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Re: White Paper on Stop Loss Insurance  

Date: September 15, 2014  

The NAIC’s ERISA Subgroup’s White Paper on Stop Loss Insurance, Self-Funding, and the ACA makes a very valuable contribution to the literature on this important topic. It should be widely read by state insurance regulators and by state legislators. In the hope of making a great paper even better, the consumer representatives to the NAIC offer the following comments.  

The paper should state clearly up front that states can and do regulate stop-loss insurance. It is widely known that ERISA preempts state laws regulating employer-sponsored group health plans. ERISA expressly saves from preemption, however, state regulation of insurance. This includes regulation of stop loss plans. There appears to be some confusion regarding this point among some of the audiences of this paper. The regulatory authority of the state under ERISA is clarified in Appendix B but should be stated up front.  

The power to regulate is, of course, the power to prohibit. New York prohibits the sale of stop-loss insurance to groups with fifty or fewer workers and Delaware does the same for groups under fifteen. Del. Code Ann. 18- 7218 and NY Ins. Law 3231, 4317. North Carolina requires insurers selling stop loss coverage to small groups with fewer than 26 members to comply with all of the underwriting, rating, and other standards of its small group health insurance reform law. N.C. Gen. Stat. 58-50-130(a)(5). Given all of the problems with the stop loss insurance market identified in the White Paper, banning the sale of stop loss coverage to small groups is clearly an appropriate regulatory step and should be identified early in the paper as an alternative for the states.
A number of the strategies and contract provisions in the paper indicate that stop loss insurance is being sold to small groups essentially as high-deductible health insurance. Stop loss insurers are making medical necessity determinations, determining whether services are investigational or experimental, imposing provider networks, and conducting case management. Others are permitting fees for these services to count as eligible expenses. Some have very low individual attachment points that come close to mimicking the out-of-pocket limits in high deductible policies.

While these stop-loss insurance plans closely resemble high deductible health plans and stop loss insurers are carrying out many of the functions of health insurers, these plans claim immunity from state and federal law regulating health plans. Because these carriers are not subjected to regulatory oversight that covers health plans, they can engage in conduct that would be prohibited of health insurers (like health status underwriting). They are also exempt from provisions of independent external review or network adequacy review that protect consumers enrolled in health insurance plans.

The NAIC ought to recommend and states should adopt standards that clearly distinguish between health plans and stop loss plans. States should also consider regulating stop loss as first party rather than third party insurance when policy clauses clearly create a direct relationship between the insurer and employees. The NAIC should reconsider updating and increasing considerably its recommended attachment points to make them realistic for reinsurance coverage. Stop loss plans should be true reinsurance and not simply high deductible health plans.

States should also consider requiring stop loss insurers to abide by the same underwriting requirements that employer health plans must comply with under state and federal law. Employers may not exclude or charge higher premiums to employees because of their health status. Employers may not impose pre-existing conditions exclusions. Stop loss insurers should have to abide by these requirements as well. Stop loss insurers should also be required to comply with guaranteed issue and community rating requirements, at least in the small group market. Lasering – the practice of carving out, severely ill employees from coverage – should be prohibited. Small businesses that choose to self-insure should be able to purchase stop loss insurance that is subject to the same underwriting requirements that apply generally to small group carriers.

The sub-group’s paper clearly describes predatory clauses that some stop loss insurers currently impose on their small business consumers. These include unrealistic run out periods; exclusion of standard benefits that small employers must cover; provisions allowing the stop loss insurer to refuse payment for services for which the stop loss insurer is legally required to pay; unrealistically short reporting and payment period requirements; and provisions for without cause terminations, for rescissions, or for premium increases (including retroactive increases) during the policy year. Some policies contain provisions that otherwise do not comply with state law, such as venue restrictions or subrogation requirements. States may be able to deal with these practices through Unfair Trade Practice or Claims Settlements Acts or through form review. But
states should consider adopting minimum standards that directly prohibit unfair or deceptive practices.

The paper recommends clear disclosure of policy provisions to small employers. Large employers generally have human resources departments and can hire sophisticated benefits consultants to help them negotiate with stop loss carriers. Small employers often lack the time and expertise, and certainly lack the market power, available to large employers. It is all the more important, therefore, that the terms of stop loss policies are clearly disclosed to small employers. States can require this disclosure. But the NAIC should also consider issuing a consumer bulletin that could identify issues that small employers should be aware of in shopping for stop loss coverage and that state regulators could use to alert small employers as to problematic policy provisions. It is particularly important that small employers understand that the liability of their stop loss insurer is limited by the terms of the policy but that the employer’s liability as an ERISA fiduciary for medical claims is comprehensive and can be much more extensive.

The paper should note that stop loss insurers are not subject to the same medical loss ratio rules that apply to health insurers. Medical loss ratios for some stop loss insurers are reportedly considerably lower than for health insurers, even though stop loss insurers are not subject to many of the requirements with which health insurers must comply. Lower medical loss ratios mean, however, that stop loss insurers can pay higher commissions to producers, who may also make a commission for the sale of third party administrator services. Most small businesses will, appropriately, rely on producers for assisting them in deciding how to meet their health insurance needs. Small employers should be aware, however, that their producer may face conflicting interests in advising them as to the form of coverage that best meets their needs.

If states do nothing else about the sale of stop loss coverage, they should at least collect data concerning it. Colorado collects data from stop loss insurers, including information on the size of groups insured (including the size of the smallest group insured and minimum size requirements), number of lives covered by group size, minimum and median attachment points, and source of coverage prior to the issuance of the stop loss policy. CRS 10-16-119. States obviously need to know what is going on in their stop loss markets if they are to prevent abuses.

Finally, we would suggest a couple of corrections for the paper. The $2,000/$4,000 limit on deductibles for small employers mentioned on page 28 has been repealed. The reference to the risk corridor fee on the same page should refer to the reinsurance fee. Finally, the just released Kaiser Family Foundation/Health Research and Education Trust report on employer-based coverage includes information on self-insurance for small employers and should be cited.

We thank you again for producing this excellent report, and hope that it is widely read by regulators and by the public.