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Notice of Proposed Rule Regarding Civil Money Penalties and Medicare Secondary Payer Reporting Requirements

The Department of Health and Human Services (“HHS”), the governing agency for the Center for Medicare & Medicaid Services (“CMS”), has issued a Notice of Proposed Rule Making this week, indicating that monetary fines for failure to comply with the reporting requirements set forth as part of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (“MMSEA”) and now part of Medicare Secondary Payer (“MSP”) law may finally be on the way. A copy of the notice can be accessed [here](#).

As part of the MMSEA, insurers and self-insured entities qualifying as responsible reporting entities (“RRE”) are required to notify CMS of certain settlements, judgments, and awards involving Medicare recipients. This process, commonly referred to as “Section 111 reporting,” establishes Medicare as the secondary payer for all past and future medical bills associated with the reported claim. Prior to 2013, the Social Security Act stated that an entity that failed to properly comply with their Section 111 reporting requirements was subject to a mandatory \$1,000 per day fine for each claim.

In 2013, President Obama signed into law H.R. 1845, the Strengthening Medicare and Repaying Taxpayers Act of 2012 (the “SMART Act”). Section 203 of the SMART Act amended the Social Security Act by making those civil money penalties discretionary and not mandatory. Under the current law, the Social Security Act states that RREs who fail to properly report claims *may be* subject to a civil money penalty of *up to* \$1,000 for each day of noncompliance with respect to each claim. The SMART Act also directed the Secretary of the U.S. Department of Health and Human Services (“HHS”) to set forth rules and regulations specifying which reporting practices would be subject to the \$1,000 daily fine. In other words, while the current law states that some failures to comply with Section 111’s requirements will be subject to the fine, it also provides that the fine will not be imposed for some compliance failures. To date, no such rules and regulations clarifying how and why a fine may be assessed have been proposed. This has led to the penalty mechanism for failure to report a claim becoming somewhat of an MSP boogeyman, with RREs operating compliance programs under threat of a potentially massive fine with no clear enforcement criteria.

However, this Notice should be regarded as the beginning stages of the penalty mechanism taking on a more concrete form. The Notice indicates that, within the next year, HHS will issue a Proposed Rule that will solicit public comments on proposed criteria and practices for which civil money penalties will be imposed for reporting failures. This is the first step towards the enforcement of the monetary penalties.

While the Notice is a noteworthy development in the Section 111 reporting world as it signals an end to 6 years of uncertainty with regards to the fines, reporting entities should not be alarmed. For one, the final regulations are still a long ways away. The Notice states that the Proposed Rule is due by September 2019. Furthermore, the SMART Act requires that HHS review the public’s proposed enforcement criteria for a period of 60 days. Then, HHS will work with the Attorney General to formulate proposed regulations, which will be published and subject to another 60-day period of comment. After that, HHS will issue the final rules and regulations. So, we likely will not see any final regulations for another year at the very least.

Most importantly, the SMART Act specifically states that these enforcement regulations should *not* provide for sanctions for “good faith efforts” to comply with the Section 111 reporting requirements. While the Act does not define

what constitutes a “good faith effort,” this provision signals that it is not the intent of HHS to punish RREs for accidental omissions or data entry errors, and the full force of the penalty will likely be reserved to those entities that lack a defined compliance program and eschew their reporting obligations entirely.

The Dickie, McCamey & Chilcote Medicare Compliance Group is available to your organization for all aspects of Medicare Secondary Payer compliance, including establishing a compliance program for your entity or reviewing an existing program, preparing Medicare Set-Asides, obtaining CMS approval of MSAs, and resolving conditional payment issues. If you have any questions regarding the information outlined above, or any other inquiries, please feel free to contact us.



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