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## HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Provisions

On September 8, 2015, the Department of Health and Human Services (“HHS”) Office of Civil Rights (“OCR”) published a sweeping proposed rule implementing section 1557 of the Patient Protection and Affordable Care Act (“ACA”). 80 Fed. Reg. 54172. This rule prohibits discrimination in health programs and activities on the basis of race, color, national origin, sex, age, or disability. Notably, section 1557 is the first law to prohibit sex discrimination in health care programs.

The proposed rule is of critical importance to health insurance issuers, health care providers (including pharmacies and health clinics), and some group health plans. HHS has read the statutory requirements extremely broadly, potentially sweeping entire entities into the scope of section 1557 when even one plan or program receives any federal funds from HHS. The result is that even self-funded plans that utilize health insurance issuers as third-party administrators may be affected.

Key issues:

- With respect to issuers participating in the Marketplaces, the proposed rule appears to effectively apply these nondiscrimination provisions to much, if not all, of the issuer’s entire operations, including with respect to its operations as third party administrator (“TPA”) or administrative-services-only (“ASO”) provider.
- The proposed rule broadly prohibits discrimination on the basis of sex in health programs, and includes significant requirements related to transgender individuals and the treatment of gender dysphoria.
- The rule also includes requirements for language assistance for individuals with limited English proficiency (“LEP”) and accessibility and effective communication for individuals with disabilities.
- There will be a very short window for compliance: OCR proposes that the rule will be effective 60 days after being finalized.
- Finally, the proposed rule confirms a private right of action, and the availability of damages for violations of section 1557.

Comments on the proposal are due no later than **November 9, 2015**. Contact any of the attorneys in the Health and Welfare Practice Group at Groom Law Group or your regular Groom Law Group attorney if you are interested in commenting on the rule.

## **I. Background**

ACA section 1557 provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (race, color, national origin), Title IX of the Education Amendments of 1972 (sex), the Age Discrimination Act of 1975 (age), or Section 504 of the Rehabilitation Act of 1973 (disability), under any health program or activity, any part of which is receiving Federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA or its amendments. On August 1, 2013, OCR published a Request for Information (“RFI”) asking for comments from consumers, health care providers, health insurers, and other stakeholders on ACA section 1557.

## **II. Proposed Rule**

OCR proposes to apply these nondiscrimination requirements to:

- 1) any health program or activity, any part of which receives funding from HHS (with the exception of Medicare Part B payments), such as hospitals that accept Medicare patients or doctors who treat Medicaid patients;
- 2) health programs and activities administered by HHS, which would include health insurance issuers participating in the Federal Marketplace; and
- 3) health programs and activities administered by entities established under Title I of the ACA, including State-based Marketplaces.

The rule defines “Federal financial assistance” to specifically include subsidies for individuals receiving coverage through the Marketplaces. The rule also broadly defines “health program or activity” to include providing or administering health-related services or health-related insurance coverage and providing assistance in obtaining health-related services or health-related insurance coverage, and includes all of the operations of an entity principally engaged in providing or administering health services or health insurance coverage.

For issuers that receive Federal financial assistance, the rule would appear to apply to the entire entity, so that products offered through the Marketplace, outside the Marketplace, in the individual or group health insurance markets, the issuer as a TPA for self-funded employer-sponsored group health plans, and the issuer’s own employee health benefit program are subject to the proposed rule. For example, an issuer that participates in the Marketplace and that also offers plans outside the Marketplace will be covered by the proposed rule for all of its health plans, as well as when it acts as a TPA for an employer-sponsored group health plan and for their own employee benefit plans (even if self-funded).

The rule does not expressly address whether the requirements of section 1557 flow from an issuer acting as a TPA to an employer’s self-funded plan design. If a TPA’s section 1557 obligations apply to its self-funded clients, this rule will create an additional incentive for issuers to avoid participating on the Marketplace and for employers to self-fund using TPAs that do not receive federal funds.

### **Prohibited Discrimination**

As mentioned previously, the proposed rule prohibits discrimination based on an individual’s race, color, national origin, sex, age, or disability under a health program or activity. Under the rule, discriminatory actions specifically

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include denying or limiting health coverage, denying a claim, employing marketing or benefit designs, and imposing additional cost-sharing on the basis of an individual's race, color, national origin, sex, age, or disability, and automatically excluding coverage for all health services related to gender transition. The proposed rule does not provide any specific examples of benefit designs that would be discriminatory. However, one of the key compliance issues is likely to be the inclusion/exclusion and placement on formularies of drugs that treat conditions prevalent for protected individuals.

### ***Sex Discrimination***

The proposed rule also makes clear that discrimination based on sexual orientation is prohibited under section 1557. The proposed rule provides that individuals may not be subject to discrimination based on sexual stereotyping or gender identity. For example, under the rule (1) individuals cannot be denied health care or health coverage based on their sex, including their gender identity; (2) individuals must be treated consistent with their gender identity, including in access to facilities; (3) sex-specific health care cannot be denied or limited only because the person seeking such services identifies as belonging to another gender; and (4) explicit categorical exclusions in coverage for all health services related to gender transition are facially discriminatory. It is not uncommon for large employers to limit gender identity coverage, and as mentioned previously, it appears that issuers as TPAs may be subject to section 1557 while administering such a plan. The proposed rule specifically requests comment on the provisions relating to sexual discrimination.

OCR proposes that the rule would not affect the application of existing protections for religious beliefs and practices, such as provider conscience laws and the regulations issued under the ACA related to preventive services. However, under the proposed rule, women are protected from discrimination not only in the health coverage they obtain but in the health services they seek from providers. The proposed rule specifically requests comment on whether section 1557 should include an exemption for religious organizations and the scope of any exemption.

### ***Language Services and Auxiliary Aids and Services***

The rule includes requirements for language assistance for LEP individuals and provides guidance with regard to the provision of language services, such as oral interpreters and written translations. In determining what the general standard requires, the rule provides that this will be a flexible standard and will be evaluated on a case-by-case basis, taking into consideration various factors, such as the nature of the communication, how often the entity encounters individuals who speak the language at issue, and the resources of the entity. Under the proposed rule, entities would be required to post a notice of consumer rights providing information about communication assistance; and post taglines in the top 15 languages spoken by individuals with LEP nationally, indicating the availability of such assistance. OCR will provide a sample notice and translated taglines (both included as appendices to the proposed rule), and will translate the notice into 15 languages.

For individuals with disabilities, the rule includes requirements for the provision of auxiliary aids and services, including alternative formats for written information and sign language interpreters. This requirement also includes a notice that entities must post which provides information about these services.

### **Enforcement**

Section 1557 has been effective since the enactment of the ACA and since that time OCR has been accepting and investigating discrimination complaints under section 1557. The proposed rule provides that the enforcement mechanisms under the federal civil rights laws apply for violations of section 1557. Thus, the proposed rule provides

for a private right of action and damages for violations of section 1557 to the same extent that such enforcement mechanisms are provided for under the current federal civil rights laws with respect to recipients of Federal financial assistance, making it clear that individuals have the ability to file a lawsuit under section 1557. The rule is not clear about administrative exhaustion, except for age discrimination claims; OCR will require administrative exhaustion for claims of age discrimination.

### **Effective Date**

OCR proposes that the rule will be effective 60 days after being finalized. This timing may be difficult for entities that didn't realize they would be swept in under the broad applicability provisions of this rule. In addition, by the time this rule is finalized and entities understand the scope of the rule, plans will have already been approved by the Marketplaces and the State Departments of Insurance, and those plans would possibly need to be refiled to meet the requirements, including the requirement to eliminate exclusions related to gender transition. This would also be a very tight timeline for employer plans who may be indirectly subject to section 1557 through issuers receiving Federal financial assistance acting as their TPA.

### **Assurances**

OCR proposes requiring each entity applying for Federal financial assistance, each issuer seeking certification to participate in a Marketplace, and each State seeking approval to operate a State-based Marketplace to submit an assurance that its health program and activities will be in compliance with section 1557.

### **III. Conclusion**

Section 1557 has a broad scope and applies to a wide range of health programs. We consider the issues regarding applicability and scope to be the most sweeping provisions of the rule. Particularly, the applicability of section 1557 to all health plan related products and services offered by an issuer, including any TPA or ASO services, could have a far-reaching impact. Additionally, the requirements related to transgender coverage may effectively create a benefit mandate for health services related to gender transition. Finally, the proposed rule does not appear to require administrative exhaustion (i.e., filing a complaint first with OCR) for discrimination claims that are not related to age discrimination. This is disappointing, as administrative exhaustion can serve as a relatively fast and inexpensive way to investigate and resolve meritless claims.

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Please contact any of the attorneys in the Health and Welfare Practice Group at Groom Law Group or your regular Groom Law Group attorney for further information on the section 1557 proposed rule.