

VERMONT DEPARTMENT OF FINANCIAL REGULATION

RULE I-2018-02-E

**SELF-INSURED MULTIPLE EMPLOYER WELFARE ARRANGEMENTS AND
ASSOCIATION HEALTH PLANS**

Section 1. Purpose

This rule is promulgated pursuant to 8 V.S.A. § 4079a and in response to the United States Department of Labor’s June 21, 2018 amendment to 29 C.F.R. § 2510. *See* Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28,961 (June 21, 2018) (to be codified at 29 C.F.R. § 2510.3-5). The purpose of this rule is to set forth rules, forms, and procedures regarding self-insured association or MEWA health plans. This rule protects Vermont consumers and promotes the stability of Vermont’s health insurance markets, to the extent permitted under federal law, by implementing licensure, solvency, reserve, and rating requirements. This rule shall not apply to association health plans that are fully funded. Nothing in this rule shall be construed to provide a self-insured association or MEWA authority to operate in the State before January 1, 2019.

Section 2. Definitions

The following terms are defined for purposes of this rule as follows:

- A. “Association” means any foreign or domestic association that provides a health benefit plan that covers the employees of at least one employer that is either domiciled in Vermont or has its principal headquarters or principal administrative office in Vermont.
- B. “Commissioner” means the Commissioner of the Vermont Department of Financial Regulation.
- C. “Department” means the Vermont Department of Financial Regulation.
- D. “Employee Welfare Benefit Plan,” as used in this rule, has the same meaning as that contained in 29 U.S.C. § 1002(1).
- E. “Health Benefit Plan” means a policy, contract, certificate, or agreement offered or issued by a self-insured association or MEWA to provide, deliver, arrange for, pay for, or reimburse any of the costs of health services, as defined in 33 V.S.A. § 1802(3).
- F. “Multiple employer welfare arrangement (MEWA),” as used in this rule, has the same meaning as that contained in 29 U.S.C. § 1002(40).

- G. “Self-Insured” means any association or MEWA offering a health benefit plan that reimburses costs of health services incurred by covered persons pursuant to the benefits and coverages provided by their plan exclusively from association or MEWA assets.
- H. “Third-party Administrator” means any person who, on behalf of an association or MEWA, receives or collects charges, contributions, or premiums for, or adjusts or settles claims on or for residents of this State or Vermont health care providers and facilities.

Section 3. Authority

The Department has authority to promulgate rules for domestic and foreign self-insured association health benefit plans pursuant to 8 V.S.A. §§ 3368 and 4079a(b) and 29 U.S.C. § 1144(b)(6)(A)(ii). The Department has authority to regulate any association or MEWA offering a self-insured health benefit plan in this State.

Section 4. Captive

Self-insured associations and MEWAs insured via a captive insurance company are exempt from this rule pursuant to 8 V.S.A. § 6016. Such associations and MEWAs will be regulated by the Department’s Captive Insurance Division per 8 V.S.A. Chapter 141.

Section 5. Licensing Requirement

No association or MEWA may offer a self-insured health benefit plan in this State unless duly licensed with the Department. An association or MEWA shall be licensed and regulated in accordance with Title 8 V.S.A. Chapter 101, and all applicable regulations. The application for license shall be on a form prescribed by the Department. To be eligible for licensure in the State, all self-insured associations and MEWAs shall meet all of the following requirements in addition to those contained in Title 8 V.S.A. Chapter 101:

- A. Be licensed as a nonprofit corporation.
- B. Be established and maintained by a trade association, industry association, professional association, or by any other business group or association of any kind that has a constitution or bylaws specifically stating its purpose and have been organized and maintained in good faith for a continuous period of five years, for purposes other than obtaining or providing health care coverage benefits to its members.
- C. Be organized and maintained in good faith with at least 2,000 employees and 50 paid employer members and operated actively for a continuous period of five years.
- D. Have been operating in compliance with ERISA on a self-insured basis for a continuous period of five years pursuant to a trust agreement by a board of trustees

that shall have complete fiscal control over the association or MEWA, and that shall be responsible for all operations of the association or MEWA. The trustees shall be selected by vote of the participating employers and shall be owners, partners, officers, directors, or employees of one or more employers participating in the association or MEWA. A trustee may not be an owner, officer, or employee of the association, MEWA, or third-party administrator. The trustees shall have authority to approve applications of association members for participation in the association or MEWA and to contract with an authorized administrator or service company to administer the day-to-day affairs of the association or MEWA.

- E. Offer benefits only to association or MEWA members.
- F. Offer benefits only through licensed producers, as defined in Title 8 V.S.A. Chapter 131.
- G. Have within its own organization adequate facilities and competent personnel to serve the association or MEWA or have contracted with a licensed third-party administrator to provide those services.
- H. Have established a procedure for handling claims for benefits in the event of the dissolution of the association or MEWA.
- I. All filings made under this rule shall be submitted to:

Department of Financial Regulation
Insurance Division
Attn: Company Licensing
89 Main Street
Montpelier VT 05620-3101

Section 6. Stop Loss Insurance

The association or MEWA shall at all times maintain a stop-loss insurance policy or contract in compliance with Regulation H-2009-02 (Revised) and shall establish and maintain appropriate loss and loss adjustment reserves determined by sound actuarial principles.

Section 7. Rating Requirements

- A. An association or MEWA shall obtain rate approval annually from the Green Mountain Care Board through the rate review process provided in 8 V.S.A. §§ 4062 and 4062a. No self-insured association or MEWA may offer any plan that does not have approved rates.
- B. Any association or MEWA providing a health benefit plan shall use a community rating methodology acceptable to the Commissioner as outlined in this subsection. 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. The following risk classification factors are prohibited from use in rating

individual employees or employer members, and dependents of such employees or members:

1. demographic rating, including age and gender rating;
 2. geographic area rating;
 3. health status rating;
 4. industry rating;
 5. medical underwriting and screening;
 6. experience rating;
 7. tier rating (except for tiers related to family structure); and
 8. durational rating.
- C. The Commissioner may permit an association or MEWA 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. If such a wellness plan is integrated in the health benefit plan, approval shall occur through the SERFF product approval process, and the provisions of Section 5 shall apply to filing, licensure, and renewal. If the wellness plan is offered as a standalone program, then it must be submitted pursuant to Section 5 for approval in conjunction with licensure and renewal.
- D. An association or MEWA shall guarantee acceptance of all persons within the association or MEWA and their dependents.
- E. An association or MEWA shall guarantee the rates on all plans for a minimum of 12 months. The calendar year constitutes the plan year for all health benefit plans offered by an association or MEWA.
- F. Medical Loss Ratio. A foreign or domestic association or MEWA with covered lives in Vermont shall comply, with respect to those covered lives, with the medical loss ratio and rebating requirements of 45 C.F.R. §§ 158.210-240. Consistent with 45 C.F.R. § 158.210(a), a minimum medical loss ratio of 85 percent is required and shall be calculated consistent with the federal methodology.
- G. All expenses incurred by the association or MEWA and payable to a licensed agent, broker, or producer who is not an employee of the association or MEWA shall be incorporated into the medical loss ratio under subsection (F) of this Section and shall be incorporated in the administrative expense portion of the association or MEWA's rate filing. All expenses

incurred by the association or MEWA and payable to a licensed agent, broker, or producer—whether an employee of the association or MEWA or not—shall be reported to the Department with an explanation of how those fees are funded. If the association or MEWA utilizes an agent, broker, or producer for the sale of products including, but not limited to, a health benefit plan, the association or MEWA shall report the portion of the fee as it relates to the advertising, marketing, and sale of the health benefit plan only.

Section 8. Benefit Requirements

- A. Each health benefit plan offered by an association or MEWA shall, at a minimum, provide the following benefits:
1. Essential Health Benefits as defined in 42 U.S.C. § 18022(b)(1).
 2. Cost sharing requirements of 42 U.S.C. § 18022(c)(1), (c)(3).
 3. Lifetime and annual limits as prescribed in 29 C.F.R. § 2590.715-2711.
 4. A level of coverage equal to or greater than that designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan.
 5. The requirements of Department Regulation H-2009-03.
 6. All other insurance requirements and benefit mandates as provided in 8 V.S.A. and 18 V.S.A. Chapter 221, as may be amended from time to time, and as specified by rule by the Commissioner.
 7. All other benefits required to comply with applicable federal laws and regulations.
 8. Pediatric dental and vision coverage as required in (A)(1) of this Section may be offered to the association or MEWA in either a stand-alone dental or vision plan or as a benefit embedded in the health benefit plan.
- B. Every health benefit plan offered by an association or MEWA shall include a process for subscribers to appeal adverse benefit determinations that complies with the requirements of 8 V.S.A. § 4089f and Department Regulation H-2011-02.
- C. No health benefit plan or related policy, contract, certificate, or agreement offered or issued in this State may reserve discretion to an association or MEWA to interpret the terms of the contract or to provide standards of interpretation or review that are inconsistent with the laws of this State. Any such policy, contract, certificate, or agreement shall be null and void to the extent it conflicts with this subsection, pursuant to 8 V.S.A. § 4062f.

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

Section 9. Membership Requirements

- A. An association or MEWA offering a health benefit plan in the State shall meet the requirements of 83 Fed. Reg. 28,961 (June 21, 2018) (to be codified at 29 C.F.R. § 2510.3-5(c)) , provided these standards are not implemented in a manner that is subterfuge for discrimination as is prohibited under 8 V.S.A. §§ 4062 and 4083 and 83 Fed. Reg. 28,961 (June 21, 2018) (to be codified at 29 C.F.R. § 2510.3-5(d)).
- B. An association or MEWA doing business in this State may not restrict membership to employers located within a particular geographic region of the State and shall accept employers with a principal place of business located in any part of the State.

Section 10. Filing Requirements

No policy or certificate of 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 Department in accordance with 8 V.S.A. §§ 3541, 4062, 4515a, 4587, or 5104.

- A. The following notice shall be provided to employers and employees who obtain coverage from an MEWA or association and shall be printed in no less than 14-point boldface type of uniform font in the policy, certificate, and/or a stand-alone notice:

“NOTICE

The association or MEWA is not an insurance company and therefore may subject employers and employees to increased financial risk. If you have questions about an association or MEWA policy or whether such a policy is right for you, you should consult your broker, a Vermont Health Connect Assister, or the Vermont Department of Financial Regulation at _____.

The Vermont Life & Health Insurance Guaranty Association does not cover policies issued by associations or MEWAs. In the event of an insolvency or dissolution of the association or MEWA you may be liable for unpaid claims and expenses.”

- B. Each notice under subsection A of this Section shall include the Department’s current consumer service telephone number and website in the blank provided in this notice.
- C. The association or MEWA shall include in its policy document the following disclosures: (1) the Vermont employer has the option of purchasing insurance on Vermont Health Connect (Exchange) and does not have to join an association or MEWA to purchase insurance; (2) purchasing an association or MEWA health benefit plan may prevent your employees from accessing premium subsidies and cost sharing reductions; (3) purchasing

an association or MEWA health benefit plan may be more expensive than purchasing a plan on Vermont Health Connect (Exchange) and may not be the most cost-effective option for the employer or its employees; and (4) the Vermont employer should understand all of its purchasing and financing options before electing insurance coverage through an association or MEWA and can contact the Vermont Office of the Healthcare Advocate for additional information.

- D. The association or MEWA shall file its advertising and marketing materials with the Department for prior approval. The association or MEWA shall be responsible for any advertising or marketing materials disseminated about its health benefit plan regardless of the source.
- E. The association or MEWA shall file policies; certificates; statement of benefits; brochures; Summary of Benefits and Coverage; any endorsement, rider, or application used in conjunction with the health benefit plan; and any other document issued in conjunction with the health benefit plan with the Department for prior approval.

Section 11. Enrollment Periods

An association or MEWA enrolling members in a health benefit plan shall comply with all open enrollment and special enrollment periods applicable to the Vermont Health Connect (Exchange).

Section 12. Financial Auditing

- A. Each association or MEWA shall file annually with the Commissioner, and with the members of the association or MEWA, within 180 days after the end of the fiscal year, an audited financial statement for the most recently completed fiscal year as supported by an independent certified public accountant's report. If the MEWA or association 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, including, but not limited to, the cost to hire an independent auditor. An association or MEWA may request, in writing, permission from the Commissioner to submit a compilation statement or financial statement review conducted by a certified public accountant in lieu of an audited financial statement.
- B. At a minimum, the audited financial statement shall contain the following exhibits for the current and prior fiscal years:
 - 1. Balance sheet;
 - 2. Statement of income;
 - 3. Statement of changes in equity;
 - 4. Proof of minimum capital and surplus, as required pursuant to 8 V.S.A. § 3304;

5. Notes to financial statements; and
 6. Management and internal control letters.
- C. The financial statement shall be prepared in accordance with statutory accounting practices, unless the Commissioner finds an exception to statutory accounting practices is necessary to preserve the fiscal integrity of the association or MEWA.
 - D. Each association or MEWA shall file a copy of the fidelity bond, or evidence acceptable to the Commissioner, covering the administrator, the MEWA or association employees, and service agents with the audited financial statement.
 - E. 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.
 - F. An association or MEWA with covered lives in Vermont shall comply with all financial reporting requirements applicable to traditional insurance companies doing business in Vermont, including the requirement to file the Health Insurer Annual Statement (Act 152) Spreadsheet, provided for in 33 V.S.A. § 9414a. Instructions for annual filings by traditional insurance companies doing business in Vermont are set forth on the Insurance Division's webpages on the Department's website.

Section 13. Advertising and Marketing

- A. Associations, MEWAs, and insurance agents or brokers acting on behalf of an association or MEWA may advertise and market to potential customers using only marketing materials that have been submitted to and approved by the Department pursuant to Section 10 of this rule. Associations, MEWAs, and insurance agents or brokers acting on their behalf are subject to 8 V.S.A. § 4084 and all other applicable provisions of law regarding advertising and marketing practices.
- B. Using metal levels—bronze, silver, gold, and/or platinum—in the name of an association or MEWA health benefit plan, or in advertising or marketing such a plan, shall be a per se violation of 8 V.S.A. § 4084.

Section 14. Record Retention

An association or MEWA doing business in Vermont shall maintain its books and records in accordance with Department Regulation 99-01.

Section 15. Enforcement Authority

- A. To ensure compliance with the provisions of this rule and protect Vermont 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 8 V.S.A. §§ 13, 18, 3368-3390, 3563-3574, 4726, and other provisions of Titles 8 or 18 as may be applicable.
- B. The Commissioner may decline to issue or renew a license issued pursuant to this rule if the Commissioner finds that an association or MEWA does not satisfy any standard or requirement of this rule or any provision of other applicable State or federal law or regulation.
- C. The Commissioner may impose corrective action or suspend or revoke a license issued pursuant to this rule for a violation of this rule or any provision of applicable State and federal law.
- D. Any person or entity that violates any provision of this rule is subject to the penalties provided in Chapters 3, 101, 107, and 129 of Title 8 and such other provisions of Titles 8 or 18 as may be applicable.
- E. When the Commissioner believes that an association, MEWA, or any other person is operating in this State without being duly licensed or has violated the law, an administrative rule 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 8 V.S.A. § 3661.

Section 16. Notification to the Department by Third-Party Administrators of Contracts with Associations or MEWAs

- A. A third-party administrator shall notify the Department by December 31 of each year of all contracts it 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 subscribers in Vermont.
- B. The third-party administrator shall notify the Department within five days of any cancellation or termination of a contract that covered an association or MEWA with members having employees or subscribers in Vermont.
- C. Reporting Requirement for Fraudulent Association or MEWA Activity.
 - 1. A third-party administrator 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 and other materials, and the nature of the entity's practices triggering this reporting. This reporting obligation also requires a third-

party administrator to report to the Commissioner any person, including a licensed or unlicensed agent, 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 an association or MEWA in this State without complying with the requirements of this rule.

2. Confidentiality.

- a. The documents and evidence provided pursuant to subsection (C) of this Section or obtained by the Commissioner in an investigation of suspected or actual conduct in violation of this rule shall be privileged and confidential, shall not be made public, and shall not be subject to discovery or introduction into evidence in any private civil action pursuant to 1 V.S.A. § 317(c)(26) and 8 V.S.A. § 3574.
- b. Subdivision (a) 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:
 - i. in administrative or judicial proceedings to enforce laws administered by the Commissioner;
 - ii. to federal, state, or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing such conduct; or
 - iii. at the Commissioner's discretion in the furtherance of legal or regulatory proceedings brought as part of the Commissioner's official duties or to civil or criminal law enforcement authorities for use in the exercise of such authority's duties, in such manner as the Commissioner may deem proper.
- c. Release of documents and evidence under subdivision (b) of this subsection does not abrogate or modify the privilege granted in subdivision (a) of this subsection.

Section 17. Insurance Agents and Brokers

- A. 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 Vermont employer or a Vermont resident shall notify the Commissioner in writing prior to engaging in any conduct in connection with such sale. This written notification shall include, at a minimum, the person's name, address, telephone number, and email address; the name of the association or MEWA; and all materials in the person's possession used for the purposes of soliciting, offering, or selling the health benefit plan, including advertising and marketing materials.

- B. Prior to completing a sale, 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 Vermont employer or a Vermont resident shall disclose to the employer or resident that he/she is being compensated for the sale of the health benefit plan, that the employer or resident has the option of purchasing insurance on the Exchange, that purchasing such a health benefit plan may prevent the employer or individual from accessing premium subsidies and cost sharing reductions, and that purchasing such a health benefit plan may be more expensive than purchasing a plan on the Vermont Health Connect (Exchange). 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 Vermont employer or a Vermont resident shall also provide the employer or resident with a crosswalk of benefits comparing the association or MEWA health benefit plan with plans offered on the Vermont Health Connect (Exchange). As noted in Section 5, this crosswalk of benefits must be submitted to the Department for approval, either through SERFF or as part of the licensure and renewal process.
- C. A person, including a licensed agent, broker, or other individual, soliciting, offering, or selling a health benefit plan on behalf of an association or MEWA to a Vermont employer or a Vermont resident, prior to engaging in or assisting any person to engage in offering an association or MEWA health benefit plan, shall carry out and document appropriate due diligence to establish, at a minimum, the following:
- a. That the association or MEWA is licensed in the State;
 - b. That the disclosures listed in subsection (B) are in the policy document; and
 - c. That the advertising and marketing materials he/she is using have been approved by the Department.
- D. Reporting Requirement for Fraudulent Association or MEWA Activity. 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 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 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 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 an association or MEWA in this State without complying with the requirements of this rule. The confidentiality provisions of Section 16(C)(2) shall apply to this subsection.

Section 18. Severability

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