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CALIFORNIA INSURANCE COMMISSIONER

August 13, 2019

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Alex M. Azar II, Secretary
Department of Health and Human Services
Office of Civil Rights
Section 1557 NPRM, RIN 0945-0AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Comments in response to proposed rulemaking
Nondiscrimination in Health and Health Education Programs or Activities,
HHS-OCR-2019-0007

Dear Secretary Azar:

As California's Insurance Commissioner, I oppose the changes found in the proposed rule, *Nondiscrimination in Health and Health Education Programs or Activities*, 84 FR 27846 (June 14, 2019). This rule attempts to weaken or eliminate federal nondiscrimination requirements. Calling this a nondiscrimination rule is inaccurate: rather than protecting access and availability of health care for Americans this proposed rule tries to open the door to discrimination. The apparent goal of this rule is to marginalize women, communities of color, the LGBTQ community, individuals with limited English proficiency, and individuals with disabilities. If that is the goal, then this rule accomplishes this discriminatory purpose.

I, along with seventeen other state Insurance Commissioners, have written to you regarding how this rule will undermine legal protections that safeguard transgender Americans from discrimination in health care. Because of the importance of these concerns, I will also revisit them briefly in this letter.[1] Further, I have additional concerns regarding this deeply harmful rule.

The proposed rule fosters discrimination by limiting the applicability of the Section 1557 regulations

The existing Affordable Care Act (ACA) section 1557 regulations are broadly applicable[2], and broadly define "health program or activity"[3]. But the federal Department of Health and Human Services (HHS)

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[1] Letter to Secretary Azar, (Aug. 5, 2019), available at: https://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr057LtrToAzarSec1557-080519.pdf.

[2] 45 CFR § 92.2(a) "Except as provided otherwise in this part, this part applies to every health program or activity, any part of which receives Federal financial assistance provided or made available by the Department; every health program or activity administered by the Department; and every health program or activity administered by a Title I entity."

[3] 45 CFR § 92.4 provides:

> Health program or activity means the provision or administration of health-related services, health-related insurance coverage, or other health-related coverage, and the provision of assistance to individuals in obtaining health-related services or health-related insurance coverage. For an entity principally engaged in providing or administering health services or health insurance coverage or other health coverage, all of its operations are considered part of the health program or activity, except as specifically set forth otherwise in this part. Such entities include a hospital, health clinic, group health plan, health insurance issuer, physician's practice, community health center, nursing facility, residential or community-based treatment facility, or other similar entity. A health program or activity also includes all of the operations of a State Medicaid program, a Children's Health Insurance Program, and the Basic Health Program.

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proposes here to limit the rule's applicability to HHS activities administered under Title I of the ACA. And, HHS would no longer apply the nondiscrimination requirements to a program which HHS "plays a role" in administering.[4]

Limiting the scope of the rule in this way is inconsistent with the plain language of the statute.[5] ACA section 1557(a) provides that an individual shall not be excluded from participation, denied benefits, or be subjected to discrimination "under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)."[6] The applicability of Section 1557 is not limited to programs or activities administered by HHS: Section 1557 applies not only to programs or activities created by Title I of the ACA or directly administered by HHS, but any program or activity administered by any Executive Agency. Therefore, limiting the scope of this rule is inconsistent with Section 1557.

In addition, the proposed rule limits the application of the rule to a "health program or activity" principally engaged in the business of providing health ***care*** that receives Federal financial assistance.[7] An entity principally or otherwise engaged in the business of providing health ***insurance*** will not be considered to be "principally engaged in the business of health care" under this rule.[8] For any entity that is not "principally engaged in the business of providing health care" the proposed rule limits the requirements only to the extent the operation receives federal financial assistance.[9] However, the plain language of Section 1557 specifies that it applies to a "health program or activity" and does not limit the application to an entity "principally engaged in the business of providing health care." Therefore, the limited scope proposed in the rule is unnecessarily narrow, and inconsistent with Section 1557.

Also because of this narrow definition, the proposed rule only prohibits discrimination in specific programs that receive federal funding, rather than requiring that all health insurers that receive federal funds must comply with anti-discrimination requirements. Thus, this administration proposes a rule that does not bar an insurer from receiving federal funding even if they are illegally discriminating on the basis of race, color, sex, national origin, age or disability in other programs.

This rule change is inconsistent with other actions of this administration. This administration has implemented other rules to cut federal funding to entities that legally provide non-Hyde abortions services, even though no federal dollars are used to provide those services. Also, this administration has implemented rules to cut federal funding to entities that legally refer patients for non-Hyde abortion services. But here, this administration proposes to implement a new rule that attempts to allow insurers

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entities include a hospital, health clinic, group health plan, health insurance issuer, physician's practice, community health center, nursing facility, residential or community-based treatment facility, or other similar entity. A health program or activity also includes all of the operations of a State Medicaid program, a Children's Health Insurance Program, and the Basic Health Program.

[4]Proposed Section 92.3(a); 84 FR 27861 & 27891.

[5]Katie Keith *HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule* Health Affairs Blog, (May 25, 2019) https://www.healthaffairs.org/do/10.1377/hblog20190525.831858/full/.

[6]ACA section 1557 (codified as 42 USC section 18116) provides:

(a) In general. Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

[7]Proposed Section 92.3(b) at 84 FR 27891.

[8]Proposed Section 92.3(c) at 84 FR 27891.

[9]Proposed Section 92.3(b) at 84 FR 27891.

that illegally discriminate on the basis of race, color, sex, national origin, age or disability, to receive federal funding so long as the program in which the discrimination occurs does not receive federal funding. Insurers should not receive federal funding if they are engaging in illegal discrimination. Instead, the existing scope of the Section 1557 regulations should remain in place.

The proposed rule uses broad religious exemptions to facilitate discrimination

This administration once again invokes religious freedom in order to encourage discrimination. This proposed rule incorporates Title IX's blanket religious exemption.[10] [11] [12] [13] The broad scope of this language fails to balance religious freedom and civil rights. The proposed rule would incorporate the final rule *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority* rule (2019) 84 FR 23170, which explicitly allows providers to put their religious beliefs above the needs of patients. As the California Department of Insurance previously stated to your agency, the right of health care providers to hold private beliefs should not impede the ability of patients to obtain care to which they are legally entitled.[14] Similarly, here, religious freedom should not be used as a pretext for civil rights violations.

Eliminating definitions in 45 CFR section 92.4, specifically "on the basis of sex," invites discrimination

Section 1557 forbids discrimination on the basis of sex, but the proposed rule deletes the existing definition of "on the basis of sex" found in 45 CFR section 92.4 in its entirety. By eliminating this definition, the proposed rule injects ambiguity into the Section 1557 regulations, opening the door to discrimination. The existing definition of "on the basis of sex" found in Section 92.4 protects against a broad range of discrimination, including discrimination related to reproductive rights, by defining sex discrimination to include "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity." As the proposed rule would eliminate the definition of "on the basis of sex" in its entirety, women seeking or recovering from abortion services would no longer explicitly fall under these protections. This could put women at risk of not being able to access the full range of legal, necessary health services, including abortion, as well as treatment for complications from an abortion. This could put women at the risk of having their civil rights trampled upon by putting the beliefs of a provider above the health care needs of the patient, creating additional barriers to care.[15] Therefore, the removal of this definition could directly lead to illegal discrimination against women on the basis of sex.

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[10] Katie Keith *HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule* Health Affairs Blog (May 25, 2019) https://www.healthaffairs.org/do/10.1377/hblog20190525.831858/full/

[11] MaryBeth Musumeci, et al, *HHS's Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557* Kaiser Family Foundation Table (2019) at 5. http://files.kff.org/attachment/Issue-Brief-HHSs-Proposed-Changes-to-Non-Discrimination-Regulations-Under-ACA-Section-1557.

[12] Proposed 92.6(a) at 84 FR 27892.

[13] In so doing, it provides that it will not displace a wide variety of religious and anti-choice provisions, or any related, successor or similar Federal laws or regulations. Proposed Section 92.6(a), at 84 FR 27892, provides:

> Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by any of the statutes cited in paragraph (a) of this section [including Title IX] or provided by ... the Coats-Snowe Amendment (42 U.S.C. 238n), the Church Amendments (42 U.S.C. 300a-7), the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub. L. 115-245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)), or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.

[14] Commissioner Dave Jones *Comments on Proposed Rule RIN 0945-ZA03: "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority"* (Mar. 27, 2018) http://www.insurance.ca.gov/0400-news/0100-press-releases/2018/upload/nr031HHSLetter.pdf.

[15] National Women's Law Center *Nondiscrimination Protection In The Affordable Care Act: Section 1557* Fact Sheet (Sept. 2015) https://nwlc.org/wp-content/uploads/2015/09/Reproductive-Rights-and-Health_1557_2.2.16.pdf.

Elimination of existing coverage protections invites misconduct

The proposed rule eliminates Section 92.207.[16] Section 92.207(b)(1)-(2) forbids denying, canceling, limiting or refusing to issue or renew a health insurance policy; denying or limiting coverage for a claim; imposing additional limitations or restrictions on coverage, including cost-sharing; having or implementing discriminatory marketing practices or benefit designs on the basis of race, color, national origin, sex, age, or disability. When Section 92.207 was adopted in 2016, HHS specifically identified insurance design features that might be considered discriminatory and in violation of Section 1557, including placing most or all prescription medications for a specific condition on the highest cost tier of a formulary, applying age limits that are not clinically indicated, and "requiring prior authorization and/or step therapy for most or all medications in drug classes such as anti-HIV protease inhibitors, and/or immune suppressants regardless of medical evidence...."[17] By eliminating Section 92.207, which provides specific examples of forbidden insurer conduct, insurers may interpret this deletion as permission to revert to these harmful practices.

The amendments embolden discrimination based upon sexual orientation and gender identity

This rule proposes to eliminate requirements that prohibit insurers and their agents from discriminating based upon sexual orientation or gender identity. The proposed rule eliminates sexual orientation and gender identity as prohibited forms of discrimination in marketing and benefit plan design (proposed 45 CFR section 147.104(e)); in qualified health plans (proposed 45 CFR section 156.200(e)); and in essential health benefits (45 CFR section 156.125(b) incorporates 45 CFR section 156.200(e) by reference). In addition, the rule seeks to allow insurers and agents on the Federally-Facilitated Exchanges to engage in marketing and conduct that discriminates based upon gender identity or sexual orientation (proposed 45 CFR sections 156.1230 and 155.120).

The Federal Office of Disease Prevention and Health Promotion has acknowledged that LGBTQ persons face health disparities linked to social stigma, discrimination, and denial of their civil and human rights leading to higher rates of psychiatric disorders, substance abuse and suicide.[18] But the proposed rule eliminates the prohibition against discrimination on the basis of sexual orientation and gender identity as it relates to benefit plan designs and marketing. Further, insurers, or their agents, could attempt to discriminate in their marketing by using sexual orientation as a basis to refuse to market or advertise in LGBTQ-friendly areas.

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[16] 45 CFR § 92.207 Nondiscrimination in health-related insurance and other health-related coverage.
(a) General. A covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of race, color, national origin, sex, age, or disability.
(b) *Discriminatory actions prohibited.* A covered entity shall not, in providing or administering health-related insurance or other health-related coverage:
(1) Deny, cancel, limit, or refuse to issue or renew a health-related insurance plan or policy or other health-related coverage, or deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability;
(2) Have or implement marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in a health-related insurance plan or policy, or other health-related coverage;
(3) Deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available;
(4) Have or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or
(5) Otherwise deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual.

[17] Final *Nondiscrimination in Health Programs and Activities* rule (May 18, 2016) 81 FR 31376, 31434 FN 258.

[18] Office of Disease Prevention and Health Promotion *Lesbian, Gay, Bisexual, and Transgender Health* https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health.

Similarly, the proposed rule eliminates sexual orientation and gender identity from the list of explicitly prohibited forms of discrimination applicable to issuers of qualified health plans (45 CFR section 156.200(e)), as well as providers of essential health benefits (45 CFR section 156.125(b)). Therefore, inside and outside the Exchange, insurers may argue that they are providing essential health benefits even if they discriminate based upon sexual orientation or gender identity. By removing the explicit prohibition against discrimination in marketing and plan design, this proposed rule attempts to allow health insurers, and their agents, to discriminate against LGBTQ persons, to the detriment of their health.

Discrimination against transgender status or gender identity cruelly harms health

In 2012, my Department promulgated a regulation prohibiting discrimination on the basis of an insured or prospective insured person's actual or perceived gender identity, or on the basis of being a transgender person.[19] Similarly, in 2016 the existing federal rule was promulgated, to prohibit discrimination based upon gender identity and transgender status. Even though the preamble to the proposed rule mentions the injunctions and pending cases regarding the existing rule as it relates to gender identity or transgender status, the preamble fails to recognize or address existing case authority regarding the statute itself. This authority holds that ACA section 1557 protects transgender individuals from discrimination. For example, in *Prescott v. Rady Children's Hospital –San Diego*, the court applied a Title VII analysis to Section 1557 for the proposition that "sex encompasses both sex *and* gender, as well as a Title IX and Title VII analysis to protect transgender persons from discrimination."[20] There is ample legal authority to maintain protection against discrimination based on gender identity or transgender status. To fail to maintain this protection invites discrimination, denial of access to care related to gender transition, and denial of vital care related to cancer and other life-threatening conditions. Vulnerable persons may be cruelly harmed because of this aspect of the proposed rule.

Eliminating taglines blocks access to care

Under the guise of "cost savings" this administration seeks to eliminate requirements that insurers notify individuals of their right to receive interpreter services. In addition, the proposed rules justifies removing tagline requirements because "for the large majority of people who receive [taglines], the required language tagline mailings provide little or no benefit because they are already proficient English speakers with little need for, and no entitlement under the law to, translation services."[21] This is a specious argument, because English-proficient persons are not the intended beneficiaries of these taglines. Instead, the taglines exist to enable persons proficient in other languages to access their health care. All individuals that are paying for health insurance coverage should be able to communicate with and understand their doctor; this proposed rule attacks that basic right.

Eliminating disability rights imperils access and independence

The preamble of the proposed rule seeks comments on a number of provisions related to accessibility for individuals with disabilities.[22] My comment is to recommend a simple, overarching rubric: any modification to regulations regarding disability access should act to improve access, and promote independence, not the reverse. This is particularly important here, where access to health care is vital to independence.

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[19] Title 10, California Code of Regulations §§ 2561.1-2561.2.
[20] *Katherine Prescott v. Rady Children's Hospital-San Diego* (S.D., Cal. 2017) 265 F.Supp. 3d 1090, 1099.
[21] 84 FR 27882.
[22] Potential changes to: Current Section 92.202; proposed Section 92.102, which would exempt covered entities with fewer than 15 employees from their current obligation to provide auxiliary communication aids and services. Current Section 92.203, proposed Section 92.103, which potentially would erode the current application to all covered entities of the definition of "public building or facility," as defined in the 2010 Americans with Disabilities Act (ADA) standards. Current Section 92.205, proposed Section 92.105, which could limit the current requirements that covered entities make reasonable modifications to policies, practices or procedures to avoid discrimination on the basis of disability.

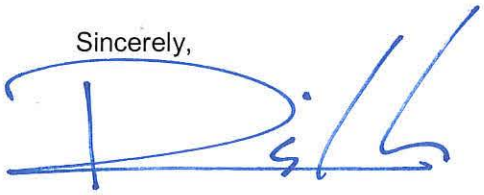
The proposed rule reduces access to justice

The existing rule provides that a private right of action is available to consumers as a way to vindicate their rights through litigation regarding disparate impact discrimination.[23] In the proposed rule, the Office of Civil Rights equivocates with respect to the availability of a private right of action with respect to disability, and states a new, harsh position that a private right of action is not permitted for disparate impact claims of discrimination on the basis of race or sex. Such a stance slams the courthouse door in the face of those whose civil rights have been violated, and could eliminate an important means to eliminate discriminatory practices. The Office of Civil Rights should live up to its name, and reconsider this ill-considered proposal.

Conclusion

Due to the egregious nature of this proposed rule and the harm it will cause, I urge the Department of Health and Human Services (HHS) to withdraw this proposed rule in its entirety.

Sincerely,



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[23] "Disparate impact" discrimination occurs when a policy or practice has a disproportionately negative impact on a protected class, such as individuals with disabilities, even though the policy or practice may appear neutral on its face.