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Section 111 Bulletin: April 28th Town Hall NGHP Teleconference Reveals No Major Developments in Agency Guidance

April 30, 2010

The Centers for Medicare & Medicaid Services (CMS) held a "town hall" teleconference for Non-Group Health Plans (NGHPs) on April 28th, focusing on policy issues related to mandatory insurer reporting under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007. As summarized below, CMS principally revisited old topics that addressed the challenges of collecting Health Insurance Claim Numbers (HICNs) and Social Security Numbers (SSNs) from claimants, the mechanics and timing of insurer requests for conditional payment information from CMS contractors and the mechanics and benefits of reporting specific ICD-9 diagnosis codes. CMS offered guidance on only a few new subjects, including the reporting of severance payments and the lifting of the Responsible Reporting Entity (RRE) requirement to submit a quarterly file transmission despite having no claims payments or settlements to report. CMS also announced the implementation by year-end of an alternative reporting process for "small, occasional reporters" that is in the final stages of development.

- **Status of Outstanding Alerts:** CMS shared on the call that the promised Alerts on clinical trial, periodic indemnity payment and risk management issues should be released within the next few weeks, and that the Agency expects to hold at least one Mass Torts working group call before the end of May 2010. CMS did not discuss the status of the previously promised Alert expected to scale back overseas insurer reporting to those insurers "doing business in the United States."

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- **Collection of HICNs and SSNs:**
  - **Modification of Model "Refusal" Form:** CMS stated that the model form posted on the CMS website and intended for use by RREs seeking HICNs and SSNs from claimants, may be altered by the RRE. Of note, CMS representatives did *not* discuss whether such a modification would eliminate the safe harbor protection granted by "CMS's August 24, 2009 Alert" to RREs that send the form unaltered and receive back a claimant's signed refusal to provide either a HICN or SSN. CMS previously indicated in its October 22, 2009 NGHP teleconference that any alteration of the form would eliminate the safe harbor.
  - **CMS References Unidentified Federal Statutory Obligation of Medicare Beneficiaries:** At the beginning of the teleconference, prior to taking audience questions and apparently in response to a growing number of RRE complaints that claimants are refusing to provide SSNs, a CMS representative reminded listeners that CMS only requires reporting of a HICN. He explained that a "federal statute" requires Medicare beneficiaries to provide their HICNs to non-governmental individuals or entities that have a reason to request the data (he carefully excluded mention of SSNs), but he did not identify these requestors other than to mention insurers broadly. He also did not offer the statutory citation, although CMS did later agree to consider one caller's request that the citation be posted on the CMS website. This discussion raises the question of whether CMS has identified new legal support for the disclosure obligation it would like to place on a Medicare beneficiary beyond the very vague regulatory requirement that Medicare beneficiaries "cooperate" in any CMS action to recover conditional payments. *See* 42 C.F.R. § 411.23. In its clear attempt to further distance itself from any alleged requirement that beneficiaries disclose their SSNs, CMS explained that Medicare only requires a HICN to match a Section 111 claims payment report to a beneficiary. CMS then corrected one caller's stated understanding that a HICN was simply the beneficiary's SSN plus an A suffix (in fact, Medicare also uses other alpha indicators), but did not address the implicit point that claimants who are reluctant to provide SSNs out of privacy concerns know that they, in effect, disclose their SSNs when they provide their HICNs.
- **Alternative Direct Data Entry (DDE) Reporting:** CMS previously discussed the possibility of an alternative reporting process for RREs with a low volume of reportable claims. The agency announced on the call that a pending Alert will provide information about an alternative "direct data entry" option intended for "small, occasional reporters." CMS stated that the data requirements for this process will be the same used in standard reporting, and that the option would be available by January 1, 2011. The Agency did not identify how "small" an RRE must be to use the alternative DDE process or what constitutes "occasional" reporting.
- **CD-9 Diagnosis Codes:** CMS clarified that RREs do not necessarily need to report the diagnosis codes appearing on a claimant's actual medical forms or invoices, noting that the codes selected by doctors or hospitals may not even appear on the list of codes that are currently accepted by CMS for Section 111 reporting purposes. CMS suggested that RREs set up a systems process to translate any invalid codes into valid ICD-9 numbers, provide text descriptions of illnesses and injuries or instruct claims handlers to independently choose a valid ICD-9 code from the code list provided by CMS. CMS noted

that although a general ICD-9 code does exist for a doctor or hospital visit independent of a specified injury, illness or diagnosis, it may be in an RRE's best interest to report a specific, more descriptive ICD-9 code in order to restrict a later CMS demand for return of conditional payments to the injury, illness or disease underlying the Medicare beneficiary's insurer claim.

- **Severance and General Releases:** CMS acknowledged that severance packages that contain general releases do not need to be reported under Section 111 as long as they do not specifically compensate for medical expense or release employer obligations for medicals under a group health plan. This clarification may have broader ramifications for other claims payment situations in which the claimant has not specifically alleged medical expenses but the insurer receives a general release of liability.
- **Empty File Submission:** CMS has removed the requirement that RREs submit an empty transmission file or otherwise notify CMS when they have no claims to report for a particular quarter.
- **Cumulative Trauma Claims:** CMS representatives also fielded questions concerning cumulative trauma claims, such as for carpal tunnel syndrome, a condition that manifests and worsens over time and therefore usually does not have a specific date of onset or an identifiable incident. Callers questioned whether such an injury matches with any "exposure" date, as defined by CMS, raising their concern that a date of first exposure is often indeterminate. CMS provided no guidance but promised to look into the issue.
- **Conditional Payment Information:** CMS discussed the availability of interim conditional payment information from the government pending settlement, judgment or award depending upon whether the requesting party is a Medicare beneficiary, workers' compensation plan, no-fault insurer or liability carrier. Beneficiaries and workers' compensation and no-fault carriers can obtain these accountings (typically from a Conditional Payment Letter) from the Medicare Secondary Payer Recovery Coordinator (MSPRC) by first contacting the Coordination of Benefits Contractor (COBC) and "self-identifying" the insurer's case. CMS reminded listeners that conditional payment information is not available to liability insurers from the MSPRC until there is a settlement, judgment or award, unless they go through the "consent to release" process and obtain the Medicare beneficiary's permission to receive such information. Whether the insurer is a workers' compensation plan, a no-fault insurer or a liability carrier, CMS believes obtaining interim conditional payment information before settlement or trial can only benefit the insurer by providing protection from unexpected CMS recovery actions and ultimately speeding up the final demand process.

The next NGHP Town Hall Teleconference, which will address solutions for technical issues with Section 111 reporting, is scheduled for May 13, 2010.

Our Section 111 Team routinely covers the Section 111 NGHP teleconferences typically held twice a month by CMS, and we send timely summaries of teleconference highlights to our clients. We also maintain a searchable electronic database of the transcripts back to October 2008. Please let us know if you would like more information about any of the topics discussed during the April 28, 2010 call. You may also access our Section 111 webpage and the other Section 111 Bulletins and articles we have published at www.wileyrein.

com/section111.