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State: NA
Insurers Stress 'Good-Faith' Exception to CMS Reporting Penalties: Top [2013-12-16]

The Centers for Medicare and Medicaid Studies is seeking proposals on how it should penalize insurers who violate the agency's claim-reporting requirements, and payers are responding that the agency should not penalize insurers who are making a good-faith effort to send the agency their data.

The Centers for Medicare and Medicaid Studies issued an advance notice of public rulemaking on Wednesday that requested public comment on civil monetary penalties for failure to comply with the Medicare Secondary Payer Act. The act requires both group health and non-group health carriers, such as workers' compensation carriers, to report claims information for Medicare beneficiaries after the carrier has assumed ongoing responsibility for medical costs or has paid its total obligation through an award, settlement or judgment.

Existing law allows CMS to fine carriers up to $1,000 a day for reporting violations. However, Congress passed the Strengthening Medicare and Repaying Taxpayers Act in late 2012, which was signed into law on Jan. 13. The act requires CMS to begin work on a rule by March 10 that specifies how the agency will enforce more relaxed penalty provisions.

CMS's advance notice of rulemaking proposal is the agency's attempt to comply with the Smart Act's requirements, even though the agency didn't issue its draft rule until nine months after the March 10 deadline. In the notice, CMS asked the general public for proposals on the dollar amounts of penalties, the practices subject to penalty and the definition of a payer's "good faith efforts" to comply with reporting requirements.

Groups such as the American Insurance Association and the Medicare Advocacy Recovery Coalition want the agency to avoid penalizing carriers who are making a concerted effort to comply with the law.

Peter Foley, vice president of claims administration for the American Insurance Administration, told WorkCompCentral that CMS should draft its rules so that it is penalizing only entities who are disregarding the reporting requirements.

"Our biggest concern is that rules shouldn't be created that penalize a company for a simple mistake, or an error," he said.

Foley said that penalties should be limited to parties that had actual intent to do something wrong, or parties that should have known that they had a duty to report, but nevertheless failed to.

He said that the AIA does not fear penalties because it has worked with CMS to fully understand the reporting requirements, and because the group's members have been successfully reporting data to CMS for years.

"They have always told us that if they find an insurance company or a self-insured who should have, would have, or could have had knowledge of reporting (requirements), and they are not reporting – that is the type of entity (CMS) is looking for," Foley said.

David Farber, an attorney who represents the Medicare Advocacy Recovery Coalition, said that technical issues can cause reporting problems.

"There are numerous instances where reporting entities are trying in good faith to report a settlement, a payment, or a judgment, and they are prevented from doing so because of technological problems," he said. "Sometimes the government's computers get balky."

Problems also arise from CMS's requirement for carriers to supply a claimant's full Social Security number, Farber said. Many beneficiaries refuse to provide that number to carriers, and the carriers are unable to satisfy CMS's requirement.

"To be clear, we are not blaming the beneficiaries for that," Farber said. "We think that it is inappropriate that CMS requires a full Social Security number, and that becomes a show-stopper in the field. Oftentimes, without a full Social Security number, you cannot report. If a settling party tries in good faith to get the data, but the beneficiary won't provide it, it is unfair to assess a penalty against the reporting entity because CMS is not functional in the field."

The existing reporting process requires carriers to complete forms with 175 fields of data, which requires so much data that it creates opportunities for multiple reporting violations, he said.

"The MARC coalition has argued for years that the reporting process needs to be streamlined, needs to be simpler, needs to be less data-intensive," Farber said. "There is no reason that one needs to report 175 fields of data simply to find out if MSP rules might apply. If there were 25 fields of simple data without Social Security numbers, this process would be a whole lot easier."

The amounts of the penalties are another area of major concern for carriers.

Foley said that the current standard of allowing CMS to fine carriers up to $1,000 a day for reporting violations could lead to unconscionable penalties.

"That could be very large, because our members can only report once a quarter," he said of the AIA's members. "If you are going to fine us for an entire quarter of claims, for 90 days, that's $90,000 per claim. That is one of the things we have expressed concern about informally, as early as March 2012."

Farber said that in cases where a reporting entity is willfully ignoring CMS's reporting requirements, the amount of the penalty that CMS can assess should be proportional to the amount of the settlement, judgment or award.

"For example, if you have a $15,000 settlement, with a $2,000 conditional repayment, and you intentionally fail to report – is it fair to assess a $365,000 a year penalty for failing to report a $2,000 repayment?" he said. "The way that the system is set up with penalties per day, per claim, can get so extraordinary, so quickly, that it really does border into the unreasonable, and perhaps, the unconstitutional."

To date, CMS has not actually penalized any reporting entities, Farber said.

"We have always expected the agency to begin enforcement at some point," he said. "This statute has now been in effect for seven years, reporting has now been in effect for four years and not a single penalty has been assessed."

Because there has been no enforcement of reporting to date, Farber said that it is premature to guess how eager CMS will be to assess new penalties.

Jennifer Jordan, general counsel for Medval, said that she believes that most carriers and self-insurers

with significant claims are already reporting. She said that small self-insureds are the most likely to be non-compliant because they either lack knowledge that they have an obligation to report or are trying to hide claims in an attempt to keep reinsurance rates down.

"I don't think reporting is a great problem but CMS has to finally establish regulations because the Smart Act mandated them," Jordan said.

CMS will be accepting public comments on the penalties until Feb. 10, at 5 p.m.

To view the advance notice of rulemaking, click here.