

October 2, 2024

Director Anita Fox, Chair of B Committee
Commissioner Grace Arnold, Chair of the Special Committee on Race and Insurance
Commissioner Scott Kipper, Chair of Senior Issues Task Force
Commissioner Glen Mulready, Chair of Regulatory Framework Task Force

Interested Regulators:

We are concerned that the excepted benefits markets covered under the Affordable Care Act’s non-discrimination protections (section 1557) – including Medigap, short-term limited duration insurance (STLDI), and fixed indemnity plans – are not moving to make necessary changes to plan designs and marketing in light of the clarifications included in the final 1557 rule issued in May 2024. We understand that there continue to be questions over how the 1557 non-discrimination protections should be applied to Medigap and other excepted benefits plans that receive federal financial assistance. We urge regulators to work collaboratively with federal agencies, consumer groups, and regulated entities to work through these questions and develop an approach to Medigap and other excepted benefits plan review that ensures compliance with the important civil rights and non-discrimination protections of section 1557.

We urge regulators to take the following actions:

Assess Medigap and Other Excepted Benefits Markets and the Extent to which Enrollment, Premiums, and Plan Designs Exclude or Limit Coverage Based on Age, Disability, Sex, or Race

As a first step in developing compliance guidance for state-regulated insurance products that must comply with section 1557, insurance regulators should use existing review touch points to assess both the extent to which products receive federal financial assistance, bringing them under section 1557, and the extent to which Medigap and other excepted benefits plans are basing premiums, cost sharing, or enrollment on a section 1557 protected class. An example is during Medigap certification for Medigap plans and when new short-term plans enter the market.

Market	Enrollment	Premiums	Plan design
Medigap	<ul style="list-style-type: none">Do Medigap plans exclude individuals from coverage based on disability, age, sex, or race for people under 65?Do Medigap plans exclude individuals from coverage based on disability, age, sex, or race for people over 65 who did not enroll during their initial open enrollment period?	<ul style="list-style-type: none">Do Medigap plans base premiums on issue-age, attained-age, health status (including conditions covered under section 504 of the Rehabilitation Act as a disability), or sex?	Medigap plans have standardized plan designs and Medigaps may be able to add innovative benefits beyond the standardized plan

Market	Enrollment	Premiums	Plan design
	<ul style="list-style-type: none"> Do Medigap plans exclude access to certain plan options based on age or disability? Do Medigap plans require a waiting period for coverage based on disability? 		
Short-term limited duration insurance (STLDI) plans	<ul style="list-style-type: none"> Do STLDI plans exclude individuals from coverage based on disability, age, sex, or race? Do STLDI plans require a waiting period for coverage based on disability? 	<ul style="list-style-type: none"> Do STLDI plans base premiums on age, health status (including conditions covered under section 504 of the Rehabilitation Act as a disability), or sex? 	<ul style="list-style-type: none"> Do STLDI plans exclude or limit benefits or services from coverage based on a person's disability, age, sex, or race? Do STLDI plans use post-claims underwriting to deny coverage for services used to treat someone with a disability?
Fixed indemnity (including accident or critical illness policies)	<ul style="list-style-type: none"> Do fixed indemnity plans exclude individuals from coverage based on disability, age, sex, or race? Do fixed indemnity plans require a waiting period for coverage based on disability? 	<ul style="list-style-type: none"> Do fixed indemnity plans base premiums on age, health status (including conditions covered under section 504 of the Rehabilitation Act as a disability), or sex? 	<ul style="list-style-type: none"> Do fixed indemnity plans exclude or limit benefits or services based on a person's disability, age, sex, or race? Do fixed indemnity plans use post-claims underwriting to deny coverage for services used to treat someone with a disability?

Consult with Consumer Groups and Other Experts on How Excepted Benefits Markets Impact Consumers Based on Age, Disability, Sex, and Race

It is difficult to assess what constitutes discrimination in markets that have historically used underwriting and other policies to limit coverage for beneficiaries who are predicted to have high health care costs. We urge regulators to gather the necessary information about how these plans operate and their impact on consumers based on the protected categories described in section 1557: race, color, national origin, sex, age, and disability. Part of this process must

include consultation with communities impacted by insurance practices that exclude or limit coverage based on these categories.

Regulators should also consult with subject matter experts on insurance non-discrimination protections, including policy experts who have experience with how non-discrimination laws and regulations operate as applied to health insurance practices, health lawyers who have litigated insurance discrimination claims based on section 1557, and other interested parties with expertise in this area.

We understand that NAIC has sent a letter to the Office of Civil Rights (OCR) asking for clarity on application of 1557 to excepted benefits plans. We support continued dialogue with OCR, and we urge NAIC to invite OCR officials to speak at NAIC venues in a formal capacity, including B Committee, the Regulatory Framework Task force, and the Senior Issues Task Force. However, we believe that there are actions regulators can and should take in the absence of additional guidance from OCR, including the information gathering and stakeholder engagement described above.

Develop Guidance for Regulated Entities on How Section 1557 Impacts Products Regulated by the State

Section 1557 is ultimately enforced by the federal Office for Civil Rights (OCR). However, state insurance regulators have a vested interest in ensuring that the regulated entities and products in their states – including excepted benefits plans – are in compliance with both federal and state non-discrimination laws and regulations. Application of a federal civil rights framework to these markets is new and is undoubtedly challenging for both regulators and regulated entities. But federal civil rights laws are not optional. Regulators should work to develop guidance for the regulated entities in their states about any changes that need to be made to bring plans into compliance with section 1557, including the interaction of section 1557 with existing state non-discrimination laws. The experience of those states that have already placed broader issuance requirements on their Medigap vendors may be of interest here.

Thank you for your attention to this important issue. We are eager to work with regulators to ensure that regulated entities and consumers are aware of the non-discrimination protections that section 1557 brings to the excepted benefits market. For questions regarding this letter, please contact Consumer Representatives, Amy Killelea, amyk@killeleaconsulting.com and Jalisa Clark, jalisa.clark@georgetown.edu.

Signed by the following Consumer Representatives to the NAIC,

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