

# HHS's Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557

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## Key Findings

On June 14, 2019, the Department of Health and Human Services (HHS) proposed what it describes as “substantial revisions” to its regulations implementing Section 1557 of the Affordable Care Act. Section 1557 prohibits discrimination based on race, color, national origin, sex, age, and disability in health programs and activities receiving federal financial assistance. Notably, it is the first federal civil rights law to prohibit discrimination in health care based on sex. The 60-day public comment period on the proposed changes closes on August 13, 2019. The proposal cannot change Section 1557’s protections in the law enacted by Congress but would significantly narrow the scope of the existing HHS implementing regulations, if finalized, by:

- Eliminating the general prohibition on discrimination based on gender identity, as well as specific health insurance coverage protections for transgender individuals;
- Adopting blanket abortion and religious freedom exemptions for health care providers;
- Eliminating the provision preventing health insurers from varying benefits in ways that discriminate against certain groups, such as people with HIV or LGBTQ people;
- Weakening protections that provide access to interpretation and translation services for individuals with limited English proficiency;
- Eliminating provisions affirming the right of private individuals to challenge alleged violations of § 1557 in court and to obtain money damages, as well as requirements for covered entities to provide non-discrimination notices and grievance procedures;
- Narrowing the reach of the regulations by only covering specific activities that receive federal funding, but not other operations, of health insurers that are not “principally engaged in the business of providing health care,” and no longer applying the regulations to all HHS-administered programs;

HHS also requests comment on whether to change certain provisions intended to ensure equal access for people with disabilities. It also proposes eliminating prohibitions on discrimination based on gender identity and sexual orientation in 10 other Medicaid, private insurance, and education program regulations outside Section 1557. If finalized, HHS’s proposed changes would substantially narrow, and in many cases entirely eliminate, the regulations’ existing protections against discrimination in meaningful ways.

## Introduction

On June 14, 2019, the Centers for Medicare and Medicaid Services (CMS) and the Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS) [proposed](#) what it describes as “substantial revisions”<sup>1</sup> to [regulations](#) implementing Section 1557 of the Affordable Care Act (ACA).<sup>2</sup> Section 1557 prohibits discrimination based on race, color, national origin, sex, age, and disability in health programs and activities receiving federal financial assistance.<sup>3</sup> For example, Section 1557 applies to health care providers, such as physicians’ practices, hospitals, nursing homes, and organ procurement centers that receive federal funds such as Medicare (excluding Part B<sup>4</sup>) or Medicaid payments; health-related education and research programs; state Medicaid, CHIP, and public health agencies; health insurance issuers and third-party administrators; state-based Marketplaces; and health programs administered by HHS.<sup>5</sup> This issue brief summarizes and considers the implications of HHS’s proposed regulations and includes tables that provide side-by-side comparisons with legal citations to the current and proposed provisions of HHS’s Section 1557 regulations (Table 1) and HHS’s proposed changes to other regulations, separate from Section 1557 (Table 2). The 60-day public comment period on all of the proposed changes closes on August 13, 2019.

## Background and HHS’s Rationale for Proposed Changes

**Section 1557 incorporates protections from existing civil rights laws.** These include Title VI of the Civil Rights Act of 1964 (race, color, and national origin), Title IX of the Education Amendments of 1972 (sex), the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973 (disability). Notably, Section 1557 is the first federal civil rights law to prohibit discrimination on the basis of sex in health care. Section 1557’s protections took effect when the ACA was enacted on March 23, 2010, and HHS’s implementing regulations were effective on July 18, 2016.<sup>6</sup>

**HHS stated that its proposed changes are needed to “address legal concerns,” relieve costs and regulatory burden, and reduce confusion because it now views the regulations as inconsistent with or duplicative of other civil rights provisions.**<sup>7</sup> In support of its proposed changes, HHS cited a federal trial court’s preliminary injunction in *Franciscan Alliance v. Azar*. This case was brought in August 2016 by a group of religiously affiliated health care providers and states, led by Texas, and a decision on the plaintiffs’ motion for summary judgment is now pending before the court. In May 2019, the Trump Administration posted its Section 1557 notice of proposed rule-making (published in the *Federal Register* on June 14, 2019) and asked the court to stay the proceedings until the proposal is finalized.

**The *Franciscan Alliance* preliminary injunction prohibits HHS from enforcing the Section 1557 regulations that outlaw discrimination on the basis of gender identity or termination of pregnancy but does not require HHS to make any regulatory changes.**<sup>8</sup> The trial court has not yet issued a final decision on the merits, and any final decision could be appealed. The December 2016 preliminary injunction order found that HHS’s Section 1557 regulation defining sex discrimination to include gender identity and termination of pregnancy exceeded HHS’s authority as delegated by Congress. Specifically, the court found that HHS should have limited its regulatory definition of sex discrimination to a binary

definition encompassing biological differences between males and females. The court also found that HHS should have incorporated Title IX's blanket abortion and religious exemptions into its Section 1557 regulations.

**While the *Franciscan Alliance* preliminary injunction bars HHS from enforcing its regulations prohibiting discrimination in health care based on gender identity and termination of pregnancy, private individuals still can bring claims alleging Section 1557 violations.** Other federal courts that have considered Section 1557 discrimination claims based on gender identity have granted relief to the individual claiming discrimination, based on the text of Section 1557 as enacted in statute. For example, a federal district court issued a preliminary injunction against the Wisconsin Medicaid program's categorical exclusion of gender affirming services from coverage, relying on the statute as enacted by Congress.<sup>9</sup> Another federal district court case was brought on behalf of a transgender boy, who committed suicide after experiencing "extreme distress" from hospital staff repeatedly referring to him as a girl while he was admitted for psychiatric inpatient care.<sup>10</sup> That court allowed a claim for emotional distress damages to proceed, finding that Section 1557's statutory language prohibiting sex-based discrimination includes discrimination based on gender identity.<sup>11</sup>

**HHS's proposed changes to its Section 1557 regulations go beyond the issues raised in the *Franciscan Alliance* case.** In addition to gender identity and termination of pregnancy, HHS's proposed Section 1557 changes would substantially change, or in some cases entirely eliminate, existing provisions related to health insurance benefit design; language access; notices, grievance procedures, and enforcement; and which entities are covered (Table 1). HHS also requests comment on whether to change some disability access provisions. Outside the Section 1557 regulations, HHS proposes removing prohibitions on discrimination based on gender identity and sexual orientation in 10 other Medicaid, private insurance, and education program regulations (Table 2). It also would add abortion and religious exemptions to existing regulations that prohibit sex discrimination in education programs under Title IX.

## Key Proposed Changes

### Sex Discrimination

#### GENDER IDENTITY

**HHS proposes eliminating entirely its Section 1557 regulatory definition of sex discrimination, which includes discrimination based on gender identity and sex stereotyping.** HHS also would eliminate the definition of gender identity, which includes gender expression and transgender status. In addition, it would remove specific provisions that require covered entities to treat individuals consistent with their gender identity. The current regulations do not recognize discrimination on the basis of sexual orientation alone as a prohibited form of sex-based discrimination. When finalizing the regulations in 2016, HHS acknowledged that caselaw on this issue is mixed<sup>12</sup> but stated that prohibited sex-based discrimination "includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes."<sup>13</sup> The current

regulatory definitions are based on caselaw, including lower federal court decisions that have recognized sex-based discrimination as encompassing discrimination based on gender identity and a Supreme Court decision finding that differential treatment of an individual based on their failure to conform to stereotypes about how men or women should behave constitutes sex-based discrimination.<sup>14</sup> In its notice of proposed rule-making, HHS noted that the Supreme Court has agreed to hear cases in the next term about whether sex-based discrimination includes gender identity and sexual orientation;<sup>15</sup> HHS therefore does not propose an alternative regulatory definition of sex discrimination under Section 1557.

**Removing gender identity and sex stereotyping from the definition of prohibited sex-based discrimination could allow health care providers to refuse to serve individuals who are transgender or who do not conform to traditional sex stereotypes.** For example, a health care provider could refuse to treat a patient for a cold or a broken arm based on the patient's gender identity or refuse to accept a transgender individual in favor of a person who is not transgender when accepting new patients.<sup>16</sup> The resulting inability to access needed health care services could exacerbate health disparities experienced by LGBTQ people, such as higher rates of depression and suicide attempts, higher risk of HIV/AIDS, higher use of tobacco and drugs, and higher risk of breast cancer.<sup>17</sup>

**The proposed regulation would no longer prohibit covered entities from denying, limiting, or imposing additional cost-sharing for services that are ordinarily or exclusively available to one sex or gender when those services are sought by an individual of a different sex or gender.** The current regulation prohibits differential coverage or cost-sharing for services based on the fact that an individual's sex assigned at birth, gender identity, or gender in a medical or health plan record differs from the one to which such services are ordinarily or exclusively available. For instance, under the existing regulation, health plans cannot deny medically necessary treatment for ovarian cancer in a transgender man based on his gender identity<sup>18</sup> nor can they single out services for higher copays only when those services are related to gender transition.<sup>19</sup> Under the proposed regulation, a health plan could deny coverage or impose greater cost-sharing in these circumstances.

**The proposed regulation also would eliminate the provision that prohibits a health plan from categorically or automatically excluding or limiting coverage for health services related to gender transition.** For example, eliminating this provision could allow an insurer to deny coverage for a hysterectomy that a provider determines is medically necessary to treat a patient's gender dysphoria, even though hysterectomies are covered in other circumstances.<sup>20</sup> When adopting this provision in 2016, HHS noted that such categorical exclusions are outdated and do not reflect current standards of care.<sup>21</sup>

## **ABORTION AND RELIGIOUS EXEMPTIONS**

**HHS proposes allowing health care providers and other covered entities to invoke blanket abortion and religious objection exemptions from the regulations' general prohibition on sex discrimination.**<sup>22</sup> The proposed regulation incorporates provisions from Title IX that exempt covered entities from complying with the general prohibition against sex discrimination if doing so (1) involves

providing or paying for abortion<sup>23</sup> or (2) would be inconsistent with the organization's religious tenants.<sup>24</sup> The proposal also exempts entities from having to comply with the Section 1557 regulations if doing so would violate a specific list of existing, as well as any future, federal abortion and religious exemption laws.<sup>25</sup> Additionally, as noted above, HHS proposes entirely eliminating the regulatory definition of sex-based discrimination, which includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, and childbirth or related medical conditions.<sup>26</sup>

**The proposed change means that people in need of abortion or other health care services that violate a provider's religious beliefs could be denied, delayed, or discouraged from seeking necessary care, placing them at risk of serious or life-threatening results in emergencies and other circumstances where the individual's choice of health care provider is limited.**<sup>27</sup> The existing regulation provides that covered entities do not have to comply with Section 1557's prohibition of discrimination on the basis of sex if doing so would violate existing federal abortion and religious exemption laws, but it does not include a blanket religious exemption.<sup>28</sup> When the Section 1557 regulations were finalized in 2016, HHS rejected incorporating Title IX's blanket religious exemption because Title IX is limited to educational institutions, which it concluded are significantly different from the health care context.<sup>29</sup> While students and parents typically have a choice about whether to select a religiously affiliated educational institution, individuals' choice of health care provider may be limited, especially in rural areas, locations where hospitals are run by religious institutions, or emergencies.<sup>30</sup> HHS explained that it instead would rely on the Religious Freedom Restoration Act to make individual case-by-base determinations about "whether a particular application of Section 1557 substantially burdened a covered entity's exercise of religion, and if so, whether there were less restrictive alternatives available."<sup>31</sup> This means that, under the current regulation, there may be some instances in which a provider's religious beliefs will exempt it from providing services to which it objects to an individual, but other instances, based on the facts of a particular case, in which an individual must receive services despite a provider's religious objection.

## Non-Discrimination in Health Coverage

**In addition to the specific gender identity provisions discussed above, HHS also would eliminate the entire regulation that prohibits discrimination in health insurance issuance, coverage, cost-sharing, marketing, and benefit design.** Under the current regulations, covered entities are prohibited from taking the following actions on the basis of race, color, national origin, sex, age, or disability:

- Denying, canceling, limiting, or refusing to issue or renew a health insurance policy;
- Denying or limiting coverage of a health insurance claim;
- Imposing additional cost sharing or other limitations or restrictions on coverage; or
- Using discriminatory marketing practices or insurance benefit designs.

Without these provisions, health plans could, for example, cover inpatient treatment for eating disorders for men but not women or cover bariatric surgery for adults except those with certain developmental

disabilities.<sup>32</sup> Other benefit designs that might be discriminatory include placing all or most prescription drugs used to treat a specific condition on a health plan's highest cost formulary tier, applying age limits to services that have been found to be clinically effective at all ages, or requiring prior authorization or step therapy for all or most medications in drug classes such as anti-HIV protease inhibitors or immune suppressants regardless of medical evidence.<sup>33</sup> Insurers also would be permitted to engage in marketing practices designed to encourage or discourage particular individuals from enrolling in certain health plans.<sup>34</sup>

## Language Access

**HHS proposes relaxing the standards governing access to language assistance services, including oral interpretation and written translation, for individuals with limited English proficiency (LEP).** Specifically, HHS would remove the current regulation's requirement that covered entities take reasonable steps to provide meaningful access to "*each individual* with LEP eligible to be served or likely to be encountered"<sup>35</sup> and replace it with a general reference to "LEP individuals." Focusing on LEP individuals in general as opposed to each individual could result in some individuals not receiving the services they need for meaningful access. Language access protections are required to prevent discrimination based on national origin.<sup>36</sup> These services are important because ineffective communication between health care providers and LEP patients for the purposes of diagnosis, treatment options, proper use of medication, obtaining informed consent, and insurance coverage can result in adverse health consequences or death.<sup>37</sup>

**HHS also proposes replacing the current test to determine when covered entities must provide language access services with one that removes the emphasis on the importance of the communication to the specific individual.** When determining whether interpretation or translation services are required under the current regulation, HHS gives "substantial weight" to the nature and importance of the health program or activity and the communication at issue to the specific individual. Under the proposed change, HHS would balance a variety of factors to determine when language assistance services are required, including the overall number of LEP individuals eligible to be served or likely to be encountered, the frequency with which any LEP individuals come into contact with the covered program or activity, and the costs involved. HHS also would eliminate the provision that allows HHS to consider whether the covered entity has an effective written language access plan. In addition, HHS proposes eliminating the current remote video interpreting standards and instead include standards only for remote audio interpreting services.

**HHS also would eliminate the existing requirement that non-discrimination notices (discussed further below) must include the availability of language assistance services and taglines in the top 15 languages spoken by LEP individuals in the state.**<sup>38</sup> HHS observed that repealing the notice and tagline requirements may "[decrease] access to, and utilization of, health care for non-English speakers by reducing their awareness of available translation services" but characterizes the expected impact as "negligible."<sup>39</sup> HHS also cited comments about regulatory burden from covered entities, including findings

from a health insurer that 75% of the 322 enrollees it surveyed “reacted negatively” to a sample document with four pages of taglines; it does not indicate whether any of those enrollees were LEP individuals.<sup>40</sup>

## Notice and Enforcement

**HHS proposes eliminating all of the existing Section 1557 nondiscrimination notice and grievance procedure requirements.** The current regulation requires covered entities with at least 15 employees to adopt a grievance procedure and designate at least one employee to coordinate its Section 1557 responsibilities. Covered entities also currently must provide notice of their nondiscrimination policies in significant communications (such as handbooks and outreach publications), physical locations where the entity interacts with the public, and on their website homepage. HHS noted that “an unknown number of persons are likely not aware of their right to file complaints with the Department’s Office for Civil Rights and some unknown subset of this population may suffer remediable grievances, but will not complain to OCR absent notices informing them of this process” as a result of the proposed change.<sup>41</sup> Based on complaints received since the Section 1557 regulations were finalized, OCR predicted that its long-term caseload would have increased by 5%, with 3% of the overall increase attributable to claims based on gender identity and sex stereotyping.<sup>42</sup>

**HHS projected that all of its proposed Section 1557 changes will result in approximately \$3.6 billion in undiscounted cost savings over the first five years after implementation, primarily from eliminating the notice and tagline requirements.**<sup>43</sup> HHS asserted that its original cost projections for the notice and tagline requirements only accounted for “employee time required to initially download, print, and post notices in public areas, but did not count the recurring costs of paper, ink/toner, and additional postage for the required initial or subsequent mailings of these notices.”<sup>44</sup>

**While these rights do not arise solely from regulation, HHS also proposes eliminating provisions that recognize the right of private individuals and entities to file lawsuits in federal court to challenge alleged violations of Section 1557.** HHS also would eliminate the regulation that provides that money damages are available to compensate those injured by violations of Section 1557. In “no longer assert[ing] that a private right of action exists for parties to sue covered entities for any and all alleged violations of the proposed rule,”<sup>45</sup> HHS effectively delegates to the courts whether an individual has a right to sue to enforce Section 1557.

## Scope of Applicability

### COVERED ENTITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

**HHS proposes narrowing the scope of the regulations to cover only the specific programs and activities that receive federal funding, and not all operations, of health insurers that are not principally engaged in the business of providing health care.** The existing rule applies Section 1557’s non-discrimination protections broadly to health programs and activities, defining them to include all operations of an entity receiving federal financial assistance that is principally engaged in the provision or

administration of health-related services or health-related insurance coverage. For example, under the current regulation, all health plans offered by an issuer that participates in a Marketplace are subject to Section 1557.<sup>46</sup> Under the proposed change, if this issuer is not principally engaged in the business of providing health care (as opposed to health insurance), only its Marketplace plans would be covered and any plans it offers outside the Marketplace would not be subject to Section 1557. The proposed change also means that the regulations “would generally not apply to short term limited duration insurance.”<sup>47</sup> In support of the proposed change, HHS states that the “‘business of providing . . . health care’ differs substantially from the business of providing health insurance coverage (or other health coverage) for such health care.”<sup>48</sup> The end result is to reduce the number and type of entities required to comply with Section 1557’s non-discrimination protections.

## **HHS PROGRAMS AND ACTIVITIES**

**HHS also would apply the regulations only to health programs and activities that it administers under ACA Title I (Marketplaces), instead of all HHS-administered programs and activities.** Health programs and activities conducted by HHS outside ACA Title I include other CMS programs and activities, the Health Services Research Administration (such as clinics operated by the National Health Service Corps), the Centers for Disease Control, the Indian Health Services (including IHS tribal hospitals), and the Substance Abuse and Mental Health Services Administration.<sup>49</sup> Under the proposed change, these HHS programs would not be subject to the Section 1557 regulations.

## **DISCRIMINATION BASED ON ASSOCIATION**

**HHS proposes eliminating the prohibition against discrimination based on an individual’s association or relationship with someone else based on that other person’s race, color, national origin, sex, age, or disability.** These grounds for discrimination are recognized by the current Section 1557 regulations. Examples of discrimination based on association that would no longer be recognized by the proposed regulations include a doctor refusing to see a white patient because the patient has a biracial child or a health plan issuer excluding a provider from its network because the provider’s patients are primarily LEP individuals.<sup>50</sup> A hearing parent who is required by a hospital to interpret for her deaf child would no longer be able to pursue a discrimination claim based on association under the Section 1557 regulations.<sup>51</sup>

## **Disability Discrimination**

**HHS does not propose specific changes to Section 1557’s regulations prohibiting discrimination based on disability, but it does request public comment on whether some of these provisions should be changed.** Specifically, HHS seeks comment on whether entities with less than 15 employees should be exempt from the requirement to provide auxiliary aids and services to ensure effective communication with people with disabilities;<sup>52</sup> whether all covered entities should be subject to the architectural standards applicable to public buildings, especially with regard to multi-story building elevator and TTY requirements;<sup>53</sup> and whether the provision requiring covered entities to make



reasonable modifications in policies, practices, and procedures to avoid disability-based discrimination should be revised to include an exemption for undue hardship, in addition to the existing exemption when doing so would fundamentally alter the nature of the program or activity.<sup>54</sup> These changes would restrict the current provisions that prohibit disability-based discrimination and ensure equal access.

## **Proposed Changes to Regulations Beyond Section 1557: Gender Identity and Sexual Orientation**

**Beyond the Section 1557 regulations, HHS also proposes eliminating explicit nondiscrimination protections related to gender identity and sexual orientation in 10 other existing regulations.** HHS characterizes these changes as “limited conforming amendments.”<sup>55</sup> These regulations include those that govern Medicaid managed care entities, state Medicaid programs, PACE organizations, group and individual health insurance issuers, Marketplaces, qualified health plan issuers, agents and brokers that assist with Marketplace applications and enrollment, and education programs that receive federal financial assistance. Currently, these other regulations, some of which have been in place for several years, provide protections against discrimination based on sexual orientation and gender identity. Without these prohibitions, a health plan issuer could inquire about an applicant’s sexual orientation and use sexual orientation for the purposes of underwriting or determining insurability. Issuers also could charge higher premiums or other fees or cancel or deny coverage for those who are LGBTQ. Medicaid managed care entities could discriminate against LGBTQ beneficiaries in enrollment, and PACE organizations could refuse to serve someone based on their sexual orientation.

## **Looking Ahead**

**In addition to the proposed changes, HHS seeks public comment on all provisions in the current Section 1557 regulations, including those that it proposes to retain, repeal, amend, or add.**<sup>56</sup> It also asks for public comment on whether any provisions from its proposed Section 1557 changes should be incorporated into regulations implementing the underlying civil rights laws, such as Title VI, Title IX, and Section 504.<sup>57</sup> As a result, if finalized, any changes to the Section 1557 regulations could be a first step toward restricting nondiscrimination protections in other civil rights regulations. However, any changes in the federal regulations would not prohibit states from outlawing discrimination in state law on the basis of gender identity, sexual orientation, or other grounds beyond those recognized under federal law,<sup>58</sup> as several states already have done.<sup>59</sup> With the publication of its proposed changes, HHS has suspended all sub-regulatory guidance, such as Frequently Asked Questions and sample notices and nondiscrimination statements, that it considers to be inconsistent with the proposed changes.<sup>60</sup>

**HHS’s proposed changes would substantially narrow, and in many cases entirely eliminate, the regulations’ existing protections against discrimination in meaningful ways.** Section 1557 sought to standardize the protections and processes that prohibit discrimination in health care for all protected populations. Section 1557 also recognizes intersectional discrimination that affects people who belong to multiple protected classes; for example, discrimination against an African-American woman could be

discrimination on the basis of both race and sex.<sup>61</sup> While HHS maintains that it “is committed to ensuring the civil rights of all individuals who access or seek to access health programs or activities of covered entities,”<sup>62</sup> the proposed changes, if finalized, would substantially scale back the non-discrimination protections in existing regulations. Because this is a notice of proposed rule-making, HHS must review and consider public comments that are submitted prior to finalizing the regulations.

**HHS’s proposed changes, while reshaping the regulatory protections, would not change the underlying statutory protections of Section 1557 as enacted by Congress.** Some federal courts have recognized claims of discrimination and awarded relief under Section 1557 based on the statute itself and may continue to do so, regardless of regulatory changes. The HHS Office for Civil Rights’ enforcement of Section 1557 would be substantially narrowed under the proposed regulations, if finalized, in terms of the scope of covered entities and the type of claims constituting prohibited discrimination. However, federal courts could continue to apply Section 1557’s statutory protections more broadly and provide relief to individuals experiencing discrimination in the health care context.

**Table 1: Key Proposed Changes to HHS Regulations Implementing ACA § 1557**

Topic	Current Regulation	Proposed Change
<b>Sex Discrimination</b>		
Equal program access on the basis of sex <sup>63</sup>	Defines sex discrimination to include discrimination on the basis of gender identity, sex stereotyping, pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions.	Remove entire provision.
Abortion and religious exemptions <sup>64</sup>	Provides that compliance with § 1557’s prohibition of discrimination based on sex is not required if doing so would violate existing abortion and religious exemption laws. Does not include Title IX’s blanket abortion and religious exemptions applied to educational institutions.	Add Title IX’s blanket abortion and religious exemptions and provide that any § 1557 regulatory requirement will not be imposed if it would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by existing and future abortion and religious exemption laws. <sup>65</sup>
<b>Discrimination in Health Coverage</b>		
Nondiscrimination in health-related insurance and other health-related coverage <sup>66</sup>	Prohibits covered entities from taking the following actions on the basis of race, color, national origin, sex, age, or disability: <ul style="list-style-type: none"> <li>• Denying, canceling, limiting, or refusing to issue or renew a health insurance policy</li> <li>• Denying or limiting coverage of a health insurance claim</li> <li>• Imposing additional cost sharing or other limitations or restrictions on coverage</li> <li>• Using discriminatory marketing practices or insurance benefit designs</li> </ul> Permits insurers to apply medical necessity rules when determining covered benefits.	Remove entire provision.
Coverage protections for transgender individuals <sup>67</sup>	Requires that covered entities treat individuals consistent with their gender identity, except that entities are prohibited from denying or limiting health services and imposing additional cost-sharing on services that are ordinarily or exclusively available to individuals of one sex or gender based on the fact that the individual’s sex assigned at birth, gender identity, or gender in a medical or health insurance plan record differs from the one to which such health services are ordinarily or exclusively available.	Remove entire provision.
Access to gender transition services <sup>68</sup>	Prohibits an insurance plan from categorically or automatically excluding or limiting coverage for all health services related to gender transition or otherwise denying or limiting coverage or denying a claim for specific health services related to gender transition if such a policy results in discrimination against the individual seeking services.	Remove entire provision.

<b>Language Access</b>		
Meaningful access for individuals with limited English proficiency (LEP) <sup>69</sup>	<p>Requires covered entities to take reasonable steps to provide meaningful access to each individual with LEP eligible to be served or likely to be encountered.</p> <p>When assessing an entity's compliance, OCR will take into account and give substantial weight to the nature and importance of the health program or activity and the communication at issue to the individual with LEP. OCR also will consider other relevant factors, including whether the entity has an effective written language access plan.</p> <p>Requires covered entities to offer a qualified interpreter when oral interpretation is a reasonable step to provide meaningful access and to use a qualified translator when translating written content.</p>	<p>Require covered entities to take reasonable steps to ensure meaningful access by LEP individuals (remove reference to each individual).</p> <p>When evaluating an entity's compliance, OCR may assess how the entity balances the number or proportion of LEP individuals eligible to be served or likely to be encountered; the frequency with which LEP individuals come in contact with the entity's health program or activity; the nature and importance of the entity's health program or activity; and the resources available to the entity and costs.</p> <p>The entity's individualized assessment of the above factors will determine whether language assistance services are required to provide meaningful access.</p>
Remote interpreting services	Includes standards for video remote interpreting services.	Remove video remote interpreting standards and require only audio remote interpreting.
Notices, including taglines <sup>70</sup>	Requires covered entities to provide non-discrimination notices (described below) in English and include taglines in the top 15 languages spoken by individuals with LEP in the state. Notices must indicate the availability of language assistance services.	Remove entire provision. <sup>71</sup>
<b>Disability Discrimination</b>		
Effective communication - auxiliary aids and services <sup>72</sup>	Requires covered entities to provide appropriate auxiliary aids and services to people with impaired sensory, manual, or speaking skills, where necessary to afford an equal opportunity to benefit from the health program or activity.	Seeks comment on whether to exempt entities with less than 15 employees, as permitted under the Section 504 regulation, but allow the OCR Director to apply this provision if it would not significantly impair the entity's ability to provide aids and services.
Building construction and architectural standards <sup>73</sup>	Adopts the 2010 ADA Standards for Accessible Design for new construction or alteration of facilities of covered entities that receive federal funding and state-based Marketplaces.	Seeks comment on the appropriateness of applying the 2010 ADA standards definition of public building or facility to all covered entities, especially regarding multi-story building elevators and TTY standards.
Reasonable modifications <sup>74</sup>	Requires covered entities to make reasonable modifications in policies, practices, and procedures to avoid disability-based discrimination, unless doing so would fundamentally alter the nature of the health program or activity.	<p>Seeks comment on whether to retain this language or substitute with the Section 504 language that provides "shall make reasonable accommodations to known physical or mental limitations of otherwise qualified people with disabilities."</p> <p>Also seeks comment on whether to include exemption for undue hardship</p>
<b>Notice and Enforcement</b>		
Designation of responsible employee and adoption of grievance procedures <sup>75</sup>	Requires covered entities that employ at least 15 people to adopt a grievance procedure and designate at least one employee to coordinate § 1557 responsibilities.	Remove entire provision.

<p>Notice requirement<sup>76</sup></p>	<p>Requires covered entities to provide notice of their nondiscrimination policies in significant communications (such as handbooks and outreach publications), physical locations where the entity interacts with the public, and on their website homepage.</p> <p>The notice must include the bases of discrimination prohibited under § 1557, the availability of free auxiliary aids and services and language assistance services, how to access those services, contact information for the employee responsible for § 1557 compliance, the entity's grievance procedures, and OCR complaint procedures.</p> <p>Includes sample notice, tagline, and grievance procedure.</p> <p>Small-sized publications may include a shorter non-discrimination statement and taglines in the top 2 non-English languages spoken.</p>	<p>Remove entire provision.<sup>77</sup></p>
<p>Compensatory damages<sup>78</sup></p>	<p>Provides that compensatory damages are available for violations of § 1557 in appropriate administrative and judicial actions brought under the regulations.</p>	<p>Remove entire provision.</p>
<p>Court access<sup>79</sup></p>	<p>Provides that private individuals and entities can sue in federal court to challenge alleged violations of § 1557 by entities receiving federal financial assistance and state-based Marketplaces</p>	<p>Remove entire provision</p>
<p><b>Scope of Application</b></p>		
<p>Covered entities<sup>80</sup></p>	<p>Applies § 1557 regulations to health programs and activities that receive federal financial assistance from HHS, all health programs and activities administered by HHS, and state-based Marketplaces.</p> <p>Defines health programs and activities to include all operations of an entity that is principally engaged in the provision or administration of health-related services or health-related insurance coverage.</p>	<p>Apply § 1557 regulations to entities principally engaged in the business of providing health care that receive federal financial assistance, health programs and activities administered by HHS under Title I of the ACA (but not other HHS-administered health programs and activities), and state-based Marketplaces.</p> <p>Apply § 1557 regulations to health insurance programs administered by entities that are not principally engaged in the business of providing health care only to the extent that those programs receive federal financial assistance. Would not apply to all operations of entities that are not principally engaged in the business of providing health care (as opposed to health insurance).</p>
<p>Discrimination based on association<sup>81</sup></p>	<p>Prohibits discrimination against an individual known or believed to have a relationship or association with someone else based on that person's race, color, national origin, age, disability, or sex.</p>	<p>Remove entire provision.</p>

<b>Table 2: Key Proposed Changes to Other HHS Anti-Discrimination Regulations</b>		
<b>Topic</b>	<b>Current Regulation</b>	<b>Proposed Change</b>
<b>Medicaid</b>		
Managed care contract requirements <sup>82</sup>	Prohibits Medicaid managed care entities from discriminating against individuals eligible to enroll or using any policy or practice that has the effect of discriminating on the basis of sexual orientation or gender identity.	Remove sexual orientation and gender identity as prohibited bases of discrimination.
Managed care - availability of services <sup>83</sup>	Requires state Medicaid programs to ensure that each Medicaid managed care entity participates in state efforts to promote service delivery in a culturally competent manner to all enrollees, regardless of gender, sexual orientation or gender identity.	Replace gender, sexual orientation or gender identity with sex.
Access and cultural conditions for state Medicaid program services <sup>84</sup>	Requires state Medicaid programs to have methods to promote access and service delivery in a culturally competent manner to all beneficiaries, regardless of gender, sexual orientation or gender identity.	Replace gender, sexual orientation or gender identity with sex.
Program of All-Inclusive Care for the Elderly (PACE) <sup>85</sup>	Prohibits PACE organizations from discriminating against any participant in the delivery of PACE services based on sexual orientation.  Provides that each PACE participant has the right to not be discriminated against in the delivery of required PACE services based on sexual orientation.	Remove sexual orientation as prohibited basis of discrimination.
<b>Group and Individual Health Insurance</b>		
Group and individual health insurance markets - guaranteed availability of coverage <sup>86</sup>	Prohibits health insurance issuers from employing marketing practices or benefit designs that discriminate based on gender identity and sexual orientation.	Remove sexual orientation and gender identity as prohibited bases of discrimination.
<b>Marketplaces</b>		
Marketplace establishment standards <sup>87</sup>	Prohibits states and Marketplaces from discriminating based on gender identity and sexual orientation when establishing Marketplace standards and functions, eligibility determinations, enrollment periods, SHOP functions, QHP certification, and health plan quality improvement.	Remove sexual orientation and gender identity as prohibited bases of discrimination.
Federally-facilitated Marketplace standards of conduct <sup>88</sup>	Prohibits agents and brokers that assist with or facilitate enrollment of individuals or applying for premium tax credits and cost sharing reductions in qualified health plans (QHPs) through a federally-facilitated Marketplace from discriminating based on gender identity and sexual orientation.	Remove sexual orientation and gender identity as prohibited bases of discrimination.
QHP issuer participation standards <sup>89</sup>	Prohibits QHP issuers from discriminating based on gender identity and sexual orientation.	Remove sexual orientation and gender identity as prohibited bases of discrimination.
Direct enrollment in a Federally-facilitated Marketplace <sup>90</sup>	Prohibits QHP issuers from marketing or conduct that discriminates based on gender identity and sexual orientation.	Remove sexual orientation and gender identity as prohibited bases of discrimination.
<b>Sex Discrimination</b>		
Education programs or activities receiving federal financial assistance <sup>91</sup>	Not addressed in regulation. Contained in statute.	Add provision prohibiting covered entities from being required to perform or pay for an abortion. <sup>92</sup>
Education programs or activities receiving federal financial assistance <sup>93</sup>	Prohibits recipients of federal financial assistance from discriminating against any person in the application of any rules of appearance on the basis of sex when providing any aid, benefit or service to a student.	Remove provision prohibiting discrimination based on the application of rules of appearance.

## Endnotes

<sup>1</sup> 84 *Fed. Reg.* 27846-27895, 27848 (June 14, 2019), <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>.

<sup>2</sup> Kaiser Family Foundation, *Summary of HHS's Final Rule on Nondiscrimination in Health Programs and Activities* (July 14, 2016); 81 *Fed. Reg.* 31375-31473 (May 18, 2016), <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>.

<sup>3</sup> 42 U.S.C. § 18116.

<sup>4</sup> HHS does not consider Medicare Part B payments to be federal financial assistance. See, e.g., 81 *Fed. Reg.* at 31383; 84 *Fed. Reg.* at 27863.

<sup>5</sup> 45 C.F.R. § 92.4, 92.208; 81 *Fed. Reg.* at 31396, 31432, 32445.

<sup>6</sup> Except that provisions requiring changes to health insurance or group health plan benefit design took effect on the first day of the first plan year on or after Jan. 1, 2017. 81 *Fed. Reg.* at 31376.

<sup>7</sup> 84 *Fed. Reg.* at 27848, 27849.

<sup>8</sup> *Franciscan Alliance v. Burwell*, C.A. No. 7:16-cv-00108-O, Order, document 62, (N.D. Tex. Dec. 31, 2016), <https://affordablecareactlitigation.files.wordpress.com/2018/10/franciscan-alliance-pi-order.pdf>.

<sup>9</sup> *Flack v. Wis. Dep't of Health Servs.* 328 F. Supp. 3d 931 (W.D. Wis. 2018).

<sup>10</sup> *Prescott v. Rady Children's Hospital – San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017).

<sup>11</sup> *Id.*

<sup>12</sup> 81 *Fed. Reg.* at 31388.

<sup>13</sup> *Id.* at 31390.

<sup>14</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); 81 *Fed. Reg.* at 31389.

<sup>15</sup> The cases are brought under Title VI. Title IX relies on Title VI standards in this area. 84 *Fed. Reg.* at 27855, 27857.

<sup>16</sup> 81 *Fed. Reg.* at 31455.

<sup>17</sup> *Id.* at 31460.

<sup>18</sup> *Id.* at 31428.

<sup>19</sup> *Id.* at 31435.

<sup>20</sup> *Id.* at 31429.

<sup>21</sup> *Id.* at 31429.

<sup>22</sup> “Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section [including Title IX]. . . such application shall not be required or imposed.” Proposed § 92.6 (b).

<sup>23</sup> The Title IX abortion exemption provides that “[n]othing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities related to an abortion. . . .” 20 U.S.C. § 1688.

<sup>24</sup> The Title IX religious exemption provides that the prohibition of discrimination on the basis of sex “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenants of such organization.” 20 U.S.C. § 1681 (a)(3).

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<sup>25</sup> HHS specifically references the Coats-Snowe Amendment, the Church Amendments, the Religious Freedom Restoration Act, ACA § 1553, ACA § 1303, the Weldon Amendment, and any related, successor, or similar federal laws or regulations. Proposed § 92.6 (b).

<sup>26</sup> The interaction between these changes, the recently finalized HHS OCR regulations protecting statutory conscience rights in health care, 84 *Fed. Reg.* 23170-23272 (May 21, 2019), <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>, and the Emergency Medical Treatment and Active Labor Act is unclear.

<sup>27</sup> *Cf.* 81 *Fed. Reg.* at 31380.

<sup>28</sup> 45 C.F.R. § 92.2 (b)(2) (providing that “[i]nsofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required”).

<sup>29</sup> 81 *Fed. Reg.* at 31380.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; *see also* 81 *Fed. Reg.* at 31397 (noting that the “availability of a religious exemption will depend on an analysis of the particular situation”).

<sup>32</sup> *Id.* at 31429.

<sup>33</sup> *Id.* at 31434, n.258.

<sup>34</sup> *Id.* at 31433.

<sup>35</sup> (emphasis added).

<sup>36</sup> 81 *Fed. Reg.* at 31410.

<sup>37</sup> *Id.* at 31413.

<sup>38</sup> Small-sized publications may include a shorter non-discrimination statement and taglines in the top 2 non-English languages spoken.

<sup>39</sup> 84 *Fed. Reg.* at 27882.

<sup>40</sup> *Id.* at 27859.

<sup>41</sup> *Id.* at 27883.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 27849.

<sup>44</sup> *Id.* at 27857.

<sup>45</sup> *Id.*

<sup>46</sup> 81 *Fed. Reg.* at 31428.

<sup>47</sup> 84 *Fed. Reg.* at 27863.

<sup>48</sup> 84 *Fed. Reg.* at 27850, 27862-27863.

<sup>49</sup> 81 *Fed. Reg.* at 31446.

<sup>50</sup> *Id.* at 31439, n.278, 279.

<sup>51</sup> *Id.*

<sup>52</sup> HHS notes that the current Section 504 regulation permits this exception but also enables the Office for Civil Rights Director to require entities with less than 15 employees to provide auxiliary aids and services to afford people with disabilities an equal opportunity to benefit from the entity’s benefits or services if doing so would not significantly impair the entity’s ability to provide its benefits or services. 84 *Fed. Reg.* at 27867.



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<sup>53</sup> HHS notes that the architectural standards exempt multistory buildings owned by private entities from the requirement to provide an elevator, unless they are the professional office of a health care provider and that the standards also have different TTY requirements for public vs. privately owned buildings. *Id.* at 27867, n. 134-135.

<sup>54</sup> HHS also seeks comment on whether the reasonable modification provision should be replaced with the Section 504 language that provides that entities “shall make reasonable accommodations to known physical or mental limitations of otherwise qualified people with disabilities.” *Id.* at 27868.

<sup>55</sup> *Id.* at 27849.

<sup>56</sup> *Id.* at 27850.

<sup>57</sup> *Id.*

<sup>58</sup> 84 *Fed. Reg.* 27857 (noting that “[t]his proposed rule is not intended to . . . deny States the ability to provide protections that exceed those required by Title IX.”).

<sup>59</sup> See, e.g., *Movement Advancement Project, Healthcare Laws and Policies* (June 26, 2019), [https://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies](https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies).

<sup>60</sup> 84 *Fed. Reg.* at 27872.

<sup>61</sup> 81 *Fed. Reg.* at 31405.

<sup>62</sup> 84 *Fed. Reg.* at 27846.

<sup>63</sup> 45 C.F.R. § 92.4, 92.206.

<sup>64</sup> 45 C.F.R. § 92.2 (b).

<sup>65</sup> HHS specifically references the Coats-Snowe Amendment, the Church Amendments, the Religious Freedom Restoration Act, ACA § 1553, ACA § 1303, the Weldon Amendment, and any related, successor, or similar federal laws or regulations. Proposed § 92.5 (b).

<sup>66</sup> 45 C.F.R. § 92.207.

<sup>67</sup> 45 C.F.R. §§ 92.206, 92.207.

<sup>68</sup> 45 C.F.R. § 92.207.

<sup>69</sup> 45 C.F.R. § 92.201. Proposed § 92.101

<sup>70</sup> 45 C.F.R. § 92.8.

<sup>71</sup> HHS assumes that tagline requirements for Marketplaces, 45 C.F.R. § 155.205 (c)(2)(iii)(A), and Qualified Health Plan Issuers, HHS Notice of Benefits and Payment Parameters for 2016; Final Rule, 80 Fed. Reg. 10750, 10788 (Feb. 27, 2015), also would be “fully repealed because they depend on, or refer to, the Final [1557] Rule for authority for the tagline requirement” but that other CMS tagline requirements for group health plans and health insurance issuers, navigators, non-navigator assistance personnel, Medicaid, Medicaid managed care, CHIP, CHIP managed care, hospitals qualifying for tax-exempt status, and Medicare Advantage (Part C) and Prescription Drug (Part D) plans would remain in effect. 84 *Fed. Reg.* at 27881.

<sup>72</sup> 45 C.F.R. § 92.202 (b).

<sup>73</sup> 45 C.F.R. § 92.203 (a).

<sup>74</sup> 45 C.F.R. § 92.205.

<sup>75</sup> 45 C.F.R. § 92.7. Proposed § 92.5.

<sup>76</sup> 45 C.F.R. § 92.8.

<sup>77</sup> HHS assumes that tagline requirements for Marketplaces, 45 C.F.R. § 155.205 (c)(2)(iii)(A), and Qualified Health Plan Issuers, HHS Notice of Benefits and Payment Parameters for 2016; Final Rule, 80 Fed. Reg. 10750, 10788 (Feb. 27, 2015), also would be “fully repealed because they depend on, or refer to, the Final [1557] Rule for authority for the tagline requirement” but that other CMS tagline requirements for group health plans and health insurance issuers, navigators, non-navigator assistance personnel, Medicaid, Medicaid managed care, CHIP, CHIP managed

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<sup>78</sup> 45 C.F.R. § 92.301.

<sup>79</sup> 45 C.F.R. § 92.302.

<sup>80</sup> 45 C.F.R. § § 92.1, 92.2, 92.4. Proposed § 92.3.

<sup>81</sup> 45 C.F.R. § 92.101.

<sup>82</sup> 42 C.F.R. § 438.3 (d)(4).

<sup>83</sup> 42 C.F.R. § 438.206 (c)(2).

<sup>84</sup> 42 C.F.R. § 440.262.

<sup>85</sup> 42 C.F.R. § § 460.98, 460.112.

<sup>86</sup> 45 C.F.R. § 147.104.

<sup>87</sup> 45 C.F.R. § 155.120.

<sup>88</sup> 45 C.F.R. § 155.220 (j)(2)(i).

<sup>89</sup> 45 C.F.R. § 156.200 (e).

<sup>90</sup> 45 C.F.R. § 156.1230 (b)(3).

<sup>91</sup> 45 C.F.R. Part 86. Proposed new § 86.18.

<sup>92</sup> HHS specifically references the First Amendment, Title IX's religious exemptions, the Religious Freedom Restoration Act, the Coats-Snowe Amendment, ACA § 1303, and appropriations riders related to abortion such as the Hyde Amendment, the Helms Amendment, and the Weldon Amendment. Proposed 45 C.F.R. § 86.18 (c).

<sup>93</sup> 45 C.F.R. § 86.31.