

## New Mandatory Medicare Secondary Payer Reporting Rules Imminent

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Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), added new mandatory reporting requirements for certain insurers and self-insured entities that will enable the Center for Medicare and Medicaid Services (CMS) to determine when the Medicare program does not have primary payment responsibility for Medicare reimbursable expenses.

As discussed more fully below, the new reporting rules apply to certain types of liability, no-fault and workers compensation plans, each styled as a "Responsible Reporting Entity" or RRE, including:

- > hospital captives and self-insurance trusts;
- > liability insurers;
- > no-fault automobile insurers;
- > workers compensation law or plans, including the U.S. government, states and workers compensation insurers; and
- > persons or entities that self-insure for any or all of the above, including hospitals and employers.

The new rules require each RRE, to register with CMS between May 1 and June 30, 2009, complete testing by the end of 2009 and submit reports commencing on an assigned date during the first quarter of 2010. These reports must contain detailed information about potential Medicare claimants. The new rules impose stiff penalties for noncompliance.

All such insurers and programs, and all entities that self-insure, whether through captives, trusts or other arrangements, including insurers providing coverage to these self-insured entities, should review carefully the new rules to determine compliance obligations.

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## Medicare Secondary Payer Rules

Medicare is a secondary payer to group health plans, liability insurance (including self-insurance), no fault insurance and workers' compensation. For example, if a patient claims to be injured by a health care provider, Medicare will pay secondary to any settlement or judgment paid by the health care provider or its professional liability insurer for any Medicare-covered medical costs incurred. Under the Medicare Secondary Payer rules, Medicare may recoup prior payments and avoid future payments for any medical expenses covered in any provider's settlement.

The new MMSEA requirements do not change existing secondary payer rules. However, the new requirements will provide more information to CMS to ensure Medicare makes payments in the proper order and takes any necessary recovery actions. The new reporting requirements became effective January 1, 2009, for group health plans and, as discussed below, will become effective no later than June 30, 2009, for liability, no fault and workers' compensation insurers, and self-insurance arrangements. The new rules and related materials, including a March 16, 2009, User Guide, are available at [www.cms.hhs.gov/MandatoryInsRep](http://www.cms.hhs.gov/MandatoryInsRep).

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## Responsible Reporting Entities

The entities responsible for complying with the reporting requirements are referred to as Responsible Reporting Entities or RREs. An RRE is defined as an "applicable plan," which means the following laws, plans or other arrangements, including the fiduciary or administrator for these laws, plans or arrangements:

- > liability insurance (including self-insurance);
- > no fault insurance; and
- > workers' compensation laws or plans.

This definition includes a wide range of entities, including liability insurers, no-fault insurers, workers' compensation programs and insurers, captive insurers, insurance trusts and entities that self-insure for these risks, like health care providers (*e.g.*, malpractice liability) and employers (*e.g.*, workers' compensation exposure).

Third-party administrators of RREs generally are not RREs based solely on their status as a TPA. While TPAs are not required to report, they may do so on behalf of an RRE. Nevertheless, under certain circumstances TPAs may be deemed to be RREs, in which event they have separate reporting obligations as an RRE. In addition, providers of reinsurance, stop-loss and excess coverage, guaranty funds and similar entities generally are not RREs when their obligation to pay runs to another entity, like a self-insured entity, who in turn has the obligation to pay the injured claimant or the claimant's representative. For example, when a stop-loss insurer is obligated to reimburse a hospital for a liability claim and the hospital is obligated to pay the claimant, the hospital, and not the stop-loss insurer, is the RRE.

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## Implementation Dates

CMS has extended certain implementation dates under guidance issued March 20, 2009. In order to timely comply with the new rules, each RRE must meet the following deadlines.

- > **Registration.** Each RRE must register online with the Medicare Coordination of Benefits Contractor between May 1, 2009, and June 30, 2009.
- > **Testing.** Each RRE must conduct testing from July 1, 2009, through December 31, 2009.
- > **Reporting.** Each RRE must now begin submitting required reports during an assigned window that will fall during the first quarter of 2010, and thereafter on a quarterly basis. The reports must be in electronic form. Reports can be submitted earlier if testing is completed.

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## Contents of Required Reports

Each report must include the identity of the Medicare beneficiary, whose illness, injury, incident or accident is at issue, as well as any other information specified by the Secretary of CMS, to enable an appropriate determination concerning coordination of benefits, including any applicable recovery claim. The RRE must submit a report, regardless of whether or not there is an admission or determination of liability, once there has been any of the following:

- > settlement,
- > judgment,
- > award, or
- > other payment.

Importantly, all settlements must be reported regardless of size. Nevertheless, CMS has established temporary thresholds for reporting of certain payment obligations to the claimant, which will phase out over the next three years.

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## Captive Insurers and Self-Insurance

The new reporting requirements clearly apply to entities that self-insure their own liability or workers' compensation risks, whether through self-insurance, captive insurance companies or insurance trusts. In the case of insurance captives, insurance trusts or similar arrangements, the RRE is typically the entity that is responsible for paying the claimant. For example, if a hospital is responsible for paying the claimant and the hospital captive merely reimburses the hospital for the amount of the claim, the hospital, and not the captive, is the RRE. Thus, all entities that self-insure, whether through captives, trusts or other arrangements, and insurers providing coverage to these entities, should carefully review existing insurance structures to determine who is the proper RRE.

## Costs and Penalties

The mandatory reporting requirements will significantly impact liability insurers, no fault insurers, workers' compensation programs and insurers, and entities that self-insure, such as health care providers. Any RRE that fails to timely comply with the reporting requirements with respect to a given claimant shall be subject to a penalty of \$1,000 for each day of noncompliance with respect to each claimant. In addition, the new reporting requirements will create administrative costs for RRE in tracking and monitoring which claimants are Medicare beneficiaries and whether there has been a reportable event, like a settlement, judgment, award or other payment.

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## Next Steps

We recommend the following steps for each provider of liability or no-fault insurance, workers' compensation programs or insurance, and each person who self-insures such risks, including TPAs:

- > Become familiar with the MMSEA reporting requirements.
- > Determine whether you are a Responsible Reporting Entity.
- > Design a process to capture required information.
- > Register online with the Medicare Coordination of Benefits Contractor before June 30, 2009.
- > Begin testing.

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