

A Lack Of Comprehensive Guidance In CMS User Guide

Law360, New York (February 24, 2012, 1:30 PM ET) -- Federal law requires that tort defendants report when they make a payment for injury or illness. The Centers for Medicare & Medicaid Services (CMS) has revised the user guide for required reporting entities six times since early 2009 with the aim of helping those required to report comply with their obligations. The latest version does not incorporate significant reporting deadlines included in an earlier notice and thus may create a trap for the unwary.

Background

Section 111 of the Medicare, Medicaid and State Children's Health Insurance Program (SCHIP) Extension Act of 2007 (42 U.S.C. § 1395y(b)(8)) created new reporting requirements for any payments made under an "applicable plan," which includes "liability insurance (including self-insurance)." 42 U.S.C. § 1395y(b)(8)(F).

Liability insurance "means insurance (including a self-insured plan) that provides payment based on legal liability for injury or illness or damage to property." 42 C.F.R. § 411.50. The statutory language and cases interpreting the statute make clear that a tort defendant qualifies as an RRE. See 42 U.S.C. § 1395y(b)(2)(A).

User Guides and Alerts

Since Section 111's passage, CMS has been continually refining the processes by which a required reporting entity (RRE) can comply with Section 111's requirements. In this vein, CMS has issued six different versions of the Section 111 user guide since early 2009.

These user guides are intended to outline the means by which an RRE can fulfill its Section 111 requirements to report ongoing responsibility for medicals (ORM) and/or total payment obligation to the claimant (TPOC) amounts incurred as a result of a settlement, judgment, award or other payment to Medicare-eligible individuals with claims that include medical expenses.

User guides are also intended to incorporate language from the various “alerts” issued by CMS since publication of the previous version of the guide. These alerts are the means by which CMS makes updates to the current version of the user guide as it continues to review and revise the existing framework.

Publication of a new user guide is intended to “include the current language in various alerts ... to bring it in line with all published material.” User Guide v.3.3, § 1, p.6.

October Alert: Revised Implementation Timeline

Of particular importance to product liability clients is an alert that CMS issued last October, dated Sept. 30, 2011, titled “Revised Implementation Timeline for Certain Liability Insurance (Including Self-Insurance) Total Payment Obligation to the Claimant (TPOC) Settlements, Judgments, Awards or Other Payments” (October alert). Available at www.cms.gov/MandatoryInsRep/Downloads/RevNGHPTimelineTPOC.pdf.

Pursuant to this alert, CMS delayed Section 111 reporting for RREs with only liability insurance, including self-insurance, TPOCs to report. The revised timeline was based on the TPOC amounts and dates at issue. Applying the revised timeline from the October alert to the existing interim reporting thresholds, the following timeline emerges:

- > \$100,000 TPOC amounts with a TPOC date on or after Oct. 1, 2011, must be reported in the quarter beginning Jan. 1, 2012;
- > \$50,000 TPOC amounts with a TPOC date on or after April 1, 2012, must be reported in the quarter beginning July 1, 2012;
- > \$25,000 TPOC amounts with a TPOC date on or after July 1, 2012, must be reported in the quarter beginning Oct. 1, 2012;
- > \$5,000 TPOC amounts with a TPOC date on or after Oct. 1, 2012, must be reported in the quarter beginning Jan. 1, 2013;
- > \$2,000 TPOC amounts with a TPOC date between Jan. 1 and Dec. 31, 2013, must be reported within 45 days when using direct data entry (DDE) or during the next reporting period when using claim input reporting;
- > \$600 TPOC amounts with a TPOC date between Jan. 1 and Dec. 31, 2014, must be reported within 45 days when using DDE or during the next reporting period when using claim input reporting; and
- All amounts with a TPOC date on or after Jan. 1, 2015, must be reported within 45 days when using DDE or during the next reporting period when using claim input reporting.

See October Alert; User Guide v.3.3, § 11.4, p.69.

DDE and claim input reporting are the two basic options for the manner in which an RRE can fulfill its reporting obligation. Claim input reporting requires that the RRE have the appropriate software, the use of which must be tested before reporting can begin.

DDE is an alternate option for “small reporters,” i.e., RREs that will submit ≤ 500 claim reports per calendar year, who can use CMS’s secure website to directly submit individual claims. See generally User Guide Version 3.3, § 6, p.17-18.

User Guide Version 3.3

In early January 2012, CMS issued the latest version of its Section 111 guides: User Guide Version 3.3 (dated Dec. 16, 2011). Available at www.cms.gov/MandatoryInsRep/Downloads/NGHPGuideV3.3.pdf. Unfortunately, by publication of this new user guide, CMS has muddied the waters in terms of when liability insurance, including self-insurance, TPOCs must be reported.

As with user guides in the past, User Guide Version 3.3 indicates that all Section 111 reporting requirement updates published in the form of an alert have been incorporated into the guide. See, e.g., User Guide v.3.3, § 1, p.6.

Despite this statement, User Guide Version 3.3 does not incorporate the timeline from the October alert. User Guide Version 3.3 does include language that indicates that RREs with only liability insurance, including self-insurance, TPOCs to report are subject to a separate reporting timeframe than other RREs.

For example, the guide states that “RREs, excluding those with only liability insurance (including self-insurance) TPOCs to report,” were to submit initial reports during the first quarter of 2011, whereas reporting of “liability insurance (including self-insurance) TPOCs with TPOC dates of 10/1/2011 and subsequent” is to commence during the first quarter of 2012. User Guide Version 3.3, § 10, p.47.

But nowhere does the user guide lay out the TPOC amount/date-dependent timeline that is provided in the October alert.

Since the publication of User Guide Version 3.3, CMS has issued other updates relating to Section 111. None of the information posted to the Section 111-dedicated website since January explicitly addresses the fact that the new user guide does not incorporate the TPOC amount/date-dependent timeline that is outlined in the October alert.

The only piece of information to address the issue in even an indirect manner is an updated list of computer-based training (CBT) courses that was issued in late January 2012 (revised CBT curriculum). Available at www.cms.gov/MandatoryInsRep/Downloads/NGHPCBTs011712.pdf. One of the courses included on this list focuses on “interim reporting thresholds.”

The description of the course indicates that it covers “the interim TPOC dollar threshold reporting requirements which have been established for Section 111 reporting, the interim TPOC dollar threshold reporting requirements for workers’ compensation claims with no ORM and the delay in reporting certain liability insurance (including self-insurance) claims with no ORM.” Revised CBT Curriculum, p.4.

Only registered RREs can attend the course, but the description alone seems to suggest that the timeline outlined in the October alert is still in effect, despite the fact that it was not incorporated into User Guide v.3.3.

Town Hall Teleconference

On Feb. 23, 2012, CMS hosted the first Section 111 “town hall teleconference” since it issued User Guide Version 3.3 in January. CMS regularly hosts these teleconferences to answer questions received via its Section 111 “Resources Mailbox” (PL110-173SEC111-comments@cms.hhs.gov).

During the call, the very first item addressed by CMS’ representatives — an item about which it reportedly received numerous questions — was the issue addressed herein. According to CMS, the timeline set forth in the October alert still applies despite the fact that it was not incorporated into the new user guide.

This offers liability insurance, including self-insurance, RREs who have only TPOC amounts to report some reassurance that continuing to rely on the October alert is appropriate.

But CMS’ representation is somewhat tempered by the two caveats that immediately preceded it, the latter of which appears in the transcripts of every Section 111 Town Hall Teleconference:

1. User Guide Version 3.3 is the “official policy” relating to Section 111 reporting requirements; and
2. If a statement made during the teleconference appears to contradict information available on the dedicated Section 111 website, “the written instructions control.”

Liability insurance, including self-insurance, RREs who have only TPOC amounts to report would likely have greater confidence in their course of action — and in future guidance from CMS — if the agency addresses this issue with “written instructions” such as a new Section 111 alert or yet another version of the Section 111 user guide.

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