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Section 111 Bulletin: House Committee Moves SMART Act Forward; Medicare Reaffirms Position on Mandatory Insurer Reporting Under Accident & Health and Short-Term Travel Policies

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Legislation designed to fix problems with the Medicare Secondary Payer (MSP) process has moved forward in the U.S. House of Representatives while the Centers for Medicare & Medicaid Services (CMS) continues to dig in its heels on its questionable interpretations of existing MSP law. Last week, the House Energy and Commerce Committee approved the Strengthening Medicare and Repaying Taxpayers (SMART) Act, contrasting sharply with the lack of forward movement in CMS guidance during last week's Town Hall Teleconference for Non-Group Health Plans (NGHPs).

The September 18 teleconference addressed both policy and technical questions related to NGHP compliance with Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Section 111 or MMSEA). During the call, CMS continued to defend its suspect classification of accident & health and short-term travel policies as no-fault insurance, resulting in increased and arguably unnecessary costs for the insurance industry at a time when Congress is signaling it wants to move in the opposite direction by reducing the burden on the industry. On a positive note for our specialty line readers, CMS also stated that "just earlier today" it had been working on revised guidance for specialty line insurers regarding the scope of their Section 111 reporting obligations in connection with the industry's common use of broad general releases in situations where the claimant or plaintiff has not made allegations of bodily injury or

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Section 111 Insurer Reporting and MSP Reimbursement

emotional distress. This guidance has long been awaited by the industry, and we will continue to monitor Agency website postings.

House Energy and Commerce Committee Passes SMART Act

On Thursday, September 20, the House Energy and Commerce Committee passed the SMART Act (H.R. 1063) by voice vote. This legislation, which we previously summarized here, was introduced by Rep. Tim Murphy (R-PA) on March 14, 2011. Some revisions were made to the original bill during committee markup, the most significant of which requires CMS to maintain a secure web portal providing information to beneficiaries, their representatives, and insurers that have been authorized by beneficiaries to access the portal. The web portal will provide information about the timing and amounts of claims paid by Medicare and final conditional payment amounts owed to CMS. The prior version of the bill required that CMS provide this information within a specified amount of time but did not require that the Agency utilize an online process. CMS recently began providing a secure online query service similar to the web portal described in this legislation. This tool is discussed in more detail below.

The committee background memo cited many frustrations of the insurance industry, stating that:

> Many claims cannot be settled in a timely or conclusive manner. Under current law, there is no requirement for CMS to provide the parties with amounts due or the amount they should set aside to cover future payments before settlement so the parties can appropriately allocate and resolve these Medicare obligations during settlement. For workers' compensation cases, CMS has created, through informal agency memoranda, a voluntary procedure for parties to seek review and approval of the medical allocations in their proposed settlements. Some have claimed the process for approval is unclear, does not recognize requirements of settlements under State workers' compensation statutes, and causes delay and inefficiency. For liability claims, no such process for prior review and approval exists.

In the words of Committee Chairman Rep. Fred Upton, the "lack of a timely response [by CMS to questions concerning conditional payment demands] has created a costly legal nightmare for large and small businesses, and created undue hardship on beneficiaries through no fault of their own." Rep. Fred Upton, Opening Statement (Sept. 19, 2012). The bill's next stop will be the House Ways and Means Committee. The House and Senate recessed at the end of last week until after the elections, so further action is unlikely for a couple of months.

Reporting Under Accident & Health and Short-Term Travel Policies

During the September 18 Town Hall Teleconference, the Agency appeared to move in the opposite direction of Congress, refusing to backpedal on current guidance that appears to contradict the plain English of CMS's own regulations. Specifically, the Section 111 NGHP User Guide provides that "Accident & Health, Short Term Travel and Occupational Accident Products are considered no-fault insurance by CMS and reportable as such under Section 111." CMS, *MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting NGHP User Guide v. 3.4* (July 3, 2012), Ch. 3 at 40. This guidance has been called into question by the insurance industry in the past because these three policy types often do not fit within CMS's regulatory definition of no-fault insurance:

> No-fault insurance means insurance that pays for medical expenses for injuries sustained on the property or premises of the insured, or in the use, occupancy, or operation of an automobile, regardless of who may have been responsible for causing the accident. This insurance includes but is not limited to automobile, homeowners, and commercial plans. It is sometimes called "medical payments coverage", "personal injury protection", or "medical expense coverage".

42 C.F.R. § 411.50. In contrast to this regulatory definition, CMS has adopted an extraordinarily expansive reading of no-fault insurance in the context of Section 111 reporting and assumedly for the Agency's collection of conditional payments. Travel policies, for example, cover accidental injuries that occur away from the property or premises of the insured and regardless of mode of travel. Some travel policies even exclude coverage for injuries falling in these categories. Nevertheless, CMS has contended that travel policies fall within the above definition of no-fault insurance.

A caller during the NGHP Teleconference challenged CMS's Section 111 guidance, citing the above narrow regulatory definition of no-fault insurance and asking CMS whether an insurer's payment to its Medicare-enrolled insured under an accident & health policy for mountain climbing injuries was required to be reported under Section 111. CMS responded that its position has not changed; reporting is required in this scenario. The caller pushed CMS about the fact that its interpretation was broader than the regulatory definition, and CMS representatives simply replied, "we understand your position."

The caller also asked whether reporting was required in connection with two other types of policies. The first was an accidental death and dismemberment benefit in a travel policy that pays insureds a set sum per injured body part, without regard to actual medical expenses incurred by the insured, where the insurer does not seek a release of medical expenses. CMS provided an oblique answer, stating that if the policy does not cover medicals and no medicals are released, and the policy is just paying a set sum for each body part injured, CMS would consider whether or not insurers paying out under such policies would be required to

report. At the same time, CMS noted that an individual who lost a limb obviously would have medical costs. CMS took the question back for further consideration, implying that the Agency may provide an answer on a future (as yet unscheduled) call or in a guidance document.

The caller also inquired whether an insurer was required to report payments made under a policy providing a limited cash benefit for each day of hospital confinement according to a set payment schedule, where the payments were unrelated to medical expenses. CMS representatives stated that they would go back and look at prior policy pronouncements but noted that they believed they had advised that reporting would be required in this situation.

CMS's responses to these above questions were consistent with the broad construction that CMS has placed on no-fault insurance. There is, however, a serious question about whether this informal guidance, issued without notice and comment rulemaking, is consistent with the regulatory definition of no-fault insurance in 42 C.F.R. § 411.50 or otherwise constitutes improper rulemaking. Now that Section 111 reporting is underway, insurers providing accident & health, short-term travel, and occupational accident products may have standing to challenge the Agency's interpretation in court. Otherwise, CMS's position in its guidance to date has been relatively clear—these policies are reportable under Section 111.

Potential Reporting Exception for Specialty Lines

Peter Foley, Vice President of Claims Administration at the American Insurance Association, called into the NGHP Teleconference and asked CMS when it expected to issue long-awaited alerts on a wide range of topics, including policy buybacks, foreign insurer reporting and specialty line insurance (errors & omissions, directors & officers liability, etc., under which allegations of bodily injury and emotional distress are rare). CMS representatives stated that they had been working on the "E&O / D&O" issue related to "broad general releases" earlier that day, providing renewed hope that CMS will announce a reporting carve-out for insurer payments with certain broad general releases under specialty line policies. CMS stated that they could not share any other updated information at this time and would not comment on the related Advance Notice of Proposed Rulemaking issued in June of this year addressing future medical expenses.

MSP Recovery Portal (MSPRP) Opens

Last July, CMS opened a web-based portal that allows qualified users (including Medicare beneficiaries and primary payers authorized by a beneficiary) to obtain available conditional payment information or dispute its accuracy. *See* MSPRP Registration Website. We previously reported on this development, which appears to be CMS's answer to the SMART Act's requirement that CMS open a secure web portal for claims information. CMS currently limits the number of primary payer employees with access to the portal to 20. One caller into the NGHP Teleconference asked CMS to grant access to more than 20 users as this limitation slows down the claims process. CMS's response implied that the number may be linked to technical limitations during the start up of the portal, but CMS advised nevertheless that it would consider the request.

CMS has not yet announced the date of the next NGHP Section 111 Teleconference.

Our Section 111 Team routinely covers the Section 111 NGHP Teleconferences held most months 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.