

CMS PROVIDES ADDITIONAL INFORMATION REGARDING SECTION 111 COMPLIANCE AT FIFTH NATIONAL “TOWN HALL” TELECONFERENCE

By: Mark Popolizio, J.D.

On February 25, 2009, the Centers for Medicare and Medicaid Services (CMS) held its fifth national “Town Hall” teleconference in conjunction with the agency’s continued implementation of its Mandatory Insurer Reporting (MIR) requirements under Section 111 of the Medicare, Medicaid & SCHIP Extension (MMSEA).¹

This teleconference related exclusively to “liability insurance (including self-insurance), no-fault insurance and workers’ compensation” which is collectively referred to under the MIR as “Non-Group Health Plans” (non-GHP or NGHP).² Through this teleconference, CMS provided additional information regarding various aspects of its MIR requirements and addressed follow up questions related thereto.

The aim of this article is to highlight key aspects addressed by CMS at the teleconference to assist Responsible Reporting Entities (RREs) and other interested parties as they continue to develop their Section 111 compliance programs. In this regard, the author presents the following for review and consideration.

CMS announced important information and updates regarding the following major MIR components:

NGHP User Guide

CMS announced that the NGHP User Guide, which was scheduled for release in late February, is now slated for release during the first two weeks of March. The guide is reportedly 160 pages in length.

CMS forewarned that the forthcoming NGHP User Guide will contain most, but not all, of the MIR directives as the agency needs additional time to address certain issues. With respect to MIR components not addressed in the guide, CMS will post “Alerts” on its dedicated Section 111 website which will eventually be incorporated into a revised version of the guide.

Additional Town Hall Teleconferences

CMS announced that several additional Town Hall teleconferences calls will be scheduled to provide further assistance to the industry.

Following the teleconference, CMS released its revised Town Hall teleconference schedule as follows:

March 24, 2009	August 18, 2009
April 21, 2009	September 30, 2009
May 14, 2009	October 22, 2009
June 9, 2009	November 17, 2009
July 14, 2009	December 15, 2009

At the teleconference, CMS indicated that it was planning to schedule at least one additional teleconference for early April to address the forthcoming NGHP User Guide, and an additional conference in early May to address the registration process.

The author encourages the reader to periodically review CMS' dedicated MIR website for any scheduling revisions and updates. CMS' dedicated website can be accessed at www.cms.hhs.gov/MandatoryInsRep.

Section 111 Reporting Threshold

From the beginning of the MIR process, CMS expressed interest in establishing a "low value" or de minimus threshold below which Section 111 reporting would not be required.

In accordance therewith, CMS announced that an "interim" Section 111 monetary threshold for reporting will be established. The parameters and specifics of the "interim" threshold will be outlined in the forthcoming NGHP User Guide. CMS would not give any indications as to any of the particulars of the "interim" threshold and advised that the public would need to wait until the NGHP User Guide is released.

Section 111 "Cut Off" Period *(How Far Back is Section 111's Reach?)*

A major concern related to CMS' MIR directives involves the question of how far back the obligation to report under Section 111 extends. That is, just how far back is the obligation to report under Section 111?

This concern was heightened by CMS' release of guidelines regarding inactive or "closed" files and claims pre-dating December 5, 1980 as contained in the "Revised" *Interim Record Layout*.³ In general, under CMS' written MIR directives RREs *may still be required* to report under Section 111 where there has been an "acceptance of on-going responsibility for medicals" (as that term is defined by CMS) even though the case from an administrative standpoint has been dormant, the claimant has returned to work, or the RRE otherwise considers the file "closed."⁴

Furthermore, under the written MIR directives the potential reach of Section 111 regarding workers' compensation cases dates back to the inception of the Medicare program in 1965, as workers' compensation has been primary to Medicare since the program

began. The situation is different for liability (including self-insurance) and no-fault cases which are governed by the December 5, 1980 effective date of the MSP. With regard to these claims, CMS stated that reporting is *not* required under Section 111 if the date of incident *as defined by CMS* was prior to December 5, 1980. Notwithstanding, the potential reach related to liability claims is quite considerable.

Accordingly, on their face the MIR directives regarding "closed" and "inactive" files, and claims with older incident dates harbor the potential for requiring reporting on a large number of dormant or older claims presenting RREs with a potentially significant administrative burden.

In recognition thereof, CMS announced that it will be establishing a Section 111 reporting "cut off" ("look back") date for older claims which will be outlined in the forthcoming NGHP User Guide. CMS would not give any indications as to the components or features of the "cut off" period and advised that the public would need to wait until the NGHP User Guide is released.

A similar concern has surfaced "on the flip side" regarding current and future claims. The question in this realm being just how long must a RRE keep a claim open into the future for Section 111 purposes that is inactive or dormant from an administrative standpoint?

The concern in this area involves the potential administrative burden and expense of keeping claims "open" into the future for Section 111 purposes that are otherwise inactive or dormant from an administrative claims standpoint. In this regard, specific instances which may prove particularly problematic include newer claims involving younger claimants whose files remain open indefinitely, and claims in jurisdictions with "life long medical" provisions or where other circumstances prevent claim resolution.

In response to this potential problem, CMS indicated that it is also considering establishing a *prospective* "cut off" date for Section 111 reporting.

“Query Access” System

CMS addressed several follow up matters regarding the Query Access system it announced at the January 22, 2009 teleconference call. The Query Access system has been established to help RREs determine Medicare entitlement status which is a cornerstone requirement under Section 111.⁵

CMS again emphasized that the claimant’s social security number (SSN) is the critical informational piece required to be submitted under the Query Access system. The other required information includes the claimant’s name, date of birth and gender. The agency stated that the turnaround time to receive a response via the Query Access system would likely be “a couple of days at most.”

CMS repeated that the Query Access system will only confirm a claimant’s Medicare entitlement status by providing the HICN. It will not provide the basis of the claimant’s entitlement or date of entitlement. Likewise, information regarding whether the claimant has applied for social security disability (or the status of any such application) will *not* be provided. Accordingly, the limited utility of the Query Access system should be noted. In this regard, while the Query Access system may be a helpful tool with regard to Section 111 compliance, it will not provide information needed to assess other Medicare compliance issues.⁶

Significantly, CMS stated that the Query Access system is *not* a “safe harbor” with respect to a RRE’s obligation to “determine” Medicare status. CMS’ announcement in this regard essentially confirmed the statement it made at the January 22, 2009 teleconference that a “non-match” return should *not* be viewed as CMS’ “confirmation” that the individual is not a Medicare beneficiary; rather, only that there was not a match “based on the information submitted.”⁷

While the “Query Access” system has generally been viewed as a welcomed addition to the MIR process, the potential problem of a RRE not being able to procure a claimant’s SSN casts a potentially ominous cloud over the system’s utility and effectiveness. With increased privacy measures being taken by indi-

viduals to protect their personal information, RREs may very likely encounter difficulty obtaining a claimant’s SSN. Unfortunately, Section 111 does not contain any provisions requiring a claimant to provide this information.⁸

In recognition of this potential problem, CMS advised that it continues to develop its “model form” process to assist RREs in obtaining a claimant’s SSN or HICN. In the interim, CMS directed the public to the agency’s “Alert” published in June, 2008 regarding release of SSN and HICN information in relation to Section 111, and suggested that same be provided to individuals who may be reluctant to release this information. A copy of said “Alert” can be obtained at <https://www.cms.hhs.gov/MandatoryInsRep/Downloads/CollectionofSSNsHICNsandEINsTINsALERT.pdf>.

On a related note, CMS again stopped short of indicating that the forthcoming “model form” process itself, or other evidence of a “good faith” attempt by the RRE to obtain a claimant’s SSN would provide a “safe harbor” for RREs in terms of Section 111 compliance.

In addition to the above, CMS addressed several other MIR aspects. The following serves as a non-exhaustive list of some of the other points discussed at the teleconference:

- CMS plans on meeting with several industry groups (not specified) over the next few weeks to further address various aspects of the MIR in the NGHP context.
- CMS’ web based training program is expected to be released before the beginning of May.
- The exact codes to be utilized for reporting will be outlined in the forthcoming NGHP User Guide.
- CMS continues to develop its policy regarding mass tort litigation.
- CMS reports that it has drafted tentative language regarding the issue of joint powers of authority which is now in their internal “clearance process.”

- CMS' forthcoming NGHP User Guide will reportedly contain charts and examples regarding certain MIR guidelines, such as "when to report" and the applicable "action type" (addition, update, etc.) for reporting purposes. Furthermore, CMS indicated that the guide will contain information explaining what factors may or may not constitute sufficient grounds for a RRE to file a "termination report" in situations where Section 111 reporting was applicable under the "acceptance of on going responsibility for medicals" reporting trigger.⁹
- CMS repeated that reporting is premised on a "beneficiary by beneficiary" and insurance type basis which could mean that *two reports* regarding the same individual arising from a single incident may need to be submitted. CMS gave the example of different claims being filed under a single policy (i.e. no fault and liability) which could result in separate reportable events under the MIR.
- CMS reported that it has prepared provisions dealing with non-compliant employers in the WC setting and situations where State funds are responsible for medicals under State law. These provisions are currently in the agency's "clearance process."
- CMS is considering specific provisions to address defense verdicts and other judgments that do not result in a finding of liability or payments.
- CMS is developing a definition of what it considers a "product" for reporting purposes under the "products liability" data reporting fields.
- CMS has not finalized its intended policy regarding the penalty aspect of Section 111. In this regard, CMS again emphasized that at this time the focus should be on developing a proper Section 111 compliance program and working with CMS regarding the implementation of same in accordance with its issued timelines and procedures.¹⁰

Conclusion

CMS provided important general information regarding major aspects of its MIR process via its February 25, 2009 "Town Hall" teleconference, including the status of the NGHP User Guide, the establishment of a monetary reporting threshold and the expected setting of a "cut off" period for older claims.

Notwithstanding, important details and information regarding the operating features and specifics related to these major MIR components, as well as other related outstanding MIR aspects, remain unknown or unclear at this time. Hopefully, CMS will provide further explanation and guidance regarding these outstanding issues in the forthcoming NGHP User Guide. As the MIR implementation timelines rapidly approach, RREs and other interested parties need to secure this information as soon as possible to allow sufficient time to incorporate the required action into their Section 111 compliance programs.

Along these lines, all RREs and other interested parties should continue to regularly monitor CMS' dedicated website www.cms.hhs.gov/MandatoryInsRep for the release of additional MIR documents and information, including the expected release of the NGHP User Guide within the next few weeks.

Likewise, close attention should be afforded to CMS' upcoming Town Hall teleconferences. The next two scheduled Town Hall conferences for NGHP are March 24, 2009 and April 21, 2009. However, as stated above, it is expected that CMS will be scheduling at least one additional teleconference in April and May. Again, it is recommended that all RREs and interested parties periodically review CMS' dedicated MIR website for any scheduling updates and revisions which can be accessed via the link provided in the preceding paragraph.

About the Author

Mark Popolizio, J.D. is the Vice President of Customer Relations for NuQuest/Bridge Pointe. Mark also served as Vice President of the National Alliance of Medicare Set-Aside Professionals (NAMSAP) from 2006-2008 and remains active with NAMSAP concentrating on educational and legislative matters.

Prior to joining NuQuest, Mark practiced workers' compensation and liability legal defense for 10 years. During this time, he developed a national Medicare practice which included Medicare Set-Asides and Medicare Compliance. Mark is very active on the national MSA/Medicare educational and training circuit. He is a regularly featured speaker on MSA/Medicare issues before carriers/TPAs, state bar associations and industry specific organizations.

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Endnotes

- ¹ Section 111 of the MMSEA is codified at 42 U.S.C. 1395y(b)(7) and (8). Subsection (8) concerns liability insurance (including self insurance), no-fault insurance and workers' compensation which are commonly referred to by CMS as non-Group Health Plans (non-GHP or NGHP). Subsection (7) pertains to Group Health Plans which is *not* addressed by this article.
- ² CMS' prior teleconferences were held on October 1, 2008, October 29, 2008, December 11, 2008 and January 22, 2009. A special "Question/Answer" session was held on January 28, 2009.

A. CMS' Published Information Regarding its Town Hall Conferences

CMS has published transcriptions of several teleconference calls which can be obtained at http://www.cms.hhs.gov/MandatoryInsRep/07_NGHP_Transcripts.asp#TopOfPage.

CMS has also released audio versions of all its prior Town Hall teleconferences with the exception of the December 11, 2008 teleconference. The available audio versions of CMS' Town Hall teleconferences can be obtained at http://www.cms.hhs.gov/MandatoryInsRep/03_Liability_Self_No_Fault_Insurance_and_Workers_Compensation.asp#TopOfPage.

B. Author's Articles Regarding Section 111 and the MIR

The author has released several articles on Section 111 in relation to each of CMS' MIR documents as follows:

Supporting Statement (August, 2008):

CMS Publishes Summary of Proposed Guidelines to Implement Section 111 of the Medicare, Medicaid & SCHIP Act, NuQuest/Bridge Pointe "Settlement News," August, 2008.

Implementation Timeline (September, 2008):

CMS Releases Implementation Timeline Regarding Section 111 of the MMSEA, NuQuest/Bridge Pointe "Settlement News," September, 2008.

Registration Process (September, 2008):

CMS Releases Registration Process Instructions for Electronic Reporting Under the Section 111 of the MMSEA, NuQuest/Bridge Pointe “Settlement News,” September 29, 2008 (Special Edition)

Interim Record Layout (Initial – October, 2008):

CMS Releases “Interim Record Layout” Information for Reporting Under Section 111 of the MMSEA, NuQuest/Bridge Pointe “Settlement News,” October, 2008.

Interim Record Layout (Updated – November, 2008):

CMS Releases “Updated” Interim Record Layout for Reporting Under Section 111 of the MMSEA, NuQuest/Bridge Pointe “Settlement News,” December, 2008.

Interim Record Layout (Revised – December 5, 2008 Version):

CMS Releases “Revised” Interim Record Layout (12/5/08 Version) for Reporting Under Section 111 of the MMSEA, NuQuest/Bridge Pointe “Settlement News,” December 18, 2008 Edition.

CMS’ “Query Access” System (January 22, 2009 Teleconference):

CMS Announces “Query Access” System to Determine Medicare Entitlement for NGHP Reporting Under Section 111 of the MMSEA, NuQuest/Bridge Pointe “Settlement News,” January, 2009.

Each of the referenced articles can be obtained by logging onto www.NQBP.com (select “Resource Library” and then choose “Settlement News”). In addition, each of CMS’ documents can be obtained at http://www.nqbp.com/rl_cms_memos.shtml.

³ See, CMS’ “Revised” Interim Record Layout (12/5/08 Version) pp. 12 -13.

⁴ The concept of “accepting on going responsibility for medicals” is one of CMS’ “triggers” for reporting under Section 111. An examination of the reporting “triggers” and the various issues related thereto is beyond the scope of this article.

The Section 111 reporting “triggers” are outlined in *CMS’ “Revised” Interim Record Layout (12/05/08 Version)* on pages 7-8 (bullet points 9-11) and pages 9-14 (25 separate bullet points). The author addressed the reporting “triggers” in his article entitled *CMS Releases “Revised” Interim Record Layout (12/5/08 Version) for Reporting Under Section 111 of the MMSEA*, NuQuest/Bridge Pointe “Settlement News,” December 18, 2008 Edition, at pages 5-7. See endnote 2 for instructions on how to obtain the cited article.

⁵ CMS outlined the operating parameters of the Query Access system at the January 22, 2009 teleconference. CMS’ written policies regarding the Query Access system will be contained in the forthcoming NGHP User Guide.

For an overview of the Query Access system, see the author’s article entitled *CMS Announces “Query Access” System to Determine Medicare Entitlement for NGHP Reporting Under Section 111 of the MMSEA*, NuQuest/Bridge Pointe “Settlement News,” January, 2009. See endnote 2 for instructions on how to obtain the cited article.

⁶ The fact that the Query Access system will not provide information regarding social security status is significant as procuring this information may be necessary in certain situations to determine whether a Medicare Set-Aside (MSA) could be applicable.

While a positive determination of Medicare entitlement is the linchpin that “triggers” Section 111 reporting, this determination and the corresponding obligations resulting there from address only one component of Medicare compliance. For example, it must be remembered that protecting Medicare’s interests in the MSA context is not only dependent on a claimant’s Medicare entitlement

status; whether or not the claimant has applied for social security disability and the status of said application are separate and important considerations outside the Section 111 context that must also be addressed. In addition, the claimant's age and whether or not he/she has End Stage Renal Disease are other relevant factors.

Thus, while the Query Access system will provide helpful information with regard Section 111 "notice and reporting" requirements, it will not necessarily provide all the information needed to address *every* aspect of Medicare compliance. Specifically, a separate request to the Social Security Administration to obtain social security status information and procurement of other relevant information will still be necessary in certain instances to address MSA compliance issues. On another front, obtaining the date a claimant became entitled to Medicare may be helpful with respect to addressing issues related to conditional payment exposure and reimbursement.

- ⁷ See the author's discussion on this point as contained in his article entitled *CMS Announces "Query Access" System to Determine Medicare Entitlement for NGHP Reporting Under Section 111 of the MMSEA*, NuQuest/Bridge Pointe "Settlement News," January, 2009, at p. 3. See endnote 2 for instructions on how to obtain the cited article.
- ⁸ See the author's discussion on this point as contained in his article entitled *CMS Announces "Query Access" System to Determine Medicare Entitlement for NGHP Reporting Under Section 111 of the MMSEA*, NuQuest/Bridge Pointe "Settlement News," January, 2009, at p. 3. See endnote 2 for instructions on how to obtain the cited article.
- ⁹ CMS' reporting "triggers" are outlined in *CMS' "Revised" Interim Record Layout (12/05/08 Version)* on pages 7-8 (bullet points 9-11) and pages 9-14 (25 separate bullet points). The author addressed the reporting "triggers" in his article entitled *CMS Releases "Revised" Interim Record Layout (12/5/08 Version) for Reporting Under Section 111 of the MMSEA*, NuQuest/Bridge Pointe "Settlement News," December 18, 2008 Edition, at pages 5-7. See endnote 2 for instructions on how to obtain CMS' *Revised Layout* and the cited article.
- ¹⁰ CMS announced timelines in relation to its MIR program in its "Implementation Timeline" document released in September, 2008. See endnote 2 for instructions on how to obtain this document.