Prompt Implementation of Medicare Secondary Payer Reforms is Critical to Strengthen Medicare and Protect Beneficiaries

What is Medicare Secondary Payer?

The Medicare Secondary Payer (MSP) law, enacted by Congress in 1980, establishes "who pays first" when a Medicare beneficiary requires treatment and a third party is responsible for paying for certain health care costs. In such cases, the third party pays "first," and Medicare becomes "secondary."

- MSP issues arise when a beneficiary has private health insurance or a third party is responsible to pay for certain health care costs, such as in a settlement or through workers compensation or no-fault (auto) insurance. These third-party non-group payers are known as "non-group health" (NGHP) claims.
- For many years, the MSP laws and regulations were poorly understood and rarely enforced NGHP claims. In 2007, Congress amended the law requiring companies settling cases to report every settlement, judgment, award, or other payment made to a beneficiary to the Centers for Medicare and Medicaid Services (CMS). Failure to report properly was subject to a penalty of $1,000 *per* day *per* claim.
- The system for reporting and repaying claims to Medicare remained broken. Settlements were unnecessarily delayed, which wasted government, beneficiary, and stakeholder resources. Beneficiaries' claims against third parties became difficult, if not impossible, to settle. All parties were left confused and frustrated. Medicare remained the primary payer in liability situations and workers' compensation (including no-fault), and in many cases would never be responsible to reimburse Medicare unless a settlement, award or judgment was reached.
- Other inefficient rules plagued the system, including:
  - Requirements that beneficiaries provide their Social Security Numbers (SSNs) to parties against whom they were pursuing a claim in order to settle,
  - A lack of safe harbors for good-faith efforts to report properly,
  - Low-dollar recovery demands that cost the government more to process than it could collect.

In response, the 112th Congress passed the SMART Act (enacted as part of H.R. 1845) to remedy the major problems within MSP. The SMART Act strengthens Medicare, protects beneficiaries, and improves the MSP process by enabling all parties to settle claims quickly and speed repayments to Medicare.

How the SMART Act Protects Beneficiaries and Strengthens Medicare

- The **SMART Act** provides a more-affordable and less-intrusive MSP system that protects beneficiaries and the Medicare Trust Fund while minimizing waste among judicial and other resources
- The **SMART Act** does not needlessly confuse parties trying to settle a beneficiary's injury claim
- The **SMART Act** empowers Medicare to provide settling parties the amount of their repayment obligation *during* the settlement process, allowing taxpayers to settle quicker and repay Medicare faster
- The **SMART Act** increases Medicare's efficiency by ensuring the government does not spend more money pursuing a MSP claim than it will actually recover
- The **SMART Act** include safe-harbors to protect stakeholders that make good faith efforts to comply with Medicare's complex MSP reporting process and safeguards Medicare beneficiaries by eliminating the required use of their SSNs in the MSP reporting process.

Congress' Help is still needed to ensure an Efficient and Effective MSP Program

Many key elements of the SMART Act are yet to be implemented by CMS, and the Agency has already missed an implementation deadline that Congress specifically established. Congress should urge CMS to ensure that the much-needed, bipartisan reforms enacted in the SMART Act are swiftly and appropriately adopted to protect beneficiaries and strengthen the Medicare Trust Fund.

MSP – A Real World Liability Case Example

The following illustrates how MSP impacts the lives of Medicare beneficiaries, the Medicare Trust Fund, and American businesses attempting to resolve claims and repay Medicare.

Imagine Mrs. Smith, a 76-year-old beneficiary, is struck by an Acme truck while crossing a street and is hospitalized with $50,000 in health care costs. Medicare pays for her treatment. Two years later Mrs. Smith sues Acme, which is insured by Choice Insurance. Choice and Acme deny Acme was responsible but want to settle the case, and Mrs. Smith, on the advice of her lawyer, is prepared to accept $120,000 on her $1 million claim.

How the MSP System Failed to Work Prior to the SMART Act:

Under the prior MSP laws, only once the settlement was paid to Mrs. Smith would Medicare's $50,000 payment turn into a "conditional payment." The Medicare Trust Fund, now the "secondary payer," would be entitled to reimbursement from Mrs. Smith, directly from Choice, or from Acme (although they had already paid Mrs. Smith for the same claim). Mrs. Smith, Acme and Choice could not determine exactly how much money Medicare was owed, because there was no mechanism for Medicare to provide that information before settlement.

Due to the risk of having to pay for the same expense *twice*, Acme and Choice were unwilling to actually settle with Mrs. Smith without resolving the MSP issue first. Mrs. Smith also could not settle because she did not know how much of the settlement she would receive to compensate for her pain and suffering and her other non-health care expenses related to the accident and how much would be paid to Medicare.

Even if the parties could determine the correct amount, they could not repay the Trust Fund at settlement. At best settlement was delayed, and often fell apart entirely. The prior system created a lose-lose-lose situation for Medicare, beneficiaries, and businesses – no one could promptly settle, so the Trust Fund was the primary payer.

How MSP Will Work Following Implementation of the SMART Act:

The SMART Act will improve the MSP process by directing Medicare to tell parties how much money is owed to the Trust Fund while the parties are in the process of settling. This means that Mrs. Smith, Acme, and Choice can appropriately allocate and resolve the MSP obligations during settlement and repay the Trust Fund far faster.

By requiring Medicare to provide the amount due within 65 days of a request, Acme and Choice will know how much money to pay Medicare, and they can factor that amount into the final settlement. This simple change will eliminate uncertainty and help parties settle claims much faster, and Medicare and Mrs. Smith can be reimbursed more quickly.

Now, Mrs. Smith will know how much money she will receive from the settlement after Medicare is repaid, and both Acme and Choice can promptly repay Medicare what it is owed without risking paying twice or facing unexpected liabilities later on. Under this new system, the Medicare Trust Fund, beneficiaries, and other stakeholders should all win.

Until CMS fully implements the SMART Act, the pre-SMART Act MSP system continues to operate – to the detriment of beneficiaries, the Medicare Trust Fund, and businesses.