FOURTH UPDATE: Are You Ready? The Clock Is Ticking on MSP Mandatory Reporting Requirements

By Mary Beth F. Johnston and Amy L. Mackin

Once again the Centers for Medicare and Medicaid Services (“CMS”) has delayed certain reporting requirements under the Medicare Secondary Payer Section 111 Mandatory Reporting Program for Non-Group Health Plans. Please consult our prior Alerts for detailed explanations of this reporting program. Click here to view the original Alert published in July 2009, here to view the First Update published in March 2010, here to view the Second Update published in June 2010, and here to view the Third Update published in November 2010.

Delayed Reporting

Most significantly, CMS has delayed mandatory reporting of certain liability insurance payments that represent “Total Payment Obligation to Claimant” (“TPOC”) payments of $100,000 or less. CMS noted in its announcement that this delay is optional and that it applies only to liability insurers, including self-insurers. Mandatory reporting has already commenced for other categories of reportable claims under Section 111. The new required reporting dates will be based on the amount and date of the TPOC, as summarized in the chart below. Prior to this announcement, all TPOCs over the minimum threshold paid by liability insurers would have been subject to mandatory reporting starting in the first quarter of 2012. The new reporting schedule amounts to a phase-in of reporting requirements for smaller payments.

<table>
<thead>
<tr>
<th>If the TPOC amount is more than</th>
<th>And the TPOC occurred on or after</th>
<th>Reporting is first required in the quarter beginning</th>
</tr>
</thead>
<tbody>
<tr>
<td>$100,000</td>
<td>Oct. 1, 2011</td>
<td>Jan. 1, 2012</td>
</tr>
<tr>
<td>$50,000</td>
<td>April 1, 2012</td>
<td>July 1, 2012</td>
</tr>
<tr>
<td>$25,000</td>
<td>July 1, 2012</td>
<td>Oct. 1, 2012</td>
</tr>
<tr>
<td>Minimum Threshold (e.g., $5000 for TPOCs on or before Dec. 31, 2012)</td>
<td>Oct. 1, 2012</td>
<td>Jan. 1, 2013</td>
</tr>
</tbody>
</table>

1 CMS, Alert: Revised Implementation Timeline for Certain Liability Insurance (Including Self-Insurance) Total Payment Obligation to the Claimant (TPOC) Settlements, Judgments, Awards or Other Payments, Sept. 30, 2011.
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There is also a new limited reporting exemption for TPOCs where the funds were placed in a qualified settlement fund prior to October 1, 2011, pursuant to Section 468B of the Internal Revenue Code in connection with a bankruptcy proceeding.²

Mass Torts

CMS has also released some long-awaited guidance on the application of the Section 111 reporting requirements for so-called “mass tort” claims.³ In short, because CMS only asserts recovery claims against liability insurers (including self-insurers) where the date of incident is on or after December 5, 1980, injuries related to ongoing exposures must be reported under Section 111 only where the date of last exposure or ingestion occurred on or after that date. More specifically, if all of the following requirements are met (for each defendant, if there is more than one), the payment does not have to be reported:

- All exposure or ingestion ended, or the implant was removed, before December 5, 1980;
- Exposure, ingestion, or an implant on or after December 5, 1980 has not been claimed and/or specifically released; and
- There is either no release for the exposure, ingestion or implant on or after December 5, 1980 or, where there is such a release, it is a broad general release which may effectively release claims for exposure, ingestion or implant on or after December 5, 1980, but does not specifically release those claims.

Foreign Insurers

CMS has also clarified its position that foreign insurers may be subject to Section 111 reporting requirements.⁴ In particular, foreign insurers that are “doing business in the United States” must report all the payments they make related to claims by Medicare beneficiaries, and insurers that have been made subject to the jurisdiction of a United States court with respect to a particular claim must report that claim. “Doing business in the United States” means that the insurer is registered in a U.S. state or territory or that it has a “definite presence in the United States,” for example by issuing or delivering insurance contracts, soliciting insurance applications, collecting premiums, or engaging in other insurance functions in a U.S. state or territory. With respect to privacy concerns raised by foreign insurers, CMS has taken the position that Medicare beneficiaries have consented to the release of this information to CMS simply by virtue of filing a Medicare claim. Please note that this CMS alert applies only to foreign liability, no-fault and workers’ compensation insurers, but not to any self-insurers. CMS has indicated that it will issue further guidance for foreign self-insured entities, including self-insured workers’ compensation entities, at a future time.

³ CMS, Liability Insurance (Including Self-Insurance): Exposure, Ingestion and Implantation Issues and December 5, 1980 (12/5/1980), Sept. 30, 2011. In its October 19, 2011 teleconference, CMS announced that it has found a typographical error in this alert. Specifically, in the second column of the chart contained in the CMS alert, the word “on” is used rather than the word “before.” CMS plans to edit and re-issue the alert with this change.
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Set-Aside Arrangements

CMS has also issued recent guidance on Medicare set-aside arrangements that are included in settlements, judgments, awards or other payments by liability insurers (including self-insurers). Specifically, where a beneficiary’s treating physician certifies in writing that the beneficiary’s treatment related to the alleged injury is complete and that no further medical items or services will be required, the arrangement does not have to be reported to CMS.5

Other Guidance from CMS

Version 3.2 of the User Guide, which mainly codifies already-announced updates to the prior version, was released in August 2011.6 The new User Guide and the official text of the updates described above are available at the CMS Section 111 website: www.cms.gov/mandatoryinsrep. Stay tuned for additional announcements from CMS about the future of this reporting program.

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5 CMS, Memorandum to Consortium Administrator for Financial Management and Fee-for-Service Operations, Sept. 29, 2011.