Society of Professional Benefit Administrators

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Department of the Treasury/Internal Revenue Service
Department of Health and Human Services/Centers for Medicare and Medicaid Services
Department of Labor/ Employee Benefits Security Administration
Office of Health Plan Standards and Compliance Assistance
Room N-5653
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

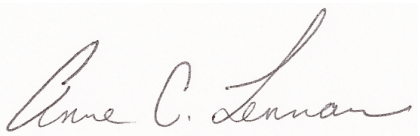
Dear Ladies and Gentlemen,

The Society of Professional Benefit Administrators (SPBA) respectfully submits comments on the Request for Information regarding Stop Loss Insurance.

SPBA has worked collaboratively with IRS, EBSA and CMS on many regulatory issues over the past 35 years and we appreciate the opportunity to address a request for information in this area of our expertise yet again. The members of the SPBA have a long history of working with employers and their plan participants throughout the United States to bring the highest level of understanding, management and administration to their health and welfare benefit Plans.

We look forward to answering any questions you have concerning these comments and stand ready to assist in any way.

Respectively,



Anne C. Lennan
President
Society of Professional Benefit Administrators

SOCIETY OF PROFESSIONAL
BENEFIT ADMINISTRATORS

REQUEST FOR INFORMATION REGARDING STOP-LOSS INSURANCE

Prepared for:

U.S. DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE

U.S. DEPARTMENT OF LABOR

EMPLOYEE BENEFIT SECURITY ADMINISTRATION

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES

CENTERS FOR MEDICARE & MEDICAID SERVICES

JUNE 27TH, 2012

PREAMBLE

The Society of Professional Benefit Administrators (SPBA) is a national association whose membership consists of Third Party Administrators (TPAs) and their service partners, such as stop-loss insurance carriers, managing general underwriters, and re-insurers. SPBA was established shortly after the passage of ERISA in 1974, and since that time, SPBA has become well-known for its candid insights, broad perspectives, and the genuine concern for workable regulatory guidance in the best interests of employee benefit plans.

A TPA is an entity that contracts with a Plan Sponsor to administer most, if not all, aspects of a Plan Sponsor's employee benefits plan. SPBA member TPAs operate much like independent accounting or law firms in that TPAs provide professional claims and comprehensive benefit plan administration services for sponsors of employee benefit plans, the vast majority of which are self-funded and utilize various types and amounts of stop-loss insurance. Stop-loss insurance carriers, managing general underwriters, and re-insurers serve important roles in employee benefits plan financing and risk allocation in order to protect plan assets, as set forth in further detail below.

It is estimated that 55% of all non-federal U.S. workers and their dependents are covered by employee benefit plans utilizing TPAs. SPBA members provide services for a wide range of employee benefit plans, including but not limited to small businesses, large corporations, unions, state and local governments, religious groups, and association-sponsored plans. These plans represent all types of industries and cover employees from all sectors of employment.

The members of the Society of Professional Benefit Administrators (SPBA) have long recognized the importance of stop-loss protection for employers as a way for them to better manage their health and welfare benefit Plan, which has become a key component in sustaining business viability in today's economic environment. Stop-loss insurance, also known as excess loss coverage, is a form of business indemnity coverage that is intended to protect an employer, Plan Sponsor or Plan from unexpected liabilities arising from an employee benefit Plan. The level of protection varies to meet the policyholder's business needs similar to general business liability insurance or fleet insurance. Stop-loss insurance is not health insurance. Whether the employer, Plan or Plan Sponsor has opted for any level of stop-loss protection or not, said entity remains responsible for making all payments for eligible services offered by the Plan of benefits.

COMMENTS

1. How common is the use of stop-loss insurance in connection with self-insured arrangements?

The purchase of stop-loss insurance for self-insured health and welfare benefit Plans is a common practice that varies based upon *many* factors, including the number of covered workers enrolled in the employer-sponsored Plan.[1] According to the most recent Kaiser Family Foundation and Health Research & Educational Trust Employer Health Benefits Survey 2011, almost three in five covered workers in self-funded Plans are in Plans with stop-loss ***protection***.[2] Stop-loss insurance is purchased by the Plan or Plan Sponsor to *protect* the Plan from unknown liabilities, including excessive losses from very large claims which are increasingly common occurrences in today's medical marketplace. This *protection* is one of the ways the Named Fiduciary in an ERISA Plan fulfills his/her fiduciary responsibility under the law to pay all the covered costs.[3] In the case of non-ERISA self-funded Plans, such as governmental or church Plans, this *protection* is one of the ways the taxpayers' dollars are shielded from excessive loss.

Does the usage vary (and, if so, how) based on the size of the underlying arrangement or based on other factors?

The amount of risk related to the self-funded health and welfare benefit Plan that is insured by the stop-loss policy is a function of several factors related to the employer group. These factors include the number of Plan participants, the employer's tolerance for risk, cost of coverage, prior experience of the group, Plan design, industry, location, and census considerations**.** Therefore, the usage varies. This is demonstrated in Exhibit 10.9 of the 2011 Kaiser Family Foundation Employer Health Benefits Survey which shows that more covered workers in "small" firms have Plans with stop-loss protection than "large" firms, 72% (<199) vs. 57% (200+), respectively.[4] The Deloitte study on self-insured health benefit Plans looked at Form 5500 data, but this data is not deemed comparable because it does not include unfunded Plans or those with fewer than 100 participants, yet the commissioned study still asserted that their results were broadly consistent with the Kaiser/HRET figures.[5]

How many individuals, if known, are covered under stop-loss insurance (either nationally or on a State-specific basis)?

[1] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011*
[2] Ibid
[3] ERISA Section 404 (a)(1)
[4] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011*(The Kaiser Family Foundation & HRET, 2011 Employer Health Benefits Annual Survey, 2011)
[5] Deloitte & Advanced Analytical Consulting Group, "*Self-Insured Health Benefit Plans*", March 23,2011

The technical answer is *none*. The stop-loss policy provides excess loss coverage as *protection* for ***the Plan or the Plan Sponsor just as the employer may have fire insurance.*** Stop-loss insurance differs from health insurance in that it ***does not*** *directly cover any individual Plan participant*. There is no direct relationship between the Plan participant and the stop-loss insurance carrier. If we address the question of how many individuals are covered by self-insured Plans that have purchased stop-loss *protection*, then the 2011 Kaiser Study[6] results can be used to extrapolate the number of self-insured lives in Plans with stop-loss insurance to a range of 45-55 million covered lives.

What are the trends? Are past trends expected to be predictive of future trends? Is the Affordable Care Act expected to affect these trends (and, if so, how)?

Trend details over the last five years on the percentage of firms offering a self-insured health and welfare benefit Plan are summarized in the Rand Technical Report and indicate a consistency of self-insurance over that same period.[7] Regardless of the ACA, the economic condition of the employer drives the decision as to whether they are more comfortable being self-insured, fully-insured directly written or through an exchange. Employers will continue to look at self insurance as a way to reduce the cost of providing essential benefits for their employees and dependents as an alternative funding method to prepaid insurance premiums and the additional costs associated with insurance company overhead as expressed through premiums. Since the passage of ERISA in 1974, the incentive of employers to establish and maintain competitive benefits is critical to their business objectives, such as the recruitment and retention of valuable employees. These types of business objectives and economic decision-making will continue and are greater influences than State or federal regulatory requirements, as reflected in the Rand Technical Report and in the experience of the SPBA members.[8]

2. What are common attachment points for stop-loss insurance policies, and what factors are used to determine these attachment points?

For those entities desiring risk protection, stop-loss insurance policies provide coverage for the Plan or Plan Sponsor in accordance with the risk tolerance of the Plan Sponsor, and utilizing parameters commonly expressed as "Attachment Points". These factors used to determine attachment points are unique to the Plan or Plan Sponsor, but may include prior claim history, Plan design, demographics of the participant population, geographic region, financial status, economic factors and risk tolerance. In addition, there may be unique business factors that influence the decision of an entity to purchase stop-loss protection. For example, some large and medium corporations do not want random medical costs to influence their stock position, so they may buy stop-loss protection to

[6] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011"*(The Kaiser Family Foundation & HRET, 2011 Employer Health Benefits Annual Survey, 2011)
[7] Rand Health, *"Employer Self-Insurance Decision and the Implication of the Patient Protection and Affordable Care Act ....of 2010(ACA)",* 2011
[8] Ibid

keep variations close to expectations. **As such, there are no industry-wide common standards for attachment points in stop-loss insurance policies.**

There are generally two types of stop-loss protection a Plan or Plan Sponsor may select: 1) **Specific Stop-loss** which *reimburses* the Plan or Plan Sponsor for claims paid by the Plan on behalf of a Plan participant in excess of a defined retention, or deductible, amount; and 2) **Aggregate Stop-Loss** which *reimburses* the Plan or Plan Sponsor for claims paid by the Plan in excess of the Aggregate Attachment Point. With regard to Aggregate Stop-Loss, it is important to note that attachment points in most stop-loss contracts are defined as a dollar amount. Typically, this dollar amount has been underwritten and actuarially-calculated in relation to expected claims for the desired contract period. The specific stop-loss attachment point is commonly based on a percentage of total annual expected claims that ranges from 3-10%, and that percentage is then expressed in a dollar amount in the application and policy.

What are common attachment points by employer size (e.g., for plans with fewer than 50, between 50 and 100, or between 100 and 250 employees, and how do these compare to attachment points used by larger plans)?

The answer to this question is subjective since the decision by the Plan or Plan Sponsor is multi-dimensional so SPBA will provide some general guidelines as seen in the industry. Even though recent studies show the "average" retention of stop-loss insurance by firm size,[9] this is *not* necessarily reflective of the median amount that our members see Plan Sponsors select for reimbursement. In fact, reliance upon this number may be misleading.

It should be noted that the aggregate attachment point relates to claims that are less than the level of any specific attachment point. This means claims that are covered by specific stop-loss (claims in excess of the specific attachment point) cannot count towards the accumulation of aggregated claims that are *protected* by aggregate stop-loss coverage. Claims below the specific attachment point are pooled together and count towards the aggregate attachment point. In other words, a claim cannot be reimbursed under both the specific and aggregate stop-loss coverage.

Typically, the specific stop-loss deductible will be set at anywhere between 3-10% of the annual expected claims total for the group. The annual Aggregate Attachment Point is commonly set at 120-125% of the annual expected eligible claims cost for the Plan. The Plan or Plan Sponsor may choose to accept more or less risk by utilizing an annual Aggregate Attachment Point that is anywhere from 110-200% of the expected claims cost. Most employers that sponsor a self-funded health and welfare benefit Plan want to minimize "fixed" costs such as stop-loss insurance premiums and would therefore generally want to purchase the highest Specific and Aggregate insurance coverage consistent with their risk tolerance and Plan funding objectives. ***Again, there is NO***

[9] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011"*

direct relationship between the stop-loss policy and any individual Plan participant. Stop-loss coverage insures the Plan or the Plan Sponsor.

What are the lowest attachment points that are available?

Specific stop-loss deductibles vary by insurance company based on its business model. Specific stop-loss is generally available in claim retention increments from $15,000 to $1,000,000 depending upon the size of the group and risk tolerance of the Plan Sponsor. In addition to the Plan or Plan Sponsor, the stop-loss carriers or their Managing General Underwriting representatives may have varying business models that do not allow attachment points below certain amounts.

What are the trends?

As medical cost inflation continues and Plans experience higher claim costs than ever before, the attachment points are affected. Specific attachment points tend to be set within the 3-10% of total expected claims range for a given self-insured employer health Plan, though exceptions do exist. Aggregate attachment points may be lower relative to expected claims for larger sized employer Plans, and higher for smaller sized employer Plans. The range may be from 110-150% and higher when used in conjunction with specific stop-loss. Specific attachment points may tend to rise over time as the attempt to maintain the relationship with total expected claims (3-10%) is made. Total expected claims (everything else being equal) will tend to rise as medical benefit Plan cost increases trend each year. As a result, the level of the specific attachment point has tended to rise as well.

3. Are employee-level ("specific") attachment points more common, or are group-level ("aggregate") attachment points more common?

Most Plan Sponsors or self-funded health and welfare benefit Plans purchase both specific and aggregate coverage. However, as the size of the employer shrinks or expands, the employer may have only one or the other and many very large Plans have neither type of stop-loss protection. The decision by the employer or Plan as to what type of coverage(s) is needed to best protect its assets is conditioned upon multiple business factors. Specific coverage is intended to protect against unknown catastrophic risk while aggregate coverage is intended to protect against significant variations in claim experience. The employer seeks to properly protect itself by budgeting for this liability in order to sustain its business.

What are the trends?

The type of stop-loss coverage and risk retention formulas for specific and aggregate stop-loss insurance have been consistent for several decades. Employers continue to look at their business objectives to influence their decisions and there is little to no evidence that more profitable employers, based on their tax returns, were more likely to self-

insure.[10] As Employer/Plan Sponsors try to mitigate expenses while at the same time experiencing the increase in excessive pricing on hospital claims, the costs to their Plans are rising, thereby leaving the Employer/Plan Sponsors no choice but to increase their Specific Attachment points. According to the Society of Actuaries, a key to driving healthcare costs downward is transparency,[11] and transparency in hospital pricing would potentially mitigate such increases.[12]

What are the common attachment points for employee-level and group-level policies?

In an effort to clarify terms, there are no "employee-level" stop-loss policies because stop-loss policies do not cover employees. As previously discussed, typically, the specific stop-loss deductible for a *group* will be set at a number between 3% and 10% of the annual expected claims total for the group. The annual Aggregate Attachment Point for a *group* is commonly set at 120%-125% of the annual expected claims cost for the Plan. However, the Plan or Plan Sponsor may choose to accept more or less risk by utilizing an annual Aggregate Attachment Point that is anywhere from 110% to 200% of the expected claims cost. Therefore, there are no common attachment points that can be applied across the industry.

4. How do insurers work with small employers to integrate stop-loss insurance protection with self-insured group health plans?

Although it may differ based on industry factors,[13] "Small Employer" is currently defined as an employer Plan with 2 to 50 covered employees[14]in most States and this definition changes in the Affordable Care Act, depending upon certain circumstances. Some small employers do not sponsor self-funded health and welfare benefit Plans because the total cost of expected claims, stop-loss insurance and administration can be greater than fully insured alternatives readily available in most States. However, other small employers in high-cost insurance cities or States may find self-funding to be a viable alternative to fully-insured group insurance policies depending upon the risk profile of their group, length of time in business and their specific risk tolerance as an employer. Stop-loss insurers or their Managing General Underwriting representatives typically work with small employers through their Third Party Administrator, Advisor or Broker/Agent to integrate stop-loss insurance protection with their Plans.

What kinds of options are generally made available? Are policies customized to meet the needs of different employers?

[10] Deloitte & Advanced Analytical Consulting Group, "*Self-Insured Health Benefit Plans",* March 23, 2011
[11]Society of Actuaries, "Actuaries Believe More Transparency in the U.S. Healthcare System Would Help Bend the Cost curve Downward", Press Release 2010
[12] John Cummins "Health Insurance Pricing Transparency could Save $36 Billion Annually", February 29, 2012
[13] Small Business Administration, 2011(Small Business Administration, 2011)
[14] Definitions. uslegal.com

Stop-loss insurance policies issued to Plans or Plan Sponsors must be filed in the admitted State and approved by the insurance department of such State prior to solicitation or sale of insurance in the State. Stop-loss policy terms are subject to the language filed by the admitted insurance company and approved by the State insurance department and can vary. *Stop-loss policy terms (i.e., definitions, coverage terms, limitations, exclusions, etc.) are not customized for individual employers, but the coverage they select can be customized*. Employers/Plan Sponsors can select the Specific Claim deductibles and annual Aggregate Attachment Points that meet their needs in accordance with the risk profile of the group and risk tolerance of the Plan Sponsor. The health and welfare benefit Plan is based on the benefits the Employer/Plan Sponsor selects to meet those needs, and these customized benefits are stated in the Summary Plan Description/Plan Document. If the Plan or Plan Sponsor chooses to protect the Plan by purchasing a filed Stop-loss policy, then the policy is underwritten based on the Plan of benefits.

How are the attachment points for a stop-loss policy determined for an employer?

Stop-loss deductibles and attachment points are determined by group size, risk profile, risk tolerance and funding objectives of the Plan Sponsor. The employer that is sponsoring the Plan makes the final determination. However, the employer may utilize the services of an actuary, CPA, Third Party Administrator, broker/agent or experienced Plan service provider to assist the employer in determining the levels of stop-loss coverage most appropriate for the group given the objectives of the Plan Sponsor.

Do self-insured group health plans purchase stop-loss insurance anticipating that they will purchase it every year?

Typically, yes, of those desiring such protection.

5. For a given attachment point, what percentage of total medical costs incurred by the employees is typically paid for by the employer and what percentage is typically paid for by the stop-loss insurance policy?

In a self-insured health and welfare benefit Plan, the *Plan* pays ***100% of all*** eligible medical expenses of the enrolled Plan participant as covered by the Plan Document. If claims paid by the Plan exceed the individual specific claim attachment point or the collective group claims for the Plan exceed the annual Aggregate Attachment Point, then the policyholder can file a claim for *reimbursement* with the stop-loss carrier and will be reimbursed in accordance with the terms of the stop-loss policy. Typically, the amount the employer ends up paying, net of any reimbursement from any stop-loss policy, is more than 50% of the total claims. However, this can vary greatly depending upon the mix of catastrophic individual claims under the Plan in relation to the size of the employer and the parameters of the stop-loss coverage.

How much do the relative percentages vary for different attachment points?

The relative percentages of the actual claims incurred by the Plan allocated between the self-insured group Plan and the amount reimbursed by the stop-loss insurance policy will vary significantly by employer Plan, the mix of actual claims incurred during the policy period, and the parameters of the stop-loss policy itself.

What are the loss ratios associated with stop-loss insurance policies?

The Stop-loss insurance market is very competitive with numerous insurance companies either directly or through managing general underwriters offering policies in most States. Loss ratios are typically consistent with excess risk casualty insurance policies and have similar expense formulas. Since stop-loss insurance is ***not*** health insurance, and is in fact a form of reinsurance, the expenses, rate formulas and underwriting manuals are substantially different than health insurance. Because definitions and components of stop-loss coverage premiums are multi-dimensional and can vary from carrier to carrier, there is no standard basis for evaluating "loss ratios". Stop-loss insurance policies are typically reinsured at multiple levels by the issuing carrier as further protection from unknown catastrophic claims. Over the last several years, loss ratios have been impacted by the increase in hyper-inflationary pricing of claims by providers, especially hospitals, so it is more important than ever for transparency in provider pricing.[15]

6. What are the administrative costs to employers related to stop-loss insurance purchased for the employers' self-insured group health plans?

Employers typically do not incur additional administrative costs associated with the purchase of stop-loss insurance. Administration of the stop-loss insurance premiums and claims are typically handled by the Plan's Third Party Administrator and are included in the TPA's global administration fee according to the terms set forth in the administrative services agreement. Premium charged by the insurance company for the stop-loss insurance varies depending upon the terms of coverage and the risk protection selected.

How do these costs compare to the administrative costs related to purchasing a health insurance policy from an issuer?

Self-insurance offers several potential advantages to employers, including lower administrative service costs.[16] A core objective of the Employer/Plan Sponsor in establishing and maintaining a self-funded health and welfare benefit Plan is to reduce administrative expenses in comparison to a group health insurance policy. Administrative savings for a self-insured Plan can range from 3-12% over a comparable health insurance policy when calculated as a percentage of the total annual funding; however, we have seen administrative savings that are significantly higher when the network is considered as part of the administrative expense.

[15] Health Care Cost Institute, "*Health Care Cost and Utilization Report:2010*", May 2012

[16] Deloitte & Advanced Analytical Consulting Group, "*Self-Insured Health Benefit Plans",* March 23, 2011(Deloitte & Advanced Analytical Consulting Group, March 23, 2011)

7. Is stop-loss insurance more prevalent in certain industries or sectors?

Generally speaking, stop-loss insurance is broadly available across the majority of employer industry classifications. However, stop-loss insurance markets are limited for most multiple employer markets such as MEWAs. According to the 2011 Kaiser /HRET Employer Health Benefits survey[17], the percentage of covered workers in a self-funded Plan fluctuates by certain industries but all listed industries were represented.

The industry is not as important to a stop-loss carrier in issuing a policy as the claims experience data which is often difficult or impossible to obtain. Only a few States have passed legislation or have regulations that require prior carriers to release up to three years of claims experience, while ensuring the health information remains protected.[18]Those States that have such statutes allow for a more transparent exchange of data in an effort to stimulate competition.

Are there any minimum employee participation requirements for a small employer to be offered stop-loss insurance?

Typical participation requirements are 75-80% of eligible employees as defined by the Plan Document and enrolled in the Plan in accordance with its terms. Most stop-loss carriers require that a minimum participation percentage of eligible employees enroll in the Plan similar to group health insurance underwriting requirements.

8. What types of entities issue stop-loss insurance? How many small entities issue stop-loss insurance policies?

Stop-loss insurance is available from insurance companies and managing general underwriters hired by insurance companies to manage their stop-loss insurance policies. In either case, the issuing carrier is liable for the claims incurred under any stop-loss policy approved and available for issue in any admitted State. State insurance departments are responsible for regulating the solvency requirements of all admitted insurance companies, and companies writing reinsurance in their States.

9. Do stop-loss issuers increase fees for groups below a certain size or exclude those groups? If so, how?

The premiums charged by stop-loss carriers to Plans or Plan Sponsors are not based on the size of the group directly but on the claim loss experience and an absolute size of the claim total. Generally, the lower the specific attachment point, the higher the stop-loss

[17] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011"*(The Kaiser Family Foundation & HRET, 2011 Employer Health Benefits Annual Survey, 2011)
[18] State of Texas, H.B. 2015, Insurance Code Section 1215.003

premium. Eligible industries, group size and demographics required for a coverage offer will vary by insurance company. There is no standard formula in the stop-loss industry as it pertains to group size or group eligibility since business interest and strategies vary by individual stop-loss insurer. Typically, there are no "fees" charged by stop-loss issuers to policyholders, only risk-related premium.

10. How do stop-loss insurers evaluate the plans seeking coverage and how is this evaluation reflected in the coverage or premiums offered?

There are several items that are important to an underwriter when evaluating a Plan for stop-loss insurance. Generally, items related to the Employer/Plan Sponsor include: business structure and organization, domicile, industry SIC classification, business management, employer operations, subsidiaries, union contracts, and expected enrollment on the proposed effective date. Furthermore, the claim loss experience of the Plan has a significant bearing, including carrier history of the group, enrollment history, claims history, rate history, open or ongoing claims status, active, retiree and COBRA enrollee census, dependent count for enrollee census, disease management/wellness programs, managed care networks and Plan design. If claims loss experience was made more readily available, such as with some other States,[19] then there would be a more level playing field wherein all proposing issuers relied on the same information so the Employer/Plan Sponsor could comparatively shop and make a more informed decision on which carrier to select. Premiums are determined by the coverage or retention limits requested by the Plan Sponsor and the risk profile of the group in accordance with the underwriting manual used by the offering insurance company or the loss experience available.

Does the profile of the plan have an effect on the attachment points available?

Yes. Census, location, industry, claims experience, benefit design, open claim status, rate history and other items are considered in the Specific and Aggregate stop-loss insurance offer. In addition, the rising cost of health care services paid by a Plan is a major contributing factor to any attachment point.

11. How do States regulate stop-loss insurance?

State insurance departments regulate filed stop-loss insurance in accordance with the statutes adopted by the State legislatures which vary by each State. The State's regulatory authority over insurance is responsible for such regulations based on each State's requirements.

[19] State of Texas, H.B. 2015, Insurance Code Section 1215.003

In States that are regulating this insurance, what are the licensing processes and standards?

All insurance companies must apply for admission in the State they intend to offer any type of insurance products, including filed stop-loss insurance. Upon issuance of an approved Certificate of Authority proffered by a State, stop-loss policies must be filed and approved for sale by the insurance department in that State. It is a normal practice for States to require licensed agents or brokers to sell stop-loss insurance, and they are subject to the States' requirement for ethics, continuing education and other requirements set forth by each State.

Have States proposed laws, regulations, or best practices with regard to stop-loss insurance?

Each State establishes its own laws and regulations based on the unique economic conditions and market needs of that State. Therefore, there is no singular law or regulation that would or could universally apply to each State. Since the passage of ERISA in 1974, several States have had varied proposed laws or regulations regarding stop-loss, some of which have been passed by the legislatures in the States and others have not. Some of the regulations have been rejected by the courts on the basis of ERISA pre-emption.

Do such proposals focus on attachment points, size of the group, percent of total claims paid by the stop-loss insurer, or other criteria?

According to the recent Rand Study, there are sixteen States that have regulation prohibiting insurers from selling filed stop-loss policies with attachment points below specified limits which range from $5000 to $25,000.[20]

What are the issues States face in regulating stop-loss insurance?

Since 60% of covered workers in the United States are in self-insured Plans and as previously discussed, a significant number of those workers are in Plans with stop-loss insurance,[21] the States are faced with a unique set of market conditions that could have a significant impact on their local economies. In accordance with this responsibility, the

[20] Rand Health, *"Employer Self-Insurance Decision and the Implication of the Patient Protection and Affordable Care Act ....of 2010(ACA)",* 2011

[21] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011"*(The Kaiser Family Foundation & HRET, 2011 Employer Health Benefits Annual Survey, 2011)

States need to have a greater understanding of the consequences before setting minimum standards for stop-loss insurance contracting terms.[22]

ERISA creates strong rights and protections for Plan participants in self-insured Plans which could be compromised if States started over-regulating stop-loss insurance. Many employers have employees that are in several states so ERISA created the pre-emption necessary for them to offer the same Plan/Plans to similarly-situated employees located in multiple states. If the regulation of stop-loss in a certain state became prohibitive to employers, then employers may be forced to purchase more expensive benefits or possibly cease to offer employee benefits altogether, thereby having an unintended consequence. Given the economic climate in the United States, the unintended consequences of over-regulating stop-loss insurance could have a significant financial impact on the States. Thus, States need to continue to tread carefully in this public policy arena.

12. What effect does the availability of stop-loss insurance with various attachment points and other particular provisions have on small employers' decisions to offer insurance to employees?

As demonstrated in the Rand Technical Report,[23] the small employer relies on the availability of stop-loss insurance to sponsor a self-funded health and welfare benefit Plan. The decision of every employer to self-insure their health benefits is unique to every employer, and different factors are likely to influence a firm's decision to self-insure.[24] The common objective of the Plan Sponsor is to be able to offer a greater level of benefits for a lower cost than other alternatives that may be available to the employer and their Plan participants with traditional insurance policies. Thus, the effect of limiting the availability of stop-loss insurance for those employers is tantamount to limiting their options to provide health coverage for their employees.

13. What impact does the use of stop-loss insurance by self-insured small employers have on the small group fully insured market?

The factors influencing the small employer to self-insure or fully-insure include regulatory differences, financial risk tolerances, business objectives, administrative costs,[25] benefit options and flexibility in Plan design. Even though a smaller amount of employers with less than 200 workers self-insure, 85% of them are in Plans protected by

[22] Rand Health, *"Employer Self-Insurance Decision and the Implication of the Patient Protection and Affordable Care Act ....of 2010(ACA)",* 2011

[23] Rand Health, *"Employer Self-Insurance Decision and the Implication of the Patient Protection and Affordable Care Act ....of 2010(ACA)",* 2011

[24] ibid

[25] Rand Health, *"Employer Self-Insurance Decision and the Implication of the Patient Protection and Affordable Care Act ....of 2010(ACA)",* 2011(Rand Health, 2011)

stop-loss insurance.[26] The removal or restriction of the use of stop-loss insurance would have a potentially significant impact on small employers to self-insure.

Perhaps a more important question to ask is what impact does the small group, fully-insured market have on the self-insured small employer's ability or decision to purchase stop-loss? The flexibility to design a benefit Plan that meets the unique needs of the Plan participants and the employer is not available with a filed, fully-insured product. Employers may find that sponsoring a self-funded health and welfare benefit Plan with stop-loss insurance is a more cost effective alternative than purchasing a fully insured policy for a comparable level of benefits. In fact, the Rand Technical Report suggested that Plans with stop-loss insurance are priced to be competitive with fully-insured insurance products.[27] Given the current economic climate, employers that are willing to sponsor a health and welfare benefit Plan should be given every opportunity to provide such benefits through whatever financial risk or insurance tool they deem most appropriate to fit their needs.

[26] The Kaiser Family Foundation & HRET, *"2011 Employer Health Benefits Annual Survey, 2011"*(The Kaiser Family Foundation & HRET, 2011 Employer Health Benefits Annual Survey, 2011)

[27] Rand Health, *"Employer Self-Insurance Decision and the Implication of the Patient Protection and Affordable Care Act ....of 2010(ACA)",* 2011(Rand Health, 2011)