



Oregon

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OREGON INSURANCE DIVISION BULLETIN INS 2013-3

TO: Issuers of Health Benefit Plans to Associations in the Oregon Health Insurance Market and Association Purchasers of Health Benefit Plan Coverage.

RE: Association Coverage under the Affordable Care Act (ACA).

The State of Oregon Insurance Division of the Department of Consumer and Business Services (DCBS) issues this bulletin to provide guidance to issuers of health benefit plans to associations.

In Oregon, association coverage is group coverage whether it's purchased by a group or an individual. ORS 743.734(7), which sunsets on January 1, 2014, exempts coverage issued to small groups through associations from the small group rating laws if they meet criteria aimed at preventing "cherry-picking," or providing less expensive coverage to the healthiest groups. Cherry-picking leaves the less-healthy groups to buy coverage in the general market, which leads to increased rates over time. The criteria for meeting the exemption include the following:

- Membership in the association or the coverage isn't denied based on health.
- Initial premium rate variations between groups are limited so that rates cannot be used to ward off higher-risk groups.
- The association maintains high retention rates or obtains an exception from these retention rate requirements.

Association coverage issued to a small employer that does not meet these requirements must comply with Oregon's small employer rating laws.

Federal law does not recognize associations as a separate market. Under federal law, the association itself is rarely considered to be one group. Rather, group size (large or small group) and market (individual or group) is determined by the purchaser. For example, coverage purchased through an association by an individual (a non-employer) constitutes individual coverage, coverage purchased through an association by an employer with 40 employees constitutes small employer coverage, and coverage purchased through an association by an employer with 51 employees constitutes large group coverage.

Under limited circumstances, however, the association itself, rather than the purchaser, is considered the group. Generally, an association is considered to be one group when the employers that make up the association have such a level of control over the association and a degree of commonality of interest with the sponsors and beneficiaries that the group is said to exist at the association level rather than at the individual employer level. This is a fact-specific determination made under federal law and is a difficult standard for most associations to meet.

However, when an association meets this standard and it has group membership (not individual membership) totaling 51 or more, it is considered one large group and is not subject to Oregon's small group rating laws or federal pooling or rating requirements.

In 2014, ACA will require carriers to pool all nongrandfathered individual coverage together, including individual coverage provided through an association. The ACA will also require the pooling of all nongrandfathered small group coverage together, including nongrandfathered small group coverage provided through an association.¹

Prior to the ACA, bona fide associations² were subject to an exemption from the guaranteed renewability and guaranteed issue requirements of the Health Insurance Portability and Accountability Act (HIPAA). Generally, for coverage offered through a bona fide association, carriers did not need to offer or renew coverage to non-association members. Thus, if an individual or group lost association membership or left the association, a carrier was not required to renew the coverage, and if an individual or group was not a member of the association, a carrier was not required to offer coverage.

The ACA eliminates the guaranteed issue exemption for coverage offered to members of bona fide associations. Thus, for plan years beginning on or after January 1, 2014, subject to limited exceptions, carriers must offer coverage previously available only to association members of bona fide associations to any individual or employer that applies for such coverage unless such coverage is not ACA compliant for the relevant market.

In Summary, the ACA requires the following:

- The elimination of the Oregon small group rating exemption for associations.
- The pooling of nongrandfathered individual association coverage with nongrandfathered individual market coverage (federal definition).
- The rating of individual association coverage according to federal rating requirements.
- The pooling of nongrandfathered small group association coverage with nongrandfathered small group market coverage (federal definition).
- The rating of small group association coverage according to federal rating requirements.
- Subject to limited exemptions, including ACA compliance for the relevant market, the offering and issuance of all association coverage in the individual and small group markets regardless of association membership.

¹“All non-grandfathered health insurance coverage offered through associations and through multiple employer welfare arrangements (MEWAs) is subject to the premium rating rules applicable to the appropriate market, as defined by PHS Act section 2791(e)(1), (3), and (5) (definitions of individual market, large group market, and small group market, respectively).” Preamble to 45 CFR Part 147, footnote 6.

² 42 U.S.C. § 300gg-91(3) defines “bona fide association: with respect to health insurance coverage offered in a state as an association which:

- “(A) has been actively in existence for at least 5 years;
- “(B) has been formed and maintained in good faith for purposes other than obtaining insurance;
- “(C) does not condition membership in the association on any health status-related factor relating to an individual (including an employee of an employer or a dependent of an employee);
- “(D) makes health insurance coverage offered through the association available to all members regardless of any health status-related factor relating to such members (or individuals eligible for coverage through a member);
- “(E) does not make health insurance coverage offered through the association available other than in connection with a member of the association; and
- “(F) meets such additional requirements as may be imposed under State law.”

For plan/policy years beginning on or after January 1, 2014, an issuer providing large group health benefit plan coverage to an association must ensure that the association qualifies as a true large group as defined in federal law before such coverage is issued. Given the legal complexity and fact-specific nature involved with such an analysis and determination, the Division will not engage in a certification process for associations. Issuers or associations interested in “verifying” large group status under the Employee Retirement Income Security Act of 1974 (ERISA) should contact the United States Department of Labor.

An issuer that intends to issue ERISA large group³ coverage to an association that is currently approved by the Division as a group policyholder, must notify the Division of its intent to issue such coverage within 30 days of this bulletin. By this same deadline, issuers must notify the Division of associations for which ERISA large group coverage is currently issued. For associations that become ERISA large groups subsequent to the deadline, an issuer must notify the Division of its intent to issue ERISA large group coverage no later than 30 days prior to issuance of such coverage. For newly approved associations, issuers will be required to submit information through the Group Health Transmittal and Standards form.

The Division will monitor carrier compliance with the law and expects to subject outliers to further scrutiny.

These links provide additional information about when association coverage is considered individual or group and how such coverage is treated under federal law:

http://www.cms.gov/CCIIO/Resources/Files/Downloads/association_coverage_9_1_2011.pdf
<http://www.conniff.com/wordpress/wp-content/uploads/Miller-letter-to-Kreidler.pdf>
<https://www.cms.gov/Regulations-and-Guidance/Health-Insurance-Reform/HealthInsReformforConsume/downloads/HIPAA-02-02.pdf>

This bulletin takes effect immediately.

Dated this 31st day of May 2013 at Salem, Oregon.

Signed

Louis D. Savage, Insurance Commissioner
Oregon Insurance Division

³ For these purposes, “ERISA large group” is defined as a collection of employer groups, at least some of which have 50 or fewer employers, with an aggregate membership in excess of 50 employees.