



## Report to Agency on Public Comment Period

Date: September 6, 2016

To: Department of Consumer and Business Services

From: Richard Y. Blackwell, Manager, Policy

Subject: Report on Proposed Bulletin No. DFR 2016-01, "Transgender Issues in the Transaction of Insurance in Oregon."

Comment Period Start: May 5, 2016  
Comment Period End: June 5, 2016

### Background

On May 5, 2016, DCBS published for comment *proposed* Bulletin No. DFR 2016-01, "Transgender Issues in the Transaction and Regulation of Insurance." The department gave reviewers and members of the public 30 days to provide comment on the draft bulletin. DCBS received five comments, summarized below.

**Note:** The Oregon Department of Justice provided written comments on this proposed draft bulletin. DOJ suggested grammatical and structural changes to improve the readability of the bulletin, which the department incorporated into the final product. This memo identifies where the DOJ provided substantive commentary below.

### Summary of Comments Received

**Christian John Rataj, Esq., Senior Director of Affairs, Western Region of NAMIC,** provided written comment on this proposed bulletin. Rataj requested clarification as to whether the proposed bulletin applied to all lines of insurance. Rataj stated that the proposed bulletin is addressed "To: All Entities Transacting Insurance in Oregon," suggesting that it applies to property and casualty insurers. However, Rataj noted, that the "Purpose Statement" seems inconclusive. Rataj also pointed out that while the detailed regulatory content and context of the draft bulleting seems focused on health insurance, the bulletin did not appear to rule out coverage of other types of insurance.

Rataj recommended that DCBS revise its statement of unfair discrimination, so that property and casualty insurers may be able to provide insurance consumers with actuarially sound rates that

appropriately reflect the transgender needs of the policyholder or applicant. Specifically, Rataj stated, if an applicant or policyholder requests that the insurer consider them for rating purposes as being a member of a particular gender, and this consumer request results in the insurer having to charge the person with a non-discriminatory, actuarially sound higher insurance rate, it could be argued that the insurers is in violation of the draft bulletin provision that prohibits “requir[ing] payment of premium that is based in whole or in part on an insured’s or prospective insured’s actual or perceived identity.”

Rataj requested clarity as to how DCBS plans to interpret the statement “DCBS expects insurers’ forms to comply with the policy regarding coverage of transgender individuals and gender affirming treatment as it is set forth in this bulletin.” Rataj requested clarification on how the division planned to apply the draft bulletin’s statement that “DCBS expects all forms to comply and in some instances, may require endorsement or revision of an existing form” to property and casualty insurers. Rataj also asked for examples germane to property and casualty insurance. Rataj also requested that DCBS clarify what it meant by “insurers should provide internal training for staff” and suggested that DCBS make it clear that this suggested internal training provision is not being turned into a *de facto* market conduct examination requirement.

**Kimberly S. Kelley, President of K.S. Kelley, RN, LLC**, provided an email comment on this proposed bulletin. Kelley stated that the act of protecting transgender people itself constituted a discriminatory action and a violation of the Oregon Constitution. Kelley noted that all people should be protected from discrimination, not just transgender people. Kelley also stated that it is unlikely that this proposed bulletin will be followed.

**Andrea Zekis, Policy Director, Basic Rights Oregon** provided written comment on this proposed bulletin. In the Purpose section, Zekis questioned whether the language should be more explicit than “prohibitions in Oregon against discrimination in the transaction of insurance in Oregon on the basis of gender dysphoria.” In this same section, Zekis noted that the terms transsexualism and gender identity disorder are out of date and may no longer hold legal significance, though Zekis recognized that the terms may need to remain due to legacy systems and processes.

Zekis offered several changes for the Background section. Zekis suggested moving the definition for “transgender person” before gender dysphoria or gender affirming treatment to support the definition of gender identity. Zekis also suggested adding language to the “gender affirming treatment” and “gender transition” definitions.

Zekis added several comments in the Discussion section as well. Zekis noted that around the issue of utilization management tools for treatment eligibility, the department should clarify that insurers should not restrict coverage based on determinations of medical necessity or eligibility or not support by medical evidence.

Zekis proposed amending the discussion about the application of state-level mandates for certain services generally reserved to one gender. Zekis requested that the department clarify that the mandates do not limit the coverage provided to the perceived gender or gender identity of a person. Zekis also requested that the bulletin make clear the department’s expectation that an

insurer should cover medically-necessary, sex-specific mandated coverage regardless of the gender of the insured, as recorded by an insurance carrier. Zekis noted that these additions would make the bulletin consistent with recent U.S. Department of Health and Human Services guidance.

Finally, Zekis suggested changing the language of biological male or female to be more explicit in the giving of examples related to ORS 743A.104 and ORS 743A.120.

**Note:** The Department of Justice, in its review of the bulletin, also noted its support of comments made by Zekis.

**J. Peterson, a member of the public**, provided an email comment on this proposed bulletin. Peterson stated that the minority should not rule the majority. Peterson made a statement about restroom use by individuals based on gender identity.

**Brian Hunter, Regulatory Services and Contract Management, Kaiser Foundation Health Plan of the Northwest** provided written comment on this proposed bulletin. Hunter suggested revising the proposed bulletin to explicitly allow carriers flexibility to define uniform medical criteria that is based on evaluation of the body of medical evidence, internally and externally, for those seeking gender affirming treatment. Hunter noted that medical evidence in this area continues to evolve and carriers should be allowed to evaluate new medical evidence in peer-reviewed literature, treating provider experience, and other appropriate information sources to assess the safety and efficacy of new services for members seeking gender affirming services.

Hunter also recommended amending the draft bulletin to clarify that insurers must meet notice requirements by adding an affirmative statement(s) of coverage of gender affirming services to their evidence of coverage (ECO) documents. Hunter stated that this will result in a uniform approach among carriers that promotes market stability and ensures that members receive clear and timely benefit information.

### Summary

After fully considering the comments received, we propose to modify the bulletin consistent with the following:

1. On page 1 of the draft bulletin, clarify that the prohibitions against unlawful discrimination apply to all insurance, with the understanding that application ensures equality in access to coverage, treatment and other insurance services.
2. On page 2 of the draft bulletin, add titles to citations of the Oregon Revised Statutes and the Oregon Administrative Rules for clarity and usability.
3. On page 3 of the draft bulletin, clarify that Bulletin No. INS 2012-1 is withdrawal and replaced with this Bulletin, No. DFR 2016-1.

4. On page 4 of the draft bulletin, clarify that statutes and rules pertaining to unlawful discrimination based on gender identity apply to all forms of insurance.
5. On page 4 of the draft bulletin, clarify the department's interpretation of the Insurance Code (i.e., that discrimination based on solely on gender identity or gender dysphoria is as prohibited as discrimination solely based on gender or race).
6. On page 4 of the draft bulletin, include in the department's interpretation of the law that insurers may not act, either facially or in effect, to discriminate based on sexual orientation.
7. On page 5 of the draft bulletin, clarify that insurers may not impose additional requirements related to a person's gender identity that an insured or prospective insured must meet to obtain insurance.
8. On page 5 of the draft bulletin, clarify that insurers may not demand or require a premium payment based on the *insurer's* perceived gender identity of an insured rather than the *person's* perceived gender identity.
9. On page 6 of the draft bulletin, clarify that insurers may not deny treatment for gender-affirming surgery by failing to recognize gender-affirming surgery or specific surgeries that may be appropriate treatments for gender dysphoria.
10. On page 6 of the draft bulletin, clarify that insurers should always current consider medical evidence when adopting standards for medical necessity.
11. On page 6 of the draft bulletin, clarify that unfair discrimination includes exclusion of treatments for gender identity dysphoria, even if exclusion applies only to a subset of insureds (e.g., insureds under the age or majority).
12. On page 7 of the draft bulletin, cite OAR 836-010-0155(2) as the adopted state rule that prohibits limited preventative services to perceived gender or gender identity of a person.
13. On page 7 of the draft bulletin, provide examples of coverage for medically necessary procedures – typically delineated by gender – that focus on the medical need and not on the person's perceived gender.
14. On page 9 of the draft bulletin, clarify that insurers should always current consider medical evidence when adopting standards for medical necessity.
15. Finally, on page 9 of the draft bulletin, note that insurers should train staff on eliminating or avoiding discriminatory actions against transgendered persons.



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Richard Y. Blackwell  
Policy Manager

This Summary and Recommendation are reviewed and adopted.

Signed this 7th day of September, 2016.

Department of Consumer and Business Services

A handwritten signature in black ink, appearing to read 'Laura Cali', with a period at the end.

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Laura Cali, FCAS, MAAA  
Insurance Commissioner  
Administrator, Division of Financial Regulation