THE COUNCIL
The Council of Insurance Agents & Brokers

April 21, 2020

Administrator Jovita Carranza
U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416

RE: PPLoan Program Clarifications –
Self-Insured Group Health Plan Expense Treatment

Dear Administrator Carranza:

I write on behalf of the Council of Insurance Agents and Brokers ("The Council") to request clarification on the "forgiveness" "payroll" calculation provisions under the Paycheck Protection Loan ("PPL") Program ("the Program"). Specifically, and as explained in more detail below, I urge you to issue further guidance to allow Program borrowers that self-insure (i.e., those that bear the risk of the group health benefits they provide to their employees) to utilize "COBRA" rates[1] to calculate the group health insurance component of "payroll" loan expenditures made during the "covered period" under the forgiveness rules. Permitting usage of the COBRA rates will ensure that such self-insured small employers will not be penalized due to the significant disruptions in normal healthcare claims patterns that have arisen during the COVID-19 emergency.

By way of background, The Council represents the largest and most successful employee benefits and property/casualty agencies and brokerage firms. Council member firms annually place more than $300 billion in commercial insurance business in the United States and abroad. In fact, they place 90 percent of all U.S. insurance products and services and they administer billions of dollars in employee benefits. Council members conduct business in some 30,000 locations and employ upward of 350,000 people worldwide, specializing in a wide range of insurance products and risk management services for business, industry, government, and the public.

[1] Sections 601 through 608 of title I of ERISA were enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, which also promulgated parallel provisions that became part of the Internal Revenue Code and the Public Health Service Act. *See* 26 U.S.C. § 4980B; 42 U.S.C. §§ 300bb-1 *et seq*. These provisions are commonly referred to as the COBRA provisions, and the continuation coverage that they mandate under a regulated rate regime is commonly referred to as "COBRA" coverage.

I. ***Overview***

Under the CARES Act, forgivable amounts are based on "*costs incurred and payments made*" in the eight-week period following loan origination (i.e., the forgiveness period). To receive full loan forgiveness, at least 75% of the loan amount must be spent on "payroll costs"—including "payment required for the provision of group health care benefits"—during that forgiveness period. Borrowers' loan amounts, however, are calculated as a function of such payroll costs during pre-crisis, non-emergency periods. For reasons set forth below, this construct presents unique challenges and disadvantages for many self-insured small businesses in the current moment.

Under a fully-insured health plan, employers and employees make regular and predictable premium payments to their insurance carriers. The insurance carriers, in turn, are then responsible for paying the health care claims under that plan. In the self-insured context, on the other hand, employers do not interact with insurance carriers. Instead, they directly pay the health care claims because they have opted to bear the risk and are therefore responsible for paying those claims.

Larger self-insured businesses often have separate trust accounts to which they make reserve payments to cover anticipated claim flow (and to which they also deposit employee contributions to be used for the same purpose). Smaller self-insured businesses—including the vast majority of the businesses participating in the PPL Program—generally do <u>not</u> maintain such separate accounts and instead pay as they go.

The employer healthcare costs (i.e., payment of claims) in a self-funded environment can be highly volatile over any short period of time.[2] This is especially true now as states are delaying or cancelling non-essential, elective care and procedures to protect patients and ensure healthcare delivery systems can focus on addressing COVID-19. In response to these state-level policy changes, self-insured employers are seeing—and expect to continue to see in the near-term only—a significant lag in non-emergency claims and overall disruptions to, and fluctuations in, their healthcare spending.

When the COVID-19 crisis abates in the coming months and our healthcare system transitions back to more standard operations, we anticipate a slow return to normal claim patterns. That transition, though, is expected to take place over a longer period of time as facility and provider capacity adjusts, and it is likely to vary significantly by geography. As regular claims pick back up, employer healthcare outlays will similarly increase beyond normal claims volume.

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[2] Indeed, to manage risk associated with unexpected fluctuations and spikes in healthcare claims costs, many self-insured employers carry stop loss insurance, which generally covers claim amounts above a pre-determined threshold. Stop loss insurance premiums are <u>not</u> the equivalent of health insurance premiums paid by fully-insured employers. Instead, self-insured employers are responsible for all claim payments up to a certain amount; stop loss premiums are paid on top of those claim amounts.

Additionally, self-insured employers must administer—or pay a third party to administer—employee health claims (instead of paying an insurer, via premiums, to handle such claims).

The PPL Program's forgiveness provisions should be interpreted to account for this reality; namely, that actual self-insured employer payments on employees' healthcare during the eight-week forgiveness period will neither reflect historical or normal expenditures, nor account for the increase in claims and related payments that will arise when normal operations resume. These employers should be treated like their fully-insured employer counterparts and should be permitted to use *forgivable* Program loan amounts to cover the anticipated costs/payments associated with deferred claims (which generally will be based on their historical experience). This can easily be done by utilizing the employer's COBRA rate calculations (which are functionally equivalent to premiums paid on fully-insured plans) as a proxy for actual costs during the eight-week period.

II. *Our Recommendations*

Self-insured employer expenditures on employee healthcare claims generally are substantial. Our members report that under normal circumstances, such claim costs make up anywhere from <u>10-15% of payroll costs</u>.

Because self-insured employers' loan amounts under the Program are calculated from payroll costs during a pre-crisis look-back period (i.e., 2019 or early 2020), these typical healthcare spending levels are incorporated into the loans. Thus, to maximize their loan forgiveness potential, self-insured employers must also be able to base their forgiveness formula on something closer to "normal" healthcare expenditures (i.e., what they would typically spend, not what they will actually spend during the eight-week forgiveness period when non-essential healthcare operations are no longer routinely offered). If self-insured employers are unable to account for this change in claims, they will functionally be foreclosed from receiving forgiveness on a significant portion of their loan amount.

We therefore recommend allowing self-insured employers to base their "payroll cost" forgiveness amounts on projected claims payments and fixed costs (e.g., stop loss insurance premiums and administrative fees) through use of their pre-determined COBRA rate calculations. Doing so will smooth out the projected claims dip, as well as the expected claims spike in the aftermath of COVID-19. Specifically, we encourage you to issue guidance and/or regulations clarifying that, for purposes of calculating PPL forgiveness amounts for self-insured employers, "payment required for the provision of group health care benefits" (under the umbrella of forgivable "payroll costs") includes the <u>greater of</u>:

- **Actual paid costs during the eight-week period; or**
- **Fully-insured equivalent premiums used to create COBRA rates under the applicable regulatory regime, which include:**
    - Expected incurred claims (based on 2019 experience) minus
    - Any stop loss insurance reimbursements due to the employer; plus
    - Stop loss insurance premiums paid by the employer during the covered period; plus
    - Plan administration fees.

This clarification will level the playing field between small employers with different group healthcare arrangements. We very much appreciate your attention to this important issue and your consideration of our comments.

Please do not hesitate to contact me if I can provide further information or answer any questions.

Respectfully submitted,

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