

**INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE**

Actuarial Services

Self-Funded Multiple Employer Welfare Arrangements and Insured Multiple Employer Arrangements

Adopted New Rules: 11:4-56

Proposed: August 4, 2003 at 35 N.J.R. 3530(a).

Adopted: May 13, 2004 by Holly C. Bakke, Commissioner, Department of Banking and Insurance.

Filed: May 13, 2004 as R. 2004 d.212, with substantive changes not requiring additional public notice and opportunity for comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1 and 15e; 17B:27C-1 et seq.; and 17B:27A-49.

Effective Date: June 7, 2004

Expiration Date: November 30, 2005.

Summary of Public Comments and Agency Responses:

The Department received comments from the Carrier Clinic, the New Jersey Hospital Association, the Health Insurance Association of America, Raritan Bay Medical Center, QualCare, Inc., NiiS/APEX Group Holdings, Inc., Wilentz Goldman & Spitzer on behalf of the Insurance Trust of the New Jersey Builders Association, and William F. Megna, Esq., on behalf of the Association Master Trust, QualCare and three physician member multiple employer welfare arrangements (MEWAs).

1. COMMENT: Four commenters expressed their support for the Department's proposal. Three commenters stated that a mechanism to monitor the financial solvency of this type of insurance plan will serve to protect consumers who have paid a premium for such coverage and the providers who supply products and services to these individuals. The commenters added that

the regulations are especially necessary considering the number of MEWAs that have recently filed for bankruptcy.

RESPONSE: The Department thanks the commenters for their support.

2. COMMENT: Three commenters raised the issue of the adequacy of the proposed rules' cash reserve requirements. Two commenters stated that the rules do not include a mechanism to ensure that, should a MEWA enter into liquidation or otherwise not have sufficient funds to pay claims, the monies could be drawn from the trust account established under the rules to reimburse providers for services rendered. The commenters added that, while N.J.A.C. 11:4-56.8(f) states that a cash reserve must be established for incurred losses, including unpaid claims, the amount of the reserve is to be determined by an actuary (likely retained by the MEWA) rather than by the Department. Without an independent review of the amount established, there are no assurances that the cash reserve would be adequate to cover unpaid claims should a MEWA enter into liquidation. This undetermined amount of cash reserves, together with the required deposit of only \$200,000, may not be adequate to cover both expected and unexpected liabilities, and consumers may find themselves responsible for payment of their healthcare claims despite having coverage through their employer.

One of the commenters stated that the HMO Act requires deposits of \$300,000 with annual adjustments to meet a minimum 20 percent net worth requirement. Future deposit requirements are tied to premium levels for the cost of liquidation and rehabilitation. Also, to maintain a certificate of authority, an HMO's net worth must be equivalent to \$1.5 million. The commenter stated that greater protections are needed for entities taking on risk, and asks that the Department reference Section 11 of the HMO Act.

RESPONSE: The enabling statute at N.J.S.A. 17B:27C-5a requires a self-funded MEWA to maintain cash reserves in an amount established by a qualified actuary as adequate to provide for all incurred losses. It does not require that the Department verify the adequacy of such reserves. Moreover, even if the Department were to examine the reserves of a self-funded MEWA and to find them inadequate, the statute does not provide the Department with the authority to order the MEWA to increase its reserves or to require it to cease operations (see N.J.S.A. 17B:27C-9).

The Department agrees that the required deposits for health maintenance organizations are far greater than those required for self-funded MEWAs. But the deposit for self-funded MEWAs is set by statute at \$200,000 and obviously is not intended to provide for all unpaid claims in the event of dissolution. That form of protection is intended to be provided under the statutory scheme by the reserve requirement. The commenter's reference to Section 11 of the HMO Act is unclear since that section (N.J.S.A. 26:2J-11) refers to the annual open enrollment period.

3. COMMENT: One commenter stated that the proposed rules do not include a mechanism to determine an individual employer's liability for contribution to the reserve fund or deposit. According to the commenter, the recent inability of several MEWAs to pay claims may indicate that these entities underestimate or understate the level of funding necessary in order to entice employers to participate. Also, carriers who provide only administrative services for self-funded plans typically do not pay claims until money has been deposited to cover the contracted premium. In such cases, carriers withhold payment on provider claims and providers have no recourse for reimbursement. The Department should ensure that employers are not held harmless for the cost of services provided to their employees, and that providers have the ability to recover reimbursement from an employer.

RESPONSE: The enabling statute does not provide the Department with the authority to review a self-funded MEWA's assessment methodology. It merely states that each member may be subject to an additional assessment if the prior fiscal year results show a loss. The Department has no authority to order a self-funded MEWA to levy an assessment or to review the size of the assessment.

4. COMMENT: Two commenters expressed concern regarding the rules' stop loss requirements at N.J.A.C. 11:4-56.8(g). One commenter stated that there is little assurance that the stop loss carrier contracted by the MEWA would be able to step in should it be necessary, and that language should be added that would require the stop loss carrier to have a B+ rating or better to insure financial solvency. Another commenter recommended that the Department increase the stop-loss requirement at N.J.A.C. 11:4-56.8(g)2 from the proposed 25 percent of expected claims to either a more significant level of protection (that is, 75 percent), or require at least 25 percent coverage up to an increased level of expected claims (that is, 150 percent) and 10 percent coverage above that threshold.

RESPONSE: The stop loss requirement is set forth at N.J.S.A 17B:27C-5b, which requires a retention level of 125 percent of expected claims per year. The Department considers a 25 percent corridor above this level to be reasonable, and fears that a higher corridor could be cost prohibitive. Since the statute does not impose any qualifications on the stop loss carrier, the Department does not believe it is appropriate to do so through these rules.

5. COMMENT: Three commenters stated that as insurance payers, MEWAs must be held to the same claim payment standards as other payers in New Jersey. The Department's prompt pay regulations at N.J.A.C. 11:22 establish timeframes within which payers must pay claims, and

require interest to be paid on late claims. Requiring MEWAs to comply with these regulations will help protect consumers and providers when they are doing business with these type plans.

RESPONSE: Self-funded MEWAs are specifically exempted from most State insurance laws (N.J.S.A. 17B:27C-8a). To the extent that a self-funded MEWA is regulated by ERISA, Federal law may control prompt pay requirements.

6. COMMENT: Two commenters stated that the proposed rules do not contain any requirements related to utilization management or quality assurance programs, and that State oversight is appropriate for any entity that takes on risk for the protection of consumers and providers.

RESPONSE: As noted above, self-funded MEWAs are exempted from most State insurance laws (see N.J.S.A. 17B:27C-8a). However, self-funded MEWAs may be subject to Federal regulation in these areas.

7. COMMENT: One commenter took issue with the proposed rules' Social Impact statement. The commenter disagreed that MEWAs would be favorably impacted because consumer confidence in their financial operations would be boosted. The commenter stated that the onerous nature of the regulatory regime imposed upon them would destroy many, if not all, MEWAs.

The commenter also disagreed that employees covered under self-funded MEWAs will be favorably impacted because they will be assured that their employer-sponsored plan meets certain financial reporting criteria. The commenter stated that because of the enormous expenses involved with meeting the new requirements, most MEWAs will cease to exist and, because some employers will be priced out of the health benefits market, a quantifiable number of employees will have no medical benefits.

The commenter also disagreed that small employers and their employees covered under self-funded MEWAs will be favorably impacted because they will have the benefit of requirements for the insured small employer health markets, including guaranteed enrollment for members of the Association, a loss ratio floor and refund requirements and limitations on permitted rating factors. The commenter stated that, in fact, there is no benefit to a small employer in the increased assessments associated with community rating or in removing the ability of small employers to acquire a favorably underwritten plan for their employees. There will be employers who cannot afford, or will be unwilling to pay to maintain, employer-sponsored benefits for their employees. They will either buy commercial coverage or terminate their programs altogether.

RESPONSE: The Department disagrees with the commenter on each of the above points. With respect to the reporting requirements, the recent failures of the self-funded MEWAs sponsored by the New Jersey Coalition of Automobile Retailers and the New Jersey Licensed Beverage Association demonstrate that persons covered by self-funded MEWAs have no guaranty fund or other protections under State law in the event of the failure of the self-funded MEWA. The legislature imposed some financial requirements in the implementing legislation by requiring self-funded MEWAs to comply with the risk-based capital requirements. To determine whether the risk-based capital requirements are being met, the Department needs self-funded MEWAs to report their financial information on the NAIC health statement blank. Without such reporting, the Department is unable to enforce the requirements of the statute. The Department will also work with self-funded MEWAs to assist them in completing these reports.

The Department notes that the regulatory scheme imposed by the implementing law requires compliance with only one section of the SEH law, the rating section. The Department

does not believe that a requirement to rate small employers on a modified community rated basis with age, gender and geography as rating factors, subject to a 75 percent minimum loss ratio, will cause most MEWAs to fail. Efficient and properly run MEWAs can be successful with a 25 percent margin for profit and administrative expenses. The Department notes that the small employer health insurance market operates at loss ratios of approximately 80 percent, indicating that a 75 percent minimum loss ratio is more than adequate.

With respect to the last point, imposition of a minimum loss ratio compels self-funded MEWAs to reduce administrative expenses and to spend at least 75 percent of the funds collected for coverage on the provision of health care services, while capping the amount spent on administration and profit to 25 percent. This is a key consumer protection against excessive premiums charged by self-funded MEWAs. The rating restrictions benefit employers who employ individuals with health conditions or who have dependents with health conditions, and prohibit self-funded MEWAs from placing unhealthy members in the guarantee issue small employer market and raising premiums in that delicate market. The commenter suggests that a small employer with all healthy employees may see rates increase if the self-funded MEWA is required to use modified community rating. Again, the rating restrictions are part of the implementing legislation and cannot be waived by the Department.

8. COMMENT: One commenter stated that the Department's Economic Impact statement was correct in stating that self-funded MEWAs will be unfavorably impacted by the financial and reporting requirements of the proposed rules. But the commenter stated that the Department was wrong in assuming that its onerous regulatory scheme will insure economic viability by disastrously increasing their operational expenses. The hidden effect of the expense load caused by these rules will almost certainly drive down the loss ratio needed to allow small association

self-funded MEWAs to break even, thereby driving the loss ratio requirements even lower than the required 75 percent. Also, the commenter disagreed that small employers will benefit because the MEWAs in which they participate will now be subject to limited regulation by the State. The commenter stated that the practical effect of the rules will be that small employers will lose small, self-funded MEWAs as a viable benefits providing alternative to large, for profit, commercial insurers.

RESPONSE: The Department disagrees with the commenter. All of the reporting requirements contained in the rules are based on the implementing statute, as is the 75 percent minimum loss ratio for small employer groups covered by self-funded MEWAs. For example, the requirement that self-funded MEWAs report on the annual NAIC health blank is necessary because the Risk Based Capital (RBC) report required by N.J.S.A. 17B:27C-6a is based on the annual NAIC health blank. The Department will work with the self-funded MEWAs to simplify and streamline the required reporting by conducting training sessions and identifying software that can be used to complete the required reports. However, the Department cannot waive these statutory reporting requirements. Moreover, a self-funded MEWA that cannot achieve a minimum 75 percent loss ratio does a disservice to its small employer members who can obtain coverage in the SEH market where the minimum loss ratio is 75 percent and the average loss ratio is approximately 80 percent.

9. COMMENT: One commenter disagreed with the Department's Jobs Impact statement that the proposed rules will not result in a loss of jobs. The commenter stated that it believed that jobs will be lost by employees of third party administrators, reinsurers and the employed staff of small, self-funded MEWAs.

RESPONSE: The Department notes that the commenter supplied no information with respect to the number of jobs the commenter suspects may be lost, the functions performed by the potentially affected individuals, and whether the jobs are located in New Jersey. In the absence of any studies or specific information on these issues, it is difficult for the Department to predict the jobs impact of the adopted rules with any certainty. The Department anticipates that, to an undetermined extent, any New Jersey jobs that are lost by entities that service self-funded MEWAs will be at least partially offset by new jobs created at health carriers, as employers formerly covered by any self-funded MEWAs which cease operations due to their inability to fulfill the solvency or other requirements for registration may purchase coverage in the insured market.

10. COMMENT: One comment concerned the Department's Regulatory Flexibility Analysis, which stated that different reporting or compliance requirements for self-funded MEWAs based on size would not be appropriate or feasible. The commenter stated that it does not believe that small MEWAs can bear the costs associated with the proposed rules and the compliance burden they impose. The commenter believes that tiers of rules, based on the number of lives covered, would be appropriate in order to save MEWAs from extinction.

RESPONSE: The enabling statute does not authorize the Department to vary the reporting requirements based on the size of the self-funded MEWA.

11. COMMENT: One commenter stated that while the scope of the rules is limited to MEWAs that provide a health benefit plan or plans to two or more employers who each have two or more employees, which properly reflects the limitations contained in the statutory definition of a self-funded MEWA and is based on the definition contained in proposed N.J.A.C. 11:4-56.2 of a self-funded Multiple Employer Welfare Arrangement, an ambiguity is created with regard to

most MEWAs. The commenter stated that neither the statute nor the proposed rules are applicable to MEWAs having one or more one-life groups. Accordingly, either MEWAs with at least one one-life group are out of the regulatory framework, or additional legislation is needed to clarify the intended scope of the regulatory framework if it was intended that all self-funded MEWAs would be covered.

RESPONSE: The statute at N.J.S.A. 17B:27C-3 defines a “multiple employer welfare arrangement” by referring to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002(40). This section defines a multiple employer welfare arrangement as an employee welfare benefit plan, or other arrangement (other than an employee welfare benefit plan) which, subject to certain exceptions, is established or maintained for the purpose of offering or providing welfare plan benefits to the employees of two or more employers (including one or more self-employed individuals). Since N.J.S.A. 17B:27-3 incorporates this definition of “multiple employer welfare arrangement,” it is clear that the rules contemplate MEWAs that include one or more self-employed individuals, and employers with only one employee. In order to enhance the level of consistency between the statute and the definition that appears in N.J.A.C. 11:4-56.2, that definition is being amended upon adoption to also refer to the definition enacted at 29 U.S.C. §1002(40). The Department is additionally revising the language of the scope of these rules at N.J.A.C. 11:4-56.1(b) to be consistent with that definition.

12. COMMENT: A few commenters stated that while there have been some notable failures of self-funded MEWAs in recent years, the economic impact of those failures has been quite limited, and MEWAs, as a whole, provide a reasonable, cost-effective and safe alternative for smaller employers to provide needed medical benefits coverage to their employees. The

Department's proposed rules, however, jeopardize the very existence of this alternative in the State of New Jersey.

RESPONSE: The Department does not agree that the two recent self-funded MEWA failures in New Jersey had limited impact. These failures resulted in millions of dollars of unpaid provider bills and the dunning of employers and employees for bills that should have been paid by the health plan. The Department's rules implement the enabling legislation, which provides limited protection against future similar failures.

13. COMMENT: Two commenters stated that the proposed rules exceed the original intent of the statutory requirements by regulating MEWAs at the same level as domestic carriers.

RESPONSE: The Department disagrees. The proposed rules simply implement the requirements set forth in the enabling legislation. Domestic carriers are subject to many more requirements than are included in these rules, such as the provision of mandated benefits, prior approval of contract forms, and investment restrictions.

14. COMMENT: One commenter stated that in some instances, the proposed rules exceed Federal standards or requirements applicable to MEWAs.

RESPONSE: The Department disagrees. As stated by the United States Department of Labor (DOL) in its handbook "Multiple Employer Welfare Arrangements Under the Employee Retirement Income Security Act: A Guide to Federal and State Regulation," prepared by the Employee Benefits Security Administration of the DOL (which can be found online at <http://www.dol.gov/ebsa/publications/mewas.html>), ERISA permits "states to treat certain ERISA-covered plans (that is, MEWAs) as insurance companies, subject to a few limitations." Self-funded MEWAs may be regulated by the state if the state law requires the self-funded MEWA to meet more stringent standards of conduct than does ERISA. The DOL has stated that

“any state insurance law which sets standards requiring the maintenance of specified levels of reserves and specified levels of contributions in order for a MEWA to be considered able to pay benefits is permissible.” (pp. 36-38 of the handbook).

15. COMMENT: Two commenters stated that the proposed rules simplistically treat MEWAs as nothing more than a grouping of small employers, and impose many requirements appropriate for small employers to prevent anecdotal anti-selection against commercial carriers serving the small employer market. The commenters believe that MEWAs should be treated as one large group whenever allowed by law. One commenter specifically stated that the Department should support a revision of the modified community rating standards that apply currently to small employers participating in MEWAs.

RESPONSE: The rules implement N.J.S.A. 17B:27C-8c, which provides that assessments paid by small employer members shall comply with N.J.S.A. 17B:27A-25. The latter statute sets various rating requirements, including modified community rating; limiting rating factors to age, gender and geography; informational rate filings; a 75 percent minimum loss ratio; and annual loss ratio reporting. If a self-funded MEWA covers small employers, it is subject to these requirements with respect to such employers.

16. COMMENT: One commenter stated that the proposal would require MEWAs to provide individual benefits at least as good as those required by each of New Jersey's mandates, whereas the Legislature's intent was to require the provision of only the actuarial equivalent (in the aggregate) of a Small Employer Plan A.

RESPONSE: N.J.S.A 17B:27C-8d states that the benefits provided by a self-funded MEWA “shall at all times be equal to or greater than benefits required to be provided in the lowest benefit level” SEH plan. The statute does not refer to actuarial equivalence. Accordingly, the

Department identified the minimum benefits of the lowest benefit SEH plan in Appendix A and is requiring that such benefits be provided by self-funded MEWAs. Contrary to the commenter's statement, the benefits in Appendix A do not include all of New Jersey's mandated benefits. The Department notes that where the Legislature has intended a test of actuarial equivalence, it has specifically so stated, such as in N.J.S.A. 17B:27A-19j(6)(c) ("if the benefits...are at least equal to the actuarial value ...of the lowest standard health benefits plan...").

17. COMMENT: One commenter stated that, in many instances, the proposal seems to assume that a self-funded MEWA will have trustees. While Subsection C-5b of the statute does contain a reference to trustees in the context of replacing stop-loss coverage, it does not require a MEWA to have trustees. Accordingly, the commenter suggested that the Department re-evaluate those aspects of the proposal that assume the existence, or have requirements pertaining to, trustees.

RESPONSE: The Department believes that since these rules, at N.J.A.C. 11:4-56.8(a), require MEWAs to establish and maintain a separate trust for the health benefits plans, it is necessary that there be trustees. The Department does not believe, however, that it is necessary for these rules to include requirements relating to the trustees. Rather, the trustees' responsibilities would be consistent with the fiduciary duties established pursuant to ERISA.

18. COMMENT: Two commenters were concerned with the proposed definition of "administrator." One commenter stated that the definition is limited to persons or entities functioning as an "executive director" of a self-funded MEWA. There are a number of arrangements where a third-party administrator has a very limited, ministerial function, or actual employees carry out the day-to-day ministerial administrative functions set forth in the

definition. The commenter suggested that the Department elicit evidence from actual MEWAs as to their administrative structure so that a more reasonable and clear definition can be created.

The second commenter stated that the proposed definition is not appropriate for all cases. The commenter suggested eliminating the reference to "trustees," and changing "health" benefit plans to "welfare" benefit plans to be consistent with ERISA and Section 3 of the statute. The commenter suggested revising the definition as follows: "Administrator means a person, partnership, corporation or other legal entity engaged by a self-funded MEWA, as defined in this section, to administer and manage the benefit plans offered by the self-funded MEWA."

RESPONSE: The Department recognizes that not all MEWAs will follow the same administrative structure. However, a number of MEWAs do contract with an administrator to serve as an executive director, and it is therefore necessary to define the term. The Department believes its proposed definition is appropriate because the Department has responsibility to monitor a MEWA's operations with respect to the provision of health benefits plans, the rules require that a trust be established, and there should be trustees responsible for the operations of the health benefit plan.

19. COMMENT: One commenter stated that the proposed definition of "association" requires the association to be in active existence for more than one year. The commenter recommended that the Department conform its definition to the HIPAA "bona fide association" definition that requires a minimum five-year existence with sufficient reserves in order to provide adequate protection to New Jersey citizens that they have purchased insurance through a legitimate vehicle.

RESPONSE: The proposed definition of "association" is the same as that which appears in the implementing statute at N.J.S.A 17B:27C-3.

20. COMMENT: One commenter stated that the proposed definition of "carrier" contains an implicit contradiction. A self-funded MEWA would be considered a carrier under the definition, but N.J.S.A. 17B:27A-49 explicitly excludes self-funded MEWAs from all New Jersey insurance laws and Department regulations except as provided in that statute. The commenter believes the definition should be clarified.

RESPONSE: The Department does not believe it is necessary to revise the proposed definition of "carrier." The rule defines carrier as any entity subject to New Jersey insurance laws and regulations or to the jurisdiction of the Commissioner. N.J.S.A. 17B:27C-8a specifies that self-funded MEWAs are subject only to the specific requirements related to MEWAs set forth in the enabling statute, and are not insurance companies or insurers under the laws of this State. Accordingly, a self-funded MEWA does not fall within the definition of carrier contained in these rules.

21. COMMENT: Two commenters expressed concern with the proposed definition of "eligible employee," which is limited to a full-time employee who works at least a 25-hour workweek. The commenters stated that the definition unfairly discriminates against part-timers, and that the statute clearly states that State insurance laws do not apply to MEWAs except as specified in the statute. Further, many industries and professions consider a 24-hour workweek to be full-time employment.

RESPONSE: The proposed rules define the terms "eligible employee" and "small employer" as those terms are defined in the SEH Act at N.J.S.A. 17B:27A-17 because self-funded MEWAs that cover small employers are required to comply with N.J.S.A. 17B:27A-25. It is therefore necessary to define "small employer" and to conform that definition to that which appears in the SEH Act. Since the definition of small employer refers to "eligible employees," it is also

necessary to define that term in accordance with the definitions in the SEH Act. Note that this definition is used only to determine whether an employer is a small employer, and does not preclude coverage by a self-funded MEWA of employees with a workweek of less than 25 hours. Rather, it precludes the counting of such employees in determining whether the employer is a "small employer."

22. COMMENT: One commenter stated that the proposed definition of "health benefits plan" does not seem to track either ERISA or the statute. Since section 3 of the statute references the appropriate section of ERISA, it would seem to make more sense to use that definition.

RESPONSE: "Health benefits plan" is not defined in either ERISA or in N.J.S.A 17B:27C-1 et seq. Accordingly, the Department drafted a definition consistent with the purposes of the enabling legislation.

23. COMMENT: One comment concerned the proposed rule's definition of "qualified actuary" as a member in good standing of the American Academy of Actuaries. The commenter stated that it does not believe there is any examination or academic requirement for being a member of the American Academy of Actuaries, and that a health actuary who is a fellow of the Society of Actuaries would not qualify under this definition. The commenter added that, while it recognizes that the definition follows the statute, the issue needs to be addressed.

RESPONSE: As the commenter stated, the Department's proposed definition reflects the enabling statute. Moreover, the commenter is incorrect in stating that the American Academy of Actuaries (Academy) has no examination or academic requirements. The Academy's educational requirements are normally met by passing the examinations of societies such as the Society of Actuaries or the Casualty Actuarial Society. The Academy additionally imposes certain continuing education and experience requirements on its members. Accordingly, the Department believes that membership in the Academy is the appropriate standard for actuarial qualification.

24. COMMENT: One commenter stated that the proposed definition of "self-funded" is somewhat awkward in that it ties being self-funded to the existence of stop-loss coverage, which the commenter believes are two discrete things. The commenter believes a more appropriate definition might be "Self-funded means that the multiple employer welfare arrangement retains the primary risk as to the benefits provided by the welfare benefits plans offered by the self-funded MEWA."

RESPONSE: The enabling statute at N.J.S.A. 17B:27C-5b requires self-funded MEWAs to maintain stop loss coverage, and the proposed definition of "self-funded" reflects this requirement.

25. COMMENT: One commenter stated that the proposed definition of "self-funded multiple employer welfare arrangement" does not totally track the ERISA definition, and seems to incorporate concepts from many areas of insurance law. The commenter suggested that the Department use the Federal definition of "multiple employer welfare arrangement" as the statute does.

RESPONSE: The definition of self-funded MEWA is based on the definition that appears in the enabling legislation at N.J.S.A 17B:27C-3.

26. COMMENT: One commenter stated that the words "as designated by the trustees" should be deleted from the proposed definition of "servicing organization."

RESPONSE: As stated above, the rules require the establishment of a trust for the operations of the health benefits plan. The trustees have the fiduciary responsibility to manage the operations of the trust, and therefore should be responsible for designating the functions to be performed by the servicing organizations.

27. COMMENT: One commenter stated that in the proposed definition of "small employer," the word "who" should be replaced with "which." Also, for clarification purposes, "for purposes of determining applicability of this subchapter" should be added at the end of the definition.

RESPONSE: The definition of "small employer" is the same as that which appears in the SEH Act at N.J.S.A. 17B:27A-17. The Department does not believe it is necessary to change that definition for purposes of these rules.

28. COMMENT: One commenter was puzzled by inclusion of the words "held in the separate trust account" in the proposed definition of "total adjusted capital." The commenter stated that the statute contains no such requirement, and this would exceed ERISA requirements. Another commenter questioned proposed N.J.A.C. 11:4-56.3(a)10, which requires three-year financial projections for the separate trust account, stating that the statute does not require a separate trust account.

RESPONSE: As stated above, the rules require the establishment of a separate trust account for the operations of the health benefits plan. The purpose of the separate account is to insulate the operations of the self-funded health benefits plan from other operations of the association and from other benefits that might be provided to members. Establishment of a separate trust account will provide for the segregation of assets to support claim liabilities and for the administration of the self-funded health benefits plan, as well as guard against commingling of assets. Since the rules' financial requirements are limited to the activities of the self-funded health benefits plan, the Department believes that a separate trust account also simplifies the application of the financial and financial reporting requirements for the self-funded health benefits plan.

29. COMMENT: One commenter stated that since an association is not the only way to form a MEWA, the words "if any" should be added after "association" in proposed N.J.A.C. 11:4-56.3(a)1v and vi.

RESPONSE: The Department agrees, and has revised N.J.A.C. 11:4-56.3(a)1v and vi and (a)5 and 6, and 11:4-56.5(a) to address the commenter's concern.

30. COMMENT: One commenter questioned the requirement at proposed N.J.A.C. 11:4-56.3(a)4 that a registrant file a copy of the "agreement to establish a separate trust account" since the statute does not require the establishment of any such account.

RESPONSE: As stated above, the rules require the establishment of a separate trust account for the operations of the health benefits plan. Therefore, a written agreement establishing that trust should exist.

31. COMMENT: One commenter questioned the reference at proposed N.J.A.C. 11:4-56.3(a)6 to participants being in a "common or similar type of trade or business" since neither the statute nor ERISA has this requirement. The commenter added that ERISA requires only that a MEWA have two or more employers to form an "arrangement," and does not require any relationship between the employers.

RESPONSE: The Department agrees that neither the enabling statute nor ERISA requires a relationship between the employers to whom a health benefit plan or plans are provided by a MEWA. Nevertheless, in those cases where the MEWA provides a health benefit plan or plans to an association, the existence of a relationship between the employers who comprise the association is required by ERISA. Accordingly, the Department has revised N.J.A.C. 11:4-56.3(a)6 to limit its application to MEWAs that provide coverage to associations. The Department has also added "to which the self-funded MEWA provides a health benefit plan or

plans at the end of N.J.A.C. 11:4-56.3(a)1vi, 5 and 6 for clarity and consistency with N.J.A.C. 11:4-56.3(a)1v.

32. COMMENT: One commenter requested clarification of what constitutes the "demonstration" referenced in proposed N.J.A.C. 11:4-56.3(a)13 "that the applicant will be able to provide the deposit required by the Rules." The commenter asked whether evidence of the actual deposit in a licensed financial institution, as required by the statute, would suffice.

RESPONSE: The Department is seeking evidence that the applicant possesses the required funds for the deposit. Documentation, such as an account statement from a bank or other financial institution showing that the account contains the required deposit amount, would be an acceptable demonstration as referenced in the rule.

33. COMMENT: One comment concerned proposed N.J.A.C. 11:4-56.3(a)15, which "is an omnibus provision which provides the Commissioner of the Department with authority to request any other information." The commenter believes that more specificity should be required in this provision, since it is an open-ended invitation for the Department to make demands on small MEWAs.

RESPONSE: The provision in question states that the Commissioner may request "any other information from a particular applicant deemed necessary . . . to determine compliance with the requirements of N.J.S.A. 17B:27C-1 et seq. and this subchapter." Accordingly, the Commissioner's authority is limited, and applies to MEWAs of any size.

34. COMMENT: One commenter stated that the 60-day time period at proposed N.J.A.C. 11:4-56.3(c), within which an applicant must address any deficiencies in its application, should be extendable upon request for good cause shown.

RESPONSE: The rules require the applicant to submit a considerable amount of information to be reviewed by the Department. Much of this information, such as financial data, can become dated; therefore, the Department believes it is necessary that any additional information requested be submitted within a reasonable timeframe. Otherwise, it becomes necessary to update a significant portion of the application, and Department staff would be required to spend additional time reviewing that information. However, the Department recognizes that an applicant may need additional time for good cause. Accordingly, proposed N.J.A.C. 11:4-56.3(c) is being revised upon adoption to allow for additional time to correct deficiencies in an application for good cause shown.

35. COMMENT: One comment concerned proposed N.J.A.C. 11:4-56.3(d), which contains the standards a MEWA must meet for approval of its application. Specifically, the commenter questioned N.J.A.C. 11:4-56.3(d)2, which requires that the persons responsible for conducting the MEWA's affairs are competent, trustworthy, possess good reputations and have appropriate experience, training and education. The commenter stated that these requirements are not included in the statute, and there is no basis in the rules to determine what constitutes these characteristics. The commenter believes that this provision needs to be refined "in justice to the reality of small association MEWAs and how they function; what happens if the class of potential trustees does not contain any 'qualified' persons?"

The commenter also took issue with proposed N.J.A.C. 11:4-56.3(d)3, which requires that the applicant has met all the requirements of all applicable small employer health benefits laws and financial requirements. The commenter stated that the statute does not provide that the SEH Act is applicable to self-funded MEWAs, and that the statute does provide that self-funded MEWAs are not insurers and are not covered by any provision of New Jersey insurance law

other than the statute. The commenter added that there is a provision in the statute (N.J.S.A. 17B:27C-8d) requiring covered MEWAs to provide benefits under their plans at least equal to the least generous SEH plan, and this provision would be meaningless if MEWAs were required to provide the standard SEH plans.

Finally, the commenter believes that proposed N.J.A.C. 11:4-56.3(d)4, which requires the Commissioner to be satisfied that the plan of operation of the separate trust account is sound, supports the continuing operations of the MEWA, and complies with N.J.S.A. 17B:17C-1 et seq. and this subchapter on an ongoing basis, should be clarified to include specific criteria. The commenter stated that, as proposed, this provision provides the Department with the ability to close a self-funded MEWA for any reason, and is not based on any provision in the statute.

RESPONSE: The Department disagrees with the objection to the requirement that the persons responsible for conducting the affairs of the MEWA be competent, trustworthy, of good reputation and have the appropriate experience, training and education. These requirements are commonly applied to entities regulated by the Department (see, for example, the Organized Delivery System regulation at N.J.A.C. 11:22-4.5(b)1), and the information used to judge whether the standard is satisfied is based on the biographical affidavits required by N.J.A.C 11:4-56.3(b)7.

The comment that N.J.A.C. 11:4-56.3(d)3 requires self-funded MEWAs to comply with the SEH law in its entirety is incorrect. That section requires compliance with the Self-Funded MEWA law, N.J.S.A. 17B:27C-1 et seq, and only those small employer health benefits laws that are required by N.J.S.A. 17B:27C-8. It does not require compliance with the SEH Act, N.J.S.A.17B:27A-17 et seq., except for the rating and loss ratio section at N.J.S.A. 17B:27A-25.

The commenter stating that proposed N.J.A.C. 11:4-56.3(d)3 permits the Department to close a self-funded MEWA for any reason misreads the rules. The proposed rules provide the Commissioner with very limited authority to require a self-funded MEWA to cease operations. Proposed N.J.A.C. 11:4-56.3(d)4 obligates a self-funded MEWA to demonstrate at the time it makes application for registration that it will be able to comply with the enabling statute and regulation on an ongoing basis. Proposed N.J.A.C. 11:4-56.12(c) requires a self-funded MEWA whose application for initial registration is denied or withdrawn to terminate coverage of employers domiciled in this State or who have their principal headquarters or principal administrative office in this State within eight months of the date of the withdrawal or denial.

36. COMMENT: Two commenters questioned the requirement at proposed N.J.A.C. 11:4-56.3(e) that the self-funded MEWA deposit securities with a market value of \$200,000 with the Commissioner since section 5 of the statute requires that the deposit be maintained with a financial institution licensed in the State. One commenter believed that this requirement exceeds the statute, and may exceed ERISA requirements. One commenter also stated that the rules do not clarify how income on the account might be earned or to whose credit it would be payable were the deposit to be made to the Commissioner.

RESPONSE: The minimum \$200,000 deposit is specifically required by N.J.S.A. 17B:27C-5a, and is not inconsistent with the statute. Moreover, a state is free to impose any requirement on a self-funded MEWA that is not inconsistent with ERISA (see 29 U.S.C. § 1144(b)(6)(A)(ii)). The United States Department of Labor has stated that state solvency regulation is not inconsistent with ERISA. As is referenced in N.J.A.C. 11:4-56.3(e)1, the deposit is made in accordance with N.J.A.C. 11:2-32, which requires such deposits to be made with a custodian on behalf of the Commissioner. Any income that may accrue on the account would be payable to the entity

making the deposit, consistent with the usual policies and practices of the custodian financial institution and of the Department concerning deposits maintained pursuant to N.J.A.C. 11:2-32.

37. COMMENT: One commenter stated that it might be more appropriate if proposed N.J.A.C. 11:4-56.3(e)2 required a "demonstration" be provided, rather than a signed copy of a stop-loss or reinsurance agreement. The commenter added that this would better reflect the practicalities of the stop-loss marketplace, and would be consistent with the requirement at N.J.A.C. 11:4-56.3(a)14.

RESPONSE: The Department is requiring as part of its review of the initial registration application that an applicant provide a demonstration, such as a binder, that stop-loss coverage will be obtained. However, the Department believes that the MEWA should be able to finalize the stop-loss or reinsurance agreement upon notification by the Department that the application has been approved.

38. COMMENT: One commenter questioned use of the term "application" at proposed N.J.A.C. 11:4-56.4(a) rather than "certification" since the provision applies to subsequent annual registration of self-funded MEWAs.

RESPONSE: The phrase "application for certification" is utilized in the rules to recognize the fact that the Commissioner can refuse to issue a certification if the requirements of the statute and rules are not satisfied.

39. COMMENT: One comment concerned proposed N.J.A.C. 11:4-56.5, Eligibility requirements for self-funded MEWA coverage. The commenter stated that the limitations on the ability of self-funded MEWAs to underwrite are so onerous for an association MEWA of limited size and resources that they make their continued existence doubtful. The commenter stated that

the proposed conditions must be removed or all self-funded MEWAs in the State will cease to exist.

RESPONSE: N.J.S.A. 17B:27C-8.b requires self-funded MEWAs to offer all products that it is actively marketing to any employer, and accept any employer and any employee of that employer who applies for any of those products. N.J.S.A. 17B:27A-25 bans underwriting based on health status by limiting rating factors to age, gender and geography. A self-funded MEWA, therefore, is statutorily precluded from medical underwriting.

40. COMMENT: Three commenters expressed concern with proposed N.J.A.C. 11:4-56.6, Rating requirements of self-funded MEWAs. One commenter stated that clarification is needed that the rating requirements contained in section 8 of the statute apply only to small employers, and not to large employers that also may be participating in a MEWA. The commenter suggested revising the section heading to "Rating requirements for small employers in self-funded MEWAs."

One commenter stated that the requirements at proposed N.J.A.C. 11:4-56.6(a) that self-funded MEWAs prepare, maintain and submit to the Department an exhibit showing the methodology for calculating assessments for small employer members are unrealistic for small MEWAs and have no basis in the statute.

One commenter stated that the restrictions on rate relativities by age and gender are too restrictive. The limitations on permitted rating factors result in intergenerational subsidies that make the funding levels at younger ages higher than actuarially justified in order to subsidize the funding levels at older ages. The draft regulations have a rating restriction of 2 to 1, which forces this subsidy and is not actuarially justified or sound. This creates the potential for anti-selection within the MEWA where the MEWA may not be able to attract enough younger age

members to support older age members. Public policy should be to encourage more provision of coverage, and not less through higher rates containing subsidies for older age groups.

One comment concerned the minimum 75 percent loss ratio requirement at proposed N.J.A.C. 11:4-56.6(b)5. The commenter stated that satisfaction of this requirement is simply an impossibility for MEWAs of limited size. The commenter believes that if a premium quoted to an employer is too high, the employer should simply not participate in a MEWA and should be able to go to a commercial insurer for coverage.

RESPONSE: The Department does not believe that clarification in the rule section heading as suggested by the commenter is necessary because subsection (a) states that the exhibit is to show the methodology used to calculate assessments to small employers. It is therefore clear that the requirements only apply to assessments made to small employers.

The requirement to prepare an exhibit showing assessment methodology is based on N.J.S.A. 17B:27A-25f, which applies to self-funded MEWAs with small employer members by N.J.S.A 17B:27C-8c.

N.J.S.A. 17B:27A-25 sets the 2:1 rating band; limits the rating factors to age, gender and geography; requires submission of an informational rate filing; sets a 75 percent minimum loss ratio; requires submission of loss ratio reports; and requires policyholder refunds if the 75 percent minimum loss ratio is not met.

41. COMMENT: One comment concerned the proposed requirement at N.J.A.C. 11:4-56.7 that a MEWA may not modify any information or document without first filing a notice of the change with the Commissioner. The commenter believes that any such advance notice would exceed ERISA requirements, add unnecessary administrative costs, and lessen plan flexibility

and responsiveness to the needs of the plan beneficiaries. The commenter also suggested that subsection (a) be deleted because there are no other subsections.

RESPONSE: The Department believes it is necessary to have prior notice of changes in the information previously submitted so that it can monitor whether self-funded MEWAs continue to operate in accordance with the governing statute and regulations. The Department agrees with the commenter's suggestion to delete the reference to subsection (a), and has revised that section.

42. COMMENT: Two commenters were concerned with proposed N.J.A.C. 11:4-56.8(a). The commenters stated that the requirement that a self-funded MEWA establish and maintain a separate trust account exceeds any requirement in either ERISA or the statute. The commenter added that this requirement applies to that segment of the MEWA's operations that provide for health benefits plans, but questions why such a requirement would apply to an aspect of a self-funded MEWA that is insured (for example, an insured disability benefit).

One commenter stated that, unlike a commercial insurer which has investment and other separate accounts, a MEWA, which would most likely be a trust, devotes all of its assets to the exclusive purpose of providing benefits to participating employees. Therefore, the mechanics of a separate trust account requirement is confusing and non-specific.

RESPONSE: The separate trust account requirement applies only to those health benefits plans that are self-funded, and not to insured plans. The Department is revising N.J.A.C. 11:4-56.8(a) to clarify that fact. Regarding the separate trust account comment, the Department reiterates its Response to Comment 28 above (that is, the purpose of the separate trust account is to insulate the operations of the self-funded health benefits plan from other operations of the MEWA that might be provided to members. Establishment of a separate trust account will provide for the segregation of assets to support claim liabilities and for the administration of the self-funded

health benefits plan, as well as guard against commingling of assets. Since the rules' financial requirements are limited to the activities of the self-funded health benefits plan, the Department believes that a separate trust account also simplifies the application of the financial reporting requirements for the self-funded health benefits plan).

43. COMMENT: One comment addressed the capital and surplus level requirements to be met by certain fixed dates specified at proposed N.J.A.C. 11:4-56.8(b). The commenter stated that the risk-based capital (RBC) targets by date should reflect elapsed time from the establishment of the MEWA, and not fixed dates, and that MEWAs should be allowed to meet the ultimate RBC requirement over a period of three years from the date of formation. According to the commenter, the RBC calculations are geared toward insurance companies, and the risks in a MEWA differ from typical health insurers in that they are smaller, members are subject to assessment in the event of adverse experience, and they are obligated to purchase stop loss insurance from an employer stop loss carrier. While employer stop loss coverage acts as a risk reduction vehicle, the commenter stated that there is no official way to reflect the provision and impact of such coverage in the RBC calculation rules. The commenter suggested that the stop loss premiums be netted out of the MEWA member revenue before any "premium-based" RBC calculations are made. The commenter added that the Department's MEWA rules should be explicit on the handling of the stop loss premiums for RBC calculations.

RESPONSE: The enabling statute at N.J.S.A. 17B:27C-9b sets forth the specific dates for the period ending, and the four-year increase in, RBC minimum requirements. Also, the information required to be used in generating the RBC requirement is derived directly from the NAIC Annual Statement, which uses a fixed date of December 31 of the prior year to generate all pertinent information. All packaged computer software that minimizes the cost to complete the RBC

calculation worksheet is driven by the NAIC Health Blank Annual Statement, which has a uniform cutoff date of December 31 of the preceding year. In the past, the Department has conducted training at a minimal cost for completing the RBC calculation worksheets, and is contemplating hosting a RBC seminar in the future if the number of participants justifies the cost. RBC training is also available commercially. Finally, the RBC instructions referred to in the enabling statute have been standardized by the NAIC over the last 10 years. The proposed suggestion to net out the stop loss premiums before any premium-based RBC calculations are made would impact the series of calculations and ratios that form the basis for determining the RBC Authorized Control Level.

44. COMMENT: Two commenters expressed concern with some of the proposed stop-loss coverage requirements at N.J.A.C. 11:4-56.8(g). One commenter stated that the statute mandates the requirements contained in paragraphs (g)1, 3 and 5. However, the commenter specifically objected to the requirement in paragraph (g)2 that aggregate stop-loss coverage for claims in excess of the retention limit be in an amount of at least 25 percent of expected claims, and the requirement in paragraph (g)4 that a minimum run-out period for reporting claims of 12 months beyond the incurral period be provided. The commenter also stated that it is unimaginable that any stop loss underwriter in the State would issue a policy with a 180-day termination provision in it. The commenter recognized that some of these issues need to be addressed by legislation, but that the Department should review the rules for consistency with current stop loss policy underwriting practices so that self-funded MEWAs would at least have a chance of survival.

The second commenter stated that, while paragraph (g)1 tracks the statute in that it provides for stop-loss coverage to be maintained with a retention level of 125 percent of

expected claims, the commenter believes that it would make more sense if the proposal required a level of at least 125 percent to allow some flexibility and, perhaps, foster solvency.

RESPONSE: The retention limit established by the rules is 125 percent of expected claims. The rules also establish a minimum aggregate stop-loss coverage amount of 25 percent of expected claims that would attach for claims in excess of the 125 percent of expected claims. The Department believes it is prudent to establish a minimum amount for stop-loss coverage, and that an additional 25 percent beyond the attachment point is reasonable.

The Department recognizes that it may be difficult to obtain coverage providing for a minimum run-out period for reporting claims of 12 months beyond the incurral period, depending on conditions in the stop-loss market at the time the MEWA negotiates coverage. The Department is adding language to the rule at N.J.A.C. 11:4-56.8(g)4 that would allow some flexibility where the MEWA can demonstrate that such coverage is commercially unavailable or unreasonably priced. In such event, the Department may accept coverage providing for a run-out period for reporting claims of six months beyond the incurral period. The 180-day termination provision is required by the statute.

45. COMMENT: One commenter stated that the annual reporting requirements at proposed N.J.A.C. 11:4-56.9(a) will significantly increase the expense load on self-funded MEWAs, which will further force the "break-even" point downward for the loss ratio, making it more difficult to satisfy the minimum 75 percent loss ratio requirement while still not losing money.

RESPONSE: The enabling statute at N.J.S.A. 17B:27C-6a specifies the submission of an annual report in a form as required by the instructions adopted by the NAIC for health insurers as amended from time to time.

46. COMMENT: Two commenters stated that the quarterly reporting requirements at proposed N.J.A.C. 11:4-56.9(b), requiring both statutory and GAAP reporting, create an unnecessary expense for MEWAs. The commenters stated that MEWAs operate as a single large insurance scheme and, because of their membership size, some volatility is expected quarter to quarter. Requiring an intense level of reporting on both bases on other than an annual basis is excessive and will not necessarily result in more effective management and regulatory information.

RESPONSE: The commenter has misunderstood this provision. N.J.A.C. 11:4-56.9(b)3 requires the quarterly report to be completed on a statutory accounting principles basis only. There is no GAAP reporting requirement on a quarterly basis.

47. COMMENT: One comment concerned the proposed requirement that a loss ratio report and RBC calculation be completed as of December 31. The commenter stated that some MEWAs have plan anniversaries other than January 1, and that all reporting should reflect the actual plan anniversary rather than an arbitrary date of January 1.

RESPONSE: The SEH loss ratio report must be completed annually because N.J.S.A. 17B:27A-25(g)2 states that the loss ratio is calculated on a calendar-year basis. The Department additionally believes that the RBC must be reported as of the preceding December 31 to be consistent with the NAIC requirements. Also, as stated in the Response to Comment 43 above, the information required to be used in generating the RBC requirement is derived directly from the NAIC Annual Statement, which uses a fixed date of December 31 of the prior year to generate all pertinent information.

48. COMMENT: One commenter stated that proposed N.J.A.C. 11:4-56.10, which states that a MEWA shall bear the reasonable cost of a financial examination on a MEWA and that the

Commissioner may employ such persons to conduct or assist in conducting such an examination, is a prohibitive imposition of expense on MEWA operations, further casting into doubt the ability of any MEWA to survive. The commenter added that this has no basis in the statute.

RESPONSE: N.J.S.A. 17B:27C-9 permits the Commissioner to examine the loss reserves of a self-funded MEWA, and to have the self-funded MEWA bear the expenses of the examination. The Commissioner commonly uses consultants to assist in examinations, and these rules reflect that practice.

49. COMMENT: One commenter stated that proposed N.J.A.C. 11:4-56.11 requires MEWAs to notify the Department each year of the names and addresses of each employer covered by the MEA, as well as the number of employees eligible for coverage. The commenter added that in many cases, a snapshot of the exact number of "eligible" employees is not available, and questioned whether this requirement may provide the Department with more information than it needs to exercise suitable regulatory oversight.

The commenter also suggested adding the word "insured" before the term "MEA" wherever it appears in N.J.A.C. 11:4-56.11, and deleting the "i" at N.J.A.C. 11:4-56.11(b) since there are no further subdivisions.

RESPONSE: N.J.A.C. 11:4-56.11(a) requires carriers to notify the Department of information with respect to insured plans for multiple employers. If the requested information is not available, the carrier should so notify the Department. A MEA is clearly defined at N.J.A.C. 11:4-56.2, which definition is intended to clarify that "MEA" and "insured MEA" have identical meanings. This definition is consistent with N.J.S.A. 17B:27A-17. The commenter is incorrect in stating that there are no further subdivisions following N.J.A.C. 11:4-56.11(b)1; subparagraph follows paragraph (b)1.

50. COMMENT: One commenter pointed out that the word "renewal" appears to be missing before the word "registration" in the first line of proposed N.J.A.C. 11:4-56.12(c).

RESPONSE: The Department agrees with the commenter that it made a typographical error in neglecting to refer to initial or renewal registration at N.J.A.C. 11:4-56.12(c). Accordingly, "subsequent annual" will be inserted before "registration" in this section.

51. COMMENT: One commenter submitted several comments concerning proposed Appendix A. The commenter stated that the Appendix seems to presuppose that the statute requires every MEWA operating in the State to provide coverage, on a benefit-by-benefit basis, equal to what is required in insured small employer plans. According to the commenter, this is not provided in section 8d of the statute, and it was not the legislative intent. The commenter stated that the Legislature intended for MEWAs to provide benefit packages having an overall actuarial equivalent to that of a Small Employer Plan A, and that if the Legislature regarded self-funded MEWAs as being a means of solving the health care affordability crisis faced by small employers in the State, this interpretation is a more logical explanation of section 8d's wording than the more costly benefit-by-benefit one. The commenter also stated that its interpretation makes more sense as to large employer participants in self-funded MEWAs, and would be more consistent with the provision in the Health Care Quality Act requiring employers having self-funded plans to notify plan participants once a year as to those New Jersey mandates with which their plans do not comply.

The commenter also pointed out that the word "recent" is misspelled in Item 4 of Appendix A; that "Immunizations," "Insulin," and "Colostomy" at Items 12r, u and v respectively should have initial caps; that a comma should appear after "bags" at 12v; and a comma should appear after the letter "A" in the third bullet on the last page of Appendix A.

RESPONSE: As the Department explained in its response to a prior comment, N.J.S.A. 17B:27C-8(d) requires that the health benefits provided by a self-funded MEWA “shall at all times be equal to or greater than benefits” provided by the lowest level SEH plan. It does not refer to actuarial equivalence as does N.J.S.A. 17B:27A-19j(6)b. Accordingly, the Department has identified certain minimum benefits in the lowest level SEH plan, and requires that such benefits be provided by a self-funded MEWA. The Department agrees with the commenter concerning some of the typographical errors appearing in proposed Appendix A. However, the commenter is incorrect regarding initial capitalizations at 12r, u and v. The Department has also corrected the remaining errors, made some additional necessary typographical corrections, and divided the numerical and alphabetical column into two separate columns for clarity.

52. COMMENT: One commenter submitted several editorial comments concerning proposed Appendix B. The commenter stated that "Self-Funded" should be hyphenated in the first line of the Appendix. The fourth line of the Appendix assumes a plan is on a calendar year basis, whereas this is not always the case. The commenter suggested deleting the reference to December 31. There should be an apostrophe in the word "years" in the second line of Item 1 in the lower half of the Appendix. Items 2 and 3 in the lower half of the Appendix have some misplaced or non-existent periods; an open parenthesis is missing from Item 2e; and "nearest" is spelled incorrectly in Item 3.

RESPONSE: The Department agrees with the commenter that several typographical errors appear in proposed Appendix B. The Department has corrected these errors, made some additional corrections, and added lines for inserting information in the third and fourth lines and at 2. Claims. However, the suggested deletion of the reference to December 31 was not made. N.J.S.A. 17B:27-25 requires the loss ratio requirement to be met on a calendar year basis, and

the proposed rules at N.J.A.C. 11:4-56.6(d) also refer to calendar year report. A MEWA with a fiscal or plan year different from the calendar year must still meet the loss ratio requirement on a calendar year basis.

Federal Standards Statement

A Federal standards analysis is not required because these rules are not subject to any Federal standards or requirements. Except for the requirements set forth in N.J.S.A. 17B:27C-1 et seq. and these rules, self-funded MEWAs are not considered insurance companies or insurers under the laws of this State. Self-funded MEWAs are subject to Federal requirements pursuant to the Employee Retirement Income Security Act (ERISA) at 29 U.S.C. §§ 1001 et seq., but these adopted new rules do not interfere with or exceed any Federal standards or requirements.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 56. SELF-FUNDED MULTIPLE EMPLOYER WELFARE ARRANGEMENTS AND INSURED MULTIPLE EMPLOYER ARRANGEMENTS

11:4-56.1 Purpose and scope

(a) (No change from proposal.)

(b) This subchapter applies to self-funded and partially self-funded multiple employer welfare arrangements ***as defined in 29 U.S.C. § 1002(40)***, other than governmental plans as defined in 29 U.S.C. § 1002(32) and church plans as defined in 29 U.S.C. § 1002(33), that provide a health benefit plan or plans *[to two or more employers who each have two or more employees]* which *[plans]* cover *** the employees of*** at least one *[or more employers]*

employer that ***[are]*** ***is*** either domiciled in New Jersey or ***[have their]*** ***has its*** principal headquarters or principal administrative office located in New Jersey. This subchapter also applies to carriers providing health benefits coverage, stop-loss coverage or administrative services to multiple employer arrangements as defined at N.J.S.A. 17B:27A-17.

11:4-56.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

. . .

"Self-funded multiple employer welfare arrangement" or "Partially self-funded multiple employer welfare arrangement"**''** (collectively, MEWA) means a multiple employer welfare arrangement ***as defined in 29 U.S.C. § 1002(40)***, other than a government or church plan as defined at 29 U.S.C. § 1002(32) and (33), respectively, that provides a health benefit plan or plans ***[to two or more employers who each have two or more employees,]*** which ***[plans]*** cover ***the employees of*** at least one ***[or more employers]*** ***employer*** that ***[are]*** ***is*** either domiciled in New Jersey or ***[have their]*** ***has its*** principal headquarters or principal administrative office located in New Jersey, and which is not fully insured as defined in 29 U.S.C. § 1144(b)(6)(D).

. . .

11:4-56.3 Initial registration of self-funded MEWAs

(a) ***[Within 90 days of the effective date of this subchapter]******By September 5, 2004*******, a self-funded MEWA operating in this State prior to ***[the effective date of this subchapter]*** **June 7, 2004** shall file an application for initial registration with the Commissioner. A self-

funded MEWA that was not operating in this State prior to the *[effective date of this subchapter]* **June 7, 2004** shall not commence operations in this State until it submits an application for initial registration to the Commissioner, and said application is approved. The application for registration shall be on a form prescribed by the Commissioner, and shall include the following:

1. A certification of an officer, director or trustee of the self-funded MEWA that states:

i. – iv. (No change from proposal.)

v. The eligibility requirements for membership in *[any]* **the** association ***, if any,*** to which the self-funded MEWA provides a health benefit plan or plans; and

vi. The fees, if any, charged for membership in *[any]* **the** association ***, if any, to which the self-funded MEWA provides a health benefit plan or plans***;

2. – 4. (No change from proposal.)

5. A copy of any documents executed by an employer to become a member of *[any]* **the** association ***, if any, to which the self-funded MEWA provides a health benefit plan or plans***; and/or obtain coverage from the self-funded MEWA, including the application for membership in the self-funded MEWA;

6. A description of the eligible employers that constitute *[any]* **the** association ***, if any, to which the self-funded MEWA provides a health benefit plan or plans***; including their common or similar type of trade or business; the common trade association, professional association or other associations;

7. - 15. (No change from proposal.)

(b) (No change from proposal.)

(c) The Commissioner shall review an application for registration and notify the applicant in writing of any deficiencies contained therein within 60 days of receipt. An applicant shall address any deficiencies in its application within 60 days of notice thereof. ***Upon written request from the applicant and for good cause shown, the Commissioner may extend this 60-day timeframe to correct any deficiencies in an application an additional 60 days. The Department shall notify the applicant in writing of its response to any such request.***

(d) - (f) (No change from proposal.)

11:4-56.5 Eligibility requirements for self-funded MEWA coverage

(a) No self-funded MEWA, *[or]* ***and no*** association that obtains health coverage from a self-funded MEWA, shall refuse to provide coverage or deny membership in the ***MEWA or*** association to any employer, employee or dependent based on any of the following characteristics of the employer, employee or dependent:

1. - 12. (No change from proposal.)

11:4-56.7 Notice of change in documents of self-funded MEWAs

[(a)] A registered self-funded MEWA shall not modify any information or document furnished pursuant to this subchapter unless the MEWA files with the Commissioner a notice of the change or modification, together with any additional information to explain the change or modification, at least 60 days prior to the use or adoption of the change. If the Commissioner fails to affirmatively approve or disapprove the change or modification within 60 days of receipt of the notice, the notice of modification shall be deemed approved. The Commissioner may extend the 60-day review period for not more than 30 additional days by

providing the MEWA with written notice of the extension before the expiration of the 60-day period. If a change or modification is disapproved, the Commissioner shall notify the MEWA in writing, and specify the reason for the disapproval.

11:4-56.8 Financial requirements of self-funded MEWAs

(a) A self-funded MEWA shall establish and maintain a separate trust account with respect to that segment of its operations that provides for ***self-funded*** health benefits plans. The trust account shall reflect the income, disbursements, assets and liabilities associated with providing health benefits. At all times, the trust account shall contain assets in an amount at least equal to the sum of its liabilities, including the claim reserve account, plus the required RBC.

(b) - (f) (No change from proposal.)

(g) The self-funded MEWA shall maintain stop-loss coverage, which shall meet the following requirements:

1. – 3. (No change from proposal.)

4. The stop-loss agreement shall provide a minimum run-out period for reporting claims of 12 months beyond the incurral period, ***except that the Commissioner shall permit a run-out period for reporting claims of six months beyond the incurral period if, upon written request of the self-funded MEWA, the Commissioner determines that it has been demonstrated that coverage with a 12-month run-out period is not commercially available or is unreasonably priced***; and

5. (No change from proposal.)

11:4-56.12 Violations and penalties

(a) (No change from proposal.)

(b) A self-funded MEWA that fails to submit an application for registration, and covers employers domiciled in New Jersey or who have their principal headquarters or principal administrative offices in New Jersey, shall terminate coverage of such employers *[within eight months of the effective date of this subchapter]* **by February 7, 2005***, and shall provide 180 days notice of termination to affected employers.

(c) A self-funded MEWA whose application for initial or **subsequent annual** registration is denied or withdrawn, but that covers employers domiciled in New Jersey or who have their principal headquarters or principal administrative office in New Jersey, shall terminate coverage of such employers within eight months of the date of withdrawal or denial and shall provide 180 days notice of termination to affected employers.

(d) (No change from proposal.)

APPENDIX A
 State of New Jersey
 Department of Banking and Insurance
 Checklist and Certification
 Multiple Employer Welfare Arrangement (MEWA) Health Plans
 Filing Made Pursuant to P.L., 2001, c.352

Plan Name: _____

ERISA Filing Identification: _____

List of Forms Submitted (Identify each as contract, insert pages, rider or amendment, summary plan description, application, enrollment form or other (please identify).

			Y E S	NO
1.		Do the forms contain any provision, statements or questions that pertain to race, creed, color, national origin, ancestry or sexual orientation?		
2.		Are the forms in final printed format?		
3.		Do the forms contain unique identifying form numbers at the lower left corner of the first page?		
4.		Have persons covered under the plans been issued information identifying the benefits the plans do not provide as required by NJSA 34:11A-14? If yes, attach a copy of the most recent list. If no, explain why below.		
5.		Do the forms comply with the readability requirements set for at NJSA 17B:17-21a?		
6.		Do the forms comply with the regulation on domestic violence set forth at NJAC 11:4-42.5(a)?		
7.		Do the forms comply with the requirements of Discontinuance and Replacement set forth at NJAC 11:2-13?		
8.		Do the forms contain a Coordination of Benefits provision consistent with the requirements of NJAC 11:4-28?		
9.		Do the plans contain definitions of the following terms which are at least as favorable to consumers as those contained in Appendix Exhibit A of NJAC 11:21?		
	a.	Ambulatory Surgical Center		
	b.	Birthing Center		
	c.	Dependent		
	d.	Diagnostic Services		

			Y E S	NO
	e.	Emergency		
	f.	Employee		
	g.	Experimental or Investigational		
	h.	Extended Care Center		
	i.	Health Status-Related Factor		
	j.	Hospice		
	k.	Hospital		
	l.	Medically Necessary and Appropriate		
	m.	Nurse		
	n.	Pre-Approval (or similar term)		
	o.	Pre-Existing Condition		
	p.	Private Duty Nursing		
	q.	Reasonable and Customary (or similar term)		
	r.	Rehabilitation Center		
	s.	Skilled Nursing Care		
	t.	Special Care Unit		
	u.	Total Disability or Totally Disabled		
	v.	Urgent Care		
10.		Do the plans contain provisions as identified below which are at least as favorable to consumers as those contained in Appendix Exhibit A of NJAC 11:21?		
	a.	Incontestability		
	b.	Payment of Premiums – Grace period		
	c.	Participation Requirements		
	d.	Term of Policy – Renewal Privilege – Termination		
	e.	Waiting Period		
	f.	Incapacitated Children		
	g.	If a network based plan, Continuation of Care		
	h.	Preexisting conditions and continuity of coverage		
11.		Do the forms provide benefits and coverage as identified below which are at least as favorable to consumers as those contained in Appendix Exhibit A of NJAC 11:21?		
	a.	Charges while hospitalized up to 30 days per calendar year (room and board) and ancillary charges*.*		
	b.	Emergency and Urgent Care Services		
	c.	Testing Charges – x-ray and laboratory prior to hospitalization		
	d.	Charges while confined in an Extended Care or Rehabilitation Facility up to 60 days per calendar year (in lieu of hospital confinement, 2 for 1 exchange for hospital days)		
	e.	Charges for home health care up to 60 days per calendar year (2 for 1 exchange for hospital days)		
	f.	Charges for hospice care up to 60 days per calendar year (2 for 1 exchange for hospital days)		
	g.	Food and food products for inherited metabolic diseases		
	h.	Practitioner charges for nonsurgical treatment, while hospitalized.		
	i.	Practitioner charges for surgery		
	j.	Second opinion charges		
	k.	Ambulatory surgical center charges		
	l.	Pregnancy as any other illness		
	m.	Birth center charges		
	n.	Newborn child coverage		

		Y E S	NO
	o. Anesthesia		
	p. Therapy services (as listed in Appendix Exhibit A of N.J.A.C. 11:21)		
	q. Preventive care (\$100.00 per person; \$300.00 per family per calendar year; first dollar coverage)		
	r. Immunizations and lead screening		
	s. Autologous bone marrow transplant and associated dose intensive chemotherapy, peripheral blood stem cell transplants.		
	t. Prescription drugs – inpatient		
	u. Insulin needles, syringes, glucose test strips, lancets		
	v. Colostomy bags*,* belts and irrigators		
]*

Explanation or clarification of response(s) to any item above:

I understand and agree that:

- To the best of my knowledge the forms described herein provide benefits and coverage at least as favorable to the consumer as that provided by Plan A as set forth at Appendix Exhibit A of N.J.A.C. 11:20.
- I understand that the Department of Banking and Insurance will rely on this certification in accepting this submission.
- If it is determined that the forms do not provide at least the minimum level of benefits and coverage of Plan A*,* I agree the plan will be amended to provide such benefits or coverage.
- I am aware of the penalties for submitting an improper certification or false submission.

Signature of Responsible Officer

Printed Name of Responsible Officer and Title

Date

APPENDIX B

Self * Funded MEWA Loss Ratio Report Form

Small Employer Business

Reporting Year (Year in which this report was prepared) * _____ *

For Preceding Calendar Year Ending December 31, _____

Name of MEWA: _____

Address of MEWA: _____

1. Premiums _____
2. Claims (a. + b. - c. + d. - e.) * _____ *
 - a. _____
 - b. _____
 - c. _____
 - d. _____
 - e. _____
3. Loss Ratio (2. /1.) _____
4. Dividends (.75 x 1.) - 2. _____

Signature of Preparer _____ Date _____

Name of Preparer _____ Title _____

Address _____

Telephone Number _____

1. Premiums are total earned premiums for small employer business, before any dividends or credits applicable to prior [year]* year's* Loss Ratio Reports.
2. Claims for small employer business are equal to *
 - a. [Claims]* claims* paid in the preceding calendar year regardless of year incurred* plus*
 - b. [Claims]* claims* paid [from]* from* January 1 to June 30 of the reporting year for claims incurred prior to January 1 of the reporting year, less*
 - c. [Claims]* claims* paid from January 1 through June 30 of the preceding calendar year for claims* incurred prior to January 1 of the preceding calendar year (as reported in the preceding year's Loss Ratio Report)*; plus*
 - d. [A]* a* residual reserve equal to 3.3 percent of a. + b. - c.* less*
 - e. [A]* a* residual reserve [* as reported in the preceding year's Loss Ratio Report).
3. Loss Ratio is the quotient, to the [nearest]* nearest* .1 percent, of the Claims divided by the [premium]* Premiums* (2. divided by 1.)
4. Dividends are 0 if the amount on Line 3 is 75.0% or greater. Otherwise, dividends are equal to (75% of Line 1.)* minus Line 2.