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BULLETIN NO. 03-16

**TO: ALL NEW JERSEY LICENSED STOP LOSS CARRIERS AND
NEW JERSEY REGISTERED THIRD PARTY
ADMINISTRATORS**

FROM: HOLLY C. BAKKE, COMMISSIONER

**RE: ILLEGAL HEALTH INSURANCE PLANS SOLICITING STOP
LOSS COVERAGE**

The operations of unlicensed, and therefore illegal, health plans have resulted in millions of dollars in unpaid claims. Your company's failure to establish or strengthen appropriate internal controls with regard to these entities may expose it to substantial liability. Your company may be subject to regulatory penalties and may be liable for all unpaid claims under N.J.S.A. 17:32-16 et seq. The National Association of Insurance Commissioners (NAIC) has urged state insurance departments to issue bulletins advising stop loss carriers and third party administrators to immediately review their internal controls and business practices to ensure that their company does not become an unwitting supporter of unlicensed (illegal) health insurance plans. Your company's urgent effort to strengthen its internal controls in this area is warranted by your company's commitment to good business practices.

The purpose of this Bulletin is to urge you to provide guidance on establish or strengthening internal controls to address the following concerns:

1. Unlawful Multiple Employer Welfare Arrangements (MEWAs)

Your company will not issue or purchase a stop loss policy or undertake to administer unlicensed "self-funded" health plans that cover the employees of two or more employers unless all covered employers are under common ownership or the plan is registered in this state as a multiple employer welfare arrangement pursuant to N.J.S.A. 17B:27C-1 et seq. If not registered as a MEWA, these plans are insurers under the laws of this State, and are transacting the business of insurance without a license. They commonly, and wrongly, claim to be exempt from state insurance law under the Federal Employee Retirement Income Security Act of 1974 (ERISA). Since these entities meet the definition of

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"multiple employer welfare arrangement" (MEWA) under ERISA, they remain subject to state insurance law;

2. Professional Employee Organizations (PEOs) Unlicensed Health Plans

Your company will not issue or purchase a stop loss policy or undertake to administer an unlicensed "self-funded" health plan for an employee leasing or professional employee organization. These firms commonly refer to their client's employees as "co-employed" or as "leased" employees of the PEO. This characterization is harmful and legally insufficient to constitute the PEO a single employer. Under ERISA, an individual is an employee only if the employer actually controls and directs the individual's work. For additional guidance on coverage through a PEO, please refer to Bulletin No. 00-SEH-02 published by the New Jersey Small Employer Health Benefits Program Board, which may be found at http://www.nj.gov/dobi.seh00_02.htm. Such a "self-funded" plan is almost certainly an unlicensed insurer under the law of this State;

3. Out of State Trusts/Stop Loss "Reinsurance" for Unlicensed Health Plans

Your company will not issue or purchase stop loss coverage for employers located in this state through an out of state trust, and will not undertake to administer an unlicensed "self-funded" health plan for employers located in this State. Operators of these arrangements contend that they are exempt from this State's insurance laws because they solicit employers in this State to apply for stop loss coverage through a trust established in an out of state bank. Often these schemes falsely characterize the stop loss policy as "reinsurance." They also represent that all claims will be paid under the "self-funded" plan in return for a fixed contribution.

Each of these claims is legally wrong and factually false. An insurer or producer that solicits the sale of stop loss coverage in this State is subject to this State's laws. Stop loss coverage is insurance, not "reinsurance," and usually there are substantial gaps in the coverage. Most importantly, only licensed insurers and producers may solicit the sale of stop loss policies in this State.

The Department asks that you take immediate steps, including the following, to ensure that your company will avoid providing unwitting support to these illegal operations:

- Review the discussion of ERISA provisions governing this topic on the U.S. Department of Labor website at <http://www.dol.gov/ebsa/Publications/mewas.html>.
- Work with the Department's MEWA contact to resolve any questions about a particular operation. The Department's contact can be reached as follows:

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- As necessary, communicate with the insurance departments of other states, which will provide the same assistance and may be contacted through the MEWA contact listed on the NAIC website at http://www.naic.org/state_contacts/docs/mewa_plan_contacts_public_list.pdf.
- Establish policies that direct your company's staff and agents to promptly report any operation described in this Bulletin to the appropriate MEWA contact.

8/12/03
Date

/s/ Holly C. Bakke
Holly C. Bakke, Commissioner