WSR 22-17-132
PROPOSED RULES
OFFICE OF THE
INSURANCE COMMISSIONER

[Insurance Commissioner Matter R 2022-04—Filed August 23, 2022, 10:48 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-13-064.

Title of Rule and Other Identifying Information: Statement requirement for consumer adverse benefit determination notices.

Hearing Location(s): On September 27, 2022, at 3:00 p.m., Zoom meeting. Detailed information for attending the Zoom meeting posted on the office of insurance commissioner (OIC) website https://www.insurance.wa.gov/statement-requirement-consumer-adverse-benefit-determination-notices-r-2022-04.

Date of Intended Adoption: September 29, 2022.

Submit Written Comments to: Shari Maier, P.O. Box 40255, Olympia, WA 98504-0255, email rulescoordinator@oic.wa.gov, fax 360-586-3109, by September 28, 2022.

Assistance for Persons with Disabilities: Contact Katie Bennett, phone 360-725-7013, fax 360-586-2023, TTY 360-586-0241, email Katie.Bennett@oic.wa.gov, by September 28, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To amend existing rules so a required statement for consumer adverse benefit determination notices will be at a lower, more accessible reading level.

Reasons Supporting Proposal: OIC was made aware that a required statement in the existing rules is at a higher reading level than appropriate for consumer correspondence.

Statutory Authority for Adoption: RCW 48.02.060 and 48.43.530.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Mike Kreidler, insurance commissioner, governmental.

Name of Agency Personnel Responsible for Drafting: Shari Maier, P.O. Box 40255, Olympia, WA 98504-0255, 360-725-7173; Implementation: Molly Nollette, P.O. Box 40255, Olympia, WA 98504-0255, 360-725-7000; and Enforcement: Charles Malone, P.O. Box 40255, Olympia, WA 98504-0255, 360-725-7000.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Simon Casson, P.O. Box 40255, Olympia, WA 98504-0255, phone 360-725-7138, fax 360-586-3109, email Simon.Casson@oic.wa.gov.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: As part of rule making for 2SSB 5313 (chapter 280, Laws of 2021), a requirement was added for adverse benefit determination (ABD) notices to include a statement regarding identification of experts who provided advice for ABD. Based on feedback received by OIC, amendments to the rules are needed to ensure this language is at a reading level more appropriate for consumer correspondence.

Chapter 19.85 RCW states that "… an agency shall prepare a small business economic impact statement: (i) If the proposed rule will im-

pose more than minor costs on businesses in an industry …." The small business economic impact statement (SBEIS) must include "… a brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements … To determine whether the proposed rule will have a disproportionate cost impact on small businesses."

This rule proposal, or portions of the proposal, are exempt from requirements of the Regulatory Fairness Act under RCW 19.85.025(4), the businesses that must comply with the proposed rule are not small businesses under chapter 19.85 RCW. OIC has found that none of the existing health insurance issuers may be considered small businesses under RCW 19.85.020(3).

The average number of employees per firm was determined below using Bureau of Labor Statistics data:

Average number of firms: 58.

Average annual employment over 12 months: 6,777.

Average number of employees per firm: 118.

The average number of employees for a direct health and medical insurance carrier is 118 employees, above the small business threshold of 50 under chapter 19.85.020(3).

OIC determines that this rule is exempt from SBEIS requirements.

Scope of exemption for rule proposal:

Is fully exempt.

August 23, 2022
Mike Kreidler
Insurance Commissioner

OTS-4024.1

AMENDATORY SECTION (Amending WSR 21-24-072, filed 11/30/21, effective 1/1/22)

WAC 284-43-3070 Notice and explanation of adverse benefit determination—General requirements. (1) A carrier must notify enrollees of an adverse benefit determination either electronically or by U.S. mail. The notification must be provided:

(a) To an appellant or their authorized representative;

(b) To the provider if the adverse benefit determination involves the preservice denial of treatment or procedure prescribed by the provider; and

(c) Whenever an adverse benefit determination relates to a protected individual, as defined in RCW 48.43.005, the health carrier must follow RCW 48.43.505.

(2) A carrier or health plan's notice must include the following information, worded in plain language:

(a) The specific reasons for the adverse benefit determination;

(b) The specific health plan policy or contract sections on which the determination is based, including references to the provisions;

(c) The plan's review procedures, including the appellant's right to a copy of the carrier and health plan's records related to the adverse benefit determination;

(d) The time limits applicable to the review;

(e) The right of appellants and their providers to present evidence as part of a review of an adverse benefit determination;

(f) Effective April 1, 2022, through December 31, 2022, the following statement or the statement from (g) of this subsection: "Enrollees may request that a health insurer identify the medical, vocational, or other experts whose advice was obtained in connection with the adverse benefit determination, even if the advice was not relied on in making the determination. Health insurers may satisfy this requirement by providing the job title, a statement as to whether the expert is affiliated with the carrier as an employee, and the expert's specialty, board certification status, or other criteria related to the expert's qualification without providing the expert's name or address."; ((~~and~~))

(g) No later than January 1, 2023, the following statement: "You can ask a health carrier to identify the experts who were consulted about the adverse benefit determination – even if the expert's advice was not used to make the determination. The carrier is not required to identify the expert by name or provide their address. The carrier can instead provide the expert's job title and specialty, board certification status or other information related to their qualifications and also state whether or not they are employed by the carrier."; and

(h) When the adverse benefit determination concerns gender affirming treatment or services, a confirmation that a health care provider experienced with prescribing or delivering gender affirming treatment has reviewed the determination and confirmed that an adverse benefit determination denying or limiting the service is appropriate and provide information to confirm that the reviewing provider has clinically appropriate expertise prescribing or delivering gender affirming treatment.

(3) If an adverse benefit determination is based on medical necessity, decisions related to experimental treatment, or a similar exclusion or limit involving the exercise of professional judgment, the notification must contain either an explanation of the scientific or clinical basis for the determination, the manner in which the terms of the health plan were applied to the appellant's medical circumstances, or a statement that such explanation is available free of charge upon request.

(4) A health carrier must not issue an adverse benefit determination concerning gender affirming services or treatment until a health care provider with experience prescribing or delivering gender affirming treatment has reviewed and confirmed the appropriateness of the adverse benefit determination.

(5) If an internal rule, guideline, protocol, or other similar criterion was relied on in making the adverse benefit determination, the notice must contain either the specific rule, guideline, protocol, or other similar criterion; or a statement that a copy of the rule, guideline, protocol, or other criterion will be provided free of charge to the appellant on request.

(6) The notice of an adverse benefit determination must include an explanation of the right to review the records of relevant information, including evidence used by the carrier or the carrier's representative that influenced or supported the decision to make the adverse benefit determination.

(a) For purposes of this subsection, "relevant information" means information relied on in making the determination, or that was submitted, considered, or generated in the course of making the determina-

tion, regardless of whether the document, record, or information was relied on in making the determination.

(b) Relevant information includes any statement of policy, procedure, or administrative process concerning the denied treatment or benefit, regardless of whether it was relied on in making the determination.

(7) If the carrier and health plan determine that additional information is necessary to perfect the denied claim, the carrier and health plan must provide a description of the additional material or information that they require, with an explanation of why it is necessary, as soon as the need is identified.

(8) An enrollee or covered person may request that a carrier identify the medical, vocational, or other experts whose advice was obtained in connection with the adverse benefit determination, even if the advice was not relied on in making the determination. The carrier may satisfy this requirement by providing the job title, a statement as to whether the expert is affiliated with the carrier as an employee, and the expert's specialty, board certification status, or other criteria related to the expert's qualification without providing the expert's name or address. The carrier must be able to identify for the commissioner upon request the name of each expert whose advice was obtained in connection with the adverse benefit determination.

(9) The notice must include language substantially similar to the following:

> "If you request a review of this adverse benefit determination, (Company name) will continue to provide coverage for the disputed benefit pending outcome of the review if you are currently receiving services or supplies under the disputed benefit. If (Company name) prevails in the appeal, you may be responsible for the cost of coverage received during the review period. The decision at the external review level is binding unless other remedies are available under state or federal law."

[Statutory Authority: RCW 48.02.060, 48.43.515 and 2021 c 280. WSR 21-24-072 (Matter No. R 2021-14), § 284-43-3070, filed 11/30/21, effective 1/1/22. Statutory Authority: RCW 48.02.060, 48.43.505, and 48.43.5051. WSR 20-24-120, § 284-43-3070, filed 12/2/20, effective 1/2/21. WSR 16-01-081, recodified as § 284-43-3070, filed 12/14/15, effective 12/14/15. Statutory Authority: RCW 48.02.060, 48.43.525, 48.43.530, 48.43.535, and The Patient Protection and Affordable Care Act, P.L. 111-148, as amended (2010). WSR 12-23-005 (Matter No. R 2011-11), § 284-43-515, filed 11/7/12, effective 11/20/12.]