July 2, 2012

Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration
Attn.: Office of Health Standards and Compliance Assistance
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5653
Washington, DC 20210
Via E-Mail: E-OHPSCA-STOPLOSS.EBSA@dol.gov

Re: **Request for Information Regarding Stop Loss Insurance**

Dear Ms. Borzi:

The Alliance of Community Health Plans (ACHP) is pleased to respond to the Request for Information (RFI) Regarding Stop Loss Insurance published in the *Federal Register* on May 1, 2012 by the Departments of Labor, Treasury, and Health and Human Services.

ACHP is a national leadership organization that brings together innovative health plans and provider groups that are among America's best at delivering affordable, high-quality coverage and care in their communities. Member plans provide coverage in the commercial market and for Medicare, Medicaid, and public employees. Members also provide administrative services for self-insured employers. The community-based and regional health plans and provider organizations that belong to ACHP improve the health of the communities they serve and are on the leading edge of patient care coordination, patient-centered medical homes, accountable health care delivery, information technology use, and other innovations to improve affordability and the quality of care that patients receive.

Request for Information

The RFI notes that the limited information available suggests that stop loss insurance is becoming more common among smaller self-insured plans and raises several policy concerns. Unless state law limits it, stop loss insurance can include attachment points so low that the stop loss insurer absorbs nearly all of the insurance risk. Under the Employee Retirement Income Security Act (ERISA), private sector group health plans that purchase stop loss insurance are not subject to state health insurance laws, including coverage laws, rating policies and other consumer protections, including some under the ACA. It has been suggested that some small employers with healthier employees may self-insure, with stop loss insurance at low attachment points, to avoid being subject to these requirements. This practice, if pursued by small employers desiring to offer coverage, could worsen the risk pool and increase premiums in the fully insured small group insurance market, including the SHOP exchanges. ACHP appreciates the Departments' recognition of these issues and supports efforts to address them.

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The RFI notes that the National Association of Insurance Commissioners (NAIC), in response to similar concerns in the 1990s, adopted a model law in 1995; according to the NAIC, 21 states have adopted it or implemented related legislative or administrative action. The model law set minimum attachment points, below which the stop loss coverage would be treated as traditional insurance and subject to state regulation. It called for a specific *individual* minimum attachment point of $20,000. For groups of 50 or fewer, the model law called for an *aggregate* attachment point not less than the highest of: $4,000 multiplied by the number of group members, 120 percent of expected claims, or $20,000. As noted below, the NAIC is now considering an update to this model law.

Policy Framework

ACHP is encouraged that the Departments are seeking data on the stop loss market and on self insurance by smaller employers more generally. ACHP will defer to the data collection capacity of state insurance departments and their responses for the broad range of data that the Departments are seeking. We believe that self-funding is a viable option for some employers, but we also think that it is important to consider an appropriate regulatory framework for stop loss insurance that will provide adequate consumer protections and not undermine the broader insurance market, including the forthcoming exchange market.

Consumer protection is the hallmark of appropriate insurance regulation. Individuals and businesses turn to insurance to protect themselves from risks that they cannot reasonably bear themselves. The regulatory infrastructure, including the changes made under the ACA, must always meet the fundamental test of protecting the consumer.

Consumer protection requires that coverage and payment for covered services be there as promised by the insurance policy, where and when it is needed. Large group health plans have long been recognized as having an insurance risk pool and financial resources sufficient to self-insure against that risk. ACHP members have served that large, self-insured market for years as third party administrators and it protects and serves consumers and employers well. However, because of concerns that large employer plans that operate in more than one state not be subject to the differing regulations of multiple states, those who drafted ERISA provided for the preemption of state laws that regulate private sector employee benefit plans, including state laws regulating health insurance.

Smaller employers by definition do not have a sufficient number of lives to provide a risk pool that allows them to self-insure, and that is why they instead turn to health insurers, regulated by the states, to provide that coverage. State regulated health insurance is designed to assure protection for the individual and companies buying coverage, and appropriate risk management and risk spreading by and among insurers. Over time, however, the ERISA preemption of state insurance laws has encouraged some portion of smaller employers to self-insure, while protecting themselves against specific or aggregate catastrophic claims by purchasing stop loss coverage. We are concerned that many of these situations breach the protective regulatory infrastructure provided by state insurance laws.

Depending on the design of the stop loss policy, there are, broadly stated, two potential negative consequences. First, because the small employer and its employees are no longer fully insured against the guarantees for coverage in the employee benefit plan, employers, while hoping to save money, can be exposed to costs that they simply cannot afford – which is what insurance regulation is designed to protect against.

Second, vendors of such policies, as noted in the RFI, can encourage smaller employers that think that they have healthier employees to self-insure, which undermines the risk-sharing across a broad base of enrollees that is required for the small insurance market to function adequately. In fact, marketing brochures from two competitors highlight the possibility of a "… fee credit with a positive claims experience" and "money-back savings potential when claims experience is better than expected." Those are clearly appeals to encourage selected employers to exit the insured and state-regulated small group market.

The consequence, as the Departments recognize, is further instability in the small group market, and higher premiums for other small employers, including those in the SHOP exchange, which can lower employer offers of coverage in this voluntary market and drive up public costs as well.

We would also point out that expansion of self-funding to smaller employers further limits the revenue base on which the ACA insurer tax is calculated. Because that tax is not a percentage but a fixed dollar amount to be allocated among insurers to which it applies, greater amounts of self-funding further shift the burden of this tax to insurers providing fully-insured coverage.

The policy challenge is how to address these regulatory issues in the private insurance market. State insurance departments and the federal government often turn to the NAIC for its expertise and guidance in these complex regulatory areas. The NAIC is in the process of considering updates to the attachment points for stop loss coverage in its Model Act, which are now more than 15 years old. A preliminary report from an NAIC subcommittee suggested changes in the attachment points, but the NAIC has clarified that the subcommittee was not a recommending body and that NAIC had not yet decided the issue. The subcommittee input may nevertheless provide a potential policy direction. It suggested raising the minimum specific attachment point from $20,000 to $60,000 and the aggregate attachment point for groups of 50 or fewer to the lower of $15,000 (up from $4,000) multiplied by the number of group members or 150 percent of expected claims (up from 120 percent).

While the specifics can be debated, ACHP believes that the NAIC is an appropriate source for guidance on this issue and that the directions developed by its subcommittee point in the right direction. Given the regulatory structure set out by the ACA for the insurance market, including the small business and individual tax credits, ACHP believes that the Departments should continue to consider appropriate steps to assure adequate protections for consumers and stable risk pools in both the small group market and the broader market, including exchanges.

We would be pleased to provide any further information and look forward to working with the Departments on this issue. Please contact Howard Shapiro, Director of Public Policy, at hshapiro@achp.org.

Sincerely,

Patricia Smith
President and CEO