NRRA
NATIONAL RISK RETENTION ASSOCIATION

June 29, 2012

U.S. Department of Labor
Office of Health Plan Standards and compliance Assistance
Employee Benefits Security Administration
Room N-5653
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for Information – Stop-Loss Insurance (CMS-9967-NC)

The National Risk Retention Association ("NRRA") is the association which represents the risk retention and purchasing group industry. As stated more fully below, risk retention groups ("RRGs") are liability insurance companies licensed in one of the states authorized by the Liability Risk Retention Act ("LRRA"), 15 USC § 3901 et seq., to write commercial liability insurance. There are over 250 RRGs in operation today. Many write contractual liability insurance and some write stop loss insurance.

Stop loss coverage is almost always utilized when employers assume the responsibility for the cost of their employees health care. "Self insurance" of this nature is widely used in the corporate world and is an important mechanism for risk managers to obtain coverage for employees efficiently and economically.

Importantly, stop loss contracts are not "health insurance". They are indemnity insurance to cover the liability of the employer to pay the expense of their employees' health care.

The provision of stop-loss insurance by a RRG is consistent with the plain language of the LRRA and is supported by the legislative history of the LRRA and the case law interpreting it. A RRG is an arrangement whereby a group of persons or entities come together to self insure similar or related liability exposures. Under the LRRA, RRGs are regulated by a single "charter" state and, with certain limited exceptions, are exempt from regulation by other states. *See* 15 U.S.C. §§ 3902, 3905.

To qualify as a RRG, a group self-insurance arrangement must meet certain conditions. Among other things, a RRG must be licensed as a liability insurance company by its chartering state. 15 U.S.C. § 3901(a)(4)(C)(i). In addition, the members of the RRG must be "engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises or

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operations...." 15 U.S.C. § 3901(a)(4)(F). Most relevant to the issue of whether a RRG may write stop-loss insurance, a RRG may only provide two types of insurance: (1) "liability insurance for assuming and spreading all or any portion of the similar or related liability exposures of its group members..." and (2) reinsurance for another RRG or its members. 15 U.S.C. § 3901(a)(4)(G).[1]

Stop-loss insurance is a form of excess liability insurance purchased by an employer or other entity sponsoring a self insured health benefit plan.[2] A stop-loss insurance policy insures the plan sponsor against the sponsor's liability to pay benefits under the self-insured plan if a single claim or claims in the aggregate exceed a certain level.

The LRRA states that "liability,"

> (A) means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of—
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> (i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations, or
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> (ii) any activity of any State or local government, or any agency or political subdivision thereof;
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> (B) does not include personal risk liability and an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.);

15 U.S.C. § 3901(a)(2).[3]

The 1986 amendments made it clear that a federal definition of "liability" was being established for purposes of the LRRA:

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[1] Certain additional requirements also apply to RRGs, *see 15 U.S.C. §* 3901(a)(4), but these requirements are not relevant to the issue of whether a RRG may write stop-loss insurance.

[2] *See, e.g., Travelers Ins. Co. v. Cuomo,* 14 F.3d 708 (2nd Cir. 1993) (a self insured health plan sponsored by an employer "usually carries excess liability coverage known as 'stop-loss' coverage"); *Broadnax Mills, Inc. v. Blue Cross Blue Shield of Virginia, 876 F.* Supp. 809, 812 (E.D. Va. 1995) (stop-loss insurance limits a self insured plan's "liability for claims" in excess of a certain amount); *Seymour Tubing, Inc. v. TIG Ins. Co.,* 2004 U.S. Dist. LEXIS 23933 (S.D. Ind. September 24, 2004) (to supplement its employee benefits plan, Seymour Tubing obtains excess liability insurance ('stop loss insurance') to limits its maximum potential liability... ").

[3] The exclusion of "employer's liability with respect to its employees" from the LRRA's definition of liability does not apply to stop-loss insurance. By excluding "employer's liability with respect to its employees" Congress only intended to exclude workers' compensation coverage from the LRRA. *Attorneys' Liability Assurance Society, Inc. v. Fitzgerald,* 174 F. Supp.2d 619, 632 (W.D. Mich. 2001).

> ...the definitions of liability, personal risk liability and insurance under any State law shall not be applied for purposes
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> of this chapter, including recognition or qualification of risk retention groups or purchasing groups.

15 U.S.C. § 3901(b).

In the event of a conflict between state and federal law, the Supremacy Clause of the United States Constitution requires that the federal law prevail. This principle of federalism is particularly applicable and relevant to the issue of the operation and functioning of RRGs due to the historical precedent established by Pub. L. No. 98-193, 97 Stat. 13344,[4] also known as the "Kasten Amendment" after its sponsor, Senator Robert Kasten of Wisconsin.

The Kasten Amendment resulted from the interpretation by state regulators and state courts of the definition of "product liability", which had the effect of limiting the utilization of product liability risk retention groups.[5] The Kasten Amendment, enacted in 1983, clearly established that the federal definition of "product liability" should preempt any conflicting state definition.[6]

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[4] Section 2(b) of the PLRRA stated that the "[t]he definition of "Product Liability" in paragraph (4) of subsection (A) of this Section shall not be construed to affect either tort law or the law governing the interpretation of insurance contracts of any State." The Kasten Amendment added the following:

> Nothing in this Act shall be construed to affect the tort law or the law governing the interpretation of insurance contracts of any State, and the definitions of liability, personal risk liability, and insurance under any State law shall not be applied for the purposes of this chapter, including recognition or qualification of risk retention groups or purchasing groups.

[5] *See* 129 Cong. Rec. H.10431-10432 (daily ed. Nov. 18, 1983) (statement of Rep. Florio):

> ... S. 1046 is a technical amendment to the Product Liability Risk Retention Act. This amendment is offered because the definition of "product liability" in model State legislation drafted to implement the Risk Retention Act could frustrate the implementation of the Act. ...

[6] *See* also the remarks of Rep. Florio:

> As noted in the House Committee Report on the act, preemption is central to the act's objective of facilitating the efficient operation of risk retention groups. Preemption eliminates the need for compliance with numerous State statutes that, in the aggregate, would thwart the interstate operation of risk retention groups.... If litigation were ever to arise on this point, the Federal definition of "product liability" would of course prevail in any construction of the scope of the application of the Risk Retention Act. Nevertheless, the prospect of litigation itself could deter formation of risk retention groups and frustrate Congressional intent. Therefore, it appears appropriate to clarify the law to remove any confusion which may have given rise to the inconsistent provision of the model State law. ... This technical amendment revises § 2(b), reaffirms our original intent and makes it absolutely clear threat for purposes of coverage authorized by the Risk Retention act, the Federal definition of "product liability" is controlling and preempts any definition of that term under State law. *Id.*

Thus, in determining whether a RRG may write stop-loss insurance, one must look to the federal definition of "liability" under the LRRA, as illuminated by the LRRA's legislative history. It is clear from the legislative history of the LRRA that a RRG may provide any type of liability insurance for similar or related liability exposures of its members, including excess liability insurance in the form of stop-loss coverage.

Very truly yours,

Robert H. Myers, Jr.
General Counsel

RHM/rtc