Secretary determined eligible professionals as those who furnish at least 50 percent of their patient encounters during the reporting period in locations with CEHRT. HITECH excluded physicians from the incentive program who furnish “substantially all” of their services in an inpatient hospital or hospital emergency department using CEHRT. The Secretary has determined that patient encounters furnished in an ambulatory surgical center (ASC), by an eligible professional, are included in the denominator when the payment adjustment is being calculated. Under HITECH, however, ASC facilities are not eligible for the Medicare EHR incentive program. As a result, eligible professionals furnishing services in an ASC are more likely to receive a payment adjustment because ASCs are not required to have the technology. Moreover, producing ASC-specific EHR technology has not been a vendor priority; additionally, certification of ASC-specific technology is not included in the Office of the National Coordinator (ONC) certification process.

## II. EXPLANATION OF THE BILL

### PRESENT LAW

#### *In general*

Under Section 1848(o)(2) of title XVIII of the Social Security Act,<sup>1</sup> Medicare provides incentive payments to hospitals and eligible professionals who become “meaningful users” of certified electronic health technology. Beginning in 2015, eligible professionals who are not meaningful users may be subject to a Medicare payment adjustment (penalty).

### REASONS FOR CHANGE

The Committee recognizes the importance of the Medicare “meaningful use” incentive program to advance the goal of providers acquiring electronic health records as a tool to provide high quality, more coordinated care. Although HITECH requires professionals (and hospitals) to use certified EHR technology to receive incentive payments and avoid payment reductions, HITECH did not include ASC facilities in the Medicare EHR incentive program. Therefore, development of EHR products specifically for the ASC setting has not been a vendor priority, nor has it been included in the certification process. Therefore, providers in ASC facilities should not be disadvantaged in the program.

---

<sup>1</sup> Pub. L. No. 74–271.

## EXPLANATION OF PROVISION

The bill, as modified by the Committee, would exclude ASC services from being counted toward the 50 percent meaningful use eligibility threshold until CEHRT applicable to the ASC setting is available. This exclusion would end three years after the Secretary, by rulemaking, determines that CEHRT applicable to the ASC setting is available.

*Effective date*

The provision applies upon enactment of the bill.

**III. BUDGET EFFECTS OF THE BILL**

## A. COMMITTEE ESTIMATES

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the following statement is made concerning the estimated budget effects of the revenue provisions of the “Electronic Health Fairness Act of 2015” as reported.

The bill is estimated to have the following effects on Federal budget receipts for fiscal years 2016–2025:

Fiscal Years												
[Millions of dollars]												
2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2016–20	2016–25
--	2	5	6	2	0	0	0	0	0	0	15	15

NOTE: Details do not add to totals due to rounding.  
Source: Estimate provided by the staff of the Congressional Budget Office.

## B. BUDGET AUTHORITY AND TAX EXPENDITURES

*Budget authority*

In compliance with section 308(a)(1) of the Congressional Budget and Impoundment Control Act of 1974 (“Budget Act”),<sup>2</sup> the Committee states that no provisions of the bill as reported involve new or increased budget authority.

*Tax expenditures*

In compliance with section 308(a)(1) of the Budget Act, the Committee states that the revenue-reducing provisions of the bill involve increased tax expenditures (see revenue table in Part A, above).

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

*S. 1347—Electronic Health Fairness Act of 2015*

Summary: Under current law, a physician or other professional may be subject to payment reductions for services furnished to Medicare beneficiaries if the provider fails to achieve “meaningful use” of electronic health record (EHR) technology. The meaningful use standard requires that at least half of the provider’s patient encounters occur in a setting that uses certified EHR technology. S. 1347 would temporarily exclude services furnished in an ambula-

<sup>2</sup>Pub. L. No. 93–344.

tory surgical center (ASC) from being included in the count of patient encounters for the purpose of determining whether a provider achieves meaningful use of EHR technology.

CBO estimates that enacting S. 1347 would increase direct spending by \$15 million over the fiscal year 2016–2025 period. Pay-as-you-go procedures apply because enacting the legislation would affect direct spending. The legislation would not affect revenues.

S. 1347 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary effect of enacting S. 1347 is shown in the following table. The costs of this legislation fall within budget function 570 (Medicare).

By fiscal year, in millions of dollars—												
2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2025	2016–2020	2016–2025
CHANGES IN DIRECT SPENDING												
Estimated Budget Authority ..	2	5	6	2	0	0	0	0	0	0	15	15
Estimated Outlays .....	2	5	6	2	0	0	0	0	0	0	15	15

Basis of estimate: S. 1347 would amend the criteria used to determine whether an eligible professional achieves meaningful use of EHR technology. For physicians who fail to achieve meaningful use in one year, Medicare’s payments for services furnished in the following year are reduced. Under current law, providers who fail to achieve meaningful use will be subject to a 2 percent reduction in Medicare payment rates in calendar year 2016 and a 3 percent reduction in 2017 and 2018. After 2018, providers will not be subject to a payment reduction based on meaningful use of EHR technology.

To qualify as a meaningful EHR user under current law, an eligible professional must conduct at least 50 percent of patient encounters at a place of service that is equipped with certified EHR technology. Many providers furnish services in more than one place of service (for example, a physician’s office, hospital outpatient department, or an ASC). S. 1347 would exclude services furnished at an ASC from being counted as patient encounters for the purpose of determining whether a provider satisfies the 50 percent threshold.

Very few ASCs currently have EHR technology. As a result, S. 1347 would make it easier for professionals who furnish some of their services in the ASC setting to qualify as meaningful users of EHR technology. Based on analysis of the extent to which physicians provide a share of services in ASCs, CBO estimates that enacting S. 1347 would enable almost 2,000 providers to avoid payment reductions that will average about \$2,000 in 2016 and about \$3,000 in both 2017 and 2018.

Enacting S. 1347 would affect the determination of meaningful use beginning with services furnished during 2015, and would affect payments beginning in 2016. As a result, CBO estimates that enacting S. 1347 would increase spending during calendar years 2016 through 2018 (fiscal years 2016 through 2019) by a total of \$15 million.

Pay-as-you-go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net

changes in outlays that are subject to those pay-as-you-go procedures are shown in the following table.

	By fiscal year, in millions of dollars—													2015– 2020	2015– 2025
	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025				
	NET INCREASE IN THE DEFICIT														
Statutory Pay-As-You-Go Impact .....	0	2	5	6	2	0	0	0	0	0	0	0	15	15	

Intergovernmental and private-sector impact: S. 1347 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Previous estimate: On March 12, 2015, CBO provided a cost estimate for H.R. 887, as ordered reported by the House Ways and Means Committee on February 26, 2015. The two versions of the bill are almost identical, except that S. 1347 specifies that the change in meaningful use determination would go into effect after 2015, which would affect spending beginning in 2016. H.R. 887, by contrast, did not specify an effective date. CBO’s estimate for H.R. 887 anticipated that the change in spending would take effect in 2017—after a rulemaking process.

The estimated budgetary effects also differ because of changes in the Medicare Access and CHIP Reauthorization Act, enacted on April 16, 2015. That legislation eliminated payment adjustments for eligible professionals after payment year 2018 and increased payment rates for physicians’ services.

Estimate prepared by: Federal costs: Zoë Williams Impact on state, local, and tribal Governments: J’Nell Blanco Suchy; Impact on the Private Sector: Amy Petz.

Estimate approved by: Holly Harvey, Deputy Assistant Director for Budget Analysis.

#### IV. VOTES OF THE COMMITTEE

In compliance with paragraph 7(b) of Rule XXVI of the standing rules of the Senate, the Committee states that, with a majority present, the “Electronic Health Fairness Act of 2015,”—as modified, was ordered favorably reported on June 24, 2015 as follows:

Final Passage of “The Electronic Health Fairness Act of 2015” approved, as modified, by voice vote.

#### V. REGULATORY IMPACT AND OTHER MATTERS

##### A. REGULATORY IMPACT

Pursuant to paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following statement concerning the regulatory impact that might be incurred in carrying out the provisions of the bill as amended.

##### *Impact on individuals and businesses, personal privacy and paperwork*

The bill is not expected to impose additional administrative requirements or regulatory burdens on individuals. The bill is expected to reduce administrative requirements and regulatory burdens on some businesses.

The provisions of the bill do not impact personal privacy.

**B. UNFUNDED MANDATES STATEMENT**

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104-4).

The Committee has determined that the bill does not contain any private sector mandates. The Committee has determined that the bill contains no intergovernmental mandate.

**VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED**

In the opinion of the Committee, it is necessary in order to expedite the business of the Senate, to dispense with the requirements of paragraph 12 of Rule XXVI of the Standing Rules of the Senate (relating to the showing of changes in existing law made by the bill as reported by the Committee).

○