STOP LOSS INSURANCE MODEL ACT

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Section 1. Purpose and Intent

This law shall be known as the Stop Loss Insurance Act. The purpose of this Act is to establish criteria for the issuance of stop loss insurance policies. Nothing in this act shall be construed as imposing any requirement or duty on any person other than an insurer or as treating any stop-loss policy as a direct policy of health insurance.

Section 2. Definitions

A. "Actuarial certification" means a written statement by a member of the American Academy of Actuaries, or other individual acceptable to the commissioner, that an insurer is in compliance with the provisions of this Act, based upon the individual's examination and including a review of the appropriate records and the actuarial assumptions and methods used by the insurer in establishing attachment points and other applicable determinations in conjunction with the provision of stop loss insurance coverage.

B. "Attachment point" means the claims amount incurred by an insured group beyond which the insurer incurs a liability for payment.

C. "Expected claims" means the amount of claims that, in the absence of a stop loss policy or other insurance, are projected to be incurred by an insured group through its health plan.

Drafting Note: This model act establishes criteria for the issuance of stop loss insurance policies. The criteria apply regardless of how the stop loss insurance carrier calculates when the aggregate attachment point has been met for the purposes of triggering payment under the policy. The model act only requires an insurer to calculate the numerical value of the aggregate attachment point pursuant to the definitions and parameters of the model; it does not preclude a stop loss carrier from using different contractual definitions of "expected claims" and other terms in order to determine how that numerical value is to be reached under the terms of its contract with the insured group.

Section 3. Stop Loss Insurance Coverage Standards

A. (1) An insurer shall not issue a stop loss insurance policy that :

(a) Has an annual attachment point for claims incurred per individual which is lower than $20,000;

(b) Has an annual aggregate attachment point, for groups of fifty (50) or fewer, that is lower than the greater of:

(i) $4,000 times the number of group members;

(ii) 120 percent of expected claims; or

(iii) $20,000;

(c) Has an annual aggregate attachment point for groups of fifty-one (51) or more that is lower than 110 percent of expected claims; or

(d) Provides direct coverage of health care expenses of an individual.

(2) An insurer shall determine the number of persons in a group, for the purposes of this subsection, on a consistent basis, at least annually.

(3) For the purposes of determining the dollar amounts set forth in Paragraph (1) above, and upon consideration of the medical components of the Consumer Price Index (CPI), the commissioner may amend these dollar amounts and shall publish any change in these dollar amounts at least six (6) months prior to their effective dates.

Drafting Note: States may wish to provide the commissioner with the authority to promulgate regulations relating to the establishment of the attachment points set forth in Paragraph (1) above. A state may wish to adjust the dollar amounts specified in Paragraph (1) to appropriately reflect medical costs in the particular state. Detailed discussions, including a statement of legislative intent, discussions concerning the actuarial assumptions underlying this model, and an actuarial study on issues relating to risk transference to stop loss insurance carriers, can be found in the minutes of the NAIC State and Federal Health Insurance Legislative Policy Task Force, and its ERISA Working Group in 1994 and 1995.

B. The commissioner may adopt rules that carry out the requirements of this act and prescribe additional standards for stop loss insurance policies.

Section 4. Actuarial Certification

An insurer shall file with the commissioner annually on or before March 15, an actuarial certification certifying that the insurer is in compliance with this Act. The certification shall be in a form and manner, and shall contain information, specified by the commissioner. A copy of the certification shall be retained by the insurer at its principal place of business.

Section 5. Effective Date

This Act shall become effective with respect to stop loss insurance policies issued or renewed six (6) months after [insert effective date].

Chronological Summary of Action (all references are to the Proceedings of the NAIC).

1995 Proc. 2nd Quarter 2, 38, 553, 663, 671-672 (adopted).
1999 Proc 3rd Quarter 25, 26, 834, 838, 839-840 (amended and reprinted).

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This chart is intended to provide readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings related to the NAIC model. Such guidance provides readers with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state's activity in this area and has determined whether the citation most appropriately fits in the Model Adoption column or Related State Activity column based on the definitions listed below. The NAIC's interpretation may or may not be shared by the individual states or by interested readers.

This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Nor does this state page reflect a determination as to whether a state meets any applicable accreditation standards. Every effort has been made to provide correct and accurate summaries to assist readers in locating useful information. Readers should consult state law for further details and for the most current information.

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KEY:

MODEL ADOPTION: States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

RELATED STATE ACTIVITY: Examples of Related State Activity include but are not limited to: older versions of the NAIC model, statutes or regulations addressing the same subject matter, or other administrative guidance such as bulletins and notices. States that have citations identified in this column **only** (and nothing listed in the Model Adoption column) have **not** adopted the most recent version of the NAIC model in a **substantially similar manner.**

NO CURRENT ACTIVITY: No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama	NO CURRENT ACTIVITY	
Alaska		ALASKA STAT. § 21.42.145 (2002); BULLETIN 2006-4 (2006).
American Samoa	NO CURRENT ACTIVITY	
Arizona	NO CURRENT ACTIVITY	
Arkansas		ARK. CODE ANN. § 23-62-111 (2007/2009); BULLETIN No. 4-2007 (2007); BULLETIN 6-2008 (2008).
California	NO CURRENT ACTIVITY	
Colorado		COLO. REV. STAT. § 10-16-119 (1994/2013).
Connecticut		CONN. GEN. STAT. § 38a-8b (2004).
Delaware		DEL. CODE ANN. tit. 18, § 7218 (2011).
District of Columbia	NO CURRENT ACTIVITY	
Florida	NO CURRENT ACTIVITY	
Georgia		GA. CODE ANN. § 33-50-6 (2011).

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Guam	NO CURRENT ACTIVITY	
Hawaii	NO CURRENT ACTIVITY	
Idaho	NO CURRENT ACTIVITY	
Illinois	NO CURRENT ACTIVITY	
Indiana	NO CURRENT ACTIVITY	
Iowa		A.G. Opinion Oct. 3, 1990 (1990).
Kansas		BULLETIN 1993-12 (1993); BULLETIN 1997-7 (1997).
Kentucky	NO CURRENT ACTIVITY	
Louisiana		LA. REV. STAT. ANN. § 22:675 (2001/2003).
Maine	NO CURRENT ACTIVITY	
Maryland		MD. CODE ANN., INS. § 15-129 (2008).
Massachusetts	NO CURRENT ACTIVITY	
Michigan	NO CURRENT ACTIVITY	
Minnesota	MINN. STAT. §§ 60A.235 to 60A.236 (1995/2009).	
Mississippi	NO CURRENT ACTIVITY	
Missouri	NO CURRENT ACTIVITY	
Montana	NO CURRENT ACTIVITY	
Nebraska	NO CURRENT ACTIVITY	
Nevada		NEV. ADMIN. CODE § 689B.350 (2001).

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
New Hampshire	N.H. REV. STAT. ANN. §§ 415-H:1 to 415-H:5 (2006).	
New Jersey		N.J. STAT. ANN. § 17B:27A-17 (1992/1997); BULLETIN 2011-20 (2011).
New Mexico	NO CURRENT ACTIVITY	
New York		OGC 8-2-2006 (# 4).
North Carolina	NO CURRENT ACTIVITY	
North Dakota	NO CURRENT ACTIVITY	
Northern Marianas	NO CURRENT ACTIVITY	
Ohio	NO CURRENT ACTIVITY	
Oklahoma		BULLETIN LH 2013-03 (2013).
Oregon		OR. REV. STAT. § 742.065 (1993/1995).
Pennsylvania		31 PA. CODE §§ 89.471 to 89.474 (1992).
Puerto Rico	NO CURRENT ACTIVITY	
Rhode Island	R. I. GEN. LAWS §§ 27-8.2-1 to 27-8.2-5 (2013).	
South Carolina	NO CURRENT ACTIVITY	
South Dakota		S.D. CODIFIED LAWS § 58-18B-35 (1995/1998) (prohibits adoption of a rule affecting stop loss coverage for self-funded employee health programs).
Tennessee		BULLETIN dated 7/1/94 (1994).
Texas	NO CURRENT ACTIVITY	

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NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Utah		UTAH CODE ANN. §§31A-43-101 to 31A-43-304 (2013) (small employer); UTAH ADMIN. CODE r. 590-268 (2014).
Vermont	21-040 VT. CODE R. § 024 (2009).	
Virgin Islands	NO CURRENT ACTIVITY	
Virginia	NO CURRENT ACTIVITY	
Washington		WASH. REV. CODE ANN. § 48.21.015 (1992).
West Virginia	NO CURRENT ACTIVITY	
Wisconsin	NO CURRENT ACTIVITY	
Wyoming	NO CURRENT ACTIVITY	

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The assignment to the group that developed the model was to recommend stop loss thresholds for coverage offered to employers who self-insure medical coverage for their workers. In particular, the working group's task was to define the point at which a stop loss policy might be viewed as a subterfuge for a health insurance policy subject to state regulation. **1994 Proc. 3rd Quarter 650**.

The chair asked for a show of hands in the audience who were aware of competitors that offered "subterfuge" health insurance policies. Several members of the audience indicated they were aware of such competitors. A regulator asked if interested parties felt the model act was the most effective way to fix the problem. An interested party indicated that federal reform will be needed and the chair of the working group agreed that would be most effective. **1994 Proc. 4th Quarter 765**.

Several associations commented in support of the NAIC's intent in drafting the model act, namely to minimize gaming—or outright avoidance of state small group insurance reforms through inappropriate use of subterfuge stop loss coverage. They opined that such actions further segment an already fragmented market and worsen existing regulatory inequities. They agreed that insurance regulation would be effective only if applied to all entities who, in substance, if not form, engaged in the business of providing health coverage. They did, however, express some concerns about the technical approach used in the draft model act. **1995 Proc. 1st Quarter 626-627**.

NAIC staff prepared a memorandum detailing legal support for the ability of the states to pass the proposed NAIC model act. The memo analyzed the preemption issues raised by ERISA and highlighted certain cases that were instructive. It noted that the specific issues in the stop loss model had not been litigated in court. **1995 Proc. 2nd Quarter 668-670**.

In 1999 the charge was given to amend the Stop Loss Insurance Model Act in light of recent court decisions. **1999 Proc. 1st Quarter 539**.

The chair of the newly appointed working group said the purpose for creating the working group was to consider amending the NAIC model to address concerns raised in litigation as well as to take into account the Department of Labor's position on the issue. Several states adopted the NAIC model after its development in 1995, and were promptly sued in federal court. The court of appeals affirmed the district court decision that the law was preempted by ERISA and the U.S. Supreme Court denied certiorari. The Fourth Circuit Court of Appeals ruled that the regulation imposed duties and responsibilities on employer benefit plans directly and held the regulation was preempted. **1999 Proc. 2nd Quarter 555**.

The working group considered a draft of revisions to the model act that addressed the problems articulated in the Fourth Circuit opinion and by the Department of Labor and Solicitor General. The draft clarified that the law applied only to insurers and did not impose obligations on the plan. **1999 Proc. 2nd Quarter 555-556**.

Section 1. Purpose and Intent

When the model was amended in 1999, the drafters made changes to Section 1 to clarify that the law only applied to insurers and imposed requirements only on stop loss carriers; it did not reform or impose obligations on the plan. The chair explained that the draft was based on his state's new law. Government officials from his state met with representatives from the Department of Labor (DOL) to discuss how to amend the stop loss law to satisfy the DOL's concerns. The chair expressed confidence that, as amended, the stop loss law would survive an ERISA challenge. **1999 Proc. 2nd Quarter 556**.

An attorney for an industry trade association opined that the model as revised would still be subject to ERISA preemption. The chair noted that the attorney general of his state had also reviewed this issue and

felt confident that the Stop Loss Insurance Model Act, as amended, would survive an ERISA challenge. **1999 Proc. 3rd Quarter II 838**.

Section 2. Definitions

During discussion of the model draft, the working group decided that it needed to define actuarial certification, attachment point and expected claims. **1994 Proc. 4th Quarter 764**.

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Section 2 (cont.)

C. An interested party commented that the definition of expected claims should not refer to incurred claims, because this term included provider charges not covered by the plan as well as charges covered by member copayments and coinsurance. To ensure that stop loss coverage was triggered only by what was payable by self-funded plans, the commenter suggested revising the definition. **1995 Proc. 1st Quarter 627**.

Section 3. Stop Loss Insurance Coverage

The group developing the first version of the model act expressed considerable concern about when a stop loss policy is a subterfuge for a health insurance policy. One standard it considered was whether the employer passed on more than 50 percent of the risk. The working group planned to examine an actuarial study related to the calculation of the percentage of self-insurance risk retained by different employers. **1994 Proc. 3rd Quarter 650-651**.

An actuary presented an analysis related to stop loss insurance. He emphasized that his report presented information and did not make specific recommendations. **1994 Proc. 3rd Quarter 641, 643-650**.

The actuarial study was refined in response to comments and included again in the next set of minutes. **1994 Proc. 4th Quarter 771-779**.

Two comment letters were attached to the minutes of the working group and both found fault with the approach taken in the actuarial study. One opined that, while states have the authority to regulate stop loss coverage, they cannot use the regulation of stop loss coverage to, in effect, regulate the conduct of self-insured plans. **1994 Proc. 4th Quarter 767**.

One interested party briefly analyzed case law on ERISA preemption and the insurance savings clause and concluded that the stop loss model would not meet the narrow tests for the savings clause. While the working group's proposal was directed at all stop loss insurers, its real aim was to prevent small employers from purchasing stop loss coverage. Since virtually all but the largest employers purchase stop loss protection for their self-funded plans, the interested party opined that making stop loss coverage unavailable to small employers was tantamount to telling them they could not self-insure. **1994 Proc. 4th Quarter 768**.

Another interested party opined that the actuarial analysis was incomplete and unclear and that the working group should not rely on its analysis to set a $20,000 specific retention. **1994 Proc. 4th Quarter 768**.

The chair noted that the stop loss model was not intended to be a "scientific" duplication of actuarial tables, but was rather an approximation intended to establish a firm number that would not be subject to interpretation. **1994 Proc. 4th Quarter 764**.

NAIC actuaries were asked to explain the actuarial premise behind the specific attachment point. After hearing a brief description, the working group agreed to consider adding to the model a clarification of the actuarial assumptions underlying the selection of attachment points. **1995 Proc. 1st Quarter 626**.

A. A regulator offered an anecdote that his state had seen stop loss filings where the attachment point was as low as $250 per year. **1994 Proc. 3rd Quarter 642**.

The working group examined the law of one state, which set the minimum threshold for a specific attachment point at five percent of expected group claims or $100,000, whichever was lower. A regulator opined that the five percent of claims might be too low for very small employer groups. The working group discussed the advantage of using a fixed number instead of a percentage of expected group claims when setting the threshold. The working group agreed to set a specific threshold at $20,000 with an adjustment for the Consumer Price Index. **1994 Proc. 4th Quarter 770**.

The working group then discussed the aggregate limit and decided to set the threshold at 120 percent of expected group claims. An interested party asked whether the suggested limit of 120 percent of expected group claims was to be calculated using expected total group claims or expected retained claims. Working group members responded that it was based upon expected total claims. **1994 Proc. 4th Quarter 770**.

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Section 3A (cont.)

A comment received by the group suggested that the options for establishing the aggregate threshold level not include $4,000 per employee because this approach created a disincentive for health plans to implement or to continue lower-cost managed care programs. **1995 Proc. 1st Quarter 627**.

At the next NAIC meeting the parent task force took up discussion of the model. The first discussion item was whether the minimum aggregate attachment point should be reduced from 120 percent to 110 percent as it applies to stop loss insurance policies sold to insured groups with more than 50 covered employees. A commissioner asked if there should be a precise number recommended, given the variation in medical costs across the states. **1995 Proc. 2nd Quarter 661**.

A regulator noted that his state law specifies minimum specific and aggregate attachment points and that the intent behind his state's law was to protect small employers and to clarify the distinction between insurance products. **1995 Proc. 2nd Quarter 661**.

The task force briefly discussed whether the $4,000 per employee formula and $20,000 minimum for aggregate stop loss should be included only within the calculation of the aggregate attachment point for stop loss policies sold to insured employer groups of 50 or fewer. **1995 Proc. 2nd Quarter 661**.

An interested party suggested that it would be helpful if Paragraph (2) defined a time frame for companies' determination of the number of employees that they had for purposes of this Act because the number was subject to change. The working group agreed to add a requirement that carriers determine the number of employees on a consistent basis. **1994 Proc. 4th Quarter 765**.

The working group discussed the Consumer Price Index (CPI) adjustment in Paragraph (3). The working group thought it would be a good idea to require that the specific limit be redetermined by the commissioner every three years, upon consideration of the medical component of the CPI, and that the commissioner should announce the new standard for the specific limit six months prior to its effective date. **1994 Proc. 4th Quarter 765**.

Task force members agreed to add a drafting note recognizing that states might want to amend the suggested attachment points to reflect local medical costs. **1995 Proc. 2nd Quarter 663**.

B. An interested party commented that the delegation of authority to the commissioner in the model act was impermissibly broad. **1995 Proc. 1st Quarter 628**.

The task force discussed whether the provision giving the commissioner authority to adopt regulations to further define a stop loss policy was too broad. **1995 Proc. 2nd Quarter 662**.

The working group spent a great deal of discussion time when drafting the first model talking about when stop loss coverage should be treated like health insurance. A Subsection D was included that stated that, even if a policy is denominated a stop loss policy; if a health insurance policy should have been issued, laws regulating health insurance were applicable. **1994 Proc. 4th Quarter 767**.

A regulator inquired into the implication of distinguishing stop loss policies from health insurance policies under the model. He raised a concern about the model's impact on other state insurance laws, such as how a stop loss carrier was to categorize its coverage for purposes of the annual statement. **1995 Proc. 1st Quarter 626**.

Section 4. Actuarial Certification

Early in the process the working group agreed to add to the draft a requirement that the stop loss carrier submit an actuarial certification that the carrier had complied with the standards. **1994 Proc. 4th Quarter 770**.

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Section 5. Effective Date

An interested party recommended that the requirements of Section 3 apply to policies issued, delivered or renewed six months after the effective date to give insurers and employers time to make necessary adjustments to their products. **1995 Proc. 1st Quarter 628**.

Chronological Summary of Action

September 1995: Model adopted.
December 1999: Amended in response to concerns about ERISA preemption.