MMSEA Section 111 Reporting

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Office of Financial Management/Financial Services Group

DATE:       June 23, 2008

SUBJECT:   Collection of Social Security Numbers (SSNs), Medicare Health Insurance Claim Numbers (HCNs) and Employer Identification Numbers (EINs) (Tax Identification Numbers) — ALERT

This ALERT is to advise that collection of SSNs, HCNs, or EINs for purposes of compliance with the reporting requirements under Section 111 of Public Law 100-173 is appropriate.

SSNs and EINs:

- The SSN is used as the basis for the Medicare HCN. The Medicare program uses the HCN to identify Medicare beneficiaries receiving health care services, and to otherwise meet its administrative responsibilities to pay for health care and operate the Medicare program. In performance of these duties, Medicare is required to protect individual privacy and confidentiality in accordance with applicable laws, including the Privacy Act of 1974 and the Health Insurance Portability and Accountability Act Privacy Rule. Please note that The Centers for Medicare & Medicaid Services (CMS) has a longstanding practice of requesting SSNs or HCNs for coordination of benefit purposes.

- The EIN is the standard unique employer identifier. It appears on the employee’s federal Internal Revenue Service Form W-2, Wage and Tax Statement received from their employer. The Medicare program uses the EIN to identify businesses. The establishment of a standard for a unique employer identifier was published in the May 31, 2002 Federal register, with a compliance date of July 30, 2004.

A new Mandatory Insurer Reporting Law (Section 111 of Public Law 110-173) requires group health plan insurers, third party administrators, and plan administrators or fiduciaries of self-insured/self-administered group health plans to report, as directed by the Secretary of the Department of Health and Human Services, information that the Secretary requires for purposes of coordination of benefits. The law also imposes this same requirement on liability insurers (including self-insurers), no-fault insurers and workers' compensation laws or plans. Two key elements that will be required to be reported are SSNs or HCNs and EINs. In order for Medicare to properly coordinate Medicare payments with other insurance and/or workers' compensation benefits, Medicare relies on the collection of both the SSN or HCN and the EIN, as applicable.

As a subscriber (or spouse or family member of a subscriber) to a group health plan arrangement, your SSN and/or HCN will likely be requested in order to meet the requirements of P.L. 110-173 if this information is not already on file with your insurer. Similarly, individuals who receive ongoing reimbursement for medical care through no-fault insurance or workers' compensation or who receive a settlement, judgment or award from liability insurance (including self-insurance), no-fault insurance, or workers' compensation will be asked to furnish information concerning their SSN and/or HCN and whether or not they (or the injured party, if the settlement, judgment and award is based upon an injury to someone else) are Medicare beneficiaries. Employers, insurers, third party administrators, etc. will be asked for EINs.

To confirm that this ALERT is an official Government document and for further information on the mandatory reporting requirements under this law, please visit the CMS website at www.cms.hhs.gov/MandatoryInsBgp.
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Introduction

- Medicare Secondary Payer Act
  - Mandates repayment of benefits paid by Medicare
  - However, claimants don’t always repay Medicare

- Medicare, Medicaid, and SCHIP Extension Act
  - Now, requires certain entities to determine if a claimant is receiving or eligible to receive Medicare and, if so, to report any payments to CMS
  - Goal is to enhance repayment to Medicare
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Introduction

- New reporting requirements start July 1, 2009
- Reporting requirements apply to all liability insurers, including self-insured entities, who pay any awards, settlements or judgments involving persons receiving or eligible to receive Medicare
- Penalties for non-compliance are steep
- If not repaid by claimant, you may be asked to repay Medicare
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Background

- Medicare Secondary Payer Act of 1980 ("MSP")
- MSP poses contingent liability on claimants, claimants’ counsel, insurance companies, self-insureds, defendants and TPAs
- Medicare slow in perfecting claims against primary payers
- MMSEA helps identify situations where Medicare is secondary payer, and enhance repayments to Medicare
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Background

- New rules apply to all types of liability claims, not just medical malpractice claims
- The right of reimbursement accrues after a claim is settled or damages are awarded to claimant
- MMSEA does not alter this repayment obligation
- MMSEA reporting does establish existence of obligation and entity from which payment may be ultimately sought.
MMSEA Section 111 Reporting Analysis

- Who Must Report?
  - Responsible Reporting Entities ("RREs")
    - Liability Insurers
    - Self-Insureds
    - No-Fault Insurers
    - Workers Compensation Insurers
    - HCPs paying out-of-pocket to avoid report to NPDB
  - Reporting may be delegated to TPAs
    - Responsibility cannot be contracted away
    - Liability still rests with RRE if TPA fails to report to CMS
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What Do I Report?

- Reporting Data Elements
  - Information on Claimant
    - Name, Gender, Birth Date, Health Insurance Claim Number (HICN) and Social Security Number (if known)
  - Information about Injury
    - Date of Incident and Venue
    - Text description of illness/injury (through December 31, 2010)
  - Information about Insurer and Attorneys
    - Total amount of payment to claimant (even if you are splitting the payment with another insurer or entity)
    - Remember, you still need to report claim to CMS Coordinator of Benefits (who determines amount to be paid to Medicare)
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What Do I Have to Report?

- The obligation to report is **not** triggered by a demand letter, a complaint or filing of a lawsuit.
- The obligation to report is **not** triggered when you write-off bills for customer services reasons.
- Payments for property damage is **not** reportable.
- Any settlement, award or judgment after January 1, 2010, to person receiving or eligible to receive Medicare
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- How Do I Determine Whether to Report?
  - Ask the Claimant
  - Query (again and again) CMS
  - Request Information in Discovery

- If you meet resistance, use CMS Alert
- Do not settle without HICN
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- How Do I Submit The Report?
  - RRE Registration from May 1- September 30, 2009
  - Filing of “test submissions” from January 1 – March 30, 2010
  - Reporting begins April 1, 2010, but RREs must report retroactively to January 1, 2010
  - RREs can report earlier, if cleared testing with CMS
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Analysis

- **When Do I Report?**
  - Reporting must begin as of April 1, 2010
  - Each RRE will be assigned seven-day window each quarter to submit reports to CMS
  - Do not assume you can wait until money exchanges hands
  - Reporting obligation arises upon assumption of responsibility for payment of the settlement, judgment, and award.
  - The obligation to report may be triggered by the signing of the settlement agreement or release.
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- What Happens If I Don’t Report?
  - Fines (up to $1,000 per day/per claim)
  - Double payment if claimant doesn’t repay Medicare

- What Happens If Claimant Doesn’t Repay Medicare?
  - Under the MSP, Medicare can pursue reimbursement from insurance companies of claimant or counsel failed to repay Medicare.
  - Section 111 does not alter this potential liability to CMS.
  - It remains unclear whether defense counsel can be held responsible for repayment.
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Recommendations

- Determine eligibility for Medicare
  - Develop Intake Checklist
  - Use CMS “Alert” to get HICN and SSN
  - Query Medicare
  - Query Medicare Again
  - Request information in discovery through Interrogatories and Document Requests, then verify information in Depositions and/or with Affidavits
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Recommendations

- Establish Process for Reporting
  - Early report to coordinator of benefits may expedite settlement and repayment to Medicare
  - File timely report with CMS
  - Track submission and receipt of reports
  - Understand that process may change as reporting begins and problems are encountered
  - Revisit reporting process as we get more guidance from CMS
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Recommendations

- Protect Yourself
  - Although not required, consider using Medicare Set-Aside Arrangements
  - Consider issuing third-party check to CMS
  - Include language in release addressing repayment and indemnification if claimant or counsel does not pay Medicare
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- Medicare Set-Aside Arrangements
  - If claimant is not currently receiving Medicare, no obligation to report under Section 111
  - If, however, the claimant will be eligible to receive benefits in the next 30 months, consider MSA
    - If dealing with inexperienced counsel or pro se claimant
    - In cases involving catastrophic injury
  - Third-party entities ready and willing to determine amount of MSA and assist with set-up for MSA (e.g. some structured settlement consultants).
MMSEA Section 111 Reporting Recommendations

- Consider issuing third-party check to CMS
  - If it ain’t broke, don’t fix it.
  - But, may be wise to consider this option if dealing with an unsophisticated attorney on the other side or an unrepresented (pro se) claimant
  - Will require communication and coordination with COBC, but will also ensure compliance with MSP
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Recommendations

- Indemnification
  - A must!
  - Request that claimant and the claimant’s attorney sign the indemnity agreement
  - Discuss indemnification early as part of the settlement negotiations
  - Consider preparing language ahead of time and providing it with your offer
Links

- https://www.cms.hhs.gov/home/medicare.asp
- https://www.cms.hhs.gov/MandatoryInsRep/03_Liability_Self_No_Fault_Insurance_and_Workers_Compensation.asp#TopOfPage
  - Town Hall Teleconferences
  - Alerts from CMS
  - User Guide Version 1.0
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Questions in Q&A?

Questions after the event – send to seminars@leclairryan.com with MMSEA in the subject line
Email for presenters

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Thank You.
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