ALLIANCE of Health Care Sharing Ministries

Comments of the Alliance of Health Care Sharing Ministries to the Stakeholder Draft Washington Office of the Insurance Commissioner Proposed Rule: Subchapter N: Health Care Sharing Ministries

The Alliance of Health Care Sharing Ministries (the Alliance) is a §501(c)(6) nonprofit organization devoted to advocating for the interests of Health Care Sharing Ministries (HCSMs) and their members. We work with most of the nine large, national HCSMs that meet the definition of an HCSM in §5000A(d)(2)(B)(ii) of the Internal Revenue Code,[1] as recognized by certification letters issued by the Centers for Medicare and Medicaid Services (CMS). We appreciate the opportunity to comment on the proposed rules. We believe we can provide a unique and expert perspective on the subject matter, particularly in the interpretation of §5000A(d)(2)(B)(ii), in part because some of our members helped to draft this definition.

HCSMs are faith communities of individuals and families who exercise their common religious beliefs by sharing with each other in certain medical expenses. Participating members make monthly contributions for sharing and follow agreed upon community standards related to their faith. Each ministry facilitates medical expense sharing among its members in accordance with the ministry's sharing guidelines. The ministries also facilitate the sharing of prayers and notes of encouragement.

This integration of the body and soul is a critical part of HCSMs' more human approach to health care and is one of the reasons so many Americans have chosen HCSMs as their solution to paying for health care, instead of buying health insurance. Although the specific procedures and infrastructures differ, all the HCSMs who work with the Alliance have a long history of faithfully sharing eligible medical expenses. More than 1.3 million Americans are members of HCSMs, sharing more than $1.9 billion in medical expenses in 2020.

The ACA recognized that HCSMs as defined in §5000A(d)(2)(B)(ii) offer a viable health care solution by exempting their members from the individual insurance mandate. In addition, because neither HCSMs nor their members assume any legal obligations or risks with respect to medical expenses incurred by the members, HCSMs are not regulated as insurance in any state.

Indeed, like 30 other states, Washington has enacted a "safe harbor" statute which specifically exempts HCSMs from insurance regulation. Washington's safe harbor, RCW 48.43.009, applies to all organizations described in §5000A(d)(2)(B)(ii)(IV). These safe harbor laws were enacted so that HCSMs and insurance regulators could avoid costly and time-consuming disputes over ministry operations. The Alliance believes strongly that any rules carrying out or interpreting such safe harbors should be constructed deferentially in order to not invite these disputes.

To that end, we have the following concerns regarding the proposed provisions:

[1] Unless otherwise noted, all section references are to the Internal Revenue Code, as amended to date.

OIC Interpretive Authority

Under the Washington safe harbor statute, RCW 48.43.009, the §5000A HCSM definition is incorporated by reference into Washington law, such that the definition of an HCSM used in Washington "has the same meaning" as under federal law.

Therefore, OIC lacks independent authority to define or interpret the meaning of the terms used in the definition. The rules, therefore, must give HCSMs the "same meaning" as federal law. In only two instances may the meaning of the terms used in §5000A be properly interpreted. One, by a federal agency, acting under clear authority granted it by Congress and within its proper administrative duties. And two, by a federal court in a case in which the interpretation of the statutory terms is necessary. Neither occasion is present now, and OIC must not exceed its authority by interpreting the statutory terms differently than they have been interpreted as described above.

The definition of "predecessor" – NEW WAC 284-43-821(10)

The HCSM definition in § 5000A(d)(2)(B)(ii)(IV), incorporated by reference in RCW 48.43.009, sets out the following:

> "[An HCSM] means an organization …. (IV) which (***or*** a ***predecessor*** of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999." (emphasis added).

OIC has proposed to define "predecessor" as "an organization whose medical expense sharing activities were taken over by a successor organization." OIC has indicated that its proposed definition requires a successor organization to "take over" the *entirety* of its predecessor's medical expense sharing activities rather than only *part* of such activities.

This proposed interpretation contradicts the interpretation of the authorized federal agencies. As an initial matter, a number of HCSMs that are successor organizations to predecessors that continue to engage in medical expense sharing activities have received certification letters from CMS determining that they satisfy the 5000A(d)(2)(B)(ii) requirements. OIC's interpretation to the contrary would result in these organizations being treated as HCSMs for federal law purposes but not for state laws purposes, even though the same federal law definition is being used in both cases.

OIC's interpretation also directly contradicts the federal interpretation upon which it apparently relies. OIC's proposed definition appears to be inferred from the definition of "successor" set forth by the IRS in *Form 1023* and the *Instructions for Form 1023*. But this "successor" definition is contrary to OIC's position because it clearly allows for a successor entity to take over only part of its predecessor's activities.

Form 1023 is the IRS Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code. Part VII Question 1 in Form 1023 asks the following:

1 Are you a successor to another organization? Answer "Yes," if you have taken or will take over the activities of another organization; you took over 25% or more of the fair market value of the net assets of another organization; or you were established upon the conversion of an organization from for-profit to nonprofit status. If "Yes," complete Schedule G.

The *Instructions for Form 1023* provide further clarity by adding that a "successor" is "[a]n organization that took over …. [*m]ore than a negligible amount* of the activities that were previously conducted by another organization." (emphasis added).

If these documents form the basis for OIC's proposed "predecessor" definition, the opposite of OIC's position is required because a successor could meet the definition by taking over only a portion of the activities of its predecessor. If OIC's position comes from a different source than those assumed here, such a source has yet to be presented to interested parties.

We reiterate that OIC lacks the authority to interpret or define federal laws incorporated into Washington law by reference, particularly in a manner contrary to authorized federal interpretations. If the definition of "predecessor" remains in the proposed rule it should be amended to clarify that a successor is not required to take over all its predecessor's sharing activities.

Continuously Sharing Medical Expenses – NEW WAC 284-43-8230

As stated above, an HCSM only qualifies under § 5000A(d)(2)(B)(ii) if "the medical expenses of the members of the HCSM (and its predecessor, if any) "have been shared continuously and without interruption since at least December 31, 1999."

OIC's proposed WAC 284-43-8230 would add two requirements: (i) there must be sharing "between members of the predecessor organization and [members of] its successor organization" and (ii) "members of the predecessor organization must share medical expenses with *all* new members."

Nothing in the language of § 5000A(d)(2)(B)(ii), which focuses on continuity of the entity and its sharing activities, supports these additional requirements. Specifically, nothing in § 5000A(d)(2)(B)(ii) requires that members of a sharing community administered by the predecessor share medical expenses of every member of a sharing community administered by the successor (or, for that matter, of a distinct sharing community administered by the predecessor). To the contrary, § 5000A(d)(2)(B)(ii) dictates only that member medical expenses have been shared continuously and without interruption; it does not dictate which other members of the HCSM (or its predecessor) must share in any particular member's medical expenses.

More generally, OIC's proposed rule incorrectly and without statutory authority requires an HCSM to administer only one sharing community. We oppose this rule and do not support any interpretation of "shared continuously and without interruption" that precludes ministries from administering distinct sharing communities.