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March 16, 2015

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**VIA EMAIL AND FIRST-CLASS MAIL**

Hearings Unit  
Office of the Insurance Commissioner  
P.O. Box 40255  
Olympia, WA 98504-0255  
Email: [hearings@oic.wa.gov](mailto:hearings@oic.wa.gov)

**Re: Demand for Hearing**

To Whom It May Concern:

We represent Master Builders Association of King and Snohomish Counties and the Master Builders Association of King and Snohomish Counties Employee Benefit Group Insurance Trust ("MBA Trust"). We write to formally demand a hearing before an administrative law judge ("ALJ"), pursuant to RCW 48.04.010 and WAC 284-02-070, to challenge the disapproval by the Office of Insurance Commissioner ("OIC") of Regence BlueShield's ("Regence's") 2014 rate and form filings ("the Filings") for the MBA Trust. A copy of the OIC's decision subject to this Demand for Hearing is attached.

MBA Trust facilitates the purchase of health benefits for over 1,300 companies in the building and construction industry. It is the Northwest's largest industry-specific healthcare program, serving over 40,000 enrollees, all of whom stand to be unfairly prejudiced by the OIC's disapproval. Given that participating employers range in size from two to over 800 employees, employers rely on the flexibility inherent in association health plan memberships to make the best insurance coverage choices for their employees. Flexibility in plan choice, contribution levels, wellness programs, and rating allows this to occur.

MBA Trust offers benefit plans through Regence that the participating employers ("Participating Employers") offer for purchase by their employees and the employees' eligible dependents (collectively, the "Members"). The OIC's rejection of the Filings directly, adversely, and unfairly affects MBA Trust, its Participating Employers, and their approximately 40,000 Members (who may be forced to move to plans with substantially reduced benefits and/or higher premiums and who may be subject to retroactively-adjusted premiums), warranting a hearing pursuant to RCW 48.04.010(1)(b).

The OIC takes issue with the fact that the Regence plans for MBA Trust include multiple Rate Categories for each plan design, established at the Participating Employer level with potentially different monthly premiums for different Participating Employers. In rejecting the Filings, the

OIC erroneously treats MBA Trust as a single employer, asserting that it must file a single rate at the association level. In its disapproval, the OIC stated:

[Y]our rates, filed for various employers, are unreasonable in relation to the amount charged for the contract for one single employer, Master Builders Association of King and Snohomish Counties. Therefore, your rate and form filings are disapproved and closed under the authority of RCW 48.44.020(3).<sup>[1]</sup>

MBA Trust challenges the OIC's decision on the following grounds:

- OIC lacks legal authority to disapprove the Filings.
  - First, RCW 48.44.020(3) does not provide a legal basis for the OIC's disapproval. That statute permits disapproval of a health benefits contract only "if the benefits provided therein are unreasonable in relation to the amount charged for the contract." OIC's own regulations, however, provide that benefits "will be found not to be unreasonable" for purposes of RCW 48.44.020(3) if the projected earned premium for the rate renewal period meets certain requirements. WAC 284-43-915(2) (emphasis added). The Filings in fact satisfy the requirements of WAC 284-43-915(2) and OIC's disapproval does not contend otherwise. Indeed, none of the attached disapproval notices even address benefits provided under the plans. Therefore, by OIC's own regulations, RCW 48.44.020(3) provides no authority for OIC's disapproval of the Filings.
  - Second, no other Washington law or regulation gives the OIC authority to reject the Filings based upon the rates. OIC's disapproval cites no such authority, and we are aware of none.<sup>2</sup>

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<sup>1</sup> See Attachment 1.

<sup>2</sup> As OIC's consultant observed, "For AHPs [Association Health Plans], the OIC can require prior approval of both rates and forms only for disability carriers. For all other carriers that write AHP business, the OIC has authority to require filing of rates and forms, but can review only forms, and cannot disapprove either rates or forms." [Emphasis supplied.] See Mathematica Policy Research, *Association Health Plans and Community-Rates Small Group Health Insurance in Washington State, Final Report* (Sept. 30, 2011) at Appx. A, available on OIC's website at: <http://www.insurance.wa.gov/about-oic/commissioner-reports/documents/association-health-plans.pdf>.

- Even if OIC had authority to disapprove the Filings (including the rates), there is no basis under state or federal law for the OIC's position that a Bona Fide Association ("BFA") like MBA Trust must be treated as a single employer for purposes of rating.<sup>3</sup>
  - No state statute or regulation prohibits separately rating Participating Employers based on non-discriminatory criteria, or requires that all Participating Employers be rated in one pool when coverage is offered through a BFA. To the contrary, Washington law explicitly and unambiguously exempts employers purchasing health plans through associations from community rating: "Employers purchasing health plans provided through associations or through member-governed groups formed specifically for the purpose of purchasing health care are not small employers and the plans are not subject to RCW 48.44.023(3) [community rating]." RCW 48.44.024(2).
  - Nor is there any basis under federal law for the OIC's position that a BFA must be treated as a single employer for purposes of rating. All rating factors utilized by Regence were consistent with federal regulations and guidance, including under the Health Insurance Accountability and Portability Act, also known as HIPAA. Indeed, the OIC's disapproval does not cite any federal law or rule that is implicated by the Filings or that provides a basis for its disapproval of the Filings.
  - Rating at the Participating Employer level is a long-standing and sanctioned practice for BFAs in Washington to which the OIC has never previously objected. There has been no recent change in federal or state law that would compel a different response from OIC.
- The OIC's unlawful disapproval of the Filings will unfairly prejudice MBA Trust, its Participating Employers, and their thousands of Members. If the OIC's proposed remedy is implemented, the approximately 40,000 Members may be forced to move to plans with substantially reduced benefits and/or higher premiums, potentially with adverse federal tax consequences, and MBA Trust and Participating Employers may be forced to retroactively adjust Member premiums.
- The OIC attempts to impose a remedy that does not flow from its rejection of the Filings. Specifically, the OIC asserts: "As a result of this disapproval, it is necessary for all

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<sup>3</sup> MBA Trust's BFA status was formally acknowledged by the OIC in a October 25, 2012 letter from Insurance Commissioner Mike Kreidler to MBA Trust. *See* Attachment 2

Office of the Insurance Commissioner

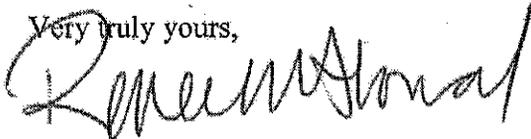
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current enrollees to be transitioned to a compliant plan as soon as possible.”<sup>4</sup> The OIC’s disapproval of Regence’s 2014 Filings after the end of the 2014 coverage period cannot logically require transfer of current enrollees (who are enrolled in 2015 plans) to new plans or require any action with respect to prior enrollees (who are not enrolled in 2015 plans).

The OIC’s rejection of the Filings lacks foundation in state or federal law; is contrary to the long-established AHP rating practices condoned by the OIC and sanctioned by state law; and, if the OIC’s illogical remedy were imposed, would unfairly prejudice MBA Trust and the tens of thousands of Washington citizens in direct contravention of the primary purpose of the Affordable Care Act: to provide individuals with access to affordable health care. For the above reasons, MBA Trust formally demands a hearing before an ALJ.

Very truly yours,



Renee M. Howard

Enclosures

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<sup>4</sup> See Attachment 1.

SERFF Tracking #:

RGWA-129292191

State Tracking #:

267174

Company Tracking #:

100000029CMR

**State:** Washington **Filing Company:** Regence BlueShield  
**TOI/Sub-TOI:** H16G Group Health - Major Medical/H16G.002A Large Group Only - PPO  
**Product Name:** Association or member-governed true employer group under 29 U.S.C. Section 1002(5) of ERISA - Master Builders Association of King and Snohomish Counties  
**Project Name/Number:** Medical/100000029CMR

## Correspondence Summary

### Dispositions

Status	Created By	Created On	Date Submitted
Disapproved	Lichiou Lee	01/15/2015	01/15/2015

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**SERFF Tracking #:**

RGWA-129292191

**State Tracking #:**

267174

**Company Tracking #:**10000029CMR

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**Project Name/Number:** Medical/10000029CMR

## Disposition

Disposition Date: 01/15/2015

Implementation Date:

Status: Disapproved

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HHS Status: HHS Denied

State Review:

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Comment: Your rate and form filings for Master Builders Association of King and Snohomish Counties are disapproved and closed under the authority of RCW 48.44.020(3).

The rating methodology and rates filed on behalf of Master Builders Association of King and Snohomish Counties and the Master Builders Association of King and Snohomish Counties Employee Benefit Group Insurance Trust are inconsistent with the fact that you filed one single large employer group.

In the rate schedule, there are 4 Rate Categories for each plan design. For example, for the Enhanced E10 Plan, an employee age between 35 to 49 can be charged a monthly rate ranging from \$498.42 to \$688.50. In our rate objections, we asked you to explain in detail how you define a Rate Category and the factors used to assign an employee to a Rate Category. We also asked you to provide detailed calculations of the rates assigned to each Rate Category. Your response to the first objection letter indicated that you have separately rated various "member groups" within Master Builders Association of King and Snohomish Counties. You also stated at the Association renewal, each "custom rated group" is assigned a unique rate increase that is added to their current rates. This means that your rates filed are for various "employers" - contrary to your form filing for one employer only.

We also asked you to identify the bona fide employment-based classifications upon which the 4 Rate Categories are based (per 26 CFR § 54.9802-1(d).) (Examples for bona fide employment-based classifications include current versus former employees, and employees located in different geographic areas.) You stated that "each subgroup" may be treated separately as each subgroup is an independent ongoing business. You further stated that each subgroup is managed separately from other subgroups and "employment" criteria, "employment" needs, benefit mix, may be unique to each subgroup. Your response reiterated that you have separately rated various "member groups." Your response also failed to identify how each Risk Level is related to bona fide employment-based classifications.

This tells us that your rates, filed for various employers, are unreasonable in relation to the amount charged for the contract for one single employer, Master Builders Association of King and Snohomish Counties. Therefore, your rate and form filings are disapproved and closed under the authority of RCW 48.44.020(3).

As a result of this disapproval, it is necessary for all current enrollees to be transitioned to a compliant plan as soon as possible. Please contact the Deputy Insurance Commissioner for Rates and Forms to discuss your plan to transition current enrollees to a compliant plan, including the proposed notice and replacement rate schedule.



SERFF Tracking #: RGWA-129292191

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Company Tracking #: 100000029CMR

State: Washington Filing Company: Regence BlueShield  
 TOI/Sub-TOI: H16G Group Health - Major Medical/H16G.002A Large Group Only - PPO  
 Product Name: Association or member-governed true employer group under 29 U.S.C. Section 1002(5) of ERISA - Master Builders Association of King and Snohomish Counties  
 Project Name/Number: Medical/100000029CMR

Schedule	Schedule Item	Schedule Item Status	Public Access
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
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Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Certificate of Coverage		Yes
Form	Custom App/Enr MBA		Yes
Form	Custom App/Enr MBA		Yes
Form	Custom app/Enr MBA		Yes



OFFICE OF  
INSURANCE COMMISSIONER

September 25, 2012

Sam Anderson, Executive Officer  
Employee Benefit Group Insurance Trustees  
Master Builders Association of King & Snohomish Counties  
335 - 116th Avenue SE  
Bellevue, WA 98004

Dear Mr. Anderson and Trustees:

As you know, under the federal Affordable Care Act, small group employers' health plans for their employees obtained through associations will be community rated beginning in 2014, unless the association constitutes an "employer" under ERISA Sec. 3 (5), which includes:

*Any person acting directly as an employer or indirectly in 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.*

While the U.S. Department of Labor (DOL) is the agency charged with administering ERISA, and its determination of this question will be given deference by a court, the Office of the Insurance Commissioner (OIC) has attempted, through careful analysis of the statutes and existent DOL Advisory Opinions regarding this issue and through consultation with individuals at DOL, to examine the facts of your organization and test them against the DOL/ERISA criteria. This letter will review the work that the OIC, in cooperation with your association and health trust, has done to analyze whether the Master Builders Association of King and Snohomish Counties, (MBAKS)'s health insurance trust arrangements and history satisfy the definition of "employer" in ERISA.<sup>1</sup>

The Master Builders Association of King and Snohomish Counties was originally formed in 1909 to promote the viability of the housing industry and to secure cooperative action in advancing the common purpose and objectives of the building and construction industry. Our analysis of the association's history prior to the 1995 inception of the Insurance Trust indicates that the employer members who are eligible for participation in the Insurance Trust have a commonality of interest and genuine organizational relationship beyond participation in the trust. Further, the Insurance Trust Agreement's limitation of the categories of MBAKS members allowed to

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<sup>1</sup> This letter will not address any fiscal issues involving Trust management, such as those contained in Articles VII and VIII of the Insurance Trust Agreement.



**OFFICE OF INSURANCE COMMISSIONER**

Sam Anderson, Executive Officer  
Employee Benefit Group Insurance Trustees  
Master Builders Association of King & Snohomish Counties  
September 25, 2012  
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participate in the Trust to 284 business categories<sup>2</sup> clearly engaged in the building and construction industry is also indicative of the commonality of interest and genuine organizational relationship of the employer members beyond participation in the insurance trust.

The Trust Agreement makes clear that only those employers whose principal business purpose is engaging in the building and construction industry are eligible for participation in the Insurance Trust.<sup>3</sup> While MBAKS is the sponsor of the Trust, it is the Trustees who control the operations of the Trust and it is the Participating Employers who elect the Trustees from among their number. The Participating Employers delegate to those duly elected Trustees certain responsibilities and authority as set forth in Article 5.01 of the Trust Agreement. The Trust Agreement allows the Trustees to delegate to MBAKS specific responsibilities and implementation authority, but requires Trustee approval of MBAKS' executing any documents on behalf of the Trust.

The Trust Agreement provides for seven voting Trustees and the Executive Officer of MBAKS as a non-voting Trustee. Each voting Trustee must be a principal in a Participating Employer and are elected by a majority of the Participating Employers. Candidates may be nominated by MBAKS, by a majority of incumbent Trustees, or by written petition signed by the lesser of 10% of the Participating Employers or 10 Participating Employers.

A Trustee may be removed by Participating Employers whose contributions during the preceding 12 months totaled more than 50 percent of all contributions. Article 6.13 of the Trust Agreement sets forth the powers and duties of the Trustees, providing them and, through them, the Participating Employers, with complete control of the critical functions of the Insurance Trust. Article 7.01 provides that all duties not allocated by the Agreement to the Trustees are to be exercised by the Participating Employer. Finally, in Article 8.01, the Trust may be amended only by a majority of Trustees approving or by Participating Employers whose contributions during the preceding 12 months totaled more than 50 percent of total contributions. It appears that the Participating Employers control and direct the activities and operation of the MBAKS' Insurance Trust.

The Participating Employers are engaged in the same industry. They also have a history of organized cooperation on employment-related matters and a genuine organizational relationship through their membership in MBAKS unrelated to the provision of welfare benefits. Furthermore, because of their authority to elect and remove the Trustees and to amend or terminate the Trust, they appear to control and direct the activities and operations of the Trust.

Based on the information submitted to this office, it is the view of the OIC that the Participating Employer members of the Insurance Trust would, at least in form, constitute a bona fide group

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<sup>2</sup> (MBAKS has 470 total business categories of membership in the Association).

<sup>3</sup> The only other eligible participants are the MBAKS' employees.

**OFFICE OF INSURANCE COMMISSIONER**

Sam Anderson, Executive Officer  
Employee Benefit Group Insurance Trustees  
Master Builders Association of King & Snohomish Counties  
September 25, 2012  
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or association of employers, and the welfare benefits provided to Participating Employers through the Insurance Trust would, at least in form, constitute an employee welfare benefit plan for purposes of Title I of ERISA.

I want to thank the association staff and Trustees for your cooperation and openness to this process; It allowed me to conclude that the Participating Employers are entitled to act as an "employer" within the meaning of ERISA Sec. (3) (2) in the offering of employee welfare benefits through the MBAKS' Health Insurance Trust. This process enabled me to fulfill my responsibilities to insurance consumers in Washington state, while supporting MBAKS' position that the Health Insurance Trust does, in my opinion, constitute, at least in form, a bona fide association of employers that satisfies the ERISA definition of "employer."

Sincerely,



Mike Kreidler  
Insurance Commissioner

Enclosure

cc: Joe Canary, Director, Office of Regulations and Interpretations  
Susan Elizabeth Rees, Chief, Division of Coverage, Reporting and Disclosure  
U.S. Department of Labor

