

ALERT

Section 111 Bulletin: CMS Posts New Version of User Guide and Requests Public Comment on Draft Language Further Defining the Responsible Reporting Entity under MMSEA Section 111

August 10, 2009

Last week, the Centers for Medicare & Medicaid Services (CMS) electronically released a new version of the Section 111 User Guide for Liability Insurers (Including Self-Insured), No-Fault Insurers, and Workers' Compensation Plans (User Guide), as well as an eight-page Alert containing draft language that is intended, when final, to replace Section 7.1 of the updated User Guide ("Who Must Report") (RRE Alert). See CMS, "MMSEA Section 111 MSP Mandatory Reporting, Liability Insurance (Including Self-Insurance), No-Fault Insurance and Workers' Compensation User Guide" (July 31, 2009); CMS, "Alert for Liability Insurance (Including Self-Insurance), No-Fault Insurance and Workers' Compensation: DRAFT Language for Public Comment" (July 31, 2009).

Although some provisions contained in the RRE Alert and the updated User Guide appear to be both helpful and reasonably clear, the new guidance fails to address many issues that are important to casualty insurers and provides ambiguous, incomplete or unworkable guidance on others. Unfortunately, much of the RRE Alert is merely a collection of incomplete statements previously made by CMS in prior guidance or during its town hall teleconferences. The alert, if left as written, is thus likely to have critical ramifications for insurers because it defines CMS's position regarding which insurers bear responsibility for Section 111 reporting under the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) and therefore may incur penalties of

Authors

Kathryn Bucher
Partner
202.719.7530
kbucher@wiley.law

Practice Areas

Insurance
Section 111 Insurer Reporting and MSP
Reimbursement

\$1,000 per day/per claimant for any failure to report.

CMS has set a deadline for comments on the RRE Alert for COB on Sunday, August 16, 2009. Based upon our initial review, at least the following elements will require further work by the agency.

Questions Not Addressed in the RRE Alert:

- In the absence of self-insurance (including a deductible or self-insured retention), where the liability insurer reimburses the policyholder but makes no direct payment to the underlying claimant, is the policyholder the RRE? Under these circumstances, insurers are unlikely to have much of the information necessary for reporting.
- Does an insurer that commutes or buys back coverage, without making any payment attributable to a specific claimant, trigger any reporting requirement? These circumstances would not appear to trigger reporting by anyone, but the RRE Alert does not address this point.
- In the event a policyholder pays a deductible and amounts in excess of the deductible that are covered by primary and excess insurance, is the policyholder the RRE with respect to the entire amount paid?
In the event of separate payments by primary, umbrella, and/or excess carriers, which carriers are deemed to be RREs?
- The RRE Alert has not addressed the reporting difficulties involved in mass tort scenarios. Although the Multiple Defendants guidance may be relevant to some mass torts situations, was it meant to apply to all mass torts scenarios?
- With respect to liability pools, CMS advises that members of the pool may not be involved in the resolution and payment of claims if the pool is to be the RRE. However, the RRE Alert does not address what activity would qualify as member "involvement."

Ambiguous, Incomplete or Impractical Guidance:

- Although recognizing that deductibles are self-insurance, the RRE Alert directs insurers and policyholders that report a paid amount that includes both a deductible and an amount exceeding the deductible to report "a value of 'N' for 'No' in Field 64 regarding Self-Insurance." See "Deductible Issues," ¶ 3(b). That is not only inaccurate (with respect to the deductible), but may result later in excessive and incorrect reimbursement claims.
- On a related point, the RRE Alert would require the insurer to report the total amount of the deductible and any amount paid in excess of the deductible, even if the deductible had been paid directly by the policyholder and not by the insurer. See "Deductible Issues," ¶ 6(b). There appears to be no reason to require reporting of the deductible by an insurer who did not actually pay the deductible; moreover, this approach would exacerbate the problem noted above.
- The RRE Alert's treatment of "Fronting Policies," consisting of three short sentences, appears inadequate to address the variety of arrangements colloquially referred to as fronting, and does not clearly state

who is responsible for reporting if the insurer pays the claimant but is made whole through retrospective premiums, captive reinsurance, or other financial arrangements. Regardless of form, the policyholder should be deemed the RRE with respect to "fronting policies."

- The section of the RRE Alert on "Re-insurance [sic], Stop Loss Insurance, Excess Insurance, Umbrella Insurance, Etc." appropriately recognizes that where the insurer does not pay the claimant directly but instead makes "payment to the self-insured entity to reimburse the self-insured entity," the self-insured entity is the RRE and no reporting is required from the insurer. However, the reference to a "self-insured entity" does not make sense in the typical scenario involving umbrella or excess insurance. Moreover, the RRE Alert fails to address the analogous situation in which a primary insurer does not pay the underlying claimant but merely reimburses the policyholder. In all of these circumstances, the policyholder that pays the claimant is in the best position to report.

Wiley Rein has formed a team to support insurers who are concerned about their claims reporting obligations and potential underlying liability to Medicare under the Medicare Secondary Payer program. For more information, please contact any of the attorneys listed below or visit the Wiley Rein Section 111: MSP Reporting and Liability Practice webpage to access prior firm publications on this topic and a list of team members.