

**STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

Before the Insurance Administrator
Department of Consumer and Business Services

In the Matter of Adopting OAR 836-053-0000,)	SUMMARY OF TESTIMONY
836-053-0471 and 836-053-0475 and)	AND HEARING OFFICER'S
Amending OAR 836-053-0465, 836-053-0780)	RECOMMENDATION
and 836-053-0910 Relating to Public Review of)	
and Confidentiality of Health Insurance Rate Filing)	
Documents)	

Procedures Followed

On October 15, 2009, the Director filed with the Secretary of State a Notice of Proposed Rulemaking Hearing (Notice), giving notice that the Director proposed to adopt rules implementing provisions enacted by the 2009 Legislative Assembly in House Bill 2009 relating to the public review of and confidentiality of health insurance rate filing documents. These rules include provisions pertaining to the review of proposed schedule or table of premium rates filed for health benefit plans for small employers, individual health benefit plans and portability health benefit plans. These rules clarify the public process established by the Legislative Assembly for these filings and, for individual and small employer group plans, specify the materials that must be submitted in a schedule or table of premium rate filing. For those filings, the rules also provide clarification of the factors the Director of the Department of Consumer and Business Services (DCBS) may consider in reviewing proposed premium, and for determining whether administrative expenses included in a rate are reasonable. The Notice announced that a rulemaking hearing would be held on December 2, 2009, and that interested persons could submit written comments through January 8, 2010. The notice was filed with a Statement of Need and Fiscal Impact. A copy of the Notice was published in the Secretary of State's Oregon Bulletin of November 1, 2009. Copies of the Notice and Statement and the proposed rulemaking were delivered or mailed to persons on the Division mailing list established under the Administrative Procedures Act, to all authorized health insurers, to insurance producers, to consumer advocates, to legislators who are required by law to be notified, to the press and to other interested persons; were made available to interested persons through the Division's e-notify system; and were posted on the Division's web site.

Testimony Received and Hearing Officer Recommendation

The hearing was held as scheduled. Jeannette Holman, Senior Policy Analyst for the Insurance Division was the hearing officer. Eleven people attended the hearing: Ann Fisher representing small businesses; Elise Brown representing America's Health Insurance Plans; Brenda Etzel representing The ODS Companies; Jim Manning and Sadie Terwilliger representing Kaiser Permanente; Dawn Hall; Dave Nesseler-Cass representing Providence Health Plan; Mary Alecia K. Briggs representing Senator Chip Shields; Kim Wirtz representing Regence; and Laura Etherton representing OSPIRG and other consumer groups. Scott Fitzpatrick, Gayle Woods and Sue Munson from the Insurance Division also attended the hearing. Three individuals, Ann

Fisher, Dawn Hall and Laura Etherton, provided oral testimony to supplement written testimony they submitted. In addition, the following written comments were received on this rulemaking:

1. Letter regarding Providence Health Plan: Request for Comments on Insurance Rate Filings, submitted on behalf of Providence Health Plan by Arden J. Olson, on September 4, 2009
2. Letter regarding Oregon Insurance Division Rate Review/Confidentiality Rulemaking submitted by Dave Nesseler-Cass, Providence, on September 8, 2009
3. Letter regarding HB 2009 Rule Making – Rate Filing Review, submitted by Michael S. Becker, Regence, on September 4, 2009
4. Letter regarding Guidance on HB 2009 – Confidentiality of Trade Secrets in Health Carrier Rate Filing & New Administrative Expense Reporting Requirements, submitted by Leanne Gassaway, America’s Health Insurance Plans, on September 9, 2009
5. Email regarding Confidentiality of Rates submitted by Victor Paguia, Pacific Source, on September 17, 2009
6. Memorandum for the Oregon Division of Insurance Re: Trade Secret Exemptions and Rate Filings, submitted by Larry Kirsch, IMR Health Economics, LLC, September 22, 2009
7. Letter regarding HB 2009 Advisory Committee Consumer Response to Trade Secrets, submitted by Sean Moriarty, CESSCO, Inc., September 22, 2009
8. Letter from Ann Fisher, AF Legal & Consulting Services, submitted on September 22, 2009
9. Letter regarding Comments on Proposed Rule on Health Insurance Rate Filings, submitted by Linda K. Williams, September 23, 2009
10. E-mail regarding OAR 836-053-0471(2)(k)(B), submitted by Larry Kirsch, October 20, 2009
11. Letter in support of the rules with suggested additions, submitted by Ann Fisher, AF Legal & Consulting Services, December 1, 2009
12. Written testimony submitted by Dawn Hall, December 2, 2009
13. Memo in support of rules and setting out suggested changes to OAR 836-053-0475, submitted by Gayle Woods, Operations Manager for the Insurance Division, December 4, 2009
14. Letter raising concerns about disclosure provisions submitted by Lisa Trussell, HealthNet on December 2, 2009
15. E-mail from Jim Swenson in support of the rules and sharing experience with disclosure of documents in rate filings, January 7, 2010
16. Letter from Theresa A. Neibert, Kaiser Foundation, raising concerns about disclosure provision and suggesting other changes to rules, January 7, 2010
17. Letter from Brenda Etzel, ODS Companies raises concern about public disclosure provision, January 8, 2010
18. Letter from Leanne Gassaway, America’s Health Insurance Plans, raises concerns about public disclosure provision, January 8, 2010
19. Memo from Laura Etherton on behalf of OSPiRG, SEIU, AARP-Oregon, Oregon Small Business Healthcare Initiative, Mid-Valley Health Care Advocates and Oregon Health Action Campaign, in support of the rules generally, but expressing disappointment at index used for administrative costs, January 8, 2010
20. Letter from Nancy Nevins, LifeWise, expressing concern about disclosure provision and portability requirements, January 8, 2010

21. Letter from Dave Nessler-Cass, reiterating concerns about disclosure provision,
January 8, 2010

In order to avoid duplicative efforts and documents, the division specified that all materials submitted by members of the rulemaking advisory committee during the advisory committee proceedings would be considered public comments and entered into the record of the rulemaking. Those materials are included in the above list.

Because of the quantity of testimony received and the repetitive nature of much of the written comment, the hearing officer will respond by issue to the comments without citing the source of comments in every case. Rather than a separate response to each individual comment, this recommendation seeks primarily to respond to larger issues and those that might affect the text of the proposed rules.

Background

These rules are necessary to respond to provisions in House Bill 2009 adopted by the 2009 Legislative Assembly intended to improve transparency in the rate review and approval process for small employer, individual and portability health benefit plans in Oregon. The first step to increase transparency was enacted in 2007 (Enrolled House Bill 3103), when the Legislative Assembly directed that all rate filing documents received by the Director of the Department of Consumer and Business Services (DCBS) must be available for public inspection immediately upon submission of the filing to the director. In HB 3103, the director was granted discretion to withhold from public disclosure any part of the filing that would, if disclosed, harm competition. (ORS 743.018(3), 2007 Edition.) Under HB 3103, the director made the determination on a case-by-case basis upon request of an individual carrier.

The 2009 Legislative Assembly strengthened this transparency and attempted to streamline the rate review process with further amendments to ORS 743.018. In HB 2009, the Legislative Assembly again required that all materials submitted as part of a rate filing must be disclosed to the public. However, in this bill, the Legislative Assembly directed DCBS to establish by rule all materials that must be included in a rate filing, and in the course of that rulemaking to identify any materials that would be exempt from disclosure. The test for exemption from disclosure remained the same (i.e., the material is a trade secret and disclosure would harm competition) and the burden for showing material qualified for this exemption is still high. But identification of the portions of a filing that would be exempt from disclosure through rulemaking was intended to eliminate the need for case-by-case examinations of each rate filing. This revised process for identifying any material not subject to disclosure upfront in the rulemaking process is the best way to assure fairness and consistency in the rate filing process. This also addresses in part, the goal of streamlining the rate filing process.

To assist in developing these rules, the Insurance Division of the DCBS appointed an advisory committee comprised of representatives of health insurance carriers, small business and other consumer groups. The division first worked with the advisory committee to clarify the particular elements of a rate filing and identify those elements in a way that will allow all rate filings to contain the same information. Upon completion of this task, the division asked the advisory committee, particularly those industry representatives, to specifically identify those portions of the rate filing elements that should be withheld from public disclosure. Members of the advisory committee had the opportunity to propose elements to be withheld and to present arguments for and against disclosure based on the two-part test in ORS 743.018.

A second issue the advisory committee examined was the form of separate reporting of administrative expenses as required in ORS 743.020. The advisory committee discussed various approaches and suggested that to the maximum extent possible, the Division tie this separate reporting to the same elements required to be reported under Senate Bill 501 (2005 Session), now identified as the “501 Report”.

The final area that required rulemaking is related to the director’s review of administrative expenses included in a carrier’s rates and whether the rules should establish an index or “trigger” that would result in increased scrutiny of administrative expenses. Earlier proposals for the rate review process that were included in language eventually enacted as Sections 29 and 31 of HB 2009 specified that this trigger would be the CPI. However, in the final version included in HB 2009, the Legislative Assembly removed this index in favor of a reasonableness standard and left it to the director to determine the reasonableness of administrative expenses.

Comments Received and Hearing Officer Recommendations

The majority of comments received addressed the issue of exemptions from public disclosure.

In all comments from industry representatives, the commenters requested that some materials be exempt from disclosure.¹ Other comments requested that the rule retain the old method of making a determination of exemption on a case-by-case basis upon the request of the carrier. Industry comments addressed the issue of trade secrets extensively, citing state and federal law and arguing for nondisclosure of many categories of filing documents without specificity as to the particular material (e.g., chart, graph, explanation, records, or calculation) in each category that should be exempt from disclosure. Industry also suggested that disclosure could result in harm to competition but did not cite specific evidence of actual harm. One industry comment suggested that disclosure would result in a regulatory taking, thus requiring due process and possibly compensation.

Representatives of consumer groups and small business likewise spent much time commenting on the issue of nondisclosure, responding to the legal arguments set forth by the carriers and arguing that the public interest in controlling escalating health care costs requires that all documents should be disclosed. Some comments also included examples of instances where all contents of rate filings were disclosed without harm to competition.

The hearing officer has carefully reviewed these comments and the state and federal laws and cases cited and finds that the explanation and evidence submitted fails to meet the two-part test that requires showing that the material is a trade secret and demonstrating harm to the competition in the Oregon insurance market. Accordingly, the hearing officer recommends that the provision in OAR 836-053-0471 providing for disclosure of all material received in a rate filing, as required in OAR 836-053-0471 be adopted as proposed without change.

The second request for change in a number of comments is to eliminate changes to OAR 836-053-0780 and 836-053-0910 that establish a 30-day public comment period for portability. Comments suggest that this is redundant and the rules should eliminate this requirement. Unfortunately, the amendments to ORS 743.018 by HB 2009 include this requirement and to

¹ Although almost all comments from carriers requested that some categories of the rate review filing be exempt from disclosure, the comments did not agree on which categories or materials should be exempt.

ignore this legislative change is outside the authority of the director. The hearing officer recommends that the changes to these rules be adopted without change.

A third area that received comments from both industry and consumers relates to the reporting and approval of administrative expenses as they are considered in setting the rates for health insurance. Comments were directed at two related issues – 1) the proper “trigger” for disapproval of an increase in administrative expense without additional demonstration of need by the insurer; and 2) the manner and content of reporting on administrative expenses as set forth in Exhibit 3 to OAR 8366-053-0471.

Consumer groups requested that the rules use the CPI as a “trigger” or index that would require the insurer to demonstrate a need for the increase. Other comments suggested that the division should develop an internal index and not include it in rules. The hearing officer recommends the language in the proposed rules which uses as an index the Producer Price Index for Direct Health and Medical Insurance Carriers Industry. This index is tied more closely to the cost of administering health insurance. Because the CPI was specifically removed by the Legislative Assembly, the hearing officer recommends against using this index. The hearing officer recommends not using an “internal” index developed by the division outside of rulemaking because this approach violates the principles of transparency underlying both the 2007 and the 2009 legislation. The hearing officer further recommends adopting the changes to this rule (OAR 836-053-0475) proposed by the division. These changes will further clarify how the division will use this index.

The second issue reflects discussions with the advisory group about what needs to be reported as part of the administrative expenses and how to report this information in the most efficient manner possible without imposing huge additional reporting burdens on carriers. Out of these discussions came recommendations in comments that the division somehow tie this requirement to information already gathered by the insurers for their 501 reports. The proposed rules reflect the compromise reached and the hearing officer recommends the final rules be adopted without change to Exhibit 3 to OAR 836-053-0471 which reflects the agreement with the advisory committee and other interested parties.

A number of comments require specific responses.

First, many changes suggested by the rulemaking advisory committee were incorporated into the proposed rules. The hearing officer recommends that those changes be retained in the final rules.

One carrier raised concerns that the Division would be implementing these rules or parts of the rules before April 1, 2010 and urged the division to reconsider. HB 2009 took effect immediately upon passage. The provisions of HB 2009 that apply to this rulemaking apply to rate filings submitted on or after April 1, 2010. Although the rules apply on April 1, 2010, the goal is to adopt the rules as soon as possible in order to allow carriers sufficient time to be able to comply with the rules with their April 1, 2010 filings. The division does not anticipate applying the rules to rate filings received before that date.

Another change requested by several comments was to revise the language of OAR 836-053-0471(4) to clarify the time lines for the 30-day public comment period. The hearing officer recommends that these changes be made, not only to this rule but also to OAR 836-053-0780 (8) which contains the same language related to rates filings for portability plans.

One comment suggested a number of changes that would require additional reporting on changes to fee reimbursement agreements between insurers and providers. The hearing officer recommends these changes not be included as this issue is beyond the scope of this rulemaking.

The hearing officer also recommends a number of technical and typographical corrections to the proposed rules. These corrections have been incorporated into the final rules.

The rulemaking was reviewed again for its economic effect on businesses, including small businesses, and there is no need for further change. The rulemaking is within the Director's rulemaking authority, and applicable rulemaking procedures were complied with.

Signed this _____ day of February 2010.

Department of Consumer and Business Services

Jeannette Holman, Hearing Officer

This Summary and Recommendation are reviewed and adopted.

Signed this _____ day of February 2010.

Department of Consumer and Business Services

Teresa Miller, Insurance Administrator