



CARR ALLISON MEDICARE COMPLIANCE NEWSLETTER

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Alabama State Bar Association rules require the following disclosure: "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."

CMS Publishes Draft Language for Public Comment

On August 3, 2009 an alert for liability insurance (including self-insurance), no-fault insurance and workers' compensation was published on the CMS Mandatory Insurer Reporting website. Draft language, available as a download, provides proposed changes to the User Guide regarding who is the RRE for Section 111 as well as clarification on many other pertinent issues. CMS will be accepting comments on the proposed language via the Section 111 resource mailbox. All comments must be received by August 16, 2009 and the subject line must include the phrase "RRE Clarifications". Highlights from the draft language are provided below.

Who Must Report

In order to determine whether an entity is a responsible reporting entity (RRE) for purposes of Section 111 reporting, the applicable statutory language should be used to determine if the law, plan or other arrangement, as defined by CMS, meets the reporting requirements.

Third Party Administrators (TPAs)

- TPAs for purposes of liability (including self-insurance), no-fault and workers' compensation reporting, as defined by CMS, are never RREs
- However, while entities meet CMS' definition of a TPA, they may under certain circumstances also be an RRE

Corporate Structure

- Generally, an entity may register for another entity only if that entity is below it in the direct line of the corporate structure
- A parent entity may register as the RRE for a subsidiary, even if the parent itself does not qualify as an RRE
- For reporting purposes a captive is considered a subsidiary of a parent entity and a sibling of any other subsidiary of its parent
- See draft language for specific examples

Deductible Issues

- Deductible amounts are self-insurance for MSP purposes
- If the TPA pays the deductible or an amount exceeding the deductible:
 - a. Payment is considered to be made by the insured if the TPA is under contract to the insured/acting on behalf of the insured
 - b. Payment is considered to be made by the insurer if the TPA is under contract to/acting on behalf of the insurer

- Where the insured or the insurer is the RRE for both the deductible and any amount exceeding the deductible:
 - a. The total of the deductible and any amount in excess of the deductible is used in determining whether any applicable reporting threshold is met
- If an insured chooses to pay directly without recourse to existing insurance, any and all payment is self-insurance and the insured is the RRE
- If the settlement, judgment, award or other payment is the deductible amount or less:
 - a. The insured is the RRE for purposes of the deductible amount if it pays the deductible to or on behalf of the injured party
 - b. The insurer is the RRE for purposes of the deductible amount if payment of the deductible is by the insurer (with reimbursement by the insured to the insurer)
- If the settlement, judgment, award or other payment exceeds the deductible:
 - a. The insured is the RRE for purposes of both the deductible amount and any amount exceeding the deductible if it pays both the deductible and any amount exceeding the deductible to or on behalf of the injured party (with reimbursement by the insurer to the insured for the amount exceeding the deductible)
 - b. The insurer is the RRE for purposes of both the deductible amount and any amount exceeding the deductible if payment of the amount exceeding the deductible is made by the insurer, regardless of whether or not the deductible amount is paid by the insured or by the insurer (with reimbursement by the insured to the insurer for the deductible)
- See draft language for specific examples

Fronting Policies

In a fronting policy, the clear intent is for the insured to pay all claims; thus where the insured does pay the claim, the insured is the RRE

Re-insurance, Stop Loss Insurance, Excess Insurance, Umbrella Insurance, etc.

For re-insurance, stop loss insurance, excess insurance, umbrella insurance, guaranty funds, patient compensation funds, etc. which have responsibility beyond a certain limit, the key in determining whether or not reporting for 42 U.S.C. 1395y(b)(8) is required for these situations is whether or not the payment is to the injured claimant/representative of the injured claimant vs. payment to the self-insured entity to reimburse the self-insured entity. Where payment is being made to reimburse the self-insured entity, the self-insured entity is the RRE for purposes a settlement, judgment, award or other payment to or on behalf of the injured party and no reporting is required by the insurer reimbursing the self-insured entity.

Multiple Defendants

In multiple party settlements, an agreement to have one party issue payment, does not shift the responsibility to the party issuing payment. All RREs involved in a settlement are responsible for their own reporting

Self-Insurance Pools

- If all 3 of the characteristics below are met, the self-insurance pool is the RRE (also applicable to joint powers of authority in workers' compensation laws or plans):
 - a. The self-insurance pool is a separate legal entity
 - b. The self-insurance pool has full responsibility to resolve and pay claims using pool funds
 - c. The self-insurance pool resolves and pays claims without involvement of the participating self-insured entity
- When a self-insured entity in the self-insurance pool has the authority to approve/disapprove payment of claims and/or negotiated resolutions, the self-insured entity is the RRE

State Funds

- Where a State agency resolves and pays claims using State funds, the agency is the RRE
- Where a State agency authorizes an insurance carrier to resolve and pay claims using State funds (without State agency review and/or approval), the carrier is the RRE
- Where a State agency authorizes an insurance carrier to resolve and pay claims using State funds (but the State agency retains review/approval authority), the State agency is the RRE
- See draft language for specific examples

Workers' Compensation

- Where an employer purchases insurance from an insurance carrier, the insurance carrier is the RRE
- Where an employer is self-insured independently of other employers, the self-insured employer is the RRE
- For workers' compensation plans involving self-insurance pools or State funds, refer to the guidelines above regarding the same

Liquidation/Bankruptcy

- To the extent that settlement, judgment, award, or other payment obligations are paid to or on behalf of the injured party, from the assets of the entity in liquidation, the entity in liquidation is the RRE
- To the extent that a portion of a settlement, judgment, award or other payment obligation against an entity in liquidation is paid to or on behalf of the injured party by another entity from that other entity's assets (for example, payment by a state guarantee fund), the entity that makes the payment is the RRE
- To the extent that a payment does not fully satisfy the entity in liquidation's debt to the injured party, the amount reported is the amount paid. Any subsequently approved interim or final payments would be handled in the same manner. That is, they would be reported as additional TPOC amounts
- Where an RRE is bankrupt, it remains the RRE to the extent that settlements, judgments, awards or other payments are paid to or on behalf of the injured party after approval by a bankruptcy court

Other Reporting Issues

Liability insurance (including self-insurance), no-fault insurance and workers compensation plans associated with multi-national organizations, foreign nations, American Indian and Alaskan Native tribes are subject to the MSP provisions and must be reported accordingly.

CMS Publishes Alert Regarding Periodic Payments

On July 29, 2009 CMS published an alert for workers' compensation plans regarding when to report periodic payments. If the periodic payments made directly to or on behalf of the claimant through a plan that specifically precludes any payments for past, present or future medical expenses, the periodic payments should not be reported. Any periodic payments which include payment for medical expenses should be reported as ongoing responsibility for medicals (ORM). The alert can be found on the Mandatory Reporting website and at the following link:

<http://www.cms.hhs.gov/MandatoryInsRep/Downloads/ALERTNGHPPeriodic%20Payment.pdf>

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