



9/16/2016

## Health Insurance and Regulation

### Take Heed: October 17, 2016 Compliance Deadlines for OCR Final Rule on Nondiscrimination in Health Programs Under Section 1557 of the Affordable Care Act

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The Affordable Care Act (ACA)[1] was enacted in 2010 with the aim to “increase the number of Americans covered by health insurance and decrease the cost of health care.”[2]

Section 1557 of the ACA[3] prohibits discrimination on the basis of race, color, national origin, sex, age, and disability by covered health programs.[4] The purpose of Section 1557 is to provide individuals in these protected classes “equal access to health care and health coverage.”[5]

On May 18, 2016, six years after the ACA’s enactment, the Department of Health and Human Services (HHS) Office for Civil Rights (OCR) issued its Final Rule to implement Section 1557, which was effective July 18.[6]

The Final Rule provides that individuals falling within the protected categories of race, color, national origin, sex, age, and disability “shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination 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.”[7]

Section 1557 and the Final Rule impose obligations and responsibilities on a covered entity that may extend beyond a covered entity’s pre-existing obligations not to discriminate:

- On the basis of race, color, or national origin under Title VI of the Civil Rights Act of 1964[8] (Title VI).
- On the basis of sex under Title IX of the Education Amendments of 1972[9] (Title IX).
- On the basis of age under the Age Discrimination Act of 1975[10] (Age Act).
- On the basis of disability under Section 504 of the Rehabilitation Act of 1973, as amended[11] (Section 504).
- On any of the enumerated bases protected under state or local laws.[12]

The Final Rule expressly provides that neither Section 1557 nor the Final Rule “shall be construed to apply a lesser standard for the protection of individuals from discrimination than the standards applied” under the foregoing federal statutes and their implementing regulations.[13]

## Covered Entities

The Final Rule applies to:

1. Entities that operate a health program or activity, any part of which receives federal financial assistance, including funds under Medicare Parts A, C, and D;

2. Entities established under Title I of the ACA that administer a health program or activity, including state-based marketplaces; and
3. Programs and activities administered by HHS, including federally-facilitated marketplaces.[\[14\]](#)

“Health program or activity” is broadly defined as “the provision or administration of health-related services, health-related insurance coverage, or other health-related coverage, and the provision of assistance to individuals in obtaining health-related services or health-related insurance coverage.”[\[15\]](#)

A non-exhaustive list of examples of entities subject to the Final Rule includes: “State agencies administering Medicaid or CHIP; Health Insurance Marketplaces; the Department in its operation of its health programs or activities; or . . . hospitals, nursing homes or skilled nursing facilities, home health agencies, and retail pharmacies (including mail-order pharmacies),”[\[16\]](#) laboratories and physicians receiving non-Medicare Part B federal assistance (e.g. Medicaid), state public health centers, community health centers, and qualified health plan issuers.[\[17\]](#)

### **Discrimination Prohibited**

A covered entity is prohibited from discriminating against the recipient of health services, or a person with whom said recipient has a relationship or an association, on the basis of race, color, national origin, sex, age, or disability.[\[18\]](#)

“On the basis of sex” is defined to include pregnancy, sex stereotyping, and gender identity.[\[19\]](#)

“Gender identity” is defined to include gender expression and being transgender.[\[20\]](#) Further emphasis on the prohibition against gender identity discrimination is added by a separate prohibition against the denial of benefits on the basis of one’s sex assigned at birth being different from the sex to which such health services are ordinarily or exclusively provided.[\[21\]](#)

OCR decided not “to resolve in this Rule whether discrimination on the basis of an individual’s sexual orientation status alone is a form of sex discrimination under Section 1557.”[\[22\]](#) OCR recognizes that the law remains unsettled as to whether discrimination based solely upon one’s sexual orientation constitutes sex discrimination. OCR will “evaluate complaints alleging sex discrimination related to an individual’s sexual orientation to determine whether they can be addressed under Section 1557.”[\[23\]](#) Although not included in the definition, OCR states in its comments to the Final Rule that it interprets sex to include sexual orientation and will enforce the Final Rule consistent with its interpretation and future legal developments.[\[24\]](#)

### **Designation of a Civil Rights Coordinator and Adoption of a Grievance Procedure**

The Final Rule requires a covered entity “to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities . . . including the investigation of any grievance communicated alleging noncompliance with Section 1557” (Civil Rights Coordinator).[\[25\]](#)

A covered entity also must adopt a grievance procedure that incorporates “appropriate due process standards” and provides for “prompt and equitable resolution of grievances alleging any action” prohibited by ACA Section 1557 or the Final Rule.[\[26\]](#)

If a covered entity already has a Section 504 Coordinator and Grievance Procedure to comply with the provisions of Section 504 and its implementing rule,[\[27\]](#) it has the option to expand that coordinator’s duties and expand the grievance procedure beyond disability, to cover race, color, national origin, age, and sex, to comply with its cognate obligations under the Final Rule.[\[28\]](#)

OCR provides a sample Grievance Procedure as an appendix to the Final Rule.[\[29\]](#)

### **Notice Requirements for Large-Sized Significant Publications, Locations of Interactions with Public, and Website**

By October 17, a covered entity is required to post a Notice[\[30\]](#) in a “conspicuously-visible font”[\[31\]](#) (no further guidance is provided by OCR as to font size): (1) in conspicuous locations in which it interacts with the public; (2) in a conspicuous location on its website accessible from the home page; and (3) in large-sized significant publications and significant communications, targeted to beneficiaries, enrollees, applicants, or members of the public.[\[32\]](#)

The Notice must contain the following elements[\[33\]](#):

1. A statement that it does not discriminate on the basis of race, color, national origin, sex, age, or disability.
2. A statement that it provides auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure persons with disabilities may participate in an equal manner.
3. A statement that it provides language assistance services, including translated documents[\[34\]](#) and oral interpretation, free of charge and in a timely manner, when such services are necessary to provide “meaningful access” to persons with limited English proficiency (LEP).
4. An explanation of how to obtain said aids and services identified in elements 2 and 3.
5. An identification of, and contact information for, the designated Civil Rights Coordinator.
6. A statement about the availability of the grievance procedure and an explanation of how to file a grievance.
7. An explanation of how to file a discrimination complaint with OCR.

OCR provides a sample Notice as an appendix to its Final Rule.[\[35\]](#)

OCR also provides its sample Notice translated into 64 non-English languages on its website. [\[36\]](#) The Final Rule does not require the Notice to be posted in non-English languages, although OCR encourages covered entities to do so.[\[37\]](#) Whether a covered entity should post a Notice in a non-English language should be determined by the standards set forth in the Final Rule’s section discussing providing language access to LEP persons.[\[38\]](#)

### **Statement Requirements for Small-Sized Significant Publications**

By October 17, a covered entity must post a Statement,[\[39\]](#) in significant publications and significant communications, which are “small-sized, such as postcards and tri-fold brochures” in “conspicuously-visible font,”[\[40\]](#) stating only that it does not discriminate on the basis of race, color, national origin, sex, age, or disability.[\[41\]](#) The remaining six items required for the Notice discussed above need not be included in small-sized significant publications and communications.[\[42\]](#)

OCR’s example of a Statement complying with these requirements states:

[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex.[\[43\]](#)

### **Large-Sized Versus Small-Sized Significant Publications**

The word “significant” in the phrase “significant publications and significant communications . . . targeted to beneficiaries, enrollees, applicants, or members of the public” (significant publications) [44] relates to the importance of the publication, not to the size of the publication.[45] However, the distinction between large-sized and small-sized significant publications determines whether the full seven-element Notice or single Statement discussed above must be included in the significant publication.

As to small-sized significant publications, OCR’s Final Rule gives the example of “postcards and tri-fold brochures.”[46] OCR’s only additional examples in its comments are “targeted fliers, small posters,” “those that are communicated through social media platforms,” and “pamphlets.”[47] OCR does not define, or provide any clarification, as to what it means by large-sized significant publications. But since small-sized significant publications appear to be limited to documents such as fliers and pamphlets that have a single page or a few pages, large-sized significant publications likely include multi-page documents, such as patient handbooks and outreach publications.

### **Types of Documents That Are Significant Publications**

OCR has provided some examples of the types of significant publications that fall within the Final Rule.

- “[S]ignificant publications and significant communications” “may include patient handbooks, outreach publications, or written notices pertaining to rights or benefits or requiring a response from an individual.”[48]
- Consent forms; complaint forms; notice of eligibility criteria; notice of rights; notice of denial of benefits or services; notice of loss of benefits or services; notice of decreases in benefits or services; and applications to participate in the covered entity’s program, activity, or to receive the covered entity’s benefits or services, are examples of “vital documents,” provided in the HHS limited English proficiency guidance,[49] and are a subset of “significant communications and significant publications.”[50]

OCR intends “to interpret ‘significant publications and significant communications’ broadly” because: “Notifying individuals of their rights under Section 1557 and this part, including the availability of language assistance services for individuals with limited English proficiency and the availability of auxiliary aids and services for persons with disabilities, is critical to providing an equal opportunity to access health care and health coverage.”[51] According to OCR, “the scope of ‘significant publications and significant communications’” includes “not only documents meant for the public but also individual letters or notices to an individual, such as a letter to a consumer notifying the individual of a change in benefits.”[52] “We have no reasoned basis to distinguish and exempt significant publications and significant communications intended for specific individuals from significant publications and significant communications intended for the public at large.”[53]

OCR declined to limit the full seven-element Notice and 15 Taglines (discussed *infra*) for large-sized significant publications to a single annual mailing,[54] or to relegate the 15 Taglines to the inside lining of an envelope that was likely to be torn and tossed away.[55]

OCR also declined to “enshrine a list of examples of ‘significant publications and significant communications’ in [the Final Rule] for two main reasons.” [56] First, given the breadth of the covered entities falling under the Final Rule, OCR cannot provide meaningful guidance to the “full spectrum of covered entities.”[57] Second, OCR intends “to maximize each covered entities’ flexibility, and each covered entity is in the best position to determine which of its communications and publications with respect to its health programs and activities are significant.”[58]

## **Taglines Requirements for Large-Sized Significant Publications, Locations of Interactions with Public, and Website**

Taglines are “short statements written in non-English languages that indicate the availability of language assistance services free of charge.”<sup>[59]</sup>

OCR’s sample Tagline in English provides:

ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: xxx-xxx-xxxx).<sup>[60]</sup>

The actual Taglines must be translated into each appropriate non-English language in its native script.<sup>[61]</sup> Taglines translated into 64 non-English languages in their native script are provided on OCR’s website.<sup>[62]</sup> The English Tagline above translated into Spanish appears as follows on OCR’s website:

ATENCIÓN: si habla español, tiene a su disposición servicios gratuitos de asistencia lingüística. Llame al 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

By October 17, a covered entity is required to post Taglines in at least the top 15 languages spoken by LEP individuals in the relevant states in which it operates,<sup>[63]</sup> in “conspicuously-visible font”<sup>[64]</sup>: (1) in conspicuous locations in which it interacts with the public; (2) in a conspicuous location on its website accessible from the home page; and (3) in large-sized significant publications.<sup>[65]</sup>

A multi-state entity satisfies this requirement<sup>[66]</sup> when it posts Taglines in the top 15 languages spoken by the “aggregate [LEP] populations of those States, rather than of each individual State.” <sup>[67]</sup>

## **Tagline Requirements for Small-Sized Significant Publications**

Also by October 17, the covered entity must post Taglines for the top two languages spoken by LEP individuals in each state in which the covered entity operates, in small-sized significant publications.<sup>[68]</sup> A multi-state entity satisfies this requirement<sup>[69]</sup> when it posts Taglines in the top two languages spoken by the “aggregate limited English proficient populations of those States, rather than of each individual State.”<sup>[70]</sup>

## **Other Requirements Contained in OCR’s Final Rule**

For individuals with limited English proficiency, the Final Rule requires a covered entity to take reasonable steps to provide meaningful access, including oral interpretation and written translation where appropriate.<sup>[71]</sup>

For individuals with disabilities, the Final Rule requires a covered entity to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with other individuals, including providing auxiliary aids and services where appropriate.<sup>[72]</sup>

With exceptions and varying deadlines, the Final Rule requires covered entities to: (1) comply with the 2010 ADA Standards for Accessible Design, even if not required to do so under the ADA, for

new alterations or new construction; and (2) to comply with the requirements applicable to public buildings, even if not required to do so under the ADA.<sup>[73]</sup>

The Final Rule also requires covered entities to make services provided through electronic and information technology equally accessible to individuals with disabilities unless it would constitute an undue financial or administrative burden or constitute a fundamental alteration of the services it provides.<sup>[74]</sup>

The Final Rule requires covered entities to make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless such modifications would fundamentally alter the nature of the services it provides.<sup>[75]</sup>

An applicant for federal financial assistance to which Section 1557 and the Final Rule apply, must submit an assurance of compliance with Section 1557 and the Final Rule.<sup>[76]</sup>

The Final Rule prohibits non-discrimination on the basis of race, color, national origin, sex, age, or disability in health-related insurance and other health-related coverage.<sup>[77]</sup>

The Final Rule provides that in certain instances an employer may be liable for discrimination in employee health benefits programs.<sup>[78]</sup>

## Conclusion

The “new” requirements of posted Notices, Statements, and Taglines are effective October 17. Therefore, covered entities who have not yet made their plans on how to comply should take heed.

The remaining requirements of the Final Rule were effective July 18, 60 days after its publication.<sup>[79]</sup> In declining to extend the effective date in response to commentators, OCR explained that “[m]ost of the requirements of Section 1557 are not new to covered entities.”<sup>[80]</sup>

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<sup>[1]</sup> 124 Stat. 119.

<sup>[2]</sup> *Nat'l Federation of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

<sup>[3]</sup> 42 U.S.C. § 18116.

<sup>[4]</sup> Section 1557(a) provides in part:

[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title [1] (or amendments).

42 U.S.C. § 18116.

<sup>[5]</sup> 81 Fed. Reg. 31376, 31389 (Preamble to the Final Rule by Office of Civil Rights in the Department of Health and Human Services).

<sup>[6]</sup> 81 Fed. Reg. 31376, 45 C.F.R. pt. 92.

<sup>[7]</sup> 45 C.F.R. § 92.1 (Purpose and effective date). See also 45 C.F.R. § 92.101 (Discrimination prohibited).

<sup>[8]</sup> 42 U.S.C. § 2000d et seq.



[9] 20 U.S.C. § 1681 et seq.

[10] 42 U.S.C. § 6101 et seq.

[11] 29 U.S.C. § 794.

[12] Section 1557(b) provides:

Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 794 of title 29, or the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

The Final Rule similarly so provides at 45 C.F.R. § 92.3(b).

[13] The Final Rule states:

Neither Section 1557 nor this part shall be construed to apply a lesser standard for the protection of individuals from discrimination than the standards applied under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, or the regulations issued pursuant to those laws.

45 C.F.R. § 92.3(a).

[14] 45 C.F.R. § 92.2(a) (Application), 45 C.F.R. § 92.4 (Definitions “Covered entity”), 81 Fed. Reg. at 31378 and 31385 n. 47.

[15] 45 C.F.R. § 92.4 (Definitions “Health program or activity”).

[16] 81 Fed. Reg. at 31412.

[17] 81 Fed. Reg. at 31445-6.

[18] 45 C.F.R. § 92.101 (Discrimination prohibited); 45 C.F.R. § 92.209 (Nondiscrimination on the basis of association).

[19] 45 C.F.R. § 92.4 (Definitions “On the basis of sex”).

[20] 45 C.F.R. § 92.4 (Definitions “Gender identity”).

[21] 45 C.F.R. § 92.206 (Equal program access on the basis of sex).

[22] 81 Fed. Reg. at 31390.

[23] *Id.*

[24] 81 Fed. Reg. at 31389-31390.

[25] 45 C.F.R. § 92.7(a).

[26] 45 C.F.R. § 92.7(b).

[27] 45 C.F.R. pt. 84.

[28] 81 Fed. Reg. at 31393-31394, 31452.

[29] 45 C.F.R. pt. 92, app. C.

[30] 45 C.F.R. § 92.8(b)(1).

[31] 45 C.F.R. § 92.8(f)(1).

[32] 45 C.F.R. § 92.8(f)(1)(i)-(iii). OCR will permit a covered entity to deplete its supply of a particular publication before having to print new ones with the requisite Notice and Taglines. 81 Fed. Reg. at 31396 and 31453.

[33] 45 C.F.R. § 92.8(a)(1)-(7). The Final Rule permits the covered entity to combine this Notice with other notices, but it may do so only if “the combined notice clearly informs individuals of their civil rights under Section 1557 and [the Final Rule].” 45 C.F.R. § 92.8(h).

[34] The statement regarding the availability of “translated documents” relates to providing language assistance services to LEP individuals. With respect to the written translation of documents into non-English languages for LEP individuals, it would only be expected where it is a “reasonable step[] to provide meaningful access to each individual with [LEP].” 92 C.F.R. § 201(a) and (d)(2).

[35] Appendix A to 45 C.F.R. pt. 92. 45 C.F.R. § 92.8(c) requires OCR to provide a sample Notice containing the seven elements listed at 45 C.F.R. § 92.8(a)(1)-(7) in English and in the non-English languages for which covered entities will have to “post taglines in at least the top 15 languages spoken by individuals with LEP of the relevant State or States” pursuant to their obligations under 45 C.F.R. § 92.8(d)(1).

[36] <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/>.

[37] 81 Fed. Reg. at 31398.

[38] The Final Rule requires a covered entity to take “reasonable steps to provide meaningful access to each individual with [LEP] eligible to be served or likely to be encountered in its health programs and activities.” 45 C.F.R. § 92.201(a). In determining whether the entity has provided “meaningful access,” OCR will: (1) evaluate “the nature and importance of the health program or activity and the particular communication at issue, to the individual with [LEP]”; and (2) take into consideration, among other things, whether the covered entity has a written language access plan to be prepared to meet its obligations to provide meaningful access. 45 C.F.R. § 92.201(b).

[39] 45 C.F.R. § 92.8 (b)(2).

[40] 45 C.F.R. § (g)(1).

[41] 45 C.F.R. § 92.8(a)(1) and § 92.8 (g)(1).

[42] *Id.*

[43] 45 C.F.R. § 92.8(a)(1), § 92.8 (g)(1), and Appendix A.

[44] 45 C.F.R. § 92.8 (f)(1)(i).

[45] See *supra* notes 30 to 35 and 39 to 43.

[46] 45 C.F.R. § 92.8(f)(1)(i) and (g).

[47] 81 Fed. Reg. at 31398.

[48] 81 Fed. Reg. at 31396.

[49] “HHS limited English proficiency guidance” refers to “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.” 68 Fed. Reg. 47311 (Aug. 8, 2003).

[50] 81 Fed. Reg. at 31402.

[51] 81 Fed. Reg. at 31401. See also 81 Fed. Reg. at 31402.

[52] 81 Fed. Reg. at 31402.

[53] *Id.*

[54] 81 Fed. Reg. at 31401.

[55] 81 Fed. Reg. at 31398.

[56] 81 Fed. Reg. at 31402.

[57] *Id.*

[58] *Id.*

[59] 45 C.F.R. § 92.4 (Definitions “Taglines”).

[60] Sample Tagline in English provided at Appendix B to 45 C.F.R. pt. 92.

[61] 45 C.F.R. § 92.4 (Definitions “Taglines”).

[62] <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>.

[63] 45 C.F.R. § 92.8(d)(1).

[64] 45 C.F.R. § 92.8(f)(1).

[65] 45 C.F.R. § 92.8(f)(1)(i)-(iii).

[66] 45 C.F.R. § 92.8(d)(1) and § 92.8 (f)(1)(i)-(iii).

[67] 81 Fed. Reg. at 31400. To prepare the “aggregate limited English proficient populations” of the states in which a covered entity operates, in the absence of data developed by the OCR for the purposes of its Final Rule, a covered entity may use the data provided by the Center for Medicare and Medicaid Services (CMS) in its Appendix A to its March 30, 2016 “Language Access Guide for Exchanges, Qualified Health Plan (QHP) Issuers, and Web-Brokers” which lists the top 15 languages spoken in each State by LEP persons and provides the number of persons who speak each languages. <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Appendix-A-Top-15.pdf>. OCR refers to the CMS March 30, 2016 Language



Access Guide in its comments on the Final Rule. 81 Fed. Reg. at 31999-31400 and 81 Fed. Reg. at 31400 n. 107. OCR relies upon the same data set from the U.S. Census Bureau, 81 Fed. Reg. at 31400 n. 109, as which was utilized by the CMS in preparing its list. March 30, 2016 Language Access Guide. <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Language-access-guidance.pdf>. As of the date the article was written, OCR has not published its own list and it is not clear whether it will do so. Although, clearly OCR has a list of the top 64 non-English languages used by persons of LEP in the United States, given its translation into those 64 non-English languages on its website. <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>.

[68] 45 C.F.R. § 92.8(d)(2) and (g)(2).

[69] *Id.*

[70] *See supra* note 67.

[71] 45 C.F.R. § 92.201.

[72] 45 C.F.R. § 92.202

[73] 45 C.F.R. § 92.203. Covered entities required to adhere to the 2010 ADA Standards for Accessible Design (2010 ADA Standards) before July 18, 2016 (the effective date of the Final Rule), must continue to adhere to the 2010 ADA Standards for construction or alterations commenced after that date. *Id.* Covered entities not required to adhere to the 2010 ADA Standards before July 18, 2016, must comply with the 2010 ADA Standards for construction or alterations commenced after January 18, 2018. *Id.* Covered entities that commenced construction or alterations prior to July 18, 2016, in conformance with the 1991 or 2010 ADA Standards, are deemed to be in compliance with the Final Rule. *Id.* Covered entities that commenced construction or alterations prior to July 18, 2016, in conformance with the Uniform Federal Accessibility Standards, and that were not required to adhere to the 1991 or 2010 ADA Standards, are deemed to be in compliance with the Final Rule. *Id.* Under the Final Rule, “all newly constructed or altered buildings or facilities subject to this section shall comply with the requirements for a ‘public building or facility’ as defined in Section 106.5 of the 2010 Standards.” *Id.* Section 106.5 of the 2010 ADA Standards defines “public building or facility” as: “A building or facility or portion of a building or facility designed, constructed, or altered by, on behalf of, or for the use of a public entity subject to Title II of the ADA and 28 C.F.R. part 35 or to Title II of the ADA and 49 C.F.R. § 37.41 or § 37.43.” The primary difference between the 2010 ADA Standards applicable to a covered entity as an ADA Title III public accommodation, and the 2010 ADA Standards applicable to as a Section 1557 covered entity under the Final Rule is that all new construction or alterations must comply with the “public building or facility” requirements of the 2010 ADA Standards, which under the ADA, was only applicable to ADA Title II government buildings. *Id.* There is no guidance provided in OCR’s comments to the Final Rule regarding this section, except OCR’s statement that it is reasonable to impose these additional physical accessibility requirements under Section 1557 on Title III public accommodations: “We believe it is reasonable to hold entities that receive Federal financial assistance to the accessibility requirements under the final rule, regardless of the standards to which they might be subject under Title III.” 81 Fed. Reg. at 31424.

[74] 45 C.F.R. § 92.204.

[75] 45 C.F.R. § 92.205.

[76] 45 C.F.R. § 92.5 (HHS Form 690).

[77] 45 C.F.R. § 92.207.

[78] 45 C.F.R. § 92.208.

[79] 81 Fed. Reg. at 31378.

[80] *Id.*

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