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ATTORNEYS AT LAW

CLIENT UPDATE

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**MEDICARE'S SECTION 111 REPORTING PROGRAM:
YEAR END UPDATE, AS PROGRAM
COMPLIANCE IS ABOUT TO BEGIN**

As has been widely reported, recent amendments to the Medicare Secondary Payer Statute require that certain insurance arrangements (including self-insurance) report to the Secretary of the Department of Health and Human Services information the Secretary deems necessary to facilitate proper coordination of benefits with the Medicare program.

After months of registration and planning, active compliance with the "Section 111 Rules" (a reference to the statutory cite) is about to begin. Starting January 1, 2010, companies (or their designated agents) must take training on data submission procedures and be prepared to actively report to Medicare by April 1, 2010 at the latest. ([A complete Section 111 Resource Guide is available.](#))

Throughout 2009, CMS held monthly Town Hall-style teleconferences to provide updates and clarifying instruction for liability providers, workers' compensation plan administrators, insured and self-insured entities, and others. Additionally, CMS convened a Mass Tort Working Group to address the reporting challenges associated with mass tort claims. On the eve of the

new year and new reporting program, this Client Update shares the most current Section 111 news and guidance.

**Highlights from the December 15, 2009
Town Hall Call**

1. Awaiting final CMS action on these issues.

There are several significant program elements under review at CMS. Final decisions are expected in early 2010 on these issues:

- **Mass Tort/Product Liability Reporting Rules**

CMS convened a Mass Tort Working Group that met weekly by teleconference from September – December 2009 to exchange ideas on how to adapt mass tort litigation work flows to the new Section 111 Reporting Rules. Three issues emerged from these discussions.

1. The timing and ability to report on settlements and payments when all the required data elements are not readily known:

- Not knowing with specificity the product(s) at issue in the litigation by type or manufacturer, nor the date, time and location of alleged exposure (this is especially true for premises-based exposure claims).
- Not knowing who gets the money. Payments are sometimes made to settlement Funds or Trusts rather than to an individual plaintiff and counsel directly and therefore, the entity making payment may not know until late, if at all, the identity of the ultimate recipient of the settlement funds, and the actual amount paid.
- Not knowing the recipient's Medicare status. Delay in identifying the recipient leads to an inability to accurately and timely determine if the recipient is a Medicare beneficiary.
- Not knowing the date of payment. If settlement dollars are paid into a Fund, to be administered by a court or law firm, the time to disburse those funds may be months later, well beyond the CMS mandated time parameters for Section 111 reporting.

Discussions within the Working Group suggest CMS may consider extending the deadline to report the details of a mass tort settlement to enable the responsible reporting entity (RRE) to gather the necessary detail, and perhaps couple that with a requirement that the RRE "alert" CMS to the fact

that a mass tort settlement has been reached.

2. Challenges presented by the "Product Liability" Fields (Field Numbers 58-62) on the Record Layout.

CMS representatives have also spent considerable time with the Mass Tort Working Group discussing the portion of the Section 111 report form that calls for disclosure of information about products that may have caused or contributed to cause an injury, illness or incident (Field numbers 58-62 on the claim input file detail record). The information requested (type of product, brand and generic name, model number, serial number) is not always known during the claims handling process, even at the time of settlement/payment, and this is especially true in the Workers' Compensation setting.

CMS representatives explained why this information is important: certain product events are associated with common injury allegations and well recognized patterns of medical services, costs and expenses. Accordingly, knowing the product details, down to the level of model and serial number, helps to facilitate a more tailored Mandatory Secondary Payer recovery process. CMS can more readily identify the medical payments that are apt to be subject to recovery and reimbursement.

CMS is considering the following revisions to the reporting of data in Fields 58-62:

- Limiting the reporting of product details to claims involving injection, implantation, exposure, inhalation and ingestion;
- Delaying the reporting of Field 58-62 data until January 1, 2011;
- Changing the Field nomenclature and definitions: move away from the broad reference “product liability” to more precise and limiting terminology.

CMS representatives emphasize that these are just some revisions that CMS is considering internally; no final decisions have yet been made.

3. How to effectively restrict reporting to liability events that occurred on or after December 5, 1980.

The liability insurance (including self-insurance) and no-fault insurance Medicare Secondary Payer (“MSP”) provisions became effective December 5, 1980. Accordingly, CMS has determined, as a matter of policy, that it will not recover under MSP provisions with respect to liability insurance (including self-insurance) or no-fault insurance settlements, judgments, awards or other payments where the date of incidence as defined by CMS was prior to December 5, 1980 unless the claim involves exposure continuing on or after December 5, 1980.

The Working Group has exchanged proposed language with CMS to define “exposure” for Section 111 Reporting

purposes (not legal exposure) and to clarify the reporting rules for such situations as:

- When a claim having a pre-December 5, 1980 exposure is paid from a policy that covers the post-December 5, 1980 period;
- When a claim having pre-December 5, 1980 exposure is settled with a Release that covers “any and all” exposures regardless of time;
- When a physical exposure occurred prior to December 5, 1980, but latent injury and symptoms emerged only after December 5, 1980.

CMS representatives are considering the work product of the Mass Tort Working Group. Revised reporting rules are expected after CMS gives clearance to final language for the proposed revisions.

- **Customer Service Write-Offs** – CMS is awaiting final clearance on language that will clarify the reporting obligations for bill write-offs and other service recovery practices which commonly occur in hospital and health care settings.

Practice tip: Any organization or entity that engages in customer service practices such as writing off bills, offering coupons or product discounts, or other similar “risk management” gestures, should maintain careful records of the transaction detail (date, amounts, names, etc.) beginning

January 1, 2010 until such time as CMS announces its final rules as to whether such practices are reportable events.

- **Finalizing the Definition of RRE** - On July 31, 2009, CMS issued an ALERT and circulated DRAFT language that provided additional detail regarding who/what entity is a Section 111 responsible reporting entity (RRE) for liability insurance (including self-insurance), no fault insurance and Workers' Compensation. CMS invited public comment on the proposed language. As of December 15, 2009, CMS is awaiting final clearance on this language; final agency approval is expected shortly. When final, new language will replace Section 7.1 of the Non-Group Health Plan User Guide regarding "Who Must Report".
- **Clinical Trials** – CMS indicates they are still reviewing the reporting obligations for clinical trial sponsors who assume responsibility for payment of expenses if trial subjects suffer injury or incur expense arising out of their participation in a clinical trial.

2. Foreign RREs' duty to report.

Foreign RREs will be obligated to participate in the Section 111 Reporting program and submit reports, but foreign RREs are unable to complete the registration process if they do not have a U.S. tax identification number (TIN) and a U.S. address. CMS representatives are working on system changes to accommodate these reporting entities. Accordingly, CMS will likely extend the registration, testing and

production deadlines for foreign RREs. The extension will not change the content of their reporting, only the timeframe within which it will begin. CMS' official decision will be announced shortly.

3. Reporting touchstone.

CMS representatives have again emphasized that regardless of the nature of the underlying claim, or the event which gave rise to the claim, if a Medicare beneficiary's medical expenses form a part of what is claimed or released, or if the Release has the effect of releasing liability for a Medicare beneficiary's medical bills, then a Section 111 reporting obligation is triggered. Thus employment claims, or professional liability claims (including claims against accountants, lawyers, or other professionals) may become reportable events. Specific guidance and instruction for reporting can be found on the CMS Mandatory Insurance website www.cms.hhs.gov/MandatoryInsRep and in the CMS Non-Group Health Plan User Guide.

4. Confidentiality concerns.

For reporting entities that are concerned about the disclosure or discoverability of payment information submitted to CMS, via a FOIA request or subpoena, CMS representatives offered the following reassurances: (a) CMS does not release private information on specific beneficiaries; (b) FOIA responses are redacted as necessary; and (c) the documents CMS would release are only those that are maintained in the ordinary course of business and since CMS does not organize its data by product line, payor name, or case

identification, records revealing such information are unlikely to be produced.

Updated User Guide Due Soon

With many operational and technical modifications under discussion, CMS anticipates issuing a revised User Guide (version 3.0) in early 2010. To the extent CMS does not issue an Alert to address some of the pending reporting issues (as described above), CMS will speak to those issues through the instructions and guidance contained in the next version of its User Guide. CMS reminds interested parties that implementing the Section 111 Reporting program is a challenging and dynamic process, so parties should expect the program requirements will continue to evolve with time and experience.

As active reporting of liability settlements, payments and awards gets under way, Tucker Ellis & West LLP will continue to share important Section 111 program updates as they become available. We also

invite your questions and comments as we strive to provide the guidance you need to be successful.

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