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TO: Medicare Advantage Organizations, Prescription Drug Plans, Medicare Medicaid Plans, Program of All-inclusive Care for the Elderly Plans, and Section 1876 Cost Plans

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SUBJECT: Guidance regarding implementation of the procedural requirements under the regulation implementing Section 1557 of the Affordable Care Act of 2010—Nondiscrimination Communication Requirements and Grievance Procedures

The Centers for Medicare & Medicaid Services (CMS) is issuing this memorandum to provide guidance regarding implementation of the procedural requirements in the regulation implementing Section 1557 of the Affordable Care Act of 2010 (Section 1557) for Medicare Advantage organizations, Prescription Drug Plans, Medicare Medicaid Plans (MMPs), Program of All-inclusive Care for the Elderly (PACE) Plans, and Section 1876 Cost Plans (“Plans/Part D Sponsors”). This memorandum does not address requirements outside of those related to the Notice, Nondiscrimination Statement, and Taglines; and those related to Grievance Procedures and Compliance Coordinators.

Except where explicitly noted, this memorandum does not address similar, but independent, requirements applicable to Plans/Part D Sponsors under other applicable law or the regulations of the Medicare Advantage, PACE, Part D, Cost Plan, or Medicaid programs. Plans/Part D Sponsors must continue to comply with the requirements of their respective programs in addition to complying with Section 1557 and its implementing regulation.

Background

Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs. The Office for Civil Rights in the U.S. Department of Health and Human Services has issued final a regulation, codified at 45 C.F.R. Part 92, that implements Section 1557. The Section 1557 regulation identifies procedural and substantive requirements that reflect longstanding Federal civil rights principles. Among covered entities' obligations, the procedural requirements at §§ 92.7 and 92.8 require covered entities to have mechanisms in place to enhance their accountability and to notify individuals of their rights and of covered entities' obligations under Section 1557. These requirements, specifically the requirements of § 92.8, will impact Plans/Part D Sponsors' presentation of their materials for Contract Year 2017.

Notice, Nondiscrimination Statement, and Taglines

Beginning with materials for Contract Year 2017, which are permitted for distribution beginning September 30, 2016, Plans/Part D Sponsors must take steps to notify beneficiaries, enrollees, and prospective members about their rights under Section 1557 and the obligations of Plans/Part D Sponsors under Section 1557. Specifically, covered entities, including Plans/Part D Sponsors, must post a nondiscrimination Notice in English and post taglines in at least the top 15 non-English languages spoken by individuals with limited English proficiency of the relevant State or States. *See* 45 C.F.R. § 92.8. The Notice of Nondiscrimination must include the seven elements listed in § 92.8(a)(1)-(7). Plans/Part D Sponsors may combine the content of other notices with the Section 1557 Nondiscrimination Notice as long as the combined notice clearly informs individuals of their rights under Section 1557 and the regulation. Plans/Part D Sponsors may use the Section 1557 Sample Notice Informing Individuals about Nondiscrimination and Accessibility Requirements ("Notice") to meet this requirement.

The Notice and Taglines must be posted in a conspicuously-visible font size in a conspicuous location of covered entity websites accessible from the home page, in significant communications and significant publications, and, where appropriate, in conspicuous physical locations where the entity interacts with the public. § 92.8(f)(1)(i)-(iii).

It is CMS' policy that the scope of significant communications and significant publications under the Section 1557 regulation as applied to the programs addressed in this memorandum, include, but are not limited to:

- All marketing materials,
- Ad hoc enrollee communications that include information related to health coverage, benefits, and prescription drug coverage;
- Part C and Part D Explanation of Benefits (EOB),
- Annual Notice of Change (ANOC)/Evidence of Coverage (EOC),
- Provider/pharmacy directories,
- Formularies,
- Enrollment forms,
- Summary of Benefits, and
- Appeals and grievance notices.

For significant communications and significant publications that are small-size, such as trifold brochures, covered entities must post a nondiscrimination statement and taglines in at least the top 2 non-English languages spoken by individuals with limited English proficiency of the relevant State or States. § 92.8(b)(2), (d)(2), (g)(1)-(2). CMS considers the Star Ratings information document as another example of a small size publication. Plans/Part D Sponsors may use the Section 1557 Sample Nondiscrimination Statement: Discrimination is Against the Law (“Statement”) to meet this requirement.

Plans/Part D Sponsors may include the Notice or the Statement on model documents as applicable and as allowed in the model instructions. For example, Plans/Part D Sponsors may include the Notice in “Chapter 11. Legal notices” of the EOC. If model instructions do not allow any alterations to the particular model, then Plans/Part D Sponsors may attach the Notice/Statement with the populated models. We note that all model documents issued to MMPs and Special Needs Plans (SNPs) participating in the Minnesota Demonstration to Align Administrative Functions for Improvements in Beneficiary Experience may be altered to include the Notice or Statement within the document. The Notice and Statement can be found at: https://www.federalregister.gov/articles/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov#h-139.

In addition, Plans/Part D Sponsors may use the multi-language insert as described below with all materials to meet this requirement. Please note that Plans/Part D Sponsors must meet this requirement regardless of whether a member of the plan speaks one of the top languages spoken by individuals with limited English proficiency of the relevant State.

The top non-English languages by State will be found in the future on the Office for Civil Rights’ website. CMS will include the top 15 non-English languages by State in its annual language analysis conducted to identify the languages spoken by 5% or more of the population within plans’ service areas.

Please note that MA Organizations, Section 1876 Cost Plans, PACE Organizations, and Part D Sponsors must continue to comply with 42 CFR 417.428, 422.2264(e), 423.2264(e) and 460.82 for requirements pertaining to non-English speaking populations. We also note that any additional languages beyond the required top non-English languages that MMPs or Minnesota demonstration SNPs are required to include in the multi-language insert (per the terms of MMPs’ three-way contract requirements) will be specified in MMP State-specific marketing guidance for CY 2017.

Medicare Marketing Guidelines 30.5.1 Multi-Language Insert

In an effort to align Medicare Advantage, Cost Plan, and Part D marketing guidance with Office for Civil Rights rules regarding notification of language assistance services, CMS is revising section 30.5.1 of the Medicare Marketing Guidelines as follows:

Plans/Part D Sponsors must create a multi-language insert that includes the following alternate language tagline translated in at least the top 15 languages spoken by

individuals with limited English proficiency in the relevant State or States: “ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).” Translations of this alternate language tagline can be found here: <http://www.hhs.gov/civil-rights-for-individuals/section-1557/translated-resources>

If the five (5) percent service area threshold (See 42 CFR 422.2264(e) and 423.2264(e) and 30.5) is applicable to a language not currently in the top 15 languages spoken by individuals with limited English proficiency in the relevant State or States, the Plan/Part D Sponsor must add that particular language to the multi-language insert.

Regardless of the five (5) percent service area threshold, all Plans/Part D Sponsors must include the multi-language insert with the following marketing materials: Summary of Benefits (SB), Annual Notice of Change (ANOC)/Evidence of Coverage (EOC), and the enrollment form. Plans/Part D Sponsors have the option to incorporate the multi-language insert as part of these materials or provide it as a separate document along with, and at the same time as, these materials.

Plans/Part D Sponsors must only include the translated tagline above and the plan logo on the multi-language insert.

Note: Dual SNPs (D-SNPs) that contract with States that have more stringent language requirements must work with CMS to determine whether those requirements can be incorporated into the multi-language insert or may be met another way.

Grievance Procedure and Compliance Coordinator

The Section 1557 final rule requires covered entities with more than 15 employees, which includes Plans/Part D Sponsors, to adopt a grievance procedure that incorporates due process standards and provides a means for the entity to promptly and equitably resolve complaints related to compliance with Section 1557 and the rule. § 92.7(b). Covered entities with more than 15 employees must also designate an employee to investigate grievances and coordinate the entity’s compliance with Section 1557 and the regulation. § 92.7(a).

Under existing requirements in the MA, Cost Plan, Part D and PACE programs and other applicable law, Plans/Part D Sponsors must already have grievance procedures. See for example, 42 CFR §§ 417.436(a)(7), 417.600(b)(1), 422.564, 423.564, and 460.120. As noted in the Section 1557 final rule, covered entities may increase the scope of their existing grievance procedures required under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) to accommodate complaints of discrimination addressing all bases prohibited under Section 1557. Plans/Part D Sponsors may also combine the grievance procedure required under Section 1557 with procedures they use to address other grievances, including those unrelated to individuals' civil rights.

CMS expects each Plan/Part D Sponsor to educate their members to ensure that enrollees call the plan’s/sponsor’s call center directly with requests and any plan complaints. Enrollees and their providers may contact CMS directly when their complaints are not resolved by the plan. All

Plans/Part D Sponsors are accountable for the prompt resolution of complaints in the Complaint Tracking Module. High complaint rates may result in compliance actions and may negatively impact the Plan/Part D Sponsors' Star Ratings. Furthermore, the availability and use of this grievance procedure does not prevent a person from pursuing other legal or administrative remedies, including filing a complaint of discrimination on the basis of race, color, national origin, sex, age or disability in court or with the Office for Civil Rights.

If you have questions about the additional requirements under Section 1557 of the Affordable Care Act of 2010 or the implementing regulation, please contact the Office for Civil Rights at 1557@hhs.gov. If you have questions about model materials and specific plan communications, please contact Marketing@cms.hhs.gov.