

# Health Care in Motion

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January 10, 2024

## Regulation Watch: What to Expect Between Now and the 2024 Presidential Election

The Biden Administration began its first term in January 2021 with a number of [commitments](#) to preserve and strengthen the ACA and Medicaid, and to make health care more equitable, affordable, and accessible, including for [the LGBTQ community](#). Since that time, the Department of Health and Human Services (HHS) has proposed various regulations to advance the Biden Administration's healthcare agenda, including rules that strengthened [network adequacy protections](#), [shored up formulary non-discrimination protections](#), and [reinstated and strengthened standardized plans](#) available in ACA marketplaces. In the waning months of the Administration's first term, we expect to see several highly anticipated final rules drop, including the ones discussed below.

### 1557 Non-Discrimination Rule

Section 1557 of the ACA is a watershed provision that applies four pre-existing federal civil rights protections to a range of federal health programs and activities, including health insurance plans. However, this particular ACA provision has had a contentious and sometimes dramatic history (see a previous CHLPI [Health Care in Motion](#) on this topic for more details).

The regulations implementing section 1557 have been something of a political lightning rod, with very different approaches depending on the political party in the White House. Under the Obama Administration, the parameters of 1557 were interpreted fairly broadly. HHS enacted protections that, for instance, explicitly prohibited discrimination on the basis of gender identity. The Trump Administration took a different approach, revising the implementing regulation for section 1557 to narrow the scope of federal activities and programs to which section 1557 applied, remove protections against discrimination based on gender identity and sexual orientation, and gut the requirements prohibiting discrimination in plan design.

#### CHLPI and the Fight for Nondiscriminatory Health Care

CHLPI has long advocated for robust and effective nondiscrimination protections in health care. We have engaged with [state](#) and [federal](#) regulators, encouraging them to bolster and actively enforce nondiscrimination laws. We have also used Section 1557 in [federal complaints](#) about discriminatory prescription drug coverage and currently are co-counsel in [BAGLY v. HHS](#), a law suit against the federal government challenging the 2020 rollback of Section 1557 protections. With a reinvigorated, finalized Section 1557 rule on the horizon, we are hopeful that the Administration will engage in more proactive efforts to ensure health care is accessible to all.

While President Biden announced his commitment to LGBTQ non-discrimination early in the Administration, the [revised rule](#) was not released until 2022 and has yet to be finalized. The proposed rule largely reinstated the Obama era protections and expanded them in some places. Proposed provisions included an expanded application of 1557 protections to a broad range of federal programs and activities; expanded language prohibiting discrimination “on the basis of sex” (clarifying that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity); and reinstatement of provisions prohibiting discriminatory plan designs, including new sections on clinical algorithms and telehealth. (Read more about the need for nondiscrimination protections in clinical algorithms [here](#).) The final rule has been submitted to the Office of Management and Budget for review and is [expected to be released](#) this winter.

## Short-term Limited Duration Insurance (STLDI) and Other Excepted Benefit Plans

Short-term Limited Duration Insurance (STLDI) plans are exactly what they sound like – plans that are available only for a short period and not intended as comprehensive, long-term health insurance coverage. Availability of these plans, and other limited plans that provide supplemental coverage for specific services or conditions but are not comprehensive health insurance coverage (known as “excepted benefit plans”), is another policy flashpoint that has yielded different regulatory responses depending on the political party in charge. Under the Obama Administration, STLDI – which are not subject to most ACA consumer protections – were limited to a duration of three months and could not be sold consecutively. The purpose behind this rule was to limit the STLDI market only to individuals who are between other coverage and truly looking for a short-term stop gap, while preventing issuers from siphoning healthier, younger consumers from regulated marketplace plans into these cheaper but far less comprehensive “junk” plans. This siphoning practice – also known as “adverse selection” – can have disastrous consequences for marketplace plans, because only the sickest, most expensive consumers will remain in marketplace plans, driving up premiums.

The Trump Administration took a different tack. Under a [regulation released in 2018](#), STLDI plans were allowed to last up to 12 months and could be renewed for a duration of up to 36 months. This meant that STLDI plans were starting looking a lot more like a cheaper version of full insurance coverage, creating a [bait and switch for consumers](#) who thought they were enrolling in comprehensive coverage only to find that most plans had pre-existing condition exclusions or restrictions, very high cost sharing, and limits on benefits and services covered. The Biden Administration released a [proposed rule](#) in July 2023 reinstating the Obama Administration’s three-month STLDI duration maximum, but adding an option to renew for one additional month.

The Biden Administration’s proposed rule also tightened regulations around fixed indemnity and other excepted benefit plans. These types of limited plans are essentially income replacement mechanisms meant to provide a cash benefit if someone undergoes a hospitalization or other significant health event—in other words, they are not health insurance. However, it can be difficult for consumers to tell the difference between these plans and comprehensive health insurance, and advocates [are reporting](#) confusing or misleading marketing practices that exacerbate this problem. The proposed rule, which is still awaiting finalization, includes requirements for these types of excepted benefits plans to provide notice to consumers about what they are buying and to avoid structures and language that would cause consumers to mistake these plans for insurance coverage.

## Deferred Action for Childhood Arrivals (DACA) Rule

DACA recipients are far more likely than U.S. born individuals to be uninsured because they are currently ineligible for federally funded health insurance, including Medicaid and ACA marketplace plans. On April 13, 2023, President Biden [announced a plan to expand health care to immigrants](#) who are enrolled in the DACA program. Shortly thereafter, on April 26, the Department of Homeland Security (DHS) issued a [proposed rule](#) with an expanded definition of which immigrants are “lawfully present,” a change that would open up eligibility for Medicaid and marketplace coverage to DACA recipients. If finalized, the proposed rule – which would expand eligibility for Medicaid, CHIP, Basic Health Program, marketplace, and marketplace subsidies to DACA recipients – is expected to have a significant impact on the ability of this group to access affordable health coverage. The final regulation was [slated for release in November 2023](#), but we have yet to see it.

### What Is DACA?

DACA was established in June 2012 to protect from deportation certain undocumented immigrants who were brought to the U.S. as children. The program allows these individuals to legally work in the U.S., and has benefited over 900,000 eligible immigrants since 2012. As of December 2022, there were 580,000 active DACA recipients. ([Kaiser Family Foundation](#))

## Notice of Benefit and Payment Parameters for 2025

Finally, the Biden Administration still has one more opportunity under its current term to fine-tune the rules of the road for ACA Qualified Health Plans and marketplaces through its annual Notice of Benefits and Payment Parameters (NBPP). The [proposed NBPP for 2025](#) – which includes important protections related to prescription drug coverage as described in a recent [Health Care in Motion](#) – was released in November 2023, and the Administration will be trying to move quickly to finalize the rule this spring.

## Timeline of Final Rules and The Congressional Review Act (CRA)

The timing of when these pending rules are finalized has consequences. The [Congressional Review Act \(CRA\)](#) enables Congress to essentially void a final rule issued by a federal agency. If Congress voids a rule using this mechanism, the agency is also prevented from reissuing a “substantially similar” rule in the future unless Congress authorizes it to do so. Congress generally has 60 legislative days after a final rule is released to review and vote to void the rule by a simple majority. The CRA can be used at any time, but usually is only invoked during a change in presidential administration or when control of Congress changes parties, two events that could happen in the November 2024 elections. While it is hard to pinpoint exactly when the 60-day “look back period” will start, [experts estimate](#) that rules finalized by the Biden Administration between May and September 2024 could come under CRA action, while rules finalized before May 2024 would likely be on safe ground.

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*Health Care in Motion is written by Carmel Shachar, Health Law and Policy Clinic Faculty Director; Kevin Costello, Litigation Director; Elizabeth Kaplan, Director of Health Care Access; Maryanne Tomazic, Clinical Instructor; Rachel Landauer, Clinical Instructor; Johnathon Card, Staff Attorney; and Suzanne Davies, Clinical Fellow. This issue was written with the assistance of Amy Killelea of Killelea Consulting.*

For further questions or inquiries please contact us at [chlpilaw@law.harvard.edu](mailto:chlpilaw@law.harvard.edu).