National Association *of* Insurance Commissioners

June 24, 2009

VIA EMAIL

Ms. Barbara Wright
Acting Director – Division of Medicare Debt Management
Centers for Medicare & Medicaid Services
7500 Security Blvd.
Baltimore, MD 21244

Ms. Wright,

I am writing you as a NAIC Officer and Chair of the NAIC Receivership & Insolvency (E) Task Force on behalf of all Commissioners and other state regulatory personnel who act as insurance company receivers. We are concerned about how the implementation of Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (See 42 U.S. C. 1395y(b)(7) and (b)(8), Section 1862(b) of the Social Security Act and C.F. R. Part 411) will negatively affect insurance company receiverships while only providing a marginal benefit, if any, to Centers for Medicare and Medicaid Services (CMS). In this letter I will briefly explain the role of an insurance company Receiver, explain how Section 111 will impact insurance company receivership estates and provide some suggestions for how the CMS can minimize those negative impacts.

Role of an Insurance Company Receiver

Because the McCarran-Ferguson Act (15 U.S.C. Section 1011 et. Seq.) delegates the principal responsibility for the regulation of the business of insurance to the states, troubled insurance companies do not go into bankruptcy. Instead, troubled insurance companies are placed into receivership by the courts of the state where the company is domiciled. The Insurance Commissioner or other similar state officer is appointed "Receiver" with the domiciliary state court taking jurisdiction over all matters involving the resulting receivership estate. The Receiver works to recover assets, adjudicate and pay claims, administer the estate of the insurance company, and in some cases rehabilitate the insurer. The Receiver's overarching goal is to maximize the value of the estate for the claimants (e.g. policyholders, third parties, creditors, stockholders, etc.). An essential part of that goal is to minimize costs to the estate. There are three basic types of insurance company receiverships: liquidation, rehabilitation, and conservation.

Section 111 creates specific reporting requirements applicable to entities that pay claims to Medicare eligible individuals under group health arrangements and under certain non-group health arrangements including liability insurance, self insurance, no-fault insurance, and workers' compensation insurance. We recognize this information will be used by CMS to assist in its enforcement of its Medicare secondary payer provisions. Although insurance company "receivers" are not

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specifically identified in the statute as a Responsible Reporting Entity (RRE), given the broad wording in the statute and the general purpose, it appears that insurance company receivers may be subject to the act in certain situations. Without some modification to the existing structure of Section 111, compliance by Receivers with these requirements will lead to increased costs to insurance company receivership estates with, in most cases, only a minimal gain of useful information by CMS.

Impact on Insurance Company Receivership Estates

The following paragraphs describe in greater detail how Section 111 will impact each type of insurance company receivership estates.

Liquidation

A Liquidation proceeding is analogous to a Chapter 7 bankruptcy proceeding. The insurance company is insolvent (liabilities greater than assets). After marshalling assets, claims against the estate are paid based on statutorily established priority, to the extent assets are available. Since the marshalling of assets typically involves protracted forensic investigation and analysis, complex litigation, the sale of real property, and claims of negligence against directors, officers, accountants, actuaries and others, most often it is 7-10 years from the time a Receiver is appointed until a distribution is made.

Moreover, in the vast majority of cases, another publicly mandated entity (a guaranty association) has timely paid policy-related claims, except for a small deductible amount (usually $100.00). In these cases, this $100.00 amount is the maximum amount an insured/claimant will be due from the Receiver. The guaranty associations have undertaken their own effort to address the Section 111 reporting requirements. In exchange for paying the claims, the guaranty association has a claim in the estate for the amounts it has paid.

If a Receiver of a liquidated insurer is required to report its distributions to CMS pursuant to Section 111, CMS will be inundated with data regarding potentially un-reimbursable payments, which are mostly de minimus in amount and relate to transactions 7-10 years old or older. The cost of gathering the required information (especially looking backward) is considerable, the effort on the part of CMS to match the data would be extensive, and the ultimate benefit to the public treasury minimal, at best. It is hard to imagine a scenario where CMS would be able to effectively enforce Medicare secondary payer provisions on $100 transactions that took place almost a decade or more before the enforcement action.

As public servants with a fiduciary responsibility to these estates, we seek to cooperatively develop with CMS a cost-effective solution to this issue. We note that the definition of "Insurer" applicable to the Section 111 reporting requirements is one created by regulation and not by statute. It is possible that one or more constructions of the definition would exclude Receivers of companies in liquidation. In order to avoid the accumulation of data by CMS that will clearly have no value, we ask that the Receiver be exempted from the Section 111 reporting requirement for companies in liquidation.

Rehabilitation/Conservation

Rehabilitation and conservation are other common forms of receivership of an insurer. There are various statutory grounds for placing an insurer in rehabilitation; however, in practice, the vast majority of rehabilitation receiverships are necessary due to the financial weakness, possibly even insolvency, of the insurers placed in receivership. Rehabilitation and conservation may be used as a means to eliminate

the problems that created the need for receivership; however, rehabilitation and conservation may also be used as a means of long-term run-off of an insurer.

Once in control of an insurer, a Receiver often finds not only that the financial problems of the insurer are worse than expected, but also that the quality of the data maintained by the insurer prior to receivership is very poor. Moreover, it is likely that Receivers will find that insurers that enter receivership in the future have not been complying with Section 111 reporting requirements.

With the insurers in rehabilitation and conservation being in a financially fragile state, teetering on the brink of insolvency in many cases, the additional financial burden of achieving immediate compliance with Section 111 reporting requirements would be significant and debilitating. Since each rehabilitation and conservation is unique in its causes, objectives, and capacities, based on our experience it would be nearly impossible to fashion relaxed Section 111 reporting guidelines which would provide adequate relief to prevent further deterioration to every insurer in rehabilitation.

An exemption from Section 111 reporting requirements during the course of rehabilitation and conservation would be most helpful to these struggling insurers if Receivers are to successfully rehabilitate them and terminate the receiverships. Alternatively, a waiver of all fines imposed by CMS for insurers in rehabilitation and conservation would minimize the exposure of the estates until financial viability is restored to a degree that would accommodate the data collection and infrastructure enhancements necessary to begin Section 111 reporting.

Conclusion and Suggestions

In conclusion, the NAIC asks that CMS consider the following alternatives and solutions to help state insurance Commissioners, as Receivers, provide useful information to CMS while minimizing the costs that will ultimately be borne by insurance company receivership estates' claimants:

- **Complete exemptions for Receivers of companies in liquidation; and**
- **Complete exemptions for companies in rehabilitation and conservation and/or a waiver of all fines imposed by CMS for companies in rehabilitation and conservation.**

In addition, the NAIC welcomes the opportunity to assist and provide additional information to CMS for the purpose of coming to a resolution on this matter. Thank you for your time and patience with this very serious and important matter. Please feel free to contact, David Vacca, Assistant Director of the NAIC Regulatory Services Division, with any questions at 816-783-8134 or dvacca@naic.org.

Sincerely,

The Honorable Susan E. Voss
Commissioner of Insurance
Division of Insurance
State of Iowa