



Office of Financial Management/Financial Services Group

May 26, 2010

**Revision to February 24, 2010 ALERT –
The only changes occur in the attached Appendix G**

**ALERT for Liability Insurance (Including Self-Insurance), No-Fault Insurance,
and Workers' Compensation: WHO MUST REPORT**

This document provides information regarding who/what entity is a MMSEA Section 111 Responsible Reporting Entity (RRE) for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation.

The July 31, 2009 draft “Who Must report” language generated many comments from the industry. While the definitions set forth in the draft language would have reduced the number of RREs in situations involving a deductible, they still allowed for the possibility of both the insured and insurer reporting with respect to ORM or a TPOC amount if it involved a deductible. Additionally, CMS received many comments indicating continuing confusion regarding who would be the RRE in situations involving a deductible, particularly when factoring in the draft language regarding TPAs. Lastly, the comments indicated confusion regarding the term “payment” – many assuming the term automatically equated to “funding” rather than physical payment. CMS believes that the instructions below eliminate reporting by both the insured and insurer due to deductible issues and address the other issues which received comments.

This following language replaces Section 7.1 of the NGHP User Guide regarding “Who Must Report”. Additionally, see the changes to Appendix G at the end of this document.

Who Must Report

General:

- 42 U.S.C. 1395y(b)(8) provides that the “applicable plan” is the RRE and defines “applicable plan” as follows:

“APPLICABLE PLAN- In this paragraph, the term `applicable plan' means the following laws, plans, or other arrangements, including the fiduciary or administrator for such law, plan, or arrangement:

- (i) Liability insurance (including self-insurance).
- (ii) No fault insurance.
- (iii) Workers' compensation laws or plans.”

- You must use the information in this Section as well as the applicable statutory language in conjunction with Appendix G (Definitions and Reporting Responsibilities) in order to determine if you are a RRE for purposes of these new provisions. The statutory language is available in Appendix F.

See Appendix G for changes made to the second paragraph under “Liability Self-Insurance” and the paragraph for “Workers’ Compensation Law or Plan”.

- CMS is aware that the industry generally does not use the term “plan” or some other CMS definitions such as the definitions for “no-fault insurance” or “self-insurance”. However, CMS is constrained by the language of the applicable statute and CMS’ regulations. **It is critical that you understand and utilize CMS’ definitions for purposes of Section 111 when reviewing and implementing Section 111 instructions.**
- Corporate structure and RREs:
 1. An entity may not register as an RRE for a sibling in its corporate structure.
 2. An entity may register as an RRE for itself or for any direct subsidiary in its corporate structure.
 3. A parent entity may register as an RRE for any subsidiary in its corporate structure regardless of whether or not the parent would otherwise qualify as an RRE.
 4. For purposes of this rule regarding corporate structure and RREs, a captive is considered a subsidiary of its parent entity and a sibling of any other subsidiary of its parent.
 5. A subsidiary may not register as an RRE for its parent.
 6. The general concept is that an entity may only register for another entity if that second entity is below it in the direct line of the corporate structure. For example an entity may register for a direct subsidiary or the subsidiary of that subsidiary.
 7. Example:
 - Facts –
 - Parent Company/Holding Company “A” has 4 subsidiaries (S1, S2, S3, S4).
 - “A” does not meet the definition of an RRE.
 - S1, S2, S3, and S4 meet the definition of an RRE for self-insurance or otherwise.
 - S1 has a captive insurance company (S1 Captive).
 - S1 Captive meets the definition of an RRE.

- “A” may register as RRE for any combination of S1, S2, S3, S4. (See #3 above.)
 - “A” registers as the RRE for S1, it may report for any of S1’s subsidiaries such as S1 Captive. (See #2 & #3.)
 - “A” may, but is not required to, designate S1, S2, S3, S4 or S1 Captive as its agent for reporting purposes for the subsidiaries for which it registers as an RRE. (See Section 7.2 on Use of Agents.)
 - S1, S2, S3, S4 and S1 Captive may each register separately as RREs and designate “A” or any of its sibling subsidiaries or S1 Captive as its agent for reporting purposes. (See #2 above & Section 7.2 on Use of Agents.)
 - S1, S2, S3, and S4 may not register as the RRE for each other. (See #1 above.)
 - S2, S3, and S4 may not register as the RRE for S1 Captive. (See #4 above.)
 - S1 Captive may not register as the RRE for S1 (its parent) or for any of the other subsidiaries. (See # 5 & #6.)
- **“Deductible” vs. “Self-Insured Retention” (SIR):**
 - “Deductible” refers to the risk the insured retains with respect the coverage provided by the insurer.
 - “Self-Insured Retention” refers to the risk the insured retains that is not included in the coverage provided by the insurer.
- **“Payment”:**

When referring to **“payment”** of an ORM or TPOC in this **“Who Must Report”** section, the reference is to actual physical payment rather than to who/which entity ultimately funds the payment.
 - **Third Party Administrators (TPAs):**
 - Third party administrators (TPAs) as defined by CMS for purposes for 42 U.S.C. 1395y(b)(7) & (8) are never RREs for purposes of 42 U.S.C. 1395y(b)(8) [liability (including self-insurance), no-fault, and workers’ compensation reporting] **based solely upon their status as this type of TPA.** (Note that for purposes of 42 U.S.C. 1395y (b)(7) reporting for group health plan arrangements, this type of TPA is automatically an RRE.)
 - However, while entities which meet this definition of a TPA generally only act as agents for purposes of the liability insurance (including self-insurance), no-fault insurance, or workers’ compensation reporting they may, under specified

circumstances, also be an RRE. See, for example, the discussion of State established “assigned claims funds.”

- Although it may contract with a TPA or other entity as its agent for actual file submissions for reporting purposes, the RRE is limited to the “applicable plan”. An RRE may not by contract or otherwise limit its reporting responsibility. The applicable plan must either report directly or contract with the TPA or some other entity to submit data as its agent. Where an RRE uses another entity for claims processing or other purposes, it may wish to consider contracting with that entity to act as its agent for reporting purposes.
- **Example:** Liability insurer hires a TPA to process claims. The TPA is a separate legal entity, makes payment decisions based upon the facts of each case, issues payment. The RRE is the liability insurer. The liability insurer may not shift its RRE responsibility to the TPA.

Acquisition/ Divestiture or Sale (Not Under Bankruptcy Liquidation):

An entity which is an RRE is acquired by another entity. The acquiring entity is the RRE as of the effective date of acquisition. The acquiring entity is the RRE with respect to **acquired** claims, including ORM.

Bankruptcy:

Where an RRE has filed for bankruptcy, it remains the RRE to the extent that settlements, judgments, awards or other payments are paid to or on behalf of the injured party after approval by a bankruptcy court. However, bankruptcy does not eliminate reporting obligations for bankrupt companies or their insurer, regardless of whether a bankrupt company or insurer is the RRE, for payments made pursuant to court order or after lifting the stay.

Deductible Issues vs. Re-insurance, Stop Loss Insurance, Excess Insurance, Umbrella Insurance, etc.:

- **Generally, the insurer is the RRE for Section 111 reporting.**
- See the change to the second paragraph under “Liability Self-Insurance” in Appendix G (“Definitions and Reporting Responsibilities”) at the end of this document.
- Where an entity engages in a business, trade, or profession, deductible amounts are self-insurance for MSP purposes. **However**, where the self-insurance in question is a deductible, and the insurer is responsible for Section 111 reporting with respect to the policy, it is responsible for reporting both the deductible and any amount in excess of the deductible. The deductible is not reported as “self-insurance”; it is reported under the applicable policy number. The total of both the deductible and any amount in excess of the deductible is

reported. (Please note that government entities are considered to be entities engaged in a business.)

- If an insured entity engages in a business, trade, or profession and acts without recourse to its insurance, it is responsible for Section 111 reporting with respect to those actions. For example: A claim is made against Company X which has insurance through Insurer Y. Company X settles the claim without informing its insurer. Company X is responsible for Section 111 reporting for the claim regardless of whether or not the settlement amount is within the deductible or in excess of the deductible.
- For re-insurance, stop loss insurance, excess insurance, umbrella insurance, guaranty funds, patient compensation funds, etc. which have responsibility beyond a certain limit, the key in determining whether or not reporting for 42 U.S.C. 1395y(b)(8) is required for these situations is whether or not the payment is to the injured claimant/representative of the injured claimant vs. payment to the self-insured entity to reimburse the self-insured entity. Where payment is being made to reimburse the self-insured entity, the self-insured entity is the RRE for purposes a settlement, judgment, award or other payment to or on behalf of the injured party and no reporting is required by the insurer reimbursing the self-insured entity.
- See also, the subsection addressing Workers' Compensation

Foreign Insurers (Including Self-Insurance): CMS will issue a separate ALERT addressing foreign insurers.

Fronting Policies:

The intent with “fronting” policies is that the insurer will not ultimately retain any risk under the insurance policy. The expectation of both the insured and the insurer is that the insured will retain the ultimate risk under the insurance policy for all claims. Where the insured pays the claim, the insured is the RRE. Where the insurer pays the claim, the insurer is the RRE.

Liquidation (settlement, judgement, award or other payment obligation against the entity in liquidation):

- To the extent that settlement, judgment, award, or other payment to or on behalf of the injured party is **funded** from the assets of the entity in liquidation, the entity in liquidation is the RRE.
- To the extent that a portion of a settlement, judgment, award or other payment obligation to or on behalf of the injured party is **funded** by another entity from that other entity's assets (for example, payment by a state guarantee fund), the entity that makes payment is the RRE.
- To the extent that a payment does not fully satisfy the entity in liquidation's debt to the injured party, the amount reported is the amount paid. Any subsequently approved interim or final payments would be handled in the same manner. That is, they would be reported as additional TPOC amounts.

Multiple Defendants:

- Where there are multiple defendants involved in a settlement, an agreement to have one of the defendant's insurer(s) issue any payment in obligation of a settlement, judgment, award or other does not shift RRE responsibility to the entity issuing the payment. All RREs involved in the settlement remain responsible for their own reporting.
- For a settlement, judgment, award or other payment with joint and several liability, each insurer must report the total settlement, judgment, award, or other payment – not just its assigned or proportionate share.

Multi-National Organizations, Foreign Nations, American Indian, Alaskan Native Tribes:

Liability insurance (including self-insurance), no-fault insurance and workers compensation plans associated with multi-national organizations, foreign nations, American Indian and Alaskan Native tribes are subject to the MSP provisions and must be reported accordingly.

Self-Insurance Pools:

- RRE for liability insurance or workers' compensation self-insurance pools -- Entities self-insured in whole or in part with respect to liability insurance or workers' compensation may elect, where permitted by law, to join with other similarly situated entities in a self-insurance pool such as a joint powers authority (JPA).
- "Review or approval authority" means that the self-insured entity has the ability to affect the payment or other terms of the settlement, judgment, award or other payment (including ORM).
- If all three of the characteristics below are met, the RRE is the self-insurance pool:
 1. The self-insurance pool is a separate legal entity.
 2. The self-insurance pool has full responsibility to resolve and pay claims using pool funds.
 3. The self-insurance pool resolves and pays claims without review or approval authority by the participating self-insured entity. When a self-insured entity in the self-insurance pool (including, for example, a JPA) has the review or approval authority for the payment of claims and/or negotiated resolutions, the self-insurance pool is not the RRE, the individual self-insured members are the RREs.
- Exception: Where the statute authorizing the establishment of a self-insurance pool stipulates that said self-insurance pool shall be licensed and regulated in the same manner as liability insurance (or workers' compensation, where applicable), then the self-insurance pool is the RRE. Absent meeting this exception, unless all three of the characteristics specified under the preceding bullet apply to the self-insurance pool, the participating self-insured entity is the RRE.

- Where the individual members are the RREs, each of the members would have the option of using the self-insured pool (or another entity) as its agent for purposes of Section 111 reporting.
- **Example:** A self-insurance pool meets the three characteristics specified above for some members of the pools but not for others. The self-insurance pool provides administrative services only (ASO) for certain members. The RRE is the self-insurance pool only for those members for which it meets the three characteristics specified above. Each member who receives ASO from the self-insurance pool is a separate RRE for its settlements, judgment, awards, or other payments. The self-insurance pool is not the RRE for such members.

State established “assigned claims fund”: RRE for a State established “assigned claims fund” which provides benefits for individuals injured in an automobile accident that do not qualify for personal injury protection/medical payments protection from an automobile insurance carrier:

- “Review or approval authority” means that the State agency has the ability to affect the payment or other terms of the settlement, judgment, award or other payment (including ORM).
- Where there is a State agency which resolves and pays the claims using State funds or funds obtained from others for this purpose, the established agency is the RRE.
- Where there is a State agency which designates an authorized insurance carrier to resolve and pay the claims using State-provided funds without State agency review and/or approval, the designated carrier is the RRE. (Note: This would be an example of the rare situation where a TPA entity would also be an RRE for NGHP.)
- Where there is a State agency which designates an authorized insurance carrier to resolve and pay the claims using State-provided funds but the State agency retains review or approval authority, the State agency is the RRE.
- **Example:** A State agency pays no-fault claims using a State fund which is not under the agency’s control. Additionally, the State agency designates an insurance carrier to resolve liability insurance claims, but the State agency retains payment responsibility. The State agency is the RRE for both the liability insurance and the no-fault insurance. It may report both types of insurance under a single RRE ID # or obtain a separate RRE ID # for each type of insurance.

Subrogation by an Insurer:

- **Fact pattern:**
 - Insurer A pays claim of its insured under the terms of its contract. The insurer is the RRE and reports the payment.
 - Insurer A may file a subrogation claim (on behalf of its insured/the injured party) against another insurer B.
 - Assume insurer B indemnifies insurer A for the payment it previously made. The indemnification payment is not reportable by either insurer.

Workers' Compensation:

- See the change to the “Workers’ Compensation Law or Plan” paragraph of Appendix G (“Definitions and Reporting Responsibilities”) at the end of this document.
- Appendix G provides, in part: *“For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8), a workers’ compensation law or plan means a law or program administered by a State (defined to include commonwealths, territories and possessions of the United States) or the United States to provide compensation to workers for work-related injuries and/or illnesses. The term includes a similar compensation plan established by an employer that is funded by such employer directly or indirectly through an insurer to provide compensation to a worker of such employer for a work-related injury or illness.”*
- Where “workers’ compensation law or plan” means *“a law or program administered by a State (defined to include commonwealths, territories and possessions of the United States) or the United States to provide compensation to workers for work-related injuries and/or illnesses,”* the following rules apply:
 - Where the applicable law or plan authorizes an employer to purchase insurance from an insurance carrier and the employer does so, follow the rules in the subsection for “Deductible Issues vs. Re-insurance, Stop Loss Insurance, Excess Insurance, Umbrella Insurance, etc.”
 - Where the applicable law or plan authorizes an employer to self-insure and the employer does so independently of other employers, follow the rules in the subsection for “Deductible Issues vs. Re-insurance, Stop Loss Insurance, Excess Insurance, Umbrella Insurance, etc.” (Here the reference is to “self-insurance” other than a “deductible.”)
 - Where the applicable law or plan authorizes employers to join with other employers in self-insurance pools (e.g., joint powers authorities) and the employer does so, follow the rules in the subsection for “Self-Insurance Pools”.
 - Where the applicable law or plan establishes a State/Federal agency with sole responsibility to resolve and pay claims, the established agency is the RRE.
 - In situations where the applicable law or plan authorizes employers to self-insure or to purchase insurance from an insurance carrier and also establishes a State/Federal agency to assume responsibility for situations where the employer fails to obtain insurance or to properly self-insure –
 - “Review or approval authority” means that the agency has the ability to affect the payment or other terms of the settlement, judgment, award or other payment (including ORM).

- Where such State/Federal agency itself resolves and pays the claims using State/Federal funds or funds obtained from others for this purpose, the established agency is the RRE.
- Where such State/Federal agency designates an authorized insurance carrier to resolve and pay the claim using State/Federal-provided funds without State/Federal agency review and/or approval, the designated carrier is the RRE.
- Where such State/Federal agency designates an authorized insurance carrier to resolve and pay the claim using State/Federal-provided funds but State/Federal agency retains review or approval authority, the State/Federal agency is the RRE.
- Where “workers’ compensation law or plan” refers to “*a similar compensation plan established by an employer that is funded by such employer directly or indirectly through an insurer to provide compensation to a worker of such employer for a work-related injury or illness*” follow the rules for insurer or self-insured, as applicable, including the rules for self-insurance pools. (Here the reference is to “self-insurance” other than a “deductible.”)

Note: For Appendix G – 1) The second paragraph under “Liability Self-Insurance” is replaced in this ALERT. 2) The paragraph for “Workers’ Compensation Law or Plan” is also being revised in this ALERT. See the last two sentences of the paragraph.

**Appendix G – MMSEA Section 111 Definitions and Reporting Responsibilities
Attachment A – Definitions and Reporting Responsibilities**

(Attachment A to the Supporting Statement for the MMSEA Section 111 Paperwork Reduction Act (PRA) Federal Register (FR) Notice published February 13, 2009.)

SUPPORTING DOCUMENT FOR PRA PACKAGE FOR MEDICARE SECONDARY PAYER REPORTING RESPONSIBILITIES FOR SECTION 111 OF THE MEDICARE, MEDICAID, AND SCHIP EXTENSION ACT OF 2007

Note: The second paragraph under Liability Self-Insurance was revised subsequent to the initial publication of this Attachment on August 1, 2008.

DEFINITIONS AND REPORTING RESPONSIBILITIES

GROUP HEALTH PLAN (GHP) ARRANGEMENTS (42 U.S.C. 1395y(b)(7)) --

INSURER

For purposes of the reporting requirements at 42 U.S.C.1395y(b)(7), an insurer is an entity that, in return for the receipt of a premium, assumes the obligation to pay claims described in the insurance contract and assumes the financial risk associated with such payments. In instances where an insurer does not process GHP claims but has a third party administrator (TPA) that does, the TPA has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(7).

THIRD PARTY ADMINISTRATOR (TPA)

For purposes of the reporting requirements at 42 U.S.C.1395y(b)(7), a TPA is an entity that pays and/or adjudicates claims and may perform other administrative services on behalf of GHPs (as defined at 42 U.S.C. 1395y(b)(1)(A)(v)), the plan sponsor(s) or the plan insurer. A TPA may perform these services for, amongst other entities, self-insured employers, unions, associations, and insurers/underwriters of such GHPs. If a GHP is self-funded and self-administered for certain purposes but also has a TPA as defined in this paragraph, the TPA has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(7).

USE OF AGENTS FOR PURPOSES OF THE REPORTING REQUIREMENTS AT 42 U.S.C. 1395y(b)(7):

For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(7), agents may submit reports on behalf of :

- Insurers for GHPs
- TPAs for GHPs
- Employers with self-insured and self-administered GHPs

Accountability for submitting the reports in the manner and form stipulated by the Secretary and the accuracy of the submitted information continues to rest with each of the above-named entities.

The CMS will provide information on the format and method of identifying agents for reporting purposes.

LIABILITY INSURANCE (INCLUDING SELF-INSURANCE), NO-FAULT INSURANCE, AND WORKERS' COMPENSATION (42 U.S.C. 1395y(b)(8)) --

INSURER

For purposes of the reporting requirements for 42 U.S.C. 1395y(b)(8), a liability insurer (except for self-insurance) or a no-fault insurer is an entity that, in return for the receipt of a premium, assumes the obligation to pay claims described in the insurance contract and assumes the financial risk associated with such payments. The insurer may or may not assume responsibility for claims processing; however, the insurer has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(8) regardless of whether it uses another entity for claim processing.

CLAIMANT:

For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8), "claimant" includes: 1) an individual filing a claim directly against the applicable plan, 2) an individual filing a claim against an individual or entity insured or covered by the applicable plan, or 3) an individual whose illness, injury, incident, or accident is/was at issue in "1)" or "2)".

APPLICABLE PLAN:

For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8), the "applicable plan" as defined in subsection (8)(F) has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(8). For workers' compensation information this would be the Federal agency, the State agency, or self-insured employer or the employer's insurer.

NO-FAULT INSURANCE:

Trade associations for liability insurance, no-fault insurance and workers' compensation have indicated that the industry's definition of no-fault insurance is narrower than CMS' definition. For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8), the definition of no-fault insurance found at 42 C.F.R. 411.50 is controlling.

LIABILITY SELF-INSURANCE:

42 U.S.C. 1395y(b)(2)(A) provides that an entity that engages in a business, trade or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part. Self-insurance or deemed self-insurance can be demonstrated by a settlement, judgment, award, or other payment to satisfy an alleged claim

(including any deductible or co-pay on a liability insurance, no-fault insurance, or workers' compensation law or plan) for a business, trade or profession. See also 42 C.F.R. 411.50.

This 5/26/2010 ALERT revision deletes the following paragraph:

Special Considerations where liability self-insurance which is a deductible or co-payment for liability insurance, no-fault insurance, or workers' compensation is paid to the insurer or workers' compensation entity for distribution (rather than directly to the claimant): As indicated in the definition of "liability self-insurance," such deductibles and co-payments constitute liability self-insurance, and require reporting by the self-insured entities. However, in order to avoid two entities reporting where the deductibles and/or co-payments are physically being paid by the insurance company or workers' compensation rather than the self-insured entity, CMS has determined that the liability insurance company, no-fault insurance company, or workers' compensation, as appropriate, must include the self-insurance deductible or co-pay in the amount it reports. [*The following sentence is hereby deleted:* Note that this rule only applies where the self-insurance deductible or co-pay is paid to the insurer for distribution rather than directly to the claimant.]

This 5/26/2010 ALERT revision adds the following paragraph:

Where an entity engages in a business, trade, or profession, deductible amounts are self-insurance for MSP purposes. **However**, where the self-insurance in question is a deductible, and the insurer is responsible for Section 111 reporting with respect to the policy, it is responsible for reporting both the deductible and any amount in excess of the deductible.

WORKERS' COMPENSATION LAW OR PLAN

For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8), a workers' compensation law or plan means a law or program administered by a State (defined to include commonwealths, territories and possessions of the United States) or the United States to provide compensation to workers for work-related injuries and/or illnesses. The term includes a similar compensation plan established by an employer that is funded by such employer directly or indirectly through an insurer to provide compensation to a worker of such employer for a work-related injury or illness. [*The following sentences are hereby deleted:* Where such a plan is directly funded by the employer, the employer has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(8). Where such a plan is indirectly funded by the employer, the insurer has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(8).]

USE OF AGENTS FOR PURPOSES OF THE REPORTING REQUIREMENTS AT 42 U.S.C. 1395y(b)(8):

Agents may submit reports on behalf of:

- Insurers for no-fault or liability insurance
- Self-insured entities for liability insurance
- Workers' compensation laws or plans

Accountability for submitting the reports in the manner and form stipulated by the Secretary and the accuracy of the submitted information continues to rest with each of the above-named entities.

TPAs of any type (including TPAs as defined for purposes of the reporting requirements at 42 U.S.C. 1395y(b)(7) for GHP arrangements) have no reporting responsibilities for purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8) for liability insurance (including self-insurance), no-fault insurance, or workers' compensation. Where an entity reports on behalf of another entity required to report under 42 U.S.C. 1395y(b)(8), it is doing so as an agent of the second entity.

CMS will provide information on the format and method of identifying agents for reporting purposes.