

ALERT

Section 111 Bulletin: CMS Town Hall Adds To Confusion Over Section 111 Reporting Obligations Of Accident and Health Insurers; Controversy Emerges Over Insurer's "Duty To Protect Medicare's Interests"

April 8, 2011

On April 6, 2011, the Centers for Medicare & Medicaid Services (CMS) held a Town Hall teleconference focusing on policy issues related to Non-Group Health Plan (NGHP) mandatory insurer reporting under Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007. CMS acknowledged continuing defects in the electronic reporting system that have sent error messages to Responsible Reporting Entities (RREs) attempting to submit reports, announced the posting of an Alert regarding changes to TIN Reference Files, discussed reporting obligations for Accident and Health insurers and commented on various technical issues that crept into the call. CMS also fielded questions about Medicare set-aside arrangements and the often-quoted-but-never-substantiated obligation to "protect Medicare's interests." Many important policy issues still remain to be tackled, including a possible reporting exception for Professional Liability payments and the questions awaiting the "Mass Torts" working group on April 14th.

Specific topics addressed on the April 6th call included:

"Mass Torts" Working Group Call: The "Mass Torts" working group call will be held on April 14th. CMS emphasized that participation is restricted to one call-in line per invitation due to a limited number of lines. Prior to the call, CMS promised to send participants revised draft guidance addressing the application of the 12/5/80 effective

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date of the Medicare Secondary Payer (MSP) statute to claims payments arising out of long-tail claims associated with exposure, ingestion and implantation. Wiley Rein's Section 111 Team will participate on the call.

Reporting Exception for Professional Liability and Employment Liability Policies: CMS kept hopes alive that it will adopt a reporting exception for professional liability claims payments in circumstances in which there "typically are no medicals." Stating that it is still "examining" appropriate relief, CMS emphasized that if medicals are in fact claimed or released under an exempted policy type, reporting would be required. CMS offered no date by which it will announce a decision.

Foreign Insurers: CMS acknowledged that entities have expressed "concerns" about CMS's February 7th Alert regarding the application of Section 111 reporting obligations to foreign insurers that CMS characterizes as doing business in the United States. CMS stated that it intends to hold meetings to address those concerns but did not provide further detail. We invite you to contact us if you are interested in submitting your comments or concerns to the Agency. We believe current guidance exceeds regulatory and legislative authority if applied to certain overseas insurers.

Group Cancer Policies, Group Critical Illness Policies, and Hospital Indemnity Policies: CMS provided ambiguous comments regarding the application of Section 111 reporting requirements to several types of what CMS classified as "Accident and Health policies." CMS stated that *group* cancer policies and *group* critical illness policies typically would not be required to report under Section 111, although reporting would depend on the "structure and administration" of each policy and possibly the "context of the accident." The Agency cautioned that the MSP rules that impose primary payment obligations on most group plans would still apply. CMS did not address *individual* cancer or critical illness policies, possibly due to the fact that individual health insurance coverage pays secondary to Medicare and carries no Section 111 obligations. CMS muddled the waters by contending that certain hospital indemnity policies could be classified as no-fault insurance, with corresponding NGHP reporting obligations, in some situations, but stated that if an employer were the plan sponsor, it would be considered a group health plan.

Duty to Protect Medicare's Interests: One caller pressed CMS to cite the statute or regulation that specifically requires insurers to "protect Medicare's interests." This phrase has been used repeatedly by CMS in discussions of Section 111 reporting requirements, but, as the caller perhaps understood, the referenced "obligation to protect Medicare's interests" is not grounded in statute or regulation. CMS responded by simply referring the caller to the full MSP statute, at 42 U.S.C. § 1395y(b) generally, and to Sections 5.4 and 19 of the Section 111 NGHP User Guide, none of which provides an authoritative legal basis for this theory. CMS's conclusory response to the caller's persistent questioning for a citation to the words "duty to protect" was that the obligation to pay on a primary basis is an obligation to protect Medicare's interests.

Medicare Set-Asides: Plaintiffs' counsel and Section 111 consultants have, from time to time, stated their beliefs that an insurer's "duty to protect Medicare's interest" requires insurers to enter into Medicare set-aside arrangements (MSAs). CMS and the Department of Justice have on many other occasions denied that a MSA

requirement exists under the law. In response to a caller question about MSAs, CMS stated that such arrangements were beyond the scope of the teleconference, and then referred the caller to workers' compensation guidance regarding MSAs even though the caller was inquiring about liability self-insurance. CMS reiterated that while Medicare's interests are to be protected, CMS does not mandate a specific mechanism for that protection.

New Alert Regarding TIN Reference Files: CMS posted an Alert dated April 1, 2011 to the CMS website with new guidance for TIN Reference Response Files and Address Validation. Since reporting began, RREs have had to report their Tax Identification Numbers (TINs), Office Code/Site IDs, and associated address information to CMS. Previously, upon system identification of an error in a TIN Reference File, the Claim Input file would continue processing, but would not merge with the TIN and address information. CMS has now implemented a two-phase process to fix this technical glitch. The first phase began in January 2011 and the second phase will be implemented in October 2011. RREs are advised to submit complete, updated TIN Reference Files with their fourth quarter 2011 file submissions.

Apology and Disclosure Programs: CMS discussed "apology and disclosure" programs sponsored by medical malpractice insurers, under which individuals who do not file formal claims against providers may obtain apologies, disclosures, or, in some cases, payments for their deductibles or co-insurance amounts. CMS stated that if the individual is a Medicare beneficiary, these payments would be considered "other payments" and would therefore be reportable under Section 111. CMS also opined that paying for only the deductibles or co-insurance would be equivalent to taking an individual's Medicare coverage into account (which is prohibited) since Medicare would still be making payments for the services. If providers or their insurers intend to assume any responsibility for payment, CMS advised that they must treat Medicare beneficiaries as if they have no Medicare coverage.

Claims Involving Ongoing Responsibility for Medicals (ORM) with a Termination Date Coincident with CMS Date of Incident: On a more technical note, CMS shared that when RREs report an ORM termination date that is also the date of incident CMS has on file for the same claim, RREs may receive an unspecified, undocumented error message. CMS stated that this should be an acceptable data pairing and that the error message reflects a flaw in CMS's system. CMS advised that it is working to fix the problem, and that RREs should resubmit affected claims.

Revised Curriculum for Computer-Based Training: CMS has posted a revised NGHP curriculum to the Section 111 website for computer-based training modules. RREs can refer to these resources on the Section 111 website for technical assistance with the reporting process.

The next NGHP Town Hall teleconference call will be held on May 4, 2011 and will focus on technical issues.

Our Section 111 Team routinely covers the Section 111 NGHP teleconferences held monthly by CMS, and we send periodic Alerts to our clients addressing notable town hall discussions and other Section 111 developments. We also maintain a searchable electronic database of town hall transcripts back to October 2008. Please let us know if you would like more information about any of the Section 111 topics discussed in

this Alert. You also may access our Section 111 webpage and other Section 111 Bulletins and articles we have published at www.wileyrein.com/section111.