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Daniel Maguire
Director

Amy Turner
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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
Submitted to: E-OHPSCA-STOPLOSS.EBSA@dol.gov

Attn: Request for Information Regarding Stop-loss Insurance

Dear Mr. Maguire and Ms. Turner:

AARP appreciates the Department's attempt to gather information on the interrelationship of self-funded health plans and stop-loss insurance, and the impact of these plan designs on the private health insurance market.

We note that this interrelationship is not a new problem. Indeed, it began with the Supreme Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 722, 747 (1985). There, the Supreme Court explained the distinction between insured and uninsured plans meant insured plans could be indirectly regulated while self-insured or uninsured plans could not. Since the 1985 decision, courts have grappled with arguments that self-insured health plans with stop-loss insurance are not truly self-insured plans. *See*, *e.g.*, *Bill Gray Enterprises, Inc. Employee Health & Welfare Plan v. Gourley*, 248 F.3d 206, 214 (3d Cir. 2001) (collecting cases since 1985 at page 214). In *American Medical Security v. Bartlett*, 111 F.3d 358 (4th Cir. 1997), the court held that ERISA preempted a Maryland insurance regulation defining a health insurance policy as including a stop-loss insurance policy with a specific attachment point below $10,000 and must therefore contain state mandated benefits. Consequently, because of ERISA preemption, state insurance officials are generally prohibited from regulating in this area, leaving a gap in the regulatory scheme. Contrary to ERISA's purpose of safeguarding employee benefits, it was used in these instances to deprive employees of rights and protections they previously enjoyed under state law, without providing any comparable federal rights. *Cf*. John

Langbein, *Trust Law as Regulatory Law: the UNUM/Provident Scandal and Judicial Review of Benefit Denials Under ERISA,* 101 NW. U. L. REV. 1315, 1317-1321 (Spring 2007) (with no compensatory or punitive damages and a deferential standard of review, UNUM compared that its potential liability for twelve benefits claims under insured plans versus ERISA plans was $7.8 million versus zero and $0.5 million.)
Moreover, courts disagree on the characterization of stop-loss insurance. In *Bartlett*, the Fourth Circuit characterized stop-loss insurance as "'reinsurance' in that it provides reimbursement to a plan after the plan makes benefit payments." 111 F.3d at 361. In contrast, the Supreme Court of Texas characterized stop-loss insurance as "direct insurance subject to regulation under the Insurance Code," not reinsurance because there is no redistribution of risk between insurers. *See Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*, 2012 Tex. LEXIS 420, *29-31, 55 Tex. Sup. J. 705 (Tex. 2012). Depending on the characterization as well as definitions under state insurance law, the results and the impact on plans are inconsistent.

A more current example of the interrelationship between self-insured plans and low attachment stop-loss insurance is the potential impact on provisions of the Patient Protection and Affordable Care Act (ACA) intended to pool risk broadly and provide a uniform set of consumer protections. The widespread availability of stop-loss insurance with low attachment points in the small group market could undermine the requirement that small groups cover the essential health benefits package and could lead to evasion of the community rating requirements of the ACA, leading to significant adverse selection against the exchanges. Quite simply, there could be a siphoning off of healthier groups which in turn could subvert the private insurance market and undermine the exchanges ability to pool risk.

To ensure a level playing field, the ACA reforms should apply uniformly to all health benefit plans – insured and uninsured -- in a particular market, covering all individual, small-group, and large-group purchasers. Moreover, associations and similar nontraditional pools should be subject to the same rules as the rest of the market. AARP submits that federal policies concerning private insurance markets should set a floor for states but should not preempt higher state standards.

This is not to say that stop-loss insurance should be prohibited. To the contrary, it has a place in plan design to spread insurance risk more broadly, where the purchase of stop-loss insurance is actually for that purpose.

Consumers thus have different protections depending on the state in which they live and whether they are covered by an insured or self-insured health plan. This division of responsibility for regulating private plans and private markets between federal authorities and the states may hurt consumers and destabilize markets. A review of these issues, with regulation as appropriate, might produce clarity for the health insurance market and employers. Consequently, AARP submits that gathering this information is a good first step to determine the necessity for, and if appropriate, regulatory guidance on self-insured health plans and low attachment point stop-loss insurance.

AARP appreciates this opportunity to respond to the Request for Information on stop-loss insurance. If you have any questions, please do not hesitate to contact Leah Cohen Hirsch at 202.434.3370 or Mary Ellen Signorille at 202.434.2072.

Sincerely,

David Certner
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