

## MEDICARE REPORTING AND RECOVERY UPDATE

### SMART ACT SIGNED INTO LAW

The long-awaited “SMART Act” (Strengthening Medicare and Repaying Taxpayers Act) was signed into law by President Obama on January 10, 2013. This legislation was the product of bipartisan efforts on the part of Medicare beneficiaries, trial lawyers, and insurance industry representatives seeking practical and balanced reforms to the Medicare reporting and recovery process.

The new law will:

- (1) Allow for greater access to Medicare payment information to make it easier for litigants to rationally evaluate potential lien obligations prior to settlement. Within nine months CMS will provide online access to obtain a “statement of reimbursement amounts” related to a case, and if downloaded within three business days before the date of a settlement or other payment, that shall constitute “the final conditional amount.”
- (2) Provide greater predictability of Medicare reporting and recovery by establishing annual thresholds starting November 15, 2014 and annually thereafter. The Secretary will establish a threshold amount below which there shall not be any reporting or recovery obligation. *But note:* The annual threshold does not apply in cases of alleged ingestion, implantation, or exposure, nor to certain types of ORM cases.
- (3) Allow for agency discretion and safe harbors in the MMSEA penalty process against Responsible Reporting Entities (RREs). The Secretary of HHS will issue regulations that will specify practices for which sanctions will and will not be imposed.

- (4) Permit, but no longer require, the reporting of SSN or HICN. Within 18 months the Secretary will modify the reporting system to allow RREs to dispense with these data elements, but still allow the MSP system to function effectively.

The 2013 SMART Act is available at: <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1845enr/pdf/BILLS-112hr1845enr.pdf>.

### MSPRC RECOVERY PORTAL

MSPRC has introduced a web-based tool designed to assist in and expedite the resolution of liability insurance, no fault, and workers’ compensation recovery cases. It can be used by attorneys, insurers, beneficiaries, and TPAs to perform the following online actions:

- Submit Proof of Representation and Consent to Release Authorizations;
- Request updates to conditional payment amounts and obtain copies of conditional payment letters (CPL);
- Dispute claims in the CPL and upload supporting documentation; and
- Submit case settlement information.

All users of the Medicare Secondary Payer Recovery Portal (MSPRP) (except beneficiaries) must register and be associated with a registered account. Users of the Section 111 COBSW can use the same login ID and password to access the MSPRP site. Users can establish a Representative or Corporate account. The Corporate accounts can include law firms, insurers, self-insured entities, or TPAs.

A detailed MSPRP User Guide (Version 2.0 February 1, 2013) is available for download under the “Reference Materials” menu option at <https://www.cob.cms.hhs.gov/MSPRP/login>.

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### STATUS OF CMS RULEMAKING REGARDING “FUTURE MEDICALS”

On June 15, 2012, CMS published an Advance Notice of Proposed Rulemaking (ANPR) soliciting comments on standardized options to help Medicare beneficiaries and their representatives meet their obligations to protect Medicare’s interests when “future medical expenses” are claimed or released in connection with a settlement, judgment, award, or other payment. The Notice appeared in 77 FR 35917 (June 15, 2012). The comment period on the ANPR closed August 14, 2012. Tucker Ellis has learned the agency is currently reviewing the comments and developing next steps in the regulatory process. Proposed rules regarding “future medicals” are expected sometime this year. Tucker Ellis continues to follow this issue closely and will provide an update as new information becomes available.

### OIG’S 2013 WORK PLAN: FOCUS ON RRES

The HHS Office of Inspector General (OIG) is charged with performing audits, inspections, and investigations to detect and prevent fraud, waste, and abuse and to ensure program integrity. Each year the OIG publishes a Work Plan outlining current focus areas and projects. MSP issues frequently appear in the annual OIG Work Plan, but for 2013, the OIG announced its intention to focus on investigating compliance with the Section 111 reporting requirements: “We will determine whether selected non-Medicare health plans properly reported insurance coverage information to Medicare as required.”

Knowing that enforcement efforts are underway, RREs are advised to review their policies and procedures to ensure timely and accurate compliance with the Section 111 reporting requirements. While OIG is always on the lookout for improper Medicare payments to beneficiaries, this is the first official signal of enforcement activity around the Section 111 program.

### UPDATE ON MSP AND MEDICARE ADVANTAGE ORGANIZATIONS POST-AVANDIA

Last summer, the Third Circuit Court of Appeals held that Humana and other similarly situated Medicare Advantage Organizations (MAOs) have a private right of action under the MSP and could bring suit for double-damages against Glaxo for failing to set aside reserves to reimburse the Medicare Advantage plans for costs of treatment for its subscribers’ Avandia-related injuries. (*In re Avandia Marketing, Sales Practices, and Product Liability Litigation*, 685 F.3d 353, 2012 WL 2433508 (3d Cir. June 28, 2012).) This decision appears to give Medicare Advantage plans some of the same rights, remedies, and options for recovery available to original Medicare under the secondary payor statute. *Note:* a *petition for cert* to the U.S. Supreme Court was filed December 5, 2012 (81 U.S.L.W. 3340; No. 12-690).

Upon remand, in the ongoing *Avandia* MDL proceedings (MDL No. 1871), the Special Master has been working with the parties to establish a proposed lien resolution program for Medicare Advantage Organizations. As of September 2012, approximately 40 plaintiff law firms and 45 healthcare plans have agreed to participate in a Private Lien Resolution Program (PLRP). The PLRP addresses lien claims by the healthcare plans for amounts paid for services allegedly related to Avandia-caused injuries. Building on the success of the PLRP, the Special Master, with the agreement of Glaxo and plaintiff’s counsel, have agreed to expand the scope of the PLRP and encourage participation with many more MAOs. On November 13, 2012, the MDL Judge reviewed and approved the proposed MAO PLRP. While participation in the MAO PLRP is strictly voluntary, the Court strongly encourages MAOs to participate so that lien claims can be resolved and settling *Avandia* claimants can receive all settlement proceeds to which they are entitled. Click to access the Court’s [Pre-Trial Order](#) and the [MAO PLRP](#), as filed with the Court.

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MAO/MSP Best Practices: Anticipating increased MSP recovery activity by Medicare Advantage Organizations post-*Avandia*, parties are advised to review their standard discovery, pre-settlement, and settlement practices to encourage the timely identification of Medicare Advantage plans that may have an interest in a particular plaintiff/injured party's settlement claim. Timely identification and satisfaction of

MAO interests should be an issue of mutual concern to both plaintiffs and defendants when resolving claims. Primary Plans (insurers and self-insured RREs) are encouraged to develop a Medicare Advantage discovery and settlement protocol to guide their claims staff and outside counsel in identifying and addressing Medicare Advantage interests.

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### ADDITIONAL INFORMATION

Tucker Ellis will continue to monitor developments in this area and provide updates and guidance for reporting and recovery obligations as available.

For questions, or to receive an Update of Selected Medicare MMSEA-MSP cases, please contact:

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