Government of the District of Columbia
Vincent C. Gray, Mayor
Department of Insurance, Securities and Banking

Chester A. McPherson
Acting Commissioner

BULLETIN

14-IB-01-12/17

TO: All Health Insurers Conducting Business in the District of Columbia

FROM: Chester A. McPherson, Acting Commissioner

SUBJECT: Association Coverage in the District of Columbia

DATE: December 17, 2014

This Bulletin is issued to affirm the position of the Department of Insurance, Securities and Banking (the "DISB") with regard to health insurance coverage sold to associations located in the District, as well as health insurance coverage sold to small employers located in the District by captive insurers domiciled outside of the District.

Associations Defined

The Centers for Medicare and Medicaid Services ("CMS") issued an Insurance Standards Bulletin Series notice on September 1, 2011[1] regarding the application of individual and group market requirements under Title XXVII of the Public Health Service Act when insurance coverage is sold to, or through, associations.[2] Under that notice, CMS stated that in most situations involving employment-based association coverage, the group health plan exists at the

[1] *See* CCIIO Technical Guidance: Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage is Sold to, or through, Associations (September 1, 2011): http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance

[2] *See also* D.C. Official Code § 31-3301.01(3) defining "bona fide association."

situations involving employment-based association coverage, the group health plan exists at the individual employer level and not at the association-of-employers level. In these situations the size of each individual employer participating in the association determines whether that employer's coverage is subject to the small group market or the large group market rules.

A "mixed" association exists where different members have coverage that is subject to the individual market, small group market, and/or large group market rules under the PHS Act, as determined by each employer member's status. An association cannot aggregate the employees of the member employers as means of attempting to qualify as a large employer. For example, it is not permissible under the PHS Act for mixed association coverage to comply only with the large group market rules, even with respect to its individual and small employer members. Accordingly, each employer member of a "mixed" association must receive coverage that complies with the requirements arising out of their own status as an individual, small employer, or large employer.

Further, under the Better Prices, Better Quality, Better Choices for Health Coverage Amendment Act of 2013, effective July 16, 2014 (D.C. Law 20-123; D.C. Official Code § 31-3171.01 (16)(B)(i)), "[a]ll persons treated as a single employer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986 (26 U.S.C. § 414(b), (c), (m), or (o)) shall be treated as a single employer," and "[a] carrier that offers individual or small group health benefit plans shall offer such plans solely through the American Health Benefit Exchange." As such, in the event an association is comprised of members who are small employers, unless each small employer operates as a separate self-insured entity, each small employer member is required to purchase insurance through DC Health Link or risk violating District law.

Multiple Employer Welfare Arrangements (MEWAs)

The U.S. Department of Labor, through the Employee Benefits Security Administration ("EBSA"), is responsible for the administration and enforcement of the provisions of Title I of ERISA (29 U.S.C. §1001 *et seq.*). ERISA prescribes standards of fiduciary conduct which apply to persons responsible for the administration and management of the assets of employee benefit plans subject to ERISA. ERISA covers only those plans, funds, or arrangements that constitute an "employee welfare benefit plan," as defined in ERISA Section 3(1), or an "employee pension benefit plan," as defined in ERISA Section 3(2). By definition, Multiple Employer Welfare Arrangements ("MEWAs") do not provide pension benefits; therefore, only those MEWAs that constitute "employee welfare benefit plans" are subject to ERISA's provisions governing employee benefit plans.

Under Federal law, a MEWA that constitutes an ERISA-covered plan is required to comply with the provisions of Title I of ERISA applicable to employee welfare benefit plans, in addition to any State insurance laws that may be applicable to the MEWA. If a MEWA is determined not to be an ERISA-covered plan, the persons who operate or manage the MEWA may nonetheless be subject to ERISA's fiduciary responsibility provisions if such persons are responsible for, or exercise control over, the assets of ERISA-covered plans. In both situations, the Department of Labor would have concurrent jurisdiction with the State(s) over the MEWA. If a MEWA solicits or provides health benefits to one or more employers domiciled in the District of Columbia, the MEWA is subject to District of Columbia insurance laws, regardless of whether the MEWA is regulated under ERISA or whether the MEWA is domiciled in the District of Columbia.

To satisfy the definition of a MEWA and be exempt from regulation by the Department of Insurance, Securities and Banking, the plan must meet the following criteria:

1. maintained or established by a single employer;
2. not a governmental plan as defined under 29 U.S.C. 1002(32); and
3. self-funded, *i.e.* not all benefits provided by the employer are guaranteed under an insurance contract.

A MEWA is fully-insured if all benefits provided by the MEWA are guaranteed under insurance contracts with licensed insurance companies. The health insurance coverage of a fully-insured MEWA is regulated through the licensed insurance companies that issue the insurance contracts. It is the position of the Department that a fully-insured MEWA established by two or more employers in the same or related industry is permissible.[3] A licensed insurance company may also issue a group health insurance policy to the trustees of a fund established by two or more employers in the same or related industry. Thus, a MEWA that establishes a trust and provides group health benefits to employers in the same or related industry through an insurance policy issued to the trust is required to purchase through a licensed insurance company. An insurance policy purchased to cover two or more employers not in the same or a related industry is not a MEWA. As such, those employers must follow applicable District law, including the requirement for small group insurance policies to be purchased through DC Health Link.

Captive Insurers, Associations or MEWAs Acting as Insurers

D.C. Official Code § 31-231 states in relevant part:

> No person shall act as an insurer, or engage in any other activity, directly or indirectly, which is regulated in acts codified in Chapters 1 through 55 of this title unless performed within the scope of a certificate of authority issued by the Commissioner as provided by this chapter.

[3] *See* ERISA Section 3(5) defining "employer" and D.C. Official Code § 31-3301.01(3) defining "bona fide association."

Section 31-232 prohibits any person from aiding or assisting another person in activity proscribed by § 31-231, including selling, soliciting, or negotiating for applications, policies, memberships, or other business.

In this regard, a captive insurer or an entity created as an association or MEWA that sells or otherwise issues or makes available health insurance policies to more than one small employer located in the District, unless where applicable as a qualified plan under ERISA, will be deemed to be engaged in the business of selling health insurance in the District and required to obtain a certificate of authority. Similarly, any person or entity that engages in the solicitation or sale of insurance policies in the District shall be required to obtain a resident or non-resident producer license pursuant to D.C. Official Code § 31-1131.01 *et seq.* If such an association, captive insurer, MEWA, or producer does not obtain the proper license, it will be subject to enforcement.

In addition, associations and MEWAs should also be aware that D.C. Official Code § 31-4712 requires a policy, certificate, or coverage for a health benefit plan offered to an employer in the District of Columbia be filed with and approved by the Commissioner. This includes coverage issued to an out-of-District trust or association or by a captive unless the Commissioner has determined the out-of-District group is exempt.

Consistent with federal guidance issued in relation to the Affordable Care Act, whether a policy issued to an association is considered individual coverage, small group coverage, or large group coverage is dependent on the purchaser's status. For example, a fully-insured plan purchased by an individual (a non-employer), whether through an association or not, constitutes individual coverage. A fully-insured plan purchased by an employer with 50 or fewer employees, whether through an association or not, constitutes small employer coverage (100 or fewer in 2016). Finally, a fully-insured plan purchased by an employer with 51 or more

employees, whether through an association or not, constitutes large group coverage (101 or more in 2016).

For more information, please review the Centers for Medicare and Medicaid Services (CMS) Insurance Standards Bulletin Series release on the Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage is Sold to, or through, Associations, issued September 1, 2011.

If you have any questions or comments concerning this bulletin, please contact the Department of Insurance, Securities and Banking at (202) 727-8000 or email disb@dc.gov.