Mike Kreidler- Insurance commissioner

As required by

The Washington State Administrative Procedures Act

Chapter 34.05 RCW

Matter No. R2021-17

# CONCISE EXPLANATORY STATEMENT; RESPONSIVENESS SUMMARY; RULE DEVELOPMENT PROCESS; AND IMPLEMENTATION PLAN

Relating to the adoption of

Health Care Sharing Ministries

August 3, 2022

# TABLE OF CONTENTS


| | | |
|---|---|---|
| Section 1 | Introduction | pg. 3 |
| Section 2 | Reasons for adopting the rule | pg. 3 |
| Section 3 | Rule development process | pg. 3 |
| Section 4 | Differences between proposed and final rule | pg. 4 |
| Section 5 | Responsiveness summary | pg. 5 |
| Section 6 | Implementation plan | pg. 34 |
| Appendix A | CR-102 Hearing Summary | pg. 36 |
| Appendix B | Supplemental CR-102 Hearing Summary | pg. 38 |

## Section 1: Introduction

Revised Code of Washington (RCW) 34.05.325 (6) requires the Office of Insurance Commissioner (OIC) to prepare a "concise explanatory statement" (CES) prior to filing a rule for permanent adoption. The CES shall:

1. Identify the Commissioner's reasons for adopting the rule;
2. Describe differences between the proposed rule and the final rule (other than editing changes) and the reasons for the differences; and
3. Summarize and respond to all comments received regarding the proposed rule during the official public comment period, indicating whether or not the comment resulted in a change to the final rule, or the Commissioner's reasoning in not incorporating the change requested by the comment; and
4. Be distributed to all persons who commented on the rule during the official public comment period and to any person who requests it.

## Section 2: Reasons for Adopting the Rule

The Commissioner is adopting rules relating to the exemption of health care sharing ministries (HCSM) from the definition of health carrier or insurer under 48.43.009 to reduce confusion related to entities' status as HCSMs, increase transparency, and codify all applicable rules related to health care sharing ministries in one location in the Washington Administrative Code.

## Section 3: Rule Development Process

The CR-101 for this rulemaking was filed in the Washington State Register on July 7, 2021 (WSR 21-14-097). The comment period for the CR-101 closed on September 15, 2021. Two comments were received.

A first stakeholder draft was released on July 21, 2021. Comments were due by August 17, 2021. A stakeholder meeting was held on August 12, 2021. Six written comments were received on the first stakeholder draft.

The CR-102 for this rulemaking was published in the Washington State Register (WSR 21-20-107) on October 4, 2021. The Commissioner accepted comments through November 24, 2021. Two written comments were received.

The Commissioner held a public hearing on the proposed rule text on November 24, 2021; the hearing was administered by Jane Beyer as a virtual meeting due

to the COVID-19 pandemic. Testimony was presented by Katy Talento (Alliance for Health Care Sharing Ministries) and Randy Pate (Randolph Pate Advisors).

As a result of the testimony and the OIC's consideration of the issues raised, a second stakeholder draft was released on March 25, 2022. Comments were due April 8, 2022. Three written comments were received.

A supplemental CR-102 was filed on April 18, 2022 (WSR 22-09-056). Comments were due by May 24, 2022. Five written comments were received.

The Commissioner held a public hearing on the supplemental CR-102 proposed rule text on May 26, 2022; the hearing was administered by Jane Beyer, as a virtual meeting due to the COVID-19 pandemic. Testimony was presented by Katy Talento (Alliance for Health Care Sharing Ministries) and Joel Noble (Samaritan Ministries).

The CR-103 was submitted to the Code Reviser for adoption on August 3, 2022.

## Section 4: Differences Between Proposed and Final Rule

The proposal included rules relating to the exemption of health care sharing ministries (HCSM) from the definition of health carrier or insurer under 48.43.009 to reduce confusion related to entities' status as HCSM's and increase transparency.

The final rule differs from the rule proposed in the supplemental CR-102 filing in the following respects:

- The definition of "annual audit" in WAC 284-43-8210 is modified to define annual audit as occurring on either a calendar or fiscal year basis.

- To reduce redundancy, the definition of "certified public accounting firm" in WAC 284-43-8210 was integrated into the definition of "independent certified public accounting firm" and a technical error in which "and" was used rather than "or" was corrected to clarify that the accounting firm need not be licensed by all states, the District of Columbia and all U.S. territories.

- WAC 284-43-8220 defines a timely response as one that occurs within twenty business days rather than fifteen business days and allows written submissions via electronic mail. The revision clarifies and aligns the response time with current OIC experience related to responses to OIC

inquiries to entities that characterize themselves as health care sharing ministries.

For the reasons described in the responses to the comments below, no other changes were made to the proposed rule (as published in the supplemental CR-102) in the final rule.

## Section 5: Responsiveness Summary

The OIC received a total of eighteen written comments and suggestions regarding R 2021-17, inclusive of the CR-101, two stakeholder drafts, the CR-102 and the supplemental CR-102. The following information contains a description of the comments, the OIC's assessment of the comments, and information about whether the OIC included or rejected the comments.

The OIC received comments from:

- Christian Healthcare Ministries
- Commonwealth Law Offices
- Patient Coalition of Washington (submitted by the The Leukemia and Lymphoma Society for the coalition members)
- Samaritan Ministries
- Sedera
- Solidarity Healthshare
- The Alliance of Health Care Sharing Ministries
- Thomas Gibson
- Washington State Hospital Association

**Comments received to the CR-101, stakeholder drafts, CR-102 and Supplemental CR-102**

| ***Comment*** | ***OIC Response*** |
|---|---|
| **General comments** | |
| (Comments to first stakeholder draft and second stakeholder draft)<br><br>Support the language in the stakeholder drafts | The Commissioner appreciates the comment. |

| *Comment* | *OIC Response* |
|---|---|
| (Washington State Hospital Assn.) | |
| (Comment to first stakeholder draft)<br><br>HCSMs pose risks to patients and consumers. Earlier this year, many of our organizations issued a report finding that HCSMs have adopted features closely resembling traditional insurance coverage, and they are often marketed as a low-cost alternative to Affordable Care Act (ACA) plans. The report went on to describe how consumers may enroll in HCSMs thinking that they are purchasing comprehensive coverage and without fully understanding the financial risks of a product that provides no guarantee of paid claims. Even the services that are purportedly “covered” are limited and expose enrollees to substantial risk. HCSMs typically do not cover pre-existing conditions and routinely exclude coverage for key services, such as mental health and substance use disorder services, preventive services and prescription drug coverage. Patients who receive a serious or life threatening diagnosis while enrolled in an HCSM plan may face coverage denials for all care leaving them responsible for devastating medical expenses.<br><br>HCSMs also note that they provide “last dollar” payment for medical bills and require that members first exhaust all other options, including other coverage, workers’ compensation, charity and government entitlements (for those with certain lower incomes). Further, members whose claims are denied have no right to appeal to an independent reviewer with medical expertise as they would under ACA-compliant coverage. | Thank you for your comment. At this time, the OIC is not conducting rulemaking on these issues. |

| *Comment* | *OIC Response* |
|---|---|
| (Patient Coalition of Washington) | |
| (Comment to second stakeholder draft)<br><br>The proliferation of "insurance-like" products, including HCSMs, in recent years is of significant concern for patient advocacy organizations. HCSMs are exempt from many important consumer protections and as a result, penalize people with pre-existing conditions and chronic illnesses. We applaud OIC's ongoing efforts to protect patients and consumers through close monitoring and taking action to reign in entities that are engaging in deceptive business practices and selling health insurance illegally. These actions and enforcements help protect patients and consumers in Washington from substandard insurance products. OIC work in this area is recognized and appreciated.<br><br>(Patient Coalition of Washington) | The Commissioner appreciates the comment |
| (Comment to CR-101)<br><br>Any participation by a licensed producer in the sale of securities that have no value and whose promises cannot therefore be kept would be in violation of the RCW/WAC. Sharing ministries do not collect sufficient funds to meet their financial obligations. Regardless of any federal or state law to the contrary, that makes participation by a licensee in Washington a participant in a fraudulent act.<br><br>(Thomas Gibson) | The Commissioner appreciates the comment.<br><br>At this time, the OIC is not conducting rulemaking on this issue. However, the OIC notes that insurance producers should be aware of the entities that the OIC has taken enforcement actions against for acting as unauthorized insurers, and not represent products from such unauthorized insurers for sale. RCW 48.15.020(2) prohibits a person from representing an unauthorized insurer except as provided in Chapter 48.15 RCW. The sale of unauthorized insurance is a violation of the Insurance Code and subject to sanctions under RCW 48.15.023. |
| (Comment to first stakeholder draft) | The federal HCSM criteria have been upheld in a constitutional challenge by the U.S. Court of Appeals for the 4th Circuit. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013). |

| *Comment* | *OIC Response* |
|---|---|
| RCW 48.43.009 should be liberally construed to avoid a First Amendment Free Exercise of religion violation.<br><br>The United States Supreme Court's unanimous ruling in Fulton et al v. City of Philadelphia et al, No. 19-123 (June 17, 2021), held that no government policy can burden or prohibit religious conduct if it grants exemptions permitting similar secular conduct. RCW 48.36A.370, titled "Exemptions," completely exempts fourteen (14) categories of entities from the Insurance Code. Those exempted are largely fraternal societies which assist members with Medical expenses. There is no compelling interest for excluding the ministries from a similar exemption.<br><br>(Samaritan Ministries) | This comment misinterprets RCW 48.36A.370. RCW 48.36A sets out provisions that regulate fraternal benefit organizations, and include operational and licensure requirements. RCW 48.36A.370 specifies exemptions from the fraternal benefit organization provisions in RCW 48.36A for certain organizations. It does not exempt these organizations from regulation under the Insurance Code. Further, RCW 48.36A.370(1) provides that "[t]he commissioner may require from any society such information as will enable the commissioner to determine whether the society is exempt from the provisions of this chapter." RCW 48.36A.370(4) provides that "[t]he commissioner may require from any society or association, by examination or otherwise, such information as will enable the commissioner to determine whether the society or association is exempt from the provisions of this chapter." These provisions are analogous to proposed WAC 284-42-8220. They explicitly grant OIC authority to take action to determine whether an entity is indeed entitled to the statutory exemption from regulation as a fraternal benefit society, just as the proposed rule does to determine whether an entity holding itself out as a HCSM that is exempt from insurance regulation meets criterial for exemption. In this way, religious and secular organizations are treated similarly. |
| (Comment to supplemental CR-102)<br><br>Insurance regulators have a reason to understand which sharing ministries are operating in their respective states and how these ministries are operating, particularly by ensuring ministries or entities claiming to be ministries are not operating in ways that confuse their products with health insurance offerings. ….(A)ll legitimate HCSM's should be comfortable with and even desiring of greater transparency…. Solidarity largely supports the pending | The Commissioner appreciates this comment. |

| *Comment* | *OIC Response* |
|---|---|
| rulemaking in WA. … The proposal, aside from the requested amendments (see below), is structured in a manner that balances this need with protections for ministries.<br><br>(Solidarity HealthShare) | |
| (Comment to supplemental CR-102)<br><br>We are happy and more than willing to share relevant documents and information with any regulator who seeks to protect the consumers of their state. We strongly believe in the transparency of our entire operation, both to our membership and to the general public, so we view these proposed rule sections as a reasonable exercise of your authority.<br><br>We also view this as an opportunity to demonstrate that not only are we conducting our operations in a way that benefits Washington consumers, we are actively advocating for more transparency in our industry throughout the nation and in Washington.<br><br>(Christian Healthcare Ministries) | The Commissioner appreciates this comment. |
| **OIC interpretive authority** | |
| (Comments to first stakeholder draft, CR-102 and supplemental CR-102)<br><br>Under the Washington safe harbor statute, RCW 48.43.009, the §5000A HCSM definition is incorporated by reference into Washington law, such that the definition of an HCSM used in Washington "has the same meaning" as under federal law.<br><br>The statute explicitly abrogates OIC's (and other agencies') ability to redefine or interpret the meaning of the terms used in the definition as it has attempted to do in the proposed rule. | There is no language in RCW 48.43.009 that delegates the authority of the Insurance Commissioner to a federal agency; nor does the incorporation of the language of the federal law into a state law limit the Commissioner's authority to interpret that state law. This provision of the Insurance Code is expressly left to the Insurance Commissioner's implementation and interpretation. *See* RCW 48.02.060(1)-(2).<br><br>The reference to 26 U.S.C. §5000A in RCW 48.49.009 adopts the meaning of a term used in federal law as the state standard. RCW 48.43.009 exists only as a matter of state law |

| *Comment* | *OIC Response* |
| --- | --- |
| OIC lacks independent authority to define or interpret the meaning of the terms used in the §5000A definition. The rules, therefore, must give HCSMs the "same meaning" as federal law. In only two instances may the meaning of the terms used in §5000A be properly interpreted. One, by a federal agency, acting under clear authority granted it by Congress and within its proper administrative duties. And two, by a federal court in a case in which the interpretation of the statutory terms is necessary.<br><br>Neither occasion is present now, and OIC must not exceed its authority by interpreting the statutory terms differently than they have been interpreted as described above.<br><br>(Alliance of Health Care Sharing Ministries) | and is subject to state-based interpretation and implementation.<br><br>The language of RCW 48.43.009 incorporates the language used to define a health care sharing ministry (HCSM) under the Affordable Care Act, into state statute, albeit for a different purpose. The phrase, "For purposes of this section, "health care sharing ministry" has the same meaning as in 26 U.S.C. Sec. 5000A", which is found in RCW 48.43.009 simply adopts the criteria in the federal statute as the standard by which the state will determine if an entity is a HCSM, and thus not an "insurer" or a "health carrier." It still leaves the authority to determine whether an entity has satisfied the definition with the state. Furthermore, it is well within OIC's authority to promulgate rules pertaining to RCW 48.43.009, and the Commissioner's interpretations are given deference. *See* RCW 48.02.060; *Premera v. Kreidler*, 133 Wn.App. 23, 31-33, 43 (2006).<br><br>Importantly, while the term "health care sharing ministries" may be used in both federal and state law, the state law use of the term is for a fundamentally different purpose. In the Affordable Care Act, the term is used with respect to whether an individual must make a personal responsibility payment (i.e. pay an individual mandate tax penalty). Washington state law uses the term to exempt certain entities from regulation as a health carrier or insurer (*See* RCW 48.43.009), as interpretated and implemented by the Insurance Commissioner. There is no federal law exempting health care sharing ministries from state insurance regulation.<br>Finally, the definition in this rule is consistent with the federal definition of the term "predecessor" found in 26 U.S.C. § 3121(a)(1), as interpreted by the IRS in IRS Form 1023. |
| **WAC 284-43-8210**<br>**Definitions** | |
| **Definition of "annual audit"** | |

| ***Comment*** | ***OIC Response*** |
| --- | --- |
| (Comment to second stakeholder draft)<br><br>As proposed, the Second Stakeholder Draft and the supplemental CR-102 define "Annual audit" as meaning an audit occurring once a year at approximately the same time each year for the preceding **calendar year.**<br><br>Samaritan Ministries and many other organizations operate on a fiscal, rather than calendar year basis and therefore their annual audits must also be done on that fiscal year.<br><br>(Samaritan Ministries) | The Commissioner appreciates this comment and has revised the final rule language to require the annual audit to occur on either a calendar year or fiscal year basis. |
| **Definition of “predecessor”** | |
| (Comment to first stakeholder draft)<br><br>Definition of “predecessor” – WAC 284-43-821(10)<br><br>The HCSM definition in §5000A(d)(2)(B)(ii)(IV), incorporated by reference in RCW 48.43.009, sets out the following:<br>“[An HCSM] means an organization …. (IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999.”<br><br>In the first stakeholder draft, OIC has proposed to define “predecessor” as “an organization whose medical expense sharing activities were taken over by a successor organization.”<br><br>OIC has indicated that its proposed definition requires a successor organization to “take over” the entirety of its predecessor’s medical expense sharing activities rather than only part of such activities. | The glossary found in Appendix C of the instructions for IRS Form 1023 defines predecessor to mean: “An organization whose activities or assets were taken by another organization.” These instructions are for <u>all</u> non-profit organizations applying for 501(c)(3) status. OIC reasonably narrowed the scope of covered activities to “medical expense sharing activities” for HCSM organizations, because that is the activity they must perform under 26 USCA § 5000A(d)(2)(B)(ii)(IV) in order to be a HCSM.<br><br>This definition is supported by caselaw referencing and relying upon Congressional intent in setting the 1999 cutoff, namely to limit the proliferation of new entities. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 102 (4th Cir. 2013) (The 1999 cutoff ensures “that the ministries provide care that possesses the reliability that comes with historical practice, and it accommodates religious health care without opening the floodgates for any group to establish a new ministry to circumvent [the Affordable Care Act].”).<br><br>OIC’s “predecessor” definition is in line with the Internal Revenue Code’s use of the term “predecessor” in other contexts to mean an entity whose property was substantially |

| *Comment* | *OIC Response* |
|---|---|
| This proposed interpretation contradicts the interpretation of the authorized federal agencies. As an initial matter, a number of HCSMs that are successor organizations to predecessors that continue to engage in medical expense sharing activities have received certification letters from CMS determining that they satisfy the 5000A(d)(2)(B)(ii) requirements. OIC's interpretation to the contrary would result in these organizations being treated as HCSMs for federal law purposes but not for state law purposes, even though the same federal law definition is being used in both cases.<br><br>OIC's proposed definition appears to be inferred from the definition of "successor" set forth by the IRS in Form 1023 and the Instructions for Form 1023. But this "successor" definition is contrary to OIC's position because it clearly allows for a successor entity to take over only part of its predecessor's activities. Form 1023 is the IRS Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code. Part VII Question 1 in Form 1023 asks the following: Are you a successor to another organization? Answer "Yes," if you have taken or will take over the activities of another organization; you took over 25% or more of the fair market value of the net assets of another organization; or you were established upon the conversion of an organization from for-profit to nonprofit status. If "Yes," complete Schedule G.<br><br>The Instructions for Form 1023 provide further clarity by adding that a "successor" is "[a]n organization that took over …. [m]ore than a negligible amount of the activities that were | acquired. *See* 26 U.S.C. § 3121(a)(1). Based on relevant caselaw and these definitions, OIC's Presiding Officer in *In the Matter of Aliera Healthcare, Inc.* (Final Order on Summary Judgment, Docket No. 19-0251, November 13, 2020) defined predecessor to mean, "A health care sharing ministry organization that is acquired, or merged with, or otherwise replaced by another health care sharing ministry organization."<br><br>As such, the OIC revised the definition of "predecessor" in the proposed rule to read: ""Predecessor" means an organization that was acquired, merged with, or otherwise replaced by a successor organization, and the predecessor no longer shares medical expenses."<br><br>Further, because the definitions in Form 1023 and Schedule G, as well as the instructions for Form 1023 and Schedule G, are applicable to all non-profit organizations, some portions of those definitions are not appropriate to apply to HCSM's, which have a narrower definition under federal law. For example, these definitions all provide that a "successor" may be "established upon the conversion of an organization from for-profit to non-profit status." Instructions for IRS Form 1023, p. 35. But the federal statute defining a HCSM requires that the organization be "described in section 501(c)(3) and is exempt from taxation under section 501(a)." 26 USCA § 5000A(d)(2)(B)(ii)(I). Since "predecessor" HCSM's must have been in existence since 1999, and must been non-profit organizations, this portion of the IRS definition cannot be applicable to HCSM's. Excluding this portion of the definition from the rule is not "inconsistent" with the federal definition of predecessor or successor. That portion of the general definition of "successor" is simply inconsistent with the more specific definition of HCSM found 26 USCA § 5000A.<br><br>Similarly, the definitions in Form 1023 and Schedule G, as well as the instructions for Form 1023 and Schedule G, provide that |

| **Comment** | **OIC Response** |
|---|---|
| previously conducted by another organization." (emphasis added).<br>If these documents form the basis for OIC's proposed "predecessor" definition, the opposite of OIC's position is required because a successor could meet the definition by taking over only a portion of the activities of its predecessor. If OIC's position comes from a different source than those assumed here, such a source has yet to be presented to interested parties.<br><br>(Alliance of Health Care Sharing Ministries) | successors either have or will "take over activities previously conducted by another organization," *or* will take over "25% or more of the fair market value of the net assets of another organization," or "Were established upon the conversion of an organization from for-profit to non-profit status." *See* IRS Form 1023 p. 5 (Part VII: Your History); p. 24 (SCHEDULE G Successor Organizations, 2(a)); Instructions for IRS Form 1023, pp. 5, 22. Even the partial glossary definition quoted in this comment provides in part that a successor is "An organization that took over: a. *More than a negligible amount* of the activities that were previously conducted by another organization . . ." Instructions for Form 1023, pg 35 (emphasis added). While the OIC's definition may have the effect of restricting the number or successor organizations that a single HCSM may create, it is still wholly consistent with the general definitions of successor and predecessor, and the more restrictive legislative intent of 26 USCA § 5000A(d)(2)(B), as determined by the federal courts. |
| (Comment to CR-102)<br><br>In new WAC-284-43-8210(10), OIC defines "predecessor" in the proposed rule as "an organization that was acquired, merged with, or otherwise replaced by a successor organization, and the predecessor no longer shares medical expenses."<br><br>We appreciate the change from the definition of "predecessor" contained in earlier stakeholder draft, because it appears the revised definition in this proposed rule would allow a successor organization to assume or take over only a part of its predecessor's medical expense sharing activities rather than requiring the successor to take over *all* | See the response above.<br><br>As a general matter, even when federal laws affect an area regulated by the state, state laws may always be subject to interpretation by the agencies that administer them. RCW 34.05.328(h) expressly contemplates that state agencies may adopt rules that differ from federal rules or statutes.<br><br>RCW 48.43.009 exists as a matter of state law and is subject to state-based interpretation and implementation. Importantly, there is no federal law exemption from state insurance regulation for health care sharing ministries. The only reason a HCSM is ever exempt from insurance regulation in Washington state is through RCW 48.43.009, as interpretated and implemented by the Insurance Commissioner. This provision of the Insurance Code is expressly left to the Insurance Commissioner's |

| Comment | OIC Response |
|---|---|
| of the predecessor's medical expense sharing activities.<br><br>However, we remain concerned that the proposed definition still impermissibly differs from the interpretation of the authorized federal agencies, and would in fact create a conflict with federal law. While portions of proposed WAC 284-43-8210 simply codify those same terms as they are defined in federal regulations and guidance, other terms are defined differently than they are at the federal level, thus creating a conflict.<br><br>In proposed WAC 284-43-8210(10), the proposed definition of "predecessor" departs significantly from the federal definition set forth in the federal instructions; while the IRS Form 1023 instructions define "predecessor" as simply "[a]n organization whose activities or assets were taken over by another organization," OIC's proposed definition would, among other things, add a requirement that "the predecessor no longer shares medical expenses."[1] This additional requirement results in HCSMs being defined differently under state law than under federal law, and is therefore impermissible.<br><br>We reiterate that OIC lacks the authority to interpret or define federal laws incorporated into Washington law by reference, particularly in a manner contrary to authorized federal interpretations.<br><br>(Alliance of Health Care Sharing Ministries) | implementation and interpretation. *See* RCW 48.02.060(1)-(2).<br><br>Here the rule is wholly consistent with the IRS definition of "predecessor." Even though the rule differs from the broader, general IRS definition of successor, OIC's interpretation is consistent with federal precedent holding that the purpose of the federal requirements concerning HCSM's was to limit the proliferation of these entities. Nothing in the rule prevents the application of the more general federal definitions, to the extent they are appropriately applied to HCSM's. Therefore, the rule is not in conflict with the general federal guidance concerning applications for 501(c)(3) status. Rather the rule works in concert with those federal requirements to provide guidance to the more narrowly defined HCSM's, consistent with the federal definition found in 26 USCA § 5000A, and the federal intent as defined by the courts. |

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

| *Comment* | *OIC Response* |
| --- | --- |
| **Definition of "health care sharing ministry" -- in existence since 1999** | |
| (Comment to first stakeholder draft, CR-102, second stakeholder draft and supplemental CR-102)<br><br>The draft's continued inclusion of the "1999" requirement is not the best way to protect consumers.<br><br>Thirty-one states, including Washington, define and exempt HCSMs from their insurance codes. Yet Washington is one of only four states that included a provision in its safe harbor that requires an HCSM to have been created prior to and continuously sharing medical expenses since at least December 31, 1999.<br><br>Ironically, the inclusion of this interpretive provision to further refine and restrict what it means to have continuously shared medical expenses since 1999 is an acknowledgement that the 1999 requirement does not effectively keep out bad actors or otherwise protect consumers, because many sharing organizations claiming pre-1999 status have acquired or merged with pre-1999 HCSMs for the explicit purpose of claiming the statutory exemption.<br><br>Of note, all of the HCSMs that were created prior to 1999 exclusively served members of certain Christian denominations. As such, restricting recognition of HCSMs to only the narrow sliver of Christian HCSMs that were created before 1999 is a prohibited "denominational preference" and violates the Establishment Clause of the First Amendment.<br><br>Furthermore, the 1999 restriction rewards HCSMs that use their religious orientation to discriminate against | The language requiring an HCSM to have been in operation since 1999 is in RCW 48.43.009. Legislative change would be necessary to eliminate that requirement.<br><br>With respect to the comment that the 1999 requirement is prohibited "denominational preference" and violates the Establishment Clause of the First Amendment, very similar constitutional challenges to the application of the federal HCSM criteria were addressed in *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 84 (4th Cir. 2013).<br><br>In *Lew*, the appellants alleged that the "arbitrary formation date of December 31, 1999 as the eligibility cutoff" was unconstitutional under the First Amendment's Establishment Clause. The court held that "even if the exemption's cutoff date is arbitrary, it is not unconstitutional. For neither the cutoff's text nor its history suggests any deliberate attempt to distinguish between particular religious groups." *Lew*, 733 F.3d at 102.<br><br>The Court explained in its ruling:<br><br>"[T]he date serves at least two 'secular legislative purpose[s].' … First, the cutoff ensures that the ministries provide care that possesses the reliability that comes with historical practice. Second, it accommodates religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act. The 'primary effect' of the cutoff accordingly 'neither advances nor inhibits religion.' *Id.* Further, given that it applies only secular criteria, the cutoff does not 'foster an excessive government entanglement with religion.'" *Lew*, 733 F.3d at 102. |

| *Comment* | *OIC Response* |
|---|---|
| unwed mothers, those with substance abuse problems, and members of the LGBTQ community. Sedera is one of the few sharing organizations that does not discriminate based on marital status, sexual orientation, or gender identity.<br><br>The 1999 requirement is an arbitrary date stamp, and does not serve as a harbinger of quality, only as an artificial constraint to competition and innovation, and serves to protect entities that either have gone to great lengths to acquire or merge with obscure ministries that were created before December 31, 1999, or are among the handful of organizations that were indeed created before the date cutoff.<br><br>(Sedera) | |
| **Definition of "certified public accounting firm"** | |
| (Comment to supplemental CR-102)<br><br>The rule has definitions for "certified public accounting firm" and "independent certified public accounting firm". Recommend using only one definition.<br><br>Solidarity HealthShare & Christian Health Care Ministries | The Commissioner appreciates this comment.<br><br>The final rule integrates the definition of "certified public accounting firm" into the definition of "independent certified public accounting firm" and clarifies that the accounting firm need not be licensed by all states, the District of Columbia and all U.S. territories. |
| **WAC 284-43-8220**<br>**Prompt reply to Commissioner** | |
| (Comment to second stakeholder draft)<br><br>Support enhanced oversight in this section. | The Commissioner appreciates the comment |

| *Comment* | *OIC Response* |
|---|---|
| (Patient Coalition of Washington) | |
| (Comment to first stakeholder draft)<br><br>The proposed New WAC 284-43-8220 prompt reply to the commissioner required, grants to the Commissioner broad and sweeping authority to demand disclosures from HCSMs on anything without any apparent pre-condition or constraint on the demand.<br><br>There is concern that such a requirement would enable what amounts to fishing exercises by the OIC. Not only would such fishing expeditions be arbitrary, but they would undermine the very intent of a safe harbor by forcing HCSMs that already comply with the safe harbor to respond to questions aimed not at protecting the interests of consumers, but at determining whether or not OIC has jurisdiction under RCW 48.43.009.<br><br>(Commonwealth Law Offices & Alliance of Health Care Sharing Ministries) | The OIC has authority to require such a response under RCW 48.42.010-40 and RCW 48.02.060(1)-(3).<br>The OIC does not conduct arbitrary investigations. The OIC's Regulatory Investigations Unit opens an investigation only when it has facts or circumstances that would lead a reasonable or prudent person to believe a subject is committing a violation of the insurance code. The OIC investigators ask the entity to provide documentation to show that it is a legitimate health care sharing ministry. If the entity is indeed legitimate, the requested documentation should be readily available.<br><br>Previous OIC investigations have identified significant violations of state law by entities that held themselves out to be legitimate HCSM's, or were engaged in marketing on behalf of HCSM's, including Aliera, OneShare and the Alliance for Shared Health.<br><br>Washington consumers continue to be harmed due to the bankruptcy of Sharity (previously Trinity), and the deceptive conduct of Aliera in marketing Trinity's product. See In re Aliera, In re Trinity HealthShare Inc., In re OneShare Health, LLC. |
| (Comment to CR-102)<br><br>OIC provides no statutory authority to justify placing this new requirement on HCSMs, nor does the rule explain the basis of OIC's jurisdiction over HCSMs generally.<br><br>(Alliance of Health Care Sharing Ministries) | As explained above, the only basis for an entity claiming to be an HCSM to be exempt from insurance regulation in Washington state is RCW 48.43.009, itself a provision of the Insurance Code. The Insurance Commissioner has authority over, and is explicitly authorized to implement, every portion of the Insurance Code, including RCW 48.43.009. *See* RCW 48.02.060(1),(2).<br><br>Further, given the number of entities claiming to be legitimate HCSMs in the last three years that have been found not to be such entities, and the number of consumers significantly harmed by entities improperly holding themselves out as HCSMs, the ability to |

| ***Comment*** | ***OIC Response*** |
| --- | --- |
| | quickly obtain information that demonstrates whether an entity is in fact an HCSM under RCW 48.43.009, or an unauthorized insurer under RCW 48.15.020, is necessary to protect consumers from those attempting to abuse the HCSM exemption in RCW 48.43.009. |
| (Comment to CR-102 & supplemental CR-102)<br><br>As currently drafted, the provision would place significant new burdens on HCSMs not only to respond to potentially open-ended inquiries from the commissioner, but to ensure that the commissioner *actually receives* the response within a very brief period of only 15 business days. Depending on the complexity of the inquiry, the level of information gathering or analysis required, and the available resources of the HCSM, compliance with this provision could impose significant burdens and costs. Therefore, even if OIC were determined to have authority to require HCSMs to respond to commissioner inquiries, we would urge OIC to extend the response time to at least 60 business days to provide HCSMs with a more appropriate amount of time to respond.<br><br>This proposed requirement is also vague, because it does not detail the level of specificity HCSMs will need to provide in order to satisfy the requirement. Should OIC move forward with finalizing this requirement, at a minimum, it should set forth (and seek public comment on) the following:<br><br>• The needed level of specificity in responses;<br>• A reasonable timeframe under which the commissioner will provide responses to HCSMs as | The Insurance Commissioner has explicit authority to conduct investigations into any potential violation of the Insurance Code. RCW 48.02.060(3)(b). If an HCSM does not meet the requirements of RCW 48.43.009, as implemented by the Insurance Commissioner under RCW 48.02.060(1)-(2), then they violate statutes such as RCW 48.15.020 and RCW 48.17.060. The Insurance Commissioner has statutory authority to adopt this rule.<br><br>Of ten HCSM investigations opened between 2018 and 2022, six of the entities responded to OIC's initial inquiry within less than twenty business days. The remaining entities responded in 21 business days, 22 business days, 25 business days and 43 business days respectively. Those whose response took more than 14 business days were granted extensions by OIC.<br><br>These investigations were initiated when the OIC identified facts or circumstances that would lead a reasonable or prudent person to believe a subject is committing a violation of the insurance code. The OIC investigators asked the entity to provide documentation to show that it is a legitimate health care sharing ministry.<br><br>As noted in the comment immediately below, in response to concerns expressed regarding the fifteen business day response period, the final rule extends the response period to 20 business days and authorizes response by electronic mail in order to minimize delay in transmission of responsive materials to OIC.<br><br>In addition, the OIC has discretion, when appropriate, to approve an extension to the response time. As indicated above, the OIC has granted extensions to response times. |

| *Comment* | *OIC Response* |
| --- | --- |
| well as the minimum content requirements of such responses;<br>• A sufficient opportunity for HCSMs to respond before any final agency determination is made; and<br>• A pathway for the HCSM to appeal any final determination by the agency.<br><br>(Alliance for Health Care Sharing Ministries) | Finally, RCW 48.04.010, WAC 284-02-070, and RCW 34.05 outline ways to request a hearing concerning decisions or orders issued by the OIC, and methods of appealing a final agency decision to Superior Court. |
| (Comment to supplemental CR-102)<br><br>The time period for response to OIC inquiry should be lengthened from 15 to 20 business days and note that response from HCSM can be via electronic mail.<br><br>Solidarity HealthShare & Christian Health Care Ministries | The Commissioner appreciates this comment.<br><br>The final rule extends the response period to 20 days and authorizes response by electronic mail.<br><br>In addition, the OIC has discretion, when appropriate, to approve an extension to the response time. As indicated above, the OIC has granted extensions to response times. |
| (Comment to CR-102 & supplemental CR-102)<br><br>We are concerned that, if finalized, this provision could violate the Free Exercise Clause of the United States Constitution. The provision is not neutral on its face and appears to single out faith-based HCSMs by imposing significant burdens in the requirement to respond to commissioner inquiries within a tight timeframe that is not generally applicable to other, non-religious entities who may run afoul of Washington state law, including RCW 48.05.030 (certificate of authority to act as an insurer/transact insurance) or RCW 48.15.020 (solicitation by unauthorized insurer). In other words, the proposed rule appears to single out | The rule's requirement for HCSM's to respond to OIC's inquiries is neutral and generally applicable when viewed in the context of statutes governing insurance in Title 48 RCW and OIC's regulatory role. *See* RCW 48.42.010-40; RCW 48.02.060(1)-(3).<br><br>OIC is responsible for investigating potential instances of entities offering unauthorized health insurance under RCW 48.02.060 and RCW 48.15.020, regardless of an entity's secular or religious affiliation. WAC 284-30-650 already requires insurers and health carriers to respond to inquiries from OIC related to any potential noncompliance with Title 48 RCW, and to provide their response within 15 days. OIC also applies this enforcement authority to any entity, whether religious or not, that is potentially engaged in the unauthorized sale of insurance in |

| ***Comment*** | ***OIC Response*** |
|---|---|
| HCSMs to require them to respond to commissioner inquiries within a certain time frame in a way that does not similarly apply to non-religious entities subject to RCW 48.05.030 and/or RCW 48.15.020. We note that, in the past, Washington courts have voided requirements that are not generally applicable and that place burdens on religious entities. We therefore strongly urge OIC to withdraw this provision.<br><br>(Alliance for Health Care Sharing Ministries) | Washington state. For example, OIC has pursued investigations against an entity that held itself out to be a single employer plan under the federal Employee Retirement Income Security Act (ERISA) (Medova Healthcare Financial Group) and against Health Plan Intermediary Holdings for the sale of unauthorized discount medical plans and insurance products in Washington state. OIC is applying its regulatory oversight and the time entities under investigation are given to provide responses to OIC inquiries, to both secular and religious entities in a neutral and generally applicable manner. |
| **WAC 284-43-8230**<br>**Continuously sharing medical expenses** | |
| (Comment to first stakeholder draft)<br><br>An HCSM only qualifies under § 5000A(d)(2)(B)(ii) if "the medical expenses of the members of the HCSM (and its predecessor, if any) "have been shared continuously and without interruption since at least December 31, 1999."<br><br>OIC's proposed WAC 284-43-8230 would add two requirements: (i) there must be sharing "between members of the predecessor organization and [members of] its successor organization" and (ii) "members of the predecessor organization must share medical expenses with all new members."<br><br>Nothing in the language of § 5000A(d)(2)(B)(ii), which focuses on continuity of the entity and its sharing activities, supports these additional requirements. Specifically, nothing in §5000A(d)(2)(B)(ii) requires that members of a sharing community administered by the predecessor | As discussed above, the Office of the Insurance Commissioner has the authority to interpret statutory terms in Title 48 RCW.<br><br>Through this WAC, OIC provides its interpretation of "shared continuously and without interruption" when there is a predecessor organization. In order to give meaning to "shared continuously and without interruption" a successor organization must take over the medical expense sharing of the predecessor organization.<br><br>As discussed above, OIC has defined predecessor to mean: an organization that was acquired, merged with, or otherwise replaced by a successor organization, and the predecessor no longer shares medical expenses."<br><br>In response to this comment, OIC removed "all" from proposed WAC 284-43-8230 in the CR-102, as sharing with "all new members" is not necessary for this criterion to be satisfied. |

| ***Comment*** | ***OIC Response*** |
|---|---|
| share medical expenses of every member of a sharing community administered by the successor (or, for that matter, of a distinct sharing community administered by the predecessor). To the contrary, § 5000A(d)(2)(B)(ii) dictates only that member medical expenses have been shared continuously and without interruption; it does not dictate which other members of the HCSM (or its predecessor) must share in any particular member's medical expenses.<br><br>(Alliance of Health Care Sharing Ministries) | |
| (Comment to first stakeholder draft)<br><br>OIC's proposed rule incorrectly and without statutory authority requires an HCSM to administer only one sharing community. We oppose this rule and do not support any interpretation of "shared continuously and without interruption" that precludes ministries from administering distinct sharing communities.<br><br>(Alliance of Health Care Sharing Ministries) | The OIC's rule is not intended to prevent a single HCSM from creating subgroups of members, as long as all members of the HCSM, regardless of how the HCSM subdivides its members, "share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed," and all members of the HCSM "retain membership even after they develop a medical condition."<br><br>The purpose of this rule is to determine whether a purported HCSM genuinely meets the statutory criteria, such as the continued sharing of medical expenses. Its purpose is not to regulate the internal operations or affairs of entities that meet the statutory criteria.<br><br>For example, divisions based on the state in which the member resides or is employed, would be impermissible, as those divisions are expressly prohibited under 26 USCA § 5000A. For example, Washington and Oregon members cannot be pooled separately from California and Arizona members. |
| (Comment to first stakeholder draft) | It is OIC's understanding that "offshoot churches" are new churches that are separate |

| *Comment* | *OIC Response* |
|---|---|
| Regarding the use of the word “all” in continuously sharing. Offshoot churches are continuously sharing. | legal entities from a prior church. Formation of a new church is distinct from a new or existing HCSM. The only entities that are relevant to this analysis are HCSM organizations and their predecessors. An HCSM may be a separate legal entity from the church. An HCSM must meet the federal requirements, including it (or its predecessor) being in existence since 1999. Members of offshoot churches may participate in the HCSM of their “parent church” without the formation of a new HCSM.<br><br>OIC removed “all” from proposed WAC 284-43-8230, as sharing with “all members” is not necessary for this criterion to be satisfied. In all cases, the HCSM organization must have shared member medical expenses continuously and without interruption. Whether HCSMs consist of members of multiple churches or not, the HCSM organization must meet this criterion. |
| (Comment to first stakeholder draft)<br><br>The language of WAC 284-43-8230 essentially makes it a tool to abolish all HCSMs by the mere passage of time. If the Commissioner actually intends that “members of the predecessor organization must share medical expenses with all new members,” then when the last member of the predecessor organization dies or drops off, the successor organization could no longer come within the language of the Rule.<br><br>(Commonwealth Law Offices) | The Commissioner appreciates this comment.<br><br>This rule is meant to address the merger of a predecessor and successor organization so that the requirement that the sharing of medical expenses be continuous and without interruption is met. It is understood that once the successor organization takes over, the predecessor members will become members of the successor organization, and the continuous sharing requirement will be met even if the members of the predecessor organization pass away.<br><br>In response to this comment, OIC added “at the time the successor organization takes over the predecessor’s medical expense sharing activities” to proposed WAC 284-43-8230 in the CR-102. |
| (Comment to first stakeholder draft)<br><br>“sharing . . . between members of a predecessor and its successor,” Literally this refers to members of one entity sharing with another entity (rather | The Commissioner appreciates this comment.<br><br>Edits were made in the proposed rule language to address these concerns and clarify the language. |

| ***Comment*** | ***OIC Response*** |
|---|---|
| than its members), which is vague and confusing.<br><br>(Samaritan Ministries) | |
| (Comment to first stakeholder draft)<br><br>For a member to ever literally share with “all” other members is impossible for an organization of any significant size, as well as some members never have a need to share.<br><br>(Samaritan Ministries) | The Commissioner appreciates this comment.<br><br>As noted above, OIC removed “all” from proposed WAC 284-43-8230, as sharing with “all members” is not necessary for this criteria to be satisfied. |
| (Comment to first stakeholder draft)<br><br>What is meant by “new”? New to what? How does that apply to different fact patterns? If a successor already had members when it took over a predecessor’s sharing activities, are all of the successor members at the time of the takeover considered “new”? Or only “new” members coming in after the takeover? What if the successor has no “new” members?<br><br>What if some members of the predecessor stay with the predecessor?<br><br>(Samaritan Ministries) | In response to this comment, OIC deleted the term “new,” in the proposed rule language, as the successor members do not need to be new.<br><br>OIC also added the phrase “if any” to the proposed rule to address the situation in which a successor does not have members.<br>With respect to some members of the predecessor organization staying with that organization, under the definition of “predecessor” in the proposed rule the predecessor organization would be acquired, merged or otherwise replaced by the successor organization. Thus, members would not remain with the predecessor organization. |
| (Comment to CR-102)<br><br>Proposed WAC-284-43-8320 would require that “remaining predecessor organization members must share medical expenses with successor organization members, if any, at the time the successor organization acquires, merges with, or otherwise replaces the predecessor’s medical expense sharing activities.”<br><br>We appreciate OIC removing the language from the earlier stakeholder draft that would have required members | As discussed above, the Office of the Insurance Commissioner has authority to interpret statutory terms in Title 48 RCW.<br><br>Also as discussed above, the term “all” has been removed.<br><br>The OIC’s rule is not intended to prevent a single HCSM from creating subgroups of members, as long as all members of the HCSM, regardless of how the HCSM subdivides its members, “share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without |

| ***Comment*** | ***OIC Response*** |
|---|---|
| of a sharing community administered by a predecessor to share medical expenses of *all* new members of a sharing community administered by the successor.<br><br>Section 5000A(d)(2)(B)(ii) requires only that member medical expenses have been shared continuously and without interruption; it does not dictate *which* other members of the HCSM (or its predecessor) must share in any particular member's medical expenses. Therefore, OIC has no authority to impose this additional requirement, which will again create a conflict with federal law. If this is not the intent, we nevertheless request that OIC remove the provision since it could cause significant confusion.<br><br>As a practical matter, HCSMs sometimes split off members into different groupings that do not share medical expenses between each other. This may be done, for example, for purposes of pilot testing quality improvements, technology platform testing, rolling out member experience improvements, other programmatic changes, imposing a requirement that could inhibit innovation among HCSMs. We therefore again request that this additional requirement be removed, or at a minimum, that language be included that gives HCSMs the ability to administer different groupings of members for quality improvement and beta testing purposes.<br><br>(Alliance of Health Care Sharing Ministries) | regard to the State in which a member resides or is employed," and all members of the HCSM "retain membership even after they develop a medical condition."<br><br>The purpose of this rule is to determine whether a purported HCSM genuinely meets the statutory criteria, such as the continued sharing of medical expenses. Its purpose is not to regulate the internal operations or affairs of entities that meet the statutory criteria.<br><br>For example, divisions based on the state in which the member resides or is employed, would be impermissible, as those divisions are expressly prohibited under 26 USCA § 5000A. For example, Washington and Oregon members cannot be pooled separately from California and Arizona members. |
| **Additional actions OIC should take** | |
| (Comment to first stakeholder draft & second stakeholder draft) | Thank you for your comment. At this time, the OIC is not conducting rulemaking on these issues. |

| *Comment* | *OIC Response* |
|---|---|
| Increase transparency and data reporting for HCSM's<br><br>HCSMs should be required to disclose plan data, marketing practices, broker incentives, enrollment information, and complaint information to state and federal regulators.<br><br>Specifically, state regulators must have information on HCSMs marketing in their states in order to evaluate whether their operations constitute the business of insurance, to watch for deceptive marketing, and to monitor enrollment.<br><br>(Patient Coalition of Washington) | |
| (Comment to first stakeholder draft & second stakeholder draft)<br><br>Prohibit sales of HCSMs through brokers<br><br>Using brokers to enroll members in HCSM contributes to consumer confusion and increases enrollment in inadequate coverage. Marketing tactics, including advertising during open enrollment for ACA plans, the use of brokers to sell memberships, and claims that HCSMs are a low-cost alternative, suggest HCSMs are not just targeting individuals who would never buy commercial insurance for religious reasons. The pursuit of non-religiously affiliated individuals indicates that some HCSMs are deviating from the statutory intent of current law to expand their market share. As such, our organizations would be supportive of efforts to prohibit brokers from selling HCSMs and other insurance-like products.<br><br>(Patient Coalition of Washington) | Thank you for your comment. At this time, the OIC is not conducting rulemaking on these issues. |

| *Comment* | *OIC Response* |
|---|---|
| (Comment to first stakeholder draft & second stakeholder draft)<br><br><u>Improve consumer disclosure of HCSM limitations</u><br><br>Many consumers may not understand the limitations of HCSMs and may erroneously believe that these products provide comprehensive coverage. While disclosure alone is not an adequate solution to the risks posed by the proliferation of HCSMs, we urge the OIC to require HCSMs to provide full disclosures in consumer-friendly language regarding the limitations of coverage. Consumer disclosure should be provided both in writing and verbally; be available in a number of commonly spoken languages for any geographic area and conveyed in a culturally competent manner; be of sufficient font size using bold text and boxes to aid consumers in identifying critical information and ensure readability; explicitly say that a HCSM plan is not comprehensive, including a list of essential health benefit services that are not provided.5<br><br>(Patient Coalition of Washington) | Thank you for your comment. At this time, the OIC is not conducting rulemaking on these issues. |
| OIC could require that HCSMs:<br><br>• Provide a written disclaimer that the organization is not an insurance company<br>• Provide a written monthly statement to participants listing: (a) the total dollar amount of qualified needs submitted to the HCSM; and (b) the amount assigned to participants for their contribution<br>• Submit to an annual state audit or make the results of an independent audit public. | Thank you for your comment. At this time, the OIC is not conducting rulemaking on these issues. |
| **Effective date of rule** | |

| *Comment* | *OIC Response* |
|---|---|
| | |
| (Comment to CR-102 & supplemental CR-102)<br><br>Request that OIC clarify the intended effective date of the rule. In order to provide sufficient time for HCSMs subject to the rule to establish new policies and procedures necessary to come into compliance, we request that the OIC delay the effective date to occur at least 120 days following issuance of any final rule.<br><br>(Alliance of Health Care Sharing Ministries) | The presumption in the Washington state Administrative Procedure Act is that rules become effective upon the expiration of thirty days after the date of filing, unless a later date…is specified in the order of adoption. RCW 34.05.380(2).<br><br>OIC considered whether to delay the effective date of the rule beyond the presumed thirty days after the date of filing, and determined that additional time is unnecessary. The response times to previous OIC inquiries to entities holding themselves out as HCSM's in Washington state, even prior to adoption of this rule, has been 15 to 43 business days. Those whose response took more than 14 business days were granted extensions by OIC.<br><br>OIC's previous inquiries to HCSM's generally began by seeking information showing that the entity meets the definition of a HCSM. The overwhelming majority (80%) of HCSMs had this information sufficiently available to provide it to the OIC within less than 30 days. Based upon this experience, it is likely that any HCSM that OIC might be sending an inquiry to will have access to documentation necessary to respond to the inquiry already on hand or within a reasonable amount of time, and well within the 30 days it will take for this rule to become effective.<br><br>Further, as noted above, OIC has discretion to grant extensions to response times. Given this experience, OIC does not anticipate that an extended period of time will be required for HCSM's to establish new policies and procedures to come into compliance. |
| **Administrative Procedure Act and Regulatory Fairness Act** | |
| (Comment to CR-102)<br><br>OIC lacks authority to interpret RCW 49.43.009 in the manner proposed, but even if such authority were determined to exist, the proposed rule does not | OIC prepared and made available a preliminary CBA and a detailed explanation of the applicability of the SBEIS exemption with issuance of the supplemental CR-102 in this rulemaking. |

| *Comment* | *OIC Response* |
|---|---|
| qualify for exemption from the requirements of either the Washington Administrative Procedure Act (APA). The proposed rule does not qualify for an exemption under RCW 34.05.328(5)(b)(iii) or (v).<br><br>(Alliance for Health Care Sharing Ministries) | |
| **Cost benefit analysis** | |
| (Comment to the supplemental CR-102 and draft cost benefit analysis)<br><br>The Cost Benefit Analysis accompanying the proposed rule fails to demonstrate that the benefits of the rule outweigh the costs and likely significantly underestimates the burdens associated with the rule's requirements.<br><br>To gather data on the number of HCSMs actively operating in Washington and the extent of consumer confusion, the analysis examined consumer inquiries to OIC from May 2020 to February 2022, a twenty-two month time period. It is unclear why this particular time period was selected; furthermore, the analysis provides no sense of the volume of consumer inquiries related to other, non-HCSM entities regulated by OIC. For example, the analysis provides no discussion of consumer inquiries or complaints regarding health insurers for purposes of comparison. However, it appears that over a span of nearly two years, OIC received only a small number (16) of inquiries from consumers who expressed confusion regarding HCSMs. The analysis admits that it is difficult to ascertain or quantify the benefits of the proposed rule given the lack of available data. We agree. While consumer inquiries should be taken | The OIC's primary mission is consumer protection. The agency appropriately uses consumer complaints to point the agency to not only individual entities that might merit further investigation, but also broader issues that merit further action by the agency. Consumer complaints inform OIC's rulemaking, legislative proposals and staff and consumer education activities, as well as investigations and enforcement.<br><br>While OIC actively encourages consumers to submit complaints to the agency, we are well aware that submitted complaints represent only a subset of consumers who have experienced problems with access to or payment for health services through their health insurance, or in this case, health care sharing ministry. Relative to the number of complaints the agency receives, the volume of consumer complaints noted in the draft CBA is not insignificant over a two-year period.<br><br>OIC chose a recent period of time to provide the most current incidence of HCSM-related consumer complaints.<br><br>The final cost-benefit analysis for this rule, dated July 20, 2022, compares the total number of HCSM complaints received by OIC to those involving individual market health plans. OIC chose this comparison as HCSM and individual health plan purchases involve what is largely a purchasing decision made by an individual. That analysis found that while 1.9% of consumer members of HCSM's submitted inquires or complaints to the OIC, |

| *Comment* | *OIC Response* |
|---|---|
| seriously, it could be that a more cost-effective alternative to the approach proposed rule could be to simply investigate consumer complaints rather than compel HCSMs and other entities to respond to inquiries in writing. Consumer complaints could serve as the basis for further investigation, including inquiries, of potential violations, without the need for new regulations. However, there is insufficient information or discussion provided by the analysis to fully assess various alternatives.<br><br>In addition, neither the analysis nor the proposed rule provides any clarity on the scope of Commissioner inquiries. Such inquiries could be highly complex and could require significant data gathering, compilation, and professional skill and judgment in interpreting and harmonizing inquiries with available data. As currently drafted, the provision would place significant new burdens on HCSMs not only to respond to potentially open-ended inquiries from the Commissioner, but to ensure that the Commissioner *actually receives* the response within a very brief period of only 15 business days. Depending on the complexity of the inquiry, the level of information gathering or analysis required, and the available resources of the HCSM, compliance with this provision could impose significant burdens and costs. We again urge OIC to extend the response time to at least 60 business days to provide HCSMs with a more appropriate amount of time to respond.<br><br>Again, the proposed rule provides no examples of the scope or number of inquiries likely to be posed by the Commissioner under this rule; it is highly unlikely that OIC will limit itself to a single inquiry per year as | 0.62% of individual health plan enrollees did so. Thus, the rate of complaints related to HCSM's, as a percentage of consumers enrolled in HCSM's was approximately three times higher than those submitted by individual health plan enrollees, as a percentage of consumers enrolled in individual health plans. The higher volume of consumer inquiries or complaints related to HCSM's in comparison to fully insured individual health plans justifies OIC's scrutiny of entities claiming to be legitimate HCSM's.<br><br>With respect to the scope of OIC inquiries, the OIC's Regulatory Investigations Unit opens an investigation when it has facts or circumstances that would lead a reasonable or prudent person to believe a subject is committing a violation of the insurance code. OIC investigations into previous consumer complaints have typically begun by asking the entity to provide documentation to show that it is a legitimate health care sharing ministry. If the entity is indeed legitimate, the requested documentation should be readily available. Because this question is the beginning point for the investigation of a consumer complaint concerning an HCSM, "investigating consumer complaints" does not provide a more cost effective option. This is precisely what the OIC has done for the past four years. This rule will help clarify that all HCSMs operating in Washington State may be asked for information, beginning with information demonstrating that they are in fact an HCSM, and that this information must be promptly provided. This will hopefully ensure that HCSM's will have ready access to information demonstrating that the entity is a legitimate HCSM.<br><br>The final cost-benefit analysis for this rule, dated July 20, 2022, provides descriptive information regarding the number of HCSM investigations OIC opened in 2021. In that year, the OIC issued 8 inquiries to different health care sharing ministries operating in Washington state. Given that more than 8 |

| *Comment* | *OIC Response* |
| --- | --- |
| contemplated by the cost benefit analysis.<br><br>Further, it is entirely unclear how, on its own, the rule promotes transparency and reduces consumer confusion. Because neither the rule nor the cost benefit analysis discusses what kind of inquiries the OIC is likely to make, what information will be required, or how such information will be shared with consumers, if at all, the purported benefits of the rule are tenuous at best.<br><br>Finally, while the analysis cites HCSM members as being "fiscally affected" by the rule, it fails to address the higher administrative and financial costs that complying with the rules may ultimately impose on HCSM members, reducing the affordability of this option for their healthcare needs. HCSMs will likely have to increase their administrative costs in order to comply with the rule, which could result in some HCSM members paying more or being forced to drop their membership altogether.<br><br>Rather than rushing to finalize this rule, OIC should undertake to gather additional key data needed to conduct a proper cost benefit analysis, including better ascertaining the number of active HCSMs in the state, actual costs of compliance, and better quantifying the benefits to consumers. It appears that, should the rule be finalized, its costs will likely greatly outweigh its slight benefit to consumers.<br><br>(Alliance of Healthcare Sharing Ministries) | ministries operate in the state, it is highly unlikely that each health care sharing ministry will receive an inquiry each year. The OIC was unable to determine exactly how many ministries operate in Washington, however by examining consumer inquiries and health care sharing ministries that are associated with the Alliance of Health Care Sharing Ministries and offer memberships nationally, we estimate that at least 14 ministries sell health care sharing ministry memberships in Washington. According to the Alliance of Health Care Sharing Ministries' website, there are 108 health care sharing ministries that meet the federal definition, indicating that there are likely more than 14 operating in Washington. health care sharing ministry.<br>Given the limited number and scope of OIC investigations of HCSM's, this rule would not impose new administrative or financial costs on HCSM's that would result in the need to shift costs onto HCSM members.<br><br>Further, this rule will contribute to greater transparency by providing a clear requirement and timeline for HCSM's to respond to OIC inquiries. This will allow the OIC to efficiently confirm whether an entity is a legitimate HCSM, or another bad actor attempting to enter the Washington market. When the Commissioner can promptly address the status of a potential HCSM, consumers can more promptly understand the nature of the HCSM, and their options for addressing any concerns. |
| (Comment to supplemental CR-102)<br><br>OIC has not complied with, nor does the preamble to the proposed rule even address, RCW 34.05.328(1)(h), which requires agencies to: | RCW 34.05.328 does not require that agencies produce all of the materials supporting their determinations in subsection 1(h) prior to the rule hearing. This determination and supporting documents must be included in the rule file. |

| Comment | OIC Response |
| --- | --- |
| Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:<br>(i) A state statute that specifically allows the agency to differ from federal standards; or<br>(ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and (i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.<br><br>We are aware of no exemptions to this statutory requirement. In this instance, we are further unaware of any state statute specifically allowing the agency to issue standards differing from federal standards. Therefore, OIC must present the "substantial evidence" required in RCW 34.05.328(1)(h)(ii). In light of the clear language in 48.43.009 directing OIC to give HCSM the same meaning as the federal definition, and the APA language cited above requiring OIC to justify any difference with federal standards absent statutory language *specifically* allowing the agency to differ from those standards, OIC should again, at minimum, withdraw the proposed rule and take steps to comply | The OIC notes that this rulemaking does not relate to the same subject matter or activity as the federal health care sharing ministry statute. The definition of HCSM in Washington state law is used for a different purpose in this rulemaking than its purpose under the Affordable Care Act. The use of the definition of HCSM's in the Affordable Care Act relates to whether an individual is obligated to pay the personal responsibility penalty under the ACA. The definition of HCMS in this rule is used for a fundamentally different purpose, i.e. to determine whether an entity qualifies as a HCSM and is thus exempt from regulation as an insurer in Washington state. The issue here is the structure and practices of the entity and how the entity holds itself out to the public.<br><br>This rule is necessary because of the violations that OIC identified through its investigations of Aliera, OneShare and the Alliance for Shared Health. Washington consumers continue to be harmed due to the bankruptcy of Sharity (previously Trinity). OIC's primary responsibility is consumer protection. OIC investigations and enforcement actions taken to date related to entities holding themselves out as and marketing themselves as HCSM's justifies the clarification of terms used in the federal definition that is referenced in state law. See In re Aliera, In re Trinity HealthShare Inc., In re OneShare Health, LLC.<br><br>Further, as noted above, this rule is consistent with the federal definition of the terms "predecessor" and "successor" that are broadly applicable to all entities that apply for 501(c)(3) status, as found in IRS Form 1023, and the Instructions for Form 1023. It is narrower than those broadly applicable terms, to be consistent with the definition and limits found in the federal definition of an HCSM as codified in 26 USCA § 5000A. |

| *Comment* | *OIC Response* |
| --- | --- |
| with RCW 34.05.328(1)(h) prior to proceeding.<br><br>(Alliance of Health Care Sharing Ministries) | |
| **Small business economic impact statement** | |
| (Comment to the supplemental CR-102 and draft cost benefit analysis)<br><br>The proposed rule does not qualify for an exemption from the Regulatory Fairness Act (RFA).<br><br>Again, the proposed rule adds to the federal definition of an HCSM as it has been incorporated into state law, which is also inconsistent with the exemptions provided in RCW 19.85. Furthermore, the proposed new WAC-284-43-8220 ("Prompt reply to the commissioner required") fails to satisfy RCW 34.05.310(4)(d), since it goes beyond merely correcting or clarifying existing language by placing entirely new requirements on HCSMs to respond to OIC inquiries within a certain timeframe.[2] In addition, the proposed rule would impose new costs and burdens on HCSMs and could increase the burden of member participation in HCSMs in the future, which will have a negative impact on those Washington small employers that participate in HCSMs. Therefore, at a minimum, OIC should withdraw the proposed rule and prepare a SBEIS in accordance with the RFA.<br><br>As stated above, the actual cost of complying with the rule is likely many times higher than the figures included in the analysis. It is also likely there are a | The OIC has complied with the requirements of the Regulatory Fairness Act to date, by providing a SBEIS exemption explanation and preliminary CBA.<br><br>As described above with respect to comments to the preliminary cost-benefit analysis, and in OIC's SBEIS exemption explanation, OIC's HCSM investigative activity to date does not indicate that the actual cost of complying with the rule will be many times higher than the figures included in the analysis. To the extent that there are HCSMs operating in Washington that would fall under the threshold for being considered a small business, the rule would not result in more than minor costs. In addition, small employers who purchase HCSM shares are not regulated under the rule; thus the Regulatory Fairness Act does not require OIC to assess the cost impact on those employers.<br><br>None of the HCSMs or HCSM associations that provided comments to this rule provided data demonstrating that the OIC's assumptions in the preliminary CBA were inaccurate. |

[2] See RCW 19.85.025(3).

| *Comment* | *OIC Response* |
|---|---|
| number of HCSMs operating in Washington that would fall under the threshold for being considered a small business, for which there would be more than minor costs.<br><br>The proposed rule would not only impose significant new costs and burdens on HCSMs, but will also likely increase the burden and cost of member participation in HCSMs in the future, which will have a negative impact on those Washington small employers that participate in HCSMs. Yet the SBEIS contains no discussion or analysis of the impact of the rule on HCSM members that are small businesses, nor does it contain any discussion or analysis of how to reduce costs of compliance with the rule on impacted small businesses as required by RCW 19.85.030(2).<br><br>Thus, OIC should withdraw the proposed rule and further analyze the impact of the rule on small businesses, including those that are members of HCSMs. In addition, as called for by RCW 19.85.040, OIC should conduct a survey of affected businesses and consider appointing a committee under RCW 34.05.310 to assist in the accurate assessment of the costs of the proposed rule as well as explore means to reduce the costs imposed on small business.<br><br>(Alliance of Health Care Sharing Ministries) | |

# Section 6: Implementation Plan

## A. Implementation and enforcement of the rule.

As described below, implementation of the rule will occur through numerous activities at OIC. The Legal Division's investigations unit will rely on this rule when determining whether to initiate an investigation of a HCSM and during any such investigation. The Legal Division will rely upon the rule in determining whether enforcement action is appropriate. The Consumer Affairs Division will continue to respond to consumer complaints related to HCSM's. Through these complaints, OIC will monitor the impact of implementation of the rule.

**B. How the Agency intends to inform and educate affected persons about the rule.**

OIC Policy staff will distribute the final rule and the Concise Explanatory Statement (CES) to all interested parties by posting and sharing the documents through the OIC's standard rule making listserv and emailing the documents to stakeholder participants. The OIC Rules Coordinator will post the CR-103 documents on the OIC's website.

| Type of Inquiry | Division |
|---|---|
| **Consumer assistance** | Consumer Advocacy Program |
| **Rule content** | Policy Division |
| **Authority for rules** | Legal Division |
| **Enforcement of rule** | Legal Division |

**C. How the Agency intends to promote and assist voluntary compliance for this rule.**

OIC will respond to inquiries from entities that plan to or are acting as health care sharing ministries in Washington state. This will provide these entities with an opportunity to fully understand and comply with these rules. OIC also stands ready to meet with organizations such as the Alliance of Health Care Sharing Ministries to respond to questions and share perspectives on implementation of the rule.

**D. How the Agency intends to evaluate whether the rule achieves the purpose for which it was adopted.**

The goal of the laws implemented through this rulemaking is to ensure that entities holding themselves out as health care sharing ministries in Washington state are legitimate entities. OIC will monitor for consumer complaints related to HCSM's and will review the outcome of HCSM investigations undertaken pursuant to this rule.

## Appendix A

### CR-102 Hearing Summary

<table>
<tr><td>

**Summarizing Memorandum**

**To: Mike Kreidler**<br>**Insurance Commissioner**

**From: Jane Beyer**<br>**Presiding Official, Hearing on Rule-making**

</td></tr>
<tr><td>

**Matter No. R2021-17**

</td></tr>
<tr><td>

**Topic of Rule-making:** Health Care Sharing Ministries

</td></tr>
<tr><td>

This memorandum summarizes the hearing on the CR-102 for the above-named rule making, held on November 24, 2021 at 3:30pm via Zoom, due to the COVID-19 public health emergency, over which I presided in your stead.

The following agency personnel were present: Tabba Allam, Jane Beyer, Simon Casson, Savanna Cavalletto, Darryl Colman, Ariele Page Landstrom and Bryon Welch.

**In attendance:**

Jennifer Dyrseth, Olympic Medical<br>Shera Evans, Sedera<br>Thomas Gibson<br>Keith Hopkinson<br>Sara Kofman, Leukemia and Lymphoma Society<br>Joel Noble, Samaritan Ministries<br>Melissa O'Reilly, Sedera<br>Randy Pate, Randolph Pate Advisors<br>Katy Talento, Alliance for Health Care Sharing Ministries

</td></tr>
<tr><td>

**Contents of the presentations made at hearing:**

Testimony was presented by Katy Talento (Alliance for Health Care Sharing Ministries) and Randy Pate (Randolph Pate Advisors):

</td></tr>
</table>

OIC does not have authority to issue rules that differ from the federal interpretation of the definition of health care sharing ministry in federal law. RCW 48.43.009 abrogates OIC authority to modify the terms of federal definitions. Concerned regarding definitions of “predecessor” and “continuously sharing medical expenses” as the proposed rule language conflicts with federal interpretation of the federal statute. These terms have been defined in federal regulation and guidance contrary to the definitions in the WAC.

OIC does not have authority to promulgate a rule requiring prompt response to inquiries from OIC. This imposes a significant burden on religious entities and violates the Free Exercise Clause of the U.S. Constitution. The requirement to respond to OIC inquiries is not generally applicable to other non-religious entities and this raised constitutional questions.

In addition, fifteen business days is too short a period for a response, e.g. fact-gathering or analysis could be needed. If OIC does maintain this provision in the rule, the response time should be extended to at least 60 business days.

The rule does not qualify for exemptions from SBEIS and CBA under the Administrative Procedures Act and Regulatory Fairness Act. Both a cost-benefit analysis and a small business impact statement should be prepared.

Request that OIC clarify the intended effective date of the rule. The effective date of the rule should be delayed to 120 days following adoption any final rule.

**The hearing was adjourned.**

*SIGNED this 24th day of November 2021*

*_ Jane Beyer__________*
*[NAME], Presiding Official*

**Appendix B**

**Supplemental CR-102 Hearing Summary**

## Summarizing Memorandum

**To: Mike Kreidler**
**Insurance Commissioner**

**From: Jane Beyer**
**Presiding Official, Hearing on Rule-making**

**Matter No. R2021-17**

**Topic of Rule-making:** Health Care Sharing Ministries

This memorandum summarizes the hearing on the Supplemental CR-102 for the above-named rule making, held on May 26, 2022 at 2pm via Zoom, due to the COVID-19 public health emergency, over which I presided in your stead.

The following agency personnel were present: Jeff Baughman, Kim Tocco, Bryon Welch, Jesse Wolff and Marta DeLeon, Assistant Attorney General.

**In attendance:**

Shera Evans, Sedera
Cara Helmer, Washington State Hospital Assn.
Jane Hogland
William Hogland
Becky Littke, Skagit Regional Health
Melissa O'Reilly, Sedera
Joel Noble, Samaritan Ministries
Jessica Rowlett, Careington
Katy Talento, Alliance for Health Care Sharing Ministries

**Contents of the presentations made at hearing:**

Testimony was presented by Katy Talento (Alliance for Health Care Sharing Ministries) and Joel Noble (Samaritan Ministries):

Katy Talento, Alliance of Health Care Sharing Ministries: Appreciate the multiple opportunities to comment. OIC has not made substantive changes to earlier drafts of the rule or proposed rule. OIC does not have authority to issue

rules that differ from federal interpretation of the federal definition of “health care sharing ministry” – RCW 48.43.009 abrogates OIC authority to modify the terms of federal definitions.

The Alliance has concerns regarding the small business economic impact statement (SBEIS), which does not recognize that some HCSM’s themselves are small businesses. At least one Alliance member is a small business. 98 of the 107 HCSM’s nationally are very small.

As Alliance members have responded to inquiries from state regulators around the nation, some have been very extensive, requiring the HCSM to obtain outside counsel. Obtaining counsel takes a significant amount of time.

Given that the rule doesn’t specify the breadth of potential OIC inquiries, the timeliness standard is problematic. The preliminary cost-benefit analysis (CBA) is flawed because the type of inquiries that will occur are not sufficiently described.

This hearing is on May 26 and the proposed effective date is too soon. The adoption of the final rule should be delayed to allow additional time for OIC to consider comments that have been submitted. Also, the Alliance asks that the effective date of the rule be clarified.

Joel Noble, Samaritan Industries: Samaritan has a technical issue regarding the definition of “annual audit” in the proposed rule. Samaritan would ask that the annual audit be allowed to occur on a fiscal year or calendar year basis, rather than only on a calendar year basis. Samaritan and some other HCSM’s operate on a fiscal year basis.

**The hearing was adjourned.**

*SIGNED this 26th day of May 2022*

*_ Jane Beyer__________*
*[NAME], Presiding Official*