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Section 111 Bulletin: CMS Teleconferences of September 30 and October 6, 2009 Address Section 111 Registration Issues

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The Centers for Medicare & Medicaid Services (CMS) held its latest "town hall" teleconferences on September 30 and October 6, 2009 regarding Section 111 registration and reporting issues for Non-Group Health Plans (NGHPs) under the Medicare, Medicaid and SCHIP Extension Act of 2007. Addressed below are selected portions of the discussion that focused on registration issues that may be of immediate importance to property and casualty insurers and self-insured entities.

A few caveats are in order: (a) CMS has not yet made transcripts of the calls available; (b) the statements attributed to CMS personnel are from our notes and typically are summaries or paraphrases rather than direct quotations; (c) some of the statements made by CMS appear to be inconsistent with the agency's prior written or oral statements; and (d) while the town hall statements may provide useful insight into the agency's current thinking, they are not necessarily binding on the government.

• Technical Problems With Initial RRE Registration

- During the September 30 teleconference, CMS confirmed that individuals attempting to register Responsible Reporting Entities (RREs) on the secure website in late September received error messages and were unable to register (as we knew from prior reports from clients).
- CMS also stated that it is "implementing a fix" this week (no explanation as to why corrective action is being taken only after the September 30 registration deadline).

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- CMS believes that the best times to register are early in the morning or late in the day (confirming anecdotal evidence we have heard and suggesting that CMS did not plan adequately for the volume of late September registration traffic).
- **September 30, 2009 Deadline**
 - On September 30, CMS made reassuring statements that meeting the September 30 registration deadline is not as critical as meeting reporting deadlines in 2010, and that CMS would not find an entity out of compliance merely because it failed to register by September 30.
 - Wiley Rein Note: Although not discussed in the teleconference, there is no statutory or regulatory penalty or fine for not registering by September 30, 2009. Moreover, entities that have no current expectation of having a reporting obligation are not required to register at this time. Section 8.1 of the NGHP User Guide states that "those who do not register initially because they have no expectation of having claims to report, must register in time to allow a full quarter for testing [before claims must be reported] if they have future situations where they have a reasonable expectation of having to report."
 - CMS advised during the teleconference that entities waiting to register until they see "final language" would not be found "out of compliance" with Section 111 if they do not register by October 1, 2009. CMS did not identify this language, but we believe it may have been referring to its draft revisions to Section 7.1 of the NGHP User Guide ("Who Must Report") issued for public comment on July 31, 2009. CMS has yet to reissue or finalize that section of the User Guide, and thus may be acknowledging that entities with policy or claims payment scenarios that are not squarely addressed by the current User Guide may not yet have a reasonable expectation of having claims to report.
 - Wiley Rein Comment: We do not counsel complacency based on these arguably conciliatory CMS comments. We believe that there will be widespread noncompliance with the reporting requirements, due in part to the novelty of the requirements; continuing technical problems with the CMS website and potentially with the electronic record systems of some RREs; CMS's late and sometimes ambiguous guidance; and the impossibility of reporting certain claims as to which RREs lack sufficient information. RREs will be in the strongest position to contest penalty claims if they are able to prove diligence in their reporting efforts, including, e.g., reasonably timely completion of the registration process.
- **EDI Assistance and "Escalation"**
 - CMS designates a specific Electronic Data Interchange (EDI) representative for each RRE, who is available to answer technical questions regarding registration and reporting on the secure website.
 - CMS reiterated in the September 30 teleconference that if an RRE is not getting the necessary answers from the EDI representative, there is an "escalation" process (described on page 104 of the NGHP User Guide), which permits access to more senior personnel.

- The first step in the escalation process is to contact Jeremy Farquhar, EDI Department Supervisor, at 646-458-6614 or at e-mail address JFarquhar@ehmedicare.com.
- Wiley Rein Comment: There is insufficient experience with the NGHP EDI representatives, at this point in time, to assess how knowledgeable and how responsive they will be when technical problems arise.
- **Foreign Insurers With No U.S. Taxpayer Identification Number (TIN)**
 - CMS stated during the September 30 teleconference that foreign insurers that are unable to register as RREs because they have no U.S. address or TIN should await further instructions from CMS before registering.
 - CMS stated that it currently is developing instructions for such foreign insurer registration and that the instructions will be posted on the CMS website (CMS indicated that such instructions would be available online in the next few weeks).
 - Wiley Rein Comment: CMS's statement would not appear to excuse late registration by a foreign insurer that always intended the required reporting to be made by a subsidiary that otherwise has a U.S. address or TIN.
 - During the October 6 teleconference devoted primarily to technical registration and reporting issues, CMS stated that foreign insurers that anticipate having reporting obligations but lack U.S. addresses or TIN numbers should contact the COBC at 646-458-6740 so CMS will be aware that the insurer wishes to be, in CMS's words, "in the pipeline" when CMS releases additional information about registration.
 - Wiley Rein Comment: If foreign insurers have not yet reached a decision regarding the extraterritorial application of the Section 111 requirements to their insurance activities, or have not yet determined that they will have claims to report, careful consideration should be given to whether such early pre-registration notice should be given to CMS.
 - **CMS also stated during the September 30 teleconference that they were not aware of "a lot" of foreign insurers that would have to report under Section 111, but as there were "enough", they wanted to make sure these insurers properly registered.**
 - Wiley Rein Comment: We find this statement curious given the somewhat blanket statements CMS has made in the past that foreign insurers must report. It may be that CMS is only now coming to understand the full breadth of issues and challenges that Section 111 raises for foreign insurers, including who must report when the insured risk is underwritten by a syndicate or pool of companies and individuals, and whether Congress intended, or has the constitutional authority, to even place Section 111 obligations on foreign insurers that write policies for overseas insureds that may pay claims to Medicare beneficiaries.
- **"Safe Harbor" Request for Information**

- Background: One of the major problems with implementation of the reporting regime is that liability insurers and self-insured businesses often do not have Social Security Numbers (SSNs) or Health Insurance Claim Numbers (HICNs) for claimants. A claim cannot be reported to Medicare without either the SSN or the HICN.
 - In an attempt to mitigate this problem, CMS recently published a form information request to be used in obtaining information from claimants. However, Medicare law imposes no obligation upon claimants to provide such information to the liability insurer or self-insured entity or even to return the form, whether with or without the required information. Moreover, although many observers had believed on the basis of prior informal statements that CMS would create a "safe harbor" for RREs who transmitted the form to claimants (whether or not claimants cooperated), a CMS statement issued with the form stated only that protection would be afforded if the RRE obtained a copy of the form "signed by the claimant."
 - In a confusing discussion during the September 30 teleconference, CMS implied that the safe harbor would extend more broadly if the insurer could prove that it had a "process" in place to obtain the information and could prove delivery of the request form to the specific claimant by certified mail or otherwise (possibly requiring more than one mailing and/or follow-up phone calls), but did not define any specific "process" that would be deemed acceptable.
 - CMS also suggested (somewhat inconsistently) that the request form is to be used only after other (perhaps informal) communications with the claimant have failed to produce the required information—a concept that finds no basis in any of CMS's written guidance regarding the request form and for which CMS supplied no rationale.
 - Wiley Rein Comment: CMS's continuing failure to define clearly the scope of the safe harbor and the specific steps required to obtain safe harbor protection is a fundamental flaw. Many observers believe that a substantial percentage of claimants will refuse to provide the necessary information, leaving RREs unfairly exposed to potentially large penalties despite the impossibility of reporting.
 - Wiley Rein Note Regarding Constitutional Limitations on Penalties: In the absence of "safe harbor" protection for RREs that attempt, in good faith, to obtain necessary information but are prevented from complying with the reporting requirements because claimants refuse to provide information, there is a substantial question whether any penalties assessed by Medicare will withstand challenge under the Excessive Fines Clause to the Eighth Amendment.
 - Wiley Rein Bottom Line: There is still time for CMS to clarify its position and to provide both a safe harbor of adequate scope and clear guidance regarding the prerequisites for such protection. In the absence of such clarification, we anticipate significant disputes regarding penalty assessments.
- **CMS Development of Enforcement Process**

During the October 6 teleconference, CMS stated that it intends to issue a "specific notification provision" and not a "routine email" to an RRE when it triggers a Section 111 enforcement action. CMS will be working on the details of this process and intends to provide more information in the future.