

DEPARTMENT OF THE TREASURY

Internal Revenue Service

DEPARTMENT OF LABOR

Employee Benefits Security Administration

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS-9967-NC]

Request for Information Regarding Stop Loss Insurance

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Request for Information.

SUMMARY: This document is a request for information regarding the use of stop loss insurance by group health plans and their plan sponsors, with a focus on the prevalence and consequences of stop loss insurance at low attachment points. Given the limited nature of data available, the Departments of Labor, Health and Human Services (HHS), and the Treasury (collectively, the Departments) invite public comments via this request for information.

DATES: Comments must be submitted on or before July 3, 2012.

ADDRESSES: Written comments may be submitted to the Department of Labor as specified below. Any comment that is submitted will be shared with the other Departments. Please do not submit duplicates. All comments will be made available to the public. **WARNING:** Please do not include any personally identifiable information (such as name, address, or other contact

information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Comments may be submitted by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Email: E-OHPSCA-STOPLOSS.EBSA@dol.gov.

Mail or Hand Delivery: 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, Attention: Stop Loss Comments.

Comments received will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and available for public inspection in the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Washington, DC 20210, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Beth Baum or Amy Turner, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335; Russ Weinheimer, Internal Revenue Service, Department of the Treasury, at (202) 622-6080; Steve Kornblit, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, at (410)786-1565.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA

Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's website (<http://www.dol.gov/ebsa>). In addition, information from HHS on private health insurance for consumers can be found on the CMS website (www.cciio.cms.gov), and information on health reform can be found at <http://www.HealthCare.gov>.

SUPPLEMENTARY INFORMATION:

I. Background

Stop loss insurance protects against health insurance claims that are catastrophic or unpredictable in nature¹ and provides coverage to self-insured group health plans once a certain level of risk has been absorbed by the plan.² Stop loss protection allows an employer to self-insure for a set amount of claims costs, with the stop loss insurance covering most or all of the remainder of the claims costs that exceed the set amount, generally referred to as the "attachment point." Attachment points can be either "specific" or "aggregate." Specific attachment points protect the plan against a high claim for any one individual (e.g., an employer self-insures up to \$500,000 in claims per year for any one enrollee and stop loss insurance covers claims amounts above the \$500,000 attachment point).³ Aggregate attachment points define the maximum dollar amount of claims that an employer will pay, in total, during a specific period (e.g., an employer self-insures up to 125 percent of expected claims per year across all employees and stop loss insurance covers claims amounts above the 125 percent attachment point).⁴ Stop loss insurance policies may be purchased by an employer or by the employer's group health plan.

¹ See the Self-Insurance Institute of America Inc.'s definition of stop-loss insurance at: <http://www.siiia.org/i4a/pages/Index.cfm?pageID=4549>.

² *American Medical Security Inc. v. Bartlett*, 111 F.3d 358, 360, 361 (4th Cir.1997)

³ See the Self-Insurance Institute of America Inc.'s definition of stop-loss insurance at: <http://www.siiia.org/i4a/pages/Index.cfm?pageID=4549>.

⁴ Id.

The Departments have little data on the incidence or terms of stop loss insurance among self-insured employers' group health plans. Private-sector employer sponsored health benefit plans that have 100 or more participants and smaller plans that hold assets in trust generally are required to file annual reports with the Department of Labor. These reports, filed on Form 5500, include some information on the plans' finances, including some information on any stop loss insurance policies held by the plans. However, the reports do not include information on the attachment points associated with stop loss insurance policies or any information on stop loss insurance policies held by plan sponsors rather than by plans. Additionally, plans with fewer than 100 participants that employers self-insure using their general assets (and that do not hold assets in trust) are not required to file Form 5500 annual reports and as a result, the Departments have even less information about stop loss coverage for these plans. The limited information on stop loss insurance policies contained in Form 5500 is summarized in the Department of Labor's Group Health Plans Reports Abstract of Form 5500 Annual Reports, available at:

<http://www.dol.gov/ebsa/publications/form5500dataresearch.html#healthplan>. The limited available information suggests that stop loss insurance is perhaps becoming more common among smaller self-insured plans but information is not available on the type of stop loss coverage purchased by plans of various sizes. More specifically, according to Form 5500 data, between 2000 and 2008, the percentage of group health plans filing a Form 5500 that reported having stop loss insurance was in the range of approximately 23 percent to 27 percent for self-insured plans and approximately 28 percent to 29 percent for partially-insured, partially self-insured plans.⁵

⁵ See Department of Labor's Report to Congress: Annual Report on Self-Insured Group Health Plans, issued on

Unless prohibited by State insurance law, an insurer may offer stop loss insurance policies with attachment points set low enough such that the stop loss insurer assumes nearly all the insurance risk. For example, the attachment point could be set at \$5,000 per employee, or \$100,000 for a small group.

Under § 514(a) of the Employee Retirement Income Security Act (ERISA), State laws that relate to “employee benefit plans,” as defined by ERISA § 3(3), are generally preempted. (Although ERISA § 514(b)(2)(A) saves State insurance laws from preemption, ERISA § 514(b)(2)(B) prohibits States from deeming employee benefit plans to be insurance companies in order to regulate them under insurance laws.)⁶ As a result, self-insured plans are not subject to State insurance laws, but insurance policies issued to those plans or plan sponsors, including stop loss insurance policies, can be regulated by States if the regulation is directed toward and affects the business of insurance rather than the relationship between an employee benefit plan and its participants.

Employers and plans that purchase stop loss insurance generally are not subject to State health insurance laws including coverage laws, rating policies, and other State and Federal consumer protections applicable to health insurance, including certain patient protections under the Patient Protection and Affordable Care Act (Affordable Care Act). It has been suggested that some small employers with healthier employees may self-insure and purchase stop loss insurance policies with relatively low attachment points to avoid being subject to these requirements while

04/24/2012, available at <http://www.dol.gov/ebsa/pdf/ACAReportToCongress041612.pdf>.

⁶ *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 373 n.6 (2002) (a State law that regulates insurance – and which is otherwise saved from preemption – may not be applied to a self-insured ERISA plan).

exposing themselves to little risk.⁷ This practice, if widespread, could worsen the risk pool and increase premiums in the fully insured small group market, including in the Small Business Health Options Program (SHOP) Exchanges that begin in 2014.⁸

In the mid-1990s, the National Association of Insurance Commissioners (NAIC) and several States expressed concern that the purchase of stop loss insurance policies with low attachment points made the self-insured classification a method to circumvent State insurance regulation. As a result, the NAIC adopted a model law (Model Act 92-1), which established standards for determining whether an insurance policy should be treated as a health insurance policy or a stop loss insurance policy under State law. The model law created minimum attachment points for stop loss insurance policies.⁹ If the attachment points exceeded the minimum amount, the policies would be treated essentially as reinsurance of a self-insured plan. If the attachment points were below the minimum, the policies would be classified as health insurance subject to State insurance regulation. In addition, the model law established distinctly different requirements for health insurance policies as opposed to stop loss insurance policies, including different licensing, reporting, policy form and solvency requirements for insurers issuing the health insurance policies.

⁷ Kathryn Linehan, *Self-Insurance and the Potential Effects of Health Reform on the Small-Group Market*, Issue Brief 840, National Health Policy Forum (December 21, 2010) available at http://www.nhpf.org/library/issue-briefs/IB840_PPACASmallGroup_12-21-10.pdf, Russell B. Korobkin, *The Battle Over Self-Insured Health Plans, or 'One Good Loophole Deserves Another'*, Yale Journal of Health Policy, Law, and Ethics, Vol. 1, 89-136 (2005).

⁸ A recent RAND report predicts that this effect, if any, is likely to be small. See <http://content.healthaffairs.org/content/31/2/324.abstract?sid=412e7755-0eb9-4b79-ac32-d39e6c739d0f>. See also Mark A. Hall, Regulating Stop-Loss Coverage May Be Needed to Deter Self-Insuring Small Employers From Undermining Market Reforms, *Health Affairs*, 31, no. 2 (2012): 316-323.

⁹ Specifically, the 1995 model law prohibited an insurer from issuing a stop loss insurance policy that had: (a) an annual attachment point for claims incurred per individual lower than \$ 20,000; and (b) an annual aggregate attachment point, for groups of fifty (50) or fewer, that was lower than the greater of: (i) \$ 4,000 times the number of group members; (ii) 120 percent of expected claims; or (iii) \$ 20,000. For groups of fifty-one or more, it prohibited an annual aggregate attachment point that was lower than 110 percent of expected claims.

Other interested stakeholders are also monitoring the market for stop loss coverage with low attachment points.¹⁰

II. Solicitation of Comments

The Departments are requesting comments to contribute to the Departments' understanding of the current and emerging market for stop loss products, both generally and with respect to the following specific areas:

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)?
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?

¹⁰ For example, Hall has cautioned that aspects of the Affordable Care Act could motivate some small businesses with younger, healthier employees to self-insure and buy relatively comprehensive stop loss coverage, and that this might increase premiums for small businesses that purchase insurance. See Mark A. Hall, *Regulating Stop-Loss Coverage May Be Needed to Deter Self-Insuring Small Employers From Undermining Market Reforms*, *Health Affairs*, 31, no. 2 (2012): 316-323. Eibner et al. generally conclude that self-insurance will have little effect on premiums for small group coverage, but suggest that this conclusion might change if affordable, attractive stop-loss policies become more available. See Christine Eibner, Carter C. Price, Raffaele Vardavas, Amando Cordova and Federico Girosi, *Small Firms' Actions in Two Areas, And Exchange Premium and Enrollment Impact*, *Health Affairs*, 31, no. 2, (2012): 324-331.

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?
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?
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?
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?
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?

8. What types of entities issue stop loss insurance? How many small entities¹¹ issue stop loss insurance policies?
9. Do stop loss issuers increase fees for groups below a certain size or exclude those groups? If so, how?
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?
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?
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?
13. What impact does the use of stop loss insurance by self-insured small employers have on the small group fully insured market?

¹¹ For this purpose, a small entity is defined as (1) a proprietary firm meeting the size standards of the Small Business Administration or (2) a nonprofit organization that is not dominant in its field.

Signed at Washington, DC this 25th day of April, 2012.

Victoria A. Judson
*Division Counsel/ Associate Chief Counsel,
Tax Exempt and Government Entities,
Internal Revenue Service,
Department of the Treasury.*

Signed at Washington, DC this 25th day of April, 2012.

George H. Bostick
*Benefits Tax Counsel,
Department of the Treasury.*

Signed this 23rd day of April, 2012.

Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
Department of Labor

Dated: April 25, 2012

Marilyn Tavenner,

Acting Administrator,

Centers for Medicare & Medicaid Services.

Approved: April 25, 2012

Kathleen Sebelius,

Secretary,

Department of Health and Human Services.

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