

# Medicare Secondary Payer and Certain Civil Monetary Penalties (CMS-6061)

MARC Coalition Presentation to OIRA – March 15, 2022

# We Urge OMB To Consider Three Issues In Reviewing The Final Rule

- Ensure appropriate safeguards been added to avoid a Constitutional “Excessive Fines” challenge
- Require CMS to Perform Needed Economic and SBREFA Analysis Because it is Economically Significant
- Verify that the Proposed CMP Factors Align with Existing CMP Regulations

# Ensure Safeguards Exist to Avoid “Excessive Fines”

- If a “primary plan” insurer does not repay a “conditional payment,” Congress authorizes the government to recover double damages. *Id.* § 1395y(b)(2)(B)(iii).
- If an “applicable plan” fails to report, Congress authorizes a “civil monetary penalty of up to \$1,000 [today around \$1,650] for each day of noncompliance with respect to each claimant.” *Id.* § 1395y(b)(8)(E).
- For the typical case, reporting penalties threaten to be many multiples of the potential repayment liabilities
- Example: A 2017 claim with a \$10,000 “conditional payment” that was not reported would result in \$20,000 of repayment, but over \$1.5M of reporting penalties
- The scale of potential penalties implicates Constitutional “excessive fines” considerations
- Does the Final Rule contain appropriate safeguards to avoid such situations?

## The Rule is Economically Significant, and CMS Must Conduct Required Economic and Other Analysis

- CMS has incorrectly characterized the rulemaking as not being “economically significant”
- The rule most definitely is economically significant, as penalties are easily going to exceed \$100M per year
  - If a single insurer intentionally and willfully does not report 1,000 claims for one year alone, the penalties could be \$600M (1,000 claims x 365 days x \$1,650 per day penalty)
  - If 100 small main street businesses do not report 10 claims each for five years, even if assessed \$100 per day, the penalties would be \$182M
- CMS must conduct required economic and SBREFA analysis
  - Executive Orders 12866 and 13563
  - Regulatory Flexibility -- 5 U.S.C. §§ 601-612

# The Final Rule Should Align with Existing CMP Regulations

- The Proposed Rule addressed CMP factors far outside of standard CMP regulations
  - This was particularly true of “sliding scale” factors
  - Compare 42 C.F.R. § 402.111, 1003.140
- OMB should ensure that MSP CMP Rule is in alignment, and considers the same sliding scale factors, as other CMP regulations

# Thank You

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