



Comments of the Alliance of Health Care Sharing Ministries on Washington Office of the Insurance Commissioner Proposed Rule: Health Care Sharing Ministries Rulemaking (Insurance Commissioner Matter R 2021-17)

The Alliance of Health Care Sharing Ministries (the Alliance) appreciates the opportunity to comment on the “Health care sharing ministries rulemaking” published on October 4, 2021 through the Office of the Insurance Commissioner (OIC).

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 several of the nine large, national HCSMs that meet the definition of an HCSM in 26 U.S.C. 5000A(d)(2)(B)(ii), as recognized by certification letters issued by the Centers for Medicare and Medicaid Services (CMS). As such, we believe we can provide a unique and expert perspective on the subject matter, particularly in the interpretation of 26 U.S.C. 5000A(d)(2)(B)(ii).

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 to participate in HCSMs as part of the management of their health care. Although the specific procedures and infrastructures differ, all HCSMs who work with the Alliance have a long history of faithfully sharing eligible medical expenses. Today, more than 1.3 million Americans are members of HCSMs, sharing more than \$1.9 billion in medical expenses in 2020.

In the Patient Protection and Affordable Care Act (ACA), Congress recognized that HCSMs (as defined in 26 U.S.C. 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 risk 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 statute, RCW 48.43.009, applies to all organizations described in 26 U.S.C. 5000A(d)(2)(B)(ii). These safe harbor laws were enacted around the country so that HCSMs and state 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 respectfully submit the following comments regarding the proposed rule:

1. OIC lacks authority to interpret the statute in a way that gives it a different meaning than the meaning conferred by federal law.

In enacting RCW 48.43.009, the Washington legislature incorporated by reference the federal definition of an HCSM in 26 U.S.C. 5000A into Washington state law, such that the definition of an HCSM in Washington must have “the same meaning” as the definition under federal law.¹ Hence, the statute explicitly abrogates OIC’s (and other agencies’) ability to redefine or interpret the meaning of the terms used in the definition as it has attempted to do in the proposed rule.

In only two instances may the meaning of the terms used in 26 U.S.C. 5000A be properly interpreted differently than they are currently interpreted under federal law, and neither of them falls within the authority of the OIC: first, by a federal agency, acting under clear authority granted it by Congress and within its proper administrative duties; and second, 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 in a way that results in a different meaning than that given under federal law.

Even if OIC were to be determined to have authority to interpret the meaning of terms in RCW 48.43.009, both the new interpretation of “continuously sharing medical expenses” in proposed WAC-284-43-9320 and a number of the definitions in proposed WAC-284-43-8210 would, if finalized, render a different meaning than those same terms under current federal law.¹ This is again in direct conflict with the plain language of RCW 48.43.009.

a. The proposed definition of “predecessor” in new WAC 284-43-8210(10) is impermissible because it results in a different meaning of HCSM than that under federal law.

The definition of an HCSM in 26 U.S.C. 5000A(d)(2)(B)(ii), incorporated by reference in RCW 48.43.009, sets forth in relevant part:

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].

In new WAC-284-43-8210(10), OIC proposes to define “predecessor” as “an organization that was acquired, merged with, or otherwise replaced by a successor organization, and the predecessor no longer shares medical expenses.”

We appreciate the change from the definition of “predecessor” contained in earlier stakeholder draft, because it appears the revised definition in this proposed rule would allow a successor organization to assume or take over only a part of its predecessor’s medical expense sharing

¹ RCW 48.43.009.

activities rather than requiring the successor to take over *all* of the predecessor's medical expense sharing activities.

However, we remain concerned that the proposed definition still impermissibly differs from the interpretation of the authorized federal agencies, and would in fact create a conflict with federal law. While portions of proposed WAC 284-43-8210 simply codify those same terms as they are defined in federal regulations and guidance, other terms are defined differently than they are at the federal level, thus creating a conflict.

An example of the former is the definition of "for profit" in proposed WAC 284-43-8210(4), which appears to be taken directly from the IRS instructions for Form 1023 (Rev. January 2020) addressing "Successors to Other Organizations."² However, in proposed WAC 284-43-8210(10), the proposed definition of "predecessor" departs significantly from the federal definition set forth in the federal instructions; while the IRS Form 1023 instructions define "predecessor" as simply "[a]n organization whose activities or assets were taken over by another organization," OIC's proposed definition would, among other things, add a requirement that "the predecessor no longer shares medical expenses."³ This additional requirement results in HCSMs being defined differently under state law than under federal law, and is therefore impermissible.

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.

b. The proposed new interpretation of "continuously sharing medical expenses" in new WAC-284-43-8320 is impermissible because it results in a different meaning of HCSM than that under federal law, and the interpretation could cause significant confusion.

As stated above, an HCSM only qualifies under 26 U.S.C. 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-284-43-8320 would add a new requirement that HCSMs must meet in order for sharing between a predecessor organization and its successor organization to be considered "continuous and without interruption." Namely, the proposed rule would require that "remaining predecessor organization members must share medical expenses with successor organization members, if any, at the time the successor organization acquires, merges with, or otherwise replaces the predecessor's medical expense sharing activities."

We appreciate OIC removing the language from the earlier stakeholder draft that would have required members of a sharing community administered by a predecessor to share medical expenses of *all* new members of a sharing community administered by the successor.

² See <https://www.irs.gov/pub/irs-pdf/i1023.pdf>.

³ See <https://www.irs.gov/pub/irs-pdf/i1023.pdf>.

However, we reiterate that nothing in the language of 26 U.S.C.5000A(d)(2)(B)(ii) supports the additional language included in the proposed rule. Specifically, nothing in section 5000A(d)(2)(B)(ii) requires that members of a sharing community administered by a predecessor share medical expenses of a distinct sharing community administered by the successor. On the contrary, section 5000A(d)(2)(B)(ii) requires 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. Therefore, OIC has no authority to impose this additional requirement, which will again create a conflict with federal law. If this is not the intent, we nevertheless request that OIC remove the provision since it could cause significant confusion.

As a practical matter, HCSMs sometimes split off members into different groupings that do not share medical expenses between each other. This may be done, for example, for purposes of pilot testing quality improvements, technology platform testing, rolling out member experience improvements, other programmatic changes, imposing a requirement that could inhibit innovation among HCSMs. We therefore again request that this additional requirement be removed, or at a minimum, that language be included that gives HCSMs the ability to administer different groupings of members for quality improvement and beta testing purposes.

2. OIC lacks authority to promulgate the proposed “prompt reply” requirement on HCSMs in new WAC-284-43-8220, which would impose significant new administrative burdens on HCSMs, is impermissibly vague, and potentially violates the Free Exercise Clause of the U.S. Constitution.

New WAC-284-43-8220 would require HCSMs currently meeting RCW 48.43.009’s safe harbor to respond in writing to OIC inquiries within 15 business days or presumably risk losing their safe harbor status. However, OIC provides no statutory authority to justify placing this new requirement on HCSMs, nor does the rule explain the basis of OIC’s jurisdiction over HCSMs generally.

Beyond OIC’s lack of statutory authority over HCSMs, we are also concerned that such a requirement would enable what amounts to fishing exercises by the OIC. Not only would such fishing expeditions be arbitrary, but they would undermine the very intent of a safe harbor by forcing HCSMs that already comply with the safe harbor to respond to questions aimed not at protecting the interests of consumers, but at determining whether or not OIC has jurisdiction under RCW 48.43.009.

In addition, as currently drafted, the provision would place significant new burdens on HCSMs not only to respond to potentially open-ended inquiries from the commissioner, but to ensure that the commissioner *actually receives* the response within a very brief period of only 15 business days. Depending on the complexity of the inquiry, the level of information gathering or analysis required, and the available resources of the HCSM, compliance with this provision could impose

significant burdens and costs. Therefore, even if OCI were determined to have authority to require HCSMs to respond to commissioner inquiries, we would urge OCI to extend the response time to at least 60 business days to provide HCSMs with a more appropriate amount of time to respond.

This proposed requirement is also vague, because it does not detail the level of specificity HCSMs will need to provide in order to satisfy the requirement. Should OIC move forward with finalizing this requirement, at a minimum, it should set forth (and seek public comment on) the following:

- The needed level of specificity in responses;
- A reasonable timeframe under which the commissioner will provide responses to HCSMs as well as the minimum content requirements of such responses;
- A sufficient opportunity for HCSMs to respond before any final agency determination is made; and
- A pathway for the HCSM to appeal any final determination by the agency.

Lastly, we are concerned that, if finalized, this provision could violate the Free Exercise Clause of the United States Constitution. The provision is not neutral on its face and appears to single out faith-based HCSMs by imposing significant burdens in the requirement to respond to commissioner inquiries within a tight timeframe that is not generally applicable to other, non-religious entities who may run afoul of Washington state law, including RCW 48.05.030 (certificate of authority to act as an insurer/transact insurance) or RCW 48.15.020 (solicitation by unauthorized insurer).⁴ In other words, the proposed rule appears to single out HCSMs to require them to respond to commissioner inquiries within a certain time frame in a way that does not similarly apply to non-religious entities subject to RCW 48.05.030 and/or RCW 48.15.020. We note that, in the past, Washington courts have voided requirements that are not generally applicable and that place burdens on religious entities.⁵ We therefore strongly urge OIC to withdraw this provision.

⁴ See, e.g., *Church of the Lukumi Babalu Aye, Inc. et al v City of Hialeah*, 508 US 520 (1993) (Municipality adopted ordinances impacting religious practice that it claimed were necessary to protect public health, but the ordinances did not also regulate secular behavior that posed a similar public health hazard); see also, *Fulton et al v. City of Philadelphia, Pennsylvania, et al.* Supreme Court of the United States. Decided June 17, 2021 (slip opinion) (“Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.”).

⁵ *City of Woodinville v. Northshore United Church of Christ*, 166 Wash.2d 633, 211 P.3d 406 (Wash 2009).

3. The proposed rule does not qualify for an exemption from the requirements of either the Washington Administrative Procedure Act (APA) or the Regulatory Fairness Act (RFA).

As discussed above, OIC lacks authority to interpret RCW 49.43.009 in the manner proposed, but even if such authority were determined to exist, the proposed rule does not qualify for exemption from the requirements of either the Washington Administrative Procedure Act (APA) or Washington’s Regulatory Fairness Act (RFA). Therefore, at a minimum, OIC must withdraw the proposed rule and follow the requirements of both the APA and RFA.

Prior to finalizing any significant legislative rule, the Washington APA requires agencies to develop and publish a cost-benefit analysis to determine whether the probable benefits of the rule exceed its probable costs. In order to comply with the APA, the agency’s cost-benefit analysis must take into account both quantitative and qualitative information and analysis, and a draft of the determination must be made available at the time of the filing for the rule’s pre-proposal or CR-102. In addition, the final version of this analysis must be completed prior to adoption of the final rule and must be included in the rulemaking file.

In the preamble material included with the proposed rule, OIC sets forth (without elaboration) its determination that the proposed rule qualifies for an exemption from these requirements under RCW 34.05.328(5)(b)(iii) (exempting rules that “adopt or incorporate...without change...federal statutes or regulations [and] Washington state statutes...”) and RCW 34.05.328(5)(b)(v) (exempting rules where “the content is explicitly and specifically dictated by statute and is exempt from RCW 34.05.328(1)(c)”). However, under a plain reading of both the proposed rule and the APA, neither of these exceptions applies.

First, RCW 34.05.328(b)(iii) does not apply because the proposed rule would both: 1) change the definition of an HCSM as set forth in RCW 48.43.009⁶ by proposing new definitions in WAC 284-43-8210 that differ significantly from those in federal law;⁷ and 2) add entirely new requirements on HCSMs in the state of Washington that do not exist at federal law in order for HCSMs continue to qualify for RCW 48.43.009’s safe harbor (namely, by adding the prompt reply requirement in WAC 284-43-8220 and the additional requirements around continuously sharing medical expenses in WAC 284-43-8320).

As previously elaborated, far from merely adopting or incorporating federal statutes without change, the proposed rule not only changes the definition of HCSM by imposing new, unauthorized requirement, but actually creates conflicts between such statutes and regulations. Additionally, OIC can point to no statutory language “explicitly and specifically” dictating that these new rules be issued. In fact, just the opposite is true: the Washington legislature gave OIC specific a interpretive instruction that, for purposes of the safe harbor, the definition of HCSM must be the “same” as the definition of HCSM under federal law, including both statute and

⁶ RCW 48.43.009 states “For purposes of this section, ‘health care sharing ministry’ *has the same meaning* as in 26 U.S.C. Sec. 5000A” [emphasis added].

⁷ As further discussed below, examples include the proposed definition of “predecessor” in proposed WAC 284-43-8210(10) and “share medical expenses” in proposed WAC 284-43-8210(11).

regulation.⁸ Therefore, OIC must withdraw the rule and develop a cost-benefit analysis in accordance with RCW 34.05.328(1)(c) and (d).

In addition, OIC has not complied with, nor does the preamble to the proposed rule even address, RCW 34.05.328(1)(h), which requires agencies to:

Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

- (i) A state statute that specifically allows the agency to differ from federal standards; or
- (ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and (i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

We are aware of no exemptions to this statutory requirement. In this instance, we are further unaware of any state statute specifically allowing the agency to issue standards differing from federal standards. Therefore, OIC must present the “substantial evidence” required in RCW 34.05.328(1)(h)(ii). In light of the clear language in 48.43.009 directing OIC to give HCSM the same meaning as the federal definition, and the APA language cited above requiring OIC to justify any difference with federal standards absent statutory language *specifically* allowing the agency to differ from those standards, OIC should again, at minimum, withdraw the proposed rule and take steps to comply with RCW 34.05.328(1)(h) prior to proceeding.

Similarly, the proposed rule does not qualify for an exemption from the Regulatory Fairness Act (RFA). The RFA requires agencies to prepare a small business economic impact statement “if the proposed rule will impose more than minor costs in an industry.”⁹ The Small Business Economic Impact Statement (SBEIS) must include “...a brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements...[t]o determine whether the proposed rule will have a disproportionate impact on small businesses.”¹⁰ OIC claims an exemption from the FRA for the proposed rule under four statutory exemptions.¹¹

⁸ Merriam-Webster online dictionary defines “same” as “resembling in every relevant respect; conforming in every respect; being one without addition, change, or discontinuance: identical.” See <https://www.merriam-webster.com/dictionary/same>.

⁹ See RCW 19.85.030.

¹⁰ See RCW 19.85.040.

¹¹ The exemptions claimed by OIC are RCW 19.85.061 (rules adopted solely for the purpose of conformity or compliance, or both, with federal statute or regulations) and RCW 19.85.025(3) (rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, correcting typographical errors or clarifying language of a rule without changing effect, or the content of which is “explicitly and specifically” dictated by statute).

As explained in more detail above, while claiming to conform state law with federal statutes and regulations, the proposed rule actually creates conflicts between such statutes and regulations and fails to satisfy the exemptions provided in the RFA.¹²

Again, the proposed rule adds to the federal definition of an HCSM as it has been incorporated into state law, which is also inconsistent with the exemptions provided in RCW 19.85. Furthermore, the proposed new WAC-284-43-8220 (“Prompt reply to the commissioner required”) fails to satisfy RCW 34.05.310(4)(d), since it goes beyond merely correcting or clarifying existing language by placing entirely new requirements on HCSMs to respond to OIC inquiries within a certain timeframe.¹³ In addition, the proposed rule would impose new costs and burdens on HCSMs and could increase the burden of member participation in HCSMs in the future, which will have a negative impact on those Washington small employers that participate in HCSMs. Therefore, at a minimum, OIC should withdraw the proposed rule and prepare a SBEIS in accordance with the RFA.

4. Need for clarification of the effective date of the rule

In the preamble material to the proposed rule, OIC lists the intended date of adoption of the rule as November 29, 2021, but notes that this is not the effective date. We request that OIC clarify the intended effective date of the rule. In order to provide sufficient time for HCSMs subject to the rule to establish new policies and procedures necessary to come into compliance, we request that the OIC delay the effective date to occur at least 120 days following issuance of any final rule.

Furthermore, the stated date of adoption of the final rule is only five calendar days after the close of the public comment period and the hearing date, and also falls just after a state holiday weekend. This gives OIC less than two business days to adopt a final rule. It is highly unlikely that OIC will be able to appropriately take into account public comments—whether received in writing or during the public hearing—and meaningfully address them in the final rule in such a truncated period of time. Unfortunately, such an unrealistic timeframe suggests prejudgment of the provisions of the final rule.

Conclusion

Again, we appreciate the opportunity to comment on this proposed rule. Should you have any questions or wish to discuss any of these comments further, please contact Katy Talento, Executive Director, at katy@achsm.org.

¹² See RCW 19.85.061.

¹³ See RCW 19.85.025(3).