September 16, 2014

Ms. Christina Goe, Chair
ERISA Working Group, Regulatory Framework Task Force
Health Insurance and Managed Care (B) Committee

Ms. Jennifer Cook
Senior Health Policy & Legislative Analyst & Counsel
National Association of Insurance Commissioners

Dear Ms. Goe and Ms. Cook:

Attached are comments related to the White Paper, "Stop Loss Insurance, Self Funding and the ACA", as requested by the ERISA Working Group of the Regulatory Framework Task Force, and including an initial comment pertaining to a remark recorded in the August 16, 2014 minutes of the working group.

In summary, there is cause to suppose that most, and perhaps all, of the concerns about stop loss expressed in the White Paper could be mitigated or resolved by defining and regulating stop loss as health insurance.

I hope this is helpful.

Sincerely,

Terry Seaton

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Life and Health Actuary
New Mexico Office of the Superintendent of Insurance
Minutes, item 1., par.2: "Mr. Jost said that another issue to include in the paper is that stop loss insurance is not subject to any loss ratio requirements...."

Despite CCIIO guidance1 (beyond, and possibly contrary to, statute and regulation), this may not be true, especially when stop loss is defined by state law as health insurance (as in New Mexico2). There is no exemption from loss ratio requirements in federal statute or regulation for stop loss insurance, by any description, as there is for limited-benefit, etc. coverage. Only the underlying group health plan is exempt. As evinced by the introduction of HR 3462 and S1735 in November, 2013, and subsequent SIAA testimony in committee, the industry is aware of this lack of exemption.

In fact, where stop loss is defined as (non-exempt) health insurance, it may be subject to all of federal and state law concerning health insurance - which may completely transform stop loss as we know it. In particular, such requirements might obviate the entire issue of stop loss for small employers, due to the incompatibility of current tradition in stop loss insurance with ACA requirements for the small-group market.

White Paper, p.7 (Section IV., par.1, p.5 - par.7, p.6): Except for the acknowledgement (Section IV., par.7, p.6) that "Some states treat it as a health insurance line", and despite its own arguments to the contrary, the paper appears to accept that stop loss should be viewed as either liability coverage or reinsurance. Casualty it may be, but not liability, and clearly not reinsurance coverage. These comments should demonstrate that definition of stop loss as health insurance will resolve most, perhaps all, of the problems and concerns expressed in the White Paper.

White Paper, p.7 (Section V., par.2, point 2): To date, regulation has been directed toward ensuring, by requiring a minimum attachment point, that self-funded employer plans are legitimately self-funded; however, the variation that individual employers (and not only small employers) may face in cash flow for claims payment may not be mitigated by stop loss coverage, so perhaps regulation should be directed instead (as suggested also in Section V., par.1, pp. 6-7) toward protecting self-funded plans from inadequate insurance, by requiring a maximum attachment, perhaps similar to the ACA’s maximum out-of-pocket limit.

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1Per CMS MLR Annual Reporting Form Filing Instructions for the 2013 MLR Reporting Year, p.6: "The experience of stop loss or excess of loss coverage for self-funded groups should be reported in Parts 1 and 2, Column 41 – Other Health Business Plans (business excluded by statute)."

2Per NMSA 59A-7-3. "Health" insurance defined.

"Health" insurance is:

A. insurance of human beings against bodily injury, disablement or death by accident or accidental means, or the expense thereof;

B. insurance of human beings against disablement or expense resulting from sickness, old age, or accident; and

C. insurance appertaining to insurance described in subsections A and B of this section, including:

(1) provisions operating to safeguard contracts of health insurance against lapse in event of strike or layoff due to labor disputes; and

(2) insurance that reimburses or pays on behalf of an employer or health care plan sponsor all or part of the employer’s, sponsor’s or health care plan’s expenses or obligations arising pursuant to a health care plan [emphasis added].
White Paper, p.7 (Section V., par.2, point 3): If the remark in fact refers to a (presumably temporary) deficit in the claims payment account as a loan from the TPA, then it is the administrative agreement, not the stop loss policy, which contains this provision. Furthermore, such a provision would raise the issue of whether or not the TPA is acting as an insurer. If, on the other hand, the provision is in the policy, then the loan is from the insurer, not the TPA. (Sometimes the insurer and TPA are the same entity, but not always.)

White Paper, p.8 (Section VI., par.3, point 3): For the sake of this paper, this point should probably read, "(even though the policy may not define what non-directed networks are)".

White paper, p.14 (Section VII., par.1, point D.1.): Again, the paper claims that "stop loss insurance products are not generally required to conform to state or federal health insurance law, including the ACA", which, as noted above, may not be the case.

The implications of the notion that stop loss is subject to all federal and state health insurance law are profound.

For 42 USC §300gg et seq. (Ch.6A, Subch.XXXV, Part A, Subpart 1), note that per ERISA [29 USC §1185d (Ch.18, Subch.I, Subtitle B, Part 7, Subpart B)], all of these provisions except §300gg-16 and §300gg-18 already apply to (self-funded) group health plans. The contention here is that they may apply to stop loss as "health insurance coverage in connection with" such plans.

§300gg implies that for small employers, ACA rating restrictions apply to the stop loss policy even though there are no "rates" for the underlying plan; granted, that such restrictions apply "with respect to the particular plan or coverage involved", which may be unique for each self-funded underlying group health plan. Nevertheless, provided that regulation could be achieved, this would obviate the concern cited in Section I., par.1, as stop loss would not be "allowed to underwrite and rate based on health status and claims experience", at the group level (again, for small employers). Indeed, the effect may be to introduce, as carriers feared under ordinary health insurance, an opportunity for employers to exercise selection powers adverse to the carriers.

The effect on mid-term, etc., rate increases described in Section VI., par.7, point 10, p.11 (and point 14, p.12) is not entirely certain, but in principle at least, such actions could not be taken in response to claims reporting (or non-reporting). Certainly the statement in the sub-point of point 10, that "Employers are legally prohibited from discriminating on the basis of health status, but stop loss insurers are not" would become untrue, and the concerns enumerated in Section VII., par.1, subpar. D.9.b.,c., p.16 would be obviated.

Keeping in mind that all the effects of §300gg relate only to small employers (ignoring the individual market), it is also important to keep in mind, wherever it applies, the change in definition of small employers that is scheduled to take effect in 2016.

§300gg-1 implies that a stop loss insurance issuer may not refuse to cover any employer's group health plan, nor exclude any employee of an employer which elects stop loss coverage. This would address the concern in Section VII., par.1, subpar. D.3, subpoint 1, p.15 regarding "'Lasering'; i.e. assigning different attachment points or deductibles, or denying coverage altogether, for an employee or dependent based on the health status of that individual [emphasis added]." §300gg-1 would also obviate the concerns of Section VI., par.7, points 3 & 6, p.10, and likewise of Section VI., par.7, point 11, p.11-12, as such terminations would be prohibited.
Perhaps more significantly, this provision may impinge on the effect of §300gg, above, if TPAs decide for competitive reasons to increase efficiency by offering common plan designs to multiple small employers (or the employers themselves, with or without collusion, embrace common plan designs), whereupon stop loss carriers' rates for those employers would become constrained by §300gg requirements.

§300gg-1 also introduces the critical point that a carrier's participation in the group market requires participation in the small-group market, and this would be as true of stop loss coverage as of fully-insured coverage. Any carrier which was (perhaps appropriately) dissuaded by the employers' selection powers under §300gg from participating in the small-group stop loss market would have to exit the (group health) stop loss market entirely.

§300gg-2 implies that a stop loss insurance issuer may not refuse to renew any employer's group health plan, although if a particular employer's plan is unique, the carrier could make renewal infeasible by increasing rates. The protection offered to employers by §300gg-2 is the same under stop loss as for fully-insured health plans: if an employer's plan is common for that carrier, the carrier cannot raise any one group's rates without raising all such groups' rates. It is presumed that competitive pressure will impose an equilibrium on the carrier in this regard, which will ultimately address the concern expressed in Section V., par.2, point 5, p.7. This provision may also begin to apply pressure to convert the stop loss market from any claims-made basis (described in Section III., par.5, p.5 and Section V., par.2, point 4, p.7) toward occurrence basis, as it becomes clear to carriers that they cannot elicit savings (and hence, lower rates) from avoidance of outstanding known, extreme claims at the end of a policy year, if the employer has the option to renew at reasonable rates. (Claims-made basis is of course especially dubious where there is no assurance of a "firewall" between the administrator and the stop loss carrier.)

§300gg-3 and §300gg-4 reinforce the points already mentioned regarding "lasering", and "actively-at-work" provisions, or in Section III., par.3, p.4, as issuers would not be permitted to impose "a higher attachment point for one or more individuals with pre-existing high cost medical conditions or other identified risk factors", and go on to bar preexisting condition exclusions as discrimination based on health status. It should be worth noting that all the anti-discrimination effects of imposing these ACA provisions on stop loss should serve to reduce, or possibly obviate, any contention that a stop loss policy "establishes a direct relationship between the stop loss insurer and the employer's member employees and dependents that goes beyond the customary contract between the stop loss insurer and the employer", as mentioned in the White Paper with regard to care management in Section VI., par.2, p.8 and par.5, p.9.

§300gg-5 is not mentioned in the White Paper as an area of concern, but probably belongs in the general category of stop loss policy provisions that might improperly deviate from the underlying self-funded plan.

It is with regard to §300gg-6 that stop loss as we know it may be radically transformed, except for the possible avoidance of state mandates. If the requirements for scope and extent of coverage are the same as for the underlying self-funded plan, then the role of the self-funded plan, if any, shifts to what used to be known as "funding under the deductible", while the stop loss policy takes the role of the ordinary health insurance - probably at the minimum allowed level of coverage, so as to maximize the role of the self-funded plan. (Such requirements continue similarly in §300gg-7 through §300gg-11, §300gg-13, §300gg-14, §300gg-19a, and §300gg-25 through §300gg-28.) This shift in the role of the self-funded plan also averts the cash-flow concerns expressed in Section VI., par.7, points 13-15, pp.12-13, since the self-funded plan itself will be of rather limited extent. It may be expected that there will be few instances where the resulting arrangement will be mutually advantageous to both the employer and the
carrier, relative to a fully-insured plan, with or without a self-administered "funding under the deductible".
The effect on the marketplace may be unsatisfactory to the industry, but it will largely solve the problems expressed in Section I, par. 1-2, p.1, Section II, par.2, p.2., and Section II, par.8, p.3.

§300gg-12 directly obviates the concern of Section VI., par.7, point 12, p.12.

The argument might be made, that §300gg-15 would re-create a relationship between the stop loss carrier and the member employees, but the informational role required of the carrier is not fiduciary.

The exemption (in 29 USC §1185d(b)) of the self-funded plan from the prohibition of discrimination in favor of highly paid employees (in §300gg-16) does not extend to the stop loss coverage, and is therefore irrelevant. If the plan extends additional benefits to those employees, such benefits are out of the scope of the stop loss policy.

The requirements of §300gg-17 appear to have been relegated to the MLR reporting requirements (in §300gg-18) in regulation.

The exemption (in 29 USC §1185d(b)) of the self-funded plan from the MLR reporting and rebating (in §300gg-18) does not extend to the stop loss coverage (see page 1 above), and is therefore highly relevant. Most current stop loss policies have target loss ratios much lower than 80%, and it is highly questionable that carriers will be willing to provide stop loss at 80% or higher.

The argument might be made, that §300gg-19 would re-create a relationship between the stop loss carrier and the member employees, but in fact the enrollees would still be concerned only with claims payment by the self-funded plan, as determined by the administrator, and would have no cause to be concerned with the reimbursement of the plan by the stop loss carrier.

§300gg-21 contains the paradox of the statement, "I'm lying", and must, to make any sense, be treated as if it were not itself included within the subparts which it purports to deign inapplicable to certain plans. As mentioned in note 4, stop loss is not among those exclusions. §300gg-22 through §300gg-23 reiterate state authority.