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Department of Health and Human Services
Office of Documents and Regulations Management
200 Independence Avenue, SW
Suite 639G
Washington, DC 20201

Attn: Barbara J. Holland, Deputy Executive Secretary to the Department

RE: Docket No. HHS-ES-2011-002

Dear Ms. Holland:

Pursuant to Executive Order 13563, 'Improving Regulation and Regulatory Review,' and your request for comment from interested parties on the 'Preliminary Plan for Retrospective Review of Existing Regulations,' we note with disappointment that the plan does not address Section 111 of the *Medicare, Medicaid, and SCHIP Extension Act of 2007* (MMSEA) (P.L.110-173). Non-group health plans (NGHPs) have been striving to prepare for and adhere to what can only be described as burdensome, incorrect and unclear guidance created by the Office of Financial Management within the Centers for Medicare and Medicaid Services (CMS).

The American Insurance Association (AIA) is the leading property-casualty insurance trade organization representing approximately 300 insurers that write nearly \$100 billion in premiums each year. AIA member companies offer all types of property-casualty insurance including personal and commercial auto insurance, commercial property and liability coverage for businesses, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. AIA has been leading a coalition of 34 foreign and domestic insurance groups and foreign trade associations in an effort to ease the burden of reporting and educate CMS as it deals with the property-casualty insurance industry for the first time.

CMS' basic lack of knowledge and understanding of the property-casualty insurance industry has plagued implementation of MMSEA reporting from the beginning. CMS has attempted to institute an entirely new reporting scheme in a sub-regulatory environment while "on the fly." Information remains confusing and difficult to understand since CMS adheres to its own definitions rather than those of the industry.

The CMS Supporting Statement for the Medicare Secondary Payer (MSP) Mandatory Insurer Reporting Requirements of Section 111 of the *Medicare, Medicaid, and SCHIP Extension Act of 2007* (CMS 10265) contains regulatory burden estimates that are grossly understated. The

Supporting Statement was part of the Paperwork Reduction Act Federal Register Notice published on August 1, 2008. CMS assumed the following:

- NGHPs currently collect all data required for reporting so there would be no additional burden. This statement was untrue on its face, as interested parties had asserted to CMS that the required data was *not* collected before issuance of the Supporting Statement.
- It was asserted that the data exchange process would take 375 man hours without knowing property-casualty insurers' systems.
- There would be approximately 400 NGHPs as registered reporting entities (RREs). In fact, in the property-casualty insurance industry, there are over 800 groups with over 3,000 companies and an unknown number of self-insureds. At one point, there were over 25,000 RREs, more than 6 times the number used by CMS in its Supporting Statement.
- The costs to the property-casualty insurance industry for system and administrative costs for all NGHPs (insurers & self insureds) reporting would be \$9,771,624. In fact, two AIA members alone estimate their costs now after three years as over three and four million dollars respectively. At this time, it is estimated that no company can adhere to the system's requirements alone for less than one million dollars a year.
- There were no capital costs because each RRE has at least one computer and access to the Internet.

CMS is attempting to achieve perfection in its regulation; an example is the query process that is now in place. An RRE must query to determine if a claimant is a Medicare beneficiary. One of the largest reporting agents has queried 80 million claimants on behalf of Section 111 RREs year-to-date in 2011. Of those queries, 260,000 beneficiaries, one in every 3,007, have been identified. Therefore, one entity has reported 400 million data elements to CMS in the query process alone.

Because rule-making was not required by the statutory language, all implementation has been done by "guidance" from CMS. In CMS' Supporting Statement for MSP Mandatory Insurer Reporting Requirements (CMS-10265), there were 45 data elements over three years--it has now been expanded to 170 data elements per claim. The Interim Record Layout dated November 17, 2008 actually appeared December 5, 2008. There are 284 data cells to be programmed with the data elements. In some cases, an RRE must report multiples of the same data elements. An example would be ICD-9 codes, up to five per claimant.

The first User Manual was published in March 2009. CMS is now on version 3.1, with another version said to be released in July 2011. Changes to the User Manual are announced by e-mail from CMS and are then posted on its website and there often are delays on the actual posting.

Communication with CMS has been difficult. AIA has on numerous occasions suggested that CMS create an advisory committee, but none has been established. We are told to write to an electronic mailbox, yet we receive no responses. CMS conducts "Town Hall" calls where it could reference an email but instead its answers must come only in an Alert or the User Manual.

AIA and its coalition members continue to believe that current guidance as it applies to foreign entities and the reporting of Accident & Health products is flawed, incorrect and must be changed. Prior to instituting reporting of liability settlements, judgments, and awards in 2012, the guidance needs to be clarified as to why reporting should apply to policies that do not pay

for bodily injuries or incepted prior to the application of the Mandatory Secondary Payer Act to liability on December 5, 1980.

AIA urges the Secretary to review the burdens being placed on the property-casualty insurance industry by administrators who have demonstrated a lack of understanding of the industry that they are attempting to "guide" through the reporting process. As always, AIA and its coalition members stand ready to assist the federal government in streamlining the regulatory process and ensuring that statutory provisions like Section 111 are implemented in an efficient and effective way that does not compromise the ongoing operations of insurance companies and the customers they serve.

Sincerely,

A handwritten signature in red ink, appearing to read "Peter R. Foley", is positioned above the typed name.

Peter R. Foley
Vice President-Claims Administration