

MEMORANDUM

To: Health Connector Board Members
Cc: Audrey Morse Gasteier, Executive Director
From: Andrew Egan, General Counsel
Marissa Woltmann, Chief of Policy
Kayla Scire, Associate Director of Policy
Date: May 5, 2023
Re: Minimum Creditable Coverage Regulations—Proposed Draft Amendments

OVERVIEW

On March 30, 2023, U.S. District Judge Reed O'Connor for the Northern District of Texas issued a ruling that placed limitations on the services subject to the Affordable Care Act's (ACA) requirement that health plans cover a broad range of preventive services, such as certain cancer screenings, and that they do so without cost-sharing. The court [ruled](#) that the U.S. Preventive Services Task Force ([USPSTF](#)) lacked the constitutional authority to promulgate legally binding requirements and therefore that the preventive care [recommendations](#) it made after 2010 could not have the force of law, meaning that health plans did not have to cover the preventive care services the USPSTF recommended after 2010 and, if they did choose to cover those services anyway, they did not have to cover them without cost-sharing. Examples of preventive services recommended by the USPSTF after 2010 (that insurers do not have to cover without cost-sharing under the ruling) include: lung and skin cancer screenings, PrEP for HIV prevention, statins to lower cholesterol, and medications to reduce breast cancer.

Massachusetts has had a longstanding commitment to ensuring robust access to preventive services. For coverage to be considered Minimum Creditable Coverage (MCC), regulations already require coverage of preventive services defined by the ACA and require that they not be subject to the plan's deductible. To avoid erosion of access and imposition of cost-sharing following the Texas ruling, Health Connector staff propose amending MCC regulations (956 CMR 5.00) to clarify and protect access to no-cost high-value preventive services for Massachusetts residents seeking to comply with the Commonwealth's individual mandate. Staff respectfully request a vote on the proposed MCC regulation amendments at the May 11, 2023 Board meeting.

This memorandum provides an overview of the (1) individual mandate and Minimum Creditable Coverage (MCC) regulations, (2) coverage of preventive services under the ACA, (3) the Braidwood Management Inc. v. Becerra ruling, and (4) Health Connector staff's recommendation to amend the MCC regulations in order to address the potential preventive services coverage gap that could result from the ruling.

THE INDIVIDUAL MANDATE AND MINIMUM CREDITABLE COVERAGE

As part of Chapter 58 reforms, Massachusetts law requires adult residents to have health insurance that meets the state's MCC standards or potentially face an individual mandate penalty. The Health Connector's MCC regulations govern what constitutes minimum creditable coverage for nearly 5 million state residents. MCC outlines the type of coverage a person needs to avoid

facing a tax penalty under the state’s individual mandate, establishing a “floor” of benefits required to “check the box” as having been covered.

State law defines MCC at a high level and authorizes the Health Connector Board to further determine the minimum standards of the plans that individual residents are required to have (via MCC regulations). MCC standards do not require market actors to provide compliant coverage. While MCC does not apply to health insurance plans directly, plans often choose to meet MCC standards so that their members don’t face tax penalties.

COVERAGE OF PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT (ACA)

Since the ACA became effective in 2010, more than 150 million people have benefited from access to preventive care without cost-sharing under the ACA, which has increased cancer screening, improved the earlier detection and treatment of chronic health conditions, and narrowed racial disparities.¹

The Affordable Care Act requires all plans to cover preventive services without cost sharing if the U.S. Preventive Services Task Force (USPSTF) recommends them. Specifically, 42 U.S.C. § 300gg-13² and its implementing regulations relating to coverage of preventive services require non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to cover, without the imposition of any cost-sharing requirements, the following items or services:

- Evidence-based items or services that have in effect a rating of “A” or “B” in the current recommendations of the United States Preventive Services Task Force (USPSTF) with respect to the individual involved;
- Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC) with respect to the individual involved;
- With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA); and
- With respect to women, such additional preventive care and screenings not described in 42 U.S.C. § 300gg-13as provided for in comprehensive guidelines supported by HRSA.³

BRAIDWOOD MANAGEMENT V. BECERRA

On March 30, 2023, the United States District Court for the Northern District of Texas issued a final judgment in the case Braidwood Management Inc. v. Becerra. The Braidwood decision prevents the Departments of Labor, Health and Human Services, and the Treasury (the Departments) from implementing and enforcing the ACA’s preventive services coverage

¹ [Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act | ASPE \(hhs.gov\)](#)

² Also sometimes referred to as Public Health Services (PHS) Act section 2713(a)(1).

³ [FAQS ABOUT AFFORDABLE CARE ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION PART 59 \(cms.gov\)](#)

requirements (42 U.S.C. § 300gg-13) for items and services recommended with an “A” or “B” rating by the U.S. Preventive Services Task Force (USPSTF) on or after March 23, 2010. Table 1. lists the major additions and revisions to USPSTF recommendations on or after March 23, 2010—these are the services with respect to which the ruling prevents the Departments from implementing and enforcing the ACA’s requirement to provide preventive services coverage without cost-sharing. (See Appendix for full list of services before and after March 23, 2010.)

The court ruled that the USPSTF’s recommendations made after March 2010 could not carry the force of law because those recommendations were not made by a constitutionally appointed “officer” and therefore no party was duly authorized under the U.S. Constitution to enforce the requirement to cover the recommended services and to do so without cost-sharing. The USPSTF existed long before the Affordable Care Act and 42 U.S.C. § 300gg-13, and the recommendations it had already made were validly incorporated by the ACA to give them the force of law, such that the requirement to cover those preventive services without cost-sharing (i.e. those existing in March 2010) remains valid.

While the Braidwood decision prevents the Departments from implementing and enforcing the ACA’s preventive services coverage requirements for items and services recommended with an “A” or “B” rating by the USPSTF on or after March 23, 2010, the Braidwood decision does not preclude plans and issuers from continuing to provide the full extent of such coverage.⁴ Preventive services recommended by entities outside of the USPSTF such as the Health Resources and Services Administration and the Advisory Committee on Immunization Practices are unaffected and will continue to be covered without cost-sharing.

The Departments of Labor, Health and Human Services (HHS), and Treasury disagree with the District Court’s ruling and are considering all available options in consultation with the Department of Justice. The Department of Justice filed a notice of appeal on March 31, 2023, and a motion for a stay on April 12, 2023.⁵

Table 1. Major Additions and Revisions to USPSTF Recommendations on or After March 23, 2010

Health Area	Preventive Service	Affected Population
Cancer	Breast Cancer: Medication Use to Reduce Risk	Women at increased risk for breast cancer aged 35 years or older
Cancer	Lung Cancer: Screening	Adults aged 50 to 80 years who have a 20 pack-year smoking history and currently smoke or have quit within the past 15 years
Cancer	Colorectal Cancer: Screening	Adults aged 45-49 years*
Chronic Conditions	Statin Use for the Primary Prevention of Cardiovascular Disease in Adults: Preventive Medication	Adults aged 40 to 75 years who have 1 or more cardiovascular risk factors and an estimated 10-year cardiovascular disease (CVD) risk of 10% or greater

⁴ [FAQS ABOUT AFFORDABLE CARE ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION PART 59 \(cms.gov\)](#)

⁵ [FAQS ABOUT AFFORDABLE CARE ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION PART 59 \(cms.gov\)](#)

Chronic Conditions	Hepatitis C Virus Infection in Adolescents and Adults: Screening	Adults 22 and older
Health Promotion	Unhealthy Drug Use: Screening	Adults 22 and older
Pregnancy	Aspirin Use to Prevent Preeclampsia and Related Morbidity and Mortality: Preventive Medications	Pregnant persons at high risk for preeclampsia
Pregnancy	Perinatal Depression: Preventive Interventions	Pregnant persons**
Sexual and Reproductive Health	Prevention of Human Immunodeficiency Virus (HIV) Infection: Preexposure Prophylaxis	Persons at high risk of HIV acquisition
Sexual and Reproductive Health	Human Immunodeficiency Virus (HIV) Infection: Screening	Men 22 and older***

Source: [KFF 2023](#)

RECOMMENDATION TO PROTECT ACCESS TO PREVENTIVE SERVICES WITHOUT COST-SHARING

The Health Connector’s MCC regulations offer a key avenue to maintain Massachusetts’ longstanding commitment to no-cost high-value preventive services by strongly encouraging residents to enroll in plans that meet MCC standards in order to avoid paying a tax penalty.

Current MCC regulations require a qualifying plan to cover Preventive Health Services, as defined by the ACA, without imposing a deductible.⁶ This requirement within MCC regulations is not impacted by the Braidwood ruling. This is because the decision did not undermine the USPSTF itself, nor its recommendations made after 2010. Rather, it found that the federal government could not give those recommendations made after 2010 the force of law. MCC’s authority does not rely on a federal constitutional officer, and the ACA’s definition of “Preventive Health Services,” which includes USPSTF recommendations made after 2010, remains valid law, as does the section of MCC regulations that refers to it to define the scope of Preventive Health Services that a Massachusetts resident’s plan must cover to satisfy the individual mandate.

While current MCC regulations state that a plan cannot impose a deductible on Preventive Health Services, MCC regulations do not prohibit other kinds of cost-sharing, such as co-pays and co-insurance. Health Connector staff propose amending the regulations to state that no cost-sharing for Preventive Health Services should apply, whether in form of a deductible or other out-of-pocket costs. Further, a clarifying edit to 956 CMR 5.03(1)(a)6 would replace the word “preventive” with the defined term “Preventive Health Services,” to clarify that the scope of

⁶ Current MCC regulations at 956 CMR 5.03(1)(a)6. require the coverage of “preventive . . . care” as part of the “broad range of medical benefits” a plan must offer. Relatedly, regulations at 956 CMR 5.03(e) require the coverage of “Preventive Health Services on an annual basis without imposing a Deductible,” where “Preventive Services” is defined at 956 CMR 5.02 by reference to 42 U.S.C. § 300gg-13.

services under the MCC regulations term “preventive” is the same as under the federal ACA term “Preventive Health Services” (See proposed regulation amendments provided.)

CONCLUDING REMARKS

Preventive services help people avoid acute illness, identify and treat chronic conditions, reduce the risk of cancer or facilitate early detection, and improve health. Coverage for USPSTF recommended preventive services has reduced disparities in, and improved, disease and condition screening rates.⁷ In 2020 alone, 3,343,000 Massachusetts residents with private health insurance coverage benefited from preventive services without cost sharing.⁸ The Braidwood decision limits the scope of the ACA’s no-cost coverage mandate for preventive services, which could lead some plans to limit their coverage of these services. Limiting the services covered without cost-sharing could in turn present barriers for Massachusetts residents’ access to those services – and such access barriers would likely have a disproportionate impact on lower income residents and people of color. Even among insured residents, extensive evidence suggests that lower income residents and people of color utilize fewer health care services generally – and are more likely to not receive preventive services (like cancer screenings) that can keep them healthy and save lives.⁹ By reducing the ACA’s preventive services coverage requirements, the Braidwood ruling has the potential to further exacerbate racial inequities in access to health care and health outcomes.

MCC’s inclusion of preventive services has provided a long-standing signal about the types of benefits a robust plan should have.

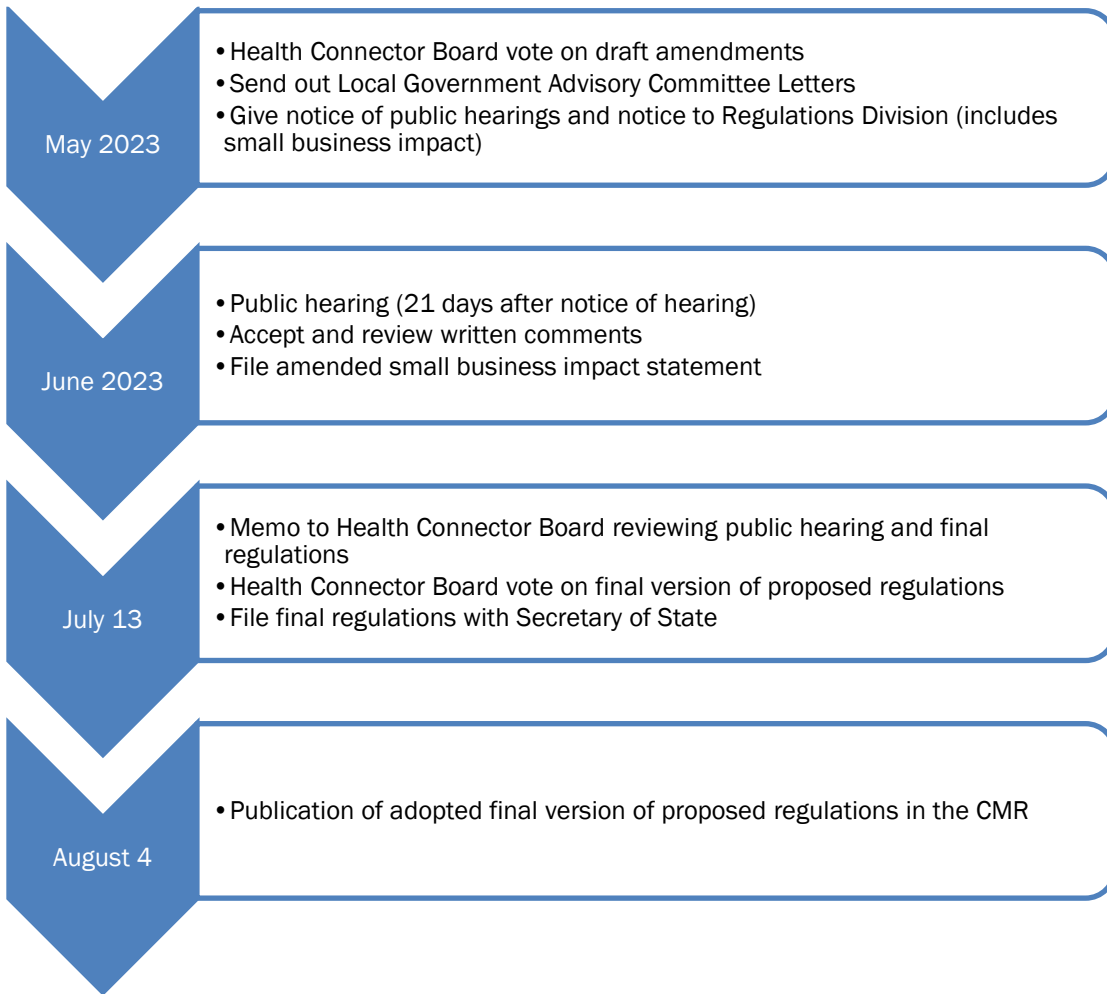
Amending the Health Connector’s MCC regulations to state that high-value preventive services should not be subject to any form of cost-sharing reconfirms the Commonwealth’s commitment to supporting residents’ having robust, high-value health insurance coverage. If the Board votes to approve Health Connector staff’s proposal to amend MCC regulations, staff would follow the timeline below, subject to Board feedback, and keep Board members informed throughout the regulation amendment process.

⁷ [FAQS ABOUT AFFORDABLE CARE ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION PART 59 \(cms.gov\)](#)

⁸ Assistant Secretary for Planning and Evaluation (ASPE). (2022). [Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act](#)

⁹ Massachusetts Cancer Registry (Cancer Incidence Statewide Reports | Mass.gov) and Massachusetts Behavioral Risk Factor Surveillance System (BRFSS), Massachusetts Department of Public Health

Figure 1. Proposed Regulatory Timeline



APPENDIX

U.S. Preventive Services Task Force (USPSTF) Recommended Preventive Services with an “A” or “B” Rating

Key:

- Preventive services recommended after 2010 which are no longer required to be provided without cost-sharing under the ruling.
- Preventive services that Massachusetts law also requires insurers and plans to cover with \$0 cost-sharing

Preventive Care Benefits for Adults:

- Abdominal aortic aneurysm one-time screening for men of specified ages who have ever smoked
- Alcohol misuse screening and counseling
- Aspirin use to prevent cardiovascular disease and colorectal cancer for adults 50 to 59 years with a high cardiovascular risk
- Blood pressure screening
- Chlamydia screening
- Cholesterol screening for adults of certain ages or at higher risk
- Colorectal cancer screening for adults 45 to 75
- Depression screening
- Diabetes (Type 2) screening for adults 40 to 70 years who are overweight or obese*
- Diet counseling for adults at higher risk for chronic disease
- Falls prevention (with exercise or physical therapy and vitamin D use) for adults 65 years and over, living in a community setting
- Hypertension screening
- Gonorrhea screening
- Hepatitis B screening for people at high risk, including people from countries with 2% or more Hepatitis B prevalence, and U.S.-born people not vaccinated as infants and with at least one parent born in a region with 8% or more Hepatitis B prevalence
- Hepatitis C screening for adults age 18 to 79 years
- HIV screening for everyone age 15 to 65, and other ages at increased risk
- PrEP (pre-exposure prophylaxis) HIV prevention medication for HIV-negative adults at high risk for getting HIV through sex or injection drug use
- Statin use for primary prevention of cardiovascular diseases in adults
- Lung cancer screening for adults 50 to 80 at high risk for lung cancer because they're heavy smokers or have quit in the past 15 years
- Obesity screening and counseling
- Sexually transmitted infection (STI) prevention counseling for adults at higher risk
- Skin cancer prevention
- Statin preventive medication for adults 40 to 75 at high risk
- Syphilis screening for adults at higher risk

- Tobacco use screening for all adults and cessation interventions for tobacco users
- Tuberculosis screening for certain adults without symptoms at high risk
- Urinary tract or other infection screening

Preventive Care Benefits for Women:

- Breastfeeding support and counseling from trained providers, and access to breastfeeding supplies, for pregnant and nursing women
- **Birth control: Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling, as prescribed by a health care provider**
- Folic acid supplements for women who may become pregnant
- Gestational diabetes screening for women 24 weeks pregnant (or later) and those at high risk of developing gestational diabetes
- Gonorrhea screening for all women at higher risk
- Hepatitis B screening for pregnant women at their first prenatal visit
- Maternal depression screening for mothers at well-baby visits
- Preeclampsia prevention and screening for pregnant women with high blood pressure
- Rh incompatibility screening for all pregnant women and follow-up testing for women at higher risk
- Syphilis screening
- Expanded tobacco intervention and counseling for pregnant tobacco users
- Urinary tract or other infection screening
- Bone density screening for all women over age 65 or women age 64 and younger that have gone through menopause
- Breast cancer genetic test counseling (BRCA) for women at higher risk
- Breast cancer risk-reducing medications, such as tamoxifen, for women who are at increased risk for breast cancer and low risk for adverse medication effects
- Breast cancer mammography screenings
- Cervical cancer screening
- Chlamydia infection screening for younger women and other women at higher risk
- Diabetes screening for women with a history of gestational diabetes who aren't currently pregnant and who haven't been diagnosed with type 2 diabetes before
- Domestic and interpersonal violence screening and counseling for all women
- Gonorrhea screening for all women at higher risk
- HIV screening and counseling for everyone age 15 to 65, and other ages at increased risk
- PrEP (pre-exposure prophylaxis) HIV prevention medication for HIV-negative women at high risk for getting HIV through sex or injection drug use
- Sexually transmitted infections counseling for sexually active women
- Tobacco use screening and interventions
- Well-woman visits to get recommended services for all women

Preventive Care Benefits for Children:

- Alcohol, tobacco, and drug use assessments for adolescents
- Anxiety in children and adolescents screening
- Depression screening for adolescents beginning routinely at age 12

- Fluoride supplements for children without fluoride in their water source
- Fluoride varnish for all infants and children as soon as teeth are present
- Gonorrhea preventive medication for the eyes of all newborns
- Hearing screening for all newborns; and regular screenings for children and adolescents
- Height, weight and body mass index (BMI) measurements
- Hematocrit or hemoglobin screening for all children
- Hemoglobinopathies or sickle cell screening for newborns
- HIV screening for adolescents at higher risk
- Hypothyroidism screening for newborns
- PrEP (pre-exposure prophylaxis) HIV prevention medication for HIV-negative adolescents at high risk for getting HIV through sex or injection drug use
- Obesity screening and counseling
- Oral health risk assessment for young children from 6 months to 6 years
- Phenylketonuria (PKU) screening for newborns
- Prevention of dental caries in children
- Sexually transmitted infection (STI) prevention counseling and screening for adolescents at higher risk
- Skin cancer prevention
- Syphilis screening for adolescents
- Tuberculin testing for children at higher risk of tuberculosis
- Vision screening for all children
- Well-baby and well-child visits