



# PROPOSED RULE MAKING

## CR-102 (July 2022) (Implements RCW 34.05.320) Do NOT use for expedited rule making

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STATE OF WASHINGTON  
FILED

DATE: August 23, 2022

TIME: 10:48 AM

WSR 22-17-132

**Agency:** Office of the Insurance Commissioner

**Original Notice**

**Supplemental Notice to WSR** \_\_\_\_\_

**Continuance of WSR** \_\_\_\_\_

**Preproposal Statement of Inquiry was filed as WSR** 22-13-064 ; or

**Expedited Rule Making--Proposed notice was filed as WSR** \_\_\_\_\_; or

**Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**

**Proposal is exempt under RCW** \_\_\_\_\_.

**Title of rule and other identifying information:** (describe subject) Statement Requirement for Consumer Adverse Benefit Determination Notices

**Insurance Commissioner Matter R 2022-04 )**

**Hearing location(s):**

**Date:**                      **Time:**                      **Location:** (be specific)                      **Comment:**

September 27, 2022	3:00 pm	Zoom meeting: Detailed information for attending the Zoom meeting posted on the OIC website here: <a href="https://www.insurance.wa.gov/statement-requirement-consumer-adverse-benefit-determination-notices-r-2022-04">https://www.insurance.wa.gov/statement-requirement-consumer-adverse-benefit-determination-notices-r-2022-04</a>	
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**Date of intended adoption:** September 29, 2022 (Note: This is **NOT** the effective date)

**Submit written comments to:**

Name: Shari Maier

Address: PO Box 40255, Olympia, WA 98504-0255

Email: [rulescoordinator@oic.wa.gov](mailto:rulescoordinator@oic.wa.gov)

Fax: 360-586-3109

Other:

By (date) 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](mailto:Katie.Bennett@oic.wa.gov)

Other:

By (date) 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:** The 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 RCW 48.43.530

**Statute being implemented:**

**Is rule necessary because of a:**

Federal Law?

Yes     No

Federal Court Decision?

Yes     No

State Court Decision?

Yes     No

If yes, CITATION:

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:**

**Type of proponent:**  Private  Public  Governmental  
**Name of proponent:** (person or organization) Mike Kreidler, Insurance Commissioner

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
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
Enforcement:	Charles Malone	P.O. Box 40255, Olympia, WA 98504-0255	360-725-7000

**Is a school district fiscal impact statement required under [RCW 28A.305.135](#)?**  Yes  No  
If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:  
Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under [RCW 34.05.328](#)?**  
 Yes: A preliminary cost-benefit analysis may be obtained by contacting:  
Name: Simon Casson  
Address: P.O. Box 40255, Olympia, WA 98504-0255  
Phone: 360-725-7138  
Fax: 360-586-3109  
TTY:  
Email: [Simon.Casson@oic.wa.gov](mailto:Simon.Casson@oic.wa.gov)  
Other:  
 No: Please explain:

**Regulatory Fairness Act and Small Business Economic Impact Statement**  
Note: The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#) provides support in completing this part.

**(1) Identification of exemptions:**  
This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see [chapter 19.85 RCW](#)). For additional information on exemptions, consult the [exemption guide published by ORIA](#). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.061](#) because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.  
Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by [RCW 34.05.313](#) before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of [RCW 15.65.570\(2\)](#) because it was adopted by a referendum.

- This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(3\)](#). Check all that apply:
- |   |   |
|---|---|
| <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(b)<br>(Internal government operations) | <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(e)<br>(Dictated by statute)  |
| <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(c)<br>(Incorporation by reference)     | <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(f)<br>(Set or adjust fees)   |
| <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(d)<br>(Correct or clarify language)    | <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(g)<br>(i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit) |
- This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(4\)](#) (does not affect small businesses).
- This rule proposal, or portions of the proposal, is exempt under RCW \_\_\_\_\_.

Explanation of how the above exemption(s) applies to the proposed rule:

As part of rulemaking 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 the ABD. Based on feedback received by the OIC, amendments to the rules are needed to ensure this language is at a reading level more appropriate for consumer correspondence.

RCW 19.85 states that "...an agency shall prepare a small business economic impact statement: (i) If the proposed rule will impose 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. The 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 small business economic impact statement requirements.

**(2) Scope of exemptions:** *Check one.*

- The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.
- The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)):
- The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

**(3) Small business economic impact statement:** *Complete this section if any portion is not exempt.*

If any portion of the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency's minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. \_\_\_\_\_
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses and a small business economic impact statement is required. Insert the required small business economic impact statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

Other:

**Date:** August 23, 2022

**Name:** Mike Kreidler

**Title:** Insurance Commissioner

**Signature:**

A handwritten signature in black ink that reads "Mike Kreidler". The signature is written in a cursive, slightly slanted style.

**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 determination, 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."