

ALERT

Section 111 Bulletin: First Section 111 Town Hall of 2012 Highlights Need for Further Clarification of Reporting Responsibilities and Frustration Over Improper Claim Denials for Which Insurers Are Taking the Heat

February 29, 2012

On February 24, 2012, the Centers for Medicare & Medicaid Services (CMS) held the first Section 111 Town Hall Teleconference of the year for Non-Group Health Plans (NGHPs). More than three years into the mandatory insurer reporting program established under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007, frustration over the continued lack of clarity in the Agency's Section 111 reporting guidance, and the snail's pace at which CMS is addressing those concerns, was evident in the questions posed by Responsible Reporting Entities (RREs).

Frustrations are particularly high among insurers that do not typically pay for bodily injuries or medical services, yet continue to be swept into reporting through the ubiquitous general release, as well as insurers settling multi-party, multi-insurer litigation that remain perplexed by the Agency's use of the term "joint and several liability." Equally telling, there was active participation in the Town Hall conference by non-U.S. insurers whose requested revisions to the definition of "doing business in the United States" have been awaiting action for more than a year. Finally, multiple callers have asked for guidance regarding the handling of a claimant's future medical expenses—for example through use of a Medicare set-aside arrangement—only to be told that the topic is both beyond the scope of the Town Hall calls and outside the responsibility of the Section 111 CMS team. The take away for CMS is that there is a real need for

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better and more accessible guidance on all Medicare Secondary Payer issues.

Medicare's Denial of Beneficiary Claims

Questions concerning Medicare's denial of claims for medical services allegedly unrelated to the injuries underlying beneficiary liability claims dominated the two-hour teleconference. Growing anecdotal evidence suggests that these claim denials are becoming increasingly common, and many clearly think that the benefit denials reflect an overly aggressive response to Section 111 reports filed by RREs, as well as NGHP "cases" established by beneficiaries at the Coordination of Benefits Contractor (COBC). This issue has been discussed at length during other Section 111 Town Hall calls, and frustration about benefit denials seems to be increasing despite CMS's avowed attempts to train its Medicare personnel to distinguish claims related to liability claims from claims for which Medicare should pay primary. Some individuals concerned about benefit denials are using social media to share information on this critical issue and demonstrate to CMS that at least part of the problem lies with Medicare's own trained personnel. One group mentioned by a caller, the LinkedIn Medicare and Medicaid Compliance group, has over 1,000 members who engage in active discussions on Medicare claim denials and related issues. CMS appeared to acknowledge the complicity of its Medicare personnel when it stated during the call that it had begun to roll out new instructions for them.

Questions Concerning Reportable TPOC Amount

Another notable development from the Town Hall discussions is that CMS appears to be clarifying or modifying its position regarding the amount to be reported to CMS where insurers face joint and several liability for a Total Payment Obligation to Claimant (TPOC) or otherwise share in a claimant's payment. CMS has stated that it will be providing a written statement of its position, most likely in the form of an alert that offers examples, but we have no information as to CMS's timing. It will be important to parse the new guidance carefully, as these issues have spawned considerable confusion in the industry about an insurer's reportable amount where multiple insurers each pay portions of a defendant's settlement liability, whether or not in a text book "joint and several liability" context.

Foreign Insurer Reporting

One caller, from the German Insurance Association (GDV), a member of the European insurance and reinsurance federation (CEA), inquired about the status of CMS's February 7, 2011 Alert for Foreign Insurers, which requires non-U.S. insurers to report claims information under Section 111 if they are "doing business in the United States," as defined by CMS. The caller effectively asked whether CMS would be revising the Agency's definition of "doing business" that first appeared in that Alert, and referenced a proposed alternative definition submitted to the Agency by CEA and the American Insurance Association (AIA) last year. CMS responded that CMS was "reviewing its relationships with foreign insurers" but that no timeframe could be given for CMS's "answer," as the review "goes way higher than those in this room." The CMS representatives declined to give foreign insurers any guidance about how to proceed in the interim. The clearly heard frustration of non-U.S. insurers is understandable.

For example, last year CEA advised CMS that Section 111 creates a "significant reporting/compliance burden for European insurers, as it would require them to set up a time-consuming and expensive infrastructure simply to locate a few U.S. claimants that may fall under the Medicare system." CEA also explained that "the reporting requirements would place most European insurers in breach of European Union (EU) legislation, as they are prohibited by EU data protection law from transferring the required data to the U.S. without the claimant's consent (which is unlikely to be obtained due to the lack of any actual relationship with the claimant)." Although CMS promised a reply in the future, for the time being, CMS again left foreign insurers in the dark.

Use of ICD-10 Codes Postponed

On February 16, 2012, the Secretary of the Department of Health and Human Services (HHS) Kathleen G. Sebelius announced that HHS will initiate a process to postpone the date by which certain health care entities must comply with International Classification of Diseases, 10th edition, diagnosis and procedure codes (ICD-10). During the Town Hall call, CMS announced that use of ICD-10 codes for purposes of Section 111 reporting has been delayed until further notice, and confirmed this through an Alert posted on the Section 111 website.

Clarification on "Ingestion and Exposure"

CMS clarified that it views trauma-based injuries as discrete events, which should be distinguished from ingestion (e.g., of food or medicine) or exposure (e.g., to toxic chemicals), which, in contrast, may give rise to continuing harm or injury and have been the focus of discussion of the separate CMS Mass Torts Working Group.

Claim Input Files Permitted More Than Once Per Quarter

One caller posed a question about how to handle situations where an RRE needs to report a termination date for the RRE's acceptance of ongoing responsibility for medicals (ORM). CMS somewhat unexpectedly stated that it would permit an RRE to submit claim input files more than once per quarter (*i.e.*, outside of the RRE's designated quarterly reporting window of seven days) when the RRE needs to report a termination date for the RRE's prior acceptance of ORM. It seems likely that CMS is implementing this change in response to the problematic beneficiary claim denials. Under the framework of quarterly reporting, a beneficiary might have to wait 90 days or more after termination of an insurer's ORM before Medicare receives notice of that event and resumes paying primary for services related to the liability claim. Although CMS representatives stated that they "recently removed quarterly reporting restrictions," the representatives did not clarify whether RREs are only permitted to report outside of their standard assigned timeframe for ORM updates, or whether the new policy will apply to all claim input file updates.

The next Town Hall Teleconference will be held on March 22, 2012, and will address both technical and policy issues.

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 [here](#).