

September 25, 2024

Melanie Fontes Rainer
Director
Office of Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Director Fontes Rainer:

On behalf of NAIC's members – the chief insurance regulators in the 50 states, the District of Columbia, and U.S. territories – we write to inquire about the status of guidance from the Office of Civil Rights (OCR) regarding enforcement of the updated Section 1557 rules on Medigap Plans, Short-Term, Limited Duration Plans, and Excepted Benefit Plans. State regulators have requested this guidance since the final rule was published but have not received a response.

As the NAIC said in its comments on the proposed Section 1557 rule changes in October 2022¹, "We agree on the need for effective regulations to better protect health insurance consumers from unfair discriminatory practices." However, we also noted that "state regulators are concerned that application of the rule as proposed would be too broad." In particular, we raised concerns about the unintended consequences of the broader application and it is our sincere hope that any guidance addresses our concerns.

In the comment letter, state regulators questioned how extending Section 1557 protections to all plans of a carrier who receives any federal funding could impact certain plans like Medicare Supplement, also known as "Medigap". We asked about how age rating restrictions could be applied and asked that the final rule include a "clear exclusion of the application of non-discrimination rules for age distinctions that are exempt from Age Act rules." We explained that "State legislatures and other legislative bodies sometimes enact legitimate age distinctions for certain benefits or assistance."

While the final rule acknowledged the concerns of state regulators it provided no further clarification on the key issues, or guidance on how the final rule should be enforced. The final rule notes that "states regulate Medigap plans in several ways, such as premium rating based on age, sex/gender, or medical underwriting, with some states requiring sex/gender rating; Medigap eligibility criteria based on an

¹ NAIC Comments on Proposed Rule "Nondiscrimination in Health Programs and Activities" - October 3, 2022: [NAIC Comment Letter on Section 1557 Regulations](#)

individual's age, disability, or end-stage renal disease, with some States specifying that Medigap plans are not available to such individuals; and State-specific standardized Medigap plans over which issuers have no control with respect to benefit design, communications, or other factors."

But the final rule concluded that OCR would take state laws "into account when evaluating the context of the challenged design feature and will work with the covered entity to achieve compliance to help ensure that issuers do not leave the Medigap market or lower quality of products for consumers." Then the rule made it clear that "section 1557 would preempt a State law Medigap requirement—or any other excepted benefit requirement—that compelled conduct prohibited by section 1557 as applied to a recipient health insurance issuer subject to section 1557."

The issue is that OCR does not approve Medigap and other plans for sale in states - state regulators have this responsibility. We need to know whether age rating and other benefit designs and coverage restrictions comply with federal Section 1557 rules before they are reviewed for approval.

Since the final rule was posted in May 2024 the NAIC has reached out to OCR seeking further enforcement guidance. To date, we are still waiting for any communication from OCR to discuss this issue, and time is at premium. The new rules become effective in PY 2025 and carriers are now beginning to submit PY 2025 plans for approval. We need answers to some key issues immediately.

Here are some of the questions state regulators and carriers have been submitting:

- What is the role of state regulators in enforcing Section 1557 rules? The final regulation says OCR will enforce the rules on a case-by-case basis. Are states expected to review rates and plans for compliance prior to their use?
- How are the Section 1557 rules to be applied to Medigap plans? May rates be based on age if permitted under state law? May access to coverage be restricted based on age or disease, like End Stage Renal Disease? Will the interpretation and implementation of rulemaking regarding Section 1557 preempt state law(s) regarding certain restrictions?
- Do the Section 1557 rules apply to Short-Term, Limited Duration plans sold by carriers who receive federal funds? If so, are state laws that allow for age rating or benefit/access limitations preempted?
- Do the Section 1557 rules apply to all Excepted Benefit plans sold by carriers that receive federal funds? What about disease-only plans? What about plans that provide additional benefits only to those with a certain disease, like diabetes?
- How are the Section 1557 rules to be applied to Third-Party Administrators (TPAs) for self-funded MEWAs? Would state rules be preempted?

We would also like to reiterate our concerns about the unlevel playing field created by the new regulations. Carriers that receive federal funds for any of their products

would be required to comply with Section 1557 for all products, while a carrier that does not receive any federal funds would not be required to comply. In Medigap and Excepted Benefit plans, in particular, this will create a situation where some plans must comply, and others do not. This will have a significant impact on markets and consumer choice. The final rule does not sufficiently address this issue, but rather dismisses it, and we ask for an opportunity to further discuss the realities of the problem and its implications with you.

Again, time is running out if the Section 1557 rules are to be effectively enforced for PY 2025. State regulators request a call with you and your staff to discuss these questions and clear guidance from OCR.

Thank you for your consideration.

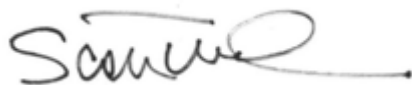
Regards,



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