

**DEPARTMENT OF HEALTH AND HUMAN SERVICES  
OFFICE OF CIVIL RIGHTS**

**AMERICAN SOCIETY FOR METABOLIC AND BARIATRIC SURGERY, INC.; THE OBESITY SOCIETY, INC.; ACADEMY FOR NUTRITION AND DIETETICS, OBESITY MEDICINE ASSOCIATION, and OBESITY ACTION COALITION, INC.,**

**Petitioners**

**v.**

**CASE NO.:**

**THE AETNA ACCIDENT & LIABILITY COMPANY, INC.; ASSURANT, INC.; CIGNA CORPORATION; COVENTRY CARELINK INSURANCE SERVICES, LLC; HUMANA, INC.; KAISER FOUNDATION HEALTH PLAN, INC.; BLUE CROSS AND BLUE SHIELD OF ALABAMA, INC.; PREMERA BLUE CROSS BLUE SHIELD OF ALAKSA, INC.; BLUE CROSS AND BLUE SHIELD OF ARIZONA, INC.; ARKANSAS BLUE CROSS AND BLUE SHIELD, INC.; ANTHEM BLUE CROSS OF CALIFORNIA, INC.; BLUE SHIELD OF CALIFORNIA, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF COLORADO, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF CONNECTICUT, INC.; HIGHMARK BLUE CROSS BLUE SHIELD OF DELAWARE, INC.; CAREFIRST BLUE CROSS BLUE SHIELD OF THE DISTRICT OF COLUMBIA, INC.; BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.; BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC.; BLUE CROSS BLUE SHIELD OF HAWAII, INC.; BLUE CROSS OF IDAHO, INC.; REGENCE BLUE SHIELD OF IDAHO, INC.; BLUE CROSS AND BLUE SHIELD OF ILLINOIS, INC.; ANTHEM BLUE CROSS BLUE SHIELD OF INDIANA, INC.; WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, INC.; BLUE CROSS BLUE SHIELD OF KANSAS, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF KENTUCKY, INC.; BLUE CROSS AND BLUE SHIELD OF LOUISIANA, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF MAINE, INC.; CAREFIRST BLUE CROSS BLUE SHIELD OF MARYLAND, INC.; BLUE CROSS AND BLUE SHIELD OF MASSACHUSSETTS, INC.; BLUE CROSS AND BLUE SHIELD OF MICHIGAN, INC.;**

**BLUE CROSS AND BLUE SHIELD OF MINNESOTA, INC.; BLUE CROSS AND BLUE SHIELD OF MISSISSIPPI, INC.; ANTHEM BLUE CROSS BLUE SHIELD OF MISSOURI, INC.; BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, MISSOURI, INC.; BLUE CROSS AND BLUE SHIELD OF MONTANA, INC.; BLUE CROSS AND BLUE SHIELD OF NEBRASKA, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF NEVADA, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF NEW HAMPSHIRE, INC.; HORIZON BLUE CROSS AND BLUE SHIELD OF NEW JERSEY, INC.; BLUE CROSS AND BLUE SHIELD OF NEW MEXICO, INC.; BLUE CROSS & BLUE SHIELD OF WESTERN NEW YORK, INC.; BLUESHIELD OF NORTHEASTERN NEW YORK, INC.; EMPIRE BLUE CROSS AND BLUE SHIELD OF NEW YORK, INC.; EXCELLUS BLUECROSS BLUESHIELD, INC.; BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, INC.; BLUE CROSS AND BLUE SHIELD OF NORTH DAKOTA, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF OHIO, INC.; BLUE CROSS AND BLUE SHIELD OF OKLAHOMA, INC.; REGENCE BLUECROSS BLUESHIELD OF OREGON, INC.; BLUE CROSS OF NORTHEASTERN-WILKES-BARRE, PENNSYLVANIA, INC.; HIGHMARK BLUE SHIELD OF PENNSYLVANIA, INC.; CAPITAL BLUECROSS – HARRISBERG, PENNSYLVANIA, INC.; HIGHMARK BLUE CROSS BLUE SHIELD – PITTSBURGH, PENNSYLVANIA, INC.; INDEPENDENCE BLUE CROSS – PHILADELPHIA, PENNSYLVANIA, INC.; BLECROSS BLUE SHIELD OF PUERTO RICO, INC.; BLUE CROSS AND BLUE SHIELD OF RHODE ISLAND, INC.; BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA, INC.; WELLMARK BLUE CROSS AND BLUE SHIELD OF SOUTH DAKOTA, INC.; BLUE CROSS AND BLUE SHIELD OF TENNESSEE, INC.; BLUE CROSS AND BLUE SHIELD OF TEXAS, INC.; REGENCE BLUECROSS BLUESHIELD OF UTAH, INC.; BLUE CROSS AND BLUE SHIELD OF VERMONT, INC.; ANTHEM BLUE CROSS AND BLUE SHIELD OF VIRGINIA, INC.; CAREFIRST BLUECROSS BLUESHIELD OF VIRGINIA, INC.; PREMIERA BLUE CROSS OF WASHINGTON, INC.; REGENCE BLUE SHIELD OF WASHINGTON, INC.; HIGHMARK BLUE CROSS BLUE SHIELD OF WEST VIRGINIA, INC.; ANTHEM**

**BLUE CROSS AND BLUE SHIELD OF WISCONSIN, INC.;**  
**BLUE CROSS AND BLUE SHIELD OF WYOMING, INC.,**

**Respondents.**

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**COMPLAINT**

Petitioners, American Society for Metabolic and Bariatric Surgery, Inc. (“ASMBS”), The Obesity Society, Inc. (“TOS”), Academy for Nutrition and Dietetics (“AND”), Obesity Medicine Association (“OMA”) and the Obesity Action Coalition, Inc. (“OAC”) hereby file this complaint against the foregoing defendants (“Health Plans”) with the Department of Health and Human Services (“HHS”), Office of Civil Rights, pursuant to the provisions of 42 USC § 18116 (§ 1557 of the Patient Protection and Affordable Care Act of 2010 (“ACA”)), and as grounds therefore state:

**INTRODUCTION**

1. ASMBS is a professional society, incorporated in Iowa and Florida, dedicated to the advancement of bariatric surgery.
2. ASMBS represents the interests of professionals involved in the practice of bariatric surgery, as well as the interests of bariatric surgery patients in general.
3. TOS is a professional society, incorporated in Maryland, dedicated to the advancement of knowledge regarding obesity.
4. AND is a professional society, incorporated in Illinois, dedicated optimizing health through food and nutrition.
5. OMA is a professional society, incorporated in Colorado, dedicated to the advancement of obesity medicine.

6. OAC is a patient advocacy organization, incorporated in Ohio, dedicated to improving the lives of those suffering from obesity.
7. Health Plans are “qualified health plans” on Affordable Care Act (ACA) exchanges pursuant to 42 USC § 18021 (§ 1301 of the ACA), which must provide “essential health benefits” pursuant to 42 USC § 18021(a)(1)(B) (§ 1301(a)(1)(B) of the ACA).
8. Essential health benefits include “chronic disease management,” pursuant to 42 USC § 18022(b)(1)(I) (§ 1302(b)(1)(I) of the ACA).
9. No ACA qualified health plan may impose “preexisting condition” exclusions from insurance coverage under the ACA, pursuant to 42 USC § 300gg-3 (§ 1201 of the ACA).
10. ACA qualified health plans’ essential health benefits may not discriminate based upon an insured’s “health conditions,” pursuant to 42 CFR §§ 156.125(a) and 156.200(e).
11. The ACA requires guaranteed issue of coverage in the individual and small group health insurance markets such that no one can be denied health insurance on the basis of a pre-existing condition, pursuant to 42 USC § 300gg-1 (§ 1201 of the ACA).
12. As well, the ACA disallows discrimination in the provision of health care benefits, pursuant to 42 USC § 18116 (§ 1557 of the ACA).
13. The ACA further prohibits any form of discrimination against individuals insured by an ACA exchange plan based upon health status or medical condition, pursuant to 42 USC § 300gg-4 (§ 1201 of the ACA).

14. A qualified health plan may “not employ marketing practices or benefit designs that have the effect of discouraging the enrollment in such plan by individuals with significant health needs” pursuant to 42 USC § 18031(c)(1)(A) (§ 1311(c)(1)(A) of the ACA) and 42 CFR § 156.225(b).
15. In addition, empirical research consistently demonstrates that obesity has a proportionally disparate adverse impact upon women in comparison to men. See, e.g., John Crawley, *The Impact of Obesity on Wages*, 39 J. Hum. Resources 451, 451-74 (2004) (demonstrating that obesity negatively impacts women’s earnings but not men’s earnings); Pierre Andre-Chiappori, et al., *Fatter Attraction: Anthropomorphic and Socioeconomic Matching on the Marriage Market*, 120 J. Pol. Econ. 659 (2012) (demonstrating that obese women marry spouses with lower education and lower earnings); Jennifer Barrett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 Berkley J. Emp. & Lab. \_\_\_\_\_ (forthcoming, 2016) (demonstrating that women with obesity, but not men with obesity, are excluded by employers from certain types of high-paying occupations).
16. Section 1557 of the ACA prohibits the denial of health care benefits on the basis of disability. The ACA incorporates the same definition of disability used in Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. An individual is disabled for the purposes of these acts if he or she is substantially limited in a major life activity, is regarded as substantially limited, or has a record of a substantially limiting impairment. In 2008, Congress mandated that the term “disability” be construed “in favor of broad coverage of individuals ... to the

maximum extent permitted” in the Americans with Disabilities Act, in the Rehabilitation Act, and by incorporation, in the ACA. See 42 USC § 12102(4)(A); 29 USC § 701; 45 CFR § 84.4. As a result, federal courts have consistently recognized since 2008 that severe obesity meets this definition of disability. See, e.g., *E.E.O.C. v. Resources for Human Development, Inc.*, 827 F. Supp. 2d 688 (E.D. La. 2011); *Whittaker v. America’s Car Mart, Inc.*, 2014 WL 1648816 (E.D. Mo. April 24, 2014); *Lowe v. American Eurocopter, LLC*, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010). The Equal Employment Opportunity Commission (“EEOC”) has also revised its guidelines since 2008 to reflect that “severe obesity ... is clearly an impairment” for the purposes of these acts.

### **FACTS**

17. Since 2013, the American Medical Association has classified obesity as a “chronic condition.” See, American Medical Association, House of Delegates, Resolution 420 (A-13), available at, <http://www.npr.org/documents/2013/jun/ama-resolution-obesity.pdf>.
18. Given that ACA qualified health plans have been available for approximately two years, any individuals with clinical obesity that have obtained health insurance from an ACA exchange, did so while their obesity was a “pre-existing condition.”
19. Currently, ACA benchmark qualified health plans for 27 states exclude coverage for bariatric surgery. See, Exhibit A.
20. In contrast, bariatric surgery is covered by the Medicare program, 49 state Medicaid plans, the Federal Employees Health Plan, Tricare, the overwhelming

majority of state employee health plans, and the majority of employer-based plans with greater than 500 employees.

21. As the above research demonstrates, obesity creates economic and social hardships that are unique to women. Because the current policy fails to cover weight-loss treatments for obesity such as bariatric surgery, many obese individuals cannot afford these treatments on their own. Failure to receive such treatments not only affects obese women's health, but it also affects their earnings potential and ability to provide for their families. For this reason, we believe that the current policy disparately impacts, and thus discriminates against, women under Section 1557 of the ACA.

### **LEGAL ARGUMENT**

22. Prior to the enactment of the ACA, health insurance companies routinely refused coverage due to pre-existing conditions, and refused to cover chronic conditions.
23. The clear intent of the ACA is to eliminate health coverage disparities based upon pre-existing conditions, and to provide chronic condition universal coverage.
24. There currently exists a significant disparity between the coverage for bariatric surgery between ACA benchmark plans for 27 states, and all major private and government health insurance plans.
25. The named defendant Health Plans are therefore not in compliance with the requirements of 42 USC § 18022(b)(1)(I), 42 USC § 300gg-3, and 42 CFR §§ 156.125(a) and 156.200(e).

26. Notably, the Health Plans' failure to comply with 42 USC § 18022(b)(1)(I), 42 USC § 300gg-3, and 42 CFR §§ 156.125(a) and 156.200(e) is gender discriminatory in that the adverse impact is disproportionately suffered by women, and thus the noncompliance also violates the provisions of 42 USC § 18116.

**RELIEF REQUESTED**

27. Petitioners request that OCR make a determination that the named Defendant Health Plans are not in compliance with relevant ACA requirements, as described above.

28. Petitioners request that OCR seek civil monetary penalties and decertification of the named Defendants as a remedy to the non-compliance.

Respectfully submitted this \_\_\_\_\_ day of October, 2015.

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