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ALERT

Section 111 Bulletin: Medicare To Issue Mandatory Insurer Reporting Guidance On Amended Complaints, Specialty Line Reporting Exceptions, And SMART Act Regulations

August 1, 2013

On Thursday, July 25, 2013, the Centers for Medicare & Medicaid Services (CMS) held a Section 111 Town Hall Teleconference for Non-Group Health Plans (NGHPs) to discuss policy and technical questions related to NGHP reporting under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). Although the discussion focused largely on technical reporting issues, the Agency kept alive industry hopes for specialty line reporting exceptions, promised forthcoming guidance on the effect of amended complaints, and discussed the status of the Agency's work to implement the SMART Act.

Reporting Exception for Specialty Lines Still Under Consideration

CMS announced that it is still considering a reporting exception for lines of insurance that rarely, if ever, cover "medicals" or have "medicals" associated with them. In other words, CMS is referring to specialty line policies that seldom result in payments for bodily injury or emotional distress. In perhaps the most concrete public discussion of this possible reporting exception to date, the Agency listed the types of insurance policies it was considering for inclusion in the exception:

- Employment Practices Liability Insurance

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Practice Areas

Health Care

Section 111 Insurer Reporting and MSP Reimbursement

- Errors and Omissions Liability Insurance
- Directors and Officers Liability Insurance
- Professional Liability Insurance (other than Medical Malpractice Liability Insurance)
- Fiduciary Liability Insurance

The Agency also put "consortium issues" on this list because "they really aren't meds related" but stated that loss of consortium claims would likely be addressed in a separate CMS Alert. The Agency then solicited industry feedback on other lines of insurance coverage that should be excluded from Section 111 reporting. Please send us an email or call (contact information below) if you would like to discuss lines of insurance coverage that you believe should be excepted from reporting. We plan to send a consolidated list of coverage types and exception rationale to CMS for its consideration.

Forthcoming Guidance on Effect of Amended Complaints

During past Town Hall Teleconferences, Responsible Reporting Entities (RREs) have questioned reporting obligations where a court-filed complaint is amended to remove any allegations of bodily injury and emotional distress. On last week's call, Barbara Wright announced that the Agency is currently working on an Alert that will address the effect of reporting obligations associated with amended complaints. Ms. Wright stated that the Agency anticipates releasing the Alert "within a couple of weeks." Wiley Rein will report on the Alert once published. It would be a significant improvement to current CMS guidance if CMS would no longer require Section 111 reporting where an amended complaint removes original allegations of bodily injury or emotional distress, even if those allegations are subsequently released in settlement.

SMART Act Regulatory Timeline

Ms. Wright also acknowledged that the Agency has received numerous questions regarding the timeline for promulgation of regulations under the Strengthening Medicare and Repaying Taxpayers (SMART) Act, which was signed into law as part of the Medicare IVIG Access Act earlier this year. She stated that the Agency could not comment on regulations until they are placed on the unified regulatory agenda, available at www.reginfo.gov, and even then the Section 111 team will only restate what is posted. There are currently two Section 111 related postings on the website. The first is a proposed rulemaking titled "Civil Money Penalties Under the Medicare, Medicaid, and SCHIP Extension Act of 2007" with an Advance Notice of Proposed Rulemaking (ANPR) issuance date of September 2103. This ANPR "will solicit proposed criteria and practices for which Civil Money Penalties will and will not be imposed under the Medicare, Medicaid, and SCHIP Extension Act of 2007." The second posting is a proposed rule that is further along in the regulatory process and which we reported on earlier. It is titled "Medicare Secondary Payer and Future Medicals.'" The ANPR was issued in June 2012, and the comment period ended last August. A Notice of Proposed Rulemaking (NPRM) is expected in September of this year and will define the actions beneficiaries may take "to protect Medicare's interest with respect to [MSP] claims . . . where future medical care is claimed or the settlement, judgment, award, or other payment releases (or has the effect of releasing) claims for future medical care." Some consultants that offer reporting and Medicare set aside services have opined that the NPRM will require

that Medicare set aside accounts be established or funds otherwise set aside from settlements to pay for future medicals. We do not share that opinion. It remains our reading of the law that CMS does not have authority under current legislation to demand insurers or beneficiaries fund such an arrangement, even if beneficiaries can be required to pay for certain future medical expenses before Medicare becomes the primary payer. See our May 2013 article in DRI's *For the Defense* for more discussion.

"Joint and Several Liability"

As has been discussed on numerous other Town Hall Teleconferences, the User Guide states that "for a settlement, judgment, award, or other payment with joint and several liability, each insurer must report the total settlement, judgment, award, or other payment - not just its assigned or proportionate share." *Section 111 NGHP User Guide,* ch. 3, § 6.1.7. RREs have continued to ask the Agency to clarify what exactly it means by "joint and several liability." The Agency has stated in the past that this phrase is meant to guide RREs in scenarios in which multiple tort defendants are jointly and severally responsible for paying a common judgment or settlement amount. In response to a caller question during last week's Town Hall Teleconference, CMS stated that if a policyholder with a self-insured retention (SIR) and an insurer both contribute funds to a settlement, each should report its own "contribution" or "individual responsibility" unless they are "jointly and severally liable for a single sum," in which case each entity should report the total settlement amount. As CMS did not elaborate, it is difficult to know if a general consensus regarding the meaning of "joint and several liability" in the context of multi-defendant or multi-insurer settlements is emerging after years of confusion.

Clinical Trials

There were a number of Resource Mailbox and caller questions concerning clinical trials and the apparent perception that there is little risk associated with not reporting clinical trial payments or the provision of free medical care to Medicare beneficiaries because fines are not being levied. CMS pointed out that the Civil Monetary Penalties ANPR is still pending (implying that this is the reason fines have not yet been imposed), but many of CMS's remarks were confusing and at times contradictory. In the last discussion on the topic, Ms. Wright appeared to explain that trial sponsors cannot treat Medicare beneficiaries differently than other trial participants when it comes to the provision of free medical care in connection with an injury or complication "arising out of a clinical trial." She added that all payments for medical care that relate to an injury or complication that "arise out of a trial" must be reported.

Technical Reporting Issues

CMS spent much of the Town Hall call discussing technical issues, including a March 24 Alert that changed several informational fields on the electronic file and Direct Data Entry (DDE) Section 111 reporting forms from mandatory to optional. We previously reported in detail on this development. CMS also discussed three recent Alerts (issued on June 11, June 24, and July 11, 2013) on the 2015 mandatory transition from ICD-9 diagnosis codes to ICD-10 diagnosis codes and technical issues related to these diagnosis codes. CMS focused on the July 11 Alert that provided a list of excluded ICD-9 and ICD-10 codes that will result in errors if RREs submit them on claim input files or DDE records. Most of these ICD-9 codes have been identified in the past as

excluded codes; the Alert provided the ICD-10 equivalent codes and identified two newly excluded ICD-9 codes - 959.8 ("other specified sites, including multiple injury") and 959.9 ("unspecified site injury") that will generate errors if submitted on claim input files or DDE records after October 1, 2013. A Coordination of Benefits Contractor (COBC) representative commented that when RREs report these vague and very general diagnosis codes, Medicare may respond by denying broad categories of health care claims, causing hardship for Medicare beneficiaries. The Agency did not address whether Medicare should perhaps change its internal processes rather than rely on RREs to assign specific diagnosis codes, often in situations where the RRE has little or no information about the claimant's actual injuries and therefore must match codes to a set of general allegations and releases. Finally, CMS reminded listeners to report codes for all alleged injuries, not just those that are compensated in a settlement.

Other CMS Updates

CMS announced that the annual RRE profile certification process, which was put on hold earlier this year after the Agency encountered technical problems, will resume on or around September 1, 2013. As some RREs may have noticed, the prior Section 111 website is no longer functional; CMS announced that the Section 111 NGHP website has a new URL address: http://go.cms.gov/mirnghp.

CMS remarked that RREs should remember that a small category of liability settlements should be classified as ongoing responsibility for medical expenses (ORM) (where the insurer accepts an ongoing responsibility to pay future medicals), and not Total Payment Obligation to the Claimant (TPOC) (where the insurer's total payment obligation to the claimant is known at the time of settlement). Many people apparently incorrectly assume that ORM always goes hand in hand with no-fault coverage. CMS gave the example of a settlement under an ocean/marine liability policy with med pay coverage as a liability ORM settlement. In response to one caller's question, CMS also noted that some TPOC liability settlements might appear more like ORM settlements because the TPOC amount might vary (*e.g.,* a fixed sum per month for a certain time period unless a certain event occurs sooner). In that instance, the RRE is permitted to estimate the TPOC amount but the settlement still must be reported as a TPOC payment and not an assumption of ORM.

CMS reminded listeners not to forget the usefulness of the Beneficiary Lookup Tool, which can be used to supplement the formal query process. The formal query process typically takes one to two weeks to return information on a claimant's Medicare eligibility. In contrast, the Beneficiary Lookup Tool returns eligibility information immediately. Each RRE is limited to 100 "lookups" per month. CMS added that due to a "glitch," beneficiaries that have been deceased for more than 27 months are not in the current query database, but CMS still expects settlements with them to be reported if their Medicare status is otherwise known or suspected (*e.g.,* due to age).

Pooling Arrangements

CMS guidance is woefully deficient when it comes to reporting payments that are funded by a pooling arrangement other than a "self-insurance" pool. If you are interested in joining with us in the preparation of a request for CMS guidance, please contact us.

Our Section 111 Team routinely covers the Section 111 NGHP Town Hall Teleconferences held by CMS, and we send periodic Section 111 Bulletins 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 Section 111 Bulletin. You also may access our Section 111 webpage and other Section 111 Bulletins and articles we have published at www.wileyrein.com/section111.