

Essential Health Benefits: Amendment to comply with recent federal guidance regarding coverage for obesity (Rule 2015-18)

Concise Explanatory Statement;
Responsiveness Summary, Rule Development
Process and Implementation Plan

September 20, 2016

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www.insurance.wa.gov

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Introduction

The 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 must:

1. Identify the OIC’s reasons for adopting the rule;
2. Describe the differences between the proposed rule and the final rule (other than editing changes) and the reasons for the difference;
3. Summarize and respond to all of the comments that the OIC 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. If the OIC did not incorporate the change that the commenter requested, the response will include an explanation of why the agency did not incorporate the change;
4. Be distributed to all persons who commented on the rule during the official public comment period and to any person who requests it.

Reasons for adopting the rule

In October 2015, the U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury jointly issued FAQs about Affordable Care Act Implementation (Part XXIX), which requires health plans to cover “intensive, multicomponent behavioral interventions for weight management” in certain circumstances as part of the Essential Health Benefits.

The new requirements conflict with a sentence in the OIC’s Essential Health Benefits rule, so the agency needed to amend the rules to bring them into alignment with the new guidance.

Rule development process

On December 22, 2015, the OIC filed notification of expedited rulemaking (CR-105) proposing a rule to implement the requirements of the October 2015 federal guidance regarding coverage for obesity. The CR-105 comment period was open through February 22, 2016.

Two stakeholders submitted comments to the OIC regarding this rule during the CR-105 comment period. The OIC made changes to the draft in response to their comments and shared the updated draft with them.

On April 29, 2016, the OIC filed a CR-102. The agency held a hearing on June 22, 2016.

The OIC filed the CR-103P to adopt the rule on September 20, 2016 and the rule went into effect 31 days later.

Differences between proposed and final rule

No differences.

Responsiveness summary of comments

The OIC received several comments and suggestions regarding this rule. 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:

- American Society for Metabolic and Bariatric Surgeons (Washington State Chapter)
- Campaign to End Obesity Action Fund
- Eisai Inc.
- Dr. Richard Lindquist on behalf of Swedish Weight Loss Services, Obesity Medicine Association and The Obesity Society
- Obesity Action Coalition
- Obesity Care Continuum
- Premera Blue Cross, LifeWise Health Plan of Washington, and LifeWise Assurance Company
- Trisha Cacabelos
- UnitedHealthcare of Washington, Inc. and UnitedHealthcare Insurance Company

Comments regarding the CR-105

Comment: Two commenters asked the OIC to move the new language from the ambulatory section, where it appeared in the CR-105 draft, to the preventive services section.

Response: In response to these comments, the OIC moved the new benefit from the ambulatory section to the preventive services section.

Comment: One commenter offered proposed language for the OIC to use.

Response: The OIC appreciates this input and used the language as a starting point for the changes in the CR-102 draft.

Comment: One commenter suggested that certain language in the CR-105 draft established a mandate, which could trigger the state's obligation to reimburse issuers for certain Exchange-based members.

Response: The OIC changed the language.

Comment: One commenter questioned the effective date for adding obesity coverage, saying that the ACA provides up to one year for issuers to implement guidance from the United States Preventive Services Task Force (USPTSF).

Response: The OIC experienced some lengthy delays regarding this rule, so this issue is now moot. As a result of the delays, instead of the rule going into effect in the spring of 2016 (which was when the CR-105 draft would have gone into effect), the rule will go into effect in October 2016. The federal government issued the applicable ACA FAQ exactly one year earlier, in October 2015, so issuers have now had a year to implement this guidance.

Comments regarding the CR-102

Comment: One commenter asked whether insurers would need to start covering bariatric surgery or prescription drugs for weight loss as a result of this rule.

Response: Although insurers will need to cover the obesity-related services that the USPTSF recommends, the recommendations are non-surgical. They only include behavioral interventions, such as teaching people to set weight goals, encouraging them to exercise, and teaching them how to make different food choices.

Comment: One commenter asked the OIC to provide materials to show that the Regence Direct Gold Plus plan, which is the base-benchmark plan, will cover certain obesity services in 2017.

Response: The Regence Direct Gold Plus plan ended at the end of 2014, so there aren't written materials showing that this specific plan will cover a requirement that the federal government issued in late 2015. However, the OIC is continuing to check the filings that issuers submit for plan year 2017 to ensure that the plans cover the USPTSF-recommended preventive services for obesity.

Comment: Some commenters asked the OIC to include the specific requirements from the USPTSF in the rule. In addition, one commenter asked the OIC to incorporate the language from the ACA FAQs regarding the intensity and frequency of behavioral interventions for weight management.

Response: With a few very limited exceptions, the OIC has tried to avoid including the specific language from the USPTSF recommendations or the ACA Frequently-Asked Questions (FAQs) in the Essential Health Benefit rule. The agency made this decision because these materials change on a regular basis, and the agency doesn't have the resources to frequently revise the Essential Health Benefits rule each time a change occurs in the USPSTF recommendations or the ACA FAQs.

Comment: Some commenters asked the OIC to require issuers to cover all medically necessary obesity services, including obesity drugs and bariatric surgery.

Response: Although the OIC appreciates this comment, the agency has declined to require issuers to cover these services. The ACA FAQs only require issuers to comply with the USPTSF recommendations, and the USPSTF recommendations do not require this.

If the OIC required issuers to cover a service that the ACA FAQs do not require them to cover, this would be a mandate. Under the health reform law, if a state creates a new mandate, the

state must fund that mandate. In our state, the legislature would need to provide this funding. To avoid having to ask the legislature to allocate funding to pay for new mandates, the OIC has tried carefully to avoid creating new mandates. For this reason, the OIC did not add these additional benefits to the rule.

Comment: Some commenters asked the OIC to review health plans to make sure that issuers are covering obesity treatment.

Response: The OIC appreciates this comment, and is reviewing the 2017 health plans to ensure that they cover obesity treatment as outlined in the USPTSF recommendations. The OIC will continue to monitor health plans to ensure that issuers cover obesity treatment in accordance with the USPTSF recommendations. However, if a stakeholder identifies a situation where an issuer is not covering obesity treatment as required by the USPTSF recommendations for a fully-insured individual or small group health plan, the OIC encourages them to fill out a complaint form. The OIC complaint forms are available at www.insurance.wa.gov.

Comment: One commenter asked whether obesity services will be part of the benefits for health plans that are sold on the Exchange if the OIC doesn't make substantive changes to the CR-102 draft.

Response: Yes, the obesity services that the USPTSF recommends will be included in fully-insured individual and small group health plans, including plans sold on the Exchange.

Implementation plan

Implementation and enforcement of the rule

The OIC intends to implement and enforce the rule through the Rates and Forms Division and Market Conduct Oversight Unit, which is part of the Company Supervision Division. Using existing resources, OIC staff will continue to work with carriers, providers, and interested parties in complying with the requirements of these rules.

How the agency will inform and educate affected persons about the rule

After the agency files the permanent rule and adopts it with the Office of the Code Reviser:

- Policy staff will distribute copies of the final rule and the Concise Explanatory Statement (CES) to all interested parties through US mail, post to the OIC's standard rule making listserv and email to stakeholder participants.
- The Rules Coordinator will post the CR-103 documents on the OIC's website
- OIC staff will address questions as follows:

Type of Inquiry	Division
Consumer assistance	Consumer Protection Division
Rule content	Rates and Forms
Authority for rules	Policy and Legislative Affairs
Enforcement of rule	Legal Division
Market Compliance	Company Supervision

How the agency intends to promote and assist voluntary compliance for this rule

The steps listed under implementation will inform and educate affected persons on the changes and help promote voluntary compliance. The OIC has also added these requirements to its Analyst Checklists, which health carriers use to ensure that their plans comply with all applicable state and federal laws.

How the agency intends to evaluate whether the rule achieves the purpose for which it was adopted

The OIC will work closely with carriers, providers, and other interested parties to evaluate the effectiveness of the rule as well as to monitor consumer complaints and to monitor plans for non-compliance. The OIC will review health plan filings to ensure that this coverage is provided.

Appendix A – Hearing Summary

Summarizing Memorandum

To: Mike Kreidler, Insurance Commissioner
From: Bianca Stoner, presiding official for rule hearing
Matter: Rule 2015-18
Topic: Essential Health Benefits: Amendment to comply with recent federal guidance regarding coverage for obesity

This memorandum summarizes the hearing on the above-named rulemaking, which was held on June 22, 2016 at 1:00 p.m. in Olympia. I presided over this hearing in your place.

In attendance but did not testify:

- Pam Martin of the Washington State HealthCare Authority

In attendance and testified:

- Dr. Richard Lindquist on behalf of Swedish Weight Loss Services, Obesity Medicine Association and The Obesity Society

The hearing began at 1:05 p.m. Because testimony did not differ from the written comments that the OIC received in the comment letter from Dr. Lindquist, the applicable Commissioner's response for the written comments on the subject applies to the comments that Dr. Lindquist mentioned during the hearing.

The hearing was adjourned.

SIGNED this 22nd day of June, 2016

Bianca Stoner, Presiding Official