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ALERT

Section 111 Bulletin: CMS Holds First Town Hall in Five Months for Non-Group Health Plans; Seeks Public Comment on Section 111 Reporting Penalties

December 20, 2013

On Tuesday, December 17, 2013, the Centers for Medicare & Medicaid Services (CMS) held a Section 111 Town Hall Teleconference for Non-Group Health Plans (NGHPs) regarding their insurer reporting obligations under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). The discussion focused largely on the role of the new Benefits Coordination & Recovery Center, the October 2013 release of the latest version of the NGHP User Guide, the upcoming transition from ICD-9-CM to ICD-10-CM Diagnosis Codes, and other technical reporting issues. The Agency also answered caller questions that raised several unique issues relating to loss of consortium claims and lump sum settlements under short-term travel insurance policies.

A week prior to the teleconference, CMS published an advance notice of proposed rulemaking (ANPRM) regarding the imposition of civil money penalties (CMPs) under Section 111, in particular seeking proposals for the process by which penalties will be defined, measured, and applied.

This Bulletin addresses both developments.

CMS Town Hall Highlights

- **New Benefits Coordination & Recovery Center**

Authors

Kathryn Bucher
Partner
202.719.7530
kbucher@wiley.law

Practice Areas

Health Care

Section 111 Insurer Reporting and MSP Reimbursement

CMS began the teleconference by introducing the prime contractor for the new Benefits Coordination & Recovery Center (BCRC), Group Health, Inc. (GHI), and the BCRC Project Director, Jim Brady. In June 2013, GHI was awarded a $319 Million contract to establish a centralized Coordination of Benefits (COB) and Medicare Secondary Payer Recovery (MSPR) operation by consolidating all activities that support the collection, management, and reporting of information of other insurance coverage of Medicare beneficiaries and the follow-up collection of Conditional Payments or mistaken primary payments by Medicare. Two entities previously performed the roles of the Coordination of Benefits Contractor (COBC) and the Medicare Secondary Payer Recovery Contractor (MSPRC) under separate silos. Mr. Brady assured listeners that GHI's goal is a seamless transition of operations. Although there will be a new consolidated customer service number and a new post office box for mailings, CMS promised NGHPs that there will be no changes to how they currently report their payments to Medicare. NGHPs can learn more about the work of the BCRC at the CMS Coordination of Benefits & Recovery Overview webpage at http://go.cms.gov/cobro.

- **Release of New NGHP User Guide**

CMS introduced Jeremy Farquhar with the COBC to discuss Version 4 of the NGHP User Guide issued on October 7, 2013. There were no surprises. All substantive updates to the User Guide were previously announced through a series of five CMS Alerts published between June and September 2013, after CMS released Version 3.5 of the User Guide in April 2013. These Alerts addressed CMS's transition from ICD-9-CM to ICD-10-CM Diagnosis Codes and the Agency's publication of a list of newly excluded ICD-9 Codes that cannot be used on No-Fault claim records after January 5, 2014. While there will be a transition period during which RREs may report either ICD-9 or ICD-10 Codes on their claim submissions, RREs will be required to use ICD-10 codes when they report claims with dates of incident on or after April 1, 2015.

CMS also fielded questions from callers regarding several compliance-related issues:

- **Loss of Consortium**

CMS was unable to answer one caller's question regarding whether a Section 111 report should be filed where: (1) the individual signing the release on behalf of the injured party (possibly now deceased) was a family member serving in the capacity of a personal representative; (2) the release was broad enough to cover any loss of consortium claim; but (3) no loss of consortium claim was expressly asserted. Likewise, CMS could not answer whether reporting would be required when the family member signed such a release but did not specify the capacity in which he or she was signing. CMS encouraged the caller to send these questions into the Resource Mailbox.

The caller also asked whether a claim payment would need to be reported where the releasing party was not entitled to recovery for loss of consortium under applicable state law. CMS responded that reporting would be required. That guidance appears to be consistent with recent case law. *See In re Asbestos Prods. Liab. Litig.,* No. 12-cv-60048, 2013 WL 2367790 (E.D. Pa. May 30, 2013) (accepting a claimant's assertion that a loss of consortium claim was barred under applicable state law but concluding nonetheless that the claim had to be reported under Section 111). Section 111 is not preempted by state law.

- **Short-Term Travel Policies**

Another caller asked about the intersection of Section 111 and short-term travel policies, following up on a discussion from a previous teleconference we covered in our September 25, 2012 Section 111 Bulletin. The caller specifically asked if there is an obligation to report lump sum indemnity only payments when the policy at issue does not provide any coverage for medical expenses, rather only a set amount for loss of certain body parts or death. Like many other NGHPs, the caller pointed out the apparent conflict between CMS's narrow regulatory definition of "no-fault insurance" and CMS's broad reading of "no-fault insurance" in the context of Section 111 reporting.

By way of background, 42 C.F.R. § 411.50 provides:

No-fault insurance means insurance that pays for medical expenses for injuries sustained on the property or premises of the insured, or in the use, occupancy, or operation of an automobile, regardless of who may have been responsible for causing the accident. This insurance includes but is not limited to automobile, homeowners, and commercial plans. It is sometimes called "medical payments coverage", "personal injury protection", or "medical expense coverage."

Notwithstanding this definition, CMS has defined no-fault insurance much more expansively. *See* NGHP User Guide, Ch. 3 at 6-32 ("Accident & Health, Short Term Travel and Occupational Accident Products are considered no-fault insurance by CMS and reportable as such under Section 111."). While some travel policies, such as those described by the caller, do not provide for payment of medical expenses and may even exclude injuries that fall within the regulatory definition of "no-fault insurance" under 42 C.F.R. § 411.50, CMS apparently still takes the position, at least in the User Guide, that those insurers have reporting obligations. But it might be considering a change in that position. Unlike its response in the prior Town Hall call, CMS stated that it did not have an answer to the question but would look to provide one in a future Alert. CMS also requested that the caller write to the Section 111 Resource Mailbox so that CMS could have a clear understanding of the hypothetical posed.

- **RRE Recertification**

One caller stated that some RREs are having issues with the RRE recertification process; specifically, CMS may be overlooking updated RRE profile information and therefore may be sending recertification requests to the wrong individuals or addresses. CMS replied that it thought it had resolved this technical problem in September but would revisit the issue.

CMS Solicits Comments for Imposition of CMPs

On December 10, 2013, CMS published an ANPRM to solicit public comment on the adoption of Agency regulations that will impose CMPs on RREs that fail to comply with their Section 111 obligations to report their payments to Medicare beneficiaries who claim bodily injury or medical expense or release them from such claims. Although issued months after the notice deadline set forth in the Medicare IVIG Access Act (commonly

referred to as the Strengthening Medicare and Repaying Taxpayers (SMART) Act) passed last December, the ANPRM seeks proposals for the process by which penalties will be defined, measured, and applied.

As originally enacted, Section 111 required CMS to impose CMPs against noncompliant RREs of $1,000 per Medicare claimant per day. The SMART Act changed that Section 111 enforcement scheme by making fines discretionary rather than mandatory and permitting fines to range presumably from $1 to $1000 a day. It also required CMS to seek industry guidance before promulgating enforcement regulations, and the current rulemaking represents CMS's efforts to fulfill that statutory obligation. More specifically, the ANPRM requests comments and proposals to: (1) to define "noncompliance" with the Section 111 reporting requirements; (2) determine the appropriate dollar amount to levy for each day that an RRE fails to comply with Section 111; and (3) identify RRE actions or "safe harbors" that constitute a "good faith effort" to identify a Medicare beneficiary, presumably allowing the RRE to escape penalties. In short, the ANPRM gives parties that will be affected by the implementation of CMPs a voice in shaping how reporting penalties will be calculated and enforced. Comments are due to CMS by February 10, 2014. Please advise if we can be of assistance to you in filing comments.

Our Section 111 Team routinely covers the Section 111 NGHP Town Hall Teleconferences, 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.