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MEMORANDUM

TO: Health Fund Clients that Receive Federal Financial Assistance

FROM: Slevin & Hart, P.C.

DATE: July 19, 2021

RE: Updated Guidance Regarding Final Regulations under Section 1557 of the Patient Protection and Affordable Care Act

As described in our September 17, 2020 Memorandum, the Department of Health and Human Services (“HHS”) issued a Final Rule under Section 1557 of the Affordable Care Act (“ACA”) that removed prohibitions on gender identity and sexual orientation discrimination for health fund programs that receive financial assistance from the federal government. The Final Rule appeared to be in conflict with the 2020 Supreme Court decision in *Bostock v. Clayton County*, 590 U.S. ___, 140 S.Ct. 1731 (June 15, 2020), and was subject to numerous legal challenges. On May 10, 2021, HHS issued guidance stating that it will interpret and enforce Section 1557 to prohibit discrimination based on both gender identity and sexual orientation, effective immediately. This position aligns the agency enforcement position with the *Bostock* decision, and reverses the Trump-era Final Rule. The HHS guidance does not otherwise affect the scope of the Final Rule.

Action Items

Section 1557 applies only to health fund programs that receive financial assistance from the federal government. For entities such as the Fund that primarily provide health benefits, this includes Fund programs that receive retiree drug subsidies (“RDS”) or self-insured Employer Group Waiver Program (“EGWP”) retiree drug programs. Additionally, Funds that have an RDS or self-insured EGWP are required to submit an “assurance” on an HHS form that the Fund complies with Section 1557 and, on future applications for the RDS or EGWP, it must include a new assurance or a reference to the prior assurance. Therefore, at a minimum, the Fund should confirm that its pharmacy benefit manager is taking steps to comply with the non-discrimination requirements of Section 1557. If a Fund utilizes an insured EGWP, the insurer is generally responsible for compliance.

HHS Guidance

In 2016, HHS (under the Obama administration) issued a Final Rule under Section 1557 of the ACA prohibiting gender identity discrimination and some forms of sexual orientation discrimination in certain health care programs. In June of 2020, HHS (under the Trump administration) issued a revised Final Rule under Section 1557 that, among other changes, removed the prohibitions on gender identity and sexual orientation discrimination.

In June 2020, the Supreme Court held in *Bostock v. Clayton County* that federal law prohibiting employment discrimination “on the basis of sex” also prohibits employment discrimination on the basis of gender identity and sexual orientation. Lawsuits were quickly filed over the Final Rule based on the *Bostock* decision and several courts issued injunctions against enforcement of the Final Rule.

When the Biden administration took office in January 2021, it issued an Executive Order directing federal agencies to review existing laws against sex discrimination and determine whether the *Bostock* reasoning should be extended to those laws. (Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 25, 2021)).

On March 26, 2021, the Department of Justice issued guidance stating that the *Bostock* decision should apply to Title IX (covering discrimination in education and health care) as well as to Title VII (covering discrimination in employment). This is reflected in the HHS Notification indicating that HHS will interpret and enforce Section 1557 of the ACA, consistent with *Bostock*, to prohibit discrimination based on both sexual orientation and gender identity, effective immediately. (Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, <https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf> (last accessed May 24, 2021)).

HHS stated that it will immediately begin accepting and investigating complaints of discrimination in health care on the basis of sexual orientation and/or gender identity. Other aspects of the 2020 Final Rule, as discussed in our previous Memorandum (relating to the scope of the Final Rule, notices, language services, and building accessibility) are not affected.

We look forward to addressing any questions you may have about how the recent guidance affects the Fund.

cc: Co-counsel (if any)