

**MEDICARE SECONDARY PAYOR REPORTING REQUIREMENTS:
NEW COMPLIANCE OBLIGATIONS FOR
HEALTH, LIABILITY, CAPTIVE AND OTHER INSURERS**

May 19, 2009

Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (“MMSEA”) added new Medicare secondary payor mandatory reporting requirements for group health plan arrangements and for liability insurance (including self-insurance), no-fault insurance, and workers’ compensation. The entities responsible for complying with the reporting requirements are referred to as Responsible Reporting Entities (“RREs”). The purpose of this reporting process is to enable the Centers for Medicare & Medicaid Services (“CMS”) to pay correctly Medicare covered items and services furnished to Medicare beneficiaries, by determining primary payor responsibility. Medicare is always the secondary payor when another source of coverage or payment exists.

Background. Section 111 requires RREs to submit specified information in a required form and manner. RREs are required to submit information electronically on liability insurance (including self-insurance), no-fault insurance, and workers’ compensation claims if the claimant (i.e., the injured individual) is a Medicare beneficiary. The data submission process will take place between the RREs and the CMS Coordination of Benefits Coordinator (the “COBC”). The COBC will manage the technical aspects of the data submission process. A civil monetary penalty of \$1,000 per day for each day an RRE is non-compliant may be imposed and is in addition to any other penalties prescribed by law.

Responsible Reporting Entities. An RRE is the person which makes payment to the injured claimant (i.e., the Medicare beneficiary) or to the claimant’s representative (e.g., a malpractice claimant’s attorney). When payment is made to reimburse a self-insured entity, the self-insured entity is the RRE and no reporting is required by the insurer reimbursing the self-insured entity. See MMSEA Sec. 111 MSP Mandatory Reporting Guidance at 4 (Dec. 5, 2008); MMSEA Sec. 111 MSP Mandatory Reporting Liability Insurance User Guide at 19 and 56 (Vers. 1.0, March 16, 2009). Importantly, an RRE may contract with another person to act as its agent to prepare and file reports with the COBC. However, the RRE remains the person responsible to report. For offshore captive insurers directly writing the policies of their insured members (and thus indemnifying such insured members for payments made by them to claimants and otherwise in connection with claims), the member insureds might consider contracting with companies furnishing reporting services, such as third-party administrators and other insurance consultants.

A health care provider is an RRE when it pays the claimant (i.e., the injured person) or the claimant’s representative, even if the provider is reimbursed by another party, such as a captive insurer. A captive insurer does not qualify as an RRE if its directly written insurance policy provides that it only indemnifies the provider for payments which the provider has made to or on behalf of the claimant. However, for captives issuing directly written policies and

making payments directly to claimants or their representatives, such entities are likely to qualify as RREs. Published CMS guidance does not specifically address the application of Section 111 reporting principles to situations involving captive insurers, so each arrangement involving a captive insurer should be analyzed separately to confirm which person is an RRE.

The presence of deductibles vs. self-insured retentions will likely yield different determinations of RRE status. If an entity carries a deductible and the payment of that deductible is therefore first made through the insurer, the insurer is the RRE responsible for including the deductible amount in the amount it reports as a settlement, judgment, award or other payment. In this circumstance, the entity is not required to register as an RRE. If, however, the self-insured entity pays the amount of a self-insured retention to the claimant or its representative directly, the entity must register and report as an RRE, even if reimbursed by its captive or other insurer.

Entities which are RREs for purposes of the Section 111 liability insurance (including self-insurance), no-fault insurance, or workers' compensation are not required to register if they will have nothing to report. However, those which do not register initially because they have no expectation of having claims to report must register in time to allow a full quarter for testing if they have future situations where they have a reasonable expectation of having to report.

RRE Registration and Filing. Section 111 RREs are required to register with the COBC and fully test the data submission process before submitting production files. RREs will then be assigned a quarterly file submission timeframe (i.e., a 7-day period each quarter) during which they are to submit files. Once in a production mode, RREs will submit their initial files containing information where the settlement, judgment, award or other payment date is July 1, 2009 or thereafter, and claims for which ongoing responsibility for medical payments exist as of July 1, 2009, regardless of the date of initial acceptance of payment responsibility. Subsequent quarterly file submissions are to contain only new or changed claim information using add, delete and update transactions.

An RRE will electronically transmit a data file to the COBC. The COBC processes the data in this input file. When this processing is completed, the COBC electronically transmits a response file back to the RRE. The response file will include information on any errors found, disposition codes that indicate the results of processing, and MSP information.

For liability insurance (including self-insurance), there is no *de minimis* dollar threshold for reporting the assumption/establishment of on-going responsibility for medical payments. Reportable information includes, but is not limited to, the name of the injured person, nature of the illness or injury, and dollar amount of the payment obligation. Where ongoing responsibility for Medicals has been assumed, the RRE must report two events -- when the responsibility is assumed and when the responsibility is terminated.

Reportable Information. RREs are obligated to report any settlement, judgment, award or other payment made to a Medicare beneficiary or to his or her representative, unless the claim asserted is for property damage only and did not seek, release or have the effect of releasing medical expenses. For reporting purposes, an RRE does not make a determination of what portion of any settlement, judgment, award, or other payment is for medical expenses and what

portion is not. CMS makes this determination for itself, notwithstanding any release or allocation agreement between the claimant and the provider or insurer, even if approved by a court. CMS will normally defer to an allocation made through a jury verdict or after a hearing on the merits. However, this is relevant to whether or not CMS has a recovery claim with respect to a particular settlement, judgment, award or other payment and does not affect the RRE's obligation to report. Most settlements and payments typically do not require court approval, so the extent to which CMS may in practice defer to contractual allocations between medical and non-medical expenses remains to be seen.

Compliance Dates. RREs must register on the COBC secure website from May 1, 2009 through September 30, 2009 and complete testing prior to submission of production files. When the registration has been processed by the COBC, the RRE will receive an email with a profile report. The profile report will contain information submitted during registration for verification purposes, assign the 7-day file submission timeframe, and assign the Section 111 report ID. The last page of the profile report must be signed by the RRE's authorized representative and returned to the COBC before testing can begin.

On May 11, 2009, CMS posted the following revised implementation timeline:

- May 1, 2009 – Sept. 30, 2009 Registration
- July 1, 2009 Test & Production Query Input Files Accepted
- Jan. 1, 2010 – March 31, 2009 Claim Input File Testing Begins
- January 1, 2010 Production Claim Input Files Accepted
- April 1, 2010 – June 30, 2010 Initial Production Claim Input File Submissions Due

The CMS website on mandatory reporting is at www.cms.hhs.gov/mandatoryinsrep/ and should be consulted regularly.

For further information, contact a member of KRW's insurance and health care practice groups:

Monte D. Jahnke
mdj@krwlaw.com

Eric I. Lark
eil@krwlaw.com

Patrick J. Haddad
pjh@krwlaw.com

Kerr, Russell and Weber, PLC
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226-3427
Phone: (313) 961-0200

© Copyright 2009 Kerr, Russell and Weber, PLC. This publication is furnished for informational purposes and does not constitute legal advice given by Kerr, Russell and Weber, PLC or its attorneys.