BRYAN CAVE POWELL GOLDSTEIN Bulletin

Employee Benefits & Executive Compensation Client Service Group

To: Our Clients and Friends March 31, 2009

New Medicare Reporting Requirements

Federal legislation enacted in 2007 extends the Medicare, Medicaid, and SCHIP programs and imposes mandatory information reporting requirements on group health plans, third party administrators, and employers. The Center for Medicare & Medicaid Services ("CMS") uses this information to identify situations where a plan or program is primary to Medicare under Medicare's "Secondary Payer" rules.

In general, effective **January 1, 2009**, insurers, third party administrators, and administrators of self-insured and self-administered **group health plans** must collect specified information from plan participants and report this information to CMS. If your group health plan's third party administrator does not already have a voluntary data sharing arrangement with CMS, implementation begins **April 1, 2009**.

Separate reporting obligations apply to **liability insurance, no-fault insurance, and workers' compensation** laws and plans, effective **July 1, 2009**.

Who must comply?

With respect to group health plans, Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("Act") applies to "an insurer or third party administrator for a group health plan . . . and[, for] a group health plan that is self-insured and self-administered, a plan administrator or fiduciary."

With respect to liability, no-fault insurance, and workers' compensation programs, the Act applies to the fiduciaries or administrators of a self-insured employer program, the insurer of an insured plan, and the responsible Federal and State agency in a government-administered plan.

What should we do now?

If you are the **sponsor of a group health plan**:

- If you pay and adjudicate claims under your plan, the plan administrator or fiduciary will be the plan's "Responsible Reporting Entity" and should register on-line with CMS between April 1 and April 30, 2009. Although the website is not yet available, the website URL will be www.Section111.cms.hhs.gov.

- If your plan has a third party administrator that previously had a Voluntary Data Sharing Agreement ("VDSA") or a Voluntary Data Exchange Agreement ("VDEA") with CMS, then your third party administrator is probably already complying with the Act. Review your administrative services agreement to ensure that it allocates to your third party administrator both the responsibility to comply with the Act and the consequences of failure to do so.

- If your plan has a third party administrator that did not previously have a VDSA or a VDEA with CMS, then ensure that your third party administrator is prepared to enroll as a Responsible Reporting Entity with respect to your plan during April 2009, and is otherwise prepared to comply with the Act. Review your administrative services agreement to ensure that it allocates to your third party administrator the responsibility to comply with the Act and the consequences of failure to do so.

- As part of the information gathering process, employers should work with their third party administrators to obtain data such as Social Security Numbers ("SSNs") and Medicare Health Insurance Claim Numbers ("HICNs") from all of their "Active Covered Individuals." CMS has acknowledged that it may be difficult to obtain this information from some Active Covered Individuals.

If you are a third party administrator:

- If you already had a VDSA or VDEA with CMS, then your previous voluntary reporting became mandatory beginning in October 2008.

- If you did not previously have a VDSA or VDEA with CMS, you must register as a Responsible Reporting Entity during April 2009 for all group health plans for which you are responsible. Although the website is not yet available, the website URL will be www.Section111.cms.hhs.gov.

- Work with your clients to ensure that they provide you with the necessary information (*e.g.*, SSNs and HICNs) about their employees and other participants and beneficiaries.

If you are the sponsor of a Health Reimbursement Arrangement ("HRA"):

- The HRA is a group health plan subject to the reporting requirements of the Act.

- The registration period for HRAs takes place during April 2009, the same as for other group health plans.

- HRA reporting is not permitted or required until the fourth quarter of 2010. Do **not** report HRA coverage information before that time. CMS granted this extra time to gather the necessary information for HRAs.

- CMS will provide further instructions on reporting HRA coverage at a later date.

If you are the sponsor of a health Flexible Spending Arrangement ("FSA") or a Health Savings Account ("HSA"):

- A health FSA is not treated as a group health plan for Medicare Secondary Payer purposes. Thus, health FSAs are not subject to reporting under the Act and no additional action is required.

- CMS will not consider HSAs to be subject to reporting under the Act as long as Medicare beneficiaries may not make a current year contribution to an HSA or did not make a contribution during the time that they were Medicare beneficiaries.

If you are an employer that self-insures liability or workers' compensation insurance:

- You are the Responsible Reporting Entity under the Act, effective July 1, 2009. You must register as a Responsible Reporting Entity on a secure CMS website between May 1 and June 30, 2009. Presumably, the URL for registration will be the same as the one published for group health plans: www.Section111.cms.hhs.gov. It is not yet active

- You may hire an agent to do the actual reporting, but you remain the Responsible Reporting Entity and are legally responsible for registration and compliance.

- You are considered to self-insure for liability purposes if you carry your own risk (whether by failure to obtain insurance or otherwise), in whole or in part.

If you are an employer who has liability, no-fault, or workers' compensation insurance:

- In general, your insurer will be responsible for reporting under this portion of the Act, whether or not the insurer uses another entity for claims processing.

- For workers' compensation, the responsible entity may be the responsible Federal or State workers' compensation agency.

- For this purpose, no-fault insurance means insurance that pays for medical expenses for injuries sustained on the property or premises of the insured, or in the use, occupancy, or operation of an automobile, regardless of who may have been responsible for causing the accident. This includes but is not limited to automobile, homeowners, and commercial plans. It is sometimes called "medical payments coverage," "personal injury protection," or "medical expense coverage."

Ongoing Compliance for Group Health Plans

Responsible Reporting Entities must register on-line during April 2009, engage in a data exchange testing process with the CMS Coordination of Benefits Contractor ("COBC") from April through June 2009, and provide the required information for existing group health plan participants who are "Active Covered Individuals" when data exchange production begins. This is currently scheduled for some time between July and September 2009.

Once the baseline information is provided, the Responsible Reporting Entity participates in routine monthly or quarterly data exchange with the COBC.

Ongoing Compliance for Liability, No-fault and Workers' Compensation Coverage:

Responsible Reporting Entities must register on-line between May 1 and June 30, 2009, and engage in a data exchange testing process with the COBC thereafter. They will be required to report the identity of each Medicare beneficiary whose illness, injury, incident, or accident was at issue and other specified information to enable appropriate Medicare coordination of benefits. They will be assigned a quarterly file submission timeframe.

A Responsible Reporting Entity's initial filing must contain information for all outstanding liability (including self-insured), no-fault, and workers' compensation obligations with respect to an injured Medicare beneficiary that are in existence as of July 1, 2009, and others with a settlement, judgment, award or other payment date of July 1, 2009, or later. Subsequent quarterly filings will require only new or updated claim information.

What happens if we do not comply?

The penalties for non-compliance are significant – $1,000 per day per individual for whom required information was not submitted. CMS stated informally that it is presently focused on compliance rather than enforcement.

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DETAILED INFORMATION IS AVAILABLE ON-LINE AT http://www.cms.hhs.gov/MandatoryInsRep/.

We urge you to contact any member of the Bryan Cave LLP Employee Benefits and Executive Compensation Group listed below if you require assistance or have any questions regarding the information described in this Bulletin.

Richard (Rick) L. Arenburg	(404) 572-6765	richard.arenburg@bryancave.com
Brian W. Berglund	(314) 259-2445	bwberglund@bryancave.com
Harold G. Blatt	(312) 602-5005	hgblatt@bryancave.com
Armin G. Brecher	(404) 572-6634	armin.brecher@bryancave.com
Bard Brockman	(404) 572-4507	bard.brockman@bryancave.com
Carrie E. Byrnes	(312) 602-5063	carrie.byrnes@bryancave.com
Paul F. Concannon	(404) 572-6856	paul.concannon@bryancave.com
Chad R. DeGroot	(314) 259-2803	chad.degroot@bryancave.com
Edmund (Ed) Emerson	(404) 572-6739	edmund.emerson@bryancave.com
Jennifer Faucett	(404) 572-4516	jennifer.faucett@bryancave.com
Kyle P. Flaherty	(212) 541-2134	kpflaherty@bryancave.com
Mark H. Goran	(314) 259-2686	mhgoran@bryancave.com
Carrie E. Herrick	(314) 259-2212	carrie.herrick@bryancave.com
Castles R. (Cass) Hollis	(404) 572-6923	cass.hollis@bryancave.com
Jonathan Hull	(314) 259-2359	jthull@bryancave.com
Charles B. Jellinek	(314) 259-2138	cbjellinek@bryancave.com
J. Clayton Johnson	(314) 259-2981	jcjohnson@bryancave.com
Hal B. Morgan	(314) 259-2511	hbmorgan@bryancave.com
Dan O'Keefe	(314) 259-2179	dmokeefe@bryancave.com
Christian Poland	(312) 602-5085	christian.poland@bryancave.com
Kathy Reardon	(314) 259-2269	kcreardon@bryancave.com
Douglas D. Ritterskamp	(314) 259-2258	ddritterskamp@bryancave.com
Jeffrey S. Russell	(314) 259-2725	jsrussell@bryancave.com
Christopher (Chris) Rylands	(404) 572-6657	chris.rylands@bryancave.com
Michael G. Salters	+44-20-7246-5844	michael.salters@bryancave.com
Steven G. (Steve) Schaffer	(404) 572-6830	steven.schaffer@bryancave.com
Kathleen R. Sherby	(314) 259-2224	krsherby@bryancave.com
Sarah Roe Sise	(314) 259-2741	srsise@bryancave.com
Michael Corey Slagle	(314) 259-2136	corey.slagle@bryancave.com
Richard C. Smith	(602) 364-7395	rcsmith@bryancave.com
Alan H. Solarz	(212) 541-2075	ahsolarz@bryancave.com
Jennifer W. Stokes	(314) 259-2671	jennifer.stokes@bryancave.com
Lisa A. Van Fleet	(314) 259-2326	lavanfleet@bryancave.com
Tom Wack	(314) 259-2182	tewack@bryancave.com
Qian "Bonita" Wang	(404) 572-6628	q.bonita.wang@bryancave.com
Jay P. Warren	(212) 541-2110	jpwarren@bryancave.com
Carolyn Wolff	(314) 259-2206	carolyn.wolff@bryancave.com
Serena F. Yee	(314) 259-2372	sfyee@bryancave.com
Michele L. Lux	(314) 259-2519	mllux@bryancave.com
Valerie A. Viemont	(602) 364-7449	vaviemont@bryancave.com
Julie A. Wagner	(314) 259-2637	jawagner@bryancave.com