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Status	Complete
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Rule number/topic	WSR 22-09-056
Comment(s) or question(s)	Please find Alliance of Health Care Sharing Ministries comments attached.
Upload up to 5 files (20MB max. file size per file)	Alliance_for_HCSM_Comment_Letter_on_Wash_St_Proposed_Rule_II_05-23-22_final.pdf (313 KB)
Last Update	2022-05-24 14:24:56
Start Time	2022-05-24 14:21:16
Finish Time	2022-05-24 14:24:56
IP	70.110.18.25
Browser	Chrome
Device	Desktop
Referrer	https://www.insurance.wa.gov/

ALLIANCE of Health Care Sharing Ministries

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). This comment letter responds to WSR 22-09-056 ("Supplemental Notice to WSR 21-20-107") published on April 18, 2022 which re-proposes the prior proposed rule contained in Insurance Commissioner Matter R 2021-17.

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 & 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 their 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, 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.

In our prior comment letter submitted on the original proposed rule, the Alliance raised a number of significant concerns with and objections to the approach OIC outlines in the proposed rule, which differs from and would create a conflict with federal law, and is therefore impermissible under Washington's safe harbor provision in RCW 48.43.009 (which requires that the definition of an HCSM must "have the same meaning" as the definition under federal law).[1]

Because OIC has not made any substantive changes to the its approach in this revised rule, we re-iterate our concerns as stated in the previous comment letter that, if finalized as proposed, the rule would violate state law and would represent an impermissible interpretation of the statute. (For your reference, please find our previous comment letter filed in response to this proposed rule in Appendix A.)

In addition to these substantive concerns, our letter cited a number of procedural deficiencies, including the proposed rule's lack of a cost-benefit analysis as required under Washington Administrative Procedure Act (APA)[2] and the package's failure to comply with the state's Regulatory Fairness Act (RFA) by not including a Small Business Economic Impact Statement (SBEIS).[3] We appreciate that OIC has included these materials for review and comment in the Supplemental Notice to the proposed rule.

In response to the draft cost-benefit analysis and SBEIS, as well as the substance of the proposed rule, we respectfully submit the following comments:

1. **OIC's provision of the APA-mandated draft cost-benefit analysis does not address the substantive concern that the proposed rule impermissibly redefines the term "health care sharing ministry" in violation of the plain language of the safe harbor statute in RCW 48.43.009.**

The mere inclusion of a draft cost-benefit analysis along with the proposed rule does not serve to establish that OIC has statutory authority to interpret the RCW 48.43.009 in the manner proposed. On the contrary, the inclusion of the cost-benefit analysis is tacit recognition by OIC that the proposed rule does introduce changes to the interpretation of federal statutes and regulations as well as Washington state statutes, which is impermissible under state law.[4]

As discussed in our previous letter, the Washington APA statute requires OIC to develop and publish a cost-benefit analysis that takes into account both quantitative and qualitative information and analysis. In the prior proposed rule package, however, such an analysis was not included because OIC had determined that the proposed rule qualified for an exemption from this

[1] RCW 48.43.009 states: "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."
[2] See RCW 34.05.328.
[3] See RCW 19.85.
[4] In the earlier draft of the proposed rule, OIC stated that it had determined that the rule qualified for an exemption from the APA under RCW 34.05.328(5)(b)(iii) (the rule will adopt or incorporate without change federal statutes or regulations, Washington state statutes, etc) and RCW 34.05.328(5)(b)(v) (the content of the rule is "explicitly and specifically dictated by statute"). Because OIC no longer claims these exemptions, consistent with the arguments set forth in our prior comment letter, it appears that OIC no longer believes this to be the case.

APA requirement because: 1) it adopted or incorporated "without change…federal statutes or regulations [and] Washington state statutes…" and 2) "the content [of the proposed rule] is explicitly and specifically dictated by statute and is exempt" from the APA.[5]

The fact that OIC now no longer invokes this exemption and instead has provided a draft cost-benefit analysis is evidence that the proposed rule would, in fact, make changes, depart from federal law, and is not "explicitly and specifically" dictated by statute.[6] Again, under a plain reading of the statute, OIC lacks authority to redefine or interpret the term "health care sharing ministry" in a way that differs from the definition contained in federal law; the statute states that "[f]or purposes of this section [RCW 48.43.009], 'health care sharing ministry' has *the same meaning* as in U.S.C. Sec. 5000A [emphasis added]." As we argued in our prior comment letter, this interpretive command included in the statute precludes OIC from promulgating this proposed rule, which on its face creates new definitions and would result in significant conflict with federal statutes and regulations.

Not only does the proposed rule impermissibly interpret RCW 48.43.009 by adding new definitions in conflict with those in federal law and regulation, but it imposes entirely new requirements on HCSMs including those in proposed WAC 284-43-8220 ("Prompt reply to the commissioner required.") and WAC 284-43-8230 ("Continuously sharing medical expenses."). But RCW 48.43.009 states only that HCSMs meeting the federal definition are *not* health carriers and they are *not* insurers; this straightforward "carve-out" language does not place any affirmative obligation on HCSMs (beyond meeting the federal definition). Hence, there is no authority for OIC to compel HCSMs to comply with the rule.[7] Simply providing a draft cost-benefit analysis as required under the Washington APA does not ameliorate the impermissible expansion of OIC regulatory authority over HCSMs contained in the proposed rule.

Furthermore, because OIC has determined that the proposed rule is a "significant legislative rule," it must also comply with 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)[sic] Coordinate

[5] See Appendix A.
[6] See RCW 34.05.328(5)(b)(v).
[7] While the Commissioner has authority under RCW 48.02.060(3)(b) to conduct investigations of potential violations of the code (some of which sound at criminal law), the code does not, as contemplated by proposed WAC-284-43-8220, confer unlimited authority to require any person or entity to respond to Commissioner inquiries without any evidence of violation. Likewise, as we argued in our prior comment letter, there is no authority in the code for the Commissioner to require HCSMs to share medical expenses in a certain manner as contemplated by proposed WAC 284-43-8230.

> the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

However, the proposed rule has again failed to make any determination pursuant to, or even to discuss, this statutory requirement. As discussed above and in our prior comment letter, clearly the proposed rule differs from the definition of HCSM in federal statute and regulation and imposes new requirements applicable to HCSMs. Therefore, OIC must present the "substantial evidence" required in RCW 34.05.328(1)(h)(ii). Yet it appears that OIC cannot point to any state statute specifically allowing it to depart from federal standards here, and has provided no discussion or substantial evidence that those differences are necessary to achieve the objectives of the rule. OIC should therefore withdraw the proposed rule and comply with this requirement, explicitly identifying and discussing the differences between the proposed rule and federal statute and regulation, pinpointing those differences, and providing substantial evidence that they are necessary to achieve the purposes of the rule.

2. **The Cost Benefit Analysis accompanying the proposed rule fails to demonstrate that the benefits of the rule outweigh the costs and likely significantly underestimates the burdens associated with the rule's requirements.**

Under the Washington APA, agencies must develop and publish a cost-benefit analysis to determine whether the probable benefits of the rule exceed its probable costs. 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 provided cost-benefit analysis accompanying this version of the proposed rule, OIC identifies entities "which may be fiscally affected" by the rule to include HCSMs themselves, "other similar entities not meeting the state definition," and members of HCSMs. The analysis states that the primary cost of complying with the rule will be associated with the requirement to respond to Commissioner inquiries in writing within fifteen business days. The analysis includes high and low estimates of the costs of complying with this requirement, with a low estimate of $191.90 per inquiry and a high estimate of $6,175.73 per inquiry.

To gather data on the number of HCSMs actively operating in Washington and the extent of consumer confusion, the analysis examined consumer inquiries to OIC from May 2020 to February 2022, a twenty-two month time period. It is unclear why this particular time period was selected; furthermore, the analysis provides no sense of the volume of consumer inquiries related to other, non-HCSM entities regulated by OIC. For example, the analysis provides no discussion of consumer inquiries or complaints regarding health insurers for purposes of comparison. However, it appears that over a span of nearly two years, OIC received only a small number (16) of inquiries from consumers who expressed confusion regarding HCSMs. The analysis admits that it is difficult to ascertain or quantify the benefits of the proposed rule given the lack of available data. We agree. While consumer inquiries should be taken seriously, it could be that a

more cost-effective alternative to the approach proposed rule could be to simply investigate consumer complaints rather than compel HCSMs and other entities to respond to inquiries in writing. Consumer complaints could serve as the basis for further investigation, including inquiries, of potential violations, without the need for new regulations. However, there is insufficient information or discussion provided by the analysis to fully assess various alternatives.

In addition, neither the analysis nor the proposed rule provides any clarity on the scope of Commissioner inquiries. Such inquiries could be highly complex and could require significant data gathering, compilation, and professional skill and judgment in interpreting and harmonizing inquiries with available data. 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. We again 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.

In addition to the lack of reasonable limits on the Commissioner's ability to make inquiries of regulated entities under the proposed rule, HCSMs vary widely in how they operate; for example, a question regarding the amount of sharing between members may be simple for one ministry to respond to, but may require significant data gathering by others. Furthermore, responses to Commissioner inquiries will likely need to be reviewed and signed off on by each ministry's senior leadership. Depending on the complexity of the inquiry, HCSMs may need to bring in outside legal counsel or other professionals such as accountants or IT professionals to fully respond to inquiries.

Again, the proposed rule provides no examples of the scope or number of inquiries likely to be posed by the Commissioner under this rule; it is highly unlikely that OIC will limit itself to a single inquiry per year as contemplated by the cost benefit analysis. Thus it is likely that the cost benefit analysis significantly underestimates the cost of complying with the rule, which may in actuality be many times the amount included in the high estimate of $6,175.73 per inquiry.

Further, it is entirely unclear how, on its own, the rule promotes transparency and reduces consumer confusion. Because neither the rule nor the cost benefit analysis discusses what kind of inquiries the OIC is likely to make, what information will be required, or how such information will be shared with consumers, if at all, the purported benefits of the rule are tenuous at best. For example, HCSMs who are members of the Alliance of Health Care Sharing Ministries already publicly disclose a large amount of information on topics ranging from administrative costs to sharing dollars to membership numbers. It is unlikely that OIC inquiries will serve to create

greater consumer transparency for HCSMs that are already disclosing such information to their members and the public.

Finally, while the analysis cites HCSM members as being "fiscally affected" by the rule, it fails to address the higher administrative and financial costs that complying with the rules may ultimately impose on HCSM members, reducing the affordability of this option for their healthcare needs. HCSMs will likely have to increase their administrative costs in order to comply with the rule, which could result in some HCSM members paying more or being forced to drop their membership altogether.

Rather than rushing to finalize this rule, OIC should undertake to gather additional key data needed to conduct a proper cost benefit analysis, including better ascertaining the number of active HCSMs in the state, actual costs of compliance, and better quantifying the benefits to consumers. It appears that, should the rule be finalized, its costs will likely greatly outweigh its slight benefit to consumers.

3. **The Small Business Economic Impact Statement (SBEIS) included in the proposed rule contains significant gaps and should be revised to better reflect true burdens on small businesses under the rule.**

The Washington Regulatory Fairness Act (RFA) requires agencies to prepare an SBEIS "if the proposed rule will impose more than minor costs in an industry."[8] The 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."[9]

RCW 19.85.030 requires agencies to examine proposed rules to determine if the rules will impose "more than minor costs on businesses in an industry." The provided SBEIS focuses on a handful of the larger HCSMs that have hundreds of employees to arrive at its conclusion that the rule will not significantly impact small businesses. As stated above, the actual cost of complying with the rule is likely many times higher than the figures included in the analysis. It is also likely there are a number of HCSMs operating in Washington that would fall under the threshold for being considered a small business, for which there would be more than minor costs.

The proposed rule would not only impose significant new costs and burdens on HCSMs, but will also likely increase the burden and cost of member participation in HCSMs in the future, which will have a negative impact on those Washington small employers that participate in HCSMs. Yet the SBEIS contains no discussion or analysis of the impact of the rule on HCSM members that are small businesses, nor does it contain any discussion or analysis of how to reduce costs of compliance with the rule on impacted small businesses as required by RCW 19.85.030(2).

[8] See RCW 19.85.030.
[9] See RCW 19.85.040.

Thus, OIC should withdraw the proposed rule and further analyze the impact of the rule on small businesses, including those that are members of HCSMs. In addition, as called for by RCW 19.85.040, OIC should conduct a survey of affected businesses and consider appointing a committee under RCW 34.05.310 to assist in the accurate assessment of the costs of the proposed rule as well as explore means to reduce the costs imposed on small business.

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

OIC lists the intended date of adoption of the rule as May 31, 2022 but notes that this is not the effective date. However, 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 hearing date and falls immediately after a major holiday. This gives OIC scant time 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 short period of time.

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.

APPENDIX A

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 their 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, 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 that under federal law.

Under Washington's safe harbor statute, the federal definition of an HCSM in 26 U.S.C. 5000A is incorporated by reference into Washington state law, such that the definition of an HCSM in Washington "has the same meaning" as the definition under federal law.[10] Hence, the statute explicitly abrogates OIC's 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 HCSM definition in 26 U.S.C. 5000A(d)(2)(B)(ii), which is incorporated by reference in RCW 48.43.009, sets forth the following 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

[10] RCW 48.43.009.

organization to assume or take over only a part of its predecessor's medical expense sharing 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 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 impermissibly defined differently than they are at the federal level.

An example of the former is the definition of "for profit" in proposed WAC 284-43-8210(4), which is taken directly from the IRS instructions for Form 1023 (Rev. January 2020) addressing "Successors to Other Organizations."[11] However, in proposed WAC 284-43-8210(10), OIC's definition of "predecessor" departs significantly from the federal definition in the Form 1023 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."[12] This results in HCSMs being defined differently under state law than under federal law, and is therefore impermissible under the interpretive directive of RCW 48.43.009.

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, 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."

[11] See https://www.irs.gov/pub/irs-pdf/i1023.pdf.
[12] See https://www.irs.gov/pub/irs-pdf/i1023.pdf.

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.

However, we reiterate that nothing in the language of 26 U.S.C.5000A(d)(2)(B)(ii) supports this additional language. Specifically, nothing in section 5000A(d)(2)(B)(ii) requires that members of a sharing community administered by the 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 certain OIC inquiries within 15 business days or presumably risk losing their safe harbor status. However, OIC provides no statutory authority to justify 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. This provision is arbitrary and would undermine the intent of the safe harbor because it would require HCSMs to respond to questions aimed not at protecting the interests of consumers, but rather 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 requirement is also impermissibly 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, it should not only provide the level of specificity in responses needed to satisfy the requirement, but, as a matter of due process it should also lay out a reasonable timeline under which the commissioner will provide a response to the HCSM; provide the HCSM ample opportunity to respond before any final agency determination is made; as well as provide 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. This requirement to respond is not generally applicable to other, secular 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).[13] In other words, the proposed rule appears to be singling 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 OIC may wish to investigate for potential violation of RCW 48.05.030 and/or RCW 48.15.020. We note that Washington courts have voided requirements that are not generally applicable and that place burdens on religious entities.[14] We therefore strongly urge OIC to withdraw this provision.

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).

[13] 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.").
[14] *City of Woodinville v. Northshore United Church of Christ*, 166 Wash.2d 633, 211 P.3d 406 (Wash 2009).

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 the Regulatory Fairness Act (RFA). Therefore, at a minimum, OIC must withdraw the proposed rule and follow the requirements of both 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. 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, 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 48.43.009[15] by proposing new definitions in WAC 284-43-8210 that differ significantly from those in federal law;[16] 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 elaborated further above, far from merely adopting or incorporating federal statutes without change, the proposed rule 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 interpretive instruction 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 regulation.[17] Therefore, OIC must withdraw the rule and develop a cost-benefit analysis in accordance with RCW 34.05.328(1)(c) and (d).

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[15] 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].
[16] 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).
[17] 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.

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:
>
> (iii) A state statute that specifically allows the agency to differ from federal standards; or
>
> (iv) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and (i)[sic] 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 interpret the definition of an HCSM to be the same 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 further.

Similarly, the proposed rule does not qualify from 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."[18] 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."[19] OIC claims an exemption from the FRA for the proposed rule under four statutory exemptions.[20]

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.[21] Again, the proposed rule adds to the federal definition of an HCSM as it has been incorporated into state law, which is also

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[18] See RCW 19.85.030.
[19] See RCW 19.85.040.
[20] 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)
[21] See RCW 19.85.061.

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.[22] 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. However, 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.

[22] See RCW 19.85.025(3).