



August 16, 2012

United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

United States Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

United States Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

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

To whom it may concern:

The Self-Insurance Institute of America, Inc. (SIIA) respectfully submits the following supplemental comments to the above referenced RFI addressing false and/or misleading statements made by other respondents.

Fallacy of Adverse Selection:

Multiple responses received stated that due to stop-loss insurance available to small businesses that have “low” attachment points, there would be a mass exodus of “healthy” small businesses out of the State Insurance Exchanges; inducing an adverse selection in the exchange and, causing an ever-increasing risk-profile of the remaining coverage pool. When details are further examined, and when empirical data and historical trends are considered, we strongly contend that those arguments have very little merit.

Those most concerned about the potential for adverse selection claim that it will be caused primarily due to “healthy” groups leaving the Exchanges. There are numerous reasons why this position is unlikely. First, small groups do not have access to their claims data. As such, the employer would not have the means to know if his group is “healthy” and in turn, neither would a stop-loss carrier. Those who acknowledge that fact will contend that an employer will know by the make-up of his workforce. That too is a point that we feel is not as viable as those may make it seem. While workers may appear to be young and healthy, there are many ailments that are not necessarily visibly noticeable. Second, an employer would have no knowledge of the health-status of an employee’s dependents. While we acknowledge that on average, younger employees are a lower-risk population; such plan participants are more prone to certain catastrophic claims; such as premature babies and car accidents. Secondly, there is a much higher rate of turnover for small businesses, meaning that their plan participants are always changing. For these many reasons, it cannot be health-status that incentivizes an employer to self-insure, and more relevant to the common arguments, that a stop-loss carrier will be able to “cherry pick” “healthy” groups.

Another claim for the justification of the potential for adverse selection in the insurance pool is that once a group who self-insures has a catastrophic claim they will move into the Exchange due to its guaranteed issue requirement. Such thinking shows a significant misunderstanding of why employers choose to self-insure and what the process for setting up a self-insured plan (and dismantling it) truly means.

It is important to note that all evidence points to the fact that there are no significant differences in the risk levels of fully-insured and self-insured plans and that self-insured plans do not enroll a more favorable selection of health risks than fully-insured plans. This was concluded in the Agencies' own *Annual Report on Group Health Plans* as well as a recent Congressional Research Report. There is no basis for the highly-speculative observation that a large number of small employers turning to self-insurance will skim healthier and better risk out of the insurance pools.

Finally, current minimum attachment point levels are significantly lower in most States than the levels currently being proposed, yet less than ten percent of employers with less than 50 lives self-insure. This is historical evidence as to why the assertions of "low" minimum attachment points do not incentivize small businesses to self-insure.

Stop-Loss is Not Health Insurance at ANY Attachment Point Level:

When an employer purchases a conventional, fully-insured group health insurance policy, the financial risk and legal liability is transferred to the insurance carrier that issues the policy. By contrast, a self-insured employer that funds its own health plan retains all the risk and liability. The availability of stop-loss insurance does not mitigate the risk assumption of the employer when electing to self-insure.

Regardless of the attachment point level, a stop-loss insurer never makes a payment to a provider on behalf of an individual, i.e. the plan is responsible for first dollar coverage. A plan-sponsor is liable for full payment of every claim against the plan. The stop-loss insurer simply reimburses the plan for claims paid above the contractually agreed upon attachment point levels. A stop-loss carrier never provides health coverage to an individual.

Stop-loss insurers have no part in plan formation, plan modifications or plan administration. There is no remedy right of any participant against the stop-loss insurer and that insurer does not have any liability to any beneficiary, solely to the plan. A plan participant, who has had a claims denial, may not make an internal appeal or ask for an external review of the stop-loss insurer.

A number of the Agencies' own ACA regulations should serve as a precedent for the interpretation that stop-loss is not intended to be regulated as health insurance. When crafting the rules on plan changes and their effects on grandfathering status, regulators stated that while a change in health insurance carriers would jeopardize the plan's grandfather status, changing stop-loss carriers would not. This is significant for two reasons. First, regulators distinguished that stop-loss is not a health insurance related product as changes to it do not directly affect the underlying plan. Secondly, in describing allowable plan changes, regulators specifically included stop-loss as a service provider – again, not as a component of the plan itself. Additionally, upon releasing the rule that dealt with the ACA's Medical Loss Ratio requirements, regulators again exempted stop-loss insurance as a compliant entity. This further shows that Federal regulators are on record distinguishing between, and recognizing that, traditional health insurance and stop-loss insurance are separate and unrelated products.

It is also important to note that there is significant legal precedent establishing that stop-loss insurance is separate than health insurance and should not be regulated as such. The following are just a sample of existing legal precedents articulating that stop-loss is a separate and different product than commercial health insurance:

- *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708,723 (2nd Cir. 1993) - (“Unlike traditional group health insurance, stop-loss insurance is akin to reinsurance in that it does not provide coverage directly to plan members or beneficiaries. Rather, most stop-loss policies provide coverage to the plan itself if the total amount of claims paid by the plan itself exceeds the amount of anticipated claims by a specific sum.”)
- *Thompson v. Talquin Building Pools Co.* 928 F.2d 649, 653 (4th Cir. 1991) - (“The purpose of the stop-loss is to protect the employer from catastrophic losses. It is not accident and health insurance for employees. Instead of covering employees directly, the stop-loss insurance covers the Plan itself.”)
- *American Medical Security Inc. v. Bartlett*, 111 F.3d 358, 360 (4th Cir. 1996) – (“Stop-loss insurance provides coverage to self-funded plans above a certain level of risk absorbed by the plan. It provides protection to the plan, not to the plan's participants and beneficiaries, against benefit payments over the specified level, called the attachment point.”)

Purchasing a Stop-Loss Policy is not a Transfer of Risk:

Certain respondents cite a study recently conducted by Milliman, Inc. as providing evidence that restrictions on attachment points are necessary and that without them, there is a significant transfer of risk from the plan-sponsor to the stop-loss carrier. We contend that Milliman’s own data shows that it is the plan, not the stop-loss carrier that maintains the plan-risk. In a table reflecting the probability of an employer who offers a plan equivalent to a Silver Plan offered in an exchange, the study concludes that that if the sponsor were to purchase a stop-loss policy with a \$20,000 specific attachment point, that only 3.34% of the total members of the plan would have claims beyond that level. As such, for 96.64% of all plan participants, the sponsor would not make any claims for reimbursement to the stop-loss carrier.

Groups Will Not Self-Insure to Escape ACA Requirements:

Another assertion is that small businesses will self-insure to avoid certain ACA requirements placed on fully-insured carriers. Such statements are highly inaccurate and have no basis.

- *Essential Health Benefits:*
Many maintain that the exclusion from the provision mandating the coverage of Essential Health Benefits is the most likely requirement that will incentivize a group to self-insure. The Agencies’ own *Annual Report on Large Group Plans*, RAND Corporation Studies, as-well-as numerous Kaiser Family Foundation *Employer Health Benefits Annual Surveys* conclude that the benefits offered by a self-insured plan are comparable to those offered in a fully-insured plan. What the freedom from the Essential Health Benefits requirement for self-insured plans does allow for is the continued flexibility for the plan-sponsor to target the benefits that his group participants want and need.

While the ACA's Essential Health Benefits are a new Federal requirement for group health plans, mandated benefits on plans by States have been in place since the inception of self-insurance. Thus, if the requirement to cover certain benefits alone were to be a driver of groups moving to self-insurance, this would have already taken place.

- *Fees on Fully-Insured Carriers:*

It has also been stated that groups will move to self-insurance to avoid the fees that will be levied on fully-insured carriers. First, all self-insured plans are required to pay all but one fee levied on fully-insured carriers. Secondly, history shows that groups do not choose to self-insure to avoid fees. Most States already have various fees on fully-insured carriers that are not applicable to self-insured plans, but we have not seen any shift to self-insurance by employers upon the enactment of these fees.

- *Risk-Adjustment Program Participation:*

The risk-adjustment program was put into place to ensure that fully-insured carriers offering coverage in the Exchange pools do not “cherry pick” their groups. A fully-insured carrier sponsors their health plans as a profit mechanism and therefore could have the incentive to risk-select their covered groups. The inverse is true for self-insured plans. A self-insured plan is a non-profit entity created solely to provide healthcare coverage to an employer's employees. Therefore there is no justifiable reason for such a plan to participate in any risk adjustment program.

- *Medical Loss Ratios:*

Here too it is inappropriate to have limits on Medical Loss Ratios applicable to self-insured plans. Again, the distinction of fully-insured plans as “for-profit” and self-insured plans as “non-profit” entities is vital. The Medical Loss Ratio provision was put into place to make sure that beneficiaries of those “for-profit”, fully-insured carriers are getting appropriate value from their premiums paid. Sponsors of self-insured plans on the other hand are strictly prohibited from using any funds not spent on claims and plan services as general revenue. In fact, sponsors use these funds to increase covered benefits and/or decrease the coverage cost to their employees. Additionally, some sponsors of self-insured plans do not use dedicated trusts, but instead pay claims as they arise. For such plans, there would be no practical way to even calculate Medical Loss Ratios.

While a small number of ACA provisions do not apply to self-insured plans, employer-sponsors of self-insured plans are exposed to many other regulatory requirements that do not apply to employers who purchase fully-insured coverage. In addition to being responsible for all financial liabilities, a self-insured employer also subjects itself to all legal and regulatory requirements under ERISA, HIPAA and COBRA.

Limiting the Option to Self-Insure is Harmful to Small Business:

The cost of health insurance has been rapidly increasing in recent years. Many small businesses self-insure as it is the most cost-efficient method to provide quality coverage to its employees. If small employers who sponsor self-insured plans were unable to purchase stop-loss insurance at appropriate rates, they very well could drop their health plans altogether; a recent RAND Corporation study concluded that this very scenario would be the case in many instances – *“Total insurance enrollment declines by 1.4 million if self-insurance is prohibited. Without the option to self-insure, some firms drop coverage and some individuals—faced with only the option of an exchange plan—choose not to enroll.”*

The study also concludes the decline in firm health coverage offer rates when the option to self-insure is unavailable to small firms; firm offer rates would fall from 79 percent to 60 percent. Additionally, if employers were restricted to purchasing stop-loss policies with increased attachment point levels, it would expose the employer to significant financial risk; potentially jeopardizing the business and its employees' livelihoods altogether.

Employees of self-insured plans enjoy the many advantages of such coverage, such as lower contributions due to cost-efficiencies, benefits that they want and need and access to wellness and prevention programs. If their employer loses the option to self-insure, at best they lose these advantages, and at worst, could lose coverage altogether.

Conclusion:

In conclusion, SIIA is of the strong opinion that contentions of the potential for adverse selection in the Insurance Exchanges due to the ability of "healthy" small businesses to purchase stop-loss policies with "low" attachment points to have no merit. In fact, we contend that restrictions on stop-loss policies would harm small business owners, their employees and the healthcare marketplace as a whole.

As always, SIIA appreciates the opportunity to be a valued resource to your Agencies and looks forward to what I'm sure will continue to be a productive working relationship. Thank you in advance for your time and consideration of our supplemental comments. If you have questions, seek additional information or would like to discuss any of our points in greater detail, please contact SIIA's Director of Government Relations, Jay Fahrer, at 202-463-8161 or [jfaher@sia.org](mailto:jfahrer@sia.org).

Respectfully submitted,



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