

June 26, 2012

By electronic mail

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

Re: Request for Information Regarding Stop Loss Insurance

Dear Sir or Madam:

I am writing on behalf of Blue Shield of California to offer comments in response to the Request for Information on Stop Loss Insurance (“RFI”) issued on May 1, 2012.

Founded in 1939, Blue Shield of California is a not-for-profit health plan with a deep commitment to expanding access to quality health care at a reasonable price for all Californians. We have roughly 3.4 million members and one of the largest provider networks in California. Over the past five years, we have donated more than \$160 million to the Blue Shield of California Foundation, which spends most of its funds to support the health care safety net. Blue Shield of California also has a strong track record of leadership in the health reform movement, and our company is committed to successfully implementing the Affordable Care Act (ACA).

Blue Shield of California was a leading proponent of legislation in California to establish a robust health insurance Exchange under the ACA. In order to protect the Exchange from adverse selection leading to higher premiums, we believe it is important that regulators ensure a level playing field between fully-insured products subject to ACA regulations and self-insured products that are exempted from many consumer protections.

The RFI specifically solicits information on whether the ACA will impact the trend of carriers offering stop loss coverage with low attachment points.<sup>1</sup> Because Blue Shield does not offer stop-loss coverage to small groups, these comments focus on the issue of how the important reforms in the ACA could impact these trends.

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<sup>1</sup> See questions 1, 2, and 13.

## **Comments:**

The ACA is intended to provide a minimum standard of affordable coverage to individuals and employees of small businesses. The ACA does this by, among other things, preventing insurers from considering health status, requiring that insurers in the individual and small group markets offer essential health benefits with limits on out of pocket expenses, and imposing a minimum medical loss ratio (MLR). However, the ACA excludes self-funded groups from many of these core requirements.

Specifically, the ACA exempts self-insured coverage from several important requirements, including:

- Self-insured plans will not be required to provide coverage with minimum essential benefits or the comprehensive coverage set forth in section 1302, or be subject to certain annual limits on deductibles.
- Self-insured plans are not subject to prohibitions based on salary or to the discrimination rules for highly compensated individuals.
- Self-insured plans will be exempt from participation in a risk-adjustment system.
- Self-insured plans are not subject to MLR and rate review mechanisms imposed on insurers.
- Self-insured plans do not have to pool risk with other groups, leading to adverse selection for insured groups because healthier groups are most likely to self-insure to avoid pooling with less healthy groups.
- Certain administrative requirements do not apply to self-insurance.
- Self-insured plans are exempt from fees under section 9010.

These exclusions provide significant incentives for employers to self-insure and avoid the new requirements and fees applicable to underwritten plans.

While the ACA prohibits underwriting based on health status in the individual and small group market, it creates an unintended loophole because carriers can still underwrite for stop-loss coverage. Current law would allow stop-loss insurers to cherry pick young and healthy small employers for coverage while leaving less healthy populations to the fully-insured market and the Exchange. Because employers with relatively young and healthy workers could gain major benefits by self-insuring, the practice could result in significantly higher premiums for the fully-insured population and adverse selection against the Exchange. It could also move a large portion of the California population into plans that are outside the authority of California regulators.

In principle, employers who self-insure take the risk of adverse claim experience, but this risk can be minimized by purchasing stop-loss insurance, particularly if such insurance is triggered at levels which are not significantly higher than expected claim levels. This creates a problem from a regulatory perspective because, if the trigger point is too low,

then the employer is not bearing enough risk in practice to be self-insuring. That is, if the employer is to pay out little or no more than expected, then the employer is really transferring the risk to the insurer and the stop loss layer simply makes the entire plan function like a fully-insured plan. Such arrangements may make self-insurance almost illusory.

The National Association of Insurance Commissioners (NAIC) has long recognized how such arrangements can undermine state insurance regulation and so it promulgated a Model Law which contained minimum stop loss trigger points designed to determine actuarially when risk is reasonably retained by the employer. The NAIC is currently updating its Model to reflect medical cost inflation where nominal dollar amounts are used.

A key factor enabling small groups to self-insure and evade the requirements of the ACA is the ability of stop-loss carriers to offer coverage with such low attachment points that employers can avoid assuming any real self-insured risk. While self-insurance by large employers who accept genuine risk must be protected, small employers should not be able to obtain coverage that renders the coverage effectively equivalent to fully-insured coverage, but outside the control of regulators.

We are concerned that the use of illusory self-insured arrangements could accelerate. The market has recently developed to offer stop loss policies with very low attachment points. Carriers are now offering stop-loss coverage to employers with as few as 15 employees.<sup>2</sup> With the new incentives to self-insure created by ACA, it is likely that low trigger point stop loss policies will become common in the market and cause adverse selection against the fully-insured small group market and the new Health Benefit Exchange. It is important that regulators send a signal to the market that promoting illusory self-insurance to groups this small will not be permitted. Otherwise, the market will quickly move to offer this type of coverage in anticipation of the market changes effective in 2014.

### **Conclusion:**

The ACA creates significant new incentives for employers, particularly small employers with young and healthy workers, to self-insure and avoid new requirements designed to protect consumers. Without regulatory action, the new market will quickly evolve to

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<sup>2</sup> See Self-Insured Plans LLC, Self-Funding customized for Small Employers Brochure, at page 5. Available at: <http://www.selfinsuredplans.com/images/stories/small-group-self-funding-sip.pdf>. Note that the brochure does not expressly declare the stop loss trigger point but does make clear that encouraging selection based on health status is the goal of these products. The brochure states, "However, if your group has serious, on-going medical issues, a fully-insured alternative will likely be better for your group."

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encourage self-insured plans exempt from state regulations and without consumer protections provided in the ACA.

Blue Shield of California remains committed to making health reform a success, and we look forward to working cooperatively on this and other issues to expand access to affordable health care.

Sincerely,

A handwritten signature in cursive script that reads "Andy Chasin".

Andy Chasin  
Associate General Counsel for Health Reform