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CMS Guidelines and the Impact on Workers' Compensation

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Pursuant to the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), the Centers for Medicare and Medicaid Services (CMS) published an Alert, dated July 31, 2009, inviting public comment on draft language that defines, with specificity, the conditions that lead to designation of an applicable plan as a Responsible Reporting Entity (RRE). The period of time for public comment was until August 16. The language, once finalized, will be incorporated into the CMS User Guide for Non-Group Health Plans (NGHP), which was first published in March.

Liability insurance (including self-insurance), no fault, and workers' compensation are under the overall umbrella of NGHP and the attendant reporting requirements as described and mandated in the Act. The Alert contains important examples of scenarios involving deductibles, fronting policies, private payments and the like that can lead to designation of an *insured* as a plan and thus as an RRE with an obligation to file Section 111 reports in accord with CMS protocols and requirements. Further, the draft language contains guidance and definitions that apply specifically to workers' compensation.

The Alert can be viewed as paradigm of the evolving complexities and subtleties of Section 111 reporting requirements against the backdrop of the necessity of RREs to complete registration by Sept. 30, and to commence testing on Jan. 1, 2010. Live reporting of claims will commence April 1, 2010, on those reportable matters with a payment date (Total Payment Obligation to the Claimant, i.e., TPOC) on or after Jan. 1, 2010. We note the subset to this general timeframe in the situations involving Ongoing Responsibility for Medicals (ORM). The regulations provide that ORM's extant as of July 1, 2009, are generally subject to reporting. Thus, live data submission in 2010 must account for these claims. We would anticipate that ORMs would typically arise in workers' compensation claims, but are certainly not limited to them.

For purposes of this article, we focus on the draft language contained at Page 4 that indicates: "If an insured chooses to pay directly without recourse to existing insurance, any and all payment (regardless of whether or not the amount exceeds the deductible) is self-insurance and the insured is the RRE. This includes where the insured pays a claim for the deductible amount or less and fails to report that amount to its insurer in order preserve/improve its experience rating (or for some other purpose)." [1]

We have seen and dealt with matters in which the application of a proactive risk management initiative to address an untoward event and to resolve a matter amicably with a claimant early on can be entirely appropriate and indicated within the totality of certain circumstances. Indeed, protracted and unnecessary litigation can be avoided and both parties can put the matter to rest in the context of fairness and efficiency. Thus, recognition of these opportunities is the hallmark of a comprehensive risk control program. If in fact the insured additionally decides, once again quite appropriately so, to handle the financial dimension internally and not call upon insurance coverage, a claim file will not have been opened and the insurer by definition will not have had any nexus to the claim. Therefore, the insurer would not be, in any sense, the RRE in that situation. Consequently, the insured is the RRE and has an obligation to report. There are meaningful practical sequelae that need to be addressed.

The insured will first have to register with CMS and complete testing of the transmission protocols before the appropriate Section 111 report reflecting the payment can be submitted. This might not be feasible to complete in a timely manner given the potential of exigent reporting timeframes that are associated with the Date of Payment as defined by CMS. A solution to this complication would

be for an organization to register on an anticipatory basis as an RRE and thus to be fully prepared should the private settlement scenario, as described in the draft language, arise. An RRE can, of course, handle all logistical obligations internally or can retain the services of an experienced and specialized agent to handle these tasks on their behalf.

The discussion, *supra*, addresses solely one part of the definitions and examples contained in the eight-page Alert. The overall document contains a plethora of important information that should be discussed once the language is finalized and incorporated into the User Guide.

[1] Centers for Medicare and Medicaid Services, ALERT for Liability Insurance (Including Self-Insurance), No-fault Insurance, and Workers' Compensation DRAFT Language for Public Comment, July 31, 2009, p.4.

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