Office of the Registrar of Regulations,
Legislative Council,
State of Delaware

DEPARTMENT OF INSURANCE

OFFICE OF THE COMMISSIONER

Statutory Authority: 18 **Del.C.** §§314, 2101 & 505; 29 **Del.C.** Ch. 101; 29 USC §1144(b)(6)(A)(i); and in response to 29 CFR 2510.3-5

18 **DE Admin. Code** 1405

EMERGENCY

EMERGENCY ORDER

1405 Filing Requirements for Multiple Employer Welfare Arrangements

Pursuant to 29 **Del.C.** §10119, it is necessary to repeal Regulation 1405, Filing Requirements for Multiple Employer Welfare Arrangements [Formerly Regulation 67] and replace it with new Regulation 1405, Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans.

REASONS FOR EMERGENCY ACTION

A. On June 19, 2018, the Federal Department of Labor (DOL) released a new regulation, to be codified at 29 CFR pt. 2510, that redefines "employer" under Section 3(5) of the Employee Retirement Income Security Act (ERISA) (hereinafter the "Final Rule"). The Final Rule was published in the *Federal Register* on June 21, 2018. *See* 83 FR 28,912.

B. The Final Rule allows small businesses to band together in an association formed primarily to offer insurance, and then offer health insurance that qualifies as a "large group plan" if the employers are in the "same trade, industry, line of business, or profession" *or* "have a principal place of business within a region that does not exceed the same State or the same metropolitan area (even if the metropolitan area includes more than one State)." *Id.* at 28,922. Such an association could attempt to offer to its members a large group health insurance plan by considering, "in the aggregate," all of the employees of the association's members, even if no member is a large employer. *Id*. at 28,934-35.

C. Large group health insurance plans do not contain the same protections or provisions that are required by the federal Patient Protection and Affordable Care Act, Public Law 111-148 (2010), to be included in individual and small group health insurance.

D. In the Final Rule, DOL made clear that States will be able to apply their insurance laws to association health plans (AHPs) that are not fully insured and to apply certain insurance laws to AHPs that are fully insured. *Id*. at 28,936. The Final Rule expressly states that it does not preempt state law, and it makes clear that state regulators maintain their full authority under state law to regulate their state insurance markets. DOL stated that, "[T]he final rule importantly depends on state insurance regulators for oversight and enforcement to, among other things, prevent fraud, abuse, incompetence and mismanagement, and avoid unpaid health claims." *Id.* at 28,960.

E. The Final Rule contains a series of effective and applicability dates. It became effective on August 20, 2018, *id*. at 28,912, and allows "fully insured plans to begin operating under the new rule on September 1, 2018" *Id.* at 28,953. In addition, "[e]xisting self-insured AHPs can begin operating under the new rule on January 1, 2019, and new self-insured AHPs can begin on April 1, 2019." *Id*. at 28,953.

F. DOL stated that the months-long delays in applicability of the Final Rule for self-insured AHPs would allot "additional time for the Department and State authorities to address concerns about self-insured AHPs' vulnerability to financial mismanagement and abuse." *Id.* at 28,953. The Final Rule noted that "[t]he Department and State authorities both need time to build and implement adequate supervision and possible infrastructure to prevent fraud and abuse," *id*., and, with respect to the April 1, 2019 date for new self-insured AHPs, to "provide sufficient time for the Department and the States to implement a robust supervisory infrastructure and program" *Id.*

G. DOL notes that the Final Rule's relaxation of legal requirements would, without safeguards, create "cause for concern about fraud," *id*. at 28,928, but the Final Rule lacks measures to address the likelihood of fraud and abuse that the Final Rule may cause. Accordingly, DOL acknowledges that the Final Rule "will introduce increased opportunities for mismanagement or abuse, in turn increasing oversight demands on the Department and State regulators," *id*. at 28,953.

H. The Emergency Regulation requires fully-insured AHPs and MEWAs operating in Delaware to offer comprehensive health insurance coverage to their members that complies with all state benefit mandates. This

requirement will protect fully insured AHP and MEWA members and their dependents who experience serious health conditions and, at the same time, will help limit upward premium pressure on Choose Health Delaware, Delaware's free official program that helps individuals and businesses learn more about the low-cost, high-quality health coverage available through the Health Insurance Marketplace (HIM). If there were no requirement that fully insured AHPs and MEWAs provide comprehensive coverage, fully-insured AHPs and MEWAs would be able to offer limited benefit or "skinny" health insurance plans that appeal to the youngest and healthiest lives on HIM.

I. The Department is not able to complete the process of repealing and replacing the existing regulations, including the requirement to meet the publication and public notice provisions of the Delaware Administrative Procedures Act, by September 1, 2018, which is the date that AHPs are allowed under the Final Rule to begin operating in Delaware.

J. Emergency rule-making is therefore necessary to ensure that fully-insured AHPs, which begin operating on or after September 1, 2018, provide affordable, comprehensive health care coverage, rather than limited benefit plans that erode the stability of Delaware's HIM.

K. The Department has completed the work necessary to submit the proposed new regulations for public comment and by issuing this emergency order will permit a timely transition for the regulatory oversight of AHPs during the time required for public comment on the proposed new regulation.

DECISION AND ORDER

1. Regulation 1405 as currently promulgated is rescinded and the attached revised version of Regulation 1405 is substituted in lieu thereof as a new emergency regulation effective September 1, 2018.

2. This order shall be effective until December 31, 2018 or until the attached proposed new Regulation 1405 is adopted pursuant to the Delaware Administrative Procedures Act, whichever shall first occur. The Department will receive, consider and respond to petitions by any interested person for the reconsideration or revision of the emergency regulation.

3. The Department gives public notice of proposed new Regulation 1405 as required by 29 **Del.C.** §10115 as follows:

PUBLIC NOTICE OF PROPOSED DEPARTMENT OF INSURANCE REGULATION RELATING TO REQUIREMENTS FOR FULLY INSURED MULTIPLE EMPLOYER WELFARE ARRANGEMENTS [FORMERLY REGULATION 67] AND ASSOCIATION HEALTH PLANS

INSURANCE COMMISSIONER TRINIDAD NAVARRO hereby gives notice of proposed new Department of Insurance Regulation 1405 relating to Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans. The docket number for these proposed amendments is 3880-2018.

As a result of the enactment of a new federal regulation, to be codified at 29 CFR pt. 2510, that redefines "Employer" under Section 3(5) of the Employee Retirement Income Security Act (ERISA) (hereinafter the "Final Rule"), the Department has determined to rescind and replace Regulation 1405 relating to Requirements for Multiple Employer Welfare Arrangements [Formerly Regulation 67], and replace it with Regulation 1405 relating to Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans. The Delaware Code authority for the change is 18 **Del.C.** §314, 18 **Del.C.** §2101, 18 **Del.C.** §505, 29 **Del.C.** Ch. 101, and 29 USC §1144(b)(6)(A)(i), and in response to 29 CFR 2510.3-5. The text can also be viewed at the Delaware Insurance Commissioner's website at www.delawareinsurance.gov and clicking on the link for "Proposed Regulations."

Any person may file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed new regulation. Any written submission in response to this notice and relevant to the proposed new regulation must be received by the Department of Insurance no later than 4:30 p.m., Tuesday, October 2, 2018 by mailing to:

Delaware Department of Insurance
Attn.: Leslie W. Ledogar, Esq., Regulatory Specialist
Docket No. 3880-2018
841 Silver Lake Boulevard,
Dover, DE 19904
or by emailing them to leslie.ledogar@state.de.us.

4. Since the wording of the attached emergency regulation is identical to the wording the Department intends to adopt as a final regulation, public comment on the emergency regulation shall be deemed to be public comment on the proposed regulation as would otherwise be permitted under 29 **Del.C.** §10115.

IT IS SO ORDERED this 15th day of August, 2018.
Trinidad Navarro
Insurance Commissioner

1405 Filing Requirements for Multiple Employer Welfare Arrangements [Formerly Regulation 67]

1.0 Purpose

1.1 The purpose of this regulation is to aid the Department of Insurance in enforcing provisions of the Delaware Insurance Code relating to the unauthorized transaction of insurance. The Department has become aware of a number of unlicensed and illegal multiple employer welfare arrangements marketing group policies in Delaware. These entitles sell group health care coverage to employers. Employers operating small businesses have been particularly targeted. Because of rate increases imposed by licensed companies, or adverse experience in their group, many small employers have been attracted by the purported low cost coverage offered by these entities.

1.2 Some of these entities represent to their agents and applicants that they are exempt from state insurance regulation either because they are subject to the Federal Retirement Insurance Security Act ("ERISA") or because they hold a policy issued outside the state. Exemption from Delaware Insurance Department regulation is available under those circumstances if certain legal standards are met. This regulation is to ensure that only those entities which meet those legal standards by the Delaware Insurance Department are permitted to operate in Delaware.

2.0 Authority

2.1 This regulation is issued pursuant to the authority vested in the Commissioner under 18 **Del.C.** §314, 18 **Del.C.** §2101, 18 **Del.C.** §505 and 29 **Del.C.** Ch. 101.

3.0 Definitions

3.1 As used in this regulation the following words and terms shall have the following meaning unless the context clearly indicates otherwise:

"Intermediary" shall mean an agent, brother, or other person who negotiates, solicits, or effectuates an agreement or contract to provide health care and/or medical coverage or benefits for any employer or employee in the state.

"Multiple Employer Welfare Arrangement" shall mean an arrangement which is established or maintained or offers to provide health care benefits or coverage to employees of two of more employers. Except, however, this regulation does not apply to multiple employer welfare arrangements which are exempt from state regulation under ERISA or which offers or provides benefits which are fully insured.

3.2 Those plans exempt form state regulation under ERISA are as follows:

3.2.1 The arrangement provides benefits or coverage under or pursuant to a collective bargaining agreement; or

3.2.2 The arrangement provides health care benefits or coverage solely to employees of governmental units; or

3.2.3 The arrangement is established and maintained by a rural electric cooperative; or

3.2.4 The arrangement provides benefits or coverage to a single employer.

4.0 Requirements

4.1 Thirty days after the adoption of this regulation, no multiple employee welfare arrangement ("MEWA") or association or any intermediary in this state may solicit, advertise, or market in this state or accept an application for, or place coverage for any employer unless prior to solicitation, advertising, marketing, acceptance of the application, or placing the coverage:

4.1.1 The multiple employer welfare benefit plan files with the Insurance Commissioner the information required under section 5.0; or

4.1.2 The intermediary files the information required under section 5.0.

4.2 If subsequent to a filing under sections 4.1.1 or 4.1.2 changes occur so that the information contained in the filing is no longer accurate, the multiple employee welfare arrangement ("MEWA") plan or intermediary with made the filing shall within fifteen days of the date the change is effective make a filing under section 5.0 with the correct information.

5.0 Filing Requirements

5.1 A MEWA or an intermediary required to file information under this regulation shall file a properly completed form prescribed by the Commissioner and shall attach:

5.1.1 A copy of any policy or contract describing benefits offered by the MEWA;

~~5.1.2 A copy of the organizational documents of the MEWA including the articles of incorporation, by-laws or trust instrument;~~

~~5.1.3 A statement that the benefits or coverage are fully insured or a description of the extent to which they are not fully insured;~~

~~5.1.4 A copy of any documentation regarding status as an ERISA preemption group; and~~

~~5.1.5 The name of the insurer, if any, which insures the MEWA.~~

~~5.2 It shall be the responsibility of any intermediary to ascertain that the MEWA represented has complied with this section. No intermediary or MEWA shall solicit any resident of this state to make application or effectuate coverage under a MEWA unless the MEWA has been registered with the Delaware Insurance Department or the MEWA is fully insured by an insurer licensed to do business in Delaware.~~

~~6.0 Applicability~~

~~6.1 Notwithstanding any other provision of law, and except as provided herein, any MEWA which provides coverage in this state for medical, surgical, chiropractic, physical therapy, speech pathology, audiology, professional mental health, dental, hospital, or optometric expense, whether such coverage is by direct payment, reimbursement, or otherwise, shall be presumed to be subject to the jurisdiction of the department unless the MEWA shows that while providing such services it is exempt from State jurisdiction as a result of federal preemption.~~

~~6.2 A MEWA may show that it is subject to the jurisdiction of the federal government by providing to the commissioner the appropriate certificate of license issued by the other governmental agency which permits or qualifies it to provide those services for which it is licensed or certified.~~

~~6.3 Any MEWA which is unable to show that it is subject to the jurisdiction of another state or the federal government, shall submit to an examination by the Commissioner to determine whether the organization and solvency of such MEWA is in compliance with the applicable provisions of Delaware law.~~

~~6.4 Any MEWA which is unable to show that it is subject to the jurisdiction of another state or the federal government shall be subject to all appropriate provisions of this regulation regarding the conduct of its business.~~

~~6.5 Any intermediary licensed by the Department who solicits, markets, advertises or administers health care coverage in this state for any MEWA, and where such coverage does not meet all pertinent requirements specified in this regulation and which is not provided or completely underwritten, insured, or otherwise fully covered by an admitted life or disability insurer, hospital service plan, health maintenance organization, or health service plan, shall advise and disclose to any purchaser, prospective purchaser, covered person or entity, all financial and operational information relative to the content and scope and, specifically, as to the lack of insurance or other coverage. Notwithstanding the above, an intermediary must comply with the filing requirements contained in section 5.0 of this regulation.~~

~~7.0 Penalties~~

~~7.1 A violation of this regulation shall be considered an unfair and deceptive trade practice under 18 **Del.C.** §2304. Failure to file the information required in this regulation shall be prima facie evidence of a deceptive practice which endangers the legitimate interest of customers and public. If the MEWA does not qualify for an exemption under ERISA, after hearing, the MEWA or intermediary may be found in violation of 18 **Del.C.** §505 and 18 **Del.C.** Ch. 21 of the Delaware Insurance Code in accordance with 18 **Del.C.** §334 of the Delaware Insurance Code.~~

1405 Requirements for Fully Insured Multiple Employer Welfare Arrangements and Association Health Plans

1.0 Purpose

1.1 The purpose of this regulation is to aid the Department of Insurance in enforcing provisions of the Delaware Insurance Code relating to the unauthorized transaction of insurance. As a result of the Final Rule issued by the U.S. Department of Labor expanding the definition of the term "employer" (see 83 FR 28,961 (to be codified at 29 CFR 2510.3-5(c)), the Department recognizes that multiple employer welfare arrangements, including association health plans, may begin marketing group policies in Delaware. These entities sell group health care coverage to employers. Employers operating small businesses may be particularly targeted. Because of rate increases imposed by licensed companies, or adverse experience in their group, many small employers have in the past been attracted by the purported low cost coverage offered by these entities.

1.2 Some of these entities incorrectly represent to their agents and applicants that they are exempt from state insurance regulation either because they are subject to the Federal Employee Retirement Income Security Act

("ERISA") or because they hold a policy issued outside the state. Exemption from Delaware Department of Insurance regulation is available under those circumstances if certain legal standards are met. This regulation also ensures that only those entities that meet the legal standards established by the Delaware Department of Insurance to issue policies in Delaware are permitted to operate in Delaware.

1.3 An additional purpose of this regulation is to set forth rules, forms, and procedures regarding fully insured MEWAs and association health plans. This regulation protects Delaware consumers and promotes the stability of Delaware's health insurance markets, to the extent permitted under federal law, by setting rules regarding licensure, solvency, reserve requirements, and rating requirements.

2.0 Authority

This regulation is issued pursuant to the authority vested in the Commissioner under 18 **Del.C.** §314, 18 **Del.C.** §2101, 18 **Del.C.** §505, 29 **Del.C.** Ch. 101, and 29 USC §1144(b)(6)(A)(i) and in response to 29 CFR 2510.3-5.

3.0 Definitions

The following words and terms, when used in this regulation, have the following meaning unless the context clearly indicates otherwise:

"**Association**" means any foreign or domestic association that complies with 18 **Del.C.** §3506(a)(1)-(6) and provides a health benefit plan that covers the employees of at least one employer that is either domiciled in Delaware or has its principal headquarters or principal administrative office in Delaware or covers a Delaware resident of a non-Delaware employer.

"**Commissioner**" means the Commissioner of the Delaware Department of Insurance.

"**Department**" means the Delaware Department of Insurance.

"**Employee welfare benefit plan**" or "**welfare plan**" means an employee welfare benefit plan or welfare plan as defined in 29 USC §1002(1).

"**Employee Retirement Income Security Act**" or "**ERISA**" means the federal statute 29 USC Chapter 18.

"**Fully Insured**" means any association or MEWA health benefit plan coverage provided by a foreign or domestic insurer licensed to do business in Delaware under the provisions of 18 **Del.C.** Ch. 5 and in compliance with 18 **Del.C.** §3506 and 29 USC §1144(b)(6)(D).

"**Health Benefit Plan**" means a policy, contract, certificate, or agreement offered or issued by a health insurer to provide, deliver, arrange for, pay for, or reimburse any of the costs of health services, as defined in 18 **Del.C.** §903. The health benefit plan is issued to an association, to a trust, or to one or more trustees of a fund established, created, or maintained for the benefit of the members of one or more associations or a contract or plan issued by an association or trust or by a MEWA as defined in the Employee Retirement Income Security Act of 1974, 29 USC §1001 et seq.

"**Insurer**" means any insurer, health service corporation, a health maintenance organization, or a managed care organization offering health insurance as defined in 18 **Del.C.** §903. An insurer shall not offer a health benefit plan to an association or MEWA with covered lives in Delaware unless it possesses a certificate of authority from the Commissioner or unless the nature of its business in Delaware is such that it is exempt from this requirement under the provisions of 18 **Del.C.** §506.

"**Intermediary**" shall mean an agent, broker, or other person who negotiates, solicits, or effectuates an agreement or contract to provide health care and/or medical coverage or benefits for any employer or employee in the state.

"**Multiple employer welfare arrangement**" or "**MEWA**" shall mean an arrangement which is established or maintained and offers to provide health care benefits or coverage to employees of two or more employers. Except, however, this regulation does not apply to multiple employer welfare arrangements which are exempt from state regulation under ERISA.

The following plans are excluded from the definition of MEWA:

- The arrangement provides benefits or coverage under or pursuant to a collective bargaining agreement; or
- The arrangement is established and maintained by a rural electric cooperative or a rural telephone cooperative association; or
- The arrangement provides benefits or coverage to a single employer.

4.0 Filing Requirements

4.1 Initial filing requirements

4.1.1 No association or MEWA or intermediary of an association or MEWA may offer either a fully insured employee welfare benefit plan or solicit any resident of this state to make application or effectuate coverage under an association plan or MEWA in Delaware unless:

4.1.1.1 The association or MEWA is duly licensed with the Department. An association or MEWA seeking to offer a fully-insured health benefit plan shall make application for a license to the Department and shall not offer such plans in this State until it is licensed;

4.1.1.2 The association's or MEWA's application for licensure is approved by the Department; and

4.1.1.3 The plan intermediary has ascertained that the MEWA represented has complied with this Section.

4.1.2 The application for licensure for a fully insured association or MEWA shall be on a form prescribed by the Department and shall include the following:

4.1.2.1 A certification of an officer, director, or trustee of the fully insured association or MEWA that states:

4.1.2.1.1 Name of the association or MEWA;

4.1.2.1.2 Names and business addresses of all principals, officers, directors, and trustees;

4.1.2.1.3 Names and addresses of the employer members;

4.1.2.1.4 Names and addresses of trustees or other persons responsible for the MEWA's or the association's operation;

4.1.2.1.5 Mailing address, email address, and telephone number at which communications are to be received;

4.1.2.1.6 Eligibility requirements for membership in the association or MEWA; and

4.1.2.1.7 The fees, if any, charged for membership in the association or MEWA;

4.1.2.2 A copy of any policy or contract describing benefits offered by the association or the MEWA;

4.1.2.3 A copy of the organizational documents of the association or MEWA, including the articles of incorporation, by-laws or trust instrument;

4.1.2.4 A statement that the benefits or coverage are fully insured;

4.1.2.5 A copy of the association's or MEWA's certificate of good standing from the state in which the association or MEWA is registered as a business;

4.1.2.6 The name of the insurer that insures the association or MEWA;

4.1.2.7 The name and contact information for the Delaware registered agent for service of process on the association or MEWA;

4.1.2.8 A certification of an officer, director, or trustee of the fully insured association or MEWA that states compliance with 18 **Del.C.** §3506;

4.1.2.9 A description of the membership requirements;

4.1.2.10 A copy of any document executed by an employer to become a member of the association, including application for membership in the association;

4.1.2.11 Biographical affidavits for all trustees, officers, directors, and other members of the association or MEWA's governing body responsible for the operation of the association or MEWA;

4.1.2.12 The names, addresses, and qualifications of persons who will solicit, negotiate, procure, or effect applications for coverage with the association or MEWA;

4.1.2.13 A copy of all current policies or contracts of insurance issued to the association or MEWA that provide coverage for health care benefits and services to be offered in Delaware;

4.1.2.14 A copy of all current contracts between the association or MEWA and insurers to provide coverage for health care benefits and services to be offered in Delaware;

4.1.2.15 A copy of all current advertising and marketing materials used by the association or MEWA;

4.1.2.16 The names and addresses of all administrators and organizations, including third party administrators or intermediaries, responsible for the operation of the association or MEWA that complies with the following:

4.1.2.16.1 The association or MEWA contact shall be the person responsible for filing all applicable forms and changes in information with the Department; and

4.1.2.16.2 The regulatory contact shall be the person responsible for receiving notice of laws regulations, bulletins, and the like that may affect the plan;

4.1.2.17 The most recent audited financial statement as defined in Section 12.0 of this regulation;

4.1.2.18 A copy of the most recent M-1 form as filed with United States Department of Labor; and

4.1.2.19 A $1000 filing fee.

4.2 Annual filing requirements

4.2.1 Following licensure, a fully insured association or MEWA that offers a plan in the State shall annually, on or before July 1, submit the following information:

4.2.1.1 A Proof of Coverage form that:

4.2.1.1.1 Affirms that all the covered benefits are fully insured on a direct basis by an insurer; and

4.2.1.1.2 Is completed and certified by an officer, director, or trustee of the association or MEWA;

4.2.1.2 Demographic Information, on a form prescribed by the Department, providing association, MEWA, third party administrator, intermediary, regulatory, and insurer contacts, that complies with the following:

4.2.1.2.1 The association or MEWA contact shall be the person responsible for filing all applicable forms and changes in information with the Department; and

4.2.1.2.2 The regulatory contact shall be the person responsible for receiving notice of laws, regulations, bulletins, and the like that may affect the plan;

4.2.1.3 Notice of any changes in information previously filed with the Commissioner, which shall include, but is not limited to, the following items:

- Biographical Affidavits of any new trustees, officers, directors, or other members of the association's or MEWA's governing body;
- The names, addresses, and qualifications of any new individuals responsible for the conduct of the plan's affairs, including any third-party administrators;
- The names, addresses, and qualifications of any new persons who will solicit, negotiate, procure, or effect applications for coverage with the plan;
- The names and addresses of any new employers and participants enrolled in the plan;
- Any new policy or amendment;
- Any new Trust Agreement, Plan Document, Plan Summary, or Bylaws;
- Any new advertising and marketing material; and,
- Any other new agreements;

4.2.1.4 The most recent audited financial statement as defined in Section 12.0 of this regulation; and

4.2.1.5 A $150.00 filing fee.

4.3 If, subsequent to a filing under subsections 4.1 or 4.2, changes occur so that the information contained in the filing is no longer accurate, the MEWA, association, or intermediary that made the filing shall, within fifteen days of the date the change is effective, file the changes with the Department.

4.4 The Commissioner shall conduct a completeness review of a filing submitted under this Section and shall notify the applicant in writing of any deficiencies found during the completeness review in within 30 business days of receipt. An applicant shall address any deficiencies in its application within 15 business days of notice thereof. Upon written request from the applicant and for good cause shown, the Commissioner may extend this 15-business day time frame to correct any deficiencies in the application or renewal for an additional 30 business days. The Department shall notify the applicant in writing of its response to any such request.

4.5 If the Commissioner rejects a complete initial licensure application, or a subsequent annual registration application filed pursuant to this Section, the Department shall advise the applicant in writing that the application is denied and shall specify the reason for denial. The applicant may make written demand upon the Commissioner within 15 business days for a hearing before the Commissioner to determine the reasonableness of the Commissioner's action. The hearing shall be held pursuant to 18 **Del.C.** §323.

5.0 Applicability of federal preemption requirements

5.1 Notwithstanding any other provision of law, and except as provided in this regulation, any association or MEWA that provides coverage in this state for medical, surgical, chiropractic, physical therapy, speech pathology, audiology, professional mental health, dental, hospital, or optometric expense, whether such coverage is by direct payment, reimbursement, or otherwise, shall be presumed to be subject to the jurisdiction of the Department unless the association or MEWA shows that while providing such services it is exempt from State jurisdiction as a result of federal preemption.

5.2 An association or MEWA may show that it is subject to federal jurisdiction by providing to the Commissioner the appropriate certificate of license issued by the federal agency which permits or qualifies it to provide those services for which it is licensed or certified. For the avoidance of doubt, an M-1 filing with the U.S. Department of Labor shall not, in and of itself, be sufficient to overcome the presumption of the Department's jurisdiction as set forth in this Section.

5.3 Except as otherwise set forth herein, any MEWA or association that is unable to show that it is subject to federal jurisdiction shall submit to an examination by the Commissioner to determine whether the organization and solvency of such association or MEWA is in compliance with the applicable provisions of Delaware law.

5.4 Any association or MEWA that is unable to show that it is subject to federal jurisdiction shall be subject to all appropriate provisions of this regulation regarding the conduct of its business.

5.5 Any intermediary licensed by the Department who solicits, markets, advertises or administers health care coverage in this state for any association or MEWA, and where such coverage does not meet all pertinent requirements specified in this regulation and which is not provided or completely underwritten, insured, or otherwise fully covered by a Delaware-admitted insurer, shall advise and disclose to any purchaser, prospective purchaser, covered person or entity, all financial and operational information relative to the content and scope and, specifically, as to the lack of insurance or other coverage. Notwithstanding the above, an intermediary must comply with the filing requirements contained in Sections 4.0 and 5.0 of this regulation.

5.6 Until such time as the Department issues regulations specific to self-insured MEWAs and associations, self-insured MEWAs and associations shall be subject to all provisions of Title 18 of the Delaware Code and all regulations promulgated thereunder to the extent not inconsistent with the provisions of ERISA, including but not limited to:

- Licensure;
- Mandated benefits;
- Reserves; and
- Financial reporting.

6.0 Surplus Requirements

6.1 When a fully-insured association or MEWA submits its initial application as required under subsection 4.1 with the Department, it shall have a minimum surplus that is not less than $500,000, regardless of whether the insurer directly bills certificate holders for premiums on behalf of the association or MEWA or if the association or MEWA bills its members for premiums and remits the premiums to the insurer.

6.2 An association or MEWA shall continue to maintain the required minimum surplus indicated in subsection 6.1 so long as it continues to provide a health benefit plan in Delaware.

6.3 One year after the application for licensure pursuant to subsection 4.1 is approved and on every July 1 thereafter, a fully insured association or MEWA shall produce documentation of its annual premium for the preceding policy year and an estimate of its annual premium for the following year.

6.4 Surplus funds required under this Section are not to be used to fund the association or MEWA's normal operations, including providing a health benefit plan to its members. This unimpaired free surplus shall be in the form of cash or marketable securities.

6.5 The Commissioner may require additional surplus funds, based on the coverages and exposures involved.

6.6 If the level of surplus falls below the amounts specified in subsection 6.1, the association or MEWA shall notify the Commissioner within five days and shall file with the Commissioner within 45 days a plan to return the surplus to the required level. This plan shall include a report of the causes of the association's or MEWA's insufficiency, the assessments necessary to replenish the minimum surplus and the steps taken to prevent a recurrence of such circumstances.

6.7 In addition to the minimum surplus required in subsection 6.1, the association or MEWA shall obtain a surety bond sufficient to cover 20% of its annual premium for Delaware members, and shall comply with the following:

6.7.1 For the first year of operation, the association or MEWA shall obtain a surety bond in the amount of $500,000.00 to ensure the association's or MEWA's contractual obligations to its health benefit plan members:

6.7.2 Every surety bond obtained by an association or MEWA shall be:

6.7.2.1 In a form to be approved by the Commissioner;

6.7.2.2 Issued by an insurer or surety licensed to transact such business in Delaware, or by a surplus lines insurer on Delaware's approved list; and

6.7.2.3 Provided, by certified copy, to the Commissioner at the time of initial application under subsection 4.1 and annually thereafter; and

6.7.3 An association or MEWA shall notify the Department within five days of any cancellation or termination of its surety bond.

7.0 Rating Requirements

7.1 An insurer offering a health benefit plan to an association or MEWA shall obtain rate approval from the Commissioner through the rate review process provided in 18 **Del.C.** Ch. 25. An insurer may use its existing group rates, without making an association or MEWA-specific rate filing, so long as its group rates have been filed with and approved by the Commissioner and meet the requirements of this Section.

7.2 No insurer shall offer a health benefit plan to an association or MEWA unless such association or MEWA meets the eligibility requirements of 18 **Del.C.** §3506 in order to qualify for a group health insurance policy.

7.3 Any insurer contracting with an association or MEWA to provide a health benefit plan shall use a community rating methodology acceptable to the Commissioner in accordance with this Section and with the following:

7.3.1 The association or MEWA may be rated based on the collective group experience of its members, provided that each certificate holder and dependent is charged the same community rate; and

7.3.2 The following risk classification factors are prohibited in rating employees or members of such groups, and dependents of such employees or members:

7.3.2.1 Demographic rating, including age and gender rating;

7.3.2.2 Geographic area rating;

7.3.2.3 Health status rating, including pre-existing conditions;

7.3.2.4 Industry rating;

7.3.2.5 Medical underwriting and screening;

7.3.2.6 Experience rating;

7.3.2.7 Tier rating (except for tiers related to family structure); or

7.3.2.8 Durational rating.

7.4 The Commissioner may permit an insurer to establish rewards, premium discounts, split benefit designs, rebates, or otherwise waive or modify applicable co-payments, deductibles, or other cost-sharing amounts in return for adherence by a member or subscriber to programs of health promotion and disease prevention that are satisfactory to the Commissioner.

7.5 An insurer offering a health benefit plan to an association or a MEWA shall guarantee acceptance of all persons within the association or MEWA and their dependents.

7.6 An insurer offering a health benefit plan or plans to an association or a MEWA shall guarantee the rates on all such plans for a minimum of 12 months.

7.7 Medical Loss Ratio. A foreign or domestic insurer offering a health benefit plan to an association or MEWA with covered lives in Delaware shall comply, with respect to those covered lives, with the medical loss ratio and rebating requirements of 45 CFR 158.210-240, but shall in no case fall below eighty-five percent (85%) of the aggregate amount of premiums earned by the insurer from policies and certificates issued in this State.

7.8 Any fees associated with broker services shall not be incorporated into the medical loss ratio under subsection 7.7, but shall be incorporated in the administrative expense portion of an insurer's rate filing.

8.0 Benefit Requirements

8.1 Each health benefit plan coverage offered to an association or MEWA in compliance with 18 **Del.C.** §3506 shall, at a minimum, provide:

8.1.1 Essential Health Benefits as defined in 42 USC §18022(b)(1), except that pediatric dental and vision coverage as required in this subsection may be offered to the association in either a stand-alone dental or vision plan or as a benefit embedded in the health benefit plan;

8.1.2 Cost sharing requirements of 42 USC §18022(c)(1), (c)(3);

8.1.3 Lifetime and annual limits as prescribed in 29 CFR 2590.715-2711;

8.1.4 A level of coverage designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan;

8.1.5 All other insurance requirements and benefit mandates for health insurers as provided in 18 **Del.C.** Chs. 35 and 72, as applicable and as may be amended, any regulations promulgated pursuant thereto, and as specified by regulation by the Commissioner; and

8.1.6 All other benefits required to comply with applicable federal laws and regulations.

8.2 Every health benefit plan offered by any insurer to an association or a MEWA shall include a process for subscribers to appeal adverse benefit determinations that complies with the requirements of 18 **Del.C.** §6418 and 18 **DE Admin. Code** 1301.

8.3 An insurer shall not deliver or issue for delivery an association or MEWA health benefit plan covering lives located in Delaware that contains an exclusion or limitation for pre-existing conditions or a waiting period on the coverage of pre-existing conditions.

8.4 Regardless of the collective size of the association or MEWA, health benefit plans issued to small employers shall comply with all insurance laws applicable to small employer groups as required by 18 **DE Admin. Code** 1308-3.3

9.0 Membership Requirements

9.1 Prior to issuing a health benefit plan to an association or MEWA, an insurer shall confirm that the association or MEWA:

9.1.1 Meets the bona fide association test outlined in 18 **Del.C.** §3506;

9.1.2 Meets the commonality-of-interest test. Pursuant to 83 FR 28,961 (to be codified at 29 CFR 2510.3-5(c)), employer members of an association or MEWA will be treated as having a commonality of interest if the standards of either subsection 9.1.2.1 or 9.1.2.2 are met, provided these standards are not implemented in a manner that is subterfuge for discrimination as is prohibited under 18 **Del.C.** Ch. 23 and 29 CFR 2510.3-5(d):

9.1.2.1 The employers are in the same trade, industry, line of business, or profession; or

9.1.2.2 Each employer has a principal place of business in the State of Delaware; and

9.1.3 Does not restrict membership to employers located within a particular geographic region of the State; and

9.1.4 Accepts employers with a principal place of business located in any part of the State.

10.0 Notice Requirements

10.1 No policy of health insurance or certificate under a policy offering health insurance shall be delivered or issued for delivery in this State until a copy of the form and of the rules for the classification of risks has been filed with and approved by the Commissioner in accordance with Section 4.0 of this regulation.

10.2 The following notice shall be provided by the insurer within the policy documents to employers and employees who obtain coverage from an association or MEWA:

"NOTICE

THE {*Insert the name of the ASSOCIATION OR MULTIPLE EMPLOYER WELFARE ARRANGEMENT in all capital letters*} IS NOT AN INSURANCE COMPANY. FOR ADDITIONAL INFORMATION ABOUT THE {*Insert the name of the ASSOCIATION OR MULTIPLE EMPLOYER WELFARE ARRANGEMENT in all capital letters*} YOU SHOULD ASK QUESTIONS OF THE ADMINISTRATOR OF THE {*Insert the name of the ASSOCIATION OR MULTIPLE EMPLOYER WELFARE ARRANGEMENT in all capital letters*}, OR YOU MAY CONTACT THE DELAWARE DEPARTMENT OF INSURANCE AT_____."

10.3 Each association or MEWA-related notice shall include the Department's current consumer service telephone number and website in the blank provided in this notice.

10.4 The insurer of a fully-insured plan shall include in its policy documents the following disclosures:

10.4.1 The Delaware resident has the option of purchasing insurance on the Delaware Health Insurance Marketplace;

10.4.2 Purchasing an association or MEWA health benefit plan may prevent the employer or individual from accessing premium subsidies and cost sharing reductions that may otherwise be available under the Patient Protection and Affordable Care Act; and

10.4.3 Purchasing an association or MEWA health benefit plan may be more expensive than purchasing a plan on the Delaware Health Exchange.

10.5 The insurer shall file its advertising and marketing materials with the Commissioner for prior approval.

10.6 The insurer shall file policies, certificates, statement of benefits, brochures, and any other endorsement, rider, or application used in conjunction with the health benefit plan with the Department for prior approval.

11.0 Enrollment Periods

At a minimum, an insurer enrolling employers or individuals in an association or MEWA health benefit plan shall comply with all open enrollment and special enrollment periods as provided in 18 **Del.C.** §3571J.

12.0 Financial Auditing

12.1 Each association or MEWA shall file annually with the Commissioner, and with the members of the association or MEWA, an audited financial statement for the most recently completed fiscal year that is certified by an independent certified public accountant. If the association or MEWA fails to file such audited financial statement, the Commissioner may perform the audit and the association or MEWA shall reimburse the Commissioner for the cost thereof.

12.2 At a minimum, the audited financial statement shall contain the following exhibits for the current and prior fiscal years:

12.2.1 Balance sheet;

12.2.2 Statement of gain or loss from operations;

12.2.3 Statement of changes in financial position;

12.2.4 Proof of minimum surplus, as set forth in Section 6.0 of this regulation;

12.2.5 Notes to financial statements; and

12.2.6 Management and internal control letters.

12.3 The financial statement shall be prepared in accordance with generally accepted accounting principles with the following exceptions:

12.3.1 Loss reserves shall not be discounted. However, the Commissioner may approve discounting of loss reserves if the association's or MEWA's actuary certifies that said discounting is in accordance with the customary practice of the traditional insurance industry, and that said discounting will not adversely affect the fiscal integrity of the association or MEWA; and

12.3.2 Any other exceptions to generally accepted accounting principles the Commissioner finds necessary to preserve the fiscal integrity of the association or MEWA.

12.4 Each association or MEWA shall include with the financial statement a statement of opinion as to the loss and loss expense reserves certified by an actuary.

12.5 Each association or MEWA shall file a copy of the fidelity bond, or evidence acceptable to the Commissioner, covering the administrator, the association or MEWA employees and service agents with the audited financial statement.

12.6 In addition to the annual audited financial statement, the Commissioner may require any association or MEWA to file additional financial information, including, but not limited to, interim financial reports, additional financial reports or exhibits, or statements considered necessary to secure complete information concerning the condition, solvency, experience, transactions, or affairs of the association or MEWA. The Commissioner shall establish reasonable deadlines for filing these additional reports, exhibits, or statements. The Commissioner may require verification of any additional required information.

12.7 Each association or MEWA shall file annually with the Commissioner the methodology for establishing the annual contributions of its members. Such contributions shall be based on reasonable assumptions and certified by an actuary.

12.8 An insurer offering a health benefit plan to an association or MEWA with covered lives in Delaware shall comply with all financial reporting requirements applicable to traditional insurance companies doing business in Delaware. Instructions for annual filings by traditional insurance companies doing business in Delaware are set forth on the Department's website.

13.0 Advertising and Marketing

Associations, MEWAs, and insurance agents or brokers acting on behalf of an association or MEWA may only use marketing materials that have been submitted to and approved by the Commissioner pursuant to Section 4.0 of this regulation. Associations, MEWAs, and insurance agents or brokers acting on behalf of an association or MEWA are subject to 18 **Del.C.** Ch. 23 and all other applicable provisions of law regarding advertising practices.

14.0 Record Retention

An association or MEWA doing business in Delaware shall maintain its books and records for a minimum period of seven years following termination of coverage under a fully-insured policy and a minimum of seven years for all association or MEWA-related documentation unrelated to insurance coverage.

15.0 Enforcement Authority

15.1 A violation of this regulation shall be considered an unfair and deceptive trade practice under 18 **Del.C.** §2304. Failure to file the information required in this regulation shall be prima facie evidence of a deceptive practice which endangers the legitimate interest of customers and public. If the MEWA or association does not qualify for an exemption under ERISA, after hearing, the MEWA or association may be found in violation of 18 **Del.C.** §505 and 18 **Del.C.** Ch. 21.

15.2 To ensure compliance with the provisions of this regulation and protect Delaware health care consumers, the Commissioner may, in his or her discretion, examine the business and financial affairs of an association or MEWA doing business in this state utilizing the powers granted by 18 **Del.C.** §320, and other provisions of Title 18 as may be applicable.

15.3 The Commissioner may decline to issue or renew a license issued pursuant to this regulation if the Commissioner finds that an association or MEWA does not satisfy any standard or requirement of this regulation or any provision of other applicable state or federal law or regulation.

15.4 The Commissioner may suspend or revoke a license issued pursuant to this regulation for a violation of this regulation or any provision of applicable state and federal law.

15.5 Any person or entity that violates any provision of this regulation is subject to the penalties provided in Chapters 3, 17 and 23 of Title 18 and such other provisions of Title 18 as may be applicable.

15.6 When the Commissioner believes that an association, MEWA, or any other person is operating in this state without being duly registered or has violated the law, an administrative regulation of the Department, or an Order of the Commissioner, the Commissioner may issue an order to cease and desist such violation or take any other action set forth in 18 **Del.C.** §2307.

16.0 Notification to the Department by Insurers of Contracts with Associations or MEWAs

16.1 An insurer shall notify the Department by December 31st of each year of all health insurance contracts and administrative-services-only contracts it issued, renewed, or had in force at any time during the 12-month period of that calendar year, that covered an association or MEWA with members having employees or dependents in Delaware.

16.2 The contract between the insurer and the association or MEWA shall contain a provision whereby the insurer shall maintain, for the benefit of certificate holders, a deposit account covering 30 days of claims should the contract be cancelled or terminated. The insurer shall notify the Department within 5 days of any cancellation or termination of a contract that covered an association or MEWA with members having employees or dependents in Delaware.

16.3 Reporting Requirement for Fraudulent Association or MEWA Activity

16.3.1 An insurer having knowledge or a reasonable suspicion that an association, MEWA, or entity holding itself out to be an association or MEWA in this state is not in compliance with the requirements of this rule shall immediately report to the Commissioner, in writing, regarding the identity of the entity, any known contact information or other materials, and the nature of the entity's practices that triggered this reporting. This reporting obligation also requires an insurer report to the Commissioner any person, including a licensed or unlicensed agent, a broker, or other individual, soliciting, offering, or selling a health benefit plan on behalf of an association, MEWA, or entity holding itself out to be such an association or MEWA in this state without complying with the requirements of this regulation.

16.3.2 Confidentiality

16.3.2.1 The documents and evidence provided pursuant to this subsection or obtained by the Commissioner in an investigation of suspected or actual conduct in violation of this regulation shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in any private civil action pursuant to 29 **Del.C.** Ch. 100 or any confidentiality provision set forth in Delaware Title 18.

16.3.2.2 Subsection 16.3.2.1 of this subsection does not prohibit release by the Commissioner of documents and evidence obtained in an investigation of suspected or actual conduct in violation of this rule:

16.3.2.2.1 In administrative or judicial proceedings to enforce laws administered by the Commissioner;

16.3.2.2.2 To federal, state, or local law enforcement or regulatory agencies, or to the National Association of Insurance Commissioners; or

16.3.2.2.3 At the Commissioner's discretion.

16.3.3 Release of documents and evidence under subsection 16.3.2 of this subsection does not abrogate or modify the privilege granted in subsection 16.3.1 of this subsection.

17.0 Insurance Agents and Brokers

17.1 Any person, including a licensed or unlicensed agent, a broker, or other individual, soliciting, offering, or selling a health benefit plan on behalf of an association or MEWA to a Delaware employer or a Delaware resident shall comply with the following requirements:

17.1.1 Notify the Commissioner in writing prior to engaging in any conduct in connection with such sale. This written notification shall include, at a minimum:

17.1.1.1 The soliciting person's name, address, telephone number, and email address;

17.1.1.2 The name of the association or MEWA; and

17.1.1.3 All materials in the soliciting person's possession used for the purposes of soliciting, offering, or selling the health benefit plan, including advertising and marketing materials;

17.1.2 Prior to completing a sale, disclose to the employer or resident that:

17.1.2.1 He/she is being compensated for the sale of the health benefit plan;

17.1.2.2 The employer or resident has the option of purchasing insurance on the Delaware Health Exchange;

17.1.2.3 Purchasing such a health benefit plan may prevent the employer or individual from accessing premium subsidies and cost sharing reductions; and

17.1.2.4 Purchasing such a health benefit plan may be more expensive than purchasing a plan on the Delaware Health Exchange.

17.1.3 Provide the employer or resident with a crosswalk of benefits comparing the association or MEWA health benefit plan with plans offered on the Delaware Health Insurance Marketplace; and

17.1.4 Prior to engaging in or assisting any person to engage in offering an association or MEWA health benefit plan, carry out and document appropriate due diligence to establish, at a minimum, the following:

17.1.4.1 That the insurer is licensed in the State;

17.1.4.2 That the association or MEWA is licensed in the State;

17.1.4.3 That the disclosures listed in subsection 17.1.2 are in the policy document; and

17.1.4.4 That the advertising and marketing materials he/she is using have been approved by the Department.

17.2 Any person, including a licensed or unlicensed agent, a broker, or other individual, soliciting, offering, or selling a health benefit plan on behalf of an association, MEWA, or entity holding itself out to be such an association or MEWA, having knowledge or a reasonable suspicion that an association, MEWA, or entity holding itself out to be an association or MEWA in this State is not in compliance with the requirements of this regulation shall immediately report to the Commissioner in writing regarding the identity of the entity, any known contact information or other materials, and the nature of the entity's practices triggering this reporting. This reporting obligation also requires such person to report to the Commissioner any person, including a licensed or unlicensed agent, a broker, or other individual, soliciting, offering, or selling a health benefit plan on behalf of an association, MEWA, or entity holding itself out to be such an association or MEWA in this State without complying with the requirements of this rule. The confidentiality provisions of subsection 16.3.2 shall apply to this subsection.

18.0 Severability

If any provision of this regulation, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this regulation which can be given effect without the invalid provision or application, and to that end the provisions of this regulation are severable.

22 DE Reg. 180 (09/01/18) (Emer.)