



September 3, 2015

Director Bruce R. Ramage
Market Conduct Examination Standards (D) Working Group
National Association of Insurance Commissioners
1100 Walnut Street
Suite 1500
Kansas City, MO 64106-2197

Dear Director Ramage:

The National Women's Law Center (the Center) commends the National Association for Insurance Commissioners (NAIC) for drafting market conduct examination standards regarding Section 1557 of the Patient Protection and Affordable Care Act (ACA). Section 1557 provides the first broad federal protection against sex discrimination in health care—including discrimination based on pregnancy, gender identity, sex stereotypes, and marital or familial status—and importantly expands existing protections against health care discrimination based on race, color, national origin, age, and disability. Strong and effective standards that implement and enforce Section 1557 of the ACA are critical to ending discrimination in health care and fulfilling one of the key goals of the ACA: to eliminate discrimination in health care, with a particular focus on sex discrimination.

Since 1972, the National Women's Law Center has worked to achieve gains for women and their families in health, education, employment, family economic security, and other critical areas. The Center has championed efforts to ensure that women receive the health care they need, including reproductive health care. To that end, the Center has long worked to end to sex discrimination in health care, including its work to ensure passage, implementation, and robust enforcement of Section 1557 consistent with Congress's intent in enacting this provision.

We applaud the NAIC for developing a draft standard on Section 1557. The U.S. Department of Health and Human Services (HHS) issued proposed regulations implementing Section 1557 earlier today.¹ Although regulations are not yet finalized, Section 1557 has been in effect since the ACA was signed on March 23, 2010, so it is critical that examiners have tools, such as the NAIC draft standard, to conduct thorough reviews of health carrier practices to make sure that they are in compliance with this important non-discrimination provision. We recommend that the NAIC update its draft standard so that it is more fully reflective of Congressional intent and principles of non-discrimination, and reaches examples of prohibited discriminatory plan design that have been documented recently in marketplace plans. To that end, and given the Center's expertise in women's health and in Title IX, Title VII, and other key guideposts for interpreting Section 1557, these comments focus on Section 1557's sex discrimination protection, while also

¹ These comments were drafted prior to the release of the proposed regulations and therefore do not include references to language used in today's proposed regulations.

including a discussion about age discrimination. In addition, we support the comments provided to by the NAIC Consumer Representatives on the proposed standard.

The ACA, and Section 1557 in Particular, Provide Important Protections against Sex Discrimination

Section 1557 provides robust protection against discrimination on the basis of sex, as evidenced not only by the first-of-its-kind protection provided by Section 1557 itself, but also by Congress’s particular focus on addressing sex discrimination throughout the ACA. Indeed, several ACA provisions were enacted specifically to correct insurer practices that discriminated against women either on their face or in their impact.² Correcting pervasive sex discrimination in health care was a primary purpose of the ACA, including both intentional discrimination and practices that are not discriminatory on their face but have a disparate impact on women. Both forms of discrimination threaten women’s health by erecting barriers to care. This discrimination results in women paying more for health care, being misdiagnosed more frequently, receiving less effective treatments, and sometimes being denied care altogether.

Section 1557 Applies to Health Insurance Issuers

Section 1557 protects individuals from discrimination “on the ground[s] prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 504 of the Rehabilitation Act of 1973” in health programs or activities, any part of which receives federal financial assistance; programs or activities administered by an executive agency; and entities established under Title I of the ACA. These health programs include activities in virtually all aspects of the health care system, including any health program or activity undertaken by a recipient of federal financial assistance. “Program or activity” has the same meaning in Section 1557 as it does under the Civil Rights Restoration Act of 1987 (CRRRA), and as a result, both public and private entities that receive federal funds are covered by Section 1557’s nondiscrimination mandate. For example, insurance companies that receive federal funds are covered by this requirement.

Section 1557 differs from the civil rights laws to which it refers by expressly identifying “credits, subsidies, [and] contracts of insurance” as forms of federal financial assistance that trigger its application. For example, an insurance company that receives federally-subsidized premium

² *E.g.*, 156 Cong. Rec. H1632-04 (daily ed. March 18, 2010) (statement of Rep. Lee) (“While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system. Too many women are locked out of the health care system because they face discriminatory insurance practices and cannot afford the necessary care for themselves and for their children”); 156 Cong. Rec. H1891-01 (daily ed. March 21, 2010) (statement of Rep. Pelosi) (“It’s personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition.”); 155 Cong. Rec. S12026 (daily ed. Oct. 8, 2009) (statements of Sen. Mikulski) (“[H]ealth care is a women’s issue, health care reform is a must-do women’s issue, and health insurance reform is a must-change women’s issue because . . . when it comes to health insurance, we women pay more and get less.”); 155 Cong. Rec. S10262-01 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) (“Women have even more at stake. Why? Because they are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform.”); 156 Cong. Rec. H1854-02 (daily ed. March 21, 2010) (statement of Rep. Maloney) (“Finally, these reforms will do more for women’s health . . . than any other legislation in my career.”).

payments through premium tax credits is covered by Section 1557. In addition, Section 1557, unlike Title VI, Title IX, and the Rehabilitation Act, includes contracts of insurance as a form of federal financial assistance.³ A contract of insurance that is federal financial assistance for purposes of Section 1557 is any contract of insurance that is funded, entered into, administered, or guaranteed by the federal government.

Section 1557 also protects individuals from discrimination by entities established under Title I of the ACA. The health insurance Exchanges and Consumer-Oriented and Operated Plans (CO-OPs) are examples of entities created pursuant to Title I of the ACA and that are, therefore, subject to Section 1557. The Pre-existing Condition Insurance Program and the Early Retiree Reinsurance Program are also examples of entities brought into existence pursuant to Title I of the ACA and therefore subject to Section 1557.⁴ Section 1557's prohibitions apply to all aspects of these entities, including their employment practices and the services that they provide to consumers.

Further, as under other civil rights laws, a covered entity itself can neither discriminate, nor can it provide assistance—monetary or otherwise—to entities that discriminate.⁵ Thus, for example, the Exchanges may neither discriminate themselves nor sell discriminatory Qualified Health Plans (QHPs). This has been acknowledged in federal regulations implementing various aspects of the ACA, including exchanges and essential health benefits.⁶

We therefore support the application of these standards to all group health products and individual products and recommend clarifying that the standards apply to the carriers as well as the products.

Sex Discrimination Under Section 1557 Includes Discrimination Based on Pregnancy, Gender Identity, Sex Stereotypes, and Marital or Familial Status

Section 1557 provides that no health program or activity may discriminate on the basis of sex.⁷ It is critical that state regulators' reviews reflect the long-established jurisprudence of strong

³ Because "contracts of insurance" are not excluded in the statutory text of Section 504 but in its regulations, there are conflicting decisions about whether the regulations properly exclude it. *Compare Moore v. Sun Bank of North Florida*, 923 F.2d 1423, 1429-32 (11th Cir. 1991) (finding that because Section 504 did not expressly exclude contracts of insurance or guaranty, the regulations containing the exclusion were invalid as inconsistent with congressional intent and that the contract at issue did in fact constitute federal financial assistance) *with Gallagher v. Croghan Colonial Bank*, 89 F.3d 275 (6th Cir. 1996) (holding that based on the Section 504 regulation's exclusion of contracts of insurance or guaranty as federal financial assistance, a bank's receipt of reimbursement for default loans was not federal financial assistance and thus the bank was not subject to the Rehabilitation Act).

⁴ The Pre-existing Condition Insurance Program and the Early Retiree Reinsurance Program both expire January 1, 2014. 42 U.S.C. §§ 18001, 18002 (2012).

⁵ *See, e.g.*, 34 C.F.R. § 106.31(b)(6) (2012).

⁶ 45 C.F.R. §§ 155.120(c) (2012) (nondiscrimination rule for QHPs) 155.110(b) (nondiscrimination rule for Exchanges); 45 C.F.R. § 147.104(e) (nondiscrimination rule for marketing and benefit design); 45 C.F.R. § 156.125 (nondiscrimination rule for EHB).

⁷ Section 1557 prohibits discrimination "on the ground prohibited under . . . title IX of the Education Amendments of 1972." Title IX prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance. 20 U.S.C. § 1681(a) (2012).

protections against sex discrimination in federal law. Regulations, guidance, and case law under Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act (PDA), and Title IX of the Education Amendments of 1972 inform the interpretation of what constitutes sex discrimination under Section 1557, particularly to the extent that these sources address issues specifically relevant to health programs and activities. Moreover, many entities are directly bound by these antidiscrimination laws in addition to Section 1557, which strongly counsels for interpreting Section 1557 to provide at least as much protection against discrimination as these laws.⁸ As the statutory text of Section 1557 makes clear, it may not be interpreted to narrow existing interpretations of and protections against sex discrimination.⁹

Specifically, Section 1557's prohibition of sex discrimination necessarily includes discrimination based on pregnancy, gender identity, and sex stereotypes—as specified in HHS's Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities of August 1, 2013.¹⁰

- Pregnancy discrimination constitutes sex discrimination under Title IX¹¹ and other civil rights statutes such as Title VII¹² and also constitutes sex discrimination under Section 1557. These laws prohibit discrimination based on pregnancy itself, as well as pregnancy-related conditions.¹³
- Title IX has consistently been interpreted to bar discrimination based on sex stereotyping—including discrimination based on the assumption that someone conforms to a sex stereotype and discrimination against an individual because he or she departs from a sex stereotype—and Section 1557 must be understood to ban such discrimination.¹⁴ This prohibition on discrimination based on sex stereotypes reach discrimination based on gender identity or sexual orientation.¹⁵

⁸ Title VII, for example, covers employers who have fifteen or more employees. 42 U.S.C. § 2000e(b) (2012). Title IX prohibits an education program or activity that receives federal financial assistance from discriminating against individuals on the basis of sex. 20 U.S.C. § 1681, et seq.

⁹ Patient Protection and Affordable Care Act § 1557(b), codified at 42 U.S.C. § 18116(b) (2012).

¹⁰ Dep't of Health & Human Servs., Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 78 Fed. Reg. 46,558, 46,559 (proposed Aug. 1, 2013) (“Sex discrimination (including discrimination on the basis of gender identity, sex stereotyping, or pregnancy)”).

¹¹ 34 C.F.R. § 106.40(b)(1) (2012). See also *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 784 (3d Cir. 1990); *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 U.S. Dist. LEXIS 58359, at *26 (E.D. Wash. July 30, 2008); *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975, 977-78 (E.D. Ky. 1998); *Hall v. Lee Coll.*, 932 F. Supp. 1027, 1033 n.1 (E.D. Tenn. 1996); *Cazares v. Barber*, Case No. CIV-90-0128-TUC-ACM, slip op. (D. Ariz. May 31, 1990); *Wort v. Vierling*, Case No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984), *aff'd*, 778 F.2d 1233 (7th Cir. 1985).

¹² 42 U.S.C. § 2000e(k) (2012).

¹³ See, e.g., 42 USC § 2000e(k) (2012); see also 29 C.F.R. pt. 1604 app.; *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983).

¹⁴ See Dep't of Educ., Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Title IX* (January 19, 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Dep't of Educ., “Dear Colleague,” 7-8 (October 26, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg8.html. See also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010); *Bibby v. Phila Coca Cola Bottling Co.*, 260 F.3d 257, 2652-63 (3d Cir. 2001); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). See also *Doe v. Brimfield Grade School*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Theno v. Tonganoxi Unified School District*, 377 F. Supp. 3d 952 (D. Kansas 2005); *Schroeder v. Maumee Bd. Of Educ.*, 296 F. Supp. 2d 869, 880 (N.D. Ohio 2003); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090-91 (D. Minn.

Indeed, HHS has already recognized the importance of addressing discrimination against lesbian, gay, bisexual and transgender people in health care when it included explicit prohibitions against sex, gender identity, and sexual orientation discrimination in final rules for health insurance Exchanges, QHPs, and the EHB.¹⁶ Sex discrimination also includes discrimination on the basis of actual or potential parental, family, or marital status if this behavior treats women and men differently or is based on sex stereotypes.¹⁷

For these reasons, we recommend that the standards explicitly enumerate potential areas of sex based discrimination including pregnancy, gender identity, sexual orientation, marital or familial status, and sex stereotyping.

Age Discrimination Under Section 1557 Includes Arbitrary Age Limits

Section 1557 also provides that no health program or activity may discriminate “on the ground prohibited under . . . the Age Discrimination Act of 1975.”¹⁸ Some health insurance benefit designs include arbitrary age limits that are a clear violation of Section 1557. In the preamble to proposed regulations issued November 21, 2014, HHS cautioned “both issuers and States that age limits are discriminatory when applied to services that have been found clinically effective at all ages.”¹⁹ We recommend that “age limits” be included in the list of other areas of potential discrimination.

One example of discriminatory age limits that has recently been documented in marketplace plans is an age limit on fertility services. In a report issued this past April, the Center discovered qualified health plans in Connecticut covered infertility for individuals up to age 40.²⁰ While in

2000); State of Wash., Office of Insurance Comm’r, Letter to Health Insurance Carriers in Washington State Transgender Health Issues and Discrimination (Jun. 25, 2014), *available at* <http://www.insurance.wa.gov/about-oic/newsroom/news/2014/documents/gender-identity-discrimination-letter.pdf>.

¹⁵ The Equal Employment Opportunity Commission (EEOC) has concluded that discrimination based on gender identity or transgender status is a form of sex discrimination under Title VII, *Macy v. Dep’t of Justice*, E.E.O.C. Appeal No. 0120120821, (April 20, 2012), as have other federal agencies, such as the Department of Housing and Urban Development with regard to the Fair Housing Act, Memorandum from John Trasviña to FHEO Regional Directors, *Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression* (June 2010), *available at* <http://www.fairhousingnc.org/wp-content/uploads/2012/03/HUD-Memo-re-Sexual-Orientation-Discrimination-6-15-2010.pdf> (announcing that the Department would treat “gender identity discrimination most often faced by transgender persons as gender discrimination under the Fair Housing Act”). The EEOC has also concluded that discrimination based on sexual orientation constitutes sex discrimination. *Baldwin v. Dep’t of Transp.*, E.E.O.C. Appeal No. 0120133080 (July 15, 2015).

¹⁶ *See, e.g.*, 45 C.F.R. §§ 155.120(c) (nondiscrimination rule for Exchanges); 156.200(e) (for QHPs); 45 C.F.R. § 147.104(e) (for marketing and benefit design); 45 C.F.R. § 156.125 (for the EHB).

¹⁷ Title IX’s prohibition of sex discrimination encompasses these grounds. *E.g.* 34 C.F.R. § 106.40(a) (2012); 34 C.F.R. § 106.57(a).

¹⁸ 20 U.S.C. § 1681(a) (2012).

¹⁹ Dep’t of Health & Human Servs., Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016; Proposed Rule, 78 Fed. Reg. 70,674, 70,723 (proposed Nov. 26, 2014).

²⁰ Nat’l Women’s Law Ctr., State of Women’s Coverage: Health Plan Violations of the Affordable Care Act 19 (Apr. 2015) *available at* <http://www.nwlc.org/sites/default/files/pdfs/stateofcoverage2015final.pdf>.

accordance with the state’s insurance requirement, the age 40 limit is an arbitrary limit that denies women over the age of 40 a health benefit based solely on their age. Appropriately, on August 13, 2015, Connecticut State Insurance Commissioner Katharine L. Wade issued a bulletin to health insurance companies and health care centers addressing the use of age-based restrictions for access to infertility treatment. The bulletin notes that a review of the age limit previously allowed in Connecticut and incorporated into some health benefit designs is unallowable under Section 1557 because “infertility treatment may be clinically effective for ages above 40.”²¹ This highlights the need for the NAIC to include age limits in the list of areas for potential discrimination in health insurance design.

Examiners Need to Conduct A Thorough Review of Health Carrier Practices

In prohibiting sex discrimination, Section 1557 prohibits both intentional sex discrimination and disparate impact sex discrimination.²² The disparate impact standard is crucial for identifying discrimination in an era in which discrimination takes ever more subtle forms. Thus, the Section 1557 market conduct standards should incorporate methods to protect against disparate impact sex discrimination. We recommend that the market conduct standards reflect the need for examiners to conduct a thorough review of health carrier practices when examining potentially discriminatory activities.

Because discrimination can often be subtle or even inadvertent, examiners must look beyond formal written policies and procedures to ensure that health carriers actual operations do not have a discriminatory effect. To do so, we recommend bolstering the standards through a more robust review. The draft standards include review of procedures and documents that will be used during the plan year—such as policy forms, communication materials, and education materials—as well as information that gives insight into how the issuer has managed the plan in the past—such as external appeals information and complaint logs. In addition to the documents listed in the draft standard, the review of procedures and documents that the plan uses during the year should also include information related to wellness and disease management programs, utilization management policies and procedures, network access plans, communications with producers, and information the health carrier requests before an individual is accepted for coverage. The review of information on how the issuer has managed the plan in the past should

²¹ State of Conn., Insurance Dep’t., Bulletin HC-104 (Aug. 13, 2015), available at <http://www.ct.gov/cid/lib/cid/BulletinHC-104-InfertilityTreatmentandProcedures.pdf>.

²² The civil rights statutes referenced by Section 1557 and parallel in structure to Section 1557 reach disparate impact discrimination, as do other core civil rights protections such as Title VII. See Dep’t of Justice, *Title VI Legal Manual* (2001), available at <http://www.justice.gov/crt/about/cor/coord/vimannual.php#B> (stating that Title VI regulations “may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory” (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 582 (1983) and *Alexander v. Choate*, 469 U.S. 287, 293 (1985)). As the editor’s note to the DOJ Title VI Manual explains, the Supreme Court held in *Alexander v. Sandoval* that there was no private right of action to enforce Title VI’s disparate impact regulations. 532 U.S. 275 (2001). *Sandoval*, however, did not undermine the validity of the disparate impact regulations or the availability of agency enforcement of them. See also Dep’t of Justice, *Title IX Legal Manual* (2001), available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.php#2> (stating “[i]n furtherance of [Congress’] broad delegation of authority [to implement Title IX’s prohibition of sex discrimination], federal agencies have uniformly implemented Title IX in a manner that incorporates and applies the disparate impact theory of discrimination.” (citing cases)).

be augmented by the collection and analysis of data to identify broader discriminatory trends by including a review of data for all applications for coverage, claims information, informal complaints, news reports, and complaints filed with the HHS Office of Civil Rights.

Attached to this letter are proposed edits embedded within the draft conduct standards. Thank you for the opportunity to provide these comments to the draft market conduct standards on Section 1557.

Sincerely, _____



Gretchen Borchelt
Vice President of Health and Reproductive Rights

PROVISION TITLE: Nondiscrimination

CITATION: §1557 of the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18116

EFFECTIVE DATE: Plan years, and in the individual market, policy years beginning on or after ~~January 1, 2014~~ March 23, 2010

PROVISION: The provisions of the health reform act prohibit discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities.

BACKGROUND: 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 (Title VI), 42 U.S.C. 2000d et seq. (race, color, national origin), Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 et seq. (sex), the Age Discrimination Act of 1975 (Age Act), 42 U.S.C. 6101 et seq. (age), or Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 (disability), 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 Title I of the Affordable Care Act or its amendments. Section 1557 states that the “enforcement mechanisms provided for and available under” Title VI, Title IX, Section 504, or the Age Act shall apply for purposes of violations of Section 1557. The antidiscrimination provisions of Section 1557 apply to health carriers, hospitals and any employer or entity that receives federal funds.

Note: Examiners need to be aware that Section 1557(c) of the Affordable Care Act authorizes the Secretary of the Department of Health and Human Services (HHS) to promulgate regulations to implement the nondiscrimination requirements in Section 1557. The HHS Office for Civil Rights (OCR); ~~in coordination with other divisions in HHS, has developed proposed regulations for implementation of Section 1557, however, final regulations hasve~~ not yet ~~been~~ issued regulations regarding implementation of Section 1557.

42 U.S.C. §18116 sets forth requirements regarding health plans sold on the Marketplace, as well as individual and ~~small~~ group employer plans offered outside of the Marketplace if the health carrier is receiving federal funds. In such cases, the health plans shall not discriminate against individuals, on the basis of:

- Race;
- Ceolor or national origin;
- Disability;
- Age; and
- Sex (to include marital or familial status, gender identity, sexual orientation, sex stereotyping and pregnancy).*

*State laws may also be applicable in these situations as well.

Section 1557 of the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. §18116, requires that a health carrier (and other covered entities) not exclude, deny benefits to, or otherwise discriminate against any person on the ground of race, color, national origin, present or predicted disability, age, sex (including; pregnancy, marital or familial status, sexual orientation, or gender identity, and sex stereotyping) in admission to, participation in, or receipt of the services and benefits under any of its health programs and activities.

Under 45 CFR 155.120(c), titled Non-interference with Federal Law and Non-Discrimination Standards, nondiscrimination provisions also apply to exchange contractors, all exchange activities (including but not limited to marketing, outreach and enrollment), navigators, non-navigator assistance personnel, certified application counselors. Note: The following nondiscrimination standards are based upon Section 1557; these standards intersect with other provisions of the ACA regarding nondiscrimination, such as ~~provisions relating to essential health benefits, nondiscrimination in benefit design, nondiscrimination based upon~~ eligibility based on health status-related factors, and nondiscrimination in the provision of provisions related to: health factors/status, cultural and linguistic materials and competency, etc. It is important to review other areas of Chapter 20A for further guidance regarding other applicable health reform provisions regarding nondiscrimination, ~~and examination standards will continue to be developed for the health reform related requirements that became effective on and after January 1, 2014.~~

This provision applies to all health carriers in the individual market, small group and large group employer plans. This provision applies to grandfathered and non-grandfathered individual, small group and large group market health plans and policies.

The scope of the civil rights protections of Section 1557 applies to:

- Any health program or activity of a recipient of federal financial assistance, such as hospitals, clinics, employers, or insurance companies that receive federal money. Visiting nurse programs, community health education interventions, and similar programs that receive federal dollars also must comply with Section 1557. Section 1557 specifically ~~extends its discrimination prohibition~~ applies to entities that receive federal financial assistance in the form of contracts of insurance, credits, or subsidies;
- Any program or activity administered by an executive agency, including federal health programs like Medicare, Medicaid, and CHIP; and
- Any program or activity created under Title I of the ACA, including state health insurance exchanges, exchange contractors, and all exchange activities (including but not limited to marketing,

outreach, and enrollment), navigators, non-navigator assistance personnel, certified application counselors.

Note: Consumers have a variety of enforcement options under Section 1557, which incorporates the enforcement mechanisms of Title VI, Title IX, Section 504, and the Age Act. These civil rights laws may be enforced in different ways through administrative processes and/or through private litigation in federal court, subject to some restrictions. In addition, consumers can file complaints directly with OCR, which accepts and investigates complaints under Section 1557. Examiners should be aware that OCR may have complaint data or other information relevant to an examination.

FAQs: See HHS Office for Civil Rights (OCR) website for guidance.

NOTES: For additional examination standards related to nondiscrimination, please review the other sections of Chapter 20A—Conducting the Affordable Care Act (ACA) Related Examination—in the *Market Regulation Handbook* related to nondiscrimination.

Prohibition on Nondiscrimination (Section 1557)

Standard 1: A health carrier offering health benefit plans providing individual, small group and large group market health insurance coverage shall not discriminate, exclude from participation, or deny coverage or benefits to any individual on the basis of race, color, national origin, sex, age, or disability.

Apply To: All health carriers offering group health products, (grandfathered and non-grandfathered products) for plan years beginning on or after March 23, 2010~~January 1, 2014~~

Apply To: All health carriers offering individual health products, (grandfathered and non-grandfathered products) for policy years beginning on or after March 23, 2010~~January 1, 2014~~

Priority: Essential

Documents to be Reviewed

Data for all applications for coverage (including the underwriting and rating characteristics of the applicant and the outcome of the application) and claims (including a description of the benefit requested and the outcome of the claim)

_____ Health carrier underwriting, complaint handling and claim handling policies and procedures ~~related to nondiscrimination~~

_____ Underwriting files and supporting documentation ~~regarding nondiscrimination~~, including letters, notices, telephone scripts, etc.

_____ Applications/pre-enrollment forms and questionnaires

Questionnaires or assessments related to wellness or disease management programs and health carrier policies and procedures for using this information

_____ Declinations/disenrollment files

_____ Complaint register/logs/files

_____ Health carrier complaint records ~~concerning nondiscrimination~~ (supporting documentation, including, but not limited to written and phone records of inquiries, complaints, complainant correspondence and health carrier response)

_____ Claim files

Informal complaints/Internal appeals/grievance register/logs/files

_____ Health carrier utilization management policies and procedures

Health carrier network access plans

_____ Applicable external appeals register/logs/files ~~related to nondiscrimination~~, external appeal resolution and associated documentation

_____ Health carrier form approvals (policy language, enrollment materials, and advertising materials, as required under state statutes, rules and regulations)

_____ Health carrier policy form language and benefit design documents

_____ Health carrier marketing and sales policies and procedures

_____ Health carrier communication and educational materials ~~related to nondiscrimination~~ provided to applicants, enrollees, policyholders and certificate holders, including communications with producers

Any information that health carriers request before an individual is accepted for coverage, including, but not limited to, claims history, family history, genetic information, and credit information

News reports or other publicly available information about potentially discriminatory practices or behaviors by a health carrier

Complaints filed with HHS OCR

_____ Training materials

_____ Producer records

_____ Applicable state and federal statutes, rules and regulations, and guidances

NAIC References

Individual Market Health Insurance Coverage Model Regulation (#26)

Small Group Market Health Insurance Coverage Model Regulation (#126)

Other References

_____ HHS/OCR/~~DOL/Treasury~~ final regulations and, ~~to include~~ FAQs ~~and other federal resource materials~~

_____ OCR voluntary resolution agreements that address complaints under Section 1557

Review Procedures and Criteria

Verify that the health carrier has established and implemented policies and procedures regarding prohibition of discrimination on the basis of race, color, national origin, present or predicted

disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping), ~~sexual orientation or gender identity~~ in accordance with federal statutory and regulatory guidance established by HHS, OCR, DOL, and the Treasury.

Review health carrier underwriting, complaint handling and claim handling, utilization management, and network access plan policies and procedures ~~related to nondiscrimination~~ to verify adequate and appropriate policies/procedures are in place to ensure a health carrier which offers health benefit plans providing individual market health insurance coverage, small group or large group market health insurance coverage does not discriminate based on an individual's race, color, national origin, present or predicted disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping) in accordance with federal statutory and regulatory guidance as set forth under final regulations established by HHS, OCR, DOL and the Treasury.

Review the health carrier's underwriting, complaint and claim files to verify that health carrier does not discriminate, exclude from participation or deny benefits to individuals on the basis of race, color, national origin, present or predicted disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping) in accordance with federal statutory and regulatory guidance, sexual orientation, or gender identity.

Review health carrier applications/pre-enrollment forms and questionnaires ~~for questions regarding nondiscrimination,~~ to verify that the health carrier does not deny application or enrollment to prospective insureds on the basis of race, color, national origin, present or predicted disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping) in accordance with federal statutory and regulatory guidance, sexual orientation, or gender identity.

Review health carrier declinations and disenrollment files to verify that the health carrier has not discriminated against applicants/enrollees on the basis of race, color, national origin, present or predicted disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping) in accordance with federal statutory and regulatory guidance, gender identity or sexual orientation.

Analyze data on applications, the outcome of applications, claims presented, and claim outcomes to assess whether there are unusual frequencies related to application or claims denials and the reasons for denials. An unusual frequency for a certain type of denial could indicate failure to comply with Section 1557's nondiscrimination requirements.

Review complaint register/logs and complaint files to identify complaints pertaining to coverage denial/restriction of coverage to assess whether there are unusual frequencies related to complaints, denials, or restrictions. An unusual frequency for a certain type of complaint could indicate failure to comply with Section 1557's nondiscrimination requirements, related to nondiscrimination.

Review complaint records, to verify that, when an individual has been the subject of a restriction of coverage or denied coverage, the health carrier has taken appropriate corrective action/adjustments in a timely and accurate manner.

Ascertain if the health carrier error could have been the result of some systemic issue (e.g. programming or processing error). If so, determine if the health carrier implemented appropriate corrective actions/adjustments to its systems in a timely and accurate manner. The examiner should include this information in the examination report.

Verify that the health carrier maintains proper documentation for correspondence, including website notifications, supporting corrective action provided to an individual for whom coverage was inappropriately restricted or denied.

Review health carrier claim files to identify any coverage denials for claimants for whom coverage was improperly restricted or denied, on the basis of ~~non~~discrimination.

Review health carrier internal appeals/grievance register/logs/files to identify any individuals for whom coverage was improperly restricted or denied.

Review ~~procedures should also require review of~~ any external appeal requests and ~~of~~ the conclusions of external appeals addressing improper denial/restriction of coverage.

Note: Examiners need to be aware that other areas of potential discrimination regarding race, color, national origin, present or predicted disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping), ~~sexual orientation, or gender identity~~ may include:

- Cost sharing;
- Narrow or tiered provider networks;
- Drug formularies;
- Visit limits;
- Age limits;
- Restrictive medical necessity definitions;
- Exclusions;
- Utilization management;
- Waiting periods;
- Service areas;
- Marketing of products;
- Rating; and
- Benefit substitution.

Therefore, examiners should review the health carrier's health benefit plans to verify these benefit design elements are consistent with reasonable medical management techniques and are not discriminatory.

Review policy form files to verify approval(s) from the applicable state and, (if applicable) from the Marketplace.

Review health carrier policy form language and benefit designs to verify that the policy forms/benefit designs do not contain language that has the effect of discrimination (e.g., arbitrary limits, exclusions or lower standards of service, etc.) based on an individual's race, color, national origin, present or predicted disability, age, or sex (including pregnancy, marital or familial status, gender identity, sexual orientation, and sex stereotyping), ~~sexual orientation, or gender identity.~~

Verify that any marketing materials provided to insureds and prospective purchasers by the health carrier provide complete and accurate information pertaining to the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557.

Verify that health carrier communication and educational materials provided to applicants, enrollees, policyholders and certificate holders provide complete and accurate information pertaining to the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557.

Verify that the health carrier has established training programs designed to inform its employees, and producers, and other downstream entities (such as customer service centers) about HHS, OCR, DOL and Treasury provisions and final the regulations requirements pertaining to the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557.

Review health carrier training materials to verify that information provided therein is complete and accurate with regard to the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557.

Review producer records and health carrier communications with producers to verify that information provided by producers to insureds and claimants is complete and accurate with respect to nondiscrimination and verify that health carrier contracts with producers require compliance with the nondiscrimination protections in Section 1557.

Determine if the health carrier monitors producer-generated coverage denials/restrictions of coverage. Review any such producer records of coverage denials/restrictions of coverage for compliance with statute and regulatory guidance pertaining to the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557 regarding nondiscrimination established by HHS, the DOL and the Treasury.

Finalize the examination report and assess whether to refer the results to a federal or state regulatory entity or a self-regulatory entity for further action. Examiners should also assess whether to notify other states of the results and/or enter into a Regulatory Information Retrieval System action.

Note: With regard to conflict of state and federal law, examiners may need to review and base examinations upon applicable state statutes, rules and regulations, especially where state statutes,

rules and regulations add state-specific requirements to the health reform requirements or creates a more generous benefit, and thus not preempted, as set forth in federal law.