

CMS Publishes Final Rule on Civil Monetary Penalties for Section 111 Reporting

WRITTEN BY

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The Centers for Medicare and Medicaid Services (CMS) published the final rule outlining how civil monetary penalties will be calculated and imposed when Responsible Reporting Entities (RRE) fail to meet their Medicare Secondary Payer (MSP) Section 111 reporting obligations. The final rule imposes penalties against Group Health Plan (GHP) and Non-Group Health Plan (NGHP) entities for untimely reporting to CMS.

Background

Until 1980, Medicare was the primary payer in all cases except workers' compensation and where another government entity was the responsible payer. With the passage of the Medicare Secondary Payer Act (MSPA) in 1980, Medicare became the secondary payer in all cases where another payer had responsibility for a Medicare beneficiary's medical bills. Pursuant to the MSPA, Medicare is entitled to reimbursement when it pays medical bills later paid by another entity through settlement, judgment, award, or other payment.

In 2007, Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) added mandatory reporting requirements for medical care payments to or on behalf of Medicare beneficiaries. While Section 111 added new reporting requirements, it did not change Medicare's recovery rights under the MSPA. Section 111 reporting simply provides the information Medicare needs to determine when it is a "secondary payer."

Section 111 reporting is required for Medicare beneficiaries who have coverage under GHP arrangements and for Medicare beneficiaries who have coverage under NGHP such as liability insurance (including self-insurance), no-fault insurance, or workers' compensation.

The MMSEA statutory language provided a \$1,000 per day, per claimant civil money penalty for failure to comply with Section 111 reporting requirements. In 2013, the Strengthening Medicare and Repaying Taxpayers (SMART) Act made the Section 111 \$1,000 per day, per claimant fine discretionary for NGHPs, added a good faith exception, and required CMS to implement rules regarding what practices would and would not be subject to the fine. The SMART Act did not, however, include an implementation date for these provisions. It would take 10 years, but we now have the final rule implementing the "CMP" provisions of the SMART Act.

Violations and Penalties

The final rule states CMPs will only be imposed for untimely reporting. While the proposed rule included contradictory reporting and errors as other grounds for CMPs, those bases are not in the final rule. For GHPs,

reporting to CMS must be done within one year of the date the GHP coverage became effective. For NGHPs, reports to CMS must occur within one year of the date of a settlement, judgment, award, or other payment obligation.

GHPs will be fined \$1,000 per day (adjusted annually for inflation) for any record that is more than one year (365 calendar days) late. Since CMS has statutory authority to adjust the penalty amount for NGHPs pursuant to the SMART Act, the final rule applies a tiered approach to NGHPs. For either type of RRE, the number of noncompliant records will be multiplied by the number of days each record was late, and then multiplied by the respective penalty amount.

The NGHP penalty approach is tiered based on the number of years the record is late. The daily penalties are as follows: \$250 for each calendar day more than one year but less than two years after the required reporting date; \$500 for each calendar day more than two years but less than three years after the required reporting date; and \$1,000 for each calendar day three years or more after the required reporting date.^[1]

Procedure

Instead of monitoring all RRE submissions as the proposed rule contemplated, CMS created a targeted audit approach. CMS will audit a random sample of 1,000 RRE submissions per calendar year (250 per quarter). The ratio of GHP to NHGP records evaluated will be proportionate to the number of records submitted. For example, if 70% of the records received during a quarter are GHP records, then 70% of the 250 records for that quarter audited will be GHP records.

Safe Harbors

The final rule includes several safe harbor provisions, that if applicable, no penalty will be imposed. First, if the NGHP entity makes a good faith effort to obtain the necessary demographic information and documents those efforts. Second, the violation is due to a technical or system error outside of the RRE's control. Third, the RRE violation is the result of a CMS policy or procedural change effective for less than six months. Finally, if the NGHP or GHP entity complied with reporting thresholds or a reporting exclusion.

Governing Time Periods and Appeals

The effective date of the final rule is December 11, 2023. The statute of limitations for CMPs is five years and will start on the discovery of any noncompliance. To appeal an imposed CMP, a RRE must use the formal appeal process laid out in 42 CFR 402.19 and 42 CFR part 1005.

Where the Rule Does Not Apply

This final rule only addresses Section 111 reporting and resulting CMPs. The MSPA provisions have not been altered by this final rule, and as a result, the risk of double damages for failing to properly reimburse Medicare still exists. The final rule does not appear to create penalties for failing to report termination of Ongoing Responsibility for Medicals (ORM). Nor does the rule appear to impose penalties for failing to enter an MSP date for GHPs. Notably, the final rule does not address penalties that simply ignore their reporting obligations and do not register

as an RRE. Arguably, this is the group that should be the first target of CMPs. Without an easy mechanism to identify this group, CMS seems to have decided to ignore it.

[1] All penalties adjusted for inflation pursuant to 45 CFR part 102.

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