

ALERT

Section 111 Bulletin: Medicare Narrows Required Reporting By Insurers; Town Hall Reveals Disconnect With Insurers On Key Questions Regarding Pre-1980 Exposures

April 15, 2013

On April 9, 2013, the Centers for Medicare & Medicaid Services (CMS) held its first Town Hall Teleconference of the year for Non-Group Health Plans (NGHPs) concerning insurer reporting mandated by Section 111 of the Medicare, Medicaid & SCHIP Extension Act of 2007 (MMSEA). At the outset, the Coordination of Benefits Contractor (COBC) reported on CMS's noncontroversial March 24 Alert that changed a number of information fields on both the electronic and Direct Data Entry (DDE) Section 111 reporting forms from mandatory to optional. The discussion became more spirited when a series of callers expressed renewed frustration with CMS's continued unwillingness or inability to state that Section 111 reporting obligations do not attach to an amended complaint that confirms that all alleged exposure took place prior to December 5, 1980, the effective date of the Medicare Secondary Payer (MSP) statute. Finally, CMS announced that the next version of the NGHP User Guide is expected out in May. The Agency clarified that the User Guide will not include any guidance not previously announced, nor will it offer any insight into the Agency's pending implementation of the Medicare IVIG Access Act (incorporating the Section 111 provisions of the Strengthening Medicare and Repaying Taxpayers (SMART) Act passed earlier by the House), on which we reported in our last Section 111 Bulletin.

Certain Reporting Fields Now Optional

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Effective April 22, 2013, the input of data for certain fields on the CMS electronic reporting form (Claim Input File) and DDE page will become optional rather than mandatory. Perhaps of greatest interest to Responsible Reporting Entities (RREs) is the removal of the requirement to enter an ICD-9 "E" Code that identifies the "Alleged Cause of Injury, Incident or Illness" that gave rise to the reported NGHP payment to a Medicare beneficiary. See Field 15 on Claim Input File Detail Record or DDE Injury Information page. Going forward, an RRE may choose to enter spaces rather than a code. This development was welcomed by RREs that have struggled to match an E Code with the facts underlying a claim, for example a claim that alleges no bodily injury but is settled with a broad general release.

Similarly, when reporting cases involving deceased injured Medicare beneficiaries who are not claimants, certain identifying information, including federal Taxpayer Identification Numbers (TINs), for "claimants" and "attorneys and other representatives" will no longer be required. Electronic file reporters, see Fields 104-132 (requesting "Claimant and Claimant Attorney/Other Representative Information") on the Claims Input File Detail Record and Fields 7-92 on the Claims Input File Auxiliary Record. For now optional TIN data requests, see Fields 105 and 123 on the Claims Input File Detail Record and Fields 8, 26, 37, 55, 66 and 84 on the Claims Input File Auxiliary Record.

Confusion Continues Over The Reporting Of Claims Alleging Pre-1980 Exposure

Several insurers participating in the Town Hall expressed frustration with CMS's continued failure to provide the Agency's position as to whether Section 111 reporting is required in cases where, notwithstanding broader or more general allegations in an original complaint, an amended complaint (generally filed after exposure information is obtained in discovery) confirms that the alleged exposure took place exclusively prior to December 5, 1980. The discussion that stirred up the RRE audience arose out of a caller's request for confirmation of the widely-shared insurer view that reporting is *not* required when an amended complaint confirms that all "exposure, ingestion, or an implant on or after 12/5/1980 has not been claimed and/or specifically released," and the two other criteria set out at page 38 of Chapter III of the current User Guide are met. CMS answered that the effect of such an amended complaint on reporting obligations remains under consideration at the Agency (apparently many callers were not aware of this), and thus it was unable to offer any additional insight or even comment on when a decision might be forthcoming.

As we reported previously, CMS gave the same response over a year ago to a similar question. CMS apparently has never made a definitive statement whether it will look to the last amended complaint to determine reporting obligations, despite the fact that this question has been raised often since the Section 111 Mass Torts Working Group began discussions with CMS several years ago. By the end of the Town Hall, a good number of callers had expressed their frustration with this extended delay and CMS's apparent inability to identify clear reporting obligations when claims raise issues of pre-December 5, 1980 exposure and latent injuries. One caller bluntly stated that CMS's failure to clarify its position has hindered and delayed settlement in numerous liability cases.

The only clarity gained from this Town Hall was that the next version of the User Guide will not provide the needed clarification on exposure issues.

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