



## Flexibility Rule 2014... The Devil's in the Details

By John Netti

After weeks of speculation this summer about whether the meaningful use “Flexibility Rule” would be finalized, the suspense finally came to an end on August 29<sup>th</sup>. The Department of Health and Human Services (HHS) announced that the rule had passed. Although that was good news for many practices, the devil’s in the details. With the announcement came a ninety page publication in the Federal Register about the reasoning behind the ruling and descriptions of when and to whom it applies. Also, regardless of whether or not a practice gets the meaningful use relief it was hoping for, there are a couple of things to be mindful of; there will be audits and many practices still face Stage 2 of meaningful use beginning on January 1<sup>st</sup>, 2015.

To determine if the Flexibility Rule will provide relief for your practice you will need to know: 1) the Stage of meaningful use your eligible professionals (EPs) are in this year (2014), and 2) whether your practice is using the 2011 or 2014 version certified electronic health record (CEHRT) software at the beginning of your ninety day reporting period. The table HHS published in the final rule shows the available options based on these two variables.

**CEHRT SYSTEMS AVAILABLE FOR USE IN 2014**

If you were scheduled to demonstrate:	You would be able to attest for Meaningful Use:		
	Using 2011 Edition CEHRT to do:	Using 2011 & 2014 Edition CEHRT to do:	Using 2014 Edition CEHRT to do:
Stage 1 in 2014	2013 Stage 1 objectives and measures*	2013 Stage 1 objectives and measures* -OR- 2014 Stage 1 objectives and measures*	2014 Stage 1 objectives and measures
Stage 2 in 2014	2013 Stage 1 objectives and measures*	2013 Stage 1 objectives and measures* -OR- 2014 Stage 1 objectives and measures* -OR- Stage 2 objectives and measures*	2014 Stage 1 objectives and measures* -OR- Stage 2 objectives and measures

\*Only providers that could not fully implement 2014 Edition CEHRT for the EHR reporting period in 2014 due to delays in 2014 Edition CEHRT

Knowing which set of meaningful use measures (2011 Stage 1, 2014 Stage 1 or 2014 Stage 2) apply to your practice is only part of what you need to know. When it comes to knowing for sure whether you can take the Flexibility Rule, the devil is in the details.

It would be helpful to keep in mind the reason the Flexibility Rule was conceived in the first place. It goes all the way back to the idea that in 2014 there would be an industry wide requirement to upgrade to a new certified version of electronic health record (EHR) software. The new version, entitled 2014 CEHRT, was to provide new functionality to support Stage 2 measures. At the beginning of the incentive program it was recognized that the 2014 changes would create an extra burden on vendors and practices. To accommodate these challenges, the meaningful use reporting period was shortened from a full year to ninety days. However, as it turned out, this accommodation was not enough. Many practices did not receive the new software until several months into 2014 and in many cases it was not working properly. Needless to say the timeframe to get the 2014 version implemented and functioning to meet the ninety day reporting period was too narrow for some practices to meet the measures. Hence the Flexibility Rule.

The Flexibility Rule applies when a practice has experienced “delays” by their vendor in getting the 2014 CEHRT which has resulted in the inability to “fully implement” it. These delays must be related to “development, certification, testing and release” of the product. The August update of Federal Register identifies some of the reasons which do not constitute legitimate “delays” regarding using the Flexibility Rule. These include financial concerns as some vendors require an additional investment in software modules to meet the requirement of having a complete certified product. The inability of a practice to meet the measures themselves is not considered a legitimate reason. Similarly, neither staff turnover nor delays in implementing the 2014 CEHRT are considered acceptable reasons.

There are however, several legitimate reasons cited in the Federal Register that allow a practice to use the Flexibility Rule. For example, the rule can be deployed in cases where the 2014 CEHRT is installed at the beginning of the reporting period but the practice is awaiting updates, there are problems with certain functionality and/or certain components are not in place due to vendor issues. Also, if the practice believes that software issues jeopardize patient safety, the EPs may be able to use the Flexibility Rule. Additionally, if a practice cannot “fully implement” the 2014 CEHRT because of vendor delays it is eligible to make use of the rule as well. This can include the inability to get staff trained in a timely manner, testing of the upgrade and/or delays in getting new workflows in place to accommodate new system functionality.

Regarding attestation, if your practice is attesting that it has used a combination of 2011 and 2014 CEHRT for its reporting period, it will be necessary to attain a unique Certified Health IT Product List (CHPL) number for the combination of the two products from the Office of the National Coordinator (ONC) web site.

Some final notes... as always, it makes good sense to document your reasoning for everything you do in the meaningful use program. This is especially true for the Flexibility Rule. It will be particularly important that you assemble all supporting documentation including vendor announcements, emails, hot fixes, software patches, reported problems and ticket numbers etc. This should be done well in advance of a potential audit. Finally, if you have completed two years of Stage 1, don't become so distracted by the fanfare of the Flexibility Rule in the fourth quarter of 2014 that you lose sight of Stage 2 which will begin again January 1<sup>st</sup>. There is a lot of preparation work you'll need to do. Short of the passage of new legislation; you will have a twelve month reporting period in 2015.

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