

July 11, 1991

SUBJECT: INSURANCE

Circular Letter No. 8
July 11, 1991

TO: ALL INSURANCE AGENTS AND BROKERS

RE: PLACEMENT OF HEALTH INSURANCE COVERAGE WITH UNLICENSED AND UNAUTHORIZED MULTIPLE EMPLOYER WELFARE ARRANGEMENTS

Since the release of Circular Letter No. 7 (1978) and Circular Letter No. 7 (1977), the Insurance Department has received additional inquiries as to whether purported "comprehensive health plans" offered by Multiple Employer Welfare Arrangements ("MEWAs") which provide major medical type benefits to employees residing in New York State on a self-funded basis can be sold in this state.

The term "MEWA" is defined in the Employee Retirement Income Security Act, Public Law 93-406, ("ERISA") to mean an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any welfare benefit to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries. However, the term "MEWA" does not include any such plan or other arrangement which is established or maintained (i) pursuant to one or more collective bargaining agreements or (ii) by a rural electric cooperative.

It is the position of this Department that the selling of the above major medical type benefits constitutes the doing of an insurance business in this state under the New York Insurance Law, and only a licensed insurer or an organization specifically exempt from such licensing requirement may offer such insurance coverage or benefits in this state.

The Department understands that certain self-funded MEWAs claim that they are exempt from the requirement of licensing and conformance to the New York Insurance Law because of the provisions of ERISA.

Based on a review of the applicable provisions of ERISA, it is the position of this Department that except as discussed below, ERISA exemption does not apply to self-funded MEWAs. Accordingly, all self-funded MEWAs must be licensed to do an insurance business in this state. It should be noted that, upon referral by this Department, the Attorney General commenced an injunctive action against one such program and its sponsors and obtained a Temporary Restraining Order and Decision that the program did in fact conduct an insurance business in violation of the insurance Law. *Corcoran v. Empire Benefit Plans, Inc.*, N.Y. Sup. Ct., Albany Co., (June 13, 1989).

Any licensee of this Department who solicits, negotiates or effectuates any coverage on behalf of an unlicensed or unauthorized self-funded MEWA would be subject to disciplinary action for having violated Sections 2110, 2117 and 2122 and other applicable provisions of the Insurance Law, and to the penalties provided therein which include suspension or revocation of all insurance licenses held and/or the imposition of monetary penalties.

Any other person who acts on behalf of an unlicensed or unauthorized self-funded MEWA in this state would be subject to monetary penalties for having violated Sections 1102, 2117 and 2122 of the Insurance Law.

The Department recognizes that certain self-funded multiple employer programs which are established or

maintained (i) pursuant to one or more collective bargaining agreements, (ii) by rural electric cooperatives, or (iii) by trades or businesses under common control may be exempt from the requirements of obtaining a license and other provisions of the Insurance Law by virtue of ERISA preemption.

However, we believe that our licensees should exercise caution when they are approached to provide services on behalf of any self-funded multiple employer program. Licensees should be suspicious when the coverage is offered to unaffiliated or unrelated parties and provides for profit-making opportunities. We note that the exemption from insurance regulation under ERISA is not intended to apply to insurance programs masquerading as employee benefit plans.

If an insurance agent or broker is approached to provide services on behalf of a self-funded multiple employer program and is unsure as to whether the program is exempt from the requirement of licensing, such licensee may submit all relevant documents to the Department for review. Placement of such coverage pending Insurance Department review may expose licensees to the liabilities of the type herein above mentioned.

Licensees of this Department who provide services to self-funded ERISA exempt plans are hereby cautioned not to misrepresent the nature of their services as being within the scope of their insurance licenses. The public relies upon Department licensees, acting in their professional capacity, to evaluate their insurance needs and to secure appropriate insurance coverage. It is the position of this Department that licensees are responsible for making full and complete disclosure in writing when they are not acting within the scope of their license. In addition, licensees should disclose in writing that the self-funded ERISA exempt plan does not operate under the supervision[ILLEGIBLE WORDS] or jurisdiction of the New York State Insurance Department and that the insurance type[ILLEGIBLE WORDS] benefits are not provided or guaranteed by a licensed insurer and are not subject to the[ILLEGIBLE WORDS] minimum standards or mandated benefits provisions of the Insurance Law. Licensees should retain signed and dated copies of such written disclosure for a period of not less[ILLEGIBLE WORDS] than five years.

As a final matter, agents and brokers should consider their potential liability under the fiduciary responsibility provisions in ERISA before agreeing to provide services on behalf of self-funded multiple employer programs. Agents and brokers may be held personally liable for the payment of benefits or for other losses incurred resulting from the failure to discharge their duties solely in the interest of and for the exclusive benef[ILLEGIBLE WORDS] of plan participants and their beneficiaries or from similar failures by cofiduciaries and, in addition, may be liable for other penalties for activities or transactions which are prohibited. Furthermore, a licensee's involvement with a fraudulent or financially unsoun[ILLEGIBLE WORDS] arrangement, including programs which charge excessive fees, may reflect negatively on the competence and trustworthiness of such licensee.

Receipt of this letter must be acknowledged in writing to:

Mr. John Mansfield
Supervising Insurance Examiner
New York State Insurance Department
160 West Broadway
New York, New York 10013

Very truly yours,

[SIGNATURE]

SALVATORE R. CURIALE

SUPERINTENDENT OF INSURANCE

ATTACHMENT

CERTIFICATION

I _____, _____ of _____

(Name) (Title) (Company Name)

do hereby acknowledge receipt of Circular Letter Number 8, dated July 11, 1991.

Copies of this Circular Letter will be sent by our company to all currently appointed agents of the company, whether appointed pursuant to 2103(a) or (b) of the New York State Insurance Law, as soon as possible but in no event later than one month from the date that I received said Circular Letter. The company also agrees to continue to provide the Circular Letter to all newly appointed agents and to keep a mailing list, which will be available for the Insurance Department's Inspection, of all agents the Circular Letter has been mailed or delivered to.

DATE: _____

NAME:

TITLE: