

## HHS Releases Far-Reaching Proposed Rule to Prohibit Discrimination by “Covered Entities” Pursuant to Section 1557 of the Affordable Care Act

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October 2015

On September 8, 2015, the U.S. Department of Health and Human Services (“HHS”) published a proposed rule titled “Nondiscrimination in Health Programs and Activities” (“Proposed Rule”)<sup>1</sup> to implement the nondiscrimination requirements of Section 1557 of the Affordable Care Act (“ACA”). The Proposed Rule would prohibit discrimination on the basis of race, color, national origin, sex, age, and disability in any health program or activity of a “Covered Entity.” This rule would be the first law to explicitly prohibit discrimination in health care programs on the basis of sex. These discrimination prohibitions generally apply to “Covered Entities” that offer health care programs receiving federal funds and include Covered Entities’ operations as health insurance issuers in Federally Facilitated Marketplaces (“FFMs”) and State-Based Marketplaces (“SBMs”), health care providers, managed care providers, and even health insurance issuers acting in their capacity as third-party administrators for self-insured group health plans. HHS’s Office for Civil Rights (“OCR”) would be responsible for enforcing the proposed nondiscrimination protections. The Proposed Rule would also provide a private right of action to enable private individuals to sue Covered Entities as a means of enforcing compliance with the proposed nondiscrimination protections.

**Public comments to the Proposed Rule are due by November 9, 2015.** OCR will consider those comments as it drafts a final rule to implement Section 1557. The final rule will take effect 60 days after publication in the *Federal Register*.

### Background

Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in “any health program or activity” that is receiving federal financial assistance, or in any program or activity that is administered by an Executive

<sup>1</sup> Nondiscrimination in Health Programs and Activities; Proposed Rule, 80 Fed. Reg. 54172 (September 8, 2015), available at <https://www.federalregister.gov/articles/2015/09/08/2015-22043/nondiscrimination-in-health-programs-and-activities>.

Agency or any agency established under Title I of the ACA. Specifically, this section prohibits discrimination in “any health program or activity” on the grounds prohibited under Title VI of the Civil Rights Act of 1964<sup>2</sup> (“Title VI”) (race, color, national origin), Title IX of the Education Amendments of 1972<sup>3</sup> (“Title IX”) (sex), the Age Discrimination Act of 1975<sup>4</sup> (“Age Act”) (age), and Section 504 of the Rehabilitation Act of 1973<sup>5</sup> (“Section 504”) (disability). The Proposed Rule explicitly states that it will not be construed to apply a lesser standard of protection than these existing nondiscrimination laws.

### **Expansive Scope of the Proposed Rule**

The Proposed Rule has a far-reaching scope and would apply to the wide range of operations conducted by Covered Entities. OCR defines a “Covered Entity” as:

- (1) An entity that operates a **health program or activity**, any part of which receives Federal financial assistance; (2) an entity established under Title I of the ACA that administers a health program or activity; and (3) the Department [of HHS].

Notably, the Proposed Rule’s broad definition of “health program or activity” would include **all** the Covered Entity’s health-related operations, whether providing or administering health services or health insurance coverage, and not just the portion for which it receives federal financial assistance. This means that the nondiscrimination requirements would appear to apply to all products offered by a health insurance issuer in the FFM, all products that the insurer offers in private individual or group health insurance markets, and any third-party administrative services that the insurer provides to employer-sponsored group health plans.

Non-health care employers that receive federal financial assistance to fund an employee health benefit program also would be subject to the Proposed Rule with respect to the provision and administration of such program. For example, if a non-health care entity receives federal financial assistance that is designated to support an employee wellness program, then the Proposed Rule would apply to the administration of that wellness program.

### **General Nondiscrimination Provisions**

The Proposed Rule would prohibit discrimination in any affected health program or activity on the basis of race, color, national origin, sex, age, or disability, in providing or administering health-related insurance or other health-related coverage (§ 92.101). Specific actions prohibited as discriminatory would include those already delineated under HHS regulations implementing Title VI, Title IX, the Age Act, and Section 504, as well as those relating to denying, canceling, limiting, or refusing to issue or renew a

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<sup>2</sup> 42 U.S.C. 2000d *et seq.*

<sup>3</sup> 20 U.S.C. 1681 *et seq.*

<sup>4</sup> 42 U.S.C. 6101 *et seq.*

<sup>5</sup> 29 U.S.C. 794.

health insurance plan; employing benefit designs; or imposing additional costs based on prohibited discrimination.

### **Equal Program Access on the Basis of Sex**

The Proposed Rule would require Covered Entities to provide “equal access to its health care programs or activities without discrimination on the basis of sex.” In August 2013, OCR published a request for information on issues arising under Section 1557. OCR noted that it received comments from 17 organizations serving lesbian, gay, bisexual, or transgender individuals and 239 personal testimonies from transgender individuals describing their experiences with discrimination in the health care setting. The term “on the basis of sex” is defined by the Proposed Rule “to include, but . . . not [be] limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity.” OCR stated that the inclusion of sex stereotyping in the definition reflects the U.S. Supreme Court’s holding in *Price Waterhouse v. Hopkins*<sup>6</sup> that sex discrimination includes discrimination based on appearance, mannerisms, or stereotypical notions of appropriate behavior for each gender.

The Proposed Rule further provides that Covered Entities “shall treat individuals consistent with their gender identity.” In the preamble to the Proposed Rule, OCR explained that it chose to include discrimination on the basis of gender identity because OCR, other federal agencies, and some courts have interpreted sex discrimination to include gender identity.<sup>7</sup>

Finally, OCR noted that the current law is mixed on whether discrimination based on sexual orientation is prohibited as sex discrimination under existing federal laws. However, OCR stated that “as a matter of policy, we support banning discrimination in health programs and activities not only on the bases identified previously, but also on the basis of sexual orientation.”<sup>8</sup>

### **Individuals with Limited English Proficiency and Auxiliary Aids and Services**

The Proposed Rule would require Covered Entities to provide meaningful access to individuals with limited English proficiency. Covered Entities may need to provide oral language assistance, written translation of documents and websites, and taglines. Language assistance services required must be provided free of charge to individuals with limited English proficiency. These services must also be accurate and timely and protect the individual’s privacy and independence. OCR noted that the definition of “timely” would depend on the circumstances of each situation. Further, OCR would consider the costs of language assistance services and the resources available to the Covered Entity—including the Covered Entity’s ability to leverage resources among its partners—in evaluating whether the requirements of the Proposed Rule are met.

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<sup>6</sup> 490 U.S. 228, 250–251 (1989).

<sup>7</sup> See 80 Fed. Reg. 54176.

<sup>8</sup> *Id.*

While the Proposed Rule does not list specific, mandatory methods for providing language assistance, it does contain some important prohibitions. First, it would prohibit a Covered Entity from relying on a family member or a minor child to provide translation services except in an emergency. HHS stated that this practice could violate an individual's confidentiality and might involve a conflict of interest. Second, a Covered Entity could not require an individual to provide his or her own interpreter. Finally, a Covered Entity could not require an individual to accept language assistance services.

The Proposed Rule would also require that individuals with disabilities be provided with auxiliary aids and services, including alternative written formats, such as Braille, and sign language interpreters.

### **Enforcement Mechanisms**

The Proposed Rule would give OCR broad enforcement power for a violation of Section 1557. Enforcement mechanisms available under Title VI (race, color, national origin), Title IX (sex), Section 504 (disability), or the Age Act (age) would apply to enforcement of a Section 1557 violation. Additionally, an individual or entity would have a private right of action for a Section 1557 violation. There does not appear to be any mechanism for administrative exhaustion, except that a complaint for age discrimination must first be filed with OCR.

### **Key Takeaways**

Managed care entities, health care providers, and other health care stakeholders should assess their business portfolio to determine whether they directly accept federal funding, and, if so, determine the extent of their business operations that would be subject to the Proposed Rule. Covered Entities operating in an FFM or SBM should consider the impact of the Proposed Rule on their product offerings, both inside and outside the FFM or SBM, as well as on any involvement they have with self-insured products as a third-party administrator or provider.

All Covered Entities should similarly assess their current language assistance plans and approaches for ensuring access to information for those with disabilities to assess the impact that the Proposed Rule would have on those efforts. Comments should address the burden that the proposed changes would have on current business operations.

Epstein Becker Green attorneys are available to discuss the specifics of your organization and how the Proposed Rule would impact your current operations as well as help you craft comments to submit to OCR to use in developing the final nondiscrimination regulations.

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*This Client Alert was authored by **Lynn Shapiro Snyder** and **Helaine I. Fingold**. For additional information about the issues discussed in this Client Alert, please contact one*

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