Peick | Conniff P.S.
A Pacific Northwest Law Firm
P.O. Box 7933
Tacoma, Washington 98406-7933
Tel. #253-759-7767 Fax. #253-761-5328

John S. Conniff
john@conniff.com

November 10, 2006

Pete Cutler, Deputy Commissioner Policy
Washington Office of Insurance Commissioner
P.O. Box 40255,
Olympia, Washington 98504-0255

Dear Pete,

I am writing on behalf of the Washington State Farm Bureau (WFB) to express opposition to the recently proposed Technical Advisory (TAA) governing association health plan rates. The WFB provides health plan benefits through a fully insured program underwritten by Regence and administered by the WFB Health Care Trust, a tax exempt employee benefit trust.

The proposed TAA affects the members of the WFB and violates a longstanding exemption from rate regulation that associations have used to craft successful health plans for Washington farmers and ranchers. The WFB disagrees with both the policy and the legal authority for the proposed action. As attorney for the WFB in this matter, I am writing to express the legal concerns of the WFB.

The Office of Insurance Commissioner (OIC) proposes "to assist carriers in complying with RCW 48.43.035(1), RCW 48.43.025(3), and the Health Insurance Portability and Accountability Act ("HIPAA") as they apply to health benefit plans issued to groups such as Associations." The OIC states that:

> Carriers may not use health status-related information in offering coverage to or setting premiums for an employer or employee member of an Association. Health status-related factors may be considered only to determine whether the carrier will accept the Association as a group or in setting rates for the Association as a whole. Thus, while it is permissible to use health status-related information to determine the rate charged to the entire Association, ***it is not permissible to develop rates for the subset of members based in any way on the health status of the members and their enrollees.*** [TAA at 2, footnotes omitted]

Thus, the WFB Trust could not set the rates of small group members of the Trust in accordance with the health or claims experience of the small group member. The Trust would be required to charge just as much for low risks as for high risks. This type of rating is precisely the reason for current market dysfunction and the reason why associations sought and obtained an exemption from community rating laws. Associations could consider non-health factors such as employer demographics but the TAA does not mention gender rating which associations would continue to use even under the TAA.

The effect of the TAA is to change the meaning of the statutory exemption from the small group community rating law that associations obtained from the Legislature over ten years ago:

> (2) 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 [the small group community rating standards that prohibit rates based upon sex or health status]. [RCW 48.44.024(2)]

The Legislative act exempting associations from the "small group" community rating law makes no sense if the association isn't even subject to the law because OIC believes the association to be a "large group." If the OIC interpretation is correct, to whom does the "small group" exemption apply since there is no "large group" community rating law? Under what circumstances would an association invoke the exemption? The demonstration of the flaw in the OIC position becomes obvious when you consider that the exemption is unnecessary under the OIC interpretation.

The OIC builds its case in part, upon the federal law governing health insurance discrimination and portability known commonly as HIPAA. The OIC states that it is applying HIPAA non-discrimination standards to Washington insurers and association plans.

In fact, HIPAA explicitly allows health plans to set rates based upon health status of employers including small employer members of associations. The OIC sidesteps this federal standard by declaring that associations are "large groups" and those small employer members are more like "employees" of the "large employer". In contrast, the Centers for Medicare and Medicaid Services (CMS), the implementing agency for parts of HIPAA, has through recent bulletins made it clear that state law does not determine the group type [large or small] or even whether a group exists for ERISA or HIPAA purposes. CMS has not adopted the OIC "large group" fiction.

CMS has taken a position directly contrary to the OIC position. CMS considers small employer association members to have separate plans each subject to HIPAA. CMS has declared that it will ignore state opinions on group size. Thus, the OIC cannot apply its conflicting "large group" fiction to HIPAA and claim to be enforcing HIPAA. The OIC may believe that an association plan is a "large group" but this belief is unrelated to the meaning of HIPAA.

Even when a master policy is issued to the association, CMS considers the plan to exist at the small group member level unless the association is considered a single ERISA group that satisfies the Department of Labor bona fide association standard, a very strict standard which nearly every association fails. Just because the OIC considers an association a large group for ease of regulatory oversight does not make the association a large group for ERISA or HIPAA purposes.

This is an important point because the OIC is essentially extending its definitional fiction of the association as a large group to argue that risk rating at the member level constitutes HIPAA discrimination against "employees." This view is flat wrong given the explicit recognition of risk rating among small groups by associations under HIPAA regulations. The TAA is an attempt to repeal the Washington statutory exemption from community rating for associations by using HIPAA as the excuse for this effort.

The OIC also argues that insurers who set rates based upon health experience of association member employers violate RCW 48.43.025 governing preexisting condition limits and RCW 48.43.035 governing guaranteed issue of health plans. In fact, neither of these statutes prohibits risk-rated premiums. The laws prohibit rates that are intended to avoid the preexisting condition limits or guaranteed issue standards.

The OIC misinterpret the laws and their purpose observing that "RCW 48.43.035(1) specifically prohibits discrimination in group health benefit plans based on health condition." [TAA at 2] In fact, the cited statute prohibits discrimination on the basis of health status for the ***"issuance"*** of coverage not for the rating of coverage. The cited statute provides that "[a]ll health carriers shall accept for enrollment ***any state resident within the group*** to whom the plan is offered…" So long as the association does not reject "any state resident within the group", the law is not violated, even if the premium is based upon the health risk of the group. The statute is focused on the ***rejection of individuals*** because of health risk not the determination of premiums for a group.

The OIC cites RCW 48.43.025, governing the use of preexisting conditions limitations. In part, the law prohibits an insurer from attempting to use rates to avoid compliance:

> "A new or changed rate classification will be deemed an attempt to avoid the provisions of this section if the new or changed classification would substantially ***discourage applications*** for coverage from ***individuals or groups*** who are higher than average health risks."

Presumably, if these risk based rates do not "substantially discourage" applicants, the health based rates are not a violation.

In using this statute, the OIC is hoisted on its own fictional petard. If the association is the "large group", a violation occurs if the OIC demonstrates that an association was discouraged from obtaining coverage because the rates offered to the association were increased to avoid pre-existing condition limits. Presumably, the "group" was not discouraged if an association buys the plan. Alternatively, the OIC would have to show that the insurer modified the rate for a particular individual within a member small group – a practice prohibited by HIPAA and not alleged to be an insurer practice in Washington. The OIC cannot have it both ways by arguing that the association plan is a "large group" plan and also a "small group" plan. In essence, the OIC argues the absurd position that "individuals" are "groups" under this statute.

Even if the OIC position that "small groups" are really "individuals" of a "large group" and that is what the statute means, the statue would not support the TAA. The OIC does not limit its TAA to insurers attempting to avoid preexisting condition limitations through risk premiums that target individuals or groups with known preexisting conditions. The OIC imposes its ban irrespective of violations of the preexisting condition statute.

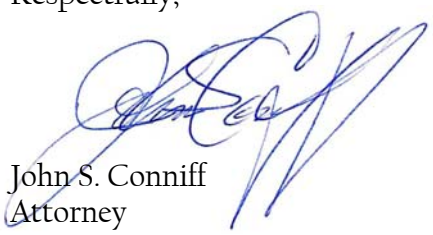
The OIC finishes its fictional loop by asserting that if the insurer does not issue a "large group" plan and instead issues a plan directly to an employer member of an association, the purchase has not occurred "through" the association and therefore the community rating exemption no longer applies. The OIC states in its TAA that the statutory exemption for community rating in association plans is:

> "available only in situations where a carrier issues a master policy to the Association. If the carrier contracts directly with Association members, however, then small employer members are not purchasing "through" the Association and the exemption does not apply." [TAA at 3]

There is no hint, no support, and no interpretation of any kind for the OIC's position as to the meaning of purchasing "through" an association. The OIC simply adopts a convenient, unsupported definition to preclude insurers from designing health plans tailored for and available only to members of an association. Thus, quite apart from attempting to prohibit rates based upon the health risk of a group, the OIC bans health plans sold exclusively through associations.

Whatever policy reasons the OIC may have for objecting to the statutory exemption from community rate regulation that associations enjoy, the WFB believes that these should be pursued in a legislative process. The OIC cannot sidestep a long established statutory exemption with over a decade of regulatory practice within the agency by simply issuing a letter "interpreting" the statute out of existence. The WFB urges the OIC to reconsider its position.

Respectfully,



John S. Conniff
Attorney