



## TECHNICAL RELEASE 2014-01

DATE: NOVEMBER 6, 2014

SUBJECT: GUIDANCE ON STATE REGULATION OF STOP-LOSS INSURANCE

### I. BACKGROUND

Under current law, employers and other sponsors of group health plans may either provide coverage through an insurance contract or instead, pay benefits directly, as claims occur. In general, private sector employment-based group health plans that self-insure are not subject to State health insurance laws, including coverage laws, rating policies, and certain other State consumer protections applicable to health insurance. Such plans are also not subject to some of requirements under the Affordable Care Act<sup>1</sup> that are applicable only to health insurance issuers, but they are subject to consumer protections in the group market reform provisions, such as the prohibition on lifetime and annual limits, prohibition on pre-existing condition exclusions, and coverage of dependents to age 26.

Employers and other sponsors of self-insured group health plans, especially small employers, may face large fluctuations in claims, and they frequently seek to reduce this risk by purchasing stop-loss insurance. Even among healthy employees, a single individual may have a catastrophic claim that strains the employer. Stop-loss insurance contracts protect against claims that are catastrophic or unpredictable in nature by covering claims costs that exceed a set amount – an attachment point – for either a single enrollee or for aggregate claims over a determined period. For example, the contract may pay claims for a single enrollee once they exceed \$500,000 in claims for a plan year. It may also cover all claims that exceed 125 percent of expected claims per plan year across all covered employees. The employer self-insures claims costs (net of employee cost sharing) below these attachment points. Stop-loss insurance generally is not treated as health insurance under State law. It does not usually guarantee the payment of benefits to plan participants. More often, it only insures the employer against losses.

### II. DISCUSSION

Unless prohibited by State insurance law, a stop-loss insurer might offer insurance policies with attachment points set so low that the insurer assumes nearly all the employer's claims risk. For example, the attachment point could be set at \$5,000 per employee, or \$100,000 for a small group. Use of stop-loss insurance with such low attachment points effectively gives nearly all the risk protection of a conventional health insurance policy without the consumer protections

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<sup>1</sup> The "Affordable Care Act" refers to the Patient Protection and Affordable Care Act (enacted March 23, 2010, Pub. L. No. 111-148), as amended by the Health Care and Education Reconciliation Act of 2010 (enacted March 30, 2010, Pub. L. No. 111-152), and as further amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (enacted April 15, 2011, Pub. L. No. 112-10).

required for such policies. Low attachment point stop-loss insurance also has the potential to create adverse selection in the risk pool and increase premiums in the fully-insured small group market, including in the Small Business Health Options (SHOP) Exchanges, by encouraging small employers with healthier employees to self-insure and thus increasing the proportion of less healthy enrollees in insured coverage.

This problem has prompted some States to consider measures for protecting the viability of their health insurance markets. The question raised is how to regulate stop-loss coverage consistent with the Federal law that prohibits most State regulation of private sector employee benefit plans. Under section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), State laws that relate to “employee benefit plans,” as defined by ERISA section 3(3), are generally preempted.<sup>2</sup> Although this does not apply to State insurance laws, States may not deem employee benefit plans to be insurance companies in order to regulate them under insurance laws.<sup>3</sup> As a result of this statutory provision, States have been uncertain of their ability to regulate the use of stop-loss insurance by self-insured group health plans governed by ERISA.

In a decision that predated enactment of the Affordable Care Act, one court invalidated a State law that would have deemed stop-loss insurance with low attachment points to be health insurance when sold to self-insured group health plans.<sup>4</sup> Although the court expressly recognized the State’s right to regulate the sale of stop-loss insurance, it held that ERISA preempted the particular law at issue because its purpose and effect was to force state mandated health benefits on such plans when they purchased these types of stop-loss insurance.<sup>5</sup> The State subsequently enacted a law that simply prohibited insurers from selling such insurance with a specific attachment point of less than \$10,000 or an aggregate attachment point of less than 115% of expected claims.<sup>6</sup> This law has not been held to be preempted by ERISA.<sup>7</sup> The National Association of Insurance Commissioners (NAIC) subsequently adopted a model law that prohibits the sale of stop-loss insurance with a specific annual attachment point below \$20,000. For groups of 50 or fewer, the aggregate annual attachment point must be at least the greater of (i) \$4,000 times the number of group members, (ii) 120% of expected claims, or (iii) \$20,000. For groups of 51 or more, the model law prohibited an annual aggregate attachment point that was lower than 110% of expected claims.<sup>8</sup>

### III. CONCLUSION

The Department of Labor, which is the agency primarily tasked with administration of Title I of ERISA,<sup>9</sup> takes the view that States may regulate insurance policies issued to plans or plan sponsors, including stop-loss insurance policies, if the law regulates the insurance company and

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<sup>2</sup> 29 U.S.C. 1144.

<sup>3</sup> Rush Prudential HMO v. Moran, 536 U.S. 355, 373 n.6 (2002).

<sup>4</sup> See American Medical Security, Inc. v. Bartlett, 111 F.3d 358 (4th Cir. 1997).

<sup>5</sup> 111 F.3d. at 365 (“This is not to say that Maryland may not regulate stop-loss insurance policies. Such regulation is clearly reserved to the states.” (Citation omitted)).

<sup>6</sup> Md. Code § 15-129(d).

<sup>7</sup> In an unreported decision decided on other grounds, a district court suggested that this law would not be preempted. American Medical Security, Inc. v. Larsen, 1999 WL 1068419 (D. Md. 1999).

<sup>8</sup> See Stop-Loss Insurance Model Act (July 2002) at <http://www.naic.org/store/free/MDL-92.pdf>

<sup>9</sup> 29 U.S.C. 1001 – 1191c.

the business of insurance.<sup>10</sup> Insurance regulation of group health insurance clearly limits insurance policy choices available to third parties, including employee benefit plans. Insurance regulation of stop-loss insurance can have a similar consequence without ERISA preempting the insurance regulation. Thus, a State law that prohibits insurers from issuing stop-loss contracts with attachment points below specified levels would not, in the Department's view, be preempted by ERISA. Thus far, about ten States have enacted laws using the same approach as the NAIC model. The Department is not aware of any challenges to such laws based on ERISA preemption.

#### IV. FOR FURTHER INFORMATION

Questions concerning this Technical Release may be directed to the Office of Health Plan Standards and Compliance Assistance at 202-693-8335. Information regarding the ERISA and the Affordable Care Act is available at [www.dol.gov/ebsa](http://www.dol.gov/ebsa). Additional information regarding the Affordable Care Act is available at [www.HealthCare.gov](http://www.HealthCare.gov).

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<sup>10</sup> Kentucky Assoc. of Health Plans v. Miller, 538 U.S. 329, 341-342 (2003) (“[F]or a state law to be deemed a ‘law ... which regulates insurance’ under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, . . . the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.”) (citations omitted).