August 5, 2019

Submitted Electronically Via Federal Rulemaking Portal: www.regulations.gov

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

Re: Nondiscrimination in Health and Health Education Programs or Activities

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the recently published Proposed Rule regarding Section 1557 of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 ("ACA").[1] In the Federal Register on June 14, 2019, the Department of Health and Human Service's ("HHS's" or "Department's") Office of Civil Rights ("OCR") published a proposed rule to revise its Section 1557 regulation.[2] The stated goal of the proposed rule is to "better comply with the mandates of Congress, address legal concerns, relieve billions of dollars in undue regulatory burdens, further substantive compliance, reduce confusion and clarify the scope of Section 1557 in keeping with preexisting civil rights statutes and regulations prohibiting discrimination on the basis of race, color, national origin, sex, age and disability."[3]

Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities. Specifically, Section 1557 of the ACA provides that "an individual shall not, on the grounds 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, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving

[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010). [hereinafter referred to as "ACA"].

[2] Proposed Rule, 84 Fed Reg. 27,846-27,895. (June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440 and 460, 45 CFR pts. 86, 92, 147, 155, and 156) [hereinafter referred to as the "Proposed Rule"] https://www.govinfo.gov/content/pkg/FR-2019-06-14/pdf/2019-11512.pdf

[3] Proposed Rule, 84 Fed. Reg. at 27,846.

Federal financial assistance, or under any programs or activity that is administered by an Executive Agency or any entity established under this title [Title I of the ACA] (or amendments)."[4]

While we applaud the revisions to the tagline requirements and covered entity interpretation, we would also like to address our concerns about the OCR's proposal to remove protections from discrimination based on gender identity, sexual orientation, and pregnancy status. The Chamber supports providing high quality services to all members, regardless of their race, color, national origin, sex, gender identity, sexual orientation, age, or disability. We believe everyone should have access to healthcare, without experiencing discrimination, no matter who they are, where they live or what their health condition may be. We encourage the OCR to consider alternative options to reduce administrative burdens without opening up the opportunity for already vulnerable populations to experience discrimination when accessing health services.

The 2019 Proposed Rule revises the two administrative components of the 2016 final regulation implementing Section 1557 which the Chamber has long criticized: the tagline requirement (and frequency of providing the taglines) as well as the expansive view of covered entities (which included "parent companies" of those offering plans that received federal funds).

CHAMBER'S EFFORTS

This Chamber has actively engaged both the current and the previous Administration for years to revise the tagline requirement and the expansive covered entity interpretation. Not only did the Chamber file comments on the previous proposed rule issued in November 2015, but we continued to raise concerns after the original final rule was published by the HHS's Office of Civil Rights (OCR) on May 18, 2016.

The Chamber has long asserted the expense of having to provide tagline translations in at least the top 15 different languages and multiple notices of these protections is significant and clearly outweighs the questionable benefit to consumers. In fact, we believe by providing these notices with such frequency, consumers will instead disregard the information rather than realize the benefit and protections afforded.

Additionally, we were very concerned about the imposition of a new regulatory regime on all programs of an entire entity based solely on the fact one program administered by that entity receives federal dollars.[5] The original expansive view of covered entities is why many consumers (including Chamber employees) receive an additional four pages of taglines with every explanation of benefit ("EOB") even though the employee's particular plan receives no federal funds. For example, although the Chamber's group health plan is self-insured and receives no federal funds, because our plan is administered by a company which also offer Medicare Advantage plans, we and all other

[4] §1557 (a) of the ACA and NPRM at 54,172.

[5] This is not a unique issue. For example, both Congress and the Office of Federal Contract Compliance Programs (OFCCP) have acknowledged that there are limitations on the requirements they may impose on private actors who have certain relationships with government programs, including in the area of healthcare. *See* Section 714 of the 2012 National Defense Authorization Act (limiting OFCCP jurisdiction over medical providers that are subcontractors in TRICARE); *see also* OFCCP FAQs, http://www.dol.gov/ofccp/regs/compliance/faqs/offaqs.htm (noting that "hospital or other health care provider is not covered under the laws enforced by OFCCP if its only relationship with the Federal government is as a participating provider under Medicare Parts A and B and Medicaid.").

beneficiaries/enrollees in plans this company offers/administers must receive four additional pages of taglines with every EOB.

PROPOSED REVISIONS TO NOTICE AND TAGLINE REQUIREMENTS

The Chamber strongly supports the Proposed Rule's modification of the requirement to include a nondiscrimination notice and language tagline on all significant communications. We agree the burden from the notice and taglines requirement which ranges from $147 million to $1.34 billion in annual costs before accounting for electronic delivery is not justified, particularly given there has been no increase in the number of calls to language lines requesting translation since the requirements went into effect.

PROPOSED REVISIONS TO COVERED ENTITY INTERPRETATION

The specific language in Section 1557 makes clear that Congress intended to apply federal nondiscrimination standards to specifically identified programs and activities and not to other services or programs that do not receive financial assistance or are not administered by an Executive Agency or other designated entity. Health care entities often provide a variety of services, programs, and products; such as medical care, health insurance coverage, other types of insurance coverage such as life and/or disability coverage, and administrative services for group health plans. Some of these programs may receive federal financial assistance or are administered by an Executive Agency or other designated entity (e.g., Medicare Advantage plans, Medicaid managed care organizations, and health insurance Exchange coverage), but some health care entities offer other products that do not receive federal financial assistance but were impacted by the 2016 final rule. Section 1557 is intended to apply only to those programs receiving federal financial assistance and not to other parts of the health care entity's businesses or products. The Chamber supports the decision to align the scope and application of the rule with the statutory language.

Conclusion

The Chamber commends the Department's efforts to reduce unnecessary regulatory burdens and expenses. The Proposed Rule's modifications are critical and we encourage the Department to continue to work carefully, pragmatically, and cooperatively with the business community to minimize burdens placed on employers as they work to comply with the law. We remain committed to the employer-sponsored system and appreciate the Department's consideration of the effects that various implementation choices have on businesses.

Sincerely,

Katie Mahoney
Vice President
Health Policy
U.S. Chamber of Commerce