

October 3, 2022

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Via Regulations.gov

To whom it may concern:

On behalf of NAIC's members—the chief insurance regulators in the 50 states, the District of Columbia, and U.S. territories—we submit comments on the proposed rule on discrimination protections under section 1557 of the Affordable Care Act. We appreciate the Department's attention to the views of states and other important stakeholders as it updates these important regulations.

Although state insurance regulators have a variety of views on the specific provisions of the rule, we agree on the need for effective regulations to better protect health insurance consumers from unfair discriminatory practices.

However, state regulators are concerned that application of the rule as proposed would be too broad. While it is appropriate and consistent with the statute to apply section 1557 protections to health insurers' programs and activities that receive federal financial assistance, the proposed rule goes further. It would apply to all the operations of health insurers when any part of the enterprise receives federal financial assistance. Because health insurers participate in some markets that receive federal financial assistance and others that do not, the proposed rule would require compliance even in activities that do not benefit from federal assistance.

Through its definitions in section 92.4, the proposed rule would apply the protections of section 1557 to "All of the operations of any entity principally engaged in the provision" of health insurance coverage, if any part of the entity receives federal financial assistance from HHS. Thus, an insurer that offers Medicare Advantage coverage funded by HHS would be bound by the nondiscrimination protections in its operations. The same issuer's Medicare supplemental coverage—funded only by enrollee premiums—would be subject to the restrictions on discrimination based on age and the other provisions of the rule.

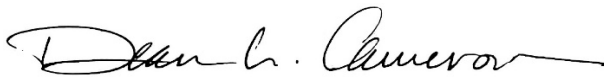
We believe this interpretation goes beyond the intent of Congress. Section 1557 of the ACA prohibits discrimination in “any health program or activity, any part of which is receiving Federal financial assistance.” Congress did not apply the protections to any entity engaging in health programs or activities, but to the programs and activities themselves, provided a part of the program or activity receives federal financial assistance.

The preamble to the proposed rule discusses the fungibility of funds to justify applying protections to operations that do not directly receive federal assistance. We believe it is inappropriate to consider funding to be fully fungible in the context of regulated insurance markets. Insurers must justify their premiums based on expected costs in a particular market, not across all operations. Federal financial assistance for one type of coverage does not actuarially support or subsidize an issuer’s operations in other markets. Therefore, we do not believe the rule should consider all of an issuers’ operations to receive federal financial assistance solely because one activity does receive assistance.

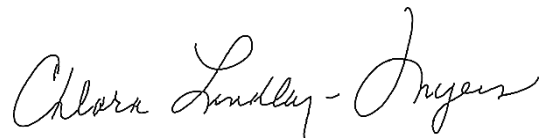
State regulators have further concern with the absence from proposed section 92.2 of a clear exclusion of the application of non-discrimination rules for age distinctions that are exempt from Age Act rules. State legislatures and other legislative bodies sometimes enact legitimate age distinctions for certain benefits or assistance. 45 CFR 93.1 holds that such distinctions are not considered discriminatory under the Age Act. The 2016 rule implementing section 1557 made clear that any age distinctions exempt from the Age Act under 45 CFR 93.1 were also exempt from section 1557 enforcement. We urge HHS to consider restoring this clarification to the 1557 rules.

Thank you for your consideration of these comments. We look forward to continued collaboration with OCR and other components of HHS as we all seek to address unlawful discrimination in health coverage.

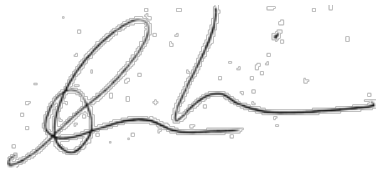
Sincerely,



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