

**MEMORANDUM**

**To:**

**From:** Peter Thomas and Christina Krynski

**Date:** June 12, 2019

**Re:** Proposed Changes to ACA Nondiscrimination Rules

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On May 24<sup>th</sup>, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) issued a Proposed Rule that would substantially replace the current rules implementing Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, disability, age, and sex.<sup>1</sup> **Comments on the Proposed Rule are due 60 days after publication in the Federal Register.**

While many of the Proposed Rule’s most significant changes are related to discrimination on the basis of sex, this memorandum will focus on the proposals that may impact the implementation and enforcement of Section 1557’s prohibition of discrimination on the basis of disability. While the Proposed Rule would retain certain provisions related to accessibility for individuals with disabilities, OCR seeks comment on whether it should consider certain exceptions to the accessibility provisions. The Proposed Rule would also limit the scope of the Section 1557 regulations and its enforcement mechanisms.

**Background on Section 1557 of the ACA**

Section 1557 applies to any health program or activity that receives Federal financial assistance, any program or activity that is administered by an executive agency under Title I of the ACA, and an entity established under Title I of the ACA.<sup>2</sup> This provision prohibits discrimination on any grounds prohibited by the following statutes:<sup>3</sup>

- Title VI of the Civil Rights Act of 1964 (race, color, and national origin);<sup>4</sup>
- Title IX of the Education Amendments of 1972 (sex);<sup>5</sup>

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<sup>1</sup> Nondiscrimination in Health and Health Education Programs or Activities (hereinafter the “Proposed Rule”), currently available at: <https://www.hhs.gov/sites/default/files/1557-nprm-hhs.pdf>.

<sup>2</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116).

<sup>3</sup> *Id.*

<sup>4</sup> 42 U.S.C. § 2000d *et seq.*

<sup>5</sup> 20 U.S.C. § 1681 *et seq.*

- The Age Discrimination Act of 1975 (age);<sup>6</sup> and
- Section 504 of the Rehabilitation Act of 1973 (disability).<sup>7</sup>

On May 18, 2016, OCR finalized its first set of regulations implementing Section 1557 at 45 C.F.R. Part 92.<sup>8</sup> Several states and religiously-affiliated health care organizations subsequently filed a lawsuit challenging certain aspects of the regulations, particularly the prohibition of discrimination on the basis of gender identity and termination of pregnancy—this litigation is ongoing.<sup>9</sup> In the Proposed Rule, OCR seeks to revise the Section 1557 regulations largely in response to this litigation, although the Proposed Rule also addresses other aspects of the regulations.

## **Overview of the Proposed Rule**

In the Proposed Rule, OCR states that it seeks to “substantially replace” the existing Section 1557 regulations.<sup>10</sup> While many of the most significant proposals are to the provisions related to discrimination on the basis of sex, some of OCR’s proposals that may impact the implementation and enforcement of Section 1557’s prohibition of discrimination on the basis of disability. OCR believes that these changes more faithfully conform to the statutory limitations and will reduce regulatory burden for covered entities.

### *Scope of the Nondiscrimination Rules*

In relevant part, Section 1557 applies to “any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance.”<sup>11</sup> The current regulations define “Federal financial assistance” to include assistance that HHS “plays a role in providing or administering, including tax credits under Title I of the ACA.”<sup>12</sup> The Proposed Rule would remove the “plays a role” language.<sup>13</sup> As a result, the regulations would no longer cover issuers of Exchange plans solely on the basis that HHS plays a role in administering tax credits. Some Exchange plans may still be subject to nondiscrimination enforcement by HHS on other grounds under Section 1557, or under other nondiscrimination authorities.<sup>14</sup> However, there may be entities that would no longer be subject to the nondiscrimination requirements as a result of this proposed change. OCR specifically seeks comment on the proposed elimination of the “plays a role” language from the definition of Federal financial assistance.

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<sup>6</sup> 42 U.S.C. § 6101 *et seq.*

<sup>7</sup> 29 U.S.C. § 794.

<sup>8</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016).

<sup>9</sup> *See* Franciscan Alliance, Inc. et al. v. Azar, No. 7:16-cv-00108-O (W.D. Tex.).

<sup>10</sup> Proposed Rule at 58.

<sup>11</sup> 42 U.S.C. § 18116(a).

<sup>12</sup> 45 C.F.R. § 92.4.

<sup>13</sup> Proposed Rule at 64-65.

<sup>14</sup> For example, qualified health plans sold on the Exchanges established under Title I of the ACA would still be subject to Section 1557. Proposed Rule at 64-65.

OCR further proposes to limit the scope of application of the nondiscrimination requirements depending on whether the entity receiving Federal financial assistance is or is not “principally engaged in the business of providing health care.”<sup>15</sup> OCR believes that the current regulations improperly cover all operations of entities that are principally engaged in providing “health insurance coverage or other health coverage,” even if they are not principally engaged in the business of providing “health care.”<sup>16</sup> Under OCR’s proposal, if an entity that receives Federal financial assistance is “principally engaged in the business of health care,” then the Section 1557 regulations would apply to all operations of that entity.<sup>17</sup> If the entity is not “principally engaged in the business of health care,” however, then the Section 1557 regulations would only apply to the operations of that entity that receive Federal financial assistance.<sup>18</sup>

This proposed change means that, for example, short term limited duration insurance (otherwise known as short term plans) would not be subject to the nondiscrimination rules.<sup>19</sup> In addition, the rules would not apply to Medicare Part B or self-funded group health plans under the Employee Retirement Income Security Act of 1974 (ERISA), or the Federal Employees Health Benefits (FEHB) Program.<sup>20</sup> OCR seeks comment on issues related to scope of coverage issues under the Proposed Rule, including whether OCR should apply the requirements of the Section 1557 regulations to sub-recipients of Federal financial assistance.

### *Provisions Related to Accessibility for Individuals with Disabilities*

The Proposed Rule would retain, but redesignate, the provisions related to accessibility for individuals with disabilities.<sup>21</sup> However, OCR seeks comments on whether it should consider certain exceptions to the following provisions, which may limit the types of facilities that these requirements apply to or the steps that facilities must take to comply with Section 1557’s requirements:

- Effective Communication for Individuals with Disabilities (Current § 92.202; Proposed § 92.102) – In relevant part, this provision imposes obligations on covered entities to provide appropriate auxiliary aids and services. OCR seeks comment on whether to propose an exemption from the auxiliary aids and services requirement for covered entities with fewer than 15 employees.<sup>22</sup>

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<sup>15</sup> Proposed Rule at 67.

<sup>16</sup> OCR’s position is that “health insurance” is distinct from “health care.” Proposed Rule at 68-71.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Proposed Rule at 70 – 71.

<sup>20</sup> *Id.*

<sup>21</sup> 45 C.F.R. §§ 92.202 – 92.205.

<sup>22</sup> Proposed Rule at 88. The regulations implementing Section 504 of the Rehabilitation Act of 1973 permit this exemption, but allow OCR to impose this requirement on recipients of Federal financial assistance with fewer than 15 employees if provision of auxiliary aids and services would not significantly impair the ability of the recipient to provide the benefits or services.

- Accessibility Standards for Buildings and Facilities (Current § 92.203; Proposed § 92.103) – This provision requires that new construction or alteration of buildings or facilities must comply with the 2010 ADA Standards for Accessible Design by January 18, 2018, with certain exceptions. OCR seeks comment on the appropriateness of applying the 2010 ADA Standards’ definition of “public building or facility” to all entities covered under Section 1557, specifically with respect to whether this requirement benefits individuals with disabilities or burdens private entities.<sup>23</sup>
- Requirement to Make Reasonable Modifications (Current § 92.205; Proposed § 92.105) – This section requires covered entities to make reasonable modifications to policies, practices, or procedures when necessary, to avoid discrimination on the basis of disability, except if the modification would fundamentally alter the nature of the health program or activity. OCR seeks comment on whether this provision should be retained or substituted with language conforming to the Department of Justice’s Section 504 coordinating regulations which state that covered entities “shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified” individual with a disability.<sup>24</sup> OCR also seeks comment whether to include an exemption for “undue hardship.”<sup>25</sup>

### *Enforcement Mechanisms*

The final rule for the current regulations stated that a private right of action was available for any disparate impact discrimination on the basis of any of the criteria enumerated in the legislation (race, color, national origin, disability, age, and sex).<sup>26</sup> In the Proposed Rule, OCR states that its position is that private rights of action are not permitted for disparate impact claims of discrimination on the basis of race or sex and states that “there is a split question with respect to disability.”<sup>27</sup> By revising its position on disparate impact claims and limiting its enforcement mechanisms to those already provided for under other statutes,<sup>28</sup> OCR leaves up to the courts the issue of resolving the current split with respect to claims of discrimination on the basis of disability based on disparate impact. “Disparate impact” discrimination is when a policy or practice is neutral on its face but nonetheless has a disproportionately negative effect on a protected class, such as individuals with disabilities.

### *Requirements for Providing Notice of Non-Discrimination and Language Assistance Services*

The Proposed Rule would repeal the requirement that covered entities mail and/or provide notices regarding non-discrimination and the availability of language assistance services with

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<sup>23</sup> Proposed Rule at 88-89.

<sup>24</sup> Proposed Rule at 91.

<sup>25</sup> *Id.*

<sup>26</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,440 (May 18, 2016).

<sup>27</sup> Proposed Rule at 23. The current regulations also state that compensatory damages may be available for violations of Section 1557. 45 C.F.R. § 92.301(b). However, OCR states that its position is that compensatory damages are generally unavailable for claims based solely on disparate impact. Proposed Rule at 24.

<sup>28</sup> Proposed Rule at 58.

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every significant communication to individuals.<sup>29</sup> OCR seeks comment on the repeal of this requirement to notify beneficiaries, enrollees, applicants, patients, and/or members of the public of rights and responsibilities under civil rights laws.<sup>30</sup>

## **Conclusion**

While OCR's Proposed Rule retains the prohibition of discrimination on the basis of disability, as required by the statute, and the provisions related to accessibility, the proposed limitations on the scope of the Section 1557 regulations, its enforcement mechanisms, and the removal of certain requirements to notify individuals of their rights may limit the effectiveness of this prohibition. Specifically, these proposals may limit the types of entities that are subject to the ACA's nondiscrimination rules, as well as the ability of individuals to both know about and enforce their rights under the law.

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## **Comments on the Proposed Rule are due 60 days after publication in the Federal Register.**

Please let us know if you would like assistance in submitting comments on the Proposed Rule.

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<sup>29</sup> Proposed Rule at 14, 93-94.

<sup>30</sup> Proposed Rule at 96-98.