From the DRI Center for Law and Public Policy's MSP Task Force

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

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The Centers for Medicare and Medicaid Services (CMS) has finalized and published the rule specifying how and when it will calculate and impose civil monetary penalties (CMPs) when Group Health Plan (GHP) and Non-Group Health Plan (NGHP) Responsible Reporting Entities (RREs) fail to meet their Medicare Secondary Payer Act (MSPA) reporting obligations. The text of the Final Rule, as published at 42 CFR 402, can be found here.

The Final Rule will become effective on December 11, 2023.

**Background:** Until 1980, Medicare was the primary payer in all cases except workers' compensation and cases in which another government entity was the responsible payer. With the passage of the MSPA in 1980, Medicare became the secondary payer in all cases in which another payer had responsibility for a Medicare beneficiary's medical bills. Pursuant to the MSPA, Medicare is entitled to reimbursement any time it pays medical bills when another entity is responsible for payment. Payment may be demonstrated 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 with respect to payments for medical care made to Medicare beneficiaries. The MMSEA did not change Medicare's recovery rights. Section 111 reporting simply provides the information Medicare needs to determine if it is a "secondary payer." Both Group Health Plans and Non-Group Health Plans, such as insurance (including self-insurance), no-fault insurance, or workers' compensation, are obligated to submit Section 111 reports. The MMSEA provided for a $1,000 per day, per claimant civil monetary penalty for failure to comply with Section 111 reporting requirements. The Strengthening Medicare and Repaying Taxpayers Act of 2012 (SMART) Act made the Section 111 $1000 per day, per claimant fine discretionary for NGHPs and required CMS to implement rules specifying when and under what circumstances RREs would be subject to a fine. Ten years later, we have the long-awaited Final Rule on the "CMP" provisions of the SMART Act.

**Basis for CMPs**: Untimely reporting is the sole basis for imposition of CMPs. Contradictory reporting and errors in reporting were included as grounds for CMPs in the proposed rule, published in February 2020, but are not included in the Final Rule.

> **GHPs**: Timeliness is defined as reporting to CMS within one year of the date GHP coverage became effective.
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> **NGHPs**: Timeliness is defined as reporting to CMS within one year of the date of a settlement, judgment, award, or other payment obligation (or the date of funding of a settlement, judgment, award, or other payment, if funding is delayed), or the date when an entity's Ongoing Responsibility for Medicals (ORM) became effective.

Failure to timely report prevents CMS from promptly and accurately determining the proper primary payer and taking the appropriate actions. CMPs are designed to address this issue.

**Procedure for Imposing CMPs**: CMS will not monitor all RRE submissions as contemplated in the proposed rule. Instead, CMS developed an audit process to identify noncompliance.

- CMS will audit a randomized sample of recently added beneficiary records. CMS has determined that it will be possible to audit a total of 1,000 records per calendar year across all RRE submissions, divided equally among each calendar quarter (250 individual beneficiary records per quarter).

- A proportionate number of GHP and NGHP records based upon the pro-rata count of recently added records will be evaluated. For example, if over the calendar quarter being evaluated, CMS received 600,000 GHP records and 400,000 NGHP records for a total of 1,000,000 recently added beneficiary records, then 60 percent of the 250 records audited for that quarter would be GPH records and 40 percent would be NGHP records.

- At the end of each calendar quarter, CMS will randomly select the indicated number of records and analyze each record for compliance.

**Penalties**: The penalties for GHPs and NGHPs are calculated differently because CMS does not have statutory authority to adjust the penalty amount imposed on GHPs.

> **GHPs**: For any selected record that is more than one year (365 calendar days) late, a penalty of $1,000 per day (adjusted annually for inflation) will be imposed.
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> **NGHPs**: For any selected record determined to be noncompliant, a tiered approach to penalties will be implemented.

To calculate the penalty imposed against an RRE, CMS will multiply the number of audited records found to be noncompliant by the number of days each record was late (in excess of 365 days). The resulting product will then be multiplied by the appropriate penalty amount.

**NGHP Tiered Penalty Approach**

Due to the MARC Coalition's efforts to have the SMART Act enacted and implemented (of which DRI was a member at the time), CMS has statutory authority to adjust the amount of NGHP CMPs. The penalties for GHPs remain mandatory at $1,000 per day, per claim.

For any record selected via the random audit process where the NGHP RRE submitted the information more than one year after the date of settlement, judgment, award, or other payment obligation (including assumption of ORM for medical care), the daily penalty will be:

$250.00 for each calendar day of noncompliance where the record was reported more than one year but less than two years after the required reporting date.

$500.00 for each calendar day of noncompliance where the record was reported more than two years but less than three years after the required reporting date.

$1,000 for each calendar day of noncompliance where the record was reported three years or more after the required reporting date.

Penalties are adjusted annually for inflation pursuant to 45 CFR part 102.

**Safe Harbors:**

No penalty will be imposed if any of the following apply.

**NGHP Good Faith Efforts to Obtain Identifying Information**

The NGHP RRE makes good faith efforts to obtain the individual's name, date of birth, gender, Medicare Beneficiary Identifier (MBI), Social Security Number (or last five digits) and those efforts are documented. To satisfy the Safe Harbor, the NGHP must perform the following action:

1. Communicate the need for the information to the individual and his/her attorney or other representative, if applicable, or both.

2. Request the information from the individual and his/her attorney or other representative (if applicable) *at least three times:*

    a. Once in writing (including electronic mail);

    b. Once more by mail; and

    c. Once more by phone or other means of contact in the absence of a response.

3. If the RRE receives a written response from the individual or their attorney or representative that clearly and unambiguously declines or refuses to provide any portion of the required information, no additional communication is required.

4. The documented refusal must be maintained for at least five years.

**Technical or System Issues Outside of the RRE's Control**

The untimely reporting is the result of a technical or system issue outside of the control of the RRE, or that is the result of an error caused by CMS or one of its contractors.

**Recent Policy or Procedural Change**

The NGHP or GHP noncompliance is due to a CMS policy or procedural change that has been effective for less than 6 months following the implementation of that policy or procedural change (or for 1 year if CMS failed to provide at least 6 months' notice before implementing the change).

**Compliance with Reporting Thresholds or Reporting Exclusions**

The NGHP or GHP entity complied with any reporting thresholds or other reporting exclusions.

**Observations and Additional Information:**

Prospective Application: CMS will evaluate compliance based only upon files submitted by the RRE on or after the effective date of the final rule. CMPs will only be imposed on instances of noncompliance based upon settlement dates, coverage effective dates or other operative dates that occur after the effective date of this regulation. CMS specifically states there will be no inadvertent or de facto retroactivity of CMPs.

Statute of Limitations: CMS has five years from the date of noncompliance to enforce CMPs.

Appeals: CMS will follow the formal appeals process set forth in 42 CFR 402.19 and 42 CFR part 1005. An informal notice (described as a written pre-notice) will precede the formal notice of the CMP. The RRE will have 30 days to respond with mitigating factors before issuance of the formal written notice. CMS encourages RREs to submit all mitigating factors, and there are no strict limits on acceptable documentation.

Total Annual CMPs: CMS calculated penalties based upon the methodology set forth above for the calendar year for 2022. Based upon that information, the maximum penalties imposed would have been $86.4 million for GHPs and $42.4 million for NGHPs, for a total amount of $128.8 million (which is below the $200 million threshold to be considered an economically significant rule). Based upon this information, GHPs appear to currently have double the risk for CMPs.

Double damages and interest for failure to reimburse Medicare: The penalties addressed in the Final Rule on CMPs pertain to Section 111 reporting only. The MSPA provisions have not been revised and are not impacted by the Final Rule. The potential for double damages and interest for failure to properly and timely reimburse Medicare remains in place.

Termination of ORM: The Final Rule does not appear to impose penalties for failure to report termination of ORM. Additional clarification from CMS will be obtained.

MSP Termination Date for GHPs: The Final Rule does not appear to impose penalties for failure to enter an MSP Termination Date. Additional clarification from CMS will be obtained.

**Future Developments**

CMS will develop and publish additional guidance related to CMPs. Questions should be directed to the new CMS Section 111 CMP mailbox at Sec111CMP@cms.hhs.gov. CMS has indicated submitters may not receive responses. CMS will use questions and comments for outreach and educational materials. CMS will post guidance and updates, including information about webinars, on the CMS.gov website.

For additional information on Section 111 reporting, please attend the MSP Task Force webinar: Medicare Reporting and Applicable Civil Money Penalties |DRI

If you have any questions about the MSPA, Section 111 reporting, or the Final Rule on CMPs, please do not hesitate to reach out to any member of DRI's MSP Task Force. https://www.dri.org/committees/leadership/MSP