



July 2, 2012

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Re: Request for Information Regarding Stop Loss Insurance

The National Partnership for Women & Families appreciates the opportunity to provide information on the use of stop-loss insurance. The National Partnership represents women and families across the country who are counting on the successful implementation of the insurance market reforms included in the Affordable Care Act (ACA) to make access to affordable, quality health care coverage a reality.

We understand that stop-loss insurance is an important product for many group health plans that self-insure and that many large employers provide comprehensive health benefits to their employees through self-insured health plans. We are concerned, however, with early indications, including internet advertisements, that insurers and benefits advisors are aggressively marketing stop-loss insurance to small employers as a means to evade consumer and market protections created by the ACA. The increase in the use of stop-loss insurance with low attachment points by self-insured small employer plans could potentially undermine the intent of the ACA. Therefore our letter responds to three of the specific questions – 2, 11, and 13 – raised in the request for information.

The ACA continues to reshape the rules of the road for health insurance, particularly through reforms to the individual and small group markets. Many small employers will purchase new, more affordable options offered by the SHOP Exchanges. Other small businesses may be enticed by the recent marketing efforts of stop-loss insurers, which increasingly sell low attachment point coverage as a way to circumvent the ACA consumer protections, including coverage of essential health benefits (EHBs), guaranteed issue, and

modified community rating. The widespread availability of stop-loss coverage with low attachment points could cause extensive adverse selection. Small groups may self insure when they have a good risk profile and return to the fully insured market when they do not.

Stop-Loss Insurance is Actively Marketed to Small Businesses [Question 2]

Employee benefits advisors and stop-loss insurers are promoting self-insurance for small employers.¹ A recent search by consumer advocates found a number of promotions for stop-loss coverage aimed at small businesses. The following is a small sampling from websites viewed in May 2012:

- “AMF can provide stop-loss on groups with as few as 10 eligible employees. . . . Stop-loss limits of \$10,000+ are available, depending on state law.”²
- “We underwrite coverage for employers with as few as 11 participating employees, and with specific retention levels from as low as \$5,000.”³
- “IAC specializes in small group plans . . . with "stop-loss numbers" ranging from as low as \$10,000 to as high as \$25,000.”⁴
- “Our goal is to bring a self insured product that best fits the below components of a self insured program to meet your needs. . . . Who is eligible? 10 – 50 Employee Businesses.”⁵
- “In today's stop-loss market, employers can find coverage with attachment points as low as \$10,000.”⁶
- “I have recently heard about one of our competitors doing [self-funding] for small groups sized 5 and up.”⁷

Further confirming this evidence, of the 474 self-insured groups the Center for Consumer Information and Insurance Oversight (CCIIO) granted “mini-med” waivers to impose

¹ See, e.g., United Benefit Advisors, Small Businesses Blaze a New Trail with Self-Funding (2011), <http://wn.ubabenefits.com/Download.aspx?ResourceID=7630>; Self-Insurance Institute of America, Companies of All Sizes Can Operate Viable; Self-Insured Group Health Plans (2011),

http://www.avalonbenefits.com/news_story.php?file=2011-02-14_150657.txt; George J. Pantos, PPACA: Small Business And Self-Insurance: Dispelling Some Myths (2011), [http://georgegjp.wordpress.com/2011/05/09/ppaca-small-](http://georgegjp.wordpress.com/2011/05/09/ppaca-small-business-and-self-insurance/)

<http://thehealthcareblog.com/blog/2011/04/08/a-case-for-self-insuring-small-business/>.

² <http://www.amfrms.com/smallgroup.htm>

³ <http://www.img-stoploss.com/about-img-stop-loss/IMG-sl-advantage.aspx>

⁴ http://www.sbisvcs.com/iac_group_advantage.htm

⁵ http://healthexchangeforselfinsurers.com/About_Self_Insurance.html

⁶ Joanne Wojcik, Smaller firms try self-funding benefits, Business insurance (2011), <http://www.businessinsurance.com/article/99999999/NEWS050101/399999918#>

⁷ http://www.actuarialoutpost.com/actuarial_discussion_forum/showthread.php?t=211409

annual limits lower than those required by ACA regulations of July 15, 2011, almost one quarter (109) had fewer than 50 enrollees, and 10 percent (47) had fewer than 25 enrollees.⁸

The only contrary indication comes from an econometric projection by the RAND Corporation, which predicts no substantial increase in small employers that self-insure.⁹ That study, however, assumed that “most stop-loss policies” have attachment points “exceeding \$75,000,” and the authors noted that their analysis might differ if the ACA “induce[s] stop-loss insurers to offer more-attractive policies geared specifically toward small firms that wish to avoid regulation.”¹⁰ Clearly, this is already happening.

Increasing Self-Insurance of Small Groups Reduces Benefits to Workers and Threatens the Stability of the Fully Insured Market [Question 13]

Self-Insured Status Avoids Essential Health Benefits Requirement

One of our concerns is that self-insuring small employers could offer their employees coverage that does not meet the EHB requirements that apply to certain plans beginning in 2014. All new health plans selling coverage to individuals and small groups—both in and outside of the new Exchanges—must offer benefits within at least the 10 broad categories of services. Some of the services included in the EHB standard, such as maternity, mental health and habilitative services, are extremely limited in the small group market, unless required by the state. Other federal requirements that govern group health plans do not apply to certain small employers. Specifically, the Pregnancy Discrimination Act and Americans with Disabilities Act do not apply to employers with fewer than 15 employees, the Age Discrimination in Employment Act does not apply to employers with fewer than 20 employees, and the Mental Health Parity Act does not apply to employers with fewer than 50 employees. This leaves potential gaps for some employers to not provide certain EHBs such as maternity care or mental health services or to provide benefits that would not comply with the non-discrimination requirements of the EHB standard.

Although we do not have data about the breadth of the ways in which coverage is lacking in the small group market, we do know that there are small group plans that currently do not cover all of the EHB categories:

- Certain categories of benefits are sometimes sold as riders. According to an Issue Brief by the office of the Assistant Secretary for Planning and Evaluation (ASPE), “[s]ome small group market plans sell riders for benefits such as maternity, mental health, substance abuse, and prescription drugs.”¹¹ This coverage would only be sold as a rider if there are employers that choose not to offer the benefit.
- Habilitative services are not commonly a part of small group market plans.

⁸ CCIIO. Self-insured employers: approved applications for waiver of the annual limit requirements [Internet]. Baltimore (MD): Centers for Medicare and Medicaid Services; 2011 Jul 15 [cited 2012 Jan 18]. Available from: http://cciio.cms.gov/resources/files/employer_07152011.pdf

⁹ C. Eibner, C. Price, R. Vardavas, et al., Small Firms’ Actions in Two Areas, and Exchange Premium and Enrollment Impact, 31 Health Aff. 324 (2012). The study also projects that prohibiting self insurance would cause a net decline in small-firm workers covered by employer-sponsored insurance.

¹⁰ Id. at 326.

¹¹ <http://aspe.hhs.gov/health/reports/2011/IndividualMarket/ib.pdf> (Footnote 4)

- Pediatric dental and vision are often sold as part of a separate excepted benefit, rather than being provided as part of the small group market plan.
- Recently, an insurance company in Washington State filed a request to remove all prescription drug coverage from the company's small group market products.¹² This suggests there is a market for small employer plans without certain benefit categories covered by the EHB package, including prescription drugs. (The request was denied by the state insurance commissioner.)

The EHB standard will help correct the gaps in current law that leave employees of small businesses without adequate health protections. However, an increased use of self-insurance made possible through low attachment point stop-loss insurance for small employers could undermine these important protections.

Extensive Use of Stop-Loss Insurance Threatens to Undermine Insurance Reforms Inside and Outside the Exchange

Under the ACA, small group policies must be offered without regard to pre-existing conditions (guaranteed issue) and using modified community rating. An increased use of self-insurance could seriously undermine the small group market and severely damage the underpinning of the ACA: getting the largest and broadest risk mix possible in the insurance market. Small groups with younger, healthier employees are likely to prefer to pay the actual predicted cost of their lower-risk employees through self-insurance, exiting the ACA risk pools which would, in turn, cause prices to rise in the ACA-covered plans. And when a group's risk profile changes and it is no longer advantageous to self-insure, groups can rejoin the fully insured market without penalty, further increasing prices. This type of market segmentation is exactly what the ACA seeks to avoid.

In the small group market today, the key problem is affordability. Overall, health coverage costs more for small groups than for large; small groups with disproportionately older or less healthy employees face even higher costs. Thus, small employers often find the cost of providing health insurance prohibitive and decline to offer it.

The ACA includes a number of requirements intended to remedy this situation in the small group market. These steps include requiring that small group policies use guaranteed issue and modified community rating. In an attempt to create the broadest risk pools possible, the ACA also bars insurers from splitting their individual and small group business in each state into smaller risk pools. In addition, the SHOP Exchanges are intended to increase the market power of small employers and reduce their administrative cost and the complexity of the market they face, thus reducing the cost of insurance, by creating a one-stop shop for small businesses to purchase private insurance, with tax credits.

Although many of the ACA reforms apply to all the major market sectors – individual, small group and large group – and to fully insured and self-insured plans, this is not uniformly the case. Some reforms that are most vital to consumers, *and key to systemic improvement*, do not apply to self-insured plans. These include covering the EHB package – a particularly important provision for women; limits on factors that may be considered in

¹² <http://www.insurance.wa.gov/news/2012/5-1-12a.shtml>

setting rates; risk pooling and risk adjustment requirements; medical loss ratios; and rate review and justification for “reasonableness.” In addition, self-insured plans are not subject to additional state law protections. Nor are stop-loss plans that insure self-insured groups covered by the ACA’s guaranteed issue or renewal requirements, restrictions on unreasonable rate increases, or underwriting limits. Thus, stop-loss plans can raise their prices dramatically for self-insured groups or refuse to insure altogether if the risk experience deteriorates significantly. Finally, stop-loss insurers are arguably not subject to the fee imposed on insurers under ACA section 9010, and thus can offer coverage to self-insured groups for less than fully insured coverage.

We are also concerned about the practice of “lasering,” which we understand is common in the stop-loss market. Under this practice, a stop-loss insurer offers a low attachment point for most members of the group, but a very high specific attachment point (as high as \$100,000 to \$400,000) for a specific member of the group with health problems. Although not specifically illegal in many states, this practice runs squarely contrary to the prohibition of health status discrimination not only in the ACA but also in the Health Insurance Portability and Accountability Act (HIPAA) and renders women with health problems highly vulnerable to employment discrimination.

State Regulation of Stop-Loss Insurance [Question 11]

Approximately 20 states regulate stop-loss insurance for small employers either by banning it altogether, which makes self-insuring infeasible for small employers, or requiring it be subject to the same laws that apply to regular insurance. New York and Oregon prohibit the sale of stop-loss insurance to groups with 50 or fewer employees, and Delaware bars it for firms with fewer than 15 employees. North Carolina prohibits insurers from serving as third-party administrators for self-funded employers.

The majority of the state laws that have addressed this issue are based on the National Association of Insurance Commissioner’s (NAIC) Stop-Loss Insurance Model Act, which sets minimum individual and aggregate attachment points defining what constitutes legitimate stop-loss insurance. The level recommended by the NAIC in 1995 for an individual attachment point was \$20,000. The NAIC recently commissioned Milliman, Inc., to make recommendations to update the model law. On June 6, 2012, three levels of NAIC actuarial groups voted to approve Milliman’s report, and the report has been sent to the NAIC Employee Retirement Income Security Act (ERISA) Working Group for further action on its recommendations.

The Milliman report suggests that substantial increases in attachment levels in the Model Act are necessary to reflect current market and economic realities. The NAIC Health Actuarial Task Force Working Group has concluded based on the report that it is appropriate to raise the attachment levels as follows: the annual individual specific attachment point must not be lower than \$60,000 (rather than the current \$20,000); the annual aggregate attachment point for groups of 50 or fewer, must be no lower than the greater of (i) \$15,000 times the number of group members (up from \$4,000); (ii) 130 percent of expected claims (up from 120 percent); or (iii) \$60,000. Milliman explained that they were most concerned about very small plans shifting to self-insurance and noted that low individual and aggregate attachment points shift most of the risk to the stop-loss insurer.

As the NAIC pursues improvements to its Model Act, a number of states fail to meet even today's low standard by allowing attachment points as low as \$10,000. This is, of course, grossly out of step with NAIC's new actuarial update to the attachment points in its Model Act. Some states do not regulate attachment points at all.

One logical reference point for minimum attachment points is the level typically purchased by employers of sufficient size to be genuinely self-insured. For instance, in 2011 the average attachment point for employers with 50-200 workers was \$73,824 and for groups of 200-1000, it was \$136,710. Based on this, a California bill SB 1431 (De Leon) was introduced that would have banned the sale of stop-loss with an attachment point less than \$95,000. However, recent amendments to that bill, which is now in the second house of the legislature, removed the specific attachment point number, leaving for further legislative debate the appropriate level for that state.

Apart from attachment points, and short of banning stop-loss insurance, other states choose to impose some or all of the same requirements on stop-loss insurance sold to small employers as those that apply to normal small-group health insurance. For instance, New Jersey's insurance commissioner ruled recently that it constitutes an unfair trade practice for insurers to refuse to sell stop-loss insurance to small employers based on health risk or conditions.¹³ By statute, North Carolina requires that stop-loss insurance sold to small employers comply with all of the underwriting, rating, and other standards of its small group health insurance reform law.¹⁴

Federal Authority to Regulate Stop Loss Coverage

The ACA uses the term "self-insured" repeatedly, without definition, and the Secretary of Health and Human Services has full authority to promulgate regulations defining the term.¹⁵ Moreover, the Secretary has authority to define the term "health insurance issuer," which also is used throughout the ACA to describe entities subject to the ACA insurance reforms.¹⁶ The law broadly defines this term as "'an insurance company, insurance service, or insurance organization . . . which is licensed to engage in the business of insurance in a State . . .'"¹⁷ This obviously describes stop-loss insurers, and so the Secretary has authority to clarify which stop-loss insurers qualify as "health insurance issuers." The definition is key, as a number of important provisions of the ACA, such as the EHB requirement, apply only to "issuers," and thus impliedly not to self-insured plans.

Federal regulations drafted by HHS should be developed in coordination with the Department of Labor (DOL), which has authority to promulgate regulations defining terms under ERISA,¹⁸ and the Department of the Treasury, the one agency that currently has regulations defining "self-insured," which were promulgated to implement the provisions of the Internal Revenue Code prohibiting discrimination by self-insured plans in favor of

¹³ BULLETIN NO. 11-20, http://www.state.nj.us/dobi/bulletins/blt11_20.pdf (2011).

¹⁴ N.C. Gen. Stat. 58-50-130(a)(5).

¹⁵ The Secretary has authority under ACA section 1311(a) and 42 U.S.C. 300gg-92 to define terms under the ACA and the Public Health Services Act.

¹⁶ ACA 1311(a); 42 U.S.C. 300gg-92.

¹⁷ 42 U.S.C. § 300gg-91(b)(2). The current regulatory definition simply repeats this definition. 45 C.F.R. § 144.103.

¹⁸ 29 U.S.C. § 1135

highly-compensated employees, as noted above.¹⁹ Federal definitions of self-insured and of issuer should recognize that a plan is not self-insured unless the plan sponsor in fact bears substantial risk for claims for which the plan is responsible. Such a definition would build on the Internal Revenue Service’s (IRS) current regulation, which defines a self-insured plan as one that “does not involve the shifting of risk to an unrelated third party.”²⁰ Both DOL and federal courts have concluded that an arrangement in which a purportedly self-insured group plan purchases 100 percent stop-loss coverage is not self-insured, but rather an insured plan, subject to state regulation.²¹ Federal courts also acknowledge that an employee benefits plan with 100 percent stop-loss coverage is an insured and not a self-insured plan.²² Beyond this, federal courts have also recognized that even if the plan sponsor of an employee benefits plan retains risk, the plan can still be an insured rather than self-insured plan if too little risk is born by the plan itself.²³

The federal agencies authorized to issue regulations and definitions under the ACA are capable, both legally and practically, of defining when enough risk is transferred to an insurer for a plan to be considered insured rather than self-insured. Federal agencies could set a minimum attachment point that is based on stop-loss policies typically purchased by larger employers.

Under such an approach, coverage that is not genuinely self-insured would become subject to all requirements of the ACA that pertain to issuers. Thus, insurers that sell to groups whose retained risk falls below the definitional threshold would have to comply with all requirements of the ACA that apply to health insurance issuers, regardless of whether the policy is nominally written as a stop-loss or insured plan. If an insurer writes “stop-loss” insurance for a group that does not qualify as self-insured, the insurer would, for example, have to comply with medical loss ratio requirements and justify unreasonable premium increases. These stop-loss policies also could not impose annual or lifetime limits, and would have to cover preventive services and, for small groups, the EHB package.

A federal definition of “self-insured” that requires a self-insured plan to actually bear significant risk makes eminent sense from a public policy perspective. As noted at the outset, a major goal of the ACA was to ensure consumer protections and end risk underwriting in the small group market. Requiring a group plan sponsor to actually bear significant risk by limiting stop-loss attachment points to a substantial level, would ensure that employees of small employers would enjoy the protection intended by the ACA. It would also protect the Exchanges and the small group market generally from the risk of adverse selection. Large plans could still self-insure – nothing would be fixed that is not broken. But the badly-broken small group market would not be broken further.

¹⁹ 29 U.S.C. § 1135

²⁰ 26 CFR 1.105-11 implementing IRC § 105(h).

²¹ Advisory Opinion 2003-03A, <http://www.dol.gov/ebsa/regs/aos/ao2003-03a.html>; Advisory Opinion 92-21A, <http://www.dol.gov/ebsa/programs/ori/advisory92/92-21a.htm>.; *McDaniel v. North American Indemnity*, 2008 WL 1336832 (S.D. Ind. 2008).; *Home Health Care Affiliates of Miss., Inc. v. Am. Heartland Health Admins., Inc.*, No. 1:01-cv-00489-D-A, 2003 WL 24046753, at *6 (N.D.Miss. Mar. 21, 2003).

²² *McDaniel v. North American Indemnity*, 2008 WL 1336832 (S.D. Ind. 2008).; *Home Health Care Affiliates of Miss., Inc. v. Am. Heartland Health Admins., Inc.*, No. 1:01-cv-00489-D-A, 2003 WL 24046753, at *6 (N.D.Miss. Mar. 21, 2003)

²³ 897 F.2d, 1351 (5th Cir. 1990).

Conclusion

Among the most important reforms in the ACA are the improvements to the small group market that increase consumer protections, improve access to comprehensive coverage, and stabilize premiums for small employers many of whom employ women. The ACA's new protections for small business turn on a crucial distinction, however, between self-insured and insured plans. The ACA repeatedly uses the terms "self-insured" and "issuer offering group health insurance coverage," but nowhere does the ACA define the term "self-insured" nor clarify when an insurer claiming to offer stop-loss coverage is in fact an "issuer offering group insurance coverage." We urge the agencies to define these terms to ensure that a small group can only claim self-insured status if the plan itself bears substantial risk and that an insurer comply with the requirements of the ACA that apply to "issuers" if the insurer in fact is the primary risk bearer rather than the group health plan.

Thank you for the opportunity to provide comments. If you have any questions please feel free to contact either Kirsten Sloan at (202) 238-4815 or Christine Monahan at (202) 238-4854.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Ness", with a long horizontal flourish extending to the right.

Debra L. Ness