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ALERT

Section 111 Bulletin: CMS Announces Five New NGHP Alerts During May 27th Town Hall NGHP Teleconference

June 1, 2010

The Centers for Medicare & Medicaid Services (CMS) held a "town hall" teleconference for Non-Group Health Plans (NGHPs) last Thursday, focusing on policy issues related to mandatory insurer reporting under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007. During the call, CMS announced the May 25th posting of an NGHP Alert summarizing the Direct Data Entry (DDE) reporting option for certain small Responsible Reporting Entities (RREs), and then read portions of four long-awaited NGHP Alerts scheduled to be posted on the CMS Section 111 website within the next week, which we outline immediately below. CMS also shared that it plans to incorporate all Alerts published since release of Version 3.0 of the NGHP User Guide into an updated User Guide by July 1, 2010. In addition, it expects to send out a Mass Torts Working Group "notice" in the next few weeks, which we presume will invite interested parties to a working conference call. Finally, in response to caller questions, CMS offered additional guidance on unresolved issues, including the still too common challenge of obtaining claimant Social Security Numbers and how to ensure a claimant uses settlement funds to reimburse CMS for conditional payments.

New Alerts

- **New Direct Data Entry Option for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation:** Through this May 25, 2010 Alert, CMS announced the creation of a Direct Data Entry (DDE) reporting option for NGHP "Small Reporters". A Small Reporter is an RRE that expects to submit 500 or fewer NGHP claims reports per

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calendar year. This DDE option will allow Small Reporters to use the Section 111 Coordination of Benefits Secure Website (COBSW) to manually enter and submit individual claims information online instead of transmitting electronic files through one of three submission methods now available. Small Reporters have the same responsibility and accountability as all other RREs. The same data elements must be reported.

Small Reporters may register to use the DDE option beginning October 1, 2010, and may begin reporting on January 3, 2011. With a few exceptions, DDE submissions are required within 45 days of a TPOC (Total Payment Obligation to Claimant) settlement or within 45 calendar days of assuming Ongoing Responsibility for Medicals (ORM). No testing is required, and querying is not available.

Qualifying RREs currently registered to use a file submission method may change their status by logging on to the COBSW. It is not yet known what consequences may befall an entity that chooses the DDE option but then exceeds 500 reports a year.

- **Clinical Trials:** According to CMS representatives, this Alert will explain that payments made by sponsors of clinical trials for injuries or complications associated with those trials must be reported under Section 111 as ORM claims. The date the injury or complication arose should be used as the date of incident.
- **Periodic Payments:** CMS is expected to clarify in this Alert that where workers' compensation plans or no fault insurers must make regularly scheduled payments for something other than medical expenses, the RRE does not need to report these periodic payments under Section 111 as long as the RRE continues to report the medical expenses separately. However, if a TPOC settlement includes compensation for medical expenses, the RRE must report the full settlement amount even if such compensation is paid on a structured or periodic basis.
- **Revision of Language in Prior "Who Must Report" Alert:** CMS stated that this Alert shall fix an unintended error in Appendix G of the Alert issued on February 24, 2010, entitled *Who Must Report*. The new Alert deletes the second paragraph of the Liability Self Insurance definition on page 12 of the February Alert and replaces that language with the following language that also appears on page 4 of the Alert: Where an entity engages in a business, trade, or profession, deductible amounts are self-insurance for MSP purposes. However, where the self-insurance in question is a deductible, and the insurer is responsible for Section 111 reporting with respect to the policy, it is responsible for reporting both the deductible and any amount in excess of the deductible.
- **Risk Management Write-Offs:** CMS explained that this Alert addresses two types of risk management write-offs. First, where a medical provider (*e.g.,* a hospital) or a physician, or other medical supplier, reduces the charges for medical services or takes some other type of write-off, the amount of this write-off must be clearly documented through the billing process, and should not be reported under Section 111. Second, where someone other than a provider or supplier offers something of value to an individual and there is a reasonable expectation that the individual has sought or may seek medical care, such payment is subject to Section 111 reporting as a TPOC settlement and the related reporting

thresholds apply.

CMS also announced that the promised Alert on overseas insurer obligations is "still on the list", but callers should not expect its issuance "within the next week or so." Also, while the issue remains "under discussion", CMS is leaning toward requiring the "date of incidence" in cumulative trauma cases to be reported as the date the injury or the complication first arose.

Other Noteworthy Issues Addressed By CMS

- **Safe Harbor Form:** In response to a question regarding an RRE's ability to make changes to the *model safe harbor language* posted to the CMS webpage for use by RREs that encounter claimants who refuse to provide either a Social Security Number (SSN) or Medicare Health Identification Claim Number (HICN), CMS advised callers that the agency would consider accepting changes to this form (and thus presumably extending of the safe harbor) if they would send in their proposed revisions to the Section 111 Resource Mailbox at PL110-173SEC111-comments@cms.hhs.gov. For example, CMS said it would welcome Spanish versions of the safe harbor form and will consider whether a second language form can be sanctioned by CMS and posted on the Section 111 website.
- **Joint and Several Liability:** CMS confirmed that insurers that enter into multiple insurer settlements accepting joint and several liability must report the total amount of the settlement, not simply the amount the RRE itself paid.
- **Dual Payee Settlement Checks:** One caller encouraged CMS to issue an Alert endorsing the settlement practice of issuing dual payee checks to the claimant and Medicare to ensure Medicare receives reimbursement for conditional payments. This might be a particularly wise practice in situations where the claimant refuses to identify his or her Medicare beneficiary status. CMS acknowledged that some CMS regions are accepting dual payee checks, and some have even required the claimant to sign over the full amount of the check to the agency, which permits the agency to deduct the appropriate amount for conditional payments and then forward any remaining sum to the claimant. Although CMS stated very clearly that it cannot legally advise insurers to follow this settlement practice, it could be inferred that CMS believes the dual payee check presents a workable solution for insurers concerned with extinguishing conditional payment debt out of settlement funds.
- **Possible Reporting Exception for PL Claims:** Another caller asked whether CMS was reconsidering the application of Section 111 to professional liability (PL) insurers, noting that most PL claimants are not Medicare beneficiaries and medical expenses are typically not at issue with such claims, or only arise in connection with a claimant's allegation that he or she may have suffered emotional distress in connection with, for example, a work place incident. What is typical, however, is for a settling PL insurer to receive a release for all emotional distress or mental health injury claims. CMS did not answer the posed question, choosing instead to restate old guidance that if medicals are released, including future medicals, the settlement must be reported.
- **Reporting Settlements Below Dollar Thresholds:** CMS does not encourage RREs to report settlements that fall below applicable dollar thresholds, even if an RRE would save administrative costs by reporting

all settlements. CMS apparently is concerned that its systems are not set up to distinguish settlements under threshold amounts from settlements Medicare would otherwise pursue.

- **Multiple RRE IDs:** CMS encouraged insurers that have registered for more RRE IDs than they need, to return those numbers by contacting their EDI reps. Also, some RREs have failed to sign their profile reports, and this must be done before those RREs may move forward with Section 111 reporting.

The next NGHP Town Hall Teleconference, which will address solutions for technical Section 111 reporting issues, is scheduled for June 10, 2010.

Our Section 111 Team routinely covers the Section 111 NGHP teleconferences typically held twice a month by CMS, and we send timely detailed 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 May 27, 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.