

ALERT

Section 111 Bulletin: CMS Delays TPOC Reporting Requirements for Liability Insurers By One Year; Other Alerts and November 10 Town Hall Clarify Existing Guidance

November 15, 2010

The Centers for Medicare & Medicaid Services (CMS) has listened to liability insurers that requested a delay of their reporting obligations under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007. In summary, liability insurers may, but are not required, to delay their reporting of TPOC settlements (or other payments) until the first quarter of 2012, if they do not accept liability for the payment of the claimant's ongoing medical expenses. Moreover, only TPOC settlements with a date on or after October 1, 2011 must be reported. Workers' compensation and no-fault reporting will begin as scheduled in the first quarter of 2011, regardless of whether the settlement is classified as TPOC (Total Payment Obligation to the Claimant) or ORM (Ongoing Responsibility for Medicals).

In an Alert dated November 9, 2011 (but not posted to the CMS Section 111 website until November 12 after the November 10 town hall call), CMS revised the reporting requirements for liability insurers (including self-insured entities) in two meaningful ways:

- Liability insurers need not begin reporting claims data on TPOC settlements, judgments, awards or other payments until the first quarter of 2012, as long as the insurer is not also accepting responsibility to pay a claimant's future medical expenses as they arise (*i.e.*, accepting ORM). Previously, this date was the first quarter of 2011. A TPOC is an insurer's "Total Payment Obligation to the Claimant" and generally refers to a fixed settlement amount (whether paid in a lump sum or in

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installments) intended to resolve or partially resolve a claim. The TPOC date is the date the payment obligation is established.

- Liability insurers must only report a TPOC settlement, judgment, award or other payment with a date of 10/01/2011 or later. Previously, this date was 10/01/2010.

Although CMS gave consideration to delaying only the reporting obligations of Responsible Reporting Entities (RREs) that settle or otherwise pay on what CMS previously has defined as "Group 2 Claims" (see Section 111 Bulletin dated 10/22/10), it ultimately chose not to draw any distinctions between claim types. Group 2 Claims relate to the allegations of individuals claiming bodily injury, mental anguish or disease from the claimants' exposure to a deleterious product, substance or condition where the bodily injury or disease for which damages are sought manifests instantaneously or some period subsequent to the initial exposure. As explained by the American Insurance Association in a letter to the Secretary of Health and Human Services last month, a delay of the TPOC reporting date for liability insurers would provide CMS with an opportunity to clarify numerous uncertainties for all affected parties (Medicare beneficiaries and their counsel, liability insurers and their counsel, and even judges and courts), all of whom have been struggling with how to apply the new law to the release of claims in a variety of scenarios, including the payment of claims arising out of pre-12/05/80 exposure to toxic substances, such as asbestos.

Despite granting these extensions, CMS encourages early TPOC reporting by liability insurers that are prepared to commence or may already have begun reporting, explaining that "early reporting" of TPOC information can work to an insurer's advantage "since it will provide the [responsible reporting entity] with an opportunity to refine its production process prior to the required reporting date."

CMS makes it clear that no-fault and workers' compensation insurers will not receive any extensions for their TPOC reports. In addition, the reporting obligations of any insurer accepting ORM liability have not changed.

Finally, for liability and workers' compensation insurers, the Alert also extends the current dollar interim thresholds for reporting TPOC settlements, judgments, awards or other payments by one calendar year. See NGHP User Guide at 59. Thus, for example, prior to January 1, 2013, these insurers need not report claims totaling \$.00 to \$5,000.

It remains to be seen whether CMS will use the extra year wisely and revisit current policy on certain issues, such as the effect of a general release on reporting obligations where pre-12/05/80 injury is neither alleged nor proven or where neither emotional distress nor bodily injury is claimed. There are many unresolved questions about how Section 111 reporting and Medicare Secondary Payer liability applies, particularly in the Mass Torts context.

In addition to the Alert revising the Section 111 implementation timeline for liability insurers, CMS posted four other Alerts in the last week (although the dates of the Alerts span approximately a month).

ALERT for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation - DOI for Cumulative Injury: Through this October 14, 2010 Alert posted on the Section 111 website on November 10, CMS clarifies that the Date of Incident (DOI) for a cumulative injury, such as a repetitive strain injury, is the earlier of: (1) the date that treatment for any manifestation of the cumulative injury began (when such treatment preceded formal diagnosis); or (2) the first date that formal diagnosis was made by any medical practitioner.

ALERT for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation - Reporting Timeframe: Through this October 14, 2010 Alert posted on the Section 111 website on November 10, CMS clarifies that TPOC settlements are reportable once the claimant on whose behalf payment will be made has been identified and after the TPOC amount for that individual has been identified as well. This resolution will enable RREs, for example, to delay reporting mass settlements until they are able to allocate a settlement amount to each claimant (though, it is worth noting, CMS will not be bound by such allocations when it seeks return of conditional payments should it believe, for example, that one or more parties to the settlement are attempting to shield funds from CMS). CMS also notes that RREs will receive, but should ignore, late compliance flags from the Coordination of Benefits Contractor (COBC) that identify an older settlement date until CMS is able to update its system edits.

REVISED ALERT: New Direct Data Entry (DDE) Option for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation: Through this November 5, 2010 Alert posted on the Section 111 website on November 12, CMS explains the DDE option, including what entities qualify for the DDE option, what the DDE option involves, when "Small Reporters" can register for the DDE option (anytime after October 4, 2010) and when reporting may begin (now January 10, 2011 but listed as January 3, 2011 in the NGHP User Guide at page 126) and how the DDE option differs from the current file submission method.

REVISED ALERT: Direct Data Entry (DDE) Registration Information for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation: Through this second Alert also dated November 5, 2010, but posted on the Section 111 website on November 12, CMS provides information about the RRE registration process for the DDE reporting option, overlapping to a great extent with the other November 5, 2010 DDE Alert. In a section titled "Issues to Consider Before Selecting the DDE Option," CMS emphasizes that the DDE option should not be used as a query tool because the Medicare status of a claimant is verified during DDE and even a "no match outcome" will count toward the 500 claim limit. In addition, CMS warns that because DDE RREs are required to report the same data elements as RREs using the current file submission method, the manual entry of DDE claims information may take a considerable amount of time. Finally, the Alert refers potential Small Reporters to the Computer Based Training (CBT) modules and the COB Secure Website (COBSW) User Guide (not to be confused with the NGHP User Guide) for further information.

November 10, 2010 Town Hall Conference Call

The November 10th Town Hall discussion broke little new ground, but reiterated several previously announced policies and reaffirmed CMS's intention to begin Section 111 reporting of at least some claims in the first quarter of 2011.

Noteworthy Issues Addressed By CMS

- **Asbestos Claims:** In response to what CMS described as persistent rumors of an imminent announcement of a new, nation-wide process for handling the reporting of asbestos claims under Section 111, CMS denied that any such announcement was currently contemplated. Instead, CMS said that it is considering guidance for specific mass tort circumstances, but gave no time frame as to when such guidance may be forthcoming.
- **Numbers of RREs:** CMS provided the first update in many months on the current number of registered RREs. According to CMS, there are now more than 10,000 registered RREs that have successfully tested and are ready to begin or have begun submitting reports. Of these, approximately one third are "in production status," having already sent in at least one report.
- **Cumulative Injuries:** In reference to CMS's October 14, 2010 Alert addressing the reporting of cumulative injuries (described above), a caller asked CMS to define "cumulative injury." CMS responded that the guidance in the Alert had been provided in response to specific requests for information on what the relevant date of incident (DOI) is for injuries that only become evident over a period to time, particularly repetitive strain injuries. CMS stated that although there is no formal definition of "cumulative injury," the Alert applies to physical injuries not involving a specific, single incident of trauma, such as carpal tunnel syndrome, and is not intended to apply to "exposure" cases, including asbestos cases or other incidents of pollution or toxic exposure. This statement is consistent with current guidance in the User Guide, Appendix A, Fields 12 and 13 ("For claims involving exposure . . . the date of incident is the date of *last* exposure . . ."). Appendix A, Fields 12 and 13, acknowledges that the CMS DOI for claims involving exposure, ingestion, or implants generally differs from the DOI generally used in the industry for workers' compensation claims.
- **Policy Types:** CMS reaffirmed that general accident policies, occupational accident, and occupation and health policies are "no-fault" policies as CMS defines this policy type in the Medicare regulations. In contrast, a "policy offered to a patron of an event" (we immediately conjured up a policy purchased by a rock concert promoter) qualifies as a liability policy.
- **ICD-9 Training Courses:** CMS announced that it anticipates posting within the next week two computer-based training courses on the proper reporting of ICD-9 codes.
- **ICD-9 Pending Alerts:** CMS also announced that it anticipates releasing an Alert confirming its recent decision to allow RREs to retain old ICD-9 codes when submitting an update to a previously-submitted record. CMS also anticipates releasing an Alert regarding use of a default "NOINJ" code in limited circumstances, such as when reporting Employer Professional Liability (EPL) claims settlements, in which the underlying claim alleges no injury but the claimant signs a broad general release.

The following Section 111 practice members contributed to this report: Kathryn Bucher, Laura Foggan, Howard Anglin and Peter Jenkins.

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