Health Insurance Association of America

November 25, 2002

<u>Sent via e-mail on November 25, 2002</u>
ATTN: Section 352 – Insurance Company Regulations

James Sloan, Director
Financial Crimes Enforcement Network
United States Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

Re: Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Insurance Companies (Notice of Proposed Rulemaking, 67 Federal Register 60625, September 26, 2002).

Dear Director Sloan:

The Health Insurance Association of America (HIAA) is pleased to submit these comments regarding the Financial Crimes Enforcement Network (FinCEN) notice of proposed rulemaking (NPRM) for Anti-Money Laundering Programs for Insurance Companies.[1]

HIAA is the nation's most prominent trade association representing the private health care system. Its nearly 300 members provide health, long-term care, dental, disability, and supplemental coverage to more than 100 million Americans. It is the nation's premier provider of self-study courses on health insurance and managed care.

HIAA and its members strongly support the goals of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001[2] as it amended the anti-money laundering provisions of the Bank Secrecy Act (BSA).[3] In the NPRM's preamble, FinCEN recognizes that health insurance products do not contain those elements that allow large amounts of funds to be moved though the financial system or to be used to create a significant income stream.[4] Such elements, attractive to money launderers, are seen in life, investment and annuity products that allow a customer to place large amounts of funds into the financial system and transfer such funds or produce an income stream in order to disguise the true origin of the original funds. We thank FinCEN for making the distinction and the Secretary for using the discretion granted under the BSA not to apply the anti-money laundering program requirements in the proposed rule specifically to health insurance products and health insurers. HIAA endorses this treatment of health insurance products in the final rule.

[1] 67 Federal Register 60625, September 26, 2002.
[2] Public Law 107-56.
[3] 31 U.S.C. § 5318(h).
[4] *See* 67 Fed. Reg. 60626.

While health insurance products and issuers are not specifically included in the NPRM's proposed definition of an "insurance company," the proposed definition does extend beyond life and annuity product insurers to include a "functional definition" applicable to any insurer engaged in the underwriting or reinsuring of any insurance product "which can be used to store value and transfer that value to another person."[5] FinCEN clarifies that the assessment of a product's money laundering risk should not be predicated solely on the existence of an ability to obtain a refund. "Rather, the focus should be on the ability of a money launderer to use a particular financial product to store and move illicit funds through the financial system."[6] There are few health insurance products that lend themselves to scrutiny under this standard. Among those few may be medical savings accounts (MSAs)[7] and small subsets of long-term care (LTC) and disability income (DI) insurance products. However, based on our analysis, HIAA believes that the final rule should also clarify that these few products pose little or no money laundering risk and that the rule would not require the implementation of an anti-money laundering program for these few health insurance products.

In support of HIAA's recommendation we explore these few products below.

SPECIFIC HEALTH INSURANCE PRODUCTS

Based on the standards from the NPRM, HIAA members gave consideration to those health insurance products which:

- Store value;
- Permit transfer of that value to another person;
- Facilitate the movement of illicit funds through the financial system; and
- Allow large amounts of funds to be moved though the financial system or used to create a significant income stream.

While a few health products could meet one or more of these elements, no health product we reviewed met all of them. The products considered were: MSAs; LTC insurance products that contain nonforfeiture (NF) provisions such as return of premium (ROP) riders; and, similarly, individual DI insurance products with NF characteristics.

Medical Savings Accounts

MSAs do not lend themselves to storing large amounts of value. Nor do MSAs constitute an attractive vehicle for transferring what value may be stored to another person. Specifically

[5] *Id* at 60630 (Proposed 31 C.F.R. § 103.137(a)(2)(C)).
[6] *Id* at 60627.
[7] The Health Insurance Portability and Accountability Act (HIPAA), P.L. 104-191 created MSAs. They are also know as "Archer" MSAs in recognition of their sponsor, Congressman Bill Archer, (R-TX) former Chairman Ways and Means Committee, United States House of Representatives.

created by HIPAA as a pilot project[8], an MSA is a trust created or organized in the United States exclusively for the purpose of paying the qualified medical expenses of the account holder. HIPAA allowed health insurance companies to offer MSAs to employees of small businesses (50 or fewer employees) and to self-employed persons. Individuals electing to use MSAs must already be covered under a qualifying high deductible health plan. A high deductible health plan is one with an annual deductible ranging from $1,650 to $2,500 per person for self-only coverage or from $3,300 to $4,950 for family coverage. (Certain out-of-pocket expense limits also apply.) Account holders (or their employers) deposit funds into the MSA and withdraw amounts as needed to meet medical expenses up to the amount of the related health plan's deductible. Annual contributions into an MSA are generally limited to 65% of the health plan's deductible for single coverage and 75% of the deductible for family coverage.

MSAs are, in effect, a way for an insured individual to set aside his/her own earnings in a pre-tax vehicle to use toward medical expenses up to that point where existing health insurance coverage begins. Distributions for medical expenses are generally excluded from taxable income, but withdrawals for any other purpose are both taxed as income and assessed a 15% penalty. The account can transfer to the surviving spouse as if the spouse were the account holder, but generally any other surviving beneficiary receiving funds remaining in the account must treat such funds as income.

These limiting factors: the necessity for underlying insurance coverage; the annual limit on the amount that may be placed in an MSA; the tax penalties related to non-medical expense withdrawals; the limited scope of the MSA pilot project; and the need for the account holder to die to transfer the account value to another individual together make MSAs a relatively useless vehicle for the purpose of laundering money. For these reasons, MSAs should be specifically excluded from the final rule.

Certain Long-Term Care Insurance Products

Virtually all LTC products are not potential vehicles for money laundering and do not fall within the NPRM.[9] HIPAA placed significant design and benefit requirements on LTC insurance in exchange for allowing a tax deduction on a portion of the premium paid for the policy. Some of these changes which limit the value of LTC insurance as a money laundering

[8] P.L. 104-191. MSA's were slated to expire as a December 31, 2000 but were extended, through December 31, 2002. There has not been a further extension in the 107th Congress and, as of today, there is no authority to create new MSAs after 2002.

[9] Tax-qualified long-term care insurance is a policy or rider that provides coverage for not less than twelve consecutive months for health or personal care services provided in a setting other than an acute care unit of a hospital. Several types of policies are available, but most are reimbursement policies. They pay up to a fixed dollar amount for each day of care received. Policyholders usually have a choice of daily benefit amounts ranging from $50 to more than $300 dollars per day for long-term care coverage. Many policies today offer "integrated" or "pooled benefits," where the daily benefit amount may be applied toward any of several types of long-term expenses including, nursing home, assisted living or home care expenses. Some life insurance and annuity policies include long-term care benefits. An analysis of the money laundering potential of these long-term care benefit riders, regardless of their payment of benefits, would presumably be subsumed in the assessment of the life policy to which they were attached.

device include not permitting cash surrender values from a tax-qualified policy to be assigned or pledged as collateral for a loan and providing that all refunds of premiums, policyholder dividends or similar amounts be applied to increase benefits or decrease future premiums. Although cash refunds of premiums on death of the insured or on complete surrender or cancellation of the contract may be made, the amount of the refund cannot exceed the aggregate premiums paid under the contract. Such NF riders returning the premiums on death or contract termination are available, but they are rarely purchased as they increase the cost of the product and provide low rates of return below levels attractive as vehicles for money laundering purposes.

Because, in our opinion, LTC policies with this NF features pose little or no money laundering or terrorism risk, HIAA recommends FinCEN clarify in the final rule that, like most LTC insurance policies, the very few LTC policies that refund premiums on a limited basis do not create products that cause their issuers to be included in the insurance company definition in the rule.

Certain Individual Disability Income Insurance

DI insurance is a health insurance product and, except for those outlier policies with NF provisions, does not meet any of the elements in the NPRM definition of a potential vehicle for money laundering. Rather than reimbursement for medical costs, DI provides a periodic payment if a person is unable to work because of illness or injury. Disability insurance is purchased either by groups or as individual policies and by some government programs. In order to qualify for private DI benefits, a person covered must suffer partial or total disability from either illness or injury, but the injury need not be job-related. Disability benefits vary and are measured by the number of work loss days, restricted activity days, or total disability days.

The insured's eligibility to receive benefits under a DI policy is based on the policy's definition of disability. Generally, the definition distinguishes between total and partial disability, a permanent from a temporary disability and an accident from a sickness disability. Additionally, the benefit period during which the income benefits are paid may extend from one to 10 years, until a certain age, or over a lifetime. The longer the benefit period of the DI policy, the higher the premium paid by the insured. DI policies generally stretch premium payments over time and payments are made at given intervals, rather than having the insured pay the premium as a lump sum.

Similarly to that small portion of LTC insurance that contains NF provisions, a return of premium provision or cash value option is rare and generally only available as an additional rider to an individual DI policy and only for an additional premium. The amount of premium returned is usually adjusted based on the individual insured's favorable claims activity over a specified period of time, either periodically or at age 65. These limited return of premium and cash value options make these outlier DI products highly impractical as health insurance vehicles for money laundering purposes.

Because, in our opinion, DI policies with these NF features pose little or no money laundering or terrorism risk, HIAA recommends FinCEN clarify in the final rule that, like most DI insurance policies, the very few DI policies that refund premiums on a limited basis or contain a minimal cash surrender value do not create products that cause their issuers to be included in the insurance company definition in the rule.

CONCLUSION

As stated above, HIAA endorses the exclusion of health products from the specific treatment received by life, annuity and investment products as vehicles useful to terrorists as money laundering vehicles. We again commend the Secretary for using his discretion to not specifically require health insurers to establish anti-money laundering programs for health insurance products. Further, we see no need for an insurer to first establish an anti-money laundering program on the scope required by the rule solely for the purpose of evaluating those few products which might fall under the functional definition of an insurance product that stores and transfers value to another person when it can be demonstrated that such products run little or no risk of being used for money laundering purposes. HIAA has demonstrated that medical savings accounts and those few outlier LTC and DI products with NF and ROP features do not present such a risk. In conclusion, we again recommend and request that FinCEN explicitly clarify in the final rule that insurers selling these products do not need to establish anti-money laundering programs to determine that these products do not pose a money laundering risk.

HIAA appreciates this opportunity to submit our comments.

Sincerely,

Henry Desmarais, M.D.
Senior Vice President of Policy and Information