

**MINORITY VIEWS**  
**H.R. 1304, the *Self-Insurance Protection Act***  
**115th CONGRESS, FIRST SESSION**  
**MARCH 20, 2017**

**INTRODUCTION**

Committee Democrats are concerned about H.R. 1304, the *Self-Insurance Protection Act* and were also troubled by the Majority's insistence on considering health-related legislation while two other Committees (Energy and Commerce and Ways and Means) simultaneously considered legislation to gut the Affordable Care Act (ACA).

**PROGRESS OF THE ACA HELPS SMALL BUSINESSES & WORKING FAMILIES**

The ACA took steps to level the playing field for small businesses and workers. The ACA added reforms to ensure that one small business with an older or sick employee or owner is not disadvantaged compared to other small businesses. The medical loss ratio provision of the ACA requires insurance, including plans that cover small businesses, to spend at least 80% of premiums on health care claims and quality improvement, ensuring that premium dollars go toward the actual health costs of covering the small business and its employees, and not just profits. Further, the ACA created more options for employers and workers through the creation of the Small Business Health Options Program (SHOP) and included a tax credit to defray the cost of health insurance for their employees. The ACA also establishes several safeguards for workers and families. Thanks to the ACA, most insurance plans must now provide coverage without cost sharing for certain preventive health services, including pap smears and mammograms for women, well-child visits, flu shots, and more. Early estimates, after the ACA's passage, showed that there were around 129 million Americans with a pre-existing condition, 82 million of whom were enrolled in employer-based coverage.<sup>1</sup> For these millions of American workers, the ACA means that losing a job does not mean losing health insurance coverage.

**THE REPUBLICAN REPLACEMENT PLAN THREATENS THE HEALTH INSURANCE SECURITY OF AMERICAN FAMILIES**

Two days prior to the Committee's consideration of the three bills, Republicans released their ACA replacement plan, the *American Health Care Act*. At the same time, a recent poll shows public support for the ACA has reached its highest level on record.<sup>2</sup> The Ways and Means and Energy and Commerce Committees moved the bill forward through the Committee process, despite the fact that the Congressional Budget Office had not yet released estimates on the legislation's impact on coverage or cost. Committee Democrats expressed their concern about the lack of transparency in moving the bill forward and also further expressed concern that the markup in the Education and the Workforce Committee occurred simultaneous to this process – essentially forcing the Committee to consider legislation that represents a moving target.

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<sup>1</sup> Department of Health and Human Services, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans: 129 Million People Could be Denied Affordable Coverage Without Health Reform*, (November 1, 2011) available at: <https://aspe.hhs.gov/sites/default/files/pdf/76376/index.pdf>.

<sup>2</sup> Pew Research Center, *Support for 2010 Health Care Law Reaches New High*, (February 23, 2017) available at: <http://www.pewresearch.org/fact-tank/2017/02/23/support-for-2010-health-care-law-reaches-new-high/>.

## SELF-INSURANCE CAN POSE RISKS TO SMALL BUSINESSES AND WORKERS

A self-insured group health plan (or a 'self-funded' plan) is one in which the employer assumes the financial risk for providing health care benefits to its employees. In practical terms, self-insured employers pay for each out-of-pocket claim as it is incurred instead of paying a fixed premium to an insurance carrier, like a fully-insured plan. Both fully insured and self-insured plans are regulated by the Employee Retirement Income Security Act of 1974 (ERISA). However, self-insured plans are not required to cover health care services for state-mandated benefits, as fully insured plans are, and they are exempt from certain provisions of the ACA (e.g., the medical loss ratio and the health insurer fee). Because self-insurance may offer advantages – such as greater flexibility in benefit design and lower costs – they are especially attractive to large firms with enough employees to spread risk adequately to avoid the financial fallout from potentially catastrophic medical costs of a single employee or a few employees.

It is common for self-insured plans to purchase stop-loss insurance which protects plans from catastrophic financial losses. Stop-loss is not regulated at the federal level and enjoys limited and varied regulation at the state level. In many cases, the lines are blurred between stop-loss insurance and conventional insurance; a self-insured plan with a specific attachment point (the point in which the stop-loss begins coverage) of \$5,000 functions in the same way as a plan with a \$5,000 deductible.<sup>3</sup>

All employers face risks when self-insuring, but small employers run the risk of incurring unmanageable losses if an employee suffers an unexpected injury or illness. Although some risk can be mitigated by obtaining stop-loss insurance, stop-loss coverage also presents its own risks. While these policies can be cheaper for employers with a healthier and younger workforce, the premiums can be increased or workers can be denied renewal if their health declines or they become more expensive to cover. Stop-loss insurance can pick its market and its availability is not guaranteed for an employer.

Stop-loss policies also often engage in *lasering*. *Lasering* is the practice of assigning a different attachment point or denying coverage altogether for an employee based on health status, allowing stop-loss insurers to set higher attachment points for employees with costly pre-existing conditions, which then transfers the liability for these employees' costs back to the employer and employee.<sup>4</sup> While the ACA explicitly prevents this discriminatory practice, this protection does not apply to self-funded plans.<sup>5</sup> Stop-loss also often requires notification if “new risk” is incurred. Employers are legally prohibited from discriminating on the basis of health status, but stop-loss insurers are not, and many of the policies have provisions that will trigger immediate, or even retroactive, increased premiums when the stop-loss insurer receives greater-than-expected claims.<sup>6</sup> For these and other reasons, the National Association of Insurance Commissioners has indicated that, “...because stop loss insurance products are not generally required to conform to state or federal health insurance law, including the ACA, there may be

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<sup>3</sup> Center for American Progress, “*The Threat of Self-Insured Plans Among Small Businesses*”, (June 19, 2013) available at: <https://www.americanprogress.org/issues/healthcare/reports/2013/06/19/65790/the-threat-of-self-insured-plans-among-small-businesses/>.

<sup>4</sup> Center on Health Insurance Reform Blog Post, *As Self-Funding Increases in Popularity, Two States Step up to Address Potential Stop-Loss Policy Concerns*, (March 11, 2016) available at: <http://chirblog.org/as-self-funding-increases-in-popularity-two-states-step-up/>.

<sup>5</sup> *Id.*

<sup>6</sup> National Association of Insurance Commissioners, *White Paper Stop Loss Insurance, Self-funding and the ACA*, (2015) available at: [http://www.naic.org/documents/SLI\\_SF.pdf](http://www.naic.org/documents/SLI_SF.pdf).

exposure to additional risk in some stop loss insurance products that is not immediately apparent.”<sup>7</sup>

### COMMITTEE CONSIDERATION OF H.R. 1304

Committee Democrats do not oppose the use of stop-loss insurance to help employers mitigate their risk when they choose to self-insure; Democrats also want to make certain that both employers and employees are protected when self-insuring and purchasing stop-loss and are aware of the risks of doing so.

The *Self-Insurance Protection Act*, introduced by Representative Roe, would provide that stop-loss insurance is not health insurance coverage for the purposes of ERISA, the Public Health Service Act, and the Internal Revenue Code. Due to a “Request for Information Regarding Stop Loss Insurance” issued in 2012 by the Departments of Treasury/Labor/Health and Human Services,<sup>8</sup> there was concern that the administration would regulate stop-loss insurance. This legislation was previously introduced largely in response to that concern. There has been no recent indication that the federal government is seeking to regulate stop-loss insurance, though some consumer groups and researchers have expressed concern about the inadequacy of the current regulatory framework for stop-loss.

Some states have taken action to address the concerns and threats that stop-loss insurance can pose to employers and workers, particularly small businesses. For example, Connecticut issued guidance to insurers prohibiting them from imposing an attachment point for a single enrollee that is greater than three times the attachment point for the overall policy.<sup>9</sup> Some states, including Delaware, New York, and Oregon, have prohibited the sale of stop-loss to small employers.<sup>10</sup> North Carolina permits stop-loss insurance, but regulates it as if it were normal health insurance when it is provided to small employers.<sup>11</sup>

Democrats offered a number of amendments to make improvements to the bill. The first amendment, offered by Representative Takano, expressed a sense of Congress that any health care insurance legislation should build on the current progress of the ACA, as measured by CBO analysis that demonstrates improvements in cost and coverage. That amendment was withdrawn.

Representative Bonamici offered a clarifying amendment to ensure that the legislation would not be construed to restrict the ability of states to regulate stop-loss policies. She explained, “Several states, including my home state of Oregon, have regulations in place to protect consumers, both business owners and employees, when it comes to stop-loss insurance. I am concerned that the bill before us may preempt those consumer protections and prevent a State from determining how to best regulate the stop-loss insurance being offered within its borders.” At the request of Ranking Member Scott, Chairwoman Foxx agreed to include such clarifying language in the

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<sup>7</sup> *Id.*

<sup>8</sup> Departments of the Treasury, Labor, and Health and Human Services, *Request for Information Regarding Stop Loss Insurance*, (May 1, 2012) available at: <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=26054&AgencyId=8&DocumentType=3>.

<sup>9</sup> Center on Health Insurance Reform Blog Post, *As Self-Funding Increases in Popularity, Two States Step up to Address Potential Stop-Loss Policy Concerns*, (March 11, 2016) available at: <http://chirblog.org/as-self-funding-increases-in-popularity-two-states-step-up/>.

<sup>10</sup> Mark Hall, *Regulating Stop-Loss Coverage May Be Needed To Deter Self-Insuring Small Employers From Undermining Market Reforms*, Health Affairs, (February 2012), available at: <http://content.healthaffairs.org/content/31/2/316.full#ref-16>.

<sup>11</sup> *Id.*

Committee report, accepting and agreeing with the intent of Representative Bonamici's amendment. This clarification is vital to ensuring that nothing in the bill is erroneously construed to preempt or restrict states' ability to regulate stop-loss policies as states see fit or otherwise restrict effective oversight and regulation of these policies at the state level. Based on the understanding between Chairwoman Foxx and Ranking Member Scott that this clarification would be included in the Committee's official report, Representative Bonamici withdrew her amendment.

Representative Polis offered an amendment to create a public insurance option, which was ruled not germane. Committee Democrats remain committed to building on the progress of the ACA and proposing constructive measures, such as the public option, that will increase competition and help drive down costs for working families.

While Democrats continue to be concerned about the lack of clarity of the legislation and the possible unintended consequences, Committee Democrats have worked with the Majority to ensure that report language addresses some of these concerns, particularly those raised by the Bonamici amendment.

H.R. 1304 was favorably reported, as amended, by voice vote.

#### **CONCLUSION**

After seven years of disparaging the ACA, Republicans released a repeal and replacement plan that will leave millions of Americans worse off. Meanwhile, legislation considered in the Committee would not work to build on the progress of the ACA or improve and expand coverage. Committee Democrats continue to express concerns about the ambiguity of H.R. 1304, the *Self-Insurance Protection Act* and its impact on current and future state regulation of stop-loss insurance, particularly as Republicans seek to dismantle the entirety of the ACA. Committee Democrats are committed to health care as a right, not a privilege for only the healthiest and wealthiest Americans.



ROBERT C. "BOBBY" SCOTT  
Ranking Member



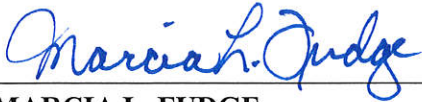
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