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August 17, 2021

To: RulesCoordinator@oic.wa.gov

Re: Health Care Sharing Ministries rulemaking (R 2021-17)
New WAC 284-43-8210 *Definitions Section.*
New WAC 284-43-8220 *Prompt reply to the commissioner required*.
New WAC 284-43-8230 *Continuously Sharing Medical Expenses*.

Dear Rules Coordinator:

Thank you for the opportunity to comment upon the proposed new rules regarding Health Care Sharing Ministries.

I. THE PROPOSED NEW RULES CREATE JURISDICTION OVER HCSMS WHERE NONE EXISTS UNDER EXISTING STATUTORY LAW.

The current law in Washington as to Health Care Sharing Ministries (HCSMs) states in its entirety:

> "Health care sharing ministries are not health carriers as defined in RCW 48.43.005 or insurers as defined in RCW 48.01.050. For purposes of this section, 'health care sharing ministry' has the same meaning as in 26 U.S.C. Sec. 5000A."

Wash. Rev. Code 48.43.009 *Health care sharing ministries.*[1]

The biggest problem with the three proposed new rules is that through them the Office of the Insurance Commissioner attempts to grant to itself continuing oversight jurisdiction over all HCSMs even though Washington's legislature has said HCSMs which come within the ACA's definition were NOT health carriers or insurers and thus outside of its authority.

[1] The Affordable Care Act ("ACA") at 26 U.S.C. § 5000A (d)(2)(B)(1) provided this definition of a health care sharing ministry:

> The term "health care sharing ministry" means an organization —
>
> (I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),
>
> (II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,
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> (III) members of which retain membership even after they develop a medical condition,
>
> (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, and
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> (V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

II. THE PROPOSED RULES DIMINISH THE CONSTITUTIONAL RIGHTS OF THE HEALTH CARE SHARING MINISTRIES AND THEIR MEMBERS.

Perhaps of primary importance in considering the validity of this rulemaking effort is the restriction on rulemaking which is codified at the very beginning of Washington's Administrative Procedure Act: "**Nothing in this chapter may be held to diminish the constitutional rights of any person** or to limit or repeal additional requirements imposed by statute or otherwise recognized by law." RCW 34.05.020 (Bold added for emphasis.)

Even though the legislature has removed valid Health Care Sharing Ministries from the jurisdiction of the Commissioner by exempting them from regulation as "insurance," the three new proposed Rules unilaterally grant to the Office of the Commissioner jurisdiction sufficient to mandate reporting and disclosures from HCSMs to the Commissioner.

In creating their current state constitution, the citizens of Washington officially recognized the existence and sovereignty of God in the Preamble to the Constitution of Washington:

> *We the people of the state of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.*
>
> CONSTITUTION OF THE STATE OF WASHINGTON, Preamble.

That recognition of the sovereignty of the Supreme Ruler of the Universe was reaffirmed in the first Article of the Washington Constitution, the Declaration of Rights:

> *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment:*
>
> *PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.*
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> CONSTITUTION OF THE STATE OF WASHINGTON. Article I, §11.

As a former territory, Washington's admittance as a state into the Union required a Compact with the United States. The primacy of freedom of religion in Washington's public policy is revealed by the fact that the very first section of that all-important Compact is the permanent and irrevocable grant of religious liberty:

> *The following ordinance shall be irrevocable without the consent of the United States and the people of this state: First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall*

ever be molested in person or property on account of his or her mode of religious worship.

CONSTITUTION OF THE STATE OF WASHINGTON. Article XXVI, Compact with The United States, §I.

These repeated official recognitions of the primacy of religion and religious freedom in Washington are important not only to support the right of Christians to share each others' needs as an expression of their religion, but also as an added boost to an Equal Protection argument for the right to be free from regulation to at least the same extent as exempted secular organizations. A government which officially recognizes the primacy of religion cannot constitutionally favor a secular organization and disfavor a religious one.

The United State Supreme Court's unanimous ruling in *Fulton et al v. City of Philadelphia et al*, No. 19-123 (June 17, 2021), ordered that **no** government policy can burden or prohibit religious conduct if it grants exemptions permitting similar secular conduct.

Even though the facts in that case are, of course, quite dissimilar from the OIC's attempt to impose its secular requirements upon religious health care sharing ministries, the reasoning and the rule of law in that opinion certainly allow HCSMs to operate in Washington on the same basis as the persons and entities Washington says are completely exempt from application of its insurance laws under RCW 48.36A.370, titled "Exemptions."

In *Fulton et al v. City of Philadelphia et al*, the Supreme Court ruled:

- [L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. (p. 5)
- [But a] law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." (pp.5-6)
- A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. (p. 6)
- A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so. (p. 13)

(Internal citations omitted.)

Thus, under this ruling, Washington's Insurance Code would be found to be not generally applicable and its attempted imposition of the burden of insurance laws on religious health care sharing ministries would not be able to survive strict scrutiny.

Washington has a statute, RCW 48.36A.370, titled "Exemptions," which completely exempts fourteen (14) categories of entities from the Insurance Code and states, "Nothing contained in this chapter shall be so construed as to affect or apply to [them] and … [they] shall also be exempt from all other provisions of the insurance laws of this state."

These are the entities which are completely and entirely exempted from Washington's insurance laws:

1. Grand or subordinate lodges of Masons,
2. Odd Fellows,
3. Improved Order of Red Men,
4. Fraternal Order of Eagles,
5. Loyal Order of Moose,
6. Knights of Pythias,
7. Grand Aerie Fraternal Order of Eagles,
8. Junior Order of United American Mechanics,
9. Similar societies which do not issue insurance certificates,
10. Orders, societies, or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, which admit to membership only persons engaged insuring only their own members and their families,
11. The ladies' societies or ladies' auxiliaries to such orders, societies, or associations,
12. Domestic societies which limit their membership to the employees of a particular city or town,
13. Domestic societies which limit their membership to a designated firm, business house, or corporation,
14. Domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred fifty dollars to any one person in any one year.

Clearly, the Washington Insurance Code provides a mechanism for individualized exemptions, and so it isn't a "generally applicable" law. Under *Fulton et al v. City of Philadelphia et al,* Washington cannot impose the full strength of its Insurance Code on HCSMs while at the same time permitting the fourteen listed secular entities to be completely exempt. Washington by its exemption statute has shown it believes it can still achieve its governmental interests even though it grants complete exemptions to the secular entities. By doing so, it cannot now withhold the same right from the religious health care sharing ministries.

The proposed New WAC 284-43-8220 *Prompt reply to the commissioner required*, grants to the Commissioner broad and sweeping authority to demand disclosures from HCSMs on anything without any apparent pre-condition or constraint on the demand:

> "Health care sharing ministries shall timely reply in writing to an inquiry of the commissioner regarding their compliance with RCW 48.43.009, and any potential violations of RCW 48.05.030(1) and RCW 48.15.020(1), and any related regulations including this regulation. A timely response is one that is received by the commissioner within fifteen business days from receipt of the inquiry."

In the very recent United States Supreme Court ruling, *Americans for Prosperity Foundation v. Bonta, et al*, No. 19-251 (July 1, 2021), Chief Justice Roberts wrote in the Court's 6-3 opinion: "When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is

enough, '[b]ecause First Amendment freedoms need breathing space to survive.'" *Id.* at 19, quoting *NAACP v. Button*, 371 U. S. 415, 433 (1963).

The Supreme Court said that it has settled on "exacting scrutiny" as the standard of review that applies to First Amendment challenges to compelled disclosure. "To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* at 7. "Such scrutiny," the Court said, "is appropriate given the 'deterrent effect on the exercise of First Amendment rights' that arises as an 'inevitable result of the government's conduct in requiring disclosure.'" *Id.* at 7-8, internal citations omitted.

"While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* at 9. The Commissioner's asserted interest in compliance is not at all narrowly tailored in the proposed New WAC 284-43-8220. For example, it does not even require the Commissioner to identify the alleged violation with any degree of specificity, nor does it require the Commissioner to identify the source of the accusation. Rather than it being narrowly tailored, it clearly was written to be as broad and all-encompassing as possible.

"[A] substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. This requirement makes sense. Narrow tailoring is crucial where First Amendment activity is chilled-even if indirectly '[b]ecause First Amendment freedoms need breathing space to survive.'" *Id.* at 9-10.

"The 'government may regulate in the [First Amendment] area only with narrow specificity, and compelled disclosure regimes are no exception. When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas ... discourage citizens from exercising rights protected by the Constitution.'" *Id.* at 10-11.

III. THE PROPOSED NEW WAC 284-43-8230 "CONTINUOUSLY SHARING MEDICAL EXPENSES" IMPROPERLY EXPANDS THE SCOPE OF THE PRE-1999 CLAUSE OF 26 U.S.C. SEC. 5000A (WHICH IS INCORPORATED IN RCW 48.43.009) BY REDEFINING THE TERMS "PREDECESSOR" AND "CONTINUOUSLY," AND MAKES IT A TOOL TO ABOLISH ALL HCSMS OVER TIME.

The section of the Affordable Care Act ("ACA") at 26 U.S.C. § 5000A (d)(2)(B)(1) pertinent to this discussion provides an objective and straightforward requirement which merely says: "The term 'health care sharing ministry' 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."

The proposed New WAC 284-43-8230 *Continuously Sharing Medical Expenses* confuses the clarity of the ACA, and is not in keeping with Washington's statutory[2] or case law[3] on "predecessor." It completely changes the ACA's simple definitional element.

The proposed rule on *Continuously Sharing Medical Expenses* says: "In order for there to be continuous sharing without interruption of medical expenses between members of a predecessor organization and its successor health care sharing ministry, members of the predecessor organization must share medical expenses with all new members."

This language of WAC 284-43-8230 essentially makes it a tool to abolish all HCSMs by the mere passage of time. If the Commissioner actually intends that "members of the predecessor organization must share medical expenses with all new members," then when the last member of the predecessor organization dies or drops off, the successor organization could no longer come within the language of the Rule.

CONCLUSION.

It would be unwise to promulgate the proposed Rules in their current form.

The proposed Rules create jurisdiction over HCSMs where none exists under existing statutory law and diminish the constitutional rights of the Health Care Sharing Ministries and their members.

The Proposed New WAC 284-43-8230 "Continuously Sharing Medical Expenses" improperly expands the scope of the pre-1999 clause of 26 U.S.C. Sec. 5000A (which is incorporated in RCW 48.43.009) by redefining the terms "predecessor" and "continuously," and makes it a tool to abolish all HCSMs over time.

[4]Again, thank you for the opportunity to comment upon the proposed new rules regarding Health Care Sharing Ministries.

Best Regards,

J. Michael Sharman

J. Michael Sharman

[2] RCW 11.114.170 Liability to third persons; RCW 50.29.062 Contribution rates for predecessor and successor employers; RCW 11.98.039 Nonjudicial change of trustee—Judicial appointment or change of trustee—Liability and duties of successor fiduciary; RCW 36.28.130 Actions by successors and by officials after expiration of term of office validated; RCW 50.29.063 Predecessor or successor employers—Transfer to obtain reduced array calculation factor rate.

[3] See, e.g., *Leren v. Kaiser Gypsum Co*., 442 P.3d 273 (Wash. App. 2019), predecessor corporation; *Beebe v. Swerda*, 793 P.2d 442, 58 Wn.App. 375 (Wash. App. 1990), predecessor in title; *Farrow v. Alfa Laval*, Inc., 179 Wash.App. 652, 319 P.3d 861 (Wash. App. 2014) predecessor in interest; *Community Telecable v. City of Seattle DOA*, 149 P.3d 380, 136 Wn. App. 169 (Wash. App. 2006), predecessor corporation; and *Hall v. Armstrong Cork, Inc*., 103 Wn.2d 258, 692 P.2d 787 (Wash. 1984), product line rule of successor liability