

**★★★ NOTICE OF RULEMAKING HEARING ★★★****Clearinghouse Rule 16-023****Notice of Hearing**

NOTICE IS HEREBY GIVEN that the Office of the Commissioner of Insurance will hold a public hearing on a permanent and emergency rule pursuant to s. 227.18 Stats., to amend s. Ins 17.35 (4) relating to deductibles and cost sharing provision limitations in medical malpractice insurance policies and affecting small business at the time and place shown below.

**Hearing Information**

Date: March 16, 2016

Time: 2:00 pm

Location: OCI Room 227, 125 S. Webster Street 2<sup>nd</sup> Floor, Madison, WI.

**Accessibility** Pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of information material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Julie Walsh at (608) 264-8101 with specific information on your request at least 10 days before the date of the scheduled hearing. There is also handicap access at the hearing location.

**Appearances at the Hearing and Submittal of Written Comments**

Written comments can be mailed to:

Julie E. Walsh  
Legal Unit - OCI Rule Comment for Rule Ins 1735  
Office of the Commissioner of Insurance  
PO Box 7873  
Madison WI 53707-7873

Written comments can be hand delivered to:

Julie E. Walsh  
Legal Unit - OCI Rule Comment for Rule Ins 1735  
Office of the Commissioner of Insurance  
125 South Webster St – 2<sup>nd</sup> Floor  
Madison WI 53703-3474

Comments can be emailed to:

Julie E. Walsh at [julie.walsh@wisconsin.gov](mailto:julie.walsh@wisconsin.gov)

The deadline for submitting comments is 4:00 p.m. on March 22, 2015.

The rules may be reviewed and comments made at [adminrules.wisconsin.gov](http://adminrules.wisconsin.gov) or at <http://www.oci.wi.gov/ocirules.htm> no later than 4:00 pm on March 22, 2016.

### **Initial Regulatory Flexibility Analysis**

Notice is hereby further given that pursuant to s. 227.114, Stats., the proposed rule may have an effect on small businesses. The initial regulatory flexibility analysis is as follows:

a. Types of small businesses affected:

Small businesses that are either owned or operated by one or more physicians or certified nurse anesthetists that participate in the Fund and currently have a fully insured policy with cost sharing provisions that are in excess of 25%. Small businesses that owned and operated in Wisconsin receiving services from a health care provider group whose current fully insured policy exceeds the proposed 25% maximum liability for Fund providers.

b. Description of reporting and bookkeeping procedures required:

None beyond those currently required.

c. Description of professional skills required:

The consultation with an agent or broker to determine best cost alternatives for primary coverage for medical malpractice in accordance with s. 655.23 (4), Stats.

**Agency Small Business Regulatory Coordinator** The OCI small business coordinator is Kate Ludlum [kate.ludlum@wisconsin.gov](mailto:kate.ludlum@wisconsin.gov) or 608-264-6232.

### **CONTACT PERSON**

A copy of the full text of the emergency rule and the proposed permanent rule changes, analysis and fiscal estimate may be obtained from the OCI internet Web site at <http://oci.wi.gov/ocirules.htm> or by contacting Julie E. Walsh, 125 South Webster Street – 2<sup>nd</sup> Floor, Madison WI or PO Box 7873, Madison WI 53707-7873.

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### **PROPOSED ORDER REPEAL AND CREATE A RULE**

Agency 145 – INS 17.35 (4), Wis. Admin. Code:

The Commissioner of Insurance proposes an order to repeal and recreate s. Ins 17.35 (4), relating to deductibles and cost sharing provision limitations in medical malpractice insurance policies and affecting small business in primary coverage for the Injured Patients and Families Compensation Fund and affecting small business.

The statement of scope for this rule SS 028-15, was approved by the Governor on March 12, 2015, published in Register No. 711A4, on March 23, 2015, and approved by the Commissioner on April 6, 2015.

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### **ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE (OCI)**

**1. Statutes interpreted:**

ss. 631.20, 655.23, 655.24, and 655.245, Stats.

**2. Statutory authority:**

ss. 655.23 (4), Stats.

**3. Explanation of OCI's authority to promulgate the proposed rule:**

The injured patients and families compensation fund (fund) was established by and is operated as provided in ch. 655, Wis. Stat. The commissioner of insurance, with approval by the board, may promulgate such rules under ch. 227, Wis. Stat., as are necessary to enable them to perform their responsibilities under this chapter. Sections 655.23, 655.24 and 655.245, Wis. Stats., describe generally the limitations of liability, the requirements and limitations for policy forms issued for health care liability insurance and that such policies be submitted for review and approval by the commissioner in accordance with s. 631.20, Wis. Stats. Finally, s. 601.41 (3), Wis. Stat., provides that the commissioner shall have rule-making authority under s. 227.11 (2), Wis. Stat.

**4. Related statutes or rules:**

None.

**5. The plain language analysis:**

Currently s. Ins 17.35 (4), Wis. Stat., permits insurers offering medical malpractice insurance to include deductibles or coinsurance clauses while retaining the responsibility for payment of the total amount of indemnity up to the limits of s. 655.23 (4), Wis. Stats., and permits insurers to recoup the amount of the deductible or coinsurance from the insured after the insurer's payment obligation was satisfied. At the time s. Ins 17.35 (4), Wis. Adm. Code, was created, insurers used deductibles or coinsurance less frequently and more typically in the 10-20% range than is currently arising. The board and its legal committee spent several years reviewing, analyzing and debating whether this section should be modified and if so how. The board determined that the use of deductibles should be limited in a manner that more closely reflects the majority of the marketplace and still maintain a competitive marketplace. The board determined that a limitation not to exceed 25% deductible including all cost sharing provisions such as coinsurance was appropriate.

The proposed rule implements the board's resolution and clearly delineates the limitations to the use of deductibles and any cost sharing provisions that are contained in the policy for liability coverage. Specifically, the proposed rule clarifies what is considered "the policy" that is to be filed with the commissioner, including addendums, endorsements and any other contract that affects the terms of the coverage contained in the policy. The proposed rule then limits the total provider exposure under a liability policy not to exceed 25%. The propose rule retains the ability for the insurer or foreign insurer to recoup the deductible or other cost sharing after the insurer or foreign insurer has satisfied its financial obligation under the terms of the policy.

**6. Summary of and comparison with any existing or proposed federal statutes and regulations:**

To the fund board's and OCI's knowledge there is no existing or proposed federal regulation that is intended to address deductibles and cost sharing provisions for health care liability coverage that complies with the fund, as no other state nor the federal government has a similar fund.

**7. Comparison of similar rules in adjacent states:**

To the fund board's and OCI's knowledge there are no similar rules in the adjacent states to compare this rule to as none of adjacent states have a fund created by statute where providers are required to participate in a fund and that regulate health care liability coverage in conjunction with the fund, as no other state has a similar fund.

**8. A summary of the factual data and analytical methodologies that OCI used in support of the proposed rule:**

The office of the commissioner of insurance and the patients compensation fund conducted a survey to of insurers offering health care liability coverage that was compliant with the fund requirements and determined that the vast majority of providers in the state were covered by health care liability coverage that contained deductible or any other cost sharing provisions that exceeded 25%. While coverage does exist with greater provider responsibility up to 100% deductibles, the board of governors stated that the use of deductibles should not exceed the level of coverage that the majority of health care providers carry in the state. The impact of this proposed change is limited to those providers that are fully-insured by licensed insurers or certified foreign insurers with policies that contain deductible or other cost sharing provisions that require the provider to pay more than 25% of the liability limit. The commissioner determined in 2012 that of the nearly 15,000 providers who participate in the fund fewer than 20 providers representing approximately 1,000 insureds may be affected by this proposed rule change.

**9. Analysis and supporting documentation that OCI used in support of OCI's determination of the rule's effect on small business or in preparation of an economic impact analysis:**

This proposed rule may affect small business to the extent the provider that qualifies as a small business is currently insured under a policy with cost sharing provisions that exceed 25% of the liability limit. Based upon a 2012 survey, the vast majority of providers nearly 14,000 of 15,000 providers were covered under policies that comply with the proposed rule. Providers will be required to obtain compliant policies most likely at a higher premium that is currently paid. There is a chance that this increase in premium for a relatively small number of providers may be shifted to persons obtaining care from providers affected by this proposed rule change.

**10. Effect on small business.**

This proposed rule may affect small business to the extent the provider that qualifies as a small business is currently insured under a policy with cost sharing provisions that exceed 25% of the liability limit. Based upon a 2012 survey, the vast majority of providers nearly 14,000 of 15,000 providers were covered under policies that comply with the proposed rule. Providers will be required to obtain compliant policies on or after July 1, 2017 and will most likely be charged a higher premium than is currently paid. The potential increase in premium will not have a significant effect on small businesses that participate in the fund nor should it negatively affect the small business's ability to compete with other providers.

**11. A copy of any comments and opinion prepared by the Board of Veterans Affairs under s. 45.03 (2m), Stats., for rules proposed by the Department of Veterans Affairs.**

None.

**12. Agency contact person:**

A copy of the full text of the proposed rule changes, analysis and fiscal estimate may be obtained from the Web site at: <http://oci.wi.gov/ocirules.htm>

or by contacting Julie E. Walsh:

Phone: (608) 264-8101  
Email: Julie.Walsh@wisconsin.gov  
Address: 125 South Webster St – 2<sup>nd</sup> Floor, Madison WI 53703-3474  
Mail: PO Box 7873, Madison, WI 53707-7873

**13. Place where comments are to be submitted and deadline for submission:**

The deadline for submitting comments is 4:00 p.m. on March 22, 2016.

Mailing address:

Julie E. Walsh  
Legal Unit - OCI Rule Comment for Rule Ins 1735  
Office of the Commissioner of Insurance  
PO Box 7873  
Madison WI 53707-7873

Street address:

Julie E. Walsh  
Legal Unit - OCI Rule Comment for Rule Ins 1735  
Office of the Commissioner of Insurance  
125 South Webster St – 2<sup>nd</sup> Floor  
Madison WI 53703-3474

Email address:

Julie E. Walsh  
julie.walsh@wisconsin.gov

Web site: <http://oci.wi.gov/ocirules.htm>

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**The proposed rule changes are:**

**SECTION 1. Ins 17.35 (4) is repealed and recreated to read:**

Ins 17.35 (4) DEDUCTIBLES. (a) In addition to sub. (2) (d), that requires the insurer or foreign insurer to be responsible for payment of the total amount of indemnity up to the limits under s. 655.23 (4), Stats., a policy as defined at s. 600.03 (35), Stats., or group policy as defined at s. 600.03 (23), Stats., that contains any term or condition that results in or requires the provider to reimburse, pay or otherwise be financially responsible to the insurer or foreign insurer for a portion of the limits set forth in s. 655.23 (4), Stat., such provision or provisions in aggregate shall not exceed 25% of the total amount of indemnity up to the limits under s. 655.23 (4), Stats. The insurer or foreign insurer shall file with the office the entire policy, in accordance with s. 631.13 (intro.), Stats., and shall include all provisions including but not limited to, deductible, coinsurance, other cost sharing provisions, endorsements, amendments, agreements or other instruments, that has the effect of requiring the provider to reimburse, pay or otherwise be financially responsible to the insurer or foreign insurer in accordance with s. 631.20, Stats.

(b) After the insurer's or foreign insurer's payment obligation is satisfied, the insurer or foreign insurer may recoup the amount of cost sharing from the insured provider in an amount that does not exceed 25% of the total amount of indemnity up to the limits under s. 655.23 (4), Stats.

**SECTION 2.** These changes first apply to health care liability coverage policies issued on or after July 1, 2017.

**SECTION 3.** These changes will take effect the first day of the month after publication, as provided in s. 227.22(2) (intro.), Stats.

Dated at Madison, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, 2016.

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Daniel J. Schwartzer  
Deputy Commissioner

**Office of the Commissioner of Insurance  
Private Sector Fiscal Analysis**

Section Ins 17.35 relating to deductibles and cost sharing provision limitations in medical malpractice insurance policies and affecting small business in primary coverage for the Injured Patients and Families Compensation Fund and affecting small business.

This rule change will have no significant effect on the private sector as this proposed rule limits the amount of financial responsibility a health care provider may bear under fully-insured medical malpractice liability coverage to no more than 25%. The rule directly affects only a small portion of the fund participants who currently carry coverage with cost sharing provisions that in total exceed the 25% threshold proposed in this rule. There should not be an effect on county, city, village, town, school district, technical college district and sewerage district fiscal liabilities and revenues.