Comments of the writer
Due to economies of space, the writer's suggested stop-loss changes are offered without discussion or elaboration. Such however, are available on the SIIA Web Site at www.siia.org where this critique is set forth in its entirety. The writer has no illusions that these suggested changes will get rave reviews from any or all vendors; nor that the fortunes of self-funding will greatly suffer if they are not (in whole or part) embraced. Yet, the writer is prepared to demonstrate to all skeptics how and why each suggestion is practicable, needed, appropriate and in the best interest of self-funding.

Suggested Stop-Loss Changes

Overview

The *playing field* between self-funding and its competition continues to shift. Recent legislation (HIPAA, Gramm-Leach-Biley, e.g.); aggressive state actions (newer forms of mandates such as prompt payment and claims review, e.g.): court decision which weaken the preemption provision of ERISA; financial and competitive challenges of insurers and MCOs; and the lessoning of managed care as a viable cost containing option have all influenced the popularity and viability of the various funding methods in significant ways.

The primary challenges to self-funding in the near future will come from ASO arrangements where the insurer plays to its strength (name recognition, computer systems, good networks, competitive stop-loss) but allows the claims and recordkeeping, administration, consulting and risk management functions to be subcontracted to a local TPA which will be doubtless ***connected*** to the computers of the insurer.

Self-funding has many strengths, which will permit it to survive and prosper, but there are two areas which need attention (in the opinion of the writer):
Lack of strong risk management disciplines by the TPA
Stop-loss changes.

Risk Management Guide to Self-Funding is a critique elsewhere. This critique deals only with stop-loss [illegible]

By Carlton Harker

Areas in which stop-loss changes might be helpful are as follows:

Aggregate Advances

The TPA should offer an aggregate advance as an administrative service. The aggregate advance should not be confused with the specific advance. Carefully-crafted, attorney-prepared language in the TPA-Employer plan supervisor agreement is essential.

Aggregate Audits

The goal of the carrier's aggregate audit should be to (a) bring the primary (employer) and secondary (carrier) into close harmony, (b) improve the quality of the services each offers to the other and (c) enhance the image and true value of self-funding. The aggregate audit should not be limited to a review of aggregate claims but rather should be a part of the carrier's due diligence review of the TPA's total plan-related actions. Independent audit firms are acceptable but they must not be paid as a function of claims recovered. There should be no bounty-hunting. Errors found on the audit might be shared (as a creative solution) one-third each by the TPA, the employer and the carrier.

Applicable Laws

The stop-loss agreement should declare itself, for legal purposes, to be a contract of excess insurance for purposes of common law and also to incorporate therein the two essential principles of such common law. These are (a) prompt and accurate communication (i.e., notification) and (b) fair and equitable treatment of the employer by the carrier and vice versa. In addition, those provisions in the agreement which reflect this relationship should be expanded in scope and specificity.

Arbitration

The arbitration provision should always be included with stop-loss coverages but in much more detail. The brevity of this provision works against its effectiveness.

ASO Conflicted Interests

No stop-loss should attach where the claims administration below the attachment points is performed by any entity connected to the carrier by either ownership or a tying agreement (common ownership or otherwise). An ERISA amendment banning such conflicted interests should be enacted.

Association of Stop-Loss Carriers

The interests of self-funding as an industry and the multiple vendors who serve

(see page 16)

Not all Stop-Loss insurance is created equal. With Sun Life Financial, you'll receive a whole lot more.

Financial strength.
Fair renewal philosophy.
Innovative, money-saving programs and services.
Exceptional rewards for cross-selling with Group Life and Disability.

Sun Life Financial
We listen. We care. We deliver peace of mind.

CIRCLE #7 ON READER SERVICE CARD

such, will be best served if the stop-loss carriers have an association in both the legal and organizational sense to achieve a greater degree of self-discipline and to generally promote self-funding. The association will abide by the anti-trust laws, in letter and spirit, and should be honored by the NAIC (hopefully).

Attitude Changes

While group insurance has from its early beginning been viewed as a commodity this does not mean that such attitude should be automatically carried over to stop-loss. This attitude carryover is in fact the problem itself. The two products (group and stop-loss) are so different that their common treatment is hurtful to self-funding. Self-funding deserves something much better than having stop-loss be treated like group insurance.

Claims Gaming

Both the stop-loss agreement and the TPA-employer administration agreement should deal directly by contract terms with the problem of claims gaining and how such manipulation should be handled.

Clerical Error

Define clerical error to be any error:

- Relating to information transmittal and/or communication
- Perfunctory or ministerial in nature
- Involving claims processing, record-keeping or underwriting function
- Made by stop-loss carrier, employer or any vendor (parties thereto)
- Excluding errors of judgment or errors involving the knowledge of such error and its implication as an advantage to any party thereto
- Which, when discovered, is promptly corrected

However, no party's negligence or incompetence may be excused or escaped by failure of plan language. There should be no defense of clerical errors as a refuge for misconduct or poor administration.

Comity Between Employer and Carrier

The stop-loss carrier and the employer, as the two principals, should enter into a formal contract of understanding whereby each subscribe to the many years of excess insurance case law; i.e., prompt and full disclosure and fair and equitable dealings. As part of this agreement, the employer must disclose to the carrier any vendor agreements which might create conflicted interests (MGUs, networks, e.g.); the employer must do likewise with its vendors (TPA, and consultant/broker). Also, the employer should signify in the contract of understanding that it accepts the nature of the stop-loss agreement; i.e., it is a reimbursement contract. In brief, all of the parties to the self-funded plans should carefully (a) underwrite the business with fair but detailed rules and also (b) treat their partners with old-fashioned trust and honesty. Doing (a) alone will fail.

Dispute Resolution — Stop-loss Benefit

This problem should be recognized in two ways:

1. **Plan Document**
   A micromanaged plan should be used to reduce the possibility of such disputes to a minimum.
2. **Stop-Loss Agreement**
   The Agreement should contain these dispute resolution provisions:
   - The employer has the obligation to not pay a claim which is disputable without having an ad hoc amendment addressing such claim and its payability.
   - As a consequence, the carrier and the employer can *duke it out* as a plan amendment matter rather than as a claim matter.

The stop-loss agreement should contain a provision that any dispute involving such agreement will be resolved in the following order of priority.

- **First.** For *de minimis* disputes (under $X thousand, e.g.), the stop-loss agreement should provide that disputes be settled by equally dividing the amount in dispute among the parties involved (carrier, MGU, employer, TPA, provider and participant).
- **Second.** Where the amount in dispute exceeds the *de minimis* threshold, the parties shall submit the facts of the dispute to a panel of industry experts with one representative from each of the major trade associations who may be considered as candidates to contribute to the resolution. For example:
  Stop-loss Association (newly-formed)
  MGU Association (newly-formed)
  TPA (SPBA, e.g.)
  Self-funding Broadly (SIIA, e.g.)
  Agency/Brokerage – NALHU
- **Third.** The insurance department should be offered the option to review the dispute depending on facts and circumstances of such dispute.
- **Fourth.** Arbitration.
- **Fifth.** Litigation.

Dividing the Stop-loss Risk

Require full disclosure to the plan's fiduciaries and/or vendors as to how the risk is divided; i.e., any risk shift to other non-carrier entities and/or retrocessions must be disclosable information.

Due Diligence with Stop-Loss

As part of the due diligence, the disclosure obligations to be met by the carrier, broker and TPA are as follows:

- **Broker/Consultant**
  Written assurance that the stop-loss and its basic arrangement, etc. are legal, duly filed and approved; also, that such broker/consultant is duly licensed in the appropriate jurisdiction
- **TPA**
  Written assurance that the TPA's obligations to the stop-loss carrier will be met and that it will be in conformity with all statutory and regulatory requirements. Also, it is necessary that full disclosure, for risk appraisal purposes, of all shock claims be made. A shock claim is one which is expected to exceed the specific regardless of whether the first $1 of benefit has been paid thereon.
- **Stop-loss Carrier**
  The stop-loss carrier shall provide two items of information: (a) its industry rating and (b) whether or not the state's applicable insurance guaranty fund will be at risk. These two items are in addition to the usual information provided by the carrier and to the division of risk discussed earlier.

For all plan vendors, the record should indicate by what entity they are either owned or controlled.

ERISA Governance

Pains should be taken to define the role of the carrier as a non-fiduciary in the ERISA sense. To safely avoid such risk, these rules should be followed:

- Agreement has the employer, not the plan, as applicant, owner, payer and beneficiary.
- The carrier makes no loans, advances, etc. to the plan which loan might be construed as plan assets.
- The carrier avoids any involvement with benefit determination but will respond to plan amendments (positively or negatively) when the issue of benefit eligibility is at stake.

Health Saving Account (HSA) Challenges

The new HSA requires risk trifurcation (lower claim amounts with participants; middle claims with employer and higher claims with stop-loss carrier). This risk rearrangement will make the present stop-loss rating methodologies inappropriate unless revised by some modeling technique such as the Monte Carlo Simulation. To arrive at fair HDHP stop-loss premiums, new methodologies for stop-loss are required.

Managing General Underwriter

The MGUs should seek through an association (existing or newly-formed) so as to effect (a) greater self-governance, (b) improved sharing of knowledge and skills and (c) sponsorship of projects/studies which will enhance their role as a major player in self-funding. The MGU should not be micromanaged by the appointing carrier.

Plan Document

On a suitable Web Site there should be posted an industry-acceptable plan document consisting of three parts:

1. Schedule of benefits (fill in the blanks model)
2. Variations from standard document (both benefits and provisions)
3. Standard document language (with great care being taken in adopting boiler plate language).

The stop-loss agreement will have as a physical addendum Parts 1 and 2; Part 3 will be by reference only. The most likely Web site manager would be the association of stop-loss carriers or association of MGUs.

Plan Provisions Which Facilitate Stop-loss

Two situations arise with some frequency in claims administration which present problems with stop-loss.

Situation Number 1. Questionable Large Claims

Either the plan wants the claim paid and the stop-loss carrier wishes otherwise or the claims is simply *up-in-the-air* but all of the workup is complete. The employer cannot (or will not) risk its fortunes by either paying without reimbursement or not paying and risking litigation. The employer (as primary risk bearer) needs help from the stop-loss carrier (secondary). The question is: how should the plan document help?

Treatment of Questionable Health Care Expense

It is the intention of this Plan Document that any submitted expense will be either covered or not covered without question. If an expense is submitted that is questionable (i.e., not clearly covered or denied), the following will be the action of the Plan Administrator (or the Plan Supervisor by direction of the Plan Administrator):

- The plan shall be amended to be effective prior to the incurred dates of such Questionable Health Care Expenses indicating whether such procedure or diagnosis is to be covered by the Plan
- Such Questionable Health Care Expenses will then either be paid or denied depending on the wording of the Amendment.

Situation Number 2. Indeterminate Claim

This is where the plan has a liability but is reluctant to pay because the payee eligibility has not been legally determined. This would be a situation post-Knudson involving subrogation where the payment to a trust or escrow presents some legal concerns. There are other circumstances also. This clause is described in the next paragraph and is particularly useful in establishing a stop-loss liability to the proper plan year or transferring such liability to the proper plan year.

Treatment of an Indeterminate Benefit

The Plan will treat an Indeterminate Benefit in the following manner:

(see page 18)

1. The benefit will be deemed a newly-defined Plan benefit.
2. This newly-defined Plan benefit will result from such Plan amendment and will accomplish the following:
   - Specify the event, participant, etc.
   - State the reason and purpose of the Amendment.
   - Enumerate the beneficiaries and provider-assignees who are affected.

Plan Supervisors Agreement

The plan supervisor agreement should be expanded to include under TPA duties/obligation a special section relative to stop-loss. In this section the principles of prompt and thorough notification and fair and equitable treatment should be enunciated.

Procedure Role with Stop-Loss

The stop-loss carrier should not release a proposal to any TPA or producer for any plan without a caveat from such TPA or producer that the proposal will not be spread-sheeted with a fully insured (includes HMO) proposal by the designated producer unless (a) formally requested by the employer, (b) a copy of such spread sheet containing both fully insured and self-funded quotes is provided to the stop-loss carrier or (c) there are mitigating circumstances justifying spread-sheeting. Spread-sheeting means that the TPA or producer may be designated broker, agent of record, etc. on both the self-funded or the fully insured proposal. Spread-sheeting of self-funding options would be acceptable.

References to Stop-loss in Plan Document

The following paragraphs should be included in the funding section of both the plan document and the SPD.

1. The Employer, as Plan Sponsor, has the full final obligation to pay plan benefits. As a step of prudent precaution the Employer has arranged for it to be protected against unfavorable claims experience by stop-loss insurance.
2. The Employer, as Plan Sponsor, has arranged for various vendors to assist it with the administration of the Plan.
3. The Employer has done due diligence to be satisfied that the stop-loss insurance and the various vendors are duly licensed and bring insurance products which are duly filed and approved and issued by quality insurers.

Revised Risk Arrangements

Either or both of the following risk-arrangements should be considered:

- Block stop-loss (pooled experience)
- Traditional reinsurance (most likely with a foreign or offshore insurer).

Predatory state uninsured pool taxation and the extraordinary burden of claims experience manipulation for aggregate coverage are several problems with the present system which cry out for a solution.

Risks Assured and Captions Offered

New risks should be covered (LTD and death benefits); new stop-loss arrangements block aggregate) and expanded carve-out options should be offered. New and more favorable avenues for stop-loss favorable to self-funding are needed.

Specific Advances

Eliminate specific advances as being dangerously close to the carrier being deemed a direct insurer of the claimant and a fiduciary. By plan amendement, or otherwise, eliminate the possibility of any claim going over specific without and ad hoc plan document amendment accepting or denying liability. The stop-losss carrier may wish to offer as an alternative contract, necessarily at a higher rates, in which the contract follows the fortunes (as in old reinsurance treaties) of the plan, simply mirroring its benefits. Needless to say, this requires very discriminating underwriting of the TPA as well as the plan.

Terminology

The product should recognize its uniqueness and appropriately name itself stop-loss so as to clearly differentiate if from its cousins which are reinsurance and excess loss insurance. We should all be totally consistent and call it stop-loss (or stop loss).

TPA Role with Stop-loss

The TPA should be made a party to the stop-loss with expanded and non-ministerial duties and obligations. Such duties would relate to claims gaming, conflicted interests, dealing with clerical errors, expanded guidelines on disclosures, e.g. The assent of the TPA would be evidenced by the TPA being a signatory to the agreement.

Carlton Harker, FSA, MAAA is a well known and respected member of the self-funding community and has been an active participant in the Self-Insurance Institute of America's educational programs for many years. In addition to authoring numerous books on a diversity of subjects related to self-funded health care, Carlton has appeared as a speaker and panel member at various industry educational functions. Harker has appeared as an expert witness in many hearings and trials. Mr. Harker is the Principal of Self-Funding Actuarial Services, 8025 North Point Blvd., Suite 207 W., Winston-Salem, NC 27106. (tel) 336-759-2035, (fax) (336)892-0392, or via e-mail at harker2@earthlink.net He maintains a web site at www.self-fundhealth.com