

A L E R T

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Product Liability and Insurance Services

NEW MANDATORY REPORTING REQUIREMENTS
AFFECT COMPANIES WHO PAY MONEY TO RESOLVE
PERSONAL INJURY CLAIMS

Companies that pay funds to persons eligible for Medicare, whether in settlement of claims or to satisfy a judgment, have substantial new reporting obligations under the Medicare, Medicaid and SCHIP Extension Act of 2007 (“MMSEA”). These obligations apply to both insurance companies and self-insured entities. If your company anticipates paying funds for any such claims, it must register with the Centers for Medicare & Medicaid Services (“CMS”) between May 1, 2009 and June 30, 2009. Because failure to do so carries stiff penalties (\$1,000 each day for each claimant), every company is advised to review this new law and determine whether it must register. This article provides a brief overview of the law and the resulting registration requirements.

In December 2007, President Bush signed MMSEA into law. One of the purposes of this legislation is to allow CMS to better track payments to Medicare eligible persons so that CMS can determine the appropriate amounts it needs to pay to its claimants and evaluate whether it has a recovery claim. The new law (Section 111 of MMSEA, codified at 42 U.S.C. § 1395y(b)(8)) places the burden on the payor to determine whether a claimant is entitled to Medicare benefits. If the claimant is so entitled, the entity paying funds must provide the CMS with information relating to the payment and the recipient. Individuals are Medicare-eligible if they are age 65 or older or have certain specified disabilities.

Section 111 applies to any “applicable plan.” Applicable Plan is defined in the section as “the following laws, plans or other arrangements... :

- (i) Liability insurance (including self-insurance).
- (ii) No fault insurance.
- (iii) Workers’ compensation laws or plans.”

42 U.S.C. 1395y(b)(8)(F). CMS recognizes that most companies (including insurance companies) do not typically use the term “plan” to describe themselves or their programs, but CMS cautions that the definitions set forth in Section 111 control.

Liability insurance “means insurance (including a self-insured plan) that provides payment based on legal liability for injury or illness or damage to property. It includes, but is not limited to, automobile liability insurance, uninsured motorist insurance, underinsured motorist insurance, homeowners’ liability insurance, malpractice insurance, product liability insurance, and general casualty insurance.” 42 C.F.R. Part 411.50. According to CMS, entities engaged in a business, trade or profession are self-insured to the extent they have not purchased liability insurance coverage, including responsibility for deductibles. 42 U.S.C. § 1395y(b)(2)(A). **Any entity that carries its own risk, in whole or in part, qualifies as “liability insurance” and hence as an “applicable plan.”**

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Any applicable plan that makes payments to Medicare eligible persons is deemed a “Responsible Reporting Entity” (RRE). If an entity is self-insured through a deductible but the payment of that deductible is done through the insurer, then the insurer must report the entire amount of the payment including the deductible. In that scenario, the insured entity does not need to report. If the entity makes direct payments to a Medicare-eligible claimant, however, or contributes to a joint payment in a multiple defendant settlement, such entity is responsible for reporting the amount of its payment.

If you are a Responsible Reporting Entity and anticipate having any payments to report, you must register with the CMS’ Coordination of Benefits Contractor (COBC). Even though the reporting requirements will not begin until the first quarter of 2010, RREs must register between May 1, 2009 and June 30, 2009. The purpose of this early registration is to allow the COBC to identify and validate all RREs and establish and test the necessary electronic file transfer mechanisms. Registration is accomplished through the following Web site: www.Section111.cms.hhs.gov. Detailed instructions regarding the registration process are available at www.cms.hhs.gov/MandatoryInsRep/Downloads/RegistrationOverview.pdf. Information regarding reportable payments must be tracked beginning on July 1, 2009, and the RRE is responsible for testing its submissions on the COBC system between July 1, 2009 and December 31, 2009. Quarterly reports must be submitted beginning the first quarter of 2010.

Entities who are RREs but do not anticipate having any payments to report do not need to register. For instance, entities

who are self-insured through a deductible, but whose deductible is paid to its insurer who then pays the claim, may not have anything to report. However, if at a later point that entity has a reasonable expectation of having to report payments, the entity must register in sufficient time to allow adequate testing.

The MMSEA provides substantial penalties for failure to comply with these requirements. Subsection (8)(E) provides for a civil money penalty of “\$1,000 for each day of noncompliance with respect to each claimant.”

The new requirements impose substantial burdens on RREs. The reporting requirements themselves are onerous, especially for large institutions that make many such payments. In addition, it is unclear at this point how an entity is supposed to determine whether a claimant is entitled to Medicare benefits. Presumably, representations from the claimant regarding any disabilities that may qualify that person for Medicare would be sufficient, but if CMS determines that reliance on the claimant’s representations are insufficient and that further investigation is necessary, the burden could be enormous. At a minimum, RREs will have to collect this information from the claimant as a condition of any settlement. It may also be advisable to seek this information through an interrogatory during discovery in each such case. In addition, RREs are advised to obtain indemnification from settlement recipients for any liability for Medicare liens or recoveries.

Companies are advised to review the requirements of this new law and determine whether registration is required. Because registration expires on June 30, 2009, this review should be conducted as early as possible. ♦

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