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BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTERS OF:

MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH
COUNTIES and MASTER BUILDERS
ASSOCIATION OF KING AND
SNOHOMISH COUNTIES EMPLOYEE
BENEFIT GROUP INSURANCE TRUST
("MBA TRUST")
No. 15-0062

CAMBIA HEALTH SOLUTIONS
(RE MBA TRUST) ("CAMBIA 1")
No. 15-0071

BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON HEALTH
INSURANCE TRUST ("BIAW TRUST")
No. 15-0075

CAMBIA HEALTH SOLUTIONS
(RE BIAW TRUST) ("CAMBIA 2")
No. 15-0078

NORTHWEST MARINE TRADE
ASSOCIATION and NORTHWEST
MARINE TRADE ASSOCIATION
HEALTH TRUST ("NMTA TRUST")
No. 15-0079

CAMBIA HEALTH SOLUTIONS
(RE NMTA TRUST) ("CAMBIA 3")
No. 15-0084

Docket Nos. 15-0062; 15-0071; 15-0075;
15-0078; 15-0079 and 15-084

MBA TRUST, BIAW TRUST, NMTA
TRUST, AND CAMBIA'S REPLY IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT

MBA TRUST, BIAW TRUST, NMTA TRUST, AND
CAMBIA'S REPLY IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT - 1

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I. INTRODUCTION

Despite having multiple opportunities to brief its position, the Office of the Insurance Commissioner (“OIC”) has yet to identify a proper basis for its January 15, 2015 disapprovals (the “Disapprovals”) of the 2014 rate filings (the “Filings”) of Master Builders Association of King and Snohomish Counties and Master Builders Association of King and Snohomish Counties Employee Benefit Group Insurance Trust (collectively “MBA Trust”), Building Industry Association of Washington Health Insurance Trust (“BIAW Trust”), and Northwest Marine Trade Association and Northwest Marine Trade Association Health Trust (collectively “NMTA Trust”). MBA Trust, BIAW Trust, and NMTA Trust are collectively referred to herein as the “AHPs.” The Disapprovals are merely the latest in a series of unsuccessful attempts to effectuate a major policy change in the OIC’s treatment of association health plans. However, no amount of policy rhetoric or vague references to the Affordable Care Act (“ACA”) can mask the fact that the rating methodology reflected in the Filings is appropriate under both federal and state law and that the OIC has no authority to prohibit association health plans from rating at the Participating Employer¹ level, a practice that the OIC has approved for more than a decade.

The OIC has already advanced—and lost in prior litigation—the same arguments it is making now in support of its Motion for Summary Judgment. Its only new “twist” is the novel (and completely mistaken) contention that its position is now somehow compelled by unspecified “new federal language” in the ACA that “dramatically changed” the legal landscape with respect to association health plans in Washington State. Tellingly, the OIC does not cite to a single provision of the ACA, or a single implementing regulation, that supports its position. That is because there is none. Instead, the OIC resorts to the same arguments about the (far from new) HIPAA nondiscrimination rules that the agency has been making for at least eight years, without success. These nondiscrimination rules were never cited in the OIC’s Disapprovals,

¹ Capitalized terms not defined herein have the meaning assigned to them in the Motion for Summary Judgment filed by MBA Trust, BIAW Trust, NMTA Trust, and Cambia.

1 however, and in any event, these rules permit rating at the Participating Employer level, as the
2 OIC has acknowledged by its approval of filings containing identical rating methodologies for
3 over a decade.

4 The OIC's policy about-face and lack of support for its new policy is the epitome of
5 arbitrary and capricious decision-making and adversely affects the AHPs and Cambia.
6 Accordingly, MBA Trust, BIAW Trust, NMTA Trust, and Cambia's Motion for Summary
7 Judgment should be granted and the OIC's Motion for Summary Judgment should be denied.

8 II. ARGUMENT

9 A. The AHPs and Cambia Have Standing to Challenge the OIC's Decisions.

10 The OIC Staff's Response to Appellants' Motion for Summary Judgment ("OIC
11 Response") does not offer additional support for the standing arguments in its Motion for
12 Summary Judgment. In fact, no serious argument exists that the AHPs and Cambia were not
13 "aggrieved" when the OIC abruptly and unlawfully altered its more than decade-long policy of
14 approving similar rating methodologies by publicly disapproving the Filings. The fact that the
15 Disapprovals correspond to the 2014 plan year is irrelevant. "Economic losses, such as harm to
16 competitive positioning in a commercial market . . . have consistently been recognized as injuries
17 sufficient to establish standing." *Snohomish Cnty. Pub. Transp. Benefit Area v. State Pub. Emp't*
18 *Relations Comm'n*, 173 Wn. App. 504, 514, 294 P.3d 803 (2013) (internal quotation marks and
19 citation omitted). The OIC's public disapprovals of the 2014 Plans have harmed the AHPs'
20 competitive positions, for example, by adversely affecting the AHPs' ability to market their 2015
21 Plans, which incorporate the same rating methodologies improperly disapproved by the OIC for
22 the 2014 Plans. See Declaration of Jerry Belur in Support of MBA Trust, BIAW Trust, NMTA
23 Trust, and Cambia's Reply in Support of Their Motion for Summary Judgment ("Third Belur
24 Decl.") ¶¶ 3-5. The AHPs have already lost customers and experienced a drop in sales activity
25 as a result of the market instability and uncertainty caused by the OIC's decisions—
26 vulnerabilities that the AHPs' competitors have been quick to exploit. *Id.* ¶¶ 6-7.

1 **B. The OIC Response Does Not Even Address RCW 48.44.020(3), the Only Cited Basis**
2 **for Its Disapprovals.**

3 Revealingly, the OIC Response does not discuss RCW 48.44.020(3), the only legal
4 authority that the agency provided in connection with its Disapprovals.² That statutory provision
5 provides that “the commissioner may disapprove any [health care service contractor (“HCSC”)]
6 contract if the benefits provided therein are unreasonable in relation to the amount charged for
7 the contract.” RCW 48.44.020(3). Instead, the OIC now argues that it was authorized to
8 disapprove the Filings because they “fail[] to conform to minimum standards required by rule or
9 statute.” OIC Response at 2. The language used by the OIC is loosely based on RCW
10 48.44.020(2)(f), an entirely different statutory provision than the one cited in the Disapprovals.
11 RCW 48.44.020(2)(f) permits the OIC to disapprove HCSC contracts that do not “conform to
12 minimum provisions or standards required by regulation made by the commissioner.” The OIC’s
13 logic appears to be that because the OIC’s regulations include a catch-all requirement that
14 “[h]ealth carriers shall comply with all Washington state and federal laws relating to the acts and
15 practices of carriers and laws relating to health plan benefits,” WAC 284-43-125, the OIC was
16 authorized to disapprove the Filings because they did not, according to the OIC’s briefing,
17 conform to unspecified “federal law.” OIC Response at 2.

18 The OIC did not reject the Filings based on RCW 48.44.020(2)(f), however, and should
19 not be permitted to do so now. And even if it had issued the Disapprovals on that basis, the OIC
20 has still not identified a single “federal law” that would support a disapproval of the Filings.
21

22
23 ² In fact, the OIC appears to have abandoned altogether its reliance on RCW
24 48.44.020(3), as it now argues that “the defect in the rates filed by Regence for these associations
25 is not that an overall increase negotiated by the parties is too high or fails to meet a minimum
26 loss ratio.” OIC Response at 6. Instead, the OIC contends: “The defect is structural. The plans
are improperly rated at the small group level in violation of the ACA’s group market reforms,
and they are rated at the subgroup level based on health related factors such as the claims
experience, average age, and sex of the individuals in the subgroup in violation of the HIPAA
nondiscrimination rules.” *Id.*

1 **C. The OIC Does Not Cite Any Provision of the ACA in Support of Its Position.**

2 Despite its contention that Washington State law “dramatically changed with the
3 enactment of the ACA” and as a result of unspecified “group market reforms that took effect in
4 2014,” OIC Response at 5-6, the agency does not cite a single provision of the ACA that
5 addresses association health plan rating or otherwise supports its position that association health
6 plans can no longer rate at the Participating Employer level. That is because there is no such
7 law. While the ACA certainly brought about a number of changes to the insurance industry, the
8 laws governing how association health plans are permitted to rate have not changed.

9 The “group market reforms” to which the OIC alludes (but does not cite) in its brief are
10 unavailing. As discussed in previous briefing, the ACA merely pulled certain definitions into the
11 Act that were already present in federal regulations, such as the definition of “employer” found
12 in Section 3(5) of the Employee Retirement Income Security Act (“ERISA”).³ See MBA Trust,
13 BIAW Trust, NMTA Trust, and Cambia’s Opposition to OIC Staff’s Motion for Summary
14 Judgment at 13-14. With the enactment of the ACA, this definition of “employer” took on
15 additional significance because the ACA contains certain rules for the “small group market”
16 (employers with 100 or fewer employees), such as community rating. 42 U.S.C. §
17 300gg(a)(1)(A); 42 U.S.C. § 300gg-91. Under laws predating the ACA, and continuing today, a
18 Section 3(5) Employer (e.g., a bona fide employer health plan, such as each of the three AHPs) is
19 permitted to group all employers together for purposes of determining whether the association
20 belongs in the small or large group market. See 45 C.F.R. §§ 144.103 (2007), (2015); 45 C.F.R.
21 § 146.145 (2007), (2015). Nothing in federal law changed (or even addresses) how a bona fide
22 employer association health plan is permitted to rate the plans offered to its Participating
23 Employers.

24
25 ³ “The term ‘employer’ means any person acting directly as an employer, or indirectly in
26 the interest of an employer, in relation to an employee benefit plan” and “includes a group or
association of employers acting for an employer in such capacity.” 29 U.S.C. § 1002(5).

1 In short, the ERISA Section 3(5) Employer definition is not new with the ACA, and has
2 always applied to the HIPAA nondiscrimination provisions, which the OIC also cite in its
3 briefing. In addition, the OIC has never articulated how an association health plan's status as a
4 "single employer" for purposes of ERISA Section 3(5) requires the association health plan to be
5 rated at the association level, rather than at the Participating Employer level, or how the ACA
6 supposedly changed the law in this area.

7 **D. The OIC's Arguments Are a Retread of the Agency's 2007 Position Defending an**
8 **Unlawful Technical Assistance Advisory.**

9 As a threshold matter, the OIC's Disapprovals never cited HIPAA nondiscrimination
10 requirements as a basis for rejecting the Filings, and even if they had, those rules have been in
11 existence for over fourteen years and cannot justify a sudden policy change in 2015.⁴ For those
12 reasons alone, the OIC's HIPAA-related arguments fail.

13 The OIC's attempted reliance on nonexistent reforms in the ACA to support its policy
14 change cannot mask the fact that the agency is simply retreading an argument that it lost eight
15 years ago when it tried to bypass the Washington Legislature's earlier enactment of RCW
16 48.44.024(2) in 1995, which explicitly exempted association health plans from community rating
17 requirements that apply to the small group market.⁵ On December 15, 2006, the OIC issued
18 Technical Assistance Advisory 06-07 (the "TAA"), which addressed how carriers were to rate
19 health plans purchased through associations. The TAA purported to establish a new requirement
20 that the claims experience of all small employers purchasing health insurance through an
21 association health plan must be pooled for rating purposes, and purported to forbid experience
22 rating of employer groups purchasing such coverage from associations effective for association
23 health plans issued or renewed on or after January 1, 2008. *See* Ex. 1 to MBA Trust, BIAW

24 ⁴ *See* 66 Fed. Reg. 1421 (Jan. 8, 2001). In fact, the substance of what is now 26 C.F.R.
25 § 54.9802-1(c)(1) was present in former 26 C.F.R. § 54.9802-1(b)(1) since at least 1997.

26 ⁵ This provision provides that "employers purchasing health plans provided through
associations . . . are not small employers and the plans are not subject to RCW 48.44.023(3)
[community rating requirements]." RCW 48.44.024(2).

1 Trust, NMTA Trust, and Cambia's Opposition to OIC Staff's Motion for Summary Judgment at
2 2. Two association health plans filed a lawsuit to request a ruling that the TAA was an invalid
3 and unenforceable usurpation of the legislature's decision to exempt association health plans
4 from community rating through RCW 48.44.024(2), and that the agency violated due process
5 requirements by attempting to effectuate a major policy change without notice and comment
6 rulemaking. *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment (Apr.
7 13, 2007), Ex. 1 to Declaration of Renee M. Howard ("Howard Decl.") at 1-2.

8 In defending the lawsuit, the OIC advanced the same argument that it relies upon today:
9 that the HIPAA nondiscrimination rules somehow prohibit association health plans from rating at
10 the Participating Employer level because the association is the "employer." *See* Memorandum in
11 Response to Plaintiffs' Motion for Summary Judgment (May 11, 2007), Ex. 2 to Howard Decl. at
12 9-11. The Spokane County Superior Court soundly rejected the OIC's argument, however, by
13 granting the association health plan plaintiffs' motion for summary judgment and declaring the
14 TAA unenforceable. The court's final observations and holding were that "TA 06-07 amounts to
15 a major policy shift from the plaintiff's perspective. Policy is made by the legislature. The
16 legislature should make the decision. More than a decade has past [sic] since the legislation was
17 enacted, if the legislature believes it is time for a change they will act." Memorandum Decision
18 (Aug. 27, 2007), Ex. 3 to Howard Decl. at 5.

19 The HIPAA nondiscrimination rules have not changed since 2007, through the ACA's
20 health reforms or otherwise. Rating at the Participating Employer level, even where that rating
21 includes factors such as the claims experience of an employer group, is not prohibited by the
22 rules, and is expressly permitted according to federal agency guidance. As noted by the
23 Appellants in their opening brief, and acknowledged by the OIC in its Response, the United
24 States Department of Labor, in its FAQ document, advises as follows:

25 **Is it permissible for a health insurance issuer to charge a**
26 **higher premium to one group health plan (or employer) that**
covers individuals, some of whom have adverse health factors,

1 **than it charges another group health plan comprised of fewer**
2 **individuals with adverse health factors?**

3 Yes. In fact, HIPAA does not restrict a health insurance issuer
4 from charging a higher rate to one group health plan (or employer)
5 over another. An issuer may take health factors of individuals into
6 account when establishing blended, aggregate rates for group
7 health plans (or employers). This may result in one health plan (or
8 employer) being charged a higher premium than another for the
9 same coverage through the same issuer.

10 **Can a health insurance issuer charge an employer different**
11 **premiums for each individual within a group of similarly**
12 **situated individuals based on each individual's health status?**

13 No. Issuers may not charge or quote an employer or group health
14 plan separate rates that vary for individuals (commonly referred to
15 as "list billing"), based on any of the health factors.

16 This does not prevent issuers from taking the health factors of each
17 individual into account when establishing a blended, aggregate rate
18 for providing coverage to the employment-based group overall.
19 The issuer may then charge the employer (or plan) a higher overall
20 rate, or a higher blended per-participant rate.

21 While HIPAA prohibits list billing based on health factors, it does
22 not restrict communications between issuers and employers (or
23 plans) regarding the factors considered in the rate calculations.⁶

24 Although it is difficult to understand its reasoning and logic, the OIC appears to argue
25 that these FAQs actually support its position, because the Department of Labor somehow
26 intended the term "employment-based group" to mean something different in the context of
association health plans, which are not even addressed in its FAQ. OIC Response at 11. The
OIC suggests that somehow the existence of the association eviscerates the status of Participating
Employers as a collection of distinct entities for rating purposes, a proposition that is not
compelled or even suggested by the federal rules or federal agency guidance. The OIC's logic
appears to be that if an association is considered the "employer" for ERISA purposes (and thus
qualifies for treatment as a large group plan), then somehow the employment relationship

⁶ See U.S. Dep't of Labor, The HIPAA Nondiscrimination Requirements (emphases added), available at http://www.dol.gov/ebsa/faqs/faq_hipaa_ND.html (last visited June 1, 2015).

1 between (for example) the 1,300 employers participating in the MBA Trust and their employees
2 is legally irrelevant, and all 40,000 Members and dependents of MBA Trust must be regarded as
3 employees of the same entity.⁷ But even if they were considered employees of a single
4 association entity, an interpretation not supported by the HIPAA rules or in agency guidance,
5 there would be nothing prohibiting Cambia from establishing rates based on aggregate claims
6 experience within distinct groups of similarly situated individuals, such as employees of the
7 same common law employer. *See* Motion for Summary Judgment by MBA Trust, BIAW Trust,
8 NMTA Trust, and Cambia at 23-25.

9 In any event, the HIPAA nondiscrimination rules have not changed, and those rules and
10 agency guidance could not be more clear that the prohibition against discrimination based on
11 health status relates to individuals and not to groups of individuals. The AHPs' rating practices
12 have never, and do not currently, discriminate against individual Members or their dependents
13 based on health status factors or otherwise, a fact that the OIC has repeatedly acknowledged by
14 approving the AHPs' filings for more than a decade. Accordingly, the OIC's arguments are as
15 wrong today as they were eight years ago.

16 **E. The Attorney General's Opinion on an Unrelated Issue Is Irrelevant.**

17 The OIC Response cites to a letter from the Office of the Attorney General to a state
18 lawmaker in support of a legislative proposal that would have given the Commissioner authority
19 to "independently determine whether a multiple employer health plan arrangement constitutes an
20 'employer' . . . under ERISA . . . [and] order a health carrier to terminate or amend the employer
21 plan accordingly." OIC Response at 4-5. The Attorney General's opinion on this topic has no
22 bearing on the rating issues in this matter. There is no dispute that the Commissioner considers
23 the three AHPs to be bona fide association health plans under ERISA Section 3(5). The
24 Attorney General's opinion about the Commissioner's authority to determine bona fide employer
25

26 ⁷ *See* Declaration of Jerry Belur in Support of Motion for Summary Judgment by MBA
Trust, BIAW Trust, NMTA Trust, and Cambia ¶ 2.

1 status (without intervention from the United States Department of Labor) does not speak to how
2 carriers may rate the plans offered through association health plans with bona fide employer
3 status, other than its reference to the state law that exempts association health plans from
4 community rating requirements. *Id.* at 4. The letter says nothing about the Commissioner's
5 authority to deny association health plan filings if the rating is performed at the Participating
6 Employer level, and thus does not support the OIC's argument that it had a legal basis for issuing
7 the Disapprovals.

8 III. CONCLUSION

9 For the reasons set forth above, as well as the reasons articulated in MBA Trust, BIAW
10 Trust, NMTA Trust, and Cambia's Motion for Summary Judgment and their Opposition to the
11 OIC Staff's Motion for Summary Judgment, MBA Trust, BIAW Trust, NMTA Trust, and
12 Cambia respectfully request that (i) their Motion for Summary Judgment be granted and that the
13 OIC Staff's Motion for Summary Judgment be denied, (ii) the Disapprovals be overturned, and
14 (iii) the OIC be directed to review the 2014 Filings in accordance with the law.

15 Dated this 3rd day of June, 2015.

16 PERKINS COIE LLP



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23 Attorney for Master Builders Association of King and

24 Snohomish Counties, et al. and Building Industry

25 Association of Washington Health Insurance Trust

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Northwest Marine Trade Association Health Trust

1 **CERTIFICATE OF SERVICE**

2 I, Kay M. Sagawinia, certify under penalty of perjury under the laws of the State of
3 Washington that, on June 3, 2015, I caused the foregoing document to be served on the persons
4 listed below in the manner shown:

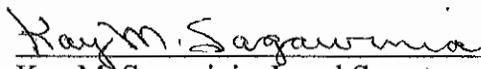
5 Judge George Finkle (Ret.)
6 Presiding Officer
7 Office of the Insurance Commissioner
8 PO Box 40255
9 Olympia, WA 98504-0255
10 Email: kellyc@oic.wa.gov

11 *Via email and U.S. Mail*

12 Mike Kreidler, Insurance Commissioner
13 Email: mikek@oic.wa.gov
14 James T. Odiorne, J.D., CPA, Chief Deputy
15 Insurance Commissioner
16 Email: jameso@oic.wa.gov
17 Molly Nollette, Deputy Commissioner, Rates and
18 Forms Division
19 Email: mollyn@oic.wa.gov
20 AnnaLisa Gellermann, Deputy Commissioner,
21 Legal Affairs Division
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23 Charles Brown, Sr., Insurance Enforcement
24 Specialist, Legal Affairs Division
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26 Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Via email and U.S. Mail

17 Dated this 3rd day of June, 2015, at Seattle, Washington.

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19 
20 Kay M. Sagawinia, Legal Secretary
21 PERKINS COIE LLP

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BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTERS OF:

MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH
COUNTIES and MASTER BUILDERS
ASSOCIATION OF KING AND
SNOHOMISH COUNTIES EMPLOYEE
BENEFIT GROUP INSURANCE TRUST
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CAMBIA HEALTH SOLUTIONS
(RE MBA TRUST) ("CAMBIA 1")
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No. 15-0079

CAMBIA HEALTH SOLUTIONS
(RE NMTA TRUST) ("CAMBIA 3")
No. 15-0084

Docket Nos. 15-0062; 15-0071; 15-0075;
15-0078; 15-0079 and 15-084

DECLARATION OF JERRY BELUR IN
SUPPORT OF MBA TRUST, BIAW
TRUST, NMTA TRUST, AND CAMBIA'S
REPLY IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

1 I, Jerry Belur, declare under penalty of perjury under the laws of the State of
2 Washington that I am over the age of eighteen, I am competent to make this declaration, and
3 make it upon personal knowledge.

4 1. I am an attorney and an active member of the Washington State Bar
5 Association (No. 9208); I was admitted to the WSBA in 1979. I am also Chief Executive
6 Officer of EPK & Associates, Inc. (EPK). I have held this position since 1999. EPK is the
7 third party administrator of the Master Builders Association of King and Snohomish Counties
8 Employee Benefits Group Insurance Trust (MBA Trust), of the Building Industry Association
9 of Washington Health Insurance Trust (BIAW Trust), and of the Northwest Marine Trade
10 Association Health Trust (NMTA Trust), sometimes together called the AHPs.

11 2. I have reviewed the May 6, 2015, OIC Staff's Motion for Summary Judgment
12 and the May 26, 2015, OIC Staff's Reply to Motion for Summary Judgment by MBA Trust,
13 BIAW Trust, NMTA Trust, and Cambia. The OIC staff has challenged the standing of the
14 three AHPs and their sponsoring associations to object to and litigate the 2014 OIC rate and
15 form disapprovals at issue in this proceeding. The OIC Staff asserts that the litigants are not
16 aggrieved parties under Washington law [OIC Motion for Summary Judgment, p. 2, lines 20-
17 26] and have not suffered any cognizable injury or harm. [OIC Motion for Summary
18 Judgment, p. 7, line 24 – p. 8, line 2] The OIC Staff has restated the latter point in its Reply.
19 [OIC Reply p. 2, lines 11-12]

20 3. Injury in fact to the three AHPs and their sponsoring associations, caused by
21 the OIC disapprovals of the 2014 rate filings, is quantifiable today. Non-AHP vendors and
22 agents are using the OIC disapprovals to take business away from the AHPs, in substance
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1 arguing that “the handwriting is on the wall,” and that AHP insurance benefits are about to
2 become prohibitively expensive or are about to disappear from the marketplace altogether.

3 4. I know that AHP competitors routinely exploit the OIC’s 2014 disapprovals to
4 their business advantage. Comments that have reached me run along these lines: “[The OIC]
5 is compelling fundamental changes in [association] rating methodology, which would effect
6 major rate hikes for many employers. These associations may be forced out of the market, in
7 only a few months from now.... [E]xpect intense market disruption later this spring.” And:
8 “[The OIC] wants the MBA to use the same rate table for all groups.... If they move to a
9 system where they rate everyone the same, it will cause your rates to increase. We have many
10 groups who are concerned about this.”
11

12 5. Months ago, the Seattle Times reported the serious, possibly fatal, impact on
13 AHPs resulting from the OIC’s disapprovals. In a lengthy article published on March 8,
14 2015, the Times has noted that “while experts are split in the fight over the regulations, many
15 agree that if the new rules survive, the associations will not.”
16

17 6. The adverse effects and economic injury caused by the 2014 disapprovals for
18 the three AHPs are clear. [See **Attachment 1.**] A comparison of the three AHPs’ sales
19 figures for the period January through April 2014 versus the same period in 2015 shows: 1) a
20 35% decrease in the number of employers receiving quotes, 2) a 14% decrease in the number
21 of employees receiving quotes, 3) a 43% decrease in the number of new companies
22 participating in a healthcare trust (“sold companies”), and 4) a 45% decrease in the number of
23 newly enrolled employees.
24

25 7. The adverse competitive impact in the AHP marketplace caused by the
26 uncertainty, confusion, and concern introduced by the OIC disapprovals is incontrovertible.

1 The AHPs and their sponsoring associations have suffered and will continue to suffer serious
2 harm, meaning, in my opinion, that the litigants here have standing under Washington law to
3 pursue administrative and judicial relief from the OIC's unlawful disapprovals.
4

5 I declare under penalty of perjury under the laws of the State of Washington that the
6 foregoing is true and correct to the best of my knowledge.

7 Signed at SEATTLE, WA this 2ND day of JUNE, 2015.

8 
9 _____
10 Jerry Belur

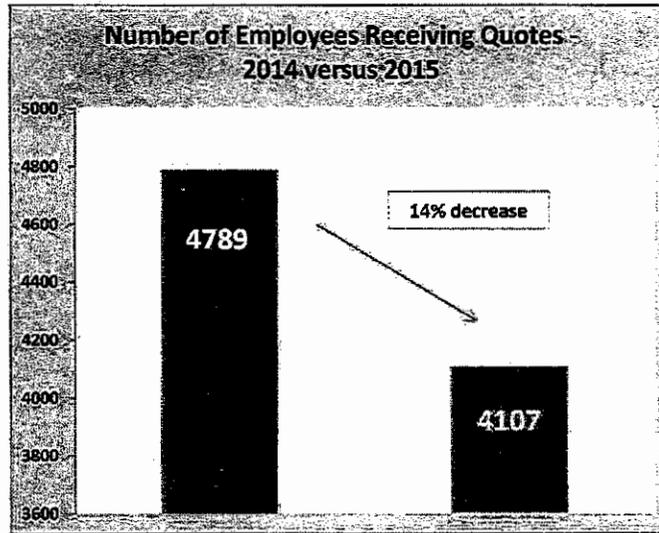
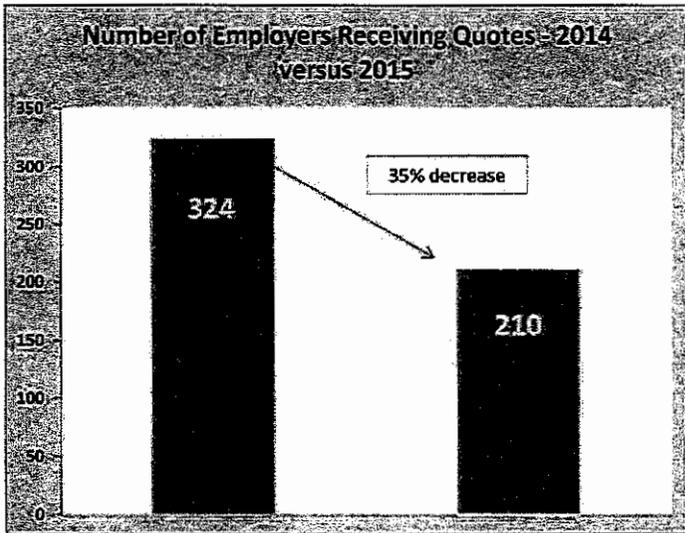
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ATTACHMENT 1

Summary of Total RFPs received

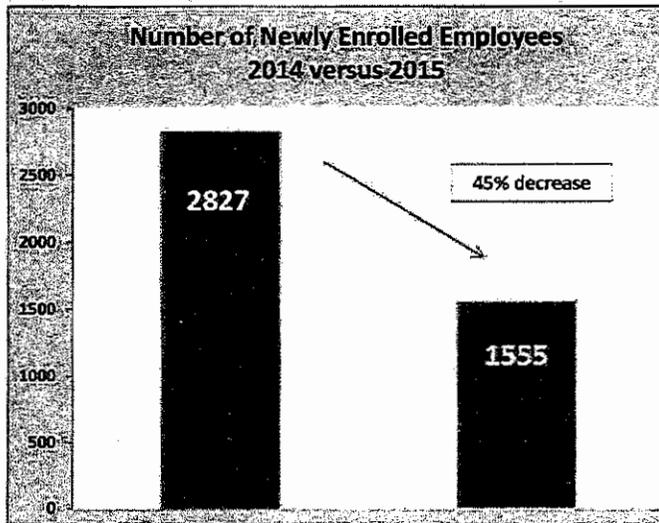
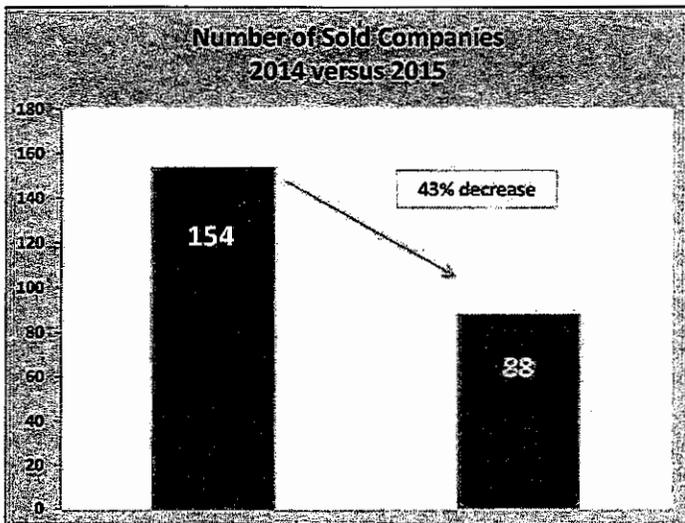
	2014	2015
# of employees	4789	4107
# of Groups	324	210

Comparison of 2014 versus 2015 January through April time frame and the adverse affects attributed to the disapproval of 2014 rates - MBA / BIAW / NMTA Health Trusts



Summary of New - Participating Members

	2014	2015
# of Employees	2827	1555
# of Companies	154	88



FILED

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BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTERS OF:

Docket Nos. 15-0062; 15-0071; 15-0075; 15-0078; 15-0079 and 15-084

MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH
COUNTIES and MASTER BUILDERS
ASSOCIATION OF KING AND
SNOHOMISH COUNTIES EMPLOYEE
BENEFIT GROUP INSURANCE TRUST
("MBA TRUST")
No. 15-0062

DECLARATION OF RENEE HOWARD IN
SUPPORT OF APPELLANTS' REPLY IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT

CAMBIA HEALTH SOLUTIONS
(RE MBA TRUST) ("CAMBIA 1")
No. 15-0071

BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON HEALTH
INSURANCE TRUST ("BIAW TRUST")
No. 15-0075

CAMBIA HEALTH SOLUTIONS
(RE BIAW TRUST) ("CAMBIA 2")
No. 15-0078

NORTHWEST MARINE TRADE
ASSOCIATION and NORTHWEST
MARINE TRADE ASSOCIATION
HEALTH TRUST ("NMTA TRUST")
No. 15-0079

CAMBIA HEALTH SOLUTIONS
(RE NMTA TRUST) ("CAMBIA 3")

DECLARATION OF RENEE HOWARD - 1

Perkins Cole LLP
1201 THIRD AVENUE, SUITE 4900
SEATTLE, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000

3 I, Renee Howard, declare under penalty of perjury under the laws of the State of
4 Washington that I am over the age of eighteen, I am competent to make this declaration, and
5 make it upon personal knowledge.

6 1. I am a partner with the law firm Perkins Coie LLP. Our firm is representing
7 the appellants MBA Trust and BIAW Trust in this matter.

8 2. Attached hereto as Exhibit 1 is a true and accurate copy of the publicly-available
9 document entitled "Plaintiffs' Memorandum in Support of Motion for Summary Judgment,"
10 filed on April 13, 2007 in the case *Associated Industries of the Inland Northwest et al. v. State*
11 *of Washington Office of the Insurance Commissioner*, No. 2007-02-00592-1 (Spokane County
12 Superior Court).

13 3. Attached hereto as Exhibit 2 is a true and accurate copy of the publicly-
14 available document entitled "Memorandum in Response to Plaintiffs' Motion for Summary
15 Judgment and in Support of Defendants' Cross-Motion for Summary Judgment," filed on May
16 11, 2007 in the case *Associated Industries of the Inland Northwest et al. v. State of*
17 *Washington Office of the Insurance Commissioner*, No. 2007-02-00592-1 (Spokane County
18 Superior Court).

19 4. Attached hereto as Exhibit 3 is a true and accurate copy of the publicly-
20 available document entitled "Memorandum Decision" dated August 27, 2007 and signed by
21 Superior Court Judge Kathleen O'Connor, which was filed in the case *Associated Industries of*
22 *the Inland Northwest et al. v. State of Washington Office of the Insurance Commissioner*, No.
23 2007-02-00592-1 (Spokane County Superior Court). The signed Memorandum Decision is
24
25
26

27 DECLARATION OF RENEE HOWARD -- 2

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SEATTLE, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000

1 identical to the document attached as Exhibit 1 to Appellants' Opposition to OIC Staff's
2 Motion for Summary Judgment, except for the signature and file stamp.
3

4 I declare under penalty of perjury under the laws of the State of Washington that the
5 foregoing is true and correct to the best of my knowledge.

6 SIGNED at Seattle, Washington this 1st day of June, 2015.

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8 
9 Renee Howard

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27 DECLARATION OF RENEE HOWARD - 3

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EXHIBIT 1

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JUDGE KATHLEEN M. O'CONNOR

FILED
APR 13 2007
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

ASSOCIATED INDUSTRIES OF THE
INLAND NORTHWEST, a Washington Non-
Profit Corporation; THE ASSOCIATION OF
WASHINGTON BUSINESSES, a
Washington Corporation,

NO. 2007-02-00592-1

Plaintiffs,

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

v.

STATE OF WASHINGTON OFFICE OF
THE INSURANCE COMMISSIONER;
MIKE KREIDLER, Washington State
Insurance Commissioner,

Defendants.

I. INTRODUCTION/RELIEF REQUESTED

This is a declaratory judgment action resulting from defendant Insurance
Commissioner Mike Kreidler's issuance of Technical Assistance Advisory T06-07 ("TAA 06-
07"), dated December 14, 2006, which is invalid and unenforceable because: (1) Defendants
violated the Washington Constitution – Wash. Const. art. II, § 1 – when they issued TAA 06-
07, and (2) TAA 06-07 is procedurally invalid because Defendants did not follow the rule-
making procedures set forth in the Washington Administrative Procedures Act ("APA"),
RCW Chapter 34.05, before issuing it. TAA 06-07 is simply an illegal "short cut" to avoid
the debate and deliberations attendant to the legislature process and, if not an act to usurp
legislative power, to avoid the due process protections provided by the APA. The law does

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 1

108312.0037/1366140.1

ORIGINAL

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1 not allow this. Because there is no genuine issue of material fact to dispute that Defendants
2 have exceeded their constitutional authority and failed to follow the APA's rule-making
3 procedures in issuing TAA 06-07, Plaintiffs request this Court to grant their request for an
4 Order on summary judgment ruling that, as a matter of law, TAA 06-07 is invalid and
5 unenforceable.

6 II. STATEMENT OF FACTS

7 A. Plaintiffs Make Health Insurance Plans Available to the Employer Members of 8 Their Associations.

9 AI and AWB each are independent business associations serving employer members,
10 including small businesses located and doing business in Washington. See Declaration of
11 Debra Brown ("Brown Decl."), at ¶ 2; Declaration of Jim Dewalt ("Dewalt Decl.") at ¶ 2. AI
12 and AWB each provide various services to their respective members, including, but not
13 limited to, making health insurance programs available to small employers. Id. Through the
14 Associated Employers Trust ("AET"), founded in 1952, AI provides an alternative for its
15 small employer members to purchase medical coverage for their employees. See Dewalt
16 Decl, at ¶ 3. Through AET, AI offers numerous benefit plans including medical, dental, and
17 vision coverage underwritten through various health carriers that are registered with and
18 regulated by OIC. Id. These AI programs cover small employers primarily located in Eastern
19 Washington and insuring working employees and their dependent families. Id.

20 Through its HealthChoice health care program, created in 1996, AWB provides fully-
21 insured health insurance plans tailored to its company members with two to fifty employees.
22 See Brown Decl., at ¶ 3. The HealthChoice program offers, among other things, medical,
23 dental, and vision coverage underwritten through various carriers that are registered with and
24 regulated by OIC. Id. Participating member employers are geographically diverse, located
25 throughout the state of Washington, and represent a broad spectrum of industry types and
26 sizes, ranging for example, from two-person retail shops to larger manufacturing firms. Id.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 2

108312.0037/1366140.1

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1 The HealthChoice program makes coverage available to numerous small employers, and their
2 working employees and dependent families.¹ Id.

3 Plaintiffs' health insurance plans are subject to OIC review and approval. See Dewalt
4 Decl. at ¶ 6; Brown Decl., at ¶ 6; Senn Decl., at ¶¶ 33-34. If OIC determines that such plans
5 violate applicable statutes, agency rules, or TAA's, it will reject them. See Senn Decl, at
6 ¶¶ 33-34. Additionally, as OIC's own internal documents confirm, Defendants plan to initiate
7 enforcement action against entities violation TAA 06-07. See Carol Sureau Memorandum,
8 dated May 4, 2006, attached as Exhibit C to Declaration of John S. Devlin ("Devlin Decl."),
9 at OIC-1576.

10 **B. In 1995, the Washington Legislature Passed Exemptions to Community Rating**
11 **Requirements for Employers Purchasing Health Insurance Through**
12 **Associations.**

13 1. **RCW 48.44.023(3) Established Various Requirements Regarding**
14 **Premium Rating for All Small Employer Health Insurance Plans.** RCW 48.21.045(3),
15 RCW 48.44.023(3), and RCW 48.46.066(3), which are all identically entitled, "Health plan
16 benefits for small employers -- Coverage -- Exemption from statutory requirements -- Premium
17 rates -- Requirements for providing coverage for small employers," mandate identical
18 requirements for setting premium rates for small employers. The only substantive difference
19 between these statutes is that they refer, respectively, to the three types of health insurance
20 carriers in Washington -- i.e., life and disability insurers (RCW 48.21.045), health care
21 services contractors ("HCSC") (RCW 48.44.023), and health maintenance organizations
22 ("HMO") (RCW 48.46.066).² Since Plaintiffs currently offer health insurance to their

23 ¹ AWB and AI also participate as small employers in HealthChoice and AET, respectively, to
24 make health insurance available to their own employees and their dependents. See Brown
25 Decl., at ¶ 4; DeWalt Decl., at ¶ 4.

26 ² There are three types of licenses issued to "health insurers" in the state of Washington: (1)
traditional indemnity companies or life and disability insurers (e.g., Aetna Health & Life
Insurance Co.), (2) health care service contractors (e.g., Regence or Premera (formerly
(continued . . .))

1 members through HCSC's, RCW 48.44.023 and its related exemption for employers
 2 purchasing health insurance plans through employer associations and "member governed
 3 groups" ("Associations"), RCW 48.44.023(3), are used in this analysis. See Declaration of
 4 Deborah Senn ("Senn Decl."), at ¶ 5.

5 In pertinent part, RCW 48.44.023 states the following concerning premium rating
 6 requirements for health insurance plans offered to small employers directly or through an
 7 association or member-governed group:

8 (3) Premium rates for health benefit plans for small employers as defined in
 9 this section shall be subject to the following provisions:

10 (a) The contractor shall develop its rates based on an adjusted
 11 community rate and may only vary the adjusted community rate for:

- 12 (i) Geographic area;
- 13 (ii) Family size;
- 14 (iii) Age; and
- 15 (iv) Wellness activities.

16 RCW 48.44.023(3)(a) (emphasis added). Because RCW 48.44.023(3)(a) does not allow the
 17 community rating of small employers to be adjusted for any factors other than geographic
 18 area, family size, age, and wellness activities, it does not allow the consideration of prior
 19 claims experience and health history. Thus, "experience rating" using health status-related
 20 factors is forbidden by RCW 48.44.023(3) for purposes of setting rates for health insurance
 21 plans offered directly from carriers to small employers.

22 Notably, RCW 48.44.023(3)(i) requires that adjusted community rates established
 23 under RCW 48.44.023(3) "pool the medical experience of all groups purchasing coverage."
 24 Thus, under this section of the Insurance Code, the health experience of individual employer

25 (. . . continued)

26 consisting of Medical Service Corp. ("MSC") and Blue Cross of Washington)), (3) health
 maintenance organizations (e.g., Group Health). See Declaration of Deborah Senn ("Senn
 Decl."), at ¶ 6, n.1. Thus, there are three sets of statutes governing health insurers. For the
 Court's easy reference, all three types of health insurers are referred to as "health carriers."

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
 MOTION FOR SUMMARY JUDGMENT - 4

108312.0037/1366140.1

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1 members may not be considered in setting rates. In the absence of a statutory exemption for
2 coverage purchased from Associations rather than directly from carriers, such claims
3 information for each small employer obtaining coverage from an Association would also have
4 to be combined with all other small groups in the Association and rated as a whole.

5 2. RCW 48.44.023(2) Is A Clear Exemption from RCW 48.44.023(3) for
6 Employers Purchasing Health Insurance Plans Through Associations. In 1995, members
7 of Washington's business community and the insurance industry approached the governor and
8 the legislature with concerns about the impact of the community rating provisions in the
9 insurance code and its effect on the operation of health plans provided by employer
10 Associations. See Senn Decl., at ¶ 5. These concerns related to the requirements of
11 community rating for small employer groups that obtained health insurance for their
12 employees through an Association. *Id.* Members of the health insurance industry and their
13 client Associations claimed that for all practical purposes, they could not attract participants
14 to an Association plan if the small employers who were part of that Association had to
15 comply with the community rating pooling standards contained in RCW 48.44.023.³ *Id.*

16 Thereafter, the Washington legislature passed exemptions from community rating
17 requirements for small employers purchasing health plans through Associations. See Senn
18 Decl., at ¶ 6. They are codified at RCW 48.44.024(2), RCW 48.46.068(2), and RCW
19 48.21.047(2) – identical provisions applied to HCSC's, HMO's and insurers, respectively.
20 The exemption – which is identical in all three statutes – reads as follows:

21 Employers purchasing health plans provided through associations . . . are not
22 small employers and the plans are not subject to RCW 48.44.023(3) [RCW
23 48.46.066(3) and RCW 48.21.045(3)].

24 RCW 48.44.024(2) (emphasis added); see also RCW 48.46.068(2), RCW 48.21.047(2). Since
25 the legislature enacted RCW 48.44.024(2), exempting their Association employer members

26 ³ AI and AWB are two of the Associations that were affected by RCW 48.44.023. See Senn
Decl., at ¶ 5.

1 from the community rating requirements of RCW 48.44.023(3), Plaintiffs have been offering
2 them health insurance plans that determine premium rates for individual employer members
3 using "experience rating" – which includes consideration of each employer's claims
4 experience and each individual employer's aggregated health history, rather than community
5 rating pooling requirements.

6 C. Since 1995, the OIC Has Allowed Associations To "Experience Rate" Each Of
7 Their Small Employer Members.

8 AI and AWB have offered affordable coverage to their small employer members since
9 the Washington State Legislature's 1995 adoption of legislation – codified at RCW
10 48.21.047(2), RCW 48.44.024(2), RCW 48.46.068(2) – exempting small employers
11 purchasing health plans through associations from community rating requirements otherwise
12 applicable to small employers purchasing insurance coverage. Between 1995, when the
13 legislature enacted RCW 48.44.024(2), and December 15, 2006, when OIC first issued
14 TAA 06-07, the OIC has permitted Association plans like those offered by AI and AWB to
15 rate each small employer member purchasing their Association health plans, based upon the
16 respective aggregated claims experience of each individual small employer – i.e., experience
17 rating.⁴ See Brown Decl., at ¶ 5; Dewalt Decl., at ¶ 5. Additionally, OIC has permitted the
18 use of health status-related information in rating each such small employer member
19 purchasing health plans through an Association. Id.

20 The OIC has never rejected Plaintiffs' respective Association health plans even though
21 the rates for these plans were established by "experience rating" each individual employer
22 member or "pod" using the aggregated health status information for each respective pod. See
23 Brown Decl., at ¶ 6; Dewalt Decl., at ¶ 6.

24
25
26 ⁴ OIC has authority over the rates and forms issued to Plaintiffs' health plans by their carriers.
See Brown Decl., at ¶ 5; DeWalt Decl., at ¶ 5, ¶ 6.

1 **D. Defendants Issued TAA 06-07, Which Eliminates the Exemption From Small**
2 **Employer Pooling Requirements and Establishes a Prohibition on Experience**
3 **Rating for Each Individual Employer Purchasing Health Plans Through**
4 **Associations and Changes the RCW 48.44.024(2) Exemption.**

5 On or about December 15, 2006, the OIC issued Technical Assistance Advisory
6 T06-07, dated December 14, 2006 (the "TAA" or "TAA 06-07") and various accompanying
7 documents. See TAA 06-07, and accompanying documents, attached as Exhibit A to
8 Declaration of John S. Devlin in Support of Motion for Summary Judgment ("Devlin
9 Decl.").⁵ Defendants did not issue TAA 06-07 pursuant to the rule-making procedures set
10 forth in the Washington Administrative Procedures Act ("APA"), RCW Chapter 34.05.

11 TAA 06-07 establishes a new requirement that the claims experience of all small
12 employers purchasing health insurance from Association plans must be pooled for rating
13 purposes, and forbids experience rating of individual small employees purchasing such
14 coverage from Association plans "effective for Association plans issued or renewed on or
15 after January 1, 2008." See Devlin Decl., Ex. A, at p. 3, § 5. In this regard, TAA 06-07
16 states:

17 . . . [C]arriers may not use health status-related information in offering
18 coverage to or setting premiums for an employer or employee member of an
19 Association. Health status-related factors may be considered only to determine
20 whether the carrier will accept the Association as a group or in setting rates for
21 the Association as a whole. Thus, while it is permissible to use health-status
22 related information to determine the rate charged to the entire Association, it is
23 not permissible to develop rates for the subset of members based in any way on
24 the health status of the members and their enrollees.

25 Id., at p. 2, § 2 (footnote omitted).

26 ⁵ On or about December 27, 2006, the OIC reissued the TAA and republished the
accompanying documents, some of which were slightly revised. See Devlin Decl., Ex. B.
TAA 06-07 was not revised.

1 of the moving party in a summary judgment motion in Young v. Key Pharmaceuticals, Inc.,

2 112 Wn.2d 216, 770 P.2d 182 (1989) as follows:

3 In a summary judgment motion, the moving party bears the initial burden of
4 showing the absence of an issue of material fact. See LaPlante v. State, 85
5 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and
6 meets this initial showing, then the inquiry shifts to the party with the burden
7 of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a
8 showing sufficient to establish the existence of an element essential to that
9 party's case, and on which the party will bear the burden of proof at trial," then
10 the trial court should grant the motion.

11 Young, 112 Wn.2d at 225 (citing Celotex Co. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548,
12 91 L. Ed. 2d 265 (1986)) (footnote omitted) (additional citation omitted).

13 Here, summary judgment is appropriate because Defendants cannot show that there is
14 a genuine issue of material fact to prevent a finding that: (1) Defendants violated the
15 Washington State Constitution in issuing TAA 06-07, and (2) TAA 06-07 is an invalid Rule
16 promulgated without following the rule-making requirements of the APA.

17 **A. TAA 06-07 Is A Legally Meritless Attempt to Change the Law.**

18 As discussed more fully below, Defendants have acted outside their authority in
19 issuing TAA 06-07, which is also a procedurally invalid Rule. However, on a fundamental
20 level, TAA 06-07 is legally meritless because it relies upon RCW 48.43.035(1), RCW
21 48.43.025(3), and the Health Insurance Portability and Accountability Act ("HIPAA") as
22 support for its prohibition against using "health status-related factors in establishing rates for
23 members who obtain coverage through an Association." See Devlin Decl., Ex. A, at p. 1, § 1.
24 None of these laws provide support for TAA 06-07, nor do they allow Defendants to supplant
25 the legislative process or the APA.

26 1. **RCW 48.43.035(1) Does Not Support TAA 06-07 Because It Addresses
Individual Access To Coverage - Not Premium Rating.** TAA 06-07 relies on the "non-
discrimination requirements" of RCW 48.43.035(1), which is a statute designed to prohibit

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1 discrimination relating to access, or "enrollment," in a health plan – not rating. In pertinent
2 part, this section states:

3 All health carriers shall accept for enrollment any state resident within the
4 group to whom the plan is offered and within the carrier's service area and
5 provide or assure the provision of all covered services regardless of age, sex,
6 family structure, ethnicity, race, health condition, geographic location,
7 employment status, socioeconomic status, other condition or situation, or the
8 provisions of 49.60.174(2). The insurance commissioner may grant a
temporary exemption from this subsection, if, upon application by a health
carrier the commissioner finds that the clinical, financial, or administrative
capacity to serve existing enrollees will be impaired if a health carrier is
required to continue enrollment of additional eligible individuals.

9 RCW 48.43.035(1) (emphasis added). This statute prohibits discrimination against
10 individuals by a carrier's refusal to accept such individuals for enrollment within a group to
11 which a carrier offers a plan. It is undisputed that there is no evidence that any individual in
12 a small group within any Association has been discriminated against by being rejected for
13 enrollment in an Association plan because of a health status-related factors.

14 RCW 48.43.035(1) addresses the precise issue of enrollment in a health plan, which
15 dictates access to a particular health plan – not the rating of the plan. Commonly, health
16 policy treats rating and access differently. See Senn Decl., at ¶ 9. It is a general concept in
17 insurance that risk can be evaluated in two ways. Id. First, whether the insured is a suitable
18 risk for coverage, and, second, once provided coverage, whether the insured is placed in a
19 higher risk category for the purpose of rate setting. Id. RCW 48.43.035(1) addresses the
20 former, not the latter. Similarly, access and affordability are two distinct concepts. Id.
21 RCW 48.43.035(1) requires a showing that an individual has been denied access to a health
22 plan because of a health condition. There is no evidence of any such discrimination in this
23 case.

24 2. RCW 48.43.025(3) Does Not Support TAA 06-07 Because It Requires a
25 Showing That Access to a Health Plan Is "Substantially Discouraged" by That Plan's
26 Rates. TAA 06-07 relies on one fragment of RCW 48.43.025(3), stating only, "The carrier

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1 may not 'avoid the requirements of this section through the creation of a new rate
2 classification or the modification of an existing rate classification.'" See Devlin Decl.,
3 Ex. A, at p. 1, § 2. A complete quote of the statute shows that Defendants omitted a crucial
4 aspect of the law:

5 No carrier may avoid the requirements of this section through the creation of a
6 new rate classification or the modification of an existing rate classification. A
7 new or changed rate classification will be deemed an attempt to avoid the
8 provisions of this section if the new or changed classification would
9 substantially discourage applications for coverage from individuals or groups
10 who are higher than average health risks. These provisions apply only to
11 individuals who are Washington residents.

12 RCW 48.43.025(3) (emphasis added). This statute forbids the use of rates to deny access to
13 coverage. However, it specifically requires a finding that a new or changed rate classification
14 has "substantially discourage[d] applications for coverage." Id.

15 The language of RCW 48.43.025(3) is clear and very specific, and no reasonable trier
16 of fact could find in it a basis for TAA 06-07. To the extent there is any ambiguity, one need
17 only refer to the testimony of the Insurance Commissioner during whose administration
18 RCW 48.43.025(3) was enacted, Deborah Senn, and her Deputy Commissioner for Health
19 Care, Robert Hoffinan, who actually wrote the language in the regulations that were later
20 codified in RCW 48.43.025(3). According to them, the language was written to provide that
21 there be a specific factual finding about whether a new or modified rate classification
22 "substantially discouraged" coverage. See Senn Decl., at ¶ 13; Declaration of Robert
23 Hoffman ("Hoffman Decl."), at ¶ 6; see also J. Conniff Letter, dated November 10, 2006,
24 copy attached to Senn Decl., as Exhibit 3. In this case, there is no evidence of any "new or
25 modified rate classification," or that any such rate classification has "substantially
26 discourage[d]" access to coverage to any applicant.

27 3. HIPAA Does Not Provide Legal Support for TAA 06-07. TAA 06-07 cites
28 HIPAA generally for the proposition that an Association is prohibited from considering health
29 conditions when setting rates. TAA 06-07 provides no specific citation to any HIPAA

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1 provision that supports its conclusion. There are none. Indeed TAA 06-07 contradicts
2 HIPAA. The U.S. Department of Labor website, entitled "FAQs About the HIPAA
3 Nondiscrimination Requirements" directly contradicts TAA 06-07 in this context. See FAQs
4 About the HIPAA Nondiscrimination Requirements, attached to Senn Decl. as Exhibit 9. In
5 this regard, the U.S. Department of Labor's website states the following questions and
6 answers:

7 **Is it permissible for a health insurance issuer to charge a higher premium**
8 **to one group health plan (or employer) that covers individuals, some of**
9 **whom have adverse health factors, than it charges another group health**
10 **plan comprised of fewer individuals with adverse health factors?**

11 Yes. In fact, HIPAA does not restrict a health insurance issuer from charging a
12 higher rate to one group health plan (or employer) over another. An issuer
13 may take health factors of individuals into account when establishing blended,
14 aggregate rates for group health plans (or employers). This may result in one
15 health plan (or employer) being charged a higher premium than another for the
16 same coverage through the same issuer.

17 **Can a health insurance issuer charge an employer different premiums for**
18 **each individual within a group of similarly situated individuals based on**
19 **each individual's health status?**

20 No. Issuers may not charge or quote an employer or group health plan separate
21 rates that vary for individuals (commonly referred to as "list billing"), based on
22 any of the health factors.

23 This does not prevent issuers from taking the health factors of each individual
24 into account when establishing a blended, aggregate rate for providing
25 coverage to the employment-based group overall. The issuer may then charge
26 the employer (or plan) a higher overall rate, or a higher blended per-participant
rate.

http://www.dol.gov/ebsa/faqs/faq_HIPAA_ND.html

27 See Senn Decl., ¶ 37. HIPAA allows experience rating for groups, and it allows consideration
28 of each respective small employer's aggregate health claims data during the rating process.
29 Id., at ¶ 38. Thus, TAA 06-07 actually contradicts HIPAA.

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1 As OIC's own internal documents reveal, Defendants are well aware that TAA 06-07
2 does not correctly state the law under HIPAA regarding the rating of small employer groups.
3 Indeed, OIC's Deputy Commissioner, Carol Sureau, has acknowledged that HIPAA forbids
4 group health plans from requiring any *individual*, as a condition of enrollment in the plan, to
5 pay a higher premium than other *individuals* similarly situated "on the basis of any health
6 status-related factor in relation to the *individual*." See Carol Sureau Memorandum, dated
7 January 17, 2002, attached to Devlin Decl. as Exhibit D, at p. 4 (OIC-919). However, she
8 admitted that:

9 This provision has been construed as requiring only that carriers blend the rates
10 for an employer small group so that an individuals' contribution to that rate is
11 not identifiable. (See DHHS Regulation Section 146.121(c)). List billing,
12 where an individual's higher premium based on his health status is quoted
13 separately to the employer, is prohibited.

14 Id. (emphasis added). Other internal documentation confirms that Defendants are well aware
15 that "HIPAA's Nondiscrimination Rules" allow the use of health questionnaires to "set rates"
16 in the small group market and to "determine whether to accept a group as a whole" in the
17 "large group market." See HIPAA's Nondiscrimination Rules, attached to Devlin Decl., as
18 Exhibit E, at OIC-897. In yet another internal document, OIC personnel state the following
19 concerning HIPAA group rules:

20 Sec. 2702 of the PHSA prohibits discrimination: carrier must accept all
21 groups; carriers can't rate individuals using health factors; carrier can rate
22 employer using experience.

23 See "Interoffice Memo" of Bethany Weidner, dated March 13, 2000, attached to Devlin Decl.
24 as Exhibit F, at OIC-887. As far back as 2000, Ms. Sureau declared:

25 The [HIPAA] premium rating restriction applies only to individuals within an
26 employer group, i.e., an insurer can raise the rates of an employer group
because of the health status of the group as a whole, but not the rates of an
individual within the group because of that individual's health status.

See Carol Sureau Memorandum, dated May 4, 2000, copy attached to Devlin Decl., as
Exhibit H, at p. 4 (Bates No. OIC-879).

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1 As interpreted by the federal government and in OIC's own internal documents, there
2 is no legal basis for the assertion in TAA 06-07 that Association plans are in violation of
3 HIPAA because they rate based on each participating small employer's aggregated health
4 status-related factors.

5 **B. TAA 06-07 Violates the Washington Constitution Because It Makes New Law.**

6 Even if there was a valid legal basis to support TAA 06-07, it would still be invalid
7 and unenforceable because it displaces legislative authority in violation of the Washington
8 constitution. The Washington constitution and the "Separation of Powers" doctrine forbid
9 state agencies from changing the law. Article II, Section 1 of the Washington Constitution
10 states, in pertinent part:

11 The legislative authority of the state of Washington shall be vested in the
12 legislature, consisting of a senate and house of representatives, which shall
13 be called the legislature of the state of Washington, but the people reserve
14 to themselves the power to propose bills, laws, and to enact or reject the
15 same at the polls, independent of the legislature, and also reserve power, at
16 their own option, to approve or reject at the polls any act, item, section, or
17 part of any bill, act, or law passed by the legislature.

18 Wash. Const., Art. II, § 1. While the Washington Constitution does not contain a formal
19 separation of powers provision, it is established that:

20 One of the fundamental principles of the American constitutional system is
21 that the governmental powers are divided among three departments--the
22 legislative, the executive, and the judicial--and that each is separate from
23 the other.

24 Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60
25 Wn. App. 584, 587, 805 P.2d 263, rev. denied, 116 Wn.2d 1030, 813 P.2d 582 (1991)). The
26 division of Washington's government into different branches has been "presumed throughout
our state's history to give rise to a vital separation of powers doctrine." Id. at 135. The
"doctrine serves mainly to ensure that the fundamental functions of each branch remain
inviolate." Id. While the branches are not "hermetically sealed off from one another" under
the separation of powers doctrine, the doctrine is violated when "the activity of one branch

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1 threatens the independence or integrity or invades the prerogatives of another." Id. at 135
2 (citing Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)); see Fischer-McReynolds v.
3 Quasim, 101 Wn. App. 801, 812, 6 P.3d 30 (2000) (citing Art. II, Section I and holding a
4 Governor's Executive Order does not have force of law when legislature has not explicitly
5 granted the Governor the authority to make the Executive Order covering that topic).
6 Therefore, the OIC, a state agency under the executive branch cannot make, amend, or repeal
7 laws, as these acts fall solely within the purview of the legislative branch.

8 Although legislative power may be delegated as long as the legislature provides
9 guidelines regarding the scope of the power and procedural safeguards exist, it is a violation
10 of Article II, Section I of the Washington Constitution and a violation of the principles of
11 separation of powers for the Legislature to abdicate or transfer its purely legislative function
12 to others. See Sackett v. Santilli, 146 Wn.2d 498, 504-05, 47 P.3d 948 (2002) (citing 16A
13 Am. Jur. 2d Constitutional Law § 295 ("[T]he legislature ... cannot delegate functions which
14 the state constitution expressly and unqualifiedly vests in the legislature itself...")).
15 Regarding such non-delegable powers, the Washington Supreme Court has determined:

16 [T]hese nondelegable powers include the power to enact, suspend, and repeal
17 laws, and the power to declare general public policy. A statute must be
18 complete in itself when it leaves the hands of the Legislature.

19 Diversified Inv. P'ship v. Dep't of Soc. & Health Servs., 113 Wn.2d 19, 24, 775 P.2d 947
20 (1989) (internal citations omitted). Therefore, the Washington Legislature cannot grant to the
21 OIC the authority to enact or repeal laws.

22 In addition, there are limits on any legislative action by an agency, including: (1) an
23 agency may not legislate under the guise of its rule-making power, and (2) the rules must be
24 within the framework of the policy laid down in the statute or ordinance. West v. City of
25 Seattle, 50 Wn.2d 94, 97, 309 P.2d 751 (1957) (holding void an agency rule delegating
26 administrative power to another body). "It is well established, however, that an administrative

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1 agency may not, by means of an interpretative or clarifying regulation, actually modify or
2 amend the statute in question." Fisher Flouring Mills Co. v. State, 35 Wn.2d 482, 492, 213
3 P.2d 938 (1950).⁷

4 1. TAA 06-07 Makes New Law Governing the Setting of Premium Rates for
5 Small Employers Purchasing Health Plans Provided Through Associations. TAA 06-07
6 is Defendants' attempt to create new law. Currently, there are no such laws or rules governing
7 the insurance premium rating requirements for small employers that are Association members,
8 and who purchase Association health plans. Association plans are not defined as large groups
9 for rating purposes. Commissioner Kreidler has admitted this in testimony before the
10 Washington legislature. See Declaration of Jeff Gingold ("Gingold Decl."), at ¶¶ 7-9. TAA
11 06-07 is his attempt to create law in this regard.

12 Requirements regarding the setting of health plan premium rates for small employers
13 are set forth in RCW 48.44.023(3), RCW 48.21.045(3), and RCW 48.46.066(3) (collectively
14 "Small Employer Rating Requirements"). However, small employers purchasing health plans
15 provided through Associations are exempt from these requirements by, respectively, RCW
16 48.44.024(2), RCW 48.21.047(2), and RCW 48.46.068(2).

17 The exemptions from Small Employer Rating Requirements simply state that small
18 employers purchasing health plans provided through Associations "are not small employers
19 and the plans are not subject to" the small employer premium rating requirements found in
20 RCW 48.44.023(3), RCW 48.21.045(3), and RCW 48.46.066(3). See RCW 48.44.024(2);

21
22 ⁷ See also Pac. Nw. Bell Tel. Co. v. Dep't of Revenue, 78 Wn.2d 961, 967, 481 P.2d 556
23 (1971) (invalidating Department of Revenue rule that the statute of limitations does not apply
24 against the Department because the Department trespassed into the arena of legislative
25 prerogative); Pringle v. State, 77 Wn.2d 569, 575, 464 P.2d 425 (1970) (finding the Tax
26 Commission's rule interpreting the statute defining "sale at retail" contradicted the statute's
meaning and reversing the tax charged); State v. Miles, 5 Wn.2d 322, 327, 105 P.2d 51 (1940)
(affirming dismissal of a charge of violating a State Game Commission regulation prohibiting
the display of game animals, when the agency's authority only extended to the taking of game
animals).

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 16

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1 RCW 48.21.047(2); RCW 48.46.068(2). They do not establish rating requirements for such
2 plans, and there are no requirements for rating them anywhere else in the Insurance Code. In
3 a footnote, TAA 06-07 refers to "large group rating factors." See Devlin Decl., Ex. A, at p. 2,
4 n.5. The Defendants also refer repeatedly to "large group rating requirements" in exhibits to
5 the so-called "Health Plans Data Report" accompanying TAA 06-07. See Devlin Decl.,
6 Ex. A. Defendants apparently assume the so-called large group rating requirements exist and
7 apply to association small employer members. There are no large group rating requirements
8 in the Insurance Code. The Legislature has never enacted any such requirements into law.

9 TAA 06-07 is Defendants' attempt to create laws or Rules to fill an alleged void in the
10 law -- which is something that can only be legally accomplished through legislation or, if
11 allowed under its legislative grant of authority and not violative of existing law, through rule
12 making under the APA. As demonstrated below, TAA 06-07 is invalid and unenforceable.

13 2. **TAA 06-07 Violates the Washington Constitution Because It Changes the**
14 **Exemption from Community Rating and Grouping Requirements the Legislature Made**
15 **Available to Association Employer Members.** TAA 06-07 changes the small employer
16 exemption from community rating and grouping requirements the legislature made available
17 to employers purchasing health coverage from Associations. Despite the 1995 exemptions
18 from community rating and grouping requirements for small groups purchasing health
19 insurance through Associations -- i.e., RCW 48.21.047(2), RCW 48.44.024(2), RCW
20 48.46.068(2) -- TAA 06-07 asserts new law by forbidding the use of health status-related
21 information in establishing premium rates for Association members and by requiring that the
22 claims experience for all employees purchasing from Association plans must be grouped
23 together. See Devlin Decl., Ex. A, at p. 3, § 4. Accordingly, TAA 06-07 is invalid because it
24 violates the Washington constitution -- Wash. Const. art. II, § 1 -- and the separation of powers
25 doctrine.

26

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 17

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1 a. The Insurance Code Permits the Use of Health Status-Related
 2 Factors in Setting Rates for Employer Health Plans Purchased Through Associations.

3 TAA 06-07 specifically prohibits consideration of the "health status" or "health information"
 4 of an Association's employer members in determining the respective rates for each such
 5 employer. See Devlin Decl., Ex. A at p. 2, § 3. At the same time, the TAA confirms that
 6 factors such as age, family size, and geographic location⁸ may be used in "setting the
 7 premium for an Association member." Id. at p. 2, § 2, n.5. Thus, the TAA allows the use of
 8 the non-health status-related factors set forth in RCW 48.44.023(3)(a) when setting rates for
 9 each individual employer that is "an Association member" but limits the use of health status-
 10 related factors to "the Association as a group." Id. at p. 2, § 2. Stated differently, the TAA
 11 allows experience rating to be applied only to an Association as a discrete group – not to the
 12 employer members or small group "pods" – while allowing non-health status-related factors,
 13 which the TAA refers to as "large group rating factors," to be applied to Association members
 14 separately. Id. at p.2, § 2 n. 5. There is no legal basis for this distinction – and it violates the
 15 language contained in RCW 48.44.023(3) and the exemption to that statute for Association
 16 members, RCW 48.44.024(2).

17 There is no such thing as "large group factors" in the Insurance Code for purposes of
 18 establishing premium rates for Association member employers. In general, the setting of
 19 premium rates for small employers is governed by RCW 48.44.023(3), RCW 48.46.066(3),
 20 and RCW 48.21.045(3).⁹ Except for the exemption from these rating statutes – in this case,
 21 the RCW 48.44.024(2) exemption from RCW 48.44.023(3) – for employers purchasing health
 22 plans through Associations, there are no laws specifically governing the rating of Association

23 ⁸ These are three of the four factors listed in RCW 48.44.023(3)(a), which specifies the factors
 24 to be used in "adjusted" community rating of small employers. TAA 06-07 does not cite the
 25 fourth factor – "Wellness activities."

26 ⁹ RCW 48.44.023(3), RCW 48.46.066(3), and RCW 48.21.045(3) are identical, except for
 references to the particular type of health carrier to which they apply. See, infra, n.2. Though
 all three statutes are interchangeable for this analysis, RCW 48.44.023(3) applies to Plaintiffs.

1 health plans. Thus, one must refer to RCW 48.44.023(3) and the corresponding exemption
2 from that statute in RCW 48.44.024(2) for small employer members of Associations to
3 determine the premium rating requirements for such employers.

4 Under RCW 48.44.024, a health carrier "may not offer any health benefit plan to any
5 small employer without complying with RCW 48.44.023(3)." RCW 48.44.024(1). However,
6 Association member employers "are not small employers" and health plans "provided through
7 associations" are "not subject to RCW 48.44.023(3)." RCW 48.44.024(2). For purposes of
8 this exemption, "small employers" are defined the same as "small groups." RCW
9 48.44.024(3); ~~RCW 48.43.005(24)~~. Thus, the health plans purchased by employer members
10 of Associations, or "small groups," through their Associations are not subject to certain
11 limitations contained in RCW 48.44.023(3). For example, these employers are not subject to
12 RCW 48.44.023(3)(a), which requires premium rates to be based on an adjusted community
13 rate that may only vary for geographic area, family size, age, and wellness activities. The
14 legislature explicitly removed these limitations and since there are no other limitations on the
15 factors that may be considered in setting premium rates for Association members, health
16 insurers may use health and claim history in setting their rates. By prohibiting the use of
17 health status-related factors in determining premium rates for Association employer members,
18 TAA 06-07 is an invalid legislative act by Defendants in violation of the Washington
19 constitution and the separation of powers doctrine.

20 b. The Insurance Code Permits the Application of Health Status-
21 Related Factors to Each Small Group Members of Associations and Does Not Require
22 the Association to Be Treated as One Big Group. In general, the Insurance Code requires
23 that adjusted community rates established under RCW 48.44.023(3) "pool the medical
24 experience of all groups purchasing coverage." RCW 48.44.023(3)(i). However, since 1995,
25 RCW 48.44.024(2) has exempted employers purchasing health plans provided through
26 Associations from the community rating requirements of RCW 48.44.023(3). Under the clear

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 19

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1 and unambiguous language of RCW 48.44.024(2), "Employers purchasing health plans
2 provided through associations . . . are not small employers and the plans are not subject to
3 RCW 48.44.023(3)." Thus, since 1995, the requirement that the health information "of all
4 groups purchasing coverage" be "pooled" has not applied to plans offered to employers
5 purchasing them through Associations.

6 However, contrary to existing law, TAA 06-07 states, "Health status-related factors
7 may be considered only to determine the . . . [rate charged] to the Association as a whole."
8 See Devlin Decl., Ex. A, at p. 2, § 2. In this manner, TAA 06-07 requires the "pooling" of the
9 "medical experience of all groups purchasing coverage" – a requirement of RCW 48.44.024
10 from which the legislature exempted Plaintiffs through RCW 48.44.024(2).¹⁰ Accordingly, by
11 requiring the application of health status-related information to entire Associations in
12 determining premium rates – rather than allowing such factors to be applied to member
13 employers – TAA 06-07 is an invalid legislative act by Defendants in violation of the
14 Washington constitution and the separation of powers doctrine.

15 c. TAA 06-07 Changes the Exemption From RCW 48.44.023(3)

16 Available to Association Members. TAA 06-07 changes RCW 48.44.024(2). In pertinent
17 part, TAA 06-07 states:

18 RCW 48.21.047, RCW 48.44.024 and RCW 48.46.068 provide an exemption
19 from the community rating requirement otherwise applicable to all small
20 groups.
21
22

23 ¹⁰ The citation in TAA 06-07 to the unpublished oral decision in Regence Blue Shield v. State
24 of Washington, Office of Insurance Commissioner, Thurston County Case No. 04-2-01761-8
25 for the proposition that the Association is the "group" in this context ignores this exemption.
26 In the Regence case, the court ruled that health carriers are required to offer the same package
of benefits to all employer groups in an Association. That case did not involve a specific
statutory exemption from the requirement, as in the instant case. Moreover, the Regence case
focused on access to benefits in the first instance, and did not address rating requirements.

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1 Id. at p. 2, § 4. In the face of this acknowledgment of the explicit language in these
2 exemptions, TAA 06-07 states simply:

3 These exemptions are available only in situations where a carrier issues a
4 master policy to the Association. If the carrier contracts directly with
5 Association members, however, then small employer members are not
purchasing “through” the Association and the exemption does not apply.

6 Id. TAA 06-07 does not cite to any legal precedent in support of this distinction because none
7 exists. TAA 06-07 violates existing law in this regard. There is no statutory or regulatory
8 authority to support Defendants’ pronouncement concerning the applicability of the
9 community rating exemption.

10 Even if this new pronouncement was legally supportable, it would not prevent the
11 exemption from applying to Plaintiffs. AWB and AI are issued master policies by their
12 respective carriers, which do not contract directly with the employer members of AI and
13 AWB. See Senn Decl., at ¶ 15; Brown Decl., at ¶ 7; Dewalt Decl., ¶ 7. Therefore, the
14 community rating exemption in RCW 48.44.024(2) applies to AWB and AI, allowing them to
15 provide health plans that consider health information in rating their employer members.
16 Nevertheless, the law does not require them to “pool the medical experience” of the entire
17 Association as one group. Accordingly, Defendants’ proclamation that Plaintiffs have
18 violated the law by experience rating their members is incorrect.

19 **C. TAA 06-07 Is An Invalid and Unenforceable Rule Issued in Violation of the**
20 **Washington Administrative Procedures Act.**

21 **1. Agency “Rules” That Do Not Meet the Rule-Making Requirements of the**
22 **Washington Administrative Procedures Act Are Invalid.** Under the Washington
23 Administrative Procedures Act (APA), a “Rule” is “any agency order, directive, or regulation
24 of general applicability . . . (a) the violation of which subjects a person to a penalty or
25 administrative sanction; ... [or] (c) which establishes, alters, or revokes any qualification or
26 requirement relating to the enjoyment of benefits or privileges conferred by law....” RCW

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1 34.05.010(16). The fact that an agency statement or directive is not designated as a "Rule" is
2 irrelevant in the determination of whether it is subject APA rule-making requirements.
3 Indeed, the decision to not designate a statement or directive as a "Rule" may be an effort to
4 avoid the due process requirement of the APA's rule-making procedures.¹¹ See Hillis v.
5 Dep't of Ecology, 131 Wn.2d 373, 399-400, 932 P.2d 139 (1997) (deciding agency change in
6 the right to apply and be considered under the statutory criteria for a groundwater withdrawal
7 permit was a Rule because it changed priorities and prerequisites for the permit right even
8 though the four statutory requirements for a permit were not changed); Failor's Pharmacy v.
9 Dep't of Soc. and Health Servs., 125 Wn.2d 488, 497, 886 P.2d 147 (1994) (holding the
10 inclusion of reimbursement schedules in a unilateral contract for Medicaid was a Rule
11 because, although the providers could simply withdraw, the schedules altered the benefit to
12 Medicaid program participants); Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119
13 Wash.2d 640, 647-48, 835 P.2d 1030 (1992) (finding a numeric water quality standard for the
14 discharge of dioxin issued by the Department of Ecology to mills is a Rule because it
15 subjected mills to punishment for non-compliance and is of general applicability because the
16 standard is uniformly applied).

17
18
19 ¹¹ According to one commentator:

20
21 Sometimes ambiguities in agency statements are created intentionally for
22 strategic purposes. An agency might want to issue a statement that has binding
23 effect without the notice and comment procedures mandated for legislative
24 rule-making and without subjecting its statement to the kind of "searching and
25 careful" judicial review courts typically apply to legislative rules. To further
26 these illegitimate strategic goals, an agency might intentionally use ambiguous
or inconsistent language in the hope that its regulatces will give its statement
binding effect while the courts will characterize the statement as an
unreviewable general statement of policy exempt from notice and comment
procedures.

I Richard J. Pierce, Jr., Administrative Law Treatise § 6.3 at 317 (4th ed. 2002).

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
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1 In Washington, a Rule must be promulgated in accordance with the APA's rule-
2 making procedures set forth in RCW 34.05.310 - .395, or it is procedurally invalid. See
3 Failor's Pharmacy, 125 Wn.2d at 497.

4 2. TAA 06-07 Is An Agency Rule As Defined By The APA. TAA 06-07 is a
5 compulsory directive of general applicability, the violation of which subjects carriers and their
6 insureds - i.e., Associations and their member employers - to the penalty of OIC disapproval
7 of current and future Association health plans. It also alters the qualifications for OIC
8 approval of Association health plans - which provide insurance benefits "conferred by law"
9 that Association-employer members provide to their employees.

10 a. TAA 06-07 Is a Mandatory Agency Directive of General
11 Applicability. TAA 06-07 is directed to "All Health Carriers," and establishes an effective
12 date by which all carriers must comply with the TAA. See Devlin Decl., Ex. A, at p. 1; p. 3,
13 § 5. In this regard, under the heading "Implementation," TAA 06-07 states:

14 Carriers must review their Association plans for compliance with applicable
15 laws as described in this TAA. This TAA will be effective for Association
16 plans issued or renewed on or after January 1, 2008.

17 Id. Aside from the "effective" date, TAA 06-07 contains other compulsory language. For
18 example, the TAA lists certain "Examples of Prohibited Practices." Id. at p. 2, ¶ 3.
19 Additionally, the TAA specifically states:

20 Consequently carriers may not use health status-related information in offering
21 coverage to or setting premiums for an employer or employee member of an
22 Association. Health status-related factors may be considered only to determine
23 whether the carrier will accept the Association as a group or in setting rates for
24 the Association as a whole. Thus, while it is permissible to use health status-
related information to determine the rate charged to the entire Association, it is
not permissible to develop rates for the subset of members based in any way on
the health status of the members and their enrollees.

25 Id. at p. 2, ¶ 2 (footnote omitted) (emphasis added).
26

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1 Finally, the cover letter to all "Stakeholders" with which Defendants published TAA
 2 06-07 indicates that it is mandatory directive of general application, stating: "Carriers' rates
 3 must be based on the health of the entire association group." See OIC Letter to Stakeholders,
 4 dated December 15, 2006, attached to Senn Decl. as Exhibit 5 (italics in original) (emphasis
 5 added). Notably, Defendants included both AWB and AI, along with dozens of other
 6 Associations and member governed groups, in the list of "Stakeholders" affected by TAA 06-
 7 07. Id. In light of the mandatory language of TAA 06-07 and the accompanying letter to
 8 Stakeholders, there can be no dispute that TAA 06-07 is a mandatory directive of general
 9 applicability.

10 b. Violation of TAA 06-07 Will Result in a "Penalty or Administrative
 11 Action" and Alters a Requirement Relating to the Enjoyment of Insurance Benefits
 12 Conferred by Law. As an initial matter, it cannot be reasonably disputed that Defendants
 13 will take some action against any entity that does not comply with TAA 06-07. They would
 14 not have issued the TAA with an "effective" date or with the mandatory language discussed
 15 above if they were not contemplating enforcement.

16 Additionally, Defendants have already designated Plaintiffs' health plans as plans that
 17 do not comply with so-called "Large Group Rating Requirements."¹² See Exhibit 5 to
 18 "Association Health Plans Data Report," dated December 2006, entitled, "Association Plans
 19 That Do Not Comply with Large Group Rating Requirements as of December 2004," attached
 20 to Senn Decl., Ex. 2. Thus, even though the effective date for TAA 06-07 is January 1, 2008,
 21 Defendants have already determined that Plaintiffs' plans violate the law as they believe it
 22 exists now. In light of these facts, it is obvious that Defendants will enforce TAA 06-07,
 23 which they believe is "existing law."¹³

24 ¹² There are no "large group rating requirements" in the Washington Insurance Code. See
 25 infra, § B1.

26 ¹³ Defendants' correspondence to Plaintiffs' counsel on December 22, 2006, proves that they
 are planning to enforce TAA 06-07, stating: "...we are focusing on prospective practices and
 (continued...)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
 MOTION FOR SUMMARY JUDGMENT - 24

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1 Aside from an enforcement action, the OIC can force compliance by taking the
2 administrative action of rejecting the insurance products offered through Plaintiffs' health
3 plans. The OIC has the authority to review and approve insurance products used in the
4 market place. See Senn Decl., at ¶ 33. The OIC uses a checklist when approving insurance
5 contracts offered through Association plans. Id.; see Senn Decl., Ex. 4. A current OIC
6 checklist designates "topic areas" along with requirements under the heading "Reference
7 Specific Issues." Id. For example, on the first page of the OIC's checklist, under "Chemical
8 Dependency" and subtopic "detoxification services," RCW 48.43.093 is listed as a "specific
9 reference" for the required compliance. Id. Other "topic areas" cite regulations (Washington
10 Administrative Code), sections of federal law, Washington case law, and Technical
11 Assistance Advisories ("TAA"). Id. On the second page of the form, the topic "Conducting
12 Business in Licensed Name" and the related "specific reference" column, TAA 2000-06 is
13 listed. Id. Thus, the OIC currently includes TAA's on its Rates and Forms division contract
14 approval checklist. In light of OIC's current practice of including TAA's on its approval
15 checklists, it cannot be disputed that an insurance plan that does not comply with TAA 06-07
16 after January 1, 2008 will not receive OIC approval.

17 c. TAA 06-07 Is Procedurally Invalid Because Defendants Did Not
18 Follow the APA's Rule-Making Procedures. It is undisputed that Defendants did not issue
19 TAA 06-07 pursuant to the APA's rule-making procedures. The APA requires, among other
20 things, a statement of inquiry filed with the code reviser, notice of a proposed rule,¹⁴ and a
21 rule-making hearing; OIC did not comply with these requirements for TAA 06-07. See RCW

22
23 (. . . continued)
24 have provided carriers a full year to come into *compliance* with existing law." See
25 Correspondence of Michael Watson, Chief Deputy Insurance Commissioner, dated
26 December 22, 2006, copy attached to Senn Decl., as Exhibit 7 (emphasis added).
¹⁴ OIC's distribution of a version of the Technical Assistance Advisory by mail prior to
issuing the significantly revised TAA 06-07 on December 15, 2006 does not meet the
requirements of a statement of inquiry or notice of a proposed rule. See RCW 34.05.310(1).

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
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1 34.05.310, .320, .325. TAA 06-07 is a blatant attempt to circumvent the fact-finding
2 mechanisms inherent in the APA requirements. OIC's own internal documents reveal that as
3 late as September 12, 2006, Defendants did not have enough information about the relevant
4 insurance "marketplace" enact the changes mandated by TAA 06-07:

5 Much homework remains to be done that can only be done by talking with the
6 insurers and associations. At this point, we know too little about how this
7 marketplace actually functions - we're only guessing.

8 See "Association Health Plans (Ideas and comments from Melodie, 9-12-06) (Bates Nos.
9 OIC-1569 to OIC-1570), attached to Devlin Decl., as Exhibit H, at OIC-1569.

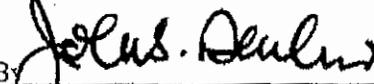
10 Because TAA 06-07 is the equivalent of a Rule under the APA, and Defendants failed to
11 follow the APA's rule-making procedures, it must be declared procedurally invalid and
12 unenforceable. Faylor's Pharmacy, 125 Wn.2d at 497.

13 **VI. CONCLUSION**

14 Plaintiffs respectfully request that this Court grant them summary judgment declaring
15 TAA 06-07 invalid and unenforceable on the grounds that: (1) it violates the Washington
16 Constitution - Wash. Const. art. II, § 1 - because it changes existing law, which only the
17 legislature may do, and (2) it is procedurally invalid because Defendants did not follow the
18 rule-making procedures set forth in the Washington Administrative Procedures Act ("APA"),
19 RCW Chapter 34.05.

20 DATED this 12th day of April, 2007.

21 LANE POWELL PC

22 By 

23 Jeffrey L. Gingold, WSBA No. 18915
24 John S. Devlin III, WSBA No. 23988
25 Attorneys for Plaintiffs
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 26

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2007, I caused to be served a copy of the foregoing Plaintiffs' Memorandum In Support of Motion for Summary Judgment on the following person(s) in the manner indicated below at the following address(es):

Christina G. Beusch,
Assistant Attorney General
Office of Attorney General
Highways-Licenses Bldg.
1125 Washington Street SE
MS: 40100
Olympia, WA 98504-0100

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery (FEDEX)


Leah S. Burrus

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT - 27

EXHIBIT 2

FILED

MAY 11 2007

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STATE OF WASHINGTON
SPOKANE COUNTY SUPERIOR COURT

ASSOCIATED INDUSTRIES OF THE
INLAND NORTHWEST, a
Washington Non-Profit Corporation;
THE ASSOCIATION OF
WASHINGTON BUSINESS, a
Washington Corporation,

Plaintiffs,

v.

STATE OF WASHINGTON, OFFICE
OF THE INSURANCE
COMMISSIONER; MIKE
KREIDLER, Washington State
Insurance Commissioner,

Defendants.

NO. 07-2-00592-1

MEMORANDUM IN RESPONSE TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN
SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT

The Office of the Insurance Commissioner and Mike Kreidler, Insurance
Commissioner (hereinafter collectively the "OIC" or the "Commissioner" or the
"Defendants"), by and through their counsel ROBERT M. MCKENNA, Attorney General,
and CHRISTINA GERSTUNG BEUSCH and MARTA DELEON, Assistant Attorneys
General, file this Memorandum in Response to the Motion for Summary Judgment of the
Associated Industries of the Inland Northwest ("AI") and the Association of Washington
Business ("AWB") (collectively, the "Associations" or the "Plaintiffs") and in Support of
Defendants' Cross-Motion for Summary Judgment.

MEMORANDUM IN RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT

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1
2 I. SUMMARY OF THE CASE

3 This case arises out of the OIC's issuance of a technical assistance advisory, TAA 06-
4 07, advising health carriers of the OIC's interpretation of certain state and federal laws
5 regarding rating of health benefit plans issued to associations, such as the Plaintiffs in this
6 case. The TAA advises that rates for the members of the association should be based on the
7 pooled experience of the entire association. In other words, carriers should not apply
8 discriminatory rate schemes where different rates are charged to employer-members, all of
9 whom belong to the same association group, based on the health condition of the employer-
10 members' employees. The fundamental principle at stake is that in group health insurance the
11 cost associated with the risk of one member of the group becoming ill is to be spread among
12 all the members of the group, and is not to be placed on the one or the few.

13 The initial challenge in addressing the Associations' arguments regarding the OIC's
14 issuance of the TAA is to understand the relief that is being requested and the authority for
15 requesting that relief. Plaintiffs assert two causes of action in their First Amended Complaint
16 ("Complaint") and cite the Uniform Declaratory Judgments Act ("UDJA") as the basis for this
17 Court's jurisdiction. The first prayer for relief is for a declaration that the TAA is invalid and
18 unenforceable because it violates Article II, § 1 of the Washington State Constitution
19 (Legislative Powers). The second request is for a declaration that the TAA is procedurally
20 invalid because the rule-making procedures of the Administrative Procedure Act ("APA")
21 were not followed. Because the relief, as requested in the Complaint, is reviewable under the
22 APA, the Complaint is not authorized under the UDJA. RCW 7.24.146; RCW 34.05.510.

23 The case might end there; however, the Plaintiffs' arguments in support of their
24 Motion for Summary Judgment go beyond the relief requested in the Complaint. What the
25 Associations appear to be truly seeking is a declaration from this Court that the OIC's
26 interpretation of the law, as expressed in the TAA, is incorrect and that, in fact, health carriers
may discriminate based on health status in rating association health plans. While the

1 Associations did not request such relief in their Complaint, if the Court were to consider such
2 a request as either implied by their Complaint or as an amendment to it, jurisdiction could be
3 conveyed under the UDJA.

4 Having worked through the jurisdictional issues, the next step is to address the legal
5 arguments. Because the TAA is a policy or interpretive statement authorized by the APA and
6 not a rule, the OIC did not violate the rule-making procedures of the APA in issuing the TAA.
7 Furthermore, the issuance of an interpretive statement is not a usurpation of the legislative
8 power and not an unconstitutional act under Article II, § 1 of the state Constitution.
9 Consequently, the Associations are not entitled to the relief they expressly have requested, and
10 summary judgment should be entered as a matter of law in favor of the OIC on these two
11 issues. Additionally, the advisory assistance given in the TAA is substantively correct and
12 consistent with state and federal law; therefore the OIC is entitled to summary judgment in
13 favor of its legal interpretation. Wherefore, the Associations' Motion for Summary Judgment
14 should be denied, and the OIC's Cross-Motion for Summary Judgment should be granted.

15 **II. FACTUAL BACKGROUND**

16 The undisputed material facts relevant to summary judgment are relatively few.¹ The
17 OIC issued TAA 06-07 dated December 14, 2006. Cutler 2nd Decl., attached TAA. The TAA
18 provides health carriers guidance on complying with state and federal law in providing
19 coverage and establishing premiums for health benefit plans issued to associations, such as the
20 AI and AWB. *Id.* The OIC explains in the TAA that the association is the "group" for
21
22

23 ¹ The Plaintiffs assert, as fact in their Memorandum in Support of Motion for Summary, legal
24 conclusions, hearsay, contested testimony from their counsel, and material that they have characterized in
25 discovery responses to the OIC as irrelevant and not necessary of being answered. The OIC has filed two
26 Motions to Strike to prohibit the Plaintiffs from offering this inadmissible evidence in these summary judgment
proceedings.

The OIC does stipulate, however, that the Associations currently hold plans that apply discriminatory
rating based on health status; they want to be able to continue to purchase such plans; and that carriers may follow
the OIC's guidance in TAA 06-07 and such plans will not be available.

1 purposes of coverage and premiums, and that carriers may not discriminate against employer-
2 members of the association because of the health status of their employers. *Id.*

3 Rate filings submitted by health carriers to the OIC fall into three categories: (1)
4 individual, (2) small employer, meaning 2 to 50 employees; and (3) large group, which
5 includes employers with more than 50 employees and associations. Lee Decl. ¶ 3. Large
6 group rate filings are "file and use," meaning that the OIC does not ever approve the filing;
7 although, if reviewed, the OIC may issue a disapproval notice after the fact. Lee Decl. ¶ 7.

8 The OIC issued the TAA after conducting a survey of carriers' rating practices and
9 meeting and communicating with carriers and associations. Berendt Decl. ¶¶ 4, 8; Cutler 2nd
10 Decl. ¶ 2. The OIC decided that it was best to address the issue with industry at one time
11 rather than through individual enforcement actions. Berendt Decl. ¶ 7. The 2005 survey was
12 the initial step in understanding the extent of the practice. Berendt Decl. ¶ 8. The OIC had
13 become aware of the practice through informal communications and rate filing that were
14 primarily filed in the 2003 to 2005 timeframe, although there were some earlier indications of
15 the issue. Berendt Decl. ¶ 5.

16 Premera Blue Cross ("Premera") responded to the survey and reported that it did
17 discriminate among employer-members based on the health status of their employees in the
18 association health plans issued to AI and AWB. Berendt Decl. ¶¶ 8, 9. Premiums for an
19 employer-member could differ more than 3 times from member to member based on health
20 status factors. Berendt Decl. ¶¶ 11, 12. However, the rate and form filings submitted by
21 Premera and other carriers contracting with AI and AWB do not reflect that health status is
22 used as a basis for rating at the employer-member level. Lee Decl. ¶ 8; Dorris Decl. ¶ 4. The
23 current group contract forms filed with the OIC clearly identify Associated Employees Trust,
24 the plan sponsored by AI, and AWB each as the "group" and the contract holder on their
25 respective policies with Premera. Dorris Decl. ¶ 5.

26

1 the substance of the TAA. The Court does have jurisdiction under RCW 34.05.570(2)(b) and
2 (c) to consider whether an agency has issued a rule and whether that rule was adopted without
3 compliance with statutory rule-making procedures. The Associations did not cite RCW
4 34.05.570 as a basis for jurisdiction; although it was referred to as a basis for venue. Because
5 jurisdiction is available under the APA, the UDJA is not applicable to this cause of action.

6 The Complaint also alleges that the TAA is "invalid and unenforceable" because the
7 issuance of the TAA was a legislative act that violated the Washington State Constitution
8 Article II, § 1. However, the APA authorizes and, in fact, encourages agencies to issue
9 guidelines and policy statements "to advise the public of its current opinions, approaches, and
10 likely courses of action." RCW 34.05.230(1). Interpretive statements, such as the TAA, are
11 advisory only, RCW 34.05.230(1), and the OIC has clearly stated in the TAA and
12 accompanying materials that the purpose of the TAA is simply to offer guidance on the
13 interpretation of current law. See attachments to Cutler 2nd Decl. However, setting aside for a
14 moment the merits of the Associations' constitutional claim, if the Associations are alleging
15 that the TAA was issued in violation of a constitutional provision, review is available under
16 the APA, RCW 34.05.570(2)(c), and the UDJA, therefore, is not applicable to this cause of
17 action.

18 Although not prayed for in their Complaint, the relief the Associations are seeking in
19 their Motion for Summary Judgment is a declaration that the OIC's interpretation of the law,
20 as expressed in the TAA, is incorrect. The Supreme Court in *Washington Education*
21 *Association v. Public Disclosure Commission*, 150 Wn.2d 612, 618, 80 P.3d 608 (2003)
22 ("*WEA* case") held that "an agency's written expression of its interpretation of the law does
23 not implement or enforce the law" and, therefore is not "other agency action"³ reviewable
24 under the APA. See RCW 34.05.570(4). In order to assert jurisdiction under the APA, the

25 ³ "Agency action" means "licensing, the implementation or enforcement of a statute, the adoption or
26 application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits,"
RCW 34.05.010(3).

1 Associations have to materially distinguish their case from the *WEA* case. As an alternative,
2 the Associations could argue that if APA review of the substance of the TAA is not available,
3 the UDJA should apply. In that case, the Associations have to establish a justiciable
4 controversy under the UDJA. See *Washington Education Association v. Public Disclosure*
5 *Commission*, 150 Wn.2d 612, 622-23, 80 P.3d 608 (2003).

6 **B. The OIC's Legal Interpretation That Health Carriers May Not Set Discriminatory**
7 **Rates For Employer-Members Of The Same Association Group Based On Health**
8 **Status Is Correct.**

- 9 1. The exemption in RCW 48.44.024, which permits a carrier to cover small
10 employers under an association plan rather than under its small employer
11 group coverage, does not grant a carrier permission to charge
12 discriminatory rates to association members based on health status.

13 The Associations' case is premised entirely on an incorrect interpretation of RCW
14 48.44.024. This statute, read in relation to RCW 48.44.023, permits health carriers to cover
15 small employers (2 to 50 employees) through an association plan rather than being obligated to
16 offering them only the carrier's small employer coverage that is "community rated" in
17 accordance with RCW 48.44.023(3). RCW 48.44.024 provides:

18 (1) A health care service contractor may not offer any health benefit plan
19 to any small employer without complying with RCW 48.44.023(3).

20 (2) Employers purchasing health plans provided through associations or
21 through member-governed groups formed specifically for the purpose of
22 purchasing health care are not small employers and the plans are not
23 subject to RCW 48.44.023(3).

24 By its plain language, RCW 48.44.024 makes no statement as to how the association plan itself
25 should be rated. It simply sets up an exemption to allow certain employers to participate in the
26 association plan who would otherwise have to be excluded. See Decl. ¶ 5.

The key to the exemption in RCW 48.44.024(2) is to understand the requirements of
small employer group rating in RCW 48.44.023(3). The premiums set by a carrier for the
small employer groups it covers are based on pooling the medical experience of all the small
employer groups purchasing coverage from the carrier. RCW 48.44.023(3)(i). Without the

1 exemption for small employers purchasing through associations, those small employers would
2 have to purchase the carriers' small employer plan and be included in the experience pool with
3 all of the other small employers covered by the carrier. Lee Decl. ¶ 5. The obvious benefit of
4 this exemption to associations, such as the Plaintiffs, is that their employer-members with 2 to
5 50 employees can participate in the association group health plan that the associations contract
6 for with the health carrier.

7 The Plaintiffs, however, read too much into the RCW 48.44.024 exemption. They
8 incorrectly conclude that, because carriers are not required to pool the experience of the
9 Associations' small employer-members with the carriers' non-association small employers,
10 carriers may discriminate in setting rates for association members. This is a non sequitor and
11 can no way be discerned from the statutory language. Because the Associations' legal
12 challenge to the substance of the TAA relies on this fundamental misinterpretation of the plain
13 language of the law, their Motion for Summary Judgment should be denied and the OIC's
14 Cross-Motion for Summary Judgment should be granted.

15 2. A health carrier's obligation not to discriminate among members of a
16 group based on health status is understood by first defining the "group,"
which in this case is the association.

17 The Plaintiffs choose to ignore the fundamental question of what constitutes the
18 "group." However, in the context of association health plans, the "group" is the association
19 and the employer-members and their employees populate the group. One can start at the most
20 basic level and examine the contracts on file with the OIC. For example, AET and AWB are
21 the contract holders of group contracts with Premera, and they are defined as the "Group"
22 throughout. Dorris Decl. ¶ 5. In addition, the definition of "group" or "group contract" in this
23 state's insurance laws specifically identify an association as a group. WAC 284-43-910(21).
24 Moreover, the OIC has addressed this issue previously in *Regence BlueShield v. State of*
25 *Washington, Office of Insurance Commissioner*, Case No. 04-2-01761-8, where the carrier
26 argued that every employer-member was its own group so the carrier could discriminate

1 | between employers by offering the smallest employers in the association only the plans with
2 | the least generous benefits. Berendt Decl. ¶ 6. The court in that case held that the association
3 | is the group, and all employer-members of the association and their employees are members of
4 | the group and therefore must have the opportunity to purchase the same benefits. Beusch
5 | Decl., attached court opinion.

6 | Based on state law and the undisputed fact that the Associations are the group contract
7 | holders for the health benefits provided to their employer-members and their employees, the
8 | OIC was correct in interpreting a carrier's obligation not to discriminate among members of
9 | the same group on the premise that the association is the "group." The OIC is entitled to
10 | summary judgment on its legal interpretation.

11 | 3. TAA 06-07 correctly interprets state and federal law to prohibit health
12 | carriers in Washington from discriminating against an employer-member
 of an association based on the health status of its employees.

13 | The purpose of the TAA, as expressly stated in Section I of the document, "is to explain
14 | that carriers may not discriminate against employer-members of Associations and their
15 | employees with respect to *coverage and premiums* in policies purchased through
16 | Associations." Cutler 2nd Decl., attached TAA. The prohibition against discrimination is
17 | established in RCW 48.43.035, RCW 48.43.025, and the federal Health Insurance Portability
18 | and Accountability Act of 1996 ("HIPAA"), Public Law 104-191, 110 Stat. 193; 42 U.S.C. §
19 | 300gg *et seq.* Carriers are required to comply with HIPAA and regulations adopted thereunder.
20 | Lee Decl. ¶ 4. Each of these provisions plays a role in the guidance given to carriers on
21 | avoiding discriminatory practices.

22 | RCW 48.43.035(1) requires a health carrier to enroll all members of a group and
23 | provide all services and benefits to members on a non-discriminatory basis, including without
24 | regard to health condition. While this section does not expressly mention rating, it establishes
25 | a baseline that carriers should not avoid the obligation to cover all members of the same group
26 | through the use of discriminatory practices. RCW 48.43.025(3) takes the legal analysis a step

1 further, because carriers are prohibited from creating new or changed rate classifications to
2 substantially discourage applications for coverage from individuals with higher than average
3 health risks. Premera may charge some AI and AWB employer-members more than three
4 times the premium amount of another member because of the health condition of an employee.
5 Berendt Decl. ¶ 12. Such discriminatory rates certainly could substantially discourage
6 applications.

7 There is also an express prohibition against the use of health status-related factors to
8 discriminate against members of the same group in HIPAA and its implementing regulations.
9 The federal law prohibits discrimination against participants in a group health plan in
10 enrollment, premiums, or contributions based on health status-related factors. CFR
11 §146.121(b) and (c). Health status-related factors include medical condition, claims
12 experience, medical history, genetic information, and disability. CFR §146.121(a). The
13 prohibition against discrimination in rating provides:

14 A group health plan, and a health insurance issuer offering health insurance
15 coverage in connection with a group health plan, may not require an individual,
16 . . . to pay a premium or contribution that is greater than the premium or
17 contribution for a similarly situated individual (described in paragraph (d) of
18 this section) enrolled in the plan or group health insurance coverage based on
19 any health factor that relates to the individual or a dependent of the individual.
20 [CFR §146.121(c)]

21 In relation to this case, the "group health plan" is the plan issued by Premera to each of
22 the Associations under the group contracts in which the Associations are the group contract
23 holders. Premera is the "health insurance issuer." See CFR §144.103. Under the current rating
24 practices, Premera is using individual employees' health status-related factors for a particular
25 employer-member to set greater rates for that member and its employees than for another
26 member of the association and its employees for the same benefits. All of the members and
their employees purchasing the same benefits through the association are similarly situated, as
the only basis for differing treatment is health status – which is not a legitimate distinction.
See CFR §146.121(d)(1).

1 The Associations attempt to avoid the prohibition against a carrier discriminating in an
2 association health plan by arguing generally that health insurers may provide different rates to
3 different employers depending upon the employers' claims experience. However, this
4 argument presumes that the employers are different groups covered under different group
5 health plans, which is, in fact, not the case here. Indeed, the definition of "employer" in the
6 federal regulations includes a "group or association of employers," CFR §144.103, further
7 confirming that the association is one group for purposes of enrollment, premium, and
8 contributions. Because the OIC has correctly interpreted state and federal law in TAA-06-07,
9 Plaintiffs' Motion for Summary Judgment should be denied, and the OIC's Cross-Motion for
10 Summary Judgment should be granted.

11 **C. TAA 06-07 Is Not A Rule; Therefore, APA Statutory Rule-making Procedures Are**
12 **Not Required.**

13 The legislature in the APA has enacted provisions encouraging agencies to issue
14 interpretive or policy statements "to advise the public of its current opinions, approaches, and
15 likely courses of action." RCW 34.05.230(1). Indeed, interpreting statutes and making the
16 public aware of those interpretations is consistent with an agency's authority to administer and
17 enforce the law. *Association of Washington Business v. Department of Revenue*, 155 Wn.2d
18 430, 440, 120 P.3d 46 (2005). Although it is suggested that longstanding interpretive or policy
19 statements be converted into rules, it is not required. *Id.* TAA 06-07, which was only issued in
20 December 2006, is the type of advisory statement that the legislature contemplated.

21 The Associations assert that the TAA should have been adopted as a rule because it is
22 an "agency order, directive, or regulation of general applicability . . . (a) the violation of which
23 subjects a person to a penalty or administrative sanction; . . . [or] (c) which establishes, alters,
24 or revokes any qualification or requirement relating to the enjoyment of benefits or privileges
25 conferred by law" RCW 34.05.010(16). The OIC acknowledges that no health carrier
26 can be cited or sanctioned for "violating" the TAA. Any enforcement action against a health

1 carrier for discriminatory rating practices must be based on the state and federal law that forms
 2 the basis of the OIC's interpretation in the TAA. Indeed, the Supreme Court has stated that
 3 even "interpretive rules" adopted by an agency do not fit within the APA definition of "rule,"
 4 because they are "nonbinding and cannot establish, amend, or revoke anything." *Association*
 5 *of Washington Business v. Department of Revenue*, 155 Wn.2d at 449.

6 The cases cited by the Plaintiffs for the proposition that the TAA is a rule present
 7 materially different facts than exist here. In *Hillis v. Department of Ecology*, 131 Wn.2d 373,
 8 400, 932 P.2d 139 (1997) and *Faylor's Pharmacy v. Department of Social and Health Services*,
 9 125 Wn.2d 488, 496, 886 P.2d 147 (1994), the court found that the agency policies actually
 10 imposed "additions" or "new requirements" to existing law. In *Simpson Tacoma Kraft Co. v.*
 11 *Department of Ecology*, 119 Wn.2d 640, 647, 835 P.2d 1030 (1992) the agency adopted in
 12 policy a specific numeric water quality standard that was incorporated in every permit, with the
 13 violation of the permit resulting in sanctions. The OIC has not imposed additional
 14 requirements or adopted standards that currently do not exist in the law. Rather, the OIC has
 15 explained its opinion of the laws relating to rating of association health plans and its likely
 16 course of action, as allowed and even encouraged by the legislature in RCW 34.05.230(1).

17 TAA 06-06 is not a "rule" as defined in the APA; therefore, the OIC was not required
 18 to engage in APA statutory rulemaking procedures. Plaintiffs' Motion for Summary Judgment
 19 should be denied, and the OIC's Cross-Motion for Summary Judgment should be granted.

20 **D. The OIC's Issuance Of TAA 06-07 Was Not Unconstitutional Under Article II, §1**
 21 **Of The Washington State Constitution.**

22 Plaintiffs' argument that the OIC has violated the Legislative Powers provision of the
 23 state Constitution appears to be based on the premise that TAA 06-07 is a "rule" under the
 24 APA that the OIC is enforcing absent any underlying statutory authority. However, this
 25 premise is not the basis for a constitutional argument but, rather, an argument under the APA
 26 regarding procedure and statutory authority. In any case, as explained in Sections IV.B and .C

1 | of this Memorandum, the TAA is not a "rule" and, in fact, does interpret the law properly.
2 | Moreover, the Associations offer no authority for the proposition that an agency's issuance of
3 | an interpretive statement, even if the statement is substantively incorrect, is an unconstitutional
4 | act.

5 | The cases cited by the Plaintiffs regarding Article II, § 1 do not actually address the
6 | issue in this case. Plaintiffs' cases deal with participants of one branch of government
7 | participating in other branches, or address situations where two branches have authority over
8 | an issue. In contrast, Plaintiffs' claim here is that the OIC was legislating when it issued TAA
9 | 06-07 and, therefore, exceeding its statutory authority. However, the cases cited by Plaintiffs
10 | regarding administrative orders and rules that purportedly legislate do not pose the question as
11 | a constitutional issue but, rather, as one of statutory authority. These cases do not even cite to
12 | Article II, § 1. In addition, these cases, all decided before the 1988 APA, do not address the
13 | procedural requirements of the APA in challenging agency actions. At best, these cases stand
14 | for the proposition that the court has subject matter jurisdiction over whether or not an
15 | agency's rule, order, or action has exceeded the agency's statutory authority. The
16 | Associations' reference to *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 6 P.3d 30
17 | (2000), also does not support their contention, as that simply makes the unremarkable holding
18 | that that the Executive Order from the Governor to state agencies, which the Governor never
19 | claimed to have the force of law, did not create a private cause of action to the plaintiff.

20 | The legislature has expressly authorized agencies to issue statements advising the
21 | public of their legal interpretations and likely course of action as a result of those
22 | interpretations. RCW 34.05.230(1). Article II, § 1 provides no independent basis for finding
23 | that an agency has acted unconstitutionally for issuing such a statement, even if the substance
24 | of the statement is not correct. Plaintiffs' Motion for Summary Judgment should be denied,
25 | and the OIC's Cross-Motion for Summary Judgment should be granted.

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IV. CONCLUSION

The Office of the Insurance Commissioner respectfully requests that the Court deny the Associations' Motion for Summary Judgment and grant the OIC's Cross-Motion for Summary Judgment on the grounds that:

1. That Technical Assistance Advisory ("TAA") 06-07 is not a rule under the Washington Administrative Procedure Act ("APA") and, therefore, the Office of the Insurance Commissioner did violate APA statutory rulemaking procedures; and

2. That the Office of the Insurance Commissioner has the authority to issue interpretive statements, such as TAA 06-07, and did not violate Article II, § 1 of the Washington State Constitution by issuing TAA 06-07; and

3. That RCW 48.44.024, (and parallel statutes RCW 48.46.068 and RCW 48.21.047), are not statutory grants of authority for health carriers to discriminate against members of associations in setting rates in association health benefit plans based on health status-related factors; and

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1 4. That the Office of the Insurance Commissioner reasonably and properly
2 interpreted the law in TAA 06-07 when stating that health carriers should not discriminate
3 against members of associations in setting rates in association health benefit plans based on
4 health status-related factors.

5 DATED this 11th day of May, 2007.

6 ROBERT M. MCKENNA
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EXHIBIT 3

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**SUPERIOR COURT OF WASHINGTON
FOR SPOKANE COUNTY**

ASSOCIATED INDUSTRIES OF THE INLAND
NORTHWEST, a Washington Non-Profit Corporation;
THE ASSOCIATION OF WASHINGTON
BUSINESSES, a Washington Corporation,

Plaintiffs,

vs.

STATE OF WASHINGTON OFFICE OF THE
INSURANCE COMMISSIONER; MIKE KREIDLER,
Washington State Insurance Commissioner,
Defendants.

NO. 2007-02-00592-1
MEMORANDUM DECISION

This matter came before the court for oral argument on June 8, 2007, on the Plaintiffs' Motion for Summary Judgment and the Defendants' Cross-Motion for Summary Judgment. Both sides are asking the court for a ruling regarding the validity of Technical Assistance Advisory T06-07 (TAA 06-07) issued by the Office of the Insurance Commissioner (OIC) on December 15, 2006.

Both sides agree that this court has jurisdiction to decide the issue either under the Uniform Declaratory Judgment Act, RCW 7.24, or the Administrative Procedure Act, RCW

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34.05. Both sides also agree that summary judgment is the proper procedure to determine the validity of TAA 06-07.

Prior to oral argument the Plaintiffs' Motion to Strike a Thurston County Superior Court decision was granted as it constituted an "unpublished" decision.

FACTS

The facts are not in dispute. Plaintiffs are independent business associations which serve employer members. They make health insurance plans available to their small employer members. They are not insurance companies but the health plans they offer to their members are subject to OIC approval.

In 1995 the legislature enacted RCW 48.44.023(3) and RCW 48.44.024(2). RCW 48.44.024(2) is a statutory exception to RCW 48.44.023(3). Since that time Plaintiffs have offered insurance plans to their small employer members where the premium for individual employer members has been calculated using "experience rating". That is, the premium takes into consideration each employer's claims experience and aggregated health history. This method is an exception to the community rating pooling requirements of RCW 48.44.023(3).

On December 15, 2006, the Office of the Insurance Commissioner issued TAA 06-07. This advisory indicated it was the OIC position that "(A)ny rating based on the health information of an individual member employee was prohibited."

STATUTES/TAA 06-07

RCW 48.44.023(3):

(3) Premium rates for health benefit plans for small employers a defined in this section shall be subject to the following provisions:

(a) The contractor shall develop its rates based on an adjusted community rate and may only vary the adjusted community rated for:

- (i) Geographic area;
- (ii) Family size;
- (iii) Age; and
- (iv) Wellness activities.

(i) Adjusted community rates established under this section shall pool the medical experience of all groups purchasing coverage.

RCW 48.44.024(2):

(2) Employers purchasing health plans provided through associations . . . are not small employers and the plans are not subject to RCW 48.44.023(3).

Technical Assistance Advisory T 06-07:

The Office of Insurance Commissioner (OIC) is issuing Technical Assistance Advisory (TAA) T – 06-07 to offer guidance on the nondiscrimination requirements that health insurance carriers must follow when rating member employers of association health plans (AHPs). The TAA applies to all AHP contracts issued or renewed on or after January 1, 2008.

Association health plans provide an important alternative for obtaining employer sponsored health insurance. Some plans, however, unlawfully discriminate against their members based on their health. Approximately 7 percent of association plans are in violation of the law by using health information to set rates for individual member employers. Rates must be based on the health of the *entire association group*. Any rating based on the health information of an individual member employer is prohibited. (emphasis in original)

ISSUES

1. Did the issuance of TA 06-07 violate APA rulemaking requirements?
2. Did the OIC violate the Washington State Constitution when it issued TA 06-06?

1. Did the issuance of TA 06-07 violate APA Rulemaking Requirements?

TA 06-07 is not a rule. In oral argument defense counsel conceded that it could not be enforced as a rule. TA 06-07 was issued under RCW 34.05.230(1). The statute permits a state agency to “advise the public of current opinions, approaches and likely courses of action” the agency may take in the future. It is advisory only. It is not subject to the rulemaking requirements of the APA.

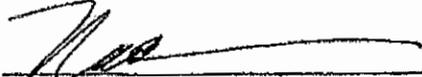
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operating under that understanding for over 12 years and have "experience rated" employer members. The OIC did not officially disagree with plaintiff's interpretation until the promulgation of TA 06-07 in December 2006.

This court's view is that the plaintiffs had a right to proceed on the statutory exemption. Their interpretation of that exemption remained unchallenged for over a decade. While OIC can issue technical advisories, they are not rules and are not enforceable. TA 06-07 amounts to a major policy shift from the plaintiff's perspective. Policy is made by the legislature. The legislature should make the decision. More than a decade has past since the legislation was enacted, if the legislature believes it is time for a change they will act.

The Plaintiff's Motion For Summary Judgment is Granted.

Dated: August 27, 2007


KATHLEEN M. O'CONNOR
SUPERIOR COURT JUDGE