



AMERICAN BENEFITS  

---

COUNCIL

August 13, 2019

*Submitted via email to Federal eRulemaking Portal: <http://www.regulations.gov>*

U.S. Department of Health and Human Services  
Office of Civil Rights  
Attention: 1557 NPRM (RIN 0945-AA11)  
Hubert H. Humphrey Building  
Room 509F  
200 Independence Avenue, SW  
Washington, DC 20201

**Re: NPRM – Section 1557 – Nondiscrimination in Health and Health Education Programs or Activities**

Dear Sir or Madam:

I write on behalf of the American Benefits Council (“the Council”) to provide comment in connection with the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) notice of proposed rulemaking (“proposed rule”) to revise its Section 1557 regulation under the Affordable Care Act (ACA) regarding Nondiscrimination in Health and Health Education Programs and Activities, as published in the Federal Register on June 14, 2019.

The American Benefits Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

## APPLICATION OF SECTION 1557

As discussed in the preamble, the proposed rule proposes to substantially revise the Section 1557 regulation in order to alleviate undue regulatory burdens, further substantive compliance, reduce confusion and address other concerns.

The Council submitted a comment letter<sup>1</sup> on the regulations proposed in 2015 strongly urging OCR to implement Section 1557 in a manner that is consistent with statutory intent and least disruptive to employer-sponsored health coverage. While the Council is supportive of the public policy goals of Section 1557, as well as the underlying federal nondiscrimination statutes, we were particularly concerned about certain interpretations represented in the regulations as proposed in 2015 and finalized May 18, 2016, regarding the application of Section 1557 with respect to self-funded group health plans.

As discussed in the preamble, the proposed rule would not apply "... to self-funded group health plans under the ERISA Retirement Income Security Act of 1974 (ERISA), the Federal Employees Health Benefits Program, or Short Term Limited Duration (STLDI) plans, because (or to the extent) such programs do not receive Federal financial assistance (FFA) from HHS and/or the entities operating them are not principally engaged in the business of providing health care... ."

The Council remains concerned, however, that the proposed rule would continue the application of Section 1557 to employer group waiver plans (EGWPs). Many employers sponsor EGWPs for the benefit of their retirees and spouses. These arrangements provide comprehensive and cost-effective prescription drug coverage to retirees and their spouses.

Generally, an EGWP is a Medicare Part D prescription drug plan. There are most commonly two types of EGWPs. The first type is often referred to as a "direct-contract" EGWP. The employer or plan contracts directly with the Centers for Medicare and Medicaid Services ("CMS") to provide the drug benefits and it receives payments directly from the government. The employer often partners with a third party administrator or pharmacy benefit manager to help administer the benefits. The second type of EGWP is commonly referred to as a "Series 800" EGWP. Under this latter type, the drug benefit is insured by a third-party carrier and the insurer is liable for providing the benefits under a contract with CMS. The insurer receives payments directly from the federal government.

EGWPs are an important means by which employers provide drug coverage to their retirees and spouses. The resulting coverage is typically offered at reduced costs to retirees. Requiring Section 1557 to apply to EGWPs and/or their plan sponsors could

---

<sup>1</sup> American Benefits Council comment letter submitted November 9, 2015, available at: <https://www.americanbenefitscouncil.org/pub/76E43073-9B5D-B9B5-5E3D-11C178838939>

result in disincentives for employers to offer such plans. This is not because employers seek to offer discriminatory Part D coverage but rather because of the costs associated with the potential for increased risk of litigation.

We urge that all EGWPs be excepted from the scope of Section 1557. In support, we note that Congress could not have intended that employers would become subject to Section 1557 merely for sponsoring a retiree drug benefit for their retirees and spouses. Rather, we believe Congress was singularly concerned with applying Section 1557 to those entities that receive material FFA as a result of the enactment of the ACA, for example, with respect to “on-exchange” individual insurance.

In the alternative, the Council requests that clarification be provided as part of any final rulemaking that employers that sponsor a Series 800 EGWP will not be subject to Section 1557. This should be without controversy given that the payments from the federal government are received by the insurer of the drug benefit directly and not the plan itself or the employer plan sponsor. Such treatment should be permitted regardless of any contractual arrangement that the insurer may have with the downstream employer plan or plan sponsor.

#### **REQUIREMENTS TO PROVIDE NOTICES AND “TAGLINES”**

The 2016 Final Rule imposed several requirements related to discrimination against individuals with limited English proficiency. These included requirements that covered entities post notices of nondiscrimination and “taglines” in a physical location, on the entity’s website and in “significant communications” or publications that alert individuals with limited English proficiency to the availability of language assistance services.

These requirements, particularly the requirement to provide “tagline” translation notices in 15 languages in “significant communications” to patients and plan participants, have imposed a substantial regulatory burden and cost on covered entities, including issuers and employers that receive FFA. For example, as noted in the preamble to the proposed rule, in practice, the 15 language “tagline” requirement has resulted in the inclusion of one to two sheets of paper per each significant communication mailed by a covered entity, “in nearly every written communication” sent to plan beneficiary. Such communications include Explanation of Benefits that are provided for each claim processed.

The proposed rule would repeal the Section 1557 provisions on taglines, the use of language access plans and notices of nondiscrimination. As discussed in the preamble to the proposed rule, HHS has concluded, based on its independent assessment and data collected from covered entities, that these existing regulatory requirements are

confusing and costly, inconsistent with tagline requirements required by other agencies and provide relatively minimal benefit to affected individuals.

The Council strongly supports the repeal of the Section 1557 provisions on taglines, the use of language access plans and notices as proposed in the proposed rule. The onerous requirements to provide notice and tagline with every “significant communication” as broadly defined under existing guidance has imposed a significant ongoing regulatory burden and cost on covered entities, including issuers and employers that receive FFA. The Council had previously recommended eliminating these requirements in comments<sup>2</sup> submitted to HHS in connection with its Request for Information (RFI) “Reducing Regulatory Burdens Imposed by the Patient Protection and Affordable Care Act & Improving Healthcare Choices to Empower Patients,” published in the Federal Register on June 12, 2017.

\* \* \*

Thank you for considering these comments submitted in response to the proposed rule. If you have any questions or would like to discuss these comments further, please contact me at (202) 289-6700.

Sincerely,



Kathryn Wilber  
Senior Counsel, Health Policy

---

<sup>2</sup> American Benefits Council comment letter submitted July 12, 2017, available at: <https://www.americanbenefitscouncil.org/pub/?id=5f698c56-f969-00a1-2a24-f94578a090c1>