

## PROPOSED ORDER OF THE DEPARTMENT OF REVENUE CREATING RULES

The Wisconsin Department of Revenue proposes an order to **create** Tax 2.985, **relating to** the electronic medical records credit.

The scope statement for this rule, SS 032-11, was approved by the Governor on October 25, 2011, published in Register No. 671 on November 14, 2011, and approved by the Secretary of Revenue on November 28, 2011.

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### *Analysis by the Department of Revenue*

**Statutes interpreted:** ss. 71.07 (5i), 71.28 (5i), 71.47 (5i), and 73.15 (1) and (2), Stats.

**Statutory authority:** ss. 73.15 (3) and 227.11 (2) (a), Stats.

#### **Explanation of agency authority:**

The department is authorized by s. 73.15 (3), Stats., to promulgate rules to comply with the provisions under ss. 73.15 (1) and (2), Stats., which provide:

73.15 (1) The department of revenue shall implement a program to certify health care providers as eligible for the electronic medical records credit under ss. 71.07 (5i), 71.28 (5i), and 71.47 (5i).

(2) If the department of revenue certifies a health care provider under sub. (1), the department shall determine the amount of credits to allocate to the health care provider. The total amount of electronic medical records credits allocated to health care providers in any calendar year may not exceed \$10,000,000.

(3) The department of revenue shall promulgate rules to administer this section.

The department is further authorized by s. 227.11 (2) (a), Stats., to promulgate rules interpreting the provisions of any statute enforced or administered by the agency if the agency believes it necessary to effectuate the purpose of the statutes enforced or administered by the agency. Section 227.11 (2) (a), Stats., provides:

227.11 (2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

**Related statute or rule:** There are no other applicable statutes or rules.

**Plain language analysis:** This proposed rule establishes procedures for:

- certifying health care providers as eligible for the electronic medical records tax credit under ss. 71.07 (5i), 71.28 (5i) and 71.47 (5i), Stats.;
- filing a claim for the electronic medical records tax credit under ss. 71.07 (5i), 71.28 (5i) and 71.47 (5i), Stats., including the method of application and information required; and
- allocating the electronic medical records tax credit to certified health care providers.

**Summary of, and comparison with, existing or proposed federal regulation:**

The federal Office of the National Coordinator (ONC) for Health IT promulgated 45 CFR 170 relating to health information technology (HIT) standards, implementation specifications, and certification criteria and certification programs for HIT. These rules, in addition to the rules for meaningful use of certified electronic health records (EHR) technology under 42 CFR 495, are being used by the Centers for Medicare and Medicaid (CMS) to administer an electronic health record incentive payment program. CMS will require health care providers participating in Medicare to adopt and use certified EHR technology or face penalties beginning in 2016.

**Comparison with rules in adjacent states:** The department is not aware of a similar rule in an adjacent state.

**Summary of factual data and analytical methodologies:** The department has created this proposed rule order to comply with the statutory requirement to administer the implementation of the electronic medical records credit. No other data was used in the preparation of this proposed rule order or this analysis.

**Analysis and supporting documents used to determine effect on small business:** As explained above, this proposed rule is created to administer Wisconsin's income and franchise tax laws. The rule itself does not have an effect beyond the statutes it interprets. As such, the department has determined that the proposed rule does not affect small businesses.

**Anticipated costs incurred by private sector:** This proposed rule does not have a fiscal effect on the private sector.

**Effect on small business:** This proposed rule does not affect small business.

**Agency contact person:** Please contact Dale Kleven at (608) 266-8253 or [dale.kleven@revenue.wi.gov](mailto:dale.kleven@revenue.wi.gov), if you have any questions regarding this proposed rule.

**Place where comments are to be submitted and deadline for submission:**

Comments may be submitted to the contact person shown below no later than the date on which the public hearing on this proposed rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Dale Kleven  
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**SECTION 1.** Tax 2.985 is created to read:

**Tax 2.985 Electronic medical records credit. (1) PURPOSE AND SCOPE.** The purpose and scope of this section is to establish procedures for all of the following:

(a) Certifying health care providers as eligible for the electronic medical records credit under ss. 71.07 (5i), 71.28 (5i), and 71.47 (5i), Stats.

(b) Filing an application for the electronic medical records credit under ss. 71.07 (5i), 71.28 (5i), and 71.47 (5i), Stats., including the method of application and information required.

(c) Allocating the electronic medical records tax credit to health care providers certified under this section.

**(2) DEFINITIONS.** In this section:

(a) "Claimant" has the meaning given in ss. 71.07 (5i) (a), 71.28 (5i) (a), and 71.47 (5i) (a), Stats.

(b) "Electronic medical record" means an electronic record of health-related information that includes patient demographic and clinical health information and has the capacity to provide clinical decision support; to support physician order entry; to capture and query information relevant to health care quality; and to exchange and integrate electronic health information with and from other sources.

(c) "Health care provider" has the meaning given in s. 146.81 (1) (a) to (p), Stats.

(d) "Taxable year" has the meaning given in ss. 71.01 (12), 71.22 (10), and 71.42 (5), Stats.

**(3) APPLYING FOR CERTIFICATION AND ALLOCATION.** (a) The department shall provide a form to apply for certification and allocation of the electronic medical records credit under ss. 71.07 (5i), 71.28 (5i), and 71.47 (5i), Stats. The form shall require an applicant to provide all of the following information:

1. The type of health care provider license or certification held and the license or certification number.

2. The amounts paid in the taxable year for information technology hardware and software used to maintain electronic medical records.

3. A description of the information technology hardware and software, including the federal certification number issued pursuant to 45 CFR 170.

4. An explanation of how the information technology hardware and software is used to maintain electronic medical records.

5. Any other information, as determined by the department, necessary to certify a health care provider or allocate the credit under sub. (4).

(b) Each application shall be completed and submitted to the department, no sooner than upon completion of the calendar year in which the amount under par. (a) 2. was paid, and no later than January 31 of the subsequent calendar year.

**Note:** An application for the electronic medical records credit may be filed beginning January 1, 2013. The application form will be available on the department's web site at [www.revenue.wi.gov](http://www.revenue.wi.gov) by December 2012.

**(4) CERTIFICATION OF APPLICANTS AND ALLOCATION OF CREDITS.** (a) Based on the information provided in sub. (3) (a) 1. to 5., the department shall certify health care providers as eligible for the electronic medical records credit under s. 71.07 (5i), 71.28 (5i), or 71.47 (5i), Stats.

(b) In conjunction with issuing a certification for an applicant, the department shall determine the amount of credit that the applicant may claim or distribute to its partners, members, or shareholders as follows:

1. If 50 percent of the total of the amounts under sub. (3) (a) 2. for all certified applicants does not exceed the \$10,000,000 maximum total established in s. 73.15 (2), Stats., for allocations in each calendar year, the credit shall be equal to 50 percent of the amount the applicant paid during the calendar year for health information technology software certified pursuant to 45 CFR 170 and hardware used to run and access certified software.

2. If 50 percent of the total of the amounts under sub. (3) (a) 2. for all certified applicants exceeds the \$10,000,000 maximum total established in s. 73.15 (2), Stats., for allocations in each calendar year, the \$10,000,000 of credits shall be allocated to each certified applicant in proportion to the amount paid during the calendar year for health information technology software certified pursuant to 45 CFR 170 and hardware used to run and access certified software.

**Example:** Health Care Providers A, B, and C are certified to claim the electronic medical records credit for the following amounts paid in 2012 for certified software and related hardware:

A	\$8,000,000
B	\$12,000,000
C	\$4,000,000

The \$10,000,000 of credits available for 2012 are allocated to A, B, and C, based on their proportionate share of the \$24,000,000. A is allocated a credit of \$3,333,333 (=  $[8,000,000 \div 24,000,000] \times \$10,000,000$ ), B is allocated a credit of \$5,000,000 (=  $[12,000,000 \div 24,000,000] \times \$10,000,000$ ), and C is allocated a credit of \$1,666,667 (=  $[4,000,000 \div 24,000,000] \times \$10,000,000$ ).

(c) Following completion of the certifications and allocations under pars. (a) and (b), the department shall notify each applicant of the outcome of its application, including the amount of credit allocated to the applicant.

**SECTION 2.** Effective date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

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### Initial Regulatory Flexibility Analysis

This proposed rule order does not affect small businesses.

DEPARTMENT OF REVENUE

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Richard G. Chandler  
Secretary of Revenue

E:Rules/2985 Proposed Order (v3)