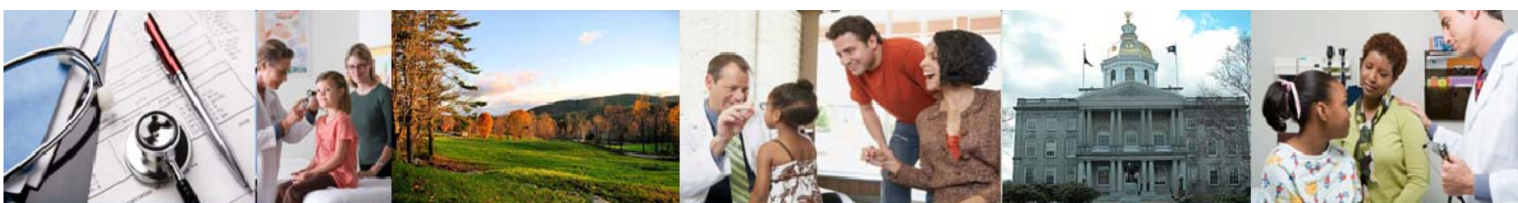
Analysis of New Hampshire Stop Loss Options



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Executive Summary

The purpose of this report is to assess options for regulating stop loss insurance in light of changing dynamics in New Hampshire's small group health insurance market. This report describes the New Hampshire small group health insurance market today, explores the potential impact of the Affordable Care Act ("ACA"), and assesses the need for and possible options with respect to stop loss regulation reform.

What is Stop Loss Insurance? Stop loss insurance provides protection from unanticipated and unusual costs to employers that "self-fund" health insurance. When employers self-fund, they retain the risk of high medical claims costs. Stop loss insurance helps self-funded employers hedge this risk by covering a defined level of catastrophic claims costs for individuals and/or for the group as a whole. For example, a stop loss policy with an individual "attachment point" of $75,000 will cover excess medical claims costs for any individual who exceeds $75,000 in claims in any given year.

Why Regulate Stop Loss for Small Groups? Stop loss regulations are intended to prevent an end run around rating laws in the small group health insurance market. Insurers selling health insurance to small groups (1-50 employees) are subject to rating laws designed to pool risk across the market – causing more predictability and stability for small groups purchasing health insurance. However, rating laws also result in higher rates for small employers with healthier than average employees. Because self-funding is not subject to small group rating laws, healthier small groups may seek to avoid rating laws by self-funding. Stop loss makes self-funding less risky, and therefore more attractive, for healthier small groups by covering claims above a designated attachment point. However, the lower the attachment point of the stop loss policy, the more it resembles risk-based insurance, rather than self-funding. And if too many healthy small groups leave the rate regulated risk-based market for unregulated self-funding with low-risk stop loss policies, rates for those left in the small group insurance market could spike, ultimately destabilizing the market overall and forcing small employers to drop coverage.

How Does Stop Loss Regulation Work? Stop loss regulation seeks to prevent such policies from becoming a mechanism for avoiding health insurance regulation by setting minimum attachment points, which require self-insured small groups to retain a certain level of risk. In 1995, following a wave of rate regulation in the small group market, the National Association of Insurance Commissioners ("NAIC") developed model stop loss legislation imposing a minimum individual attachment point of $20,000, and additional limits on aggregate attachment points. In 2004, New Hampshire became one of the few states to fully adopt the NAIC model. Today, nearly half of all states have adopted some form of stop loss regulation, some with higher and some with lower attachment points than New Hampshire. With the passage of the ACA, states will be required to implement a new round of small group market rate reforms in 2014, raising new concerns about how much risk a self-funded employer should be required to retain.

New Hampshire's Small Group Market

Small Group Rate Regulation. Because New Hampshire's small group regulation already includes several ACA-like features, it is possible that the ACA will have less impact than in other states where health status is currently an allowable rating factor, and rates are not already compressed. This may make New Hampshire less vulnerable to the market disruptions that may result from self-insurance and stop loss coverage in less regulated states. However, the ACA rating reforms are not identical to New Hampshire's and will likely cause at least some shifts in small group coverage. The elimination of group size as a rating factor may prove to be the most significant change in New Hampshire as some of the largest small groups (35-50 employees) may lose a significant rate break.

Small Group Stop Loss Regulation. New Hampshire currently requires self-funded small employers to retain responsibility for at least the first $20,000 in claims costs for each individual, and sets some additional requirements in accordance with the NAIC model. New Hampshire Insurance Department ("Department") regulations also require small employer stop loss carriers to file annual reports.

There appears to be a low prevalence of stop loss in New Hampshire's small group market today. Leading brokers and insurers in New Hampshire are not selling stop loss to small groups and report little interest in such a product from their client bases. However, a general lack of comprehensive information about small group stop loss in New Hampshire leaves significant questions as to both the number of self-funded small groups and the terms of their stop loss policies. Despite minimal stop loss filing activity, there were 900 self-funded small group market members in 2010, based on other data available to the New Hampshire Insurance Department. Whether the interest in and/or prevalence of stop loss will increase in 2014 remains to be seen.

National Environment

Although the exact impact of the ACA's market reforms will vary by state based on multiple factors, including the degree of current small group regulation and local market demographics, there appears to be a general consensus among state regulators that stop loss in the small group market needs to be reassessed in light of impending ACA reforms. Stop loss regulation is currently the subject of debate among state and federal regulators and market stakeholders across the nation struggling to understand (1) the potential impact of the ACA on a small employer's decision to self-fund, (2) the optimal minimum attachment point and/or regulatory approach to balance market stability and employer choice, and (3) whether there is adequate information to understand the impact of existing approaches to regulating stop loss in the small group market. In general, the goal is to strike a balance between controlling excessive "flight risk" – healthier groups leaving the insured market as their rates increase – through stop loss regulation, and "over-regulating" to the point where stop loss is not available for groups that can legitimately self-fund, potentially prompting some employers to drop coverage altogether.

Approaches to Stop Loss Regulation

Minimum Attachment Points. The primary regulatory approach to limiting the impact of stop loss has been to mandate minimum attachment points for stop loss insurance products. The question of whether $20,000 is still the optimal amount is at the center of the current national debate. The NAIC self-insurance subgroup recently recommended increasing the individual attachment point to $60,000 (from $20,000) and the minimum aggregate attachment point for small groups to the greater of: (i) $15,000 times the number of group members; (ii) 130% of expected claims; or (iii) $60,000. The committee plans to move this recommendation forward as proposed guidance, and public comment will be solicited.

Other Regulatory Approaches. Some states are concerned about the broader implications of stop loss coverage, including whether self-funding in the small group market undermines consumer protections. The California legislature is considering a bill that would prohibit stop loss carriers from excluding any employee or dependent of a small employer from stop loss coverage based on actual or expected health status, a practice known as "lasering." Pennsylvania requires stop loss carriers to certify that the employer's bankruptcy will not relieve the carrier from the obligation to pay claims, and Vermont requires several actuarial certifications to ensure actuarially sound ratings. North Carolina takes a different tack by prohibiting small group carriers from selling stop loss insurance or serving as third party administrators ("TPAs"), and requiring stop loss carriers to comply with small group rating laws.

Need for Better Data on Small Group Stop Loss. Although stop loss is being marketed in the small group market today, and national brokers and carriers report some, though limited prevalence, remarkably little data exists on the availability or terms of coverage (attachment points, pricing, contract terms, etc.). In late April 2012, federal officials issued a tri-agency request for information ("RFI") seeking to understand the current and emerging stop loss markets, and the prevalence and consequences of stop loss at low attachment points. The fact that the RFI was issued suggests that the federal government may be contemplating regulating stop loss at the federal level.

Regulatory Options

New Hampshire has a range of approaches to choose from when considering stop loss insurance regulation.

Option 1: Maintain the status quo. New Hampshire could decide that current law, including prohibiting the sale of stop loss insurance policies with an individual attachment point below $20,000 annually, provides the appropriate level of regulation. There is a set of competing considerations that are relevant to assessing this option.

- Current stop loss regulation appears to be well accepted in the New Hampshire marketplace.

- The two largest carriers, Anthem and Harvard-Pilgrim, support the current regulation and do not compete for Administrative Services Only (ASO) business in the small group market.

- Brokers report that it is difficult to obtain comprehensive claims data on small groups, which prevents stop loss insurers from being able to effectively underwrite small groups.

- Opposition among some stakeholders to expanded government regulation may make it difficult to enact new protections, at least in the absence of clear evidence of market failure.

- Medical inflation erodes the value of $20,000 individual attachment points each year, meaning that small businesses can self-fund more easily without assuming as much risk.

- Web-based advertising encouraging small groups to self-fund may put pressure on the New Hampshire marketplace to offer viable self-funding choices for groups with the most favorable claims trends.

Option 2: Increase attachment points. The NAIC is considering amendments to its 1995 model to increase individual and aggregate attachment points. New Hampshire could amend its law to follow any new attachment points adopted by the NAIC, or it could amend state attachment points independent of any NAIC action.

- New Hampshire's current stop loss regulation allows the Commissioner to increase attachment points based on medical inflation. While a medical inflation increase would be less than the increase the NAIC is considering (e.g., $25,000 medical inflation v. $60,000 NAIC individual attachment point) it provides New Hampshire Insurance Department with an immediate option.

- At this point, only one state has a higher attachment point than New Hampshire (Oklahoma is at $25,000) and it appears that most states are waiting for the NAIC to act before considering their options. California has pending legislation for a $60,000 individual attachment point.

- As of today there are no states to look to for evidence of what might happen in the market if New Hampshire doubled or tripled its current attachment points.

Option 3: Stricter regulation of stop loss. Stop loss regulation could be better calibrated if more was known about how the product is marketed to small groups, and if consumer protection standards were incorporated into stop loss regulation. New Hampshire could use its current regulatory authority more aggressively and could strengthen consumer protections. The Department could:

- Work proactively with the market to ensure current stop loss rate and filing requirements are understood and followed; this could provide more information about how stop loss is marketed to groups under 50 and whether there is need for additional regulation.

- Issue a data call with targeted follow-up.

- Enhance filing requirements, such as Vermont's requirement for robust actuarial information.

- Adopt consumer protections such as California's proposed ban on "lasering" or North Carolina's prohibition against small group carriers selling stop loss.

There is, however, an ERISA-based limitation on this strategy. Any such protections must be legitimate forms of insurance regulation and not backdoor attempts to regulate the employer's health benefit plan. There also will be a cost to any new regulations that must be balanced against the benefits.

Option 4: Ban stop loss for small groups. Three states ban stop loss for small groups. In New York and Oregon, the ban applies to groups with 50 or fewer employees. In Delaware, the ban applies to groups with 15 or fewer employees. New Hampshire could replace its current regulation of stop loss in the small group market with a ban on stop loss for groups with 50 or fewer employees.

- Supporters of a ban note that self-funding becomes much riskier as group size decreases, and that a clear cut-off line on stop loss is the most effective way to prevent groups from claiming to self-fund when they really are not prepared to assume the risks of self-funding.

- Opponents of a ban note that small groups already are self-funding with stop loss policies, and that this market should be allowed to grow and mature, with other, more calibrated regulation, such as minimum attachment points, as needed. Failure to allow this option could lead some small employers to drop health care coverage.

I. Introduction

The New Hampshire Insurance Department engaged Manatt Health Solutions ("MHS") to provide an assessment of options for regulating stop loss insurance in New Hampshire's small group market. Shifting dynamics in the small group market and rating reforms mandated by the Affordable Care Act have prompted a robust debate at the federal level and within the states about the appropriate role of stop loss insurance in the small group market. The small group market may become destabilized if small employers with the most favorable risk profile exit the fully insured market, leaving smaller and less healthy risk pools. Stop loss insurance could contribute to this kind of exodus if it is not carefully regulated. At the same time, efforts to regulate stop loss insurance, however well-intentioned, can become self-defeating if they result in employers dropping coverage altogether in an open and competitive marketplace where employers make decisions each year about whether and how to provide health coverage to their employees. This report considers several potential approaches to regulating stop loss insurance and the likely relative impact of each approach on adverse selection and small business choice in the small group market.

What is Stop Loss Insurance?

Employers who provide health coverage for their employees may either purchase health insurance to cover their employees' costs or "self-fund" those costs. When employers purchase health insurance for their employees, they pay their insurer a fixed premium to assume the risk of high claims costs. When employers self-fund, the employers retain the risk of high claims costs.

Stop loss insurance helps self-funded employers hedge this risk by covering a defined level of catastrophic claims costs for individuals and/or for the group as a whole. For example, a stop loss policy with an "individual attachment point" of $75,000 will cover excess claims costs for any individual who exceeds the $75,000 attachment point in any given year. Similarly, a stop loss policy with an "aggregate attachment point" of 120% of expected claims will cover excess claims costs if the group's total claims are more than 20% above projected costs.

By allowing employers to protect themselves against catastrophic risks, stop loss insurance makes self-funding a safer and better business proposition for employers who want a middle ground between being fully insured and fully bearing their own risk.

Stop Loss in the 1990s and Today

Stop loss insurance was traditionally marketed to large groups with high individual attachment points, so that the policies were relatively inexpensive and the employer retained most of the risk. However, the market for stop loss expanded in the early 1990s when a series of state small group rating laws were adopted and employers with better than average claims experience sought to avoid resulting rate increases. Self-funding is not subject to small group rating laws. Thus, self-funding, accompanied by stop loss coverage with low attachment points, emerged as an attractive alternative to traditional coverage for small employers with relatively healthy risk profiles.

Insurance regulators saw the increased interest in stop loss coverage as a threat to the stability of small group rating pools. They argued that a stop loss policy with, for example, a $10,000 individual attachment point was equivalent to a health insurance policy with a $10,000 deductible, and that such policies could prompt an exodus of healthy small groups, creating adverse selection and potentially destabilizing the remaining small group market. In 1995, the National Association of Insurance Commissioners adopted a Stop Loss Insurance Model Act "to recommend stop loss thresholds for coverage offered to employers who self-insure medical coverage for their workers." In particular, the working group was tasked with defining "the point at which a stop loss policy might be viewed as a subterfuge for a health insurance policy subject to state regulation."[1]

Chart 1: Select State Approaches to Stop Loss

Model	State	Other Information
NAIC Model	MN	None
	NH	Rate regulation
	VT	Actuarial certification
Other Attachment Points	AK	$10,000 individual; 120% aggregate
	CO	$15,000 individual; 120% aggregate
	MD	$10,000 individual; 115% aggregate
	NV	$10,000 individual; 120% aggregate
	NJ	$20,000 individual
	OK	$25,000 individual
	OR	$10,000 individual; 120% aggregate; ban for under 50
	PA	$10,000 individual; 100,000 aggregate; cut-through; stop loss is not reinsurance
Ban on Stop Loss	DE	Up to 15 employees; only applies to small group carriers
	NY	Up to 50 employees
	OR	Up to 50 employees

In 2004, New Hampshire became one of the few states that adopted the full NAIC model, including a minimum individual attachment point of $20,000 annually, meaning that self-

[1] NAIC legislative history, 1994 Proc. 3rd Quarter 650.

funded employees must retain financial responsibility for at least the first $20,000 in claims costs. Nearly half of all states have adopted some form of stop loss regulation, including two with higher minimum attachment points and several with lower individual attachment points than New Hampshire. Chart one provides examples of state regulation of stop loss insurance.

The debate over stop loss insurance has been rekindled with the passage of the Affordable Care Act, which requires states to adopt a new round of rate reforms for the small group market. As in the 1990s, the debate is largely driven by concerns about adverse selection and is focused on how much risk a self-funded employer should be required to retain.

Focus of this Report

The purpose of this report is to examine options for regulating stop loss insurance for the small group market in New Hampshire. The focus is on employers with 50 or fewer employees, the current small group market in New Hampshire.[2]

The report starts with a discussion in Section II of the current regulatory framework for the small group market in New Hampshire, including stop loss and rate regulation, describing how that regulatory framework is working today, and how the ACA rating reforms in 2014 may impact the market.

In Section III, we look at the national discussion of stop loss insurance and focus on three issues of particular importance to New Hampshire: assessing the impact of the ACA, setting minimum attachment points, and understanding the stop loss market. In each case, the national discussion helps illuminate New Hampshire's regulatory options and policy considerations. We also provide an overview of the legal limitations that ERISA imposes on state regulation of stop loss insurance. In essence, these limitations require states to stick to valid forms of insurance regulation and avoid regulation of employee benefit plans.

In Section IV, we offer four broad regulatory options and analyze the merits and limitations of each one.

- Maintain the status quo.
- Increase attachment points.
- Tighten regulation of stop loss.
- Ban stop loss for small groups.

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[2] The ACA mandates the expansion of the small group market to groups of 100 employees in 2016, and permits states the option of expanding earlier. Stop loss insurance regulation for groups of 50-100 raises a different set of issues that are not addressed in this report.

II. New Hampshire's Small Group Market

New Hampshire currently regulates its small group market with both modified community rating (similar but not identical to what the ACA requires) and stop loss minimum attachment points. While the ACA will require New Hampshire to adapt its current regulatory approach, the state may experience less market disruption than other states where markets are not similarly regulated and rates are not already compressed.[3] In this section, we describe New Hampshire's current small group market regulations and discuss the impact of specific regulatory changes under the ACA. We also describe the limited penetration of self-funding in the New Hampshire small group market today and consider possible contributing factors. This background provides a framework for evaluating potential approaches for regulating stop loss insurance in the state.

Small Group Rating in New Hampshire Today and Under the ACA

New Hampshire defines small employers as those with between 1 and 50 employees. Under this definition, small business owners and self-employed individuals can be counted as employees for purposes of calculating group size, and group market eligibility.[4] NH has only three permissible small group rating factors: age, group size and industry classification. Medical underwriting is prohibited, as is the consideration of any other group characteristics, including geographic location. New Hampshire law identifies eleven age brackets for rating purposes, and applies an overall 3.5:1 rate band for premium rate differentials.[5]

Chart 2: Regulation of New Hampshire's Small Group Market		
Regulatory Feature	Today	In 2014 Under the ACA
Medical Underwriting	Prohibited	Prohibited
Definition of Small Employers	1-50	1 -50*
Geographic Rating Areas	One	More than one permitted
Family Composition	Allowed	Allowed
Rating Factors	3.5:1 overall rate band	No overall rate band
• Age	Allowed	Allowed within a 3:1 rate band
• Group Size	Allowed	Prohibited
• Industry Classification	Allowed	Prohibited
• Tobacco Use	Prohibited	Allowed within a 1.5:1 rate band

**The small group definition expands to 1-100 in 2016. Note also that the federal definition is based on 1-50 employees, and, per federal guidance, excludes sole proprietors when counting employees. In contrast, current*

[3] As discussed later in this report, the New Hampshire Insurance Department has engaged Gorman Actuarial to assess the projected impact on New Hampshire's small group market of the ACA's small group rating reforms.
[4] N.H. Rev. Stat. Ann. §420-G:2 (2012).
[5] N.H. Rev. Stat. Ann. §420-G:4 (2012).

New Hampshire law includes owners and self-employed individuals when counting employees for group size calculation purposes.

Like New Hampshire, the ACA mandates a form of community rating as of 2014. Under the ACA, the allowable rating factors are: (1) rating areas (meaning that more than one geographic rating area factor could be developed by a state); (2) family composition (regulations still pending on degree of flexibility in this category; (3) age, within a 3:1 rate band; and (4) tobacco use within a 1.5:1 rate band.

The shift to ACA community rating in New Hampshire will have some impact on the market, as will New Hampshire's definition of the "essential health benefits" which the ACA requires all insured small groups to offer. The elimination of group size as a rating factor may prove to be the most significant change in New Hampshire as some of the largest small groups (35-50 employees) may lose a significant rate break depending, in part, upon the ways in which carriers allocate expenses across group size. These larger small groups are also the ones most likely to find self-funding feasible and attractive. Other changes are less likely to impact New Hampshire's small group market. The fact that New Hampshire already has a 3.5:1 rate band is likely to lessen the impact of the ACA's 3:1 age rate band on New Hampshire's small group market as compared to other states. The ACA also will allow New Hampshire the option to introduce rating variations based on geographic area, whereas today geography is not a permissible factor. The impact of such a change on New Hampshire's current small group market depends on the extent of geographic variation in the state.

One significant change for New Hampshire in 2014 that has the potential to improve overall experience in the small group pool and reduce administrative costs for carriers is the treatment of groups of one under the ACA. New Hampshire currently counts small business owners and self-employed individuals as employees for purposes of calculating group size. In 2014, federal guidance will likely redefine the small group market to exclude these individuals from counting as "employees" for small group calculation and eligibility purposes. This should improve the small group risk pool since so-called "groups of one" tend to have worse than average risk, though it may have an opposite impact on the individual market to the extent that currently covered groups of one convert from group to individual market policies.

The New Hampshire Insurance Department has engaged Gorman Actuarial to conduct an actuarial analysis of the ACA's projected impact on New Hampshire's small group market, including whether to anticipate change in the prevalence of self-funding. While the Gorman analysis will not be completed until September 2012, it will provide policy makers with helpful insight into the extent to which regulatory changes under the ACA are likely to contribute to shifts in small group coverage in the state.

Small Employer Stop Loss Regulation

New Hampshire currently follows the NAIC attachment point model of stop loss regulation and appears to have very low penetration of stop loss within the small group market.

Stop Loss Regulation

The individual minimum attachment point mandated under New Hampshire law is $20,000. The aggregate attachment point for groups of 1-50 must be lower than the greater of $4,000 times the number of group members, 120% of expected claims, or $20,000. Stop loss cannot provide direct coverage of an individual's health care expenses.

By statute, the Commissioner of the New Hampshire Insurance Department has authority to amend both the individual and aggregate attachment point dollar amounts, "upon consideration of the medical components of the Consumer Price Index (CPI)."[6] This provides New Hampshire Insurance Department with discretion to revise current attachment points without legislative action. If the Commissioner were to adjust current attachment points based on CPI alone, actuaries at the New Hampshire Insurance Department estimate a 25% increase in attachment points. This translates to an increase in the current individual attachment point from $20,000 to $25,000, and in the $4,000 used to calculate aggregate attachment points to $5,000.

New Hampshire Insurance Department regulations require small employer stop loss carriers to file annual reports detailing instances where a stop loss application was denied, or renewal rates were quoted at a greater than 20% increase. Rate and annual filings are also required. Stop loss carriers may underwrite potential groups, and there is no guaranteed issue in the stop loss market. However, when developing a rate for a small group, only three rating factors are permitted: age, group size, and industry.[7] Notably, the overall 3.5:1 rate band applicable to small group health insurance rates does not apply to stop loss rates. Rates are effective for an entire year and cannot vary as rating characteristics change throughout the year. New Hampshire law also provides that individuals covered under a stop loss policy are considered "covered lives" for purposes of the New Hampshire vaccine and high risk pool assessment bases.[8]

Market Penetration

There appears to be very little, if any, reported stop loss insurance in the small group market in New Hampshire today. This could be attributable to several factors: existing regulation may be impacting the offering of stop loss insurance; other non-regulatory market pressures may be deterring stop loss; or unreported/unaccounted for stop loss may exist in the small group market.

Regulation. The majority of brokers and insurers in New Hampshire are not selling stop loss to small groups, and report little interest in such a product from their client bases.[9] Moreover, the

[6] N.H. Rev. Stat. Ann. §415-H:3, III (2012)
[7] N.H. Code of Admin. Rules, Ins. 4105.04
[8] N.H. Rev. Stat. Ann. §404-G:2, V(d); 126-Q:1 (2012)
[9] Interviews with M. Proulx, Anthem Blue Cross and Blue Shield, June 7, 2012; B. Bergen, CGI, June 7, 2012; B. Roberts, Harvard Pilgrim Health Plan, June 15, 2012.

New Hampshire Insurance Department reports minimal filings for small group stop loss policies. Although some brokers do report both having existing clients and a market need for small group self-funding options,[10] one reasonable conclusion based on the lack of available reported data in addition to anecdotal evidence is that the current minimum attachment points appear to be a factor minimizing stop loss coverage in the small group market.

In 2009, the New Hampshire Insurance Department fined Health Management Advisors, LLC ("HMA"), a New Hampshire stop loss carrier, for several violations of New Hampshire law, including issuing stop loss policies below the mandated minimum attachment points.[11] The fine for violating this minimum attachment provision was $20,000, sending a signal to the larger New Hampshire broker community that violations of stop loss regulation will be taken seriously.[12]

Market Pressure. Market dynamics in New Hampshire also may be suppressing small employer stop loss offerings. First, the two largest insurers in NH, Anthem and Harvard Pilgrim,[13] do not currently offer self-funded options in the small group market. Whether or not this is the result of current stop loss regulations that restrict the scope and market potential of small group stop loss as a line of business, employers cannot purchase a product that carriers do not sell. Moreover, small employers in New Hampshire cannot access HMO provider network discounts if they self-fund,[14] and may not want to give up access to carrier provider networks, negotiated provider rates and balance billing protections in the insured market. Second, New Hampshire law does not require insurers to release claims data for groups under 50,[15] and insurers generally are hesitant to disclose such information, at least in part to protect the privacy of individual employees and deter discrimination based on health status. This may be restricting stop loss business, though the New Hampshire laws that allow underwriting but restrict rating practices in the small group stop loss market would appear to limit the value of claims data. Finally, there simply may not be an appetite for risk among small employers. Small businesses may find the insured high-deductible health plans in the $3,000 to $5,000 range to be plenty of risk-sharing (although borne by employees) and also may not have the cash flow to manage the unpredictable timing of large claims. Local brokers voiced their opinion that there will continue to be minimal interest in $20,000 attachment points in New Hampshire.[16]

Lack of Available Data. One real challenge in understanding the current market is the fact that there is a general lack of information about small group stop loss in New Hampshire today. New Hampshire regulations require certain filings of stop loss in the small group market, and,

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[10] Interviews with representatives for SIIA, June 20, 2012;
[11] N.H. Rev. Stat. Ann. §415-H:3 (2012.
[12] Interview with B. Bergen, CGI, June 7, 2012. See also http://www.nh.gov/insurance/legal/enforcement/2009enforders.htm for enforcement documents.
[13] Interviews with M. Proulx, Anthem Blue Cross and Blue Shield, June 7, 2012; B. Roberts, Harvard Pilgrim Health Plan, June 15, 2012.
[14] Interview with B. Bergen, CGI, June 7, 2012
[15] N.H. Rev. Stat. Ann. §420-G:12a (2012)
[16] Interview with B. Bergen, CGI, June 7, 2012.

based on discussions with the New Hampshire Insurance Department, it appears that there is minimal stop loss filing activity. This may be a reflection of the fact that there is currently very little, if any, stop loss being written for small employer groups in New Hampshire. However, a lack of filings does not necessarily and definitively reflect the current market. Data filings to the New Hampshire Insurance Department reflect approximately 900 self-funded small group market members in 2010, which raises questions as to what, if anything, the employers associated with these members are doing about stop loss insurance.[17] Significant questions remain as to both the number of self-funded small groups and the terms of their stop loss policies and the New Hampshire Insurance Department might consider developing and implementing a data collection initiative to better understand these questions.

Overall, New Hampshire appears to have a small group market in which most risk stays in the insured pool, and there is little evidence of self-funding. However, without better data on the groups that seek stop loss today and the terms of their policies, it is difficult to draw conclusions as to the driving forces behind the low prevalence of self-funded small groups and predict how these forces may shift in 2014.

[17] New Hampshire Insurance Department, Supplemental Report of 2010 Health Insurance Market in New Hampshire, 2012 April 10.; http://www.nh.gov/insurance/lah/documents/sup-rep_10.pdf

III. National Environment

Stop loss regulation is currently the subject of debate among state and federal regulators and market stakeholders across the nation struggling to understand (1) the potential impact of the ACA on a small employer's decision to self-insure, (2) the optimal minimum attachment point and/or regulatory approach to balance market stability and employer choice, and (3) whether there is adequate information to understand the impact of existing approaches to regulating stop loss on the small group market. These discussions at the national level and in other states can help inform New Hampshire as it evaluates its regulatory options.

The Impact of the ACA

Although the exact impact of the ACA's market reforms will vary by state based on multiple factors including the degree of current small group regulation and local market demographics, there appears to be a general consensus among state regulators that stop loss in the small group market needs to be reassessed in light of impending ACA reforms. In a modified community rating world, with no allowable rate differentiation for healthier groups or group size, and a rate that ultimately reflects the health risk of the entire small group market, employers that previously had better risk, and therefore rates, may see their rates increase significantly. Rates may be further influenced by new coverage requirements, such as limitations on cost sharing. At some point, those rates may drive employers with better risk either to self-fund or drop coverage altogether, leaving the relatively sicker, more expensive employer groups to constitute the small group market rating pool. This trend might be further exacerbated by the fact that a small employer who self-funds and then faces unexpected high claims risk can reenter the insured group market and do so without financial consequences for reentering as a group with higher claims costs.

This concern is reflected in the work of consumer advocates, such as Timothy Jost and Mark Hall, who have written about the potential for stop loss to fuel adverse selection in the small insurance market.[18, 19]

While this flight risk scenario argues in favor of stop loss regulation, there is a countervailing risk that too much regulation of stop loss might drive small employers to stop providing any form of health coverage. Stop loss carriers and advocates for self-funded groups have argued that the current regulatory parameters and market pressures are adequately addressing stop loss for small groups, and some industry representatives are actively advocating against enhanced regulation arguing that more stringent requirements could reduce participation in

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[18] Timothy S. Jost. Employers and the Exchanges under the Small Business Health Options Program: Examining the Potential and the Pitfalls. *Health Affairs*, 31, no. 2 (2012):267-274.

[19] 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.

the small group market. Indeed, the leading study assessing flight risk in the small group market under the ACA through predictive modeling found that while premiums for platinum plans offered through Health Benefit Exchanges would decrease 3.3% if small employers (1-100) were prohibited from self-insuring, the self-funding ban would also be associated with a decline in the total number of insured. Moreover, the predicted adverse selection from "flight" did not appear substantial enough to destabilize the market.[20]

It is worth noting that with the guaranteed issue mandate in individual markets starting in 2014, if employers drop coverage altogether their employees can purchase individual market policies. Thus, small group market "flight" may have a direct impact on the individual market risk pool as well.

Approaches to Stop Loss Regulation

The primary regulatory approach to limiting the impact of stop loss has been to mandate minimum attachment points for stop loss insurance products. However, states have developed a variety of other approaches, reflecting concern about whether self-funding in the small group market undermines consumer protections designed to help employees.

Minimum Attachment Points

The question of whether $20,000 is still the optimal minimum stop loss attachment point is at the center of the current national debate. Earlier this year, the NAIC self-insurance subgroup engaged Milliman, Inc. for actuarial analysis assistance in assessing the NAIC Stop Loss Insurance Model Act, created in 1995, and its attachment points set at that time, in the context of more recent claims experience. Milliman released its report, "Statistical Modeling and Analysis of Stop-Loss Insurance for Use in NAIC Model Act" on May 24, 2012, and based on the analysis, the NAIC self-insurance subgroup has recommended updated minimum attachment points. Specifically, the self-insurance subgroup recommends increasing the individual attachment point to $60,000 (from $20,000) and the minimum aggregate attachment point for small groups to the greater of: (i) $15,000 times the number of group members; (ii) 130% of expected claims; or (iii) $60,000. The subgroup is not recommending an increase to minimum aggregate attachment points for large groups. These recommendations were further discussed at an interim meeting of the health insurance and managed care committee on June 26th and 27th, 2012. The committee plans to move the recommendation forward as proposed guidance rather than a change to the current model law, and public comment will be solicited. It should be noted that the Self Insurance Institute of America, Inc. ("SIIA") disputes the subgroup's interpretation of the Milliman data, arguing that the data confirm $20,000 as the appropriate

[20] Eibner C.E., Girosi, F. Miller, A.Cordova, A. McGlynn, E.A. Pace, N.M. et al., Employer self-insurance decisions and the implications of the Patient Protection and Affordable Care Act as modified by the Health Care and Education Reconciliation Act of 2010. Santa Monica (CA): RAND Corporation; 2011, pp. viii, 56, 57.

individual attachment point. Also, both local and national carriers have expressed support for maintaining rather than increasing current attachment point levels.

The leading report on the topic by the Rand Corporation offers another view on the impact of minimum individual attachment points. Survey responses cited in that report indicate that stop loss attachment points across all firms, large and small, range from $20,000 to $300,000 with a "perceived average" of $125,000.[21] The "base case" model used in that report assumes $75,000 attachment points. At that level, the Rand modeling predicts no increase in self-funding among groups of 1-100; the percentage of workers in self-funding firms starts at 4% and stays at 4% in 2014. However, in the "low risk" model, which assumes that $20,000 attachment points are widely available and priced comparably to fully insured products, the modeling predicts an increase in self-funding from 4% of workers in the 1-100 market today to 16% in 2014. Because the increase is concentrated in the smallest firms (1-10 workers), the increase in percentage of firms self-insuring is even more dramatic, increasing from 4% to 33%.[22] While the Rand study is most commonly cited for its "base case" analysis ($75,000 attachment points), which indicates minimal changes in 2014, the "low risk" case ($20,000 attachment points) indicates a broader impact, especially among the smallest groups, with the caveat that Rand repeatedly notes the lack of information about how stop loss is priced and marketed to small groups.

Other Regulatory Approaches

States, too, are evaluating the optimal regulation of small group stop loss.

The California legislature is considering a proposal which would prohibit individual attachment points below $60,000. The proposed legislation would also prohibit stop loss carriers from excluding any employee or dependent of a small employer from stop loss coverage based on actual or expected health status, and would also require guaranteed renewal. This reflects an attempt to ban lasering, a practice in which a stop loss policy excludes or places a higher attachment point on certain individuals with ongoing or expected large claims to reduce the cost of the stop loss coverage. Under HIPAA, the employer is prohibited from discriminating against the higher cost employee based on their health status, meaning that the employer should be providing comparable insured coverage for that employee or continuing to cover the employee under the self-funded plan. But that could be a difficult matter to monitor, and there is also the concern that the insured pool suffers adverse selection when only the healthiest risks are lost to self-funding.

Pennsylvania currently requires the stop loss carrier to certify that the employer's bankruptcy will not relieve the carrier from its obligation to pay claims, and Vermont requires several actuarial certifications to ensure actuarially sound ratings. North Carolina takes a different tack

[21] Ibid., p. 20.
[22] Ibid., p. 52.

by prohibiting small group carriers from selling stop loss insurance or serving as TPAs, and requiring stop loss carriers to comply with small group rating laws.

These approaches reflect concern about whether self-funding in the small group market undermines consumer protections designed to help employees. This is generally not a concern in the large group market, where employees traditionally have more choices and richer health benefit plans. Large employers also tend to have more stable pricing due to market leverage when negotiating with insurers and the fact that large group size means more stable demographics in general. Small employers do not have this leverage, which is why the ACA focuses on the small group market as well as the individual market with rating reforms, minimum benefit standards (e.g., mandating essential health benefits and eliminating annual and lifetime caps), risk adjustment, and other reforms designed to protect individuals and employees. Only some of these protections apply to self-funded coverage, which means that the expansion of stop loss into the small group market may undermine consumer protection as well as destabilize risk pools. Moreover, while carrier solvency is regulated, employer solvency is not, creating a situation in which self-funded employers can place themselves at financial risk if they incur large claims below the attachment point threshold.

In addition to enhancing consumer protection, requirements such as Vermont's actuarial certification have the added benefit of providing regulators with information to better understand the terms of stop loss insurance within their states.

Limited Information on Small Group Stop Loss

Ideally, the impact of various stop loss regulatory approaches could be evaluated against the experience to date within the states. Unfortunately, remarkably little data exists on the availability of stop loss coverage in the small group market or the impact of various regulatory approaches on the stability of the small group market.

Stop loss is being marketed, and national brokers and carriers report some, although limited, prevalence today.[23] But little is known about the stop loss policies purchased by these self-funded small groups (attachment points, pricing, contract terms, etc.). Without fully understanding the status quo it is difficult to accurately assess upcoming market shifts. The Rand study confirms and is openly constrained by data limitations, including a lack of information on stop loss policies, and acknowledges that it would be useful to better understand existing stop loss policies before determining optimal minimum attachment points and other stop loss standards.[24]

We do know that some small employers are availing themselves of the option to self-insure with stop loss coverage. According to Rand, recent analyses reflect that 8% of employers with

[23] Interview with representatives for SIIA, June 20, 2012.
[24] Eibner, Employer self-insurance decisions, p. xiv.

between 3 and 49 employees offer at least one self-funded plan today (compared with 93% of plans with greater than 25,000 employees). Small groups (under 50) are most likely to self-insure if they are non-profit, have been in existence for more than 25 years, have some union workers, and are not in the transportation, communication or utilities industries.[25]

A review of broker and carrier websites indicates that both stop loss and self-funded plan administrative services are being marketed to small groups today. Cigna offers "administrative services for self-funded health plans . . . for employers with as few as 25 employees.."[26] Assurant states "Self-funded Health Plans could be for you if you have 10 to 50 employees."[27] With respect to stop loss services, A.M. Franklin "can provide stop loss on groups with as few as 10 eligible employees" and "Stop loss limits of $10,000+ are available, depending on state law;"[28] and IMG will "underwrite coverage for employers with as few as 11 participating employees, and with specific retention levels from as low as $5,000."[29] And, as in New Hampshire, small employer groups seeking a stop loss quote face lack of access to claims data as a significant barrier to offering stop loss in the small group market.[30]

Stop loss is being marketed to smaller groups online

- A.M. Franklin "can provide stop loss on groups with as few as 10 eligible employees" ... "Stop loss limits of $10,000+ are available, depending on state law."
- IMG: "We underwrite coverage for employers with as few as 11 participating employees, and with specific retention levels from as low as $5,000."

Insurers offering self-funded plans for smaller groups

- CIGNA offers . . . "administrative services for self-funded health plans" . . . "for employers with as few as 25 employees."
- Assurant: "Self-Funded Health Plans could be for you if you have 10 to 50 employees."

Overall, much more information is needed to understand the small employer self-funded market today. In late April, the federal Department of Health and Human Services, Department of Labor and the Internal Revenue Service issued a tri-agency request for information seeking to understand the current and emerging stop loss markets, and the prevalence and consequences of stop loss at low attachment points.[31] In general, the RFI is further evidence that there is a lack of available detailed information about stop loss policies, particularly those in the small

[25] Ibid., pp. 13, 16.
[26] Cigna website: http://www.cigna.com/grouphealthplans/index.html
[27] Assurant website: http://www.assuranthealth.com/corp/ah/HealthPlans/SESelfFunded.htm
[28] A.M. Franklin website: http://www.amfrms.com/smallgroup.htm
[29] IMG website: http://www.img-stoploss.com/about-img-stop-loss/IMG-sl-advantage.aspx
[30] Interview with representatives from SIIA, June 20, 2012.
[31] Request for Information Regarding Stop Loss Insurance, 77 FR 25788 (May 1, 2012).

group market. The information sought by the RFI includes usage, trends and prevalence; common attachment points; the process by which insurers make stop loss available to self-funded plans; loss ratios; administrative costs; whether there are minimum employee participation requirements for small employers; how states regulate stop loss; the effect of stop loss availability on small employers' decisions to offer insurance; and the impact of stop loss by small employers on the small group insured market. (The fact that the RFI was issued suggests that the federal government may be contemplating regulating stop loss at the federal as opposed to state level, where it has traditionally been regulated, and at times been subject to ERISA challenges.) Responses to the RFI should provide useful data and context for the New Hampshire Insurance Department. The Department may want to consider further refining its understanding of the current stop loss market by initiating data collection initiatives in New Hampshire. Such collection could take the form of a data call with targeted follow-up, or enhanced regulatory filing requirements.

Legal Challenges to Stop Loss Regulation

Given the connection between stop loss and the associated underlying employee benefit plan, the state regulation of stop loss is vulnerable to ERISA preemption challenges with the risk of such a challenge related to the degree of regulation. ERISA preemption is a complex legal analysis, the full scope of which is beyond the focus of this report. However, New Hampshire policy makers do need to keep a basic framework in mind as they consider options for regulating stop loss, as the full scope of regulatory options is demarcated by ERISA.

ERISA pre-emption analysis has three components: ERISA pre-empts state laws relating to employee benefit plans; state laws regulating insurance are saved from preemption (the "Savings Clause"); and employee benefit plans shall not be deemed insurance companies, insurers or engaged in the business of insurance for purposes of state laws regulating insurance.[32] In short, states can regulate insurance but not employee benefit plans, and self-funded plans are not in the business of insurance.[33]

The most well-known case involving ERISA preemption of stop loss challenged a Maryland regulation that set minimum attachment points and considered stop loss policies issued below those levels to be health insurance policies. The 4th Circuit struck down the law, finding that the regulation used stop loss policies as a vehicle to impose requirements of Maryland health insurance law, including state mandated benefits, on self-funded ERISA plans. American Medical Security v. Bartlett, 111 F. 3d 358 (4th Circuit 1997). The court did, however, affirm

[32] 29 USC 1144(a) and (b)(1)-(2)
[33] There is a large body of case law interpreting ERISA preemption, and assessing whether a state law (1) relates to employee benefit plans and is thus preempted by ERISA, and (2) regulates insurance and is thus saved from preemption. The applicable test for determining whether a state law regulates insurance has evolved over the years, and was most recently revised in Kentucky Association of Health Plans v. Miller, 538 U.S. 329 (2003). In Kentucky, the Court describes the key questions as (1) is the law specifically directed toward entities engaged in insurance, and (2) does the law substantially affect the risk pooling arrangement between insurer and insured.

that states have the right to regulate stop loss – just not with the statute at issue, which went too far in attempting to mandate the benefits self-funded plans must cover. It is also important to note that Bartlett was decided before Kentucky Assoc. of Health Plans v. Miller, 538 U.S. 320 (2003) in which the Supreme Court revised the test for determining whether a state law regulates insurance (and thus is saved from ERISA preemption).

Other courts have upheld the application of premium taxes to stop loss carriers (even when the tax was calculated based on payments of the underlying employee benefit plan), and requiring stop loss carriers to contribute to state assessment pools and file policies for review. See General Motors Corporation, et al. v. California State Board of Equalization, et al., 815 F. 2d 1305 (9th Circuit 1987) finding the tax is intimately associated with the business of insurance and does not run afoul of the deemer clause because it is imposed on insurance companies and not benefit plans. See also Texas Dept. of Insurance v. American National Insurance Co., 55 Tex. Sup. J. 705 (2012) explaining that under ERISA's savings clause and the Supreme Court's decision in Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) the state can regulate stop-loss insurers as it does other direct health-care insurers and require them to contribute to state pools and submit policies for review.

A separate but related question in cases addressing state regulation of stop loss, is whether stop loss is insurance or reinsurance. The courts have generally followed the standard insurance regulator approach to distinguishing insurance from reinsurance, which is that reinsurance is insurance sold to an insurance company. See, e.g., Texas Department of Insurance; McDaniel v. North American Indemnity, 2008 WL 1336832 (S.D. Ind.) ("As a matter of law under ERISA, the plans were not in the business of insurance.... Because the plans themselves were not in the business of insurance, then, NAI was acting as the plans' insurer...and not as a reinsurer of insurance companies providing primary coverage to the plans"), and Edstrom Industries, Inc. v. Companion Life Insurance Company, 516 F.3d 546, 551 (7th Circuit 2008) ("Stop loss is an insurance policy for losses that the insured self-insured up to the limit of the deductible. [employer] is not an insurance company, but an insured....[stop loss carrier] is not a reinsurance company, but an insurance company").

The New Hampshire Supreme Court's decision in New Hampshire Motor Transport Association Employee Benefit Trust v. New Hampshire Insurance Guaranty Association, 154 N.H. 618 (S. Ct. N.H. 2006) is not inconsistent with this approach. In that case, the NH Motor Transport Association (the "Trust"), a non-profit Multiple Employer Welfare Arrangement ("MEWA"), existed to provide health benefits to its member's employees. Member employers contributed a fixed amount per employee and the Trust administrator paid employee health claims out of the employer contributions. The Trust purchased an excess loss insurance policy from an insurance company that was subsequently liquidated, and the Trust sought coverage under the New Hampshire Insurance Guaranty Association Act and the New Hampshire Life & Health Guaranty Association Act for outstanding amounts owed to it by the excess loss carrier. The Court considered both whether the Trust was an insurer and whether the excess loss policy it purchased was direct health insurance. The Court found that the Trust was an insurer for purposes of reimbursement under the New Hampshire Insurance Guaranty Association Act, which barred reimbursement to "insurers." However, given the facts of the case, including that the entity purchasing stop loss (the Trust) was a MEWA, and that NH law explicitly deems MEWAs to be insurers for purposes of NH law regulating health insurance, it does not necessarily follow that an employer purchasing stop loss directly on its own behalf is also an "insurer" under NH jurisprudence. As for the second question, the Court found that stop loss was not "direct" health insurance for purposes of the New Hampshire Life & Health Guaranty Act (direct health insurance policies are eligible for reimbursement under the Act) because the Trust was not insured against its own illness or injury. The Court left open the possibility that stop loss could properly be considered health insurance, which is consistent with the position that states can regulate the stop loss product and insurers. [34] Moreover, the Court does not preclude an alternative assertion that stop loss is a form of direct insurance, subject to state regulation, albeit not direct "health" insurance.

Overall, New Hampshire, when considering regulation of stop loss, should keep in mind the distinction between regulating the stop loss insurance and the underlying benefit plan – there is no bright line test, but, as a general guideline, the more aggressive the regulation, the more susceptible it is to an ERISA challenge.[35]

[34] 154 N.H. 618, 625 (2006)

[35] The Self-Insurance Institute of America is arguing that California's proposed bill is likely preempted by ERISA as ERISA prohibits states from imposing regulations that affect the administration of self-funded group health plans and the legislation would restrict employer risk transfer arrangements, directly affecting plan administration. SIAA letter to CA Senate Health Committee dated 4/17/12 in opposition to SB1431. http://www.siia.org/files/DEFEAT_SB1431/SIIA%20Comments%20-%20Oppose%20SB1431.pdf

IV. Regulatory Options

New Hampshire may choose from a range of approaches to regulating stop loss insurance. In this section, we present and analyze four potential regulatory options:

- **Option 1: Maintain the status quo.** Current New Hampshire law follows the 1995 NAIC model in prohibiting the sale of stop loss insurance policies with an individual attachment point below $20,000 annually. The law also includes limits on aggregate attachment points based on group size and regulates the rating factors that may be used in pricing the product. *New Hampshire could decide that current law provides the appropriate level of regulation.*

- **Option 2: Increase attachment points.** The NAIC is considering amendments to its 1995 model that may increase individual and aggregate attachment points. *New Hampshire could amend its law to follow any new attachment points adopted by the NAIC, or it could amend state attachment points independent of any NAIC action.*

- **Option 3: Stricter regulation of stop loss.** Stop loss regulation could be better calibrated if more was known about how the product is marketed to small groups, and if standard consumer protection standards were incorporated into stop loss regulation. *New Hampshire could use its current regulatory authority more aggressively and could strengthen consumer protections.*

- **Option 4: Ban stop loss for small groups.** Three states ban stop loss for small groups. In New York and Oregon, the ban applies to groups with 50 or fewer employees. In Delaware, the ban applies to groups with 15 or fewer employees. *New Hampshire could replace its current regulation of stop loss in the small group market with a ban on stop loss for groups with 50 or fewer employees.*

Discussion of Option 1: Status Quo

The fact that New Hampshire has a stop loss regulation in place that appears to be working well makes the status quo an option to consider. While the ACA-required rating reforms scheduled for implementation in 2014 will create some new market dynamics, they may be less of an issue in the New Hampshire small group market than in other states. As discussed in Section II, New Hampshire currently has a 3.5:1 rate band in the small group market and prohibits the use of health experience in rating. This means rate compression in 2014 will not be as pronounced as it is in other states with broader rate bands and use of health experience today.

A countervailing consideration is that, other than age, the most important rating factor in the current New Hampshire market is group size, which will be eliminated in 2014. This means that the largest of the small groups (35-50 employees) may lose an important rating advantage in 2014. These larger groups help enlarge and stabilize the small group pool today, and they are the groups most likely to be a target market for those promoting self-funding, especially with the safety net of community rating should their claims experience deteriorate.

Other Considerations

- Current stop loss regulation appears to be well accepted in the marketplace, particularly after a 2009 enforcement action in which an out-of-state broker was fined for violating the stop loss regulations.
- The two largest carriers, Anthem and Harvard-Pilgrim, support the current regulation and do not compete for ASO business in the small group market.
- The Self-Insurance Institute of America interprets the NAIC-commissioned Milliman study to support $20,000 individual attachment points, but not higher ones.
- Brokers report that it is difficult to obtain comprehensive claims data on small groups, which prevents stop loss insurers from being able to effectively underwrite small groups.
- Opposition among some stakeholders to expanded government regulation may make it difficult to enact new protections, at least in the absence of clear evidence of market failure.
- Medical inflation erodes the value of $20,000 individual attachment points each year, meaning that small businesses can self-fund more easily without assuming as much risk.
- The volume of web-based advertising encouraging small groups to self-fund is likely to increase demand for stop loss coverage and put pressure on the New Hampshire marketplace to offer viable self-funding choices for groups with the most favorable claims trends.

Discussion of Option 2: Higher Attachment Points

A second option for New Hampshire would be to increase its attachment points, especially the $20,000 individual attachment point. The current regulation anticipates the possibility for increases by providing the procedure discussed in Section II for the Department to increase attachment points based on medical inflation. The Department's consideration of this option can be informed by the Milliman study and other work that the NAIC is doing to determine whether the NAIC model should be updated.

The NAIC has not come to a final decision yet, but, as discussed in Section III, a preliminary recommendation, based on the Milliman analysis, called for increasing the individual attachment point to $60,000 and the aggregate attachment point to 130% of expected claims for groups up to 50 employees. That recommendation is disputed by SIIA, which interprets the Milliman data to support leaving the attachment points at the 1995 levels. If the NAIC were to approve substantial increases in attachment points, that decision would merit careful consideration by the New Hampshire Insurance Department, including the degree to which the changes could be accomplished under the current regulation. The Department could also look to other states, but it appears that most states are waiting for the NAIC to act before considering their options. At this point, only one state has a higher attachment point than New Hampshire (Oklahoma is at $25,000). California has legislation pending that would set individual attachment points at $60,000, but today there are no states to look to for evidence of what happens if attachment points are double or triple New Hampshire's current levels.

Other Considerations

- If New Hampshire's current attachment points were increased to keep pace with medical inflation, the new attachment points would be $25,000 per individual and the lower of the greater of $5,000 x the number of group members; 120% of expected claims; or $25,000.

- Minnesota and Vermont are the only other states to join New Hampshire in adopting the full 1995 NAIC model, including $20,000 individual attachment points. (Vermont has incorporated additional requirements, as described above.) Other states, including Maryland and Nevada, have adopted $10,000 individual attachment points. See Chart 1 on page 2.

- The current NAIC study reflects broad concern among the states that current attachment points may be too low, especially given the added incentives to self-fund when the ACA-required reforms are implemented in 2014.

- The federal government is also taking a careful look at the potential for self-funding to destabilize small group risk pools in 2014, as reflected in the tri-agency request for information that is pending.

- Average stop loss attachment points for the large group market are generally much higher. The Rand study reports on a survey that found individual attachment points, across all firms large and small, ranging from $20,000 to $300,000 with a "perceived average" of $125,000.

Discussion of Option 3: Tighten Regulation of Stop Loss

New Hampshire has a number of regulatory provisions applicable to stop loss that go beyond regulating attachment points. These provisions include rate and form filing requirements and compliance with certain rating rules. The Department's aggressive action against one company that was violating the rules appears to have resonated with other carriers and brokers. The Department may want to consider assessing its current filing requirements and working proactively with the market to ensure they are understood and followed. This kind of engagement could provide more information about how stop loss is marketed to groups under 50 and whether there is need for additional regulation.

The Department might also consider data collection efforts beyond the filing requirements of current regulations. Given the apparent gap between self-funded lives in the small group market and available information on stop loss policies and practices, the Department could issue a data call with targeted follow-up. Other options include enhancing the filing requirements applicable to stop loss carriers to include more robust actuarial information, similar to that required by Vermont.

The Department also could consider adopting one or more of the approaches taken by other states, described in Section III, that go beyond setting minimum attachment points. For the reasons described in that section, consumer protections are a particular concern in the small group market, where employers have less bargaining power with insurers. Another option is to require stop loss carriers to issue “tail” coverage so that claims incurred during the coverage period would be covered regardless of when reported.

To the extent that consumer protections applicable to small group insurance are extended to stop loss, the state will insure that small businesses are not self-funding to avoid specific consumer protections. There is, however, an ERISA-based limitation on this strategy, which is that any such protections must be legitimate forms of insurance regulation and not backdoor attempts to regulate the employer’s health benefit plan. There also will be a cost to any new regulations that must be balanced against the benefits.

Discussion of Option 4: Ban Stop Loss for Small Groups

Three states – Delaware, New York, and Oregon – have banned stop loss for small groups. This is the simplest and most direct way to protect against adverse selection and ensure equal treatment for consumer protection purposes. Supporters of a ban note that self-funding becomes much riskier as group size decreases, and that a clear cut-off line on stop loss is the most effective way to prevent groups from claiming to self-funding when they are not really prepared to assume the risks of self-funding.

Opponents of a ban note that small groups are already self-funding with stop loss policies, and that this market should be allowed to grow and mature, with other, more calibrated regulation, such as minimum attachment points, as needed. Failure to allow this option could lead some small employers to drop health care coverage.

V. Conclusion

New Hampshire has a range of options for regulating stop loss in the small group market. As the Department evaluates the various approaches and considerations outlined in this report, it will have several opportunities to gain more information. For example, the Department could assess whether and how to implement data collection to better understand the current stop loss market in New Hampshire. Responses to the tri-agency stop loss RFI should also provide useful context for understanding stop loss on a national level. The Department also can use the forthcoming Gorman analysis for insights into the expected ACA impact on New Hampshire's small group market, and closely track the NAIC process for updating the stop loss model act attachment points. In particular, it will be useful to follow the competing arguments in the emerging debate as to whether the NAIC should retain the current $20,000 individual attachment point in its stop loss model, increase the individual attachment point to $60,000, or find some middle ground. Each of these activities will provide New Hampshire with more information and context for making important policy decisions as to small group market stop loss regulation.