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CLIENT ALERT

SMART Act Amends Medicare Secondary Payer Statute, Creates Three-Year Statute of Limitations, Opens Possibility of Section 111 Safe Harbors

Jan.18.2013

On January 10, 2013 President Obama signed the Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers (SMART) Act of 2012 into law [Public Law No: 112-242]. Title I established a demonstration project under Medicare Part B to evaluate the benefits of providing coverage for in-home administration of intravenous immune globin to treat primary immune deficiency diseases. Title II of the SMART Act made a number of changes to the Medicare Secondary Payer statute, Section 1862(b)(2) [42 U.S.C. § 1395y(b)(2)] of the Social Security Act.

Up-to-date Conditional Payment Information

Claimants and responsible reporting entities (RREs, as defined by 42 U.S.C. § 1395y(b)(8)) will now have access to up-to-date information on the claims for which conditional payments have been made by CMS. The SMART Act requires CMS to make claims information—including payment amounts and information regarding claims related to a potential settlement, judgment, or other payment—available to claimants or their authorized representatives and RREs (that have obtained the claimant's consent) through a secure website. This information must be updated no later than fifteen (15) days after the date that payment is made. Additionally, claimants or RREs now may provide notice to CMS that a settlement, judgment, award, or other payment is reasonably expected and the date of the expected payment up to 120 days before the reasonably expected date of the payment. CMS already has a web-based portal for claims information, the Medicare Secondary payer Recovery Portal [https://www.cob.cms.hhs.gov/MSPRP/], which appears to satisfy the requirements of the SMART Act. Final regulations must be promulgated by October 10, 2013, nine (9) months after date of enactment, the effective date of this provision.

Establishing Conditional Payment Exposure Prior to Settlement

The SMART Act provides a mechanism by which a claimant or RRE determines liability for conditional payments prior to a settlement, judgment, award, or other payment for conditional payments. To do so:

- the claimant or RRE (with the claimant's consent) must obtain a statement of reimbursement amount from the website during the "protected period"—defined as the time, if any, after the expiration of the federal government's response period following notice of a settlement, judgment, award, or other payment
    - the federal government's response period is 65 days following notice
    - it may be extended by an additional 30 days if additional time is required to address claims for which payment has been made
    - it does not include any days where there was a failure in the claims payment and posting system due to exceptional circumstances as defined by regulation
- the related settlement, judgment, award, or other payment must be made during that period, and

- the last statement of reimbursement downloaded during that period and within three (3) business days of the date of the settlement, judgment, award, or other payment shall constitute the final conditional amount subject to recovery by the federal government related to that settlement, judgment, award, or other payment.

Final regulations must be promulgated by October 10, 2013, nine (9) months after date of enactment, the effective date of this provision.

Ability to Dispute Conditional Payment Amounts

The SMART Act requires the Secretary of Health and Human Services ("Secretary") to establish a process by which a claimant (or his or her authorized representative) can dispute discrepancies with the statement of reimbursement amount. A claimant or authorized representative must submit documentation of the potential discrepancy and a proposed resolution to the Secretary. The Act states that the Secretary must determine whether there is a reasonable basis for including or removing a claim and provide a response within eleven (11) business days. Lack of a response is a deemed acceptance of the claimant's proposal. If the Secretary determines that there is not a reasonable basis to include or remove claims, the proposal will be rejected. If the Secretary concludes that there is a discrepancy, but rejects the proposed resolution, documentation showing good cause for why the Secretary has rejected the proposal and establishing an alternate discrepancy resolution must be provided to the claimant. This process does not create an appeals process, however, and the SMART Act expressly forecloses the possibility of administrative or judicial review of the Secretary's determinations. Final regulations must be promulgated by October 10, 2013, nine (9) months after the date of enactment, the effective date of this provision.

SSN/HICN Reporting Eliminated within 18 Months

The SMART Act directs the Secretary to modify the reporting requirements under 42 U.S.C. § 1395y(b)(8)(B) within eighteen (18) months from January 10, 2013 by permitting *but no longer requiring* the use of a claimant's social security number of health identification number. Upon a report to the appropriate House and Senate committees, the Act permits the Secretary to delay the modification for one-year if modification of the reporting requirements is necessary to protect patient privacy or the integrity of the Medicare secondary payer program. The Secretary can seek additional one-year delays for the same reasons. If a deadline extension is granted, however, the Secretary must provide information on the progress being made in implementing the modification and the anticipated implementation date.

Three-Year Statute of Limitations from the Date of Notice of a Settlement, Judgment, Award, or Payment

The SMART Act clarifies the uncertainty surrounding the statute of limitations governing MSP claims, establishing a three-year statute of limitations from the date of notice of a settlement, judgment, award, or payment. Prior to the SMART Act, it was unclear whether the government had three or six years within which to bring a recovery action. For example, in *United States v. Stricker*, No. 9-2423 (N.D. Al. filed Dec. 1, 2009), the court looked to the statute of limitations in the Federal Claims Collection Act, 28 U.S.C. § 2415, and applied the three-year statute of limitations for tort claims against corporate defendants and the six-year statute of limitations for contract claims brought against attorneys who represented claimants in the underlying tort litigation. The statute of limitations applies to actions brought and penalties sought on or after six (6) months from January 10, 2013, the date of enactment.

Right to Appeal Secondary Payer Determinations for Liability Insurance, No-Fault Insurance, and Workers' Compensation

The SMART Act also directs the Secretary to promulgate regulations creating a right of appeal and an appeals process for those from whom the Secretary is able to seek recovery.

Liability Insurance Payments for Physical Trauma-Based Incidents Excepted from Reporting Requirements

Payments by an RRE arising from liability insurance and from alleged physical based trauma based incidents that constitute a total payment obligation not more than an annually calculated threshold amount are not required to be reported to the Secretary. That threshold amount is to be determined no later than November 15 of each year. The Secretary is also required to submit to Congress a report on the single threshold amount for settlements by November 15 of each year. In the report, the Secretary must calculate the threshold amount and include a summary of the methodology and data used in calculating the amount and the amount of estimated savings. The amount used in calculating the threshold shall include only the cumulative value of the medical payments, and it will exclude ongoing expenses.

Modification of Section 111's Mandatory Penalty Provision and Solicitation of Safe Harbor Proposals

The SMART Act amends the strict mandatory penalty provision of Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 [42 U.S.C. § 1395y(b)(8)(E)(i)] by striking the "shall be subject" language and replacing it with the more permissive "*may* be subject to a civil monetary penalty of up to $1,000 for each day of noncompliance with respect to each claimant." This change gives RREs some breathing room to seek reductions in CMPs based on mitigating factors. To that end, the SMART Act requires the Secretary to solicit safe harbor proposals.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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