DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

7500 Security Boulevard
Baltimore, MD 21244-1850

SEP 13 2011

Arthur Lerner
Crowell & Moring, LLP.
1001 Pennsylvania Ave., NW
Washington, D.C. 20004

Dear Mr. Lerner:

Per your September 7, 2011 email request, this letter confirms that the policy described in the enclosed September 10, 2004 All Associate Regional Administrators memorandum is still the Centers for Medicare & Medicaid Services' (CMS) current policy.

I hope that you have found this information helpful. If you have any questions regarding this letter, please contact me at 410-786-0206.

Sincerely,

Fred Grabau
Health Insurance Specialist
Division of Technical Payment Policy
Chronic Care Policy Group
Center for Medicare Management

Enclosure

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**DATE:** SEP 10 2004

**TO:** All Associate Regional Administrators
Medicare

**FROM:** Herb B. Kuhn
Director
Center for Medicare Management

**SUBJECT:** Providers attempting to bill commercial health plans that are secondary to Medicare more than the applicable Medicare deductible and coinsurance amounts--INFORMATION

Central Office has heard reports from its regions that some hospitals are billing insurers that are secondary to Medicare (e.g., a beneficiary's commercial health plan) for the remainder of the hospital's charges up to the secondary insurer's allowable amount. This issue typically arises in the context of a retiree who also is covered under a full (not a Medicare supplemental) commercial health plan that has private agreements with providers who also participate in Medicare. While Medicare is properly primary in this instance, these private agreements are resulting in additional reimbursement to providers who have already accepted a Medicare primary payment. We are writing to remind you that providers are prohibited from billing a secondary insurer for covered services, except for Medicare deductible and coinsurance.

In order for a hospital to participate in Medicare, it must sign a provider agreement with the Secretary. Provider agreements are governed by section 1866 of the Social Security Act ("the Act"). As a Medicare participating provider, a hospital must agree to accept Medicare reimbursement as payment in full for all covered services, except for any Medicare beneficiary deductible or coinsurance amounts. Under section 1866(a)(1)(A) of the Act, a provider must specifically agree "not to charge, except as provided in paragraph (2), [deductibles, coinsurance, etc], **any individual or any other person** (emphasis added) for items or services for which such individual is entitled to have payment made under this title." Therefore, the prohibition also applies to entities in addition to the beneficiary. Reading the phrase "any other person" to include secondary insurers is consistent with the purpose of section 1866(a)(1)(A) of the Act, namely to protect Medicare beneficiaries-- who are elderly or disabled-- from being burdened with charges, either directly or indirectly, beyond what Medicare has agreed to pay. Beneficiaries pay for secondary insurance premiums, which could rise if a provider were permitted to bill its charges to the insurer.

Participating providers may charge beneficiaries' health plans (whether a Medigap policy or other health insurance) for deductible and coinsurance. Also, while the statute prevents a provider from charging a secondary insurer for items and services that Medicare covers, it is generally not barred from charging for services for which an individual is <u>not</u> entitled to payment

under Title XVIII of the Act. For example, if Medicare does not cover a private hospital room, but a beneficiary's commercial health plan does, the hospital could bill the health plan for room charges over and above what Medicare has paid.

In conclusion, section 1866 of the Act prohibits providers who participate in the Medicare program from billing secondary insurers for the remainder of the hospital's charges up to the secondary insurer's allowable amount for items and services for which the beneficiary is entitled to have Medicare make primary payment.