NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

Insurance Circular Letter No. 10
July 27, 2018

TO: All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, Health Maintenance Organizations and all Agents and Brokers Licensed to Sell Accident and Health Insurance in New York State

RE: Regulation of Association Health Plans

STATUTORY REFERENCES: N.Y. Insurance Law §§ 1101, 1102, 2110, 2117, 2122, 2127, 2403, 2406, 3201, 3231, 4317 and 4235

I. Purpose

This circular letter is issued to remind insurers authorized to write accident and health insurance in this State, Article 43 corporations, and health maintenance organizations (collectively, "issuers"), and insurance agents and brokers that New York requirements for accident and health insurance coverage obtained through associations are not preempted by federal law. The recent U.S. Department of Labor ("DOL") final rule ("AHP Rule") expressly does not preempt the New York Insurance law which strictly limits the associations or groups of employers that may sponsor a health insurance plan. The Department of Financial Services ("DFS") will take action against an issuer, agent or broker for any failure to comply with or attempt to circumvent New York statutory or regulatory requirements with respect to accident and health insurance coverage, employee welfare benefit plans or association health plans, including New York's requirements regarding the establishment of such groups, the provision of essential health benefits and other consumer protections.

II. Discussion

On June 21, 2018, the DOL issued the AHP Rule to permit a group or association of employers to establish a group health plan that is an employer welfare benefit plan (an association health plan or "AHP") for the benefit of its members. See 83 FR 28912. The AHP Rule clearly states that these groups and associations of employers are a type of multiple employer welfare arrangement ("MEWA") under the Employee Retirement Income Security Act ("ERISA") and that the AHP Rule has no impact on, and does not preempt in any way, state regulation of MEWAs pursuant to ERISA § 514. As a result, AHPs are subject to the same statutory and regulatory requirements as any other MEWA in New York.[1]

[1] See OGC Opinion No. 03-02-17 (February 14, 2003) (https://www.dfs.ny.gov/insurance/ogco2003/rg030217.htm) and OGC Opinion No. 05-01-07 (January 13, 2005) (https://www.dfs.ny.gov/insurance/ogco2005/rg050107.htm).

A. Fully-Insured Coverage Issued to Associations

Regardless of the AHP Rule, for a group or association of employers to sponsor a group health plan in New York, the group or association must meet specific requirements to be recognized as a group under the Insurance Law. For example, Insurance Law § 4235(c)(1)(H) and (K) require that an association be in active existence for at least two years and be formed principally for purposes other than obtaining insurance coverage for its members. An association formed for the purpose of obtaining health insurance coverage is not a recognized group in New York and therefore is not permitted to purchase health insurance coverage in New York. Accordingly, issuers may not deliver or issue for delivery health insurance policies or contracts in New York to an association that does not satisfy the New York Insurance Law requirements, nor may brokers or agents solicit or procure such a policy in this State.

In the event an association is a recognized group under the Insurance Law, every health insurance policy delivered or issued for delivery in this State to the association must meet the requirements of the Insurance Law, including those pertaining to rating and benefits. For instance, Insurance Law §§ 3231(g) and 4317(d) require that coverage issued to an association be rated based on its underlying member employers, and not based on the size of the association group. Large employer members must be issued large group coverage, small employer members must be issued small group coverage, and individual members must be issued individual coverage. This requirement is often referred to as the "look through" provision, which precludes individuals and small groups from combining for purposes of obtaining large group coverage. Importantly, under Insurance Law §§ 3221(h) and 4303(ll), coverage issued to an association that includes one or more individual or small employer members must provide coverage for essential health benefits for all of the association's members.

B. Self-Funded Associations

The AHP Rule also does not modify the existing ERISA regulatory framework that allows states to regulate self-funded associations. An association that self-funds health insurance benefits for the New York employees of its members would be doing an insurance business in New York as defined in Insurance Law § 1101. Entities doing the business of insurance in New York are subject to the Insurance Law under Insurance Law §§ 1101 and 1102, as well as other provisions of the law. New York Insurance Law requires that any self-funded association doing an insurance business in New York must be licensed to do an insurance business in this State regardless of where that self-funded association is located. As a result, self-funded associations doing the business of insurance in New York are subject to New York requirements such as solvency, premium rate review, state benefit mandates and consumer protections. Any entity that violates § 1102 is subject to monetary penalties by the Superintendent, who may also order it to cease and desist from such activities, pursuant to Insurance Law § 2406.

Moreover, any person who solicits, negotiates or effectuates any coverage on behalf of an unlicensed or unauthorized self-funded association or calls attention to such an entity doing an insurance business would be in violation of Insurance Law §§ 2117 and 2122 and subject to administrative action and penalties by the Superintendent, who may also order it to cease and desist from such activities, pursuant to Insurance Law § 2406. In addition, the Superintendent may find that any licensed insurance agent or broker that engages in such behavior is untrustworthy or incompetent and may suspend or revoke all licenses issued to such licensee pursuant to Insurance

Law § 2110 or, in lieu thereof, imposition of monetary penalties pursuant to Insurance Law § 2127. See Ins. Circular Letter No. 8 (1991).

C. Out-of-State Associations

The AHP Rule does not preempt New York State jurisdiction over health insurance coverage issued to its residents or insurance policies delivered or issued for delivery in this State. Indeed, the AHP Rule states that the application and coordination of state insurance law remains the province of the states. See 83 FR 28925. Therefore, the AHP Rule does not affect how out-of-state association coverage is regulated by DFS, and DFS will continue to enforce New York's Insurance Law and regulations promulgated thereunder to protect New Yorkers.

III. Conclusion

The AHP Rule does not preempt, in whole or in part, New York law or DFS's regulation of health insurance. DFS will continue to enforce State requirements vigorously and to the fullest extent of State law to protect the integrity of New York's health insurance markets and the consumer protections of New York law. DFS is prepared to undertake all additional enforcement actions necessary to protect New Yorkers from the AHP Rule.

Please direct any questions regarding this circular letter to Jon Thayer, Associate Attorney, by mail at New York State Department of Financial Services, Health Bureau, One Commerce Plaza, Albany, New York 12257, or by email at Jon.Thayer@dfs.ny.gov.

Very truly yours,

Lisette Johnson
Bureau Chief, Health Bureau