BlueCross BlueShield Association

An Association of Independent Blue Cross and Blue Shield Plans

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July 2, 2012

The Honorable Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, N.W.
Suite S-2524
Washington, DC 20210

Submitted via regulations.gov

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

Dear Secretary Borzi:

The Blue Cross Blue Shield Association ("BCBSA") is writing in response to the Request for Information Regarding Stop-Loss Insurance (CMS–9967–NC), 77 Fed. Reg. 25788 (May 1, 2012) ("RFI"), issued by the Department of Health and Human Services ("HHS), the Department of Labor ("DOL"), and the Internal Revenue Service ("IRS").

The Blue Cross and Blue Shield Association is a national federation of 38 independent, community-based and locally operated Blue Cross and Blue Shield Plans ("Plans") that collectively provide healthcare coverage for 100 million members – one-in-three Americans. Plans offer coverage in every market and every ZIP Code in America. Plans also partner with the government in Medicare, Medicaid, the Children's Health Insurance Program, and the Federal Employees Health Benefits Program.

We appreciate the opportunity to provide comments regarding stop-loss insurance and its use by self-insured group health plans. Plans provide administrative services to self-insured plans in the employer market and also provide stop-loss insurance, and, therefore, are well-positioned to provide factual information about stop-loss insurance as well as self-insurance.

A key question asked in the RFI is whether the Affordable Care Act ("ACA") will affect the trend of using stop loss insurance in connection with self-insured arrangements. We believe there are powerful incentives in the ACA to move more employers to self-insure, such as the health insurance tax, essential health benefits, and community rating provisions that only apply to the insured markets.

Accordingly, as requested in the RFI and as set forth in greater detail below, we offer the following information on stop-loss insurance:

- A significant number of workers have benefits through self-insured plans that are covered by stop-loss insurance.

- Attachment points are traditionally of two kinds, specific and aggregate, and depending on market conditions and regulatory requirements, attachment points can be relatively low in some cases.

- Smaller groups tend to have both specific and aggregate attachment points.

- More insurers have started to offer self-funded products to small employers in the past couple of years.

- Generally, Plans find that 12-15 percent of claims reach the stop-loss coverage.

- Stop-loss insurance varies depending on industry (*e.g.,* Manufacturing, agriculture, etc.).

- Stop-loss insurance is issued by insurers, including insurers that are not health insurers.

- Fees related to stop-loss insurance may vary based on the size of the group or the complexity of the administrative tasks involved.

- Stop-loss premiums vary based on anticipated experience of the overall group as well as who is in the group; attachment points are typically graded so as to be appropriate to group size.

- States regulate stop-loss insurance in various ways, but face challenges by self-insured employers asserting that state laws are preempted by ERISA.

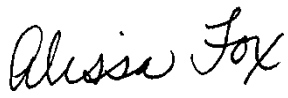
- Small employers typically explore self-insurance linked to stop-loss and various factors affect small employer decisions as to how to structure benefit plans.

- Attractively priced stop-loss insurance could cause more small employers to migrate to self-insurance.

Our detailed comments are attached.

We appreciate the opportunity to provide comments regarding stop-loss insurance and look forward to continuing to work with HHS, DOL, and the IRS as they issue guidance on stop-loss insurance. If you have any questions, please contact Richard White at Richard.White@bcbsa.com or 202.626.8613.

Sincerely,



Alissa Fox
Senior Vice President
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Blue Cross Blue Shield Association

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1. **How common is the use of stop-loss insurance in connection with self-insured arrangements? Does the usage vary (and, if so, how) based on the size of the underlying arrangement or based on other factors? How many individuals, if known, are covered under stop-loss insurance (either nationally or on a state-specific basis)? 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)?**

In understanding issues around the use of stop-loss in connection with self-insured arrangements, it is first important to understand the rates of self-funding (self-insurance) among group health plans. The Kaiser Family Foundation and the Health Research & Educational Trust (KFF/HRET) do an annual survey of employer health benefits that shows that the percentage of workers in partially or fully self-funded plans has been growing over time, increasing from 49% in 2000 to 60% in 2011. The report also shows that the rate of self-funding increases as group size increases:

Group Size	% of Covered Workers in Partially or Completely Self-Funded Plans, 2011			
	2000	2004	2008	2011
3-199	15%	10%	12%	13%
200-299	53%	50%	47%	50%
1,000-4,999	69%	78%	76%	70%
5,000+	72%	80%	89%	96%
All Firms	49%	54%	55%	60%

The KFF/HRET further shows that 23% of covered workers in firms with 50-199 employees were in self-insured plans.

The KFF/HRET study also reported on rates of stop-loss coverage among these self-funded plans in 2011 (data not available for prior years). The study shows that 58% of workers in self-funded plans are in plans that have stop-loss insurance and that workers in self-funded small firms (3-199) are more likely than workers in self-funded large firms (200+) to have stop-loss coverage (72% vs. 57%).

Group Size	% of Covered Workers in Self-Funded Plan Covered by Stop-Loss Insurance, 2011
50-199	85%*
200-299	90%
1,000-4,999	88%
5,000+	40%*
All small Firms (3-199)	72%*
All large firms (200+)	57%*
All self-funded firms	58%

**Estimate is statistically different from the estimate for all other firms not in the indicated size, region or industry category.*

Data on regional variations in the use of stop-loss insurance are also found in the KFF/HRET study. The data indicates that there is significant variation in the use of stop-loss by region. While data is not available by state, our belief is that there is even more variation at the state level.

Region	% of Covered Workers Enrolled in a Self-Funded Plan that Purchased Stop-Loss Insurance, 2011
Northeast	51%
Midwest	62%
South	54%
West	66%
All Firms	58%

Another source of data on rates of stop-loss coverage among self-funded firms is the Department of Labor's Annual Report on Self-Insured Group Health Plans. The most recent of these reports (data are for plan year 2009), found that stop-loss coverage among self-insured plans declined from 24% in 2008 to 20% in 2009. Among partially self-funded plans, the 2009 rate was 25%. About 7 million participants are in plans with stop-loss coverage. The report notes that these may be underestimates.

This table (also from the DOL report) shows variations in stop-loss rates by size of employer:

Table 20. Self-Insured Health Plans' Rate of Stop-Loss Coverage, by Plan Size (2009)

	Plans			
Participants in plan	No stop-loss coverage	Stop-loss coverage	Total self-insured	Stop-loss coverage rate
2-99	1,621	198	1,819	10.9%
100-199	2,656	563	3,219	17.5%
200-499	2,758	857	3,615	23.7%
500-999	1,413	524	1,937	27.1%
1,000-1,999	939	339	1,278	26.5%
2,000-4,999	758	196	954	20.5%
5,000+	622	76	698	10.9%
Total	10,767	2,753	13,520	20.4%

Source: Form 5500 health plan filings.

These findings are not directly comparable to the KFF/HRET findings because the DOL data include only a subset of plans with fewer than 100 participants and because as many as 37% of plan participants are in mixed-funded plans. However, given the limitations of Form 5500 health plan filings, the consulting firm Deloitte, which assembled the findings for the DOL, concludes that its results are "broadly consistent" with those found in the 2011 KFF/HRET Survey.

The RFI also seeks information related to trends in stop-loss. New Jersey insurance

regulators believe that the market for self-insurance among small employers is growing: enrollment in the state's small employer insurance market (2-50 employees) has dropped from 776,967 during the first three months of 2010 to 702,000 during the last quarter of 2011, according to data from the state Department of Banking and Insurance. DOBI officials believe some of that movement is linked to companies self-insuring their benefits. We believe that the ACA will affect these trends because some small employers will find it advantageous to avoid some ACA provisions that apply only to the insured market (*e.g.,* the health insurance excise tax imposed by ACA § 9010, essential health benefits, and community rating).

2. What are common attachment points for stop-loss insurance policies, and what factors are used to determine these attachment points? 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)? What are the lowest attachment points that are available? What are the trends?

There are two types of attachment points for stop-loss coverage:

a. **Specific Coverage** protects businesses from unexpected large-dollar medical claims incurred by covered individuals in the group. Employers select a per-person attachment point for the amount of claims risk the plan will assume. Medical benefits only may be covered or prescription drug claims can be covered as well. The client chooses the specific stop-loss deductible – the amount for which the client is responsible for each individual employee or dependent claim in the policy year. Eligible claims above the specific attachment point are reimbursed by stop-loss insurance.

According to a presentation by the NYC metro chapter of the Certified Employee Benefit Specialists, "typical" specific stop-loss levels range from $50,000 to $300,000 in $25,000 increments.

According to the 2011 KFF/HRET report, the average per employee claims cost at which stop-loss insurance pays a benefit for firms with fewer than 200 workers was $73,824 in 2011.

A recent article in *Business Insurance* described the practice of "lasering," which it claims is a common stop-loss industry practice. It involves setting higher specific attachment points for certain plan members based on their prior claims experience or the likelihood that they will become high-cost claimants in the future. For example, if a company buys stop-loss with an attachment point of $60,000, the insurer might put a $100,000 laser on an individual who is projected to have claims in excess of $60,000. The employer then is required to fund claims up to $100,000 on that specific individual. Plans have seen "lasering" becoming more prevalent in some, but not all, of their markets.

In states without stop-loss attachment point minimums (*see* #11), a minimum specific attachment point can be as low as $6,500 per employee.

b. **Aggregate Coverage** protects employers against excessive claims for the entire group. Most carriers require a minimum of 125% of expected claims as the aggregate attachment point. But in some cases companies are offering much lower aggregate attachment points.

3. Are employee-level ("specific") attachment points more common, or are group-level ("aggregate") attachment points more common? What are the trends? What are the common attachment points for employee-level and group-level policies?

Stop-loss coverage can include both specific and aggregate attachment points, but also can include aggregate only. Smaller groups tend to have both. Specific attachment point coverage is much more expensive than aggregate stop-loss coverage. Some Plans will not market aggregate only stop-loss coverage.

4. How do insurers work with small employers to integrate stop-loss insurance protection with self-insured group health plans? What kinds of options are generally made available? Are policies customized to meet the needs of different employers? How are the attachment points for a stop-loss policy determined for an employer? Do self-insured group health plans purchase stop-loss insurance anticipating that they will purchase it every year?

Typically Blue Cross Blue Shield Plans do not do offer self-funded coverage/write stop-loss coverage for groups smaller than 100 lives today. However, Plans have noticed that more insurers have started to offer self-funded products with stop-loss to small employers in the past couple of years.

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? How much do the relative percentages vary for different attachment points? What are the loss ratios associated with stop-loss insurance policies?

Generally, Plans find that 12-15 percent of claims reach the stop-loss coverage. This percentage increases when lower attachment points are used.

According to the 2011 NAIC Accident & Health Policy Exhibit the loss ratio for stop-loss was 73.8%, with an average 2011 per member per month (PMPM) premium of $21.92. In reviewing medical loss ratio it is important to remember that there is:

- Greater variability due to the low premiums so it takes many more life years of experience to become credible.

- More variation in claims since you are only insuring claims beyond the attachment points which increases the variability.

- Much lower administrative cost on a per dollar basis; however, on a percentage basis administrative costs are higher due to the low premiums typically charged.

6. What are the administrative costs to employers related to stop-loss insurance purchased for the employers' self-insured group health plans? How do these costs compare to the administrative costs related to purchasing a health insurance policy from an issuer?

Administrative costs on a per dollar per month basis are much lower than a comprehensive health insurance policy; however, on a percentage basis they are higher due to the low premiums typically charged.

7. Is stop-loss insurance more prevalent in certain industries or sectors? Are there any minimum employee participation requirements for a small employer to be offered stop-loss insurance?

According to the KFF/HRET report, the following is the percentage of covered workers covered by stop-loss by industry in 2011:

Industry	% of Covered Workers in Self-Funded Plan Covered by Stop-Loss Insurance, 2011
Agriculture/Mining/Construction	77%
Manufacturing	54%
Transportation/Communication/ Utilities	31%*
Wholesale	68%*
Retail	60%
Finance	58%
Service	66%
State/Local Government	31%*
Health Care	76%*

**Estimate is statistically different from the estimate for all other firms not in the indicated size, region or industry category.*

Regarding minimum participation requirements, some Plans take participation into consideration in deciding whether to issue stop-loss coverage. Some Plans also conduct a financial and credit review to see if a group health plan has the financial resources to assume the risk associated with self-insuring, even with stop-loss insurance.

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

Stop-loss insurance is the business of insurance, so it is offered by insurers that comply with the laws of the states where the stop-loss policy is delivered or issued for delivery. Most health insurance issuers offer stop-loss insurance, but because states typically do not define stop-loss insurance as health insurance, stop-loss insurance may also be offered by other kinds of insurers.

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

Some insurers have a graduated scale of fees depending on group size and the administrative tasks required. Some insurers have some variable administrative expense components on an absolute dollar per member basis that are higher for small groups.

10. How do stop-loss insurers evaluate the plans seeking coverage and how is this evaluation reflected in the coverage or premiums offered? Does the profile of the plan have an effect on the attachment points available?

Stop-loss insurers base their rates based on the anticipated experience of the overall group as well as who is in the group and would meet the specific stop-loss attachment points. This is done either by reviewing past experience or in the small group market potentially having persons complete a health application. In the case of persons with high cost chronic conditions, it is not uncommon to offer coverage with a higher attachment point for that specific person as opposed to increasing the stop-loss premium.

Benefit plan design is taken into consideration when setting stop-loss premiums. For example, a person in a rich plan will reach the specific stop-loss attachment point sooner in that plan versus a high deductible plan since the attachment point is based on the dollars paid by the group health plan and not the dollars incurred by the employee.

Some Plans grade attachment points to group size so that the attachment point is appropriate to group size. This is because it would not be appropriate for a large employer to have a very low attachment point or for a small employer to have a very high attachment point.

11. How do States regulate stop-loss insurance? In States that are regulating this insurance, what are the licensing processes and standards? Have States proposed laws, regulations, or best practices with regard to stop-loss insurance? Do such proposals focus on attachment points, size of the group, percent of total claims paid by the stop-loss insurer, or other criteria? What are the issues States face in regulating stop-loss insurance?

About half the states have some measure regulating stop-loss insurance. *NAIC Compendium of State Laws on Insurance Topics* II-HA-90-1 *ff.* (2011).

A recent *Health Affairs* article by Mark Hall describes three approaches states use in regulating stop-loss insurance:

a. Minimum Attachment Points. The NAIC developed a Stop-Loss Insurance Model Act in 1995, and revised it in 1999. The model act limits attachment points to a minimum of $20,000 per person. For groups of 50 or fewer employees, the model act limits aggregate attachment points to the greater of $4,000 times the number of group members, 120 percent of expected claims, or $20,000. For groups larger than 50, the aggregate attachment point can be as low as 110 percent of expected claims. About 10 states have enacted some version of this model law, with specific attachment points ranging from $10,000 to $25,000, and about ten more states regulate employer stop-loss coverage in some fashion.

The insurance commissioners' stated logic behind setting these floors is that at some point, if a stop-loss policy's deductible – or attachment point – is too low, the policy becomes a "subterfuge" for primary health insurance that facilitates "gaming" to avoid state regulation of health coverage. As an extreme case, there are several reported examples of stop-loss coverage with zero-dollar attachment points, meaning that they cover 100 percent of an employer's health claims.

b. Prohibiting Stop-Loss for Small Groups. Delaware, New York, and Oregon prohibit the sale of stop-loss insurance to small employers. In addition, New York and North Carolina also prohibit insurers from serving as third-party administrators for self-funded small employers.

c. Regulating Stop-Loss as If It Were Small Group Health Insurance. A third approach is to permit stop-loss insurance but regulate it as if it were normal health insurance when it is provided to small employers. North Carolina takes this approach. Subjecting stop-loss coverage to the full range of normal small group insurance rules might mean, among other things, that the insurance could not be priced to reflect the lower expected costs of healthier groups.

Stop-loss coverage is not subject to normal health insurance regulations – such as requirements for guaranteed issue or guaranteed renewability. Nor can self-insured employers use normal appeals channels for denials of reimbursements.

The main risk states face in regulating stop-loss insurance is ERISA preemption. The U.S. Supreme Court has ruled that self-funded ERISA plans are exempt from state

insurance regulation, and several federal appeals courts have held that employers do not lose their self-insured status simply because they purchase stop-loss coverage. For example, the Fourth Circuit in 1997 struck down a Maryland regulation that required stop-loss insurers to cover the state's normal mandated benefits if the attachment point was below $10,000.

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?

The availability of stop-loss insurance with low attachment points could potentially encourage some small employers to switch from fully insured coverage to self-insured coverage with stop-loss insurance. This is particularly possible with certain ACA provisions that only apply to insured plans (*e.g.,* the health insurance tax, essential health benefits, and community rating provisions).

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

A report by the Departments of Health and Human Services and Labor summarizing research reports by Rand and Deloitte concluded that attractively priced stop-loss coverage is generally not available for small employers, so that stop-loss would not affect ACA implementation. However, the report also states that if "…attractively-priced reinsurance [*i.e.,* stop-loss insurance] providing coverage beginning at low levels of stop-loss became widely available, then there would likely be substantial movement of small employers to self-insurance."

As noted in the response to Question 1, the KFF/HRET Employer Health Benefits Survey for 2011 showed that in 2011 only 13% of employees working for employers with group size of 3-199 are self-insured, but 72% of those are covered by stop-loss insurance. Thus, there is the potential for increased market disruption in the insured small group market if small employers with younger and/or healthier workers who would have continued to purchase insured health insurance coverage opt to become self-insured and purchase stop-loss coverage. This could result in higher costs for insured groups.