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Obama Administration signals that small businesses may not get to keep their self-insured health plans

Imagine that, in order to increase competition among grocery stores, the government created local farmers' markets all across the country. Anyone could sell food within these farmers markets—including the grocery stores. But when the grocery stores refused to participate, the government enacted regulations to force them to do so. Thus, what was meant to encourage competition instead became the means of suppressing it.

Similarly, the Obama Administration has signaled that it may create new regulations in order to protect Obamacare's online health insurance marketplaces called Health Insurance Exchanges. Despite Obama's promise that if you like your health plan you can keep it, some small businesses may not be able to keep their self-insured health plans if the Obama Administration has its way.

On May 1, 2012, the Department of Health and Human Services (HHS) published a Request for Information (RFI)¹ notice in the Federal Register signaling that the Obama Administration may regulate small, self-insured health plans, making it difficult or impossible for small businesses to insure their employee's health benefits themselves instead of purchasing a plan from an insurance company.

An increasing percentage of American workers obtain their health insurance from employers who self-insure their employees' health benefits by assuming the risk of paying their employees' health claims.²

Tracking down a \$66 million Obamacare CO-OP loan grant

As our readers know we've been very closely following loans made under Obamacare's Consumer Operated and Oriented Plan (CO-OP) program. CO-OPs are essentially non-profit insurance companies that are run by their policy holders. This is accomplished by requiring a majority of the CO-OP's board of directors to be policy holders.¹

But, perhaps because they are non-profits, or perhaps because there's little evidence that such a model can succeed, venture capitalists aren't rushing to risk their money investing in CO-OPs.

Yet the Obama Administration chose to risk \$3.4 billion of your tax money to start CO-OPs in every state.²

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Obama Admin may ban self-insurance for small businesses (continued)

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Self-insurance is attractive to businesses because it provides them the flexibility to design their own health plan. Plus, many employers find it a less expensive alternative to purchasing health insurance from an insurance company. And, while self-insured plans are subject to federal regulation, federal law prohibits states from regulating them.³

Large employers that self-insure have the personnel to manage the plan and can spread their risk between their many employees. But small employers typically hire an outside, third-party expert to manage their self-insured plan. They also purchase stop-loss insurance to protect themselves from the potential of unusually high health claims.

For example, a small company might be willing to pay a limit of up to an average of \$20,000 per employee for health claims in a year. But that company might be ruined financially if claims in a particular year spike too high. To protect itself, that company, then could purchase stop-loss insurance to reimburse them should their actual spending on health claims surpass a certain limit. That limit is called an “attachment point.” It is the point at which the stop-loss insurance plan kicks in and reimburses the employer for claims it pays over a chosen limit.

Stop-loss plans can have attachment points that are low enough to make it feasible for small businesses to accept the risk of implementing their own self-insured health plan.

While subject to many of Obamacare's new mandates, self-insured plans are not subject to the Essential Health Benefits, risk pooling, risk adjustment, rate review, or medical loss ratio mandates.⁴

This concerns liberal “consumer advocates” like Professor Timothy Jost of Washington and Lee University School of Law. Jost calls self-insurance a “loophole” in Obamacare.⁵ Jost and other Obamacare ideologues have called on the Obama Administration to use its regulatory powers to close this so-called “loophole.”⁶

Their particular concern is that self-insured plans with low attachment points are a risk to

Obamacare’s Exchange marketplaces. Now HHS, in its RFI is echoing this concern.

For this reason, we expect that the information collected from the RFI will be the basis of a future regulation. We further expect that such a future regulation may regulate self-insured plans with stop-loss insurance and thereby may attempt to make it difficult or impossible for small businesses to self-insure.

The problem with government-created marketplaces is that the government feels obligated to protect them—even at the expense of competition and market alternatives.

¹ Request for Information Regarding Stop Loss Insurance, 77 Fed. Reg. 25,788 (May 1, 2012) available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-01/pdf/2012-10441.pdf>.

² Michael J. Brien and Constantijn W.A. Panis, Deloitte, Self-Insured Health Benefit Plans 5 (Mar. 23, 2011) available at <http://www.dol.gov/ebsa/pdf/ACASelfFundedHealthPlansReport032811.pdf>.

³ Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (2011).

⁴ Timothy Jost, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*, 5 St. Louis Univ. J. of Health L. & Pol’y 27, 77.

⁵ *Id.* at 79-81.

⁶ *Id.* at 80-81. See also Kathryn Linehan, *Self-Insurance and the Potential Effects of Health Reform on the Small- Group Market*, Issue Brief 840, National Health Policy Forum (Dec. 21, 2010) available at http://www.nhpf.org/library/issue-briefs/IB840_PPACASmallGroup_12-21-10.pdf; Russell B. Korobkin, *The Battle Over Self-Insured Health Plans, or ‘One Good Loophole Deserves Another’*, 1 Yale J. of Health Pol’y, L., & Ethics 89–136 (2005); and Mark A. Hall, *Regulating Stop-Loss Coverage May Be Needed to Deter Self-Insuring Small Employers From Undermining Market Reforms*, 31 Health Affairs 316–323 (2012).

Tracking down a \$66 million CO-OP loan (continued)

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On May 18th, HHS announced the awardees of \$71,534,300 and \$65,925,396 CO-OP grants. One of these CO-OPs, "Hospitality Health CO-OP" of Nevada, particularly caught our eye because they were sponsored by a union benefit plan and an organization made of primarily unions and casinos.³

Grant without an apparent grantee

But when we searched for "Hospitality Health CO-OP" on the Nevada Secretary of State's website it didn't come up in the search results. We followed up with a call to the Nevada Secretary of State's office to see if there had been some mistake. But they only confirmed what we had found—there was no "Hospitality Health CO-OP." We then took the trouble to search the entity database of every State in the Union. No organization named "Hospitality Health CO-OP" came up in any of our searches.

A government secret revealed

Then on May 30, 2012, Avik Roy of the Apothecary blog on Forbes.com posted an internal Health and Human Services talking points memo that he obtained.⁴ Among other things, the memo says:

Q: Hospitality Health CO-OP is incorporated in Delaware but intends to operate in Nevada. Is that allowed and does this meet the statutory requirements?

A. Yes. Like all other health insurance issuers, a CO-OP may be incorporated in a different State, provided that it meets the requirements of State law in the State in which the product is sold. A CO-OP must be licensed as a health insurance issuer in each State in which it offers a health insurance plan, just like other issuers. Thus, Hospitality Health will have to be licensed as a health insurance issuer in Nevada and meet the same licensure requirements that other health insurance issuers meet in Nevada.⁵

But the Administration was not exactly forthcoming with this information. In fact, at the bottom of the page is the following warning:

INFORMATION NOT RELEASABLE TO
THE PUBLIC UNLESS AUTHORIZED

BY LAW: This information has not been publicly disclosed and may be privileged and confidential. It is for internal government use only and must not be disseminated, distributed, or copied to persons not authorized to receive the information. Unauthorized disclosure may result in prosecution to the fullest extent of the law.⁶

The search in Delaware

With this new information we searched the Delaware Division of Corporations entity database a second time. Again, we found no organization registered under the name "Hospitality Health CO-OP" in Delaware. There was, however, a non-profit called "Hospitality Health, Ltd.," and we are investigating to see if this is the organization that received the \$66 million loan grant.

In the interests of transparency, HHS should have given the real name of the organization and made public the fact of Hospitality Health's Delaware incorporation.

¹ Fact Sheet, U.S. Dep't of Health and Human Servs., New Loan Program Helps Create Customer-Driven Non-Profit Health Insurers (May 18, 2012) *available at* <http://www.healthcare.gov/news/factsheets/2012/02/coops02212012a.html>.

² Harris Meyer, *Feds Jump-Start Health Insurance Co-Ops With Loans*, KAISER HEALTH NEWS, Dec. 9, 2011, <http://www.kaiserhealthnews.org/stories/2012/february/21/health-coop-cooperatives-federal-loans.aspx>.

³ OBAMACAREWATCHER.ORG, HHS has some explaining to do on unregistered \$66 million CO-OP grant awardee (May 22, 2012) *available at* <http://obamacarewatcher.org/articles/408>.

⁴ Avik Roy, *Six Solyndras: Obamacare Blows \$3 Billion on Faulty CO-OP Insurance Loans*, THE APOTHECARY, May 30, 2012, <http://www.forbes.com/sites/aroy/2012/05/30/six-solyndras-obamacare-blows-3-billion-on-faulty->

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How to Comment on a Regulation

1. Go to the Regulations page at: ObamacareWatcher.org
2. Choose a regulation.
3. Click on the "Comment Now" link to be directed to the Regulations.gov website.
4. Click "Submit a Comment" which is located towards the top of the page.
5. Fill out the comment form.

Glossary of Agency Abbreviations

CMS:	Centers for Medicare and Medicaid Services
DOL:	Department of Labor
EBSA:	Employee Benefits Security Administration
HHS:	Department of Health and Human Services
HRSA:	Health Resources and Services Administration
IRS:	Internal Revenue Service
OIRA:	Office of Information and Regulatory Affairs
TREAS:	Department of the Treasury

Regulations open for comment

Minimum Value of an Employer-Sponsored Health Plan

RIN: N/A **Agency:** TREAS-IRS
Status: Pre-rule bulletin; Public comments accepted through June 11, 2012.

Request for Comments on Reporting of Health Insurance Coverage

RIN: N/A **Agency:** TREAS-IRS
Status: Pre-rule bulletin; Public comments accepted through June 11, 2012.

Request for Comments on Reporting by Applicable Large Employers on Health Insurance Coverage Under Employer-Sponsored Plans

RIN: N/A **Agency:** TREAS-IRS
Status: Pre-rule bulletin; Public comments accepted through June 11, 2012.

Certain Preventive Services under the ACA

RIN: 0938-AR42 **Agency:** HHS-CMS, TREAS-IRS, DOL-EBSA
Status: Advance notice of proposed rulemaking (ANPRM). Public comments accepted through June 19, 2012.

Regulations Pertaining to the Disclosure of Return Information to Carry Out Eligibility Requirements for Health Insurance Affordability Programs

RIN: 1545-BK87 **Agency:** TREAS-IRS
Status: Notice of proposed rulemaking and notice of public hearing. Public comments accepted through July 30, 2012.

Data Collection to Support Standards Related to Essential Health Benefits; Recognition of Entities for Accreditation of Qualified Health Plans

RIN: 0938-AR36 **Agency:** HHS-CMS
Status: Proposed Rule. Public comments accepted through July 5, 2012 at 5pm EDT.

For the latest status on these and other regulations, visit us at:

<http://ObamacareWatcher.org>

\$66 million CO-OP Loan (cont.)

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co-op-insurance-loans/.

⁵ Internal Memo, Dep't of Health and Human Services, CO-OP Program: Internal Questions and Answers (May 18, 2012) (emphasis added) 2, available at <http://blogs-images.forbes.com/aroy/files/2012/05/CO-OP-Awards-Internal-QA-final-5-18-12.pdf>.

⁶ *Id.*

OBAMACARE REG WATCHER

FOR MORE INFORMATION CONTACT:

WILLIAM WILSON, PRESIDENT

AMERICANS FOR LIMITED GOVERNMENT

RESEARCH FOUNDATION

9900 MAIN STREET

SUITE 303

FAIRFAX, VA 22031

703.383.0880

ObamacareWatcher.org

