



October 1, 2022

The Honorable Xavier Becerra  
Secretary, Department of Health and Human Services  
200 Independence Avenue SW  
Washington, DC 20201

RE: RIN Number 0945-AA17

Dear Secretary Becerra:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing over 100,000 licensed health insurance agents, brokers, general agents, consultants, and employee benefit specialists. We are pleased to respond to your "Nondiscrimination in Health Program and Activities," published in the *Federal Register* on August 4, 2022.

The members of NAHU work daily to help millions of people and employer group health plan sponsors purchase, administer, and utilize health insurance coverage. Since the passage of the Affordable Care Act in 2010, our members have been assisting group plan sponsors with complex ACA compliance issues, including compliance with the nondiscrimination protections addressed in this measure. In addition, our membership is bound by the nondiscrimination requirements when interacting with clients. As such, our association has a strong interest in many of the issues addressed in the proposed rule, and we appreciate the Department of Health and Human Services' consideration of feedback from stakeholders. Our comments were informed by consultations with members who specialize in ACA markets and compliance issues. For your convenience, they are broken out by topic.

### **Applicability**

NAHU members would appreciate it if, in any final rule, HHS were to provide greater clarification about the applicability of the proposed rule. What constitutes a covered entity and applicable health programs and activities are in some cases very clear, and in other cases, not at all.

The proposed rule explicitly does not include all group health plans on the lengthy list of health programs the proposed rule affects directly. It also explicitly indicates that a covered entity's employee benefit plan is not necessarily affected. However, it does note that certain group health plans will be required to directly comply with the regulation. Further, many more will be affected by its requirements due to the applicability of regulation to either the health insurance carrier that bears the risk for their plan, or to a carrier or other covered entity that provides administrative services to the plan or serves as a third-party claims administrator.



NAHU members believe, to increase regulatory compliance and mitigate compliance costs for employer group plan sponsors, any final rule should provide clearer delineation and direct examples of instances when and how this regulation will apply to different types of group health benefit plans.

As part of this clarification, our association urges HHS to provide more detailed information, including numerous clear examples about HHS-based funding streams that may directly or indirectly flow to a group health plan, thereby requiring the employer group health plan to comply with all provisions of the proposed rule. For example, if an applicable large employer has employees eligible for coverage who obtain federally subsidized health insurance coverage through a health insurance exchange marketplace, would this constitute an indirect source of funding? What about Medicare employer group waiver plan (EGWP) participants? Suppose the federal government implements new subsidies for employer-based health insurance coverage, such as the funding made available to both employer groups and individuals during the height of the COVID-19 pandemic (PPP loan funds, retention tax credits, paid leave credits, COBRA subsidies, etc.). Would these tax credits and subsidies qualify as indirect funding?

NAHU members also would appreciate clarification on compliance deadlines for entities that newly become covered entities according to the scope of the rule. Should an entity realize that it is newly subject to the rule, how long does it have to develop compliance procedures and implement the complicated provisions of this rule? It occurs to us that entities could need to become compliant the minute they begin accepting any type of funding that directly or indirectly flows from HHS. However, such entities may not realize their compliance obligations right away, and they will need time to implement appropriate procedures. Accordingly, we request a safe-harbor compliance window of at least six months for newly covered entities to be included in any final rule.

The regulation explicitly states it extends to covered entities that are “health insurance issuers and their officials, employees, agents and representatives” as well as “agents, brokers or web-brokers that assist with or facilitate enrollment of qualified individuals, qualified employers or qualified employees” through the health insurance exchange marketplaces. While the applicability to exchange-based activities is clear, when an independent health insurance agent might be considered to be an agent of a health insurance issuer for the purpose of compliance with this rule is not entirely clear to our membership. If any final regulation could provide explicit clarification and guidelines, NAHU members would appreciate it. We would also like clarification about when the covered-entity requirements in terms of required notifications, written policies and procedures, compliance coordinator and grievance process might apply to health insurance agents and brokers, especially when they are working under the auspices of another covered entity, such as a health insurance exchange or a covered health insurance issuer, group health plan or third-party administrator. What, if any, independent compliance requirements will apply?



Finally, to assist both health insurance consumers and covered entities, NAHU members urge HHS to consider developing an online applicability tool to help discern whether the expanded Section 1557 regulation applies either directly or indirectly to an organization or other health program or activity.

### **Algorithms and Nondiscrimination Requirements**

The proposed rule expands upon the existing Section 1557 regulations to prohibit discrimination in health decision-making algorithms. While our association understands that HHS included this specification in the proposed rule due to research indicating that clinical algorithms increasingly have the potential to be discriminatory, we caution HHS to take care that any technology-based regulations remain evergreen. In addition, our members note that while over-reliance on algorithms can be problematic, they also can lead individuals and institutions to make decisions and offer health-based programs to individuals that can very beneficial. It would be very unfortunate if individual access to services and health programs and activities that promote good health were inadvertently limited due to algorithm limitations. HHS should prioritize appropriate balance when finalizing any algorithm requirements.

### **Pregnancy Discrimination**

The proposed rule clarifies that the definition of discrimination “on the basis of sex” includes pregnancy and other related conditions. NAHU members would appreciate it if HHS would provide clarification, either in a final rule or via sub-regulatory guidance, as to how these pregnancy-discrimination protections relate to and may be different from those guaranteed by the Pregnancy Discrimination Act of 1978. We would appreciate guidance on any expanded protections, as well as the impact of this proposed regulatory change, considering the recent Supreme Court of the United States decision in *Dobbs v. Jackson Women’s Health Organization*.

### **Timeline for Plan-Design Changes**

If finalized, this rule will likely necessitate health plan design and compliance changes for many group and individual coverage programs since it represents significant changes to the existing regulatory requirements. To implement those changes in an efficient and cost-effective manner, NAHU members suggest a delay of one year so that the effective date of any final regulation would be no earlier than January 1, 2024. Additionally, we request a safe harbor for group health plans and group health insurance issuers so that plan-design changes for non-calendar-year plans may be implemented on the first day of the new plan year occurring on or after January 1, 2024.

### **Compliance-Coordinator Requirement**

The proposed rule requires covered entities with 15 or more employees to appoint a Section 1557 compliance coordinator. In addition, comments are solicited as to whether that threshold should be lower. Given the human capital and financial costs associated with designating an employee to be responsible for compliance,



NAHU members do not believe this requirement should be extended to smaller entities. In fact, our recommendation is to raise the threshold to exempt all businesses and industries classified as small businesses by the federal Small Business Administration.

### **Grievance Procedures**

The proposed rule also requires covered entities with 15 or more employees to develop and implement grievance procedures for employees and others that believe the covered entity has violated these proposed changes to the Section 1557 nondiscrimination rule. Given the cost and difficulties small businesses will have in developing and implementing such grievance procedures, our recommendation is to raise this compliance threshold to exempt all businesses and industries classified as small businesses by the federal Small Business Administration. For smaller entities, the federal Office of Civil Rights should be the enforcement entity, not the small employer.

### **Written Policies and Procedures**

If finalized, this proposed regulation will require covered entities to implement written Section 1557 policies and procedures. These policies and procedures must be reasonably designed, consider the size, complexity, and type of health programs and activities undertaken by the covered entity, and include an effective date. The written policy must, at minimum, state that the covered entity, in its health programs and activities, does not unlawfully discriminate on the basis of race, color, national origin (including limited English proficiency and primary language), sex (including pregnancy, sexual orientation, gender identity and sex characteristics), age or disability, and provides language-assistance services and appropriate auxiliary aids and services free of charge when necessary for compliance with Section 1557. In addition, if applicable, the policy document must include the contact information for the covered entity's Section 1557 compliance coordinator, as well as address the entity's grievance and recordkeeping procedures, including how the entity will ensure that the grievance process is accessible to individuals with limited English proficiency.

The preamble to the proposed rule indicates that HHS plans to publish sample policies online if this regulation is finalized. NAHU members strongly support this plan.

### **Website Accessibility Requirements**

The proposed rule solicits comments as to whether a covered entity's website should be subject to accessibility requirements. NAHU members are concerned about the cost of such of a requirement, so we would not support its application. At minimum, we would request an exemption for all businesses and industries classified as small businesses by the federal Small Business Administration.



### **Language-Accessibility Requirements**

The proposed rule also asks for comments from stakeholders about how HHS could be of assistance in helping covered entities in meeting the proposed rule's language-accessibility requirements. Our association members believes when HHS finalizes the rule, the best thing it can do is to provide clear sub-regulatory compliance guidelines, including templates for required notifications.

### **Compliance Guidelines**

HHS inquired whether covered entities seek guidance on best practice for compliance with Section 1557, and if so, on which topics. NAHU members always believe that sub-regulatory guidance that provides covered entities with best practices for compliance is desirable action. Regarding this proposed rule, our membership would appreciate compliance guidelines on the applicability of these requirements, specifically to group health plans, third-party administrators and health insurance carriers, including the interplay and examples of how each of these entities may qualify as covered health programs. Additionally, our association would like more details about how this regulation applies to health insurance agents and brokers, both independently and in their roles as appointed agents of a particular health insurance issuer that qualifies as a covered health program. Another area where NAHU members believe more guidance is warranted is what constitutes a covered funding stream. More examples of direct and indirect sources of funding and how they affect applicability of this regulation would be very helpful. Finally, the proposed rule includes notification requirements, as well as specifications that certain covered entities develop written compliance policies and procedures, as well as a grievance process. NAHU members always believe that templates and sample notices are helpful tools to encourage appropriate compliance.

Thank you for the opportunity to provide input about the proposed changes to the nondiscrimination requirements. If you have any questions about our comments or need more information, please do not hesitate to contact me at (202) 595-0639 or [jtrautwein@nahu.org](mailto:jtrautwein@nahu.org).

Sincerely,

A handwritten signature in black ink, which appears to read "Janet Stokes Trautwein".

Janet Stokes Trautwein  
Executive Vice President and CEO  
National Association of Health Underwriters