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Section 111 Bulletin: Medicare Reporting Requirements for Overseas Casualty Insurers

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As the Obama Administration looks to finance its proposed reform of the U.S. health care system, the federal Medicare program is opening an unprecedented dialogue with liability insurers. Through its implementation of a new reporting program mandated by Congress, Medicare will soon require liability insurers to report their bodily injury claims payments to Medicare beneficiaries. These reports will alert Medicare to potential opportunities to recover payments it may have made to Medicare beneficiaries in situations in which a liability insurer had the responsibility to pay first under U.S. law but did not do so.

What this means for overseas insurers is unclear. Administration officials have asserted publicly that the new law generally applies to these insurers but when and to what extent remains unanswered. What is clear is that the costs of compliance will be high—especially for insurers based overseas that are unlikely to have, or are unable to collect the confidential personal data required by Medicare—but the penalties for non-compliance may be even higher.

Medicare's New Mandate

What is Medicare? Medicare is the U.S. government health insurance program that primarily covers U.S. citizens aged 65 and over. (Benefits are also provided to some disabled individuals and to those with end-stage renal disease). Under the Medicare Secondary Payer (MSP) statute, it is well settled that Medicare almost always bears secondary liability for Medicare beneficiaries' medical claims, while private group health plans, liability insurers (including self-insured plans), no-fault insurers and workers' compensation insurers carry primary liability. In other words, Medicare can insist that such

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insurers pay first for medical expenses where coverage overlaps and thus limit Medicare 's obligation to any shortfall.

See 42 U.S.C. § 1395y(b), Social Security Act § 1862(b)(2)(A); 42 C.F.R. Part 411.

What is Section 111? Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) put in place a new reporting system to help the Centers for Medicare & Medicaid Services (CMS), the federal agency that administers Medicare, recover from Medicare beneficiaries and insurers when Medicare erroneously pays primary or when a beneficiary receives payment from both Medicare and an insurer for the same injury. 42 U.S.C. § 1395y(b)(8). Section 111 requires insurers to electronically report substantial claims information to CMS if they are liable for the medical expenses of an injured Medicare beneficiary, whether due to a court judgment or settlement. These insurers must begin testing "dummy" claims submissions in the fall of 2009 and then report live claims data in the second quarter of 2010, or risk incurring steep monetary penalties.

What are the potential penalties of noncompliance? Failure to comply with Section 111 could subject insurers to civil money penalties of $1,000 *for each day* of noncompliance *for each claimant* whose information they did not report.

Application of Section 111 to Overseas Insurers

Must overseas insurers report under Section 111? The MMSEA statute is silent as to its application to overseas insurers, but CMS has stated informally that the reporting requirements apply to overseas insurers when they pay the bodily injury claims of Medicare beneficiaries. There are, however, serious questions as to whether CMS can lawfully extend its regulatory authority over non-U.S. companies in all circumstances. And, based on our extensive experience in analogous health care situations, we question whether CMS will make enforcement against foreign insurers a priority in the face of more pressing, and financially significant, domestic enforcement challenges.

Why wouldn't Section 111 apply to overseas insurers? The Foreign Commerce Clause of the U.S. Constitution, the presumption against extraterritorial application of federal statutes and potential conflicts with privacy laws of other countries provide some of the strongest arguments against application of Section 111 to overseas insurers. We have analyzed these arguments in depth and determined that the viability of each argument is dependent upon the factual circumstances of each claims transaction. Relevant factors include the type of insurance coverage involved, the insurer's U.S. contacts, the identity and location of the insured and how and where payment to the claimant is made.

So how will an overseas insurer know whether its claims need to be reported? Unfortunately, there is no single, uniform answer, but we have identified a variety of factual scenarios in which overseas insurers could potentially incur reporting obligations. We also have developed a risk assessment model to help these insurers decide when to report. We have worked with this model with overseas carriers doing business in the United States or through U.S. affiliates and have advised on their Section 111 obligations, looking, in part, to the duties of overseas carriers under analogous U.S. domestic laws. While each insurer's situation is unique,

we draw on our expertise with others to confidently advise on the costs and risks associated with compliance and non-compliance in common factual scenarios.

Consultants have advised overseas insurers that they must comply with Section 111. Is this accurate? Such advice may be exaggerated. The reporting obligation of overseas insurers is currently anything but clear. Before investing time and money in a new reporting system and risking violation of the privacy laws of other nations, insurers should carefully assess the extent of their obligations under this new U.S. law.