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Submitted electronically on October 10, 2017

To:

Vermont Department of Financial Regulation
89 Main Street, Montpelier VT 05602 – 301
Attention: Gavin Boyles (gavin.boyles@vermont.gov) & Emily Brown (emily.brown@vermont.gov)

RE: Comments on Health Care Stop Loss Insurance, 2017 Amendment (H-2009-02)

Thank you for the opportunity to comment in response to the Department of Financial Regulation's (DFR) proposed Health Care Stop Loss Insurance, 2017 Amendment (Proposed Amendment).

DFR plays an important role in realizing Vermont's goal of creating an affordable, accessible, and innovative unified health care system that empowers Vermonters. One specific way that DFR contributes to this goal is by regulating stop loss insurance. We are concerned that the Proposed Amendment, by reducing the minimum stop loss insurance requirements for small employer, does not advance Vermont's goal of creating an affordable, accessible, and innovative health care system.

The Proposed Amendment will reduce the minimum requirements for small employers to self-insure. This reduction is on top of recent changes to stop loss insurance requirements that substantially reduced minimum small employer stop loss requirements. The proposed reductions to the stop loss requirements has the functional effect of further promoting self-insurance. By further promoting self-insurance, the Proposed Amendment undermines ongoing health care reform efforts while simultaneously not offering adequate consumer protections or adequate minimum health insurance coverage. Lastly, the Proposed Amendment will likely negatively impact the single risk pool thus magnifying the detrimental impact of the Proposed Amendment on Vermont's health care system.

We organize our comments on the Proposed Amendment into six topics: (1) supporting Vermont's health care reform efforts, (2) protecting employees, (3) protecting employers, (4) protecting the single risk pool, (5) evaluating the sufficiency of the scientific justification, and (6) improving the Proposed Amendment's language.

Supporting Vermont's Health Care Reform Efforts

Vermonters have devoted substantial effort to realize the health care reform goals codified in Act 43.

Self-insurance fragments Vermont's health care system and undermines health care reform efforts because it exists largely outside state health care regulatory schemes. We recognize that DFR is severely limited in its ability to regulate self-insurance. However, by regulating stop loss insurance, DFR can change the incentives for employers to self-insure and thus the likelihood of fragmenting the Vermont health care system. To protect Vermonters, DFR should make it more difficult to self-insure rather than making it easier.

Protecting Employees

There are three ways that the Proposed Amendment will negatively impact Vermont employees.

First, unlike plans purchased on the commercial market, employer self-insured plans are not required to provide minimum essential coverage under the Affordable Care Act nor are they subject to most Vermont regulations and consumer protection laws. Even if current self-insured plans offer sufficient coverage, this could change at any time.[1] Therefore, DFR should not alter stop loss rules to make it easier for small employers to self-insure using the argument justification that self-insured health care plans are equal to fully insured plans.

Second, in most cases, employer self-funded health insurance makes employees, and in many cases their families, ineligible to receive cost sharing reductions (CSR) and/or Premium Tax Credits (PTC). These cost-reducing items could make insurance purchased on Vermont Health Connect more affordable than the employee portion of self-insured employer health insurance. This lack of eligibility is less of a concern when employers provide employee health insurance plans purchased on the commercial market as employees are guaranteed minimum essential coverage under the Affordable Care Act. However, employer self-insured plans are not required to provide minimum essential coverage. There is a real risk that self-funded plans might require employees to pay more for less.

Third, self-insuring incentivizes employers to discriminate against employees who increase their health care costs such as individuals who are disabled, who have chronic health conditions, who are pregnant, who are elderly, and/or who have families. This discrimination can take the form of not hiring the individual, firing the individual, or refusing to accommodate employees with these characteristics so that they will quit. Although in many situations this is illegal activity, it is exceedingly hard to prove and therefore the laws against these types of actions are likely insufficient to protect consumers.

The lack of eligibility for CSR and/or PTC, the fact that self-insured plans do not guarantee minimal coverage standards, and the potential incentivization of discrimination raises serious consumer protection concerns.

Protecting Employers

The Proposed Amendment lowers the reserves that a self-insuring small employer must hold to cover employee health care costs. DFR highlights that by reducing these reserves small employers will be able to invest money that they previously had to hold in reserve back into their company and the Vermont economy.

Reserves, however, are a necessary component of employers being able to cover claim costs in a year with adverse claims experience. In most cases, employers who self-insure need to be able to cover employee claims as they become due and are only later reimbursed for claims by the stop loss insurance carrier. Further, there are fewer prohibitions against insurers suddenly dropping stop loss coverage than commercial health care coverage potentially leaving an employer liable to cover all claims costs until a new stop loss insurance plan can be procured. In light of these facts, any claims that the Proposed Amendment will increase employer cash flow and benefit the Vermont economy must be balanced against the risks to employees and employer solvency due to payment timing, coverage cessation, and reduced employer reserves.

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[1] Self-insurance providers may argue that small group, self-insured health plans offer employees comparable coverage to plans offered on Vermont Health Connect. However, there is no means to establish whether this is in fact true. Neither DFR nor the U.S. Department of Labor collects information regarding the coverage offered by self-insured small employers. There is simply insufficient information to determine whether employees will be provided adequate coverage in the instance that small employers choose to self-insure.

Protecting the Single Risk Pool

DFR asserts that the Proposed Amendment will have a minimal effect on the single risk pool. This conclusion is premised on (1) the validity of the data used to support this assertion and (2) that a complete assessment of how the Proposed Amendment could impact the single risk pool was conducted. Both of these premises are false.

DFR states that its estimation of the Proposed Amendment's impact on the single risk pool is based on the "carrier provided data." DFR cannot substantiate that the "carrier provided data" is reliable, accurate, or unbiased. This is because DFR *cannot require* that self-insurance providers share claims data. Rather, DFR must simply *ask* such entities to voluntarily provide data. There is no legal requirement that self-insurance providers share with DFR data that is representative, unbiased, or even true. This is a more than an abstract concern as self-insurance providers have a vested financial interest in being able to sell their product to as many small employers as possible. Given this fact, the appropriate stance to the volunteered data should be, at a minimum, extreme skepticism. DFR, however, treats the data as if it is reliable.

In addition to the issue of using unreliable data, DFR fails to accurately understand the potential impact of the Proposed Amendment on the single risk pool. DFR correctly identifies that the Proposed Amendment will cause healthy people to leave the single risk pool. This, however, is only one part of the Proposed Amendment's impact on the single risk pool.

The effect of the Proposed Amendment on the single risk pool is twofold due to the fact that small employers can cease self-insuring and enter the single risk pool, at any time, via the SHOP program. The impact of employers self-insuring on the single risk pool is thus not just the removal of healthy individuals from the single risk pool. Once employees become unhealthy, the employer can insert an unhealthy group back into the single risk pool by enrolling in the SHOP marketplace. This dual movement of removing healthy individuals and inserting an unhealthy group back into the single risk pool has the potential to gravely harm the single risk pool. DFR fails to even acknowledge this potential phenomenon when estimating the potential impact of the Proposed Amendment on the single risk pool.

Evaluating the Sufficiency of the Scientific Justification

DFR commissioned the actuarial firm Oliver Wyman to estimate the impact of the Proposed Amendment on employer risk ceding and employer insurance cost. The Oliver Wyman report (Report) uses five microsimulations to estimate the impact of the Proposed Amendment. There are five problems with the Report. Each of these problems severely undermines the Report's validity.

First, the results of only five microsimulations are insufficient to evaluate the complex effects of the Proposed Amendment. The Report thus provides DFR and the public inadequate evidence to evaluate the Proposed Amendment.

Second, the Report asserts that self-insuring employers retain sufficient risk even with a reduction to the minimum aggregate stop loss (ASL) attachment point. To justify this finding, the report uses microsimulations of which eighty percent are for group sizes of fifty or larger. By presenting the majority of microsimulations for groups of fifty or larger, the Report minimizes the amount of risk a small employer is likely to cede because groups smaller than 50 will always have a higher probability of having claims experiences that result in ceding more risk to the insurer. In short, the Report conducted microsimulations that will logically have outcomes that are most favorable to the Proposed Amendment.

Third, eighty percent of the microsimulations use individual stop loss (ISL) attachment points that are substantially above the minimum ISL attachment point. Higher ISL attachment points will always result in the employer ceding less risk to the insurer. The Report's use of higher than minimum ISL attachment points in the microsimulations minimizes the amount of risk that an employer is likely to cede to the insurer. By using a higher than minimum ISL

attachment point, the Report conducted microsimulations that will again logically have outcomes that are most favorable to the Proposed Amendment.

Fourth, there is a major research design problem with the Report's method. The Report's method does not estimate the harm the Proposed Amendment will do to Vermont's efforts to realize a unified health system. The Report myopically focuses on risk ceding and overall employer costs. We recognize that risk ceding and employer costs are important factors to consider when evaluating the Proposed Amendment. However, these factors are not the only factors that must be considered when evaluating the effects of the Proposed Amendment and the Report's focus on these elements to the exclusion of other leads to inaccurate and biased results.

Lastly, at a minimum, a scientific justification for the Proposed Amendment should recognize the full universe of key evidence related to small group stop loss insurance. There is substantial evidence, not mentioned in the Report or by DFR, that small group stop loss insurance is problematic. This evidence is from sources as varied as the National Association of Insurance Commissioners (NAIC), New York State, and consumer protection organizations.[2] At best, the exclusion of such evidence gives the appearance of a biased study. At worst, the exclusion of relevant evidence exposes foundational flaws in the Report.

We do not believe that the scientific evidence that DFR relies upon is sound. We note that the Report, by its very design and implementation, produces data that can only support the Proposed Amendment. We also note that neither the Report nor DFR acknowledges evidence that does not support the Proposed Amendment.

Technical Language Comments

Lastly, the language of the Proposed Amendment is ambiguous. Section 4(A) should be altered to clarify that self-insuring employers who purchase stop loss insurance must purchase both ISL and ASL insurance. The rule should also be altered to clarify that stop loss coverage must meet each of the elements specified in 4(A) (a)-(e). Lastly, we encourage DFR to alter the Proposed Amendment to include coverage renewal, rate alteration, and insurance provider liability in the instance of employer bankruptcy provisions as required by other jurisdictions and recommended by consumer advocacy groups.[3] We provide example language for each of the suggested alterations in *Attachment A*.

We urge DFR to not adopt the Proposed Amendment. A reduction in the minimum ASL attachment point for small employers will place Vermont employers, Vermont employees, and the single risk pool at substantial risk.

Thank you for considering these comments.

Sincerely,

/s/ Michael Fisher

Michael Fisher
Chief Advocate, Office of the Health Care Advocate.

[2] Milliman, Inc. 2012. Statistical Modelling and Analysis of Stop-Loss Insurance for Use in NAIC Model Act. NAIC; Chollet. 2012. Self-Insurance and Stop-Loss for Small Employers. NAIC; New York Insurance Law §§ 3231(h) and 4317(e); Abbot, Bach, Bimbaum, Burns, Corlette, Dittre, … Zeldin. 2012. Implementing the Affordable Care Act's Insurance Reforms: Consumer Recommendations for Regulators and Lawmakers.

[3] *E.g.* LA Rev Stat §22:883; Abbot ET AL., *supra* note 2.

Attachment A: Suggested Proposed Amendment Language Alteration

Requirement of ISL, ASL, Direct Coverage, and Exclusion Provision

A. Each health care stop loss insurance policy or contract issued or renewed by an insurer must meet each of the following four conditions:

a) Have an annual attachment point for claims incurred per individual which is at least $28,759;

b) Have an annual aggregate attachment point~~, for Small Employers, that is the at least the greater of~~

i. For Small Employers, that is at least the greater of:

~~i.~~ a. $5,700 times the number of employees

~~ii.~~ b. 120 percent of expected claims; or

~~iii.~~ c. $28,750;

~~c)~~ ii. For groups other than Small Employers, that is at least 110 percent of expected claims;

~~d)~~ c) Not provide direct coverage of health care expenses for an individual;

~~e)~~d) For Small Employers, not exclude from coverage any individuals who are covered by the underlying group health plan.

Coverage Renewal Provision

All applications for stop-loss insurance must include the option to purchase coverage extending the coverage term for at least one hundred and twenty days beyond the expiration of the original coverage term.

Rate Alteration Provision

The stop-loss insurance policy shall provide coverage with rates not subject to increase by the stop-loss insurer during the policy period, unless any of the following occur:

a) There is a change in the benefits provided under the group health plan initiated by the employer.

b) Enrollment under the group health plan changes by at least fifteen percent.

Liability of Insurer in the Instance of Employer Bankruptcy

The stop-loss insurance policy shall contain a provision stating that the bankruptcy or insolvency of the insured shall not relieve the stop-loss carrier from its obligations to pay claims incurred prior to the insured's bankruptcy filing.