PROJECT HISTORY - 2006

PREVENTION OF ILLEGAL MULTIPLE EMPLOYER WELFARE ARRANGEMENTS (MEWAS) AND OTHER ILLEGAL INSURERS MODEL REGULATION (#220)

1. Project Description

A chair discussion draft of the Illegal MEWA Prevention Model Regulation was first circulated and comments were solicited at the 2004 Winter National Meeting. This new model regulation was intended to replace Model #220: Reporting Requirements for Licensees Seeking to do Business with Certain Unauthorized Multiple Employer Welfare Arrangements (MEWAs) Model Regulation. A public hearing was held at the 2005 Spring National Meeting in order to obtain additional information and comments from licensees who would be affected by this model regulation. A new draft dated June 9, 2005, that took into account the testimony and comments received at the public hearing, was distributed at the Summer National Meeting and released for comment. Comments were due August 15, 2005. A new draft dated December 4, 2005, that took into account the comments received, was distributed at the Winter National Meeting and released for comment. Comments on the December 4, 2005 draft were due January 17, 2006. A new draft dated February, that took into account the comments received, was distributed at the 2006 Spring National Meeting. The working group discussed the new draft and agreed to adopt the model, with minor amendments.

2. Group Responsible for Drafting Model and States Participating

The ERISA (B) Working Group was responsible for drafting the Model Act, chaired by Fred Nepple (WI). The following states were members of the Working Group: Arkansas, Colorado, District of Columbia, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, South Dakota, Utah, Vermont, Virginia, Washington

3. Charge Authorizing Project

B Committee Charge: Review issues surrounding state regulation of insurance purchased by ERISA plans, and if appropriate, develop a model law on the subject.

4. Description of Drafting Process

2004 Winter National Meeting – A November 30, 2004 chair discussion draft titled Prevention of Illegal Multiple Employer Welfare Arrangements (MEWAs) and Other Illegal Health Insurers Model Regulation was distributed at the ERISA Working Group meeting. The working group decided to hold an informational public hearing at the 2005 Spring National Meeting.

2005 Spring National Meeting – A public hearing was held. The following individuals gave oral remarks at the hearing: Rick Ramsay representing America's Health Insurance Plans (AHIP); John Troy representing BlueCross BlueShield Association (BCBSA); D. Scott Asay from Employee Benefit Management Services, Inc. representing Society of Professional Benefit Administrators (SPBA); and Janet Trautwein representing the National Association of Health Underwriters (NAHU). Several interested parties submitted written comments in addition to or in lieu of testimony on the 11/30/04 discussion draft, including: William Schilling, National Association of Professional Employer Organizations (NAPEO); Fred Hunt, Society of Professional Benefit Administrators (SPBA); Gary Sanders, National Association of Insurance and Financial Advisors (NAIFA) and Association of Health Insurance Advisors (AHIA); Elizabeth Leight, Society of Professional Benefit Administrators (SPBA); D. Scott Asay, Employee Benefit Management Services, Inc. (EBMS); Janet Trautwein, National Association of Health Underwriters (NAHU); Karen Greenrose, American Association of Preferred Provider Organizations (AAPPO); David Starr, Church Alliance; and Mila Kofman, Georgetown University Institute for Health Care Research and Policy.

2005 Summer National Meeting: A new draft, which took into account the discussion and comments from the public hearing, was distributed and reviewed. Some amendments were suggested and agreed upon by the working group and a new draft dated June 9, 2005 was released and comments were requested by August 15, 2005.

2005 Fall National Meeting: Cancelled

2005 Winter National Meeting: A new draft, which took into account the discussion and comments from the public hearing, was distributed and reviewed. Some amendments were suggested and agreed upon by the working group and a new draft dated December 4, 2005, was distributed following the meeting. Comments on the December 4, 2005 draft were requested by January 17, 2006

2006 Spring National Meeting: A new draft dated February 2006, which took into account the discussion and comments on the December 4, 2005, draft, was distributed and reviewed. The working group agreed to adopt the model regulation, with minor amendments.

5. Significant Issues Raised

Interested parties wanted Section 3 to require reporting only when a licensee has actual knowledge of unauthorized insurance. Because actual knowledge is nearly impossible to prove in practice, the working group was of the opinion that there would be no realistic way to enforce any failure to report under the actual knowledge standard. Therefore, the working group decided to require reporting when a licensee knows or reasonably should know about unauthorized insurance.

A number of interested parties were concerned that, under the model regulation, a licensee might be legally liable if the information in the report under Section 3 turned out to be incorrect. The working group agreed that states should be encouraged to have laws in place that provide legal immunity to licensees as well as protect the confidentiality of information shared under this regulation prior to adopting the regulation. The working group, however, declined to insert language making state immunity and confidentiality laws a condition precedent to adopting the regulation.

The question was raised as to whether there was authority to impose the Section 4 due diligence requirements on preferred provider organizations (PPOs) in states that do not regulate PPOs. The working group was of the opinion that the states may want to consider whether they have the authority for the due diligence requirements of the regulation pursuant to the state law equivalent of the Non-Admitted Insurer Model Act, which imposes liability on any entity assisting in the unauthorized transaction of insurance.

Interested parties expressed concern that that the due diligence requirements under Section 4 were overly burdensome and were an attempt to have licensees do the work of the department of insurance by ferreting out unauthorized health insurance entities. The working group re-iterated that this is a regulation that adds detail to existing state requirements. Assisting in the unauthorized transaction of insurance is already prohibited. This regulation simply provides additional guidance as to how licensees can ensure that they are in compliance with the law.

A concern was raised that the due diligence requirements were not detailed enough for licensees to know exactly what they have to do to be in compliance. The working group was of the opinion that it is impossible to develop a definitive list as to what appropriate due diligence would be in every scenario. The exercise of good judgment is a necessary component of exercising due diligence and it cannot be legislated.