

September 30, 2022

Secretary Xavier Becerra
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: Proposed rule Section 1557 of the Affordable Care Act RIN 0945-AA17, Docket ID number HHS-OCR-2022-0012

Dear Secretary Becerra:

On behalf of the undersigned state insurance commissioners, the primary regulators of insurance markets in the United States, we write to urge the Department to finalize the changes in its recent notice of proposed rulemaking (NPRM) to amend regulations that implement Section 1557 of the Affordable Care Act (RIN 0945-AA17). The proposed rule, as outlined in the NPRM, would promote civil rights protections for millions of consumers, ensure a level playing field for regulated entities, and enhance state insurance markets.

Many of the undersigned insurance commissioners previously sent letters to the previous administration to express our deep concerns with the Department's 2020 elimination of explicit nondiscrimination protections based on sex, including gender identity and sex stereotyping.¹ In these letters, we outlined why these protections are critical to state insurance markets and the consumers we serve.

Given our concerns about the elimination of these protections, we applaud the Department for proposing to reverse these harmful changes in the NPRM and want to reiterate the importance of these protections for millions of consumers and state insurance markets. We applaud both the changes to the definition of sex discrimination—to explicitly include sexual orientation and gender identity, among other bases—as well as the proposed reinstatement of specific standards regarding equal program access on the basis of sex. These proposed standards provide clear federal guidance on prohibited discrimination under Section 1557 and will help improve access to coverage and care for our residents.

Discrimination based on gender identity and transgender status remains a serious problem in insurance coverage. States have long led the way in combatting discrimination on the basis of gender identity or transgender status by making clear to regulated entities that such discrimination is prohibited in our jurisdictions.² We implemented these protections based on state law, state regulations, and federal law,

¹ A copy of the letter to Acting Secretary Hargan is available at:

<https://transequality.org/sites/default/files/docs/Insurance%20Commissioners%20Section%201557%20Joint%20Letter%20to%20HHS%20Sec%20%282%29.pdf>. A copy of the letter to Secretary Azar is available at: <http://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr057LtrToAzarSec1557-080519.pdf>.

² See, for example: 10 Cal. Code Reg. § 2561.2 (2012); Cal. Dep't of Ins., Gen. Counsel Letter re: Permissibility of denial of coverage based solely on age for female-to-male chest reconstruction surgery as part of a treatment for gender dysphoria; (2020); Cal. Dep't of Ins., Notice Compliance with Health Insurance Antidiscrimination Protections in California Law (2020); Cal. Dep't of Managed Health Care, Letter No. 12-K, Gender Nondiscrimination Requirements (2013); Div. of Ins., Colo. Dep't of

including Section 1557, as well as the Mental Health Parity and Addiction Equity Act, and other federal regulations that prohibit discrimination in insurance.³ States have had to take these actions because of limited federal guidance on this issue and in response to consumer concerns and complaints. Some states have built on these requirements over time, recognizing the need for additional clarity regarding nondiscriminatory coverage.⁴

Transgender people should have equal access to the same health insurance and care as every other insured American. This includes health care related to gender affirmation, which for years has been recognized by every major U.S. medical society as effective and medically necessary for many individuals,⁵ as well as routine tests and treatment that are often denied to transgender individuals based on their gender identity (such as pap smears or prostate cancer screenings). Consumer protection is a core part of our mission and responsibility as regulators, and it includes ensuring that no person, transgender or not, is treated unfairly or is subject to discrimination.

The proposed changes to the 2020 rule will promote the goal of robust civil rights protections and nondiscrimination in coverage while providing additional clarity for the consumers we serve and the companies we regulate. The vast majority of regulated entities across the country, including those we

Regulatory Agencies, Bull. No. B-4.49, Insurance Unfair Practices Act Prohibitions on Discrimination Based upon Sexual Orientation (2013); Conn. Ins. Dep't, Bulletin No. IC-37, Gender Identity Nondiscrimination Requirements (2013); Del. Dep't of Ins., Bulletin No. 86, The Gender Identity Nondiscrimination Act of 2013 (rev. 2020); Hawaii. H.B. 2084 (2016); Maine. L.D. 1 (2019); Md. Maryland Insurance Administration. Bulletin 15-33 (December 10, 2015); Ill. Dep't of Ins., Company Bulletin No. 2014-10, Healthcare for Transgender Individuals (2014); Mass. Office of Consumer Affairs & Bus. Regulation, Div. of Ins. Bulletin No. 2014-03, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services (2014); Minn. Dep't of Commerce & Dep't of Health, Administrative Bulletin 2015-5 (November 24, 2015); Montana, Commissioner of Security & Insurance, 2017 Requirements for Health Plan Form Filings and Qualified Health Plan Certification (2016); Nev. Div. of Ins., Bulletin No. 15-002 (June 25, 2015); N.H. Ins. Dep't, 415:15 (2020); New Jersey. A.B. 4568 (2017); N.M. Office of Superintendent of Insurance, Bulletin No. 2018-013, Transgender Non-discrimination in Health Insurance Benefits (2018); N.Y. Department of Financial Services, Insurance Circular Letter No. 7 (2014) and Insurance Circular Letter No. 12 (2017); Or. Ins. Div., Bulletin No. INS 2012-1, Application of Senate Bill 2 (2007 Legislative Session) to Gender Identity Issues in the Transaction & Regulation of Insurance in Oregon (2012); Penn. The Pennsylvania Bulletin, Notice Regarding Nondiscrimination; Notice 2016-05 (2016); R.I. Health Ins. Comm'n, Health Bulletin 2015-3 (Nov. 23, 2015); Dep't of Fin. Regulation, Div. of Ins., Bulletin No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (2013); Vt. Dep't of Financial Regulation, Bulletin No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (2019); Virginia. H.B. 1429 (2020); Wash. Comm'r of Ins., Letter to Health Insurance Carriers in Washington State (June 25, 2014); Wisc. Comm'r of Ins., Bulletin: Nondiscrimination Regarding Coverage for Insureds Who are Transgender or Gender Dysphoric (2020); D.C. Dep't of Ins., Sec., & Banking, Bulletin No. 13-IB-01-30/15 (Revised), Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression (2014).

³ Including, for example: 45 C.F.R. §156.200(e), 45 C.F.R. §156.125(b), and 45 C.F.R. §156.125. Many of us have long relied on and cited federal laws, such as Section 1557, to protect our consumers from discrimination.

⁴ See, e.g., Div. of Ins., Colo. Dep't of Regulatory Agencies, "Biden Administration Announces Approval of Colorado's Inclusive Health Care Plan to Set Colorado's Essential Health Benefits" (2021); Washington. S.B. 5313 (2022); Hawaii. H.B. 2405 (2022); N.Y. Department of Financial Services, Insurance Circular Letter No. 9 (2018), Insurance Circular Letter No. 8 (2019), and Insurance Circular Letter No. 13 (2020).

⁵ See, e.g., Am. Academy of Fam. Physicians, Resolution No. 1004 (2012); Am. Medical Assn., Resolution 122 (A-08), Removing Financial Barriers to Care for Transgender Patients (2008); Am. Psychiatric Assn., Position Statement: Access to Care for Transgender and Gender Variant Individuals (2012); Am. Psychological Assn., Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination (2008); Am. College of Physicians, Lesbian, Gay, Bisexual, and Transgender Health Disparities: A Policy Position Paper, 163 ANN INTERN MED. 135-137 (2015); Am. Coll. of Obstetricians & Gynecologists, Committee Op. 512, 118 OBSTETRICS & GYNECOLOGY 1454 (2011); National Assn. of Social Workers, Transgender and Gender Identity Issues Policy Statement (2008).

regulate, do not use transgender-specific exclusions.⁶ Clear and well-understood federal requirements will help ensure a level playing field among insurers, promote compliance, and enable us to focus our compliance and enforcement efforts on other priorities. We are also aware that the proposed changes to the rule are consistent with several federal court rulings that have explicitly found that the sex nondiscrimination protections in Section 1557 prohibit discrimination against LGBTQ people.⁷

Our collective experience in implementing these protections has been that the fiscal and regulatory impact of ensuring nondiscriminatory treatment of insurance claims, including claims for medical care related to gender affirmation, is negligible. We have been able to consider and resolve the consumer complaints that we have received under Section 1557. In fact, we have found that these historic protections have been nothing short of life changing for people who, prior to the enactment of the Affordable Care Act, were often denied the care that their doctors deemed medically necessary or denied access to insurance altogether.

We are committed to prohibiting discrimination in our states and care deeply about the proposed rule's impact on the companies we regulate and consumers nationwide. For these reasons, we encourage you to adopt the proposed rule's changes regarding the nondiscriminatory treatment of transgender consumers. Our experience underscores that the proposed rule would bolster the civil rights protections for millions of consumers, eliminate confusion, and positively affect state insurance markets.

⁶ See Out2Enroll, *Summary of Findings: 2022 Marketplace Plan Compliance with Section 1557*, available at: <https://out2enroll.org/wp-content/uploads/2021/12/Report-on-Trans-Exclusions-in-2022-Marketplace-Plans.pdf>.

⁷ See, e.g., *Fain v. Crouch*, No. 3:20-cv-00740, 2022 WL 3051015 (S.D.W.V. August 2, 2022); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep't of Health Servs.*, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "text-book discrimination based on sex" in violation of the Affordable Care Act and the Equal Protection Clause of the Constitution); *Cruz v. Zucker*, 195 F.Supp.3d 554 (S.D.N.Y. 2016) (holding exclusion invalid under the Medicaid Act and the Affordable Care Act); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Tovar v. Essentia Health*, No. 16-cv-00100-DWF-LIB (D. Minn. September 20, 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause). Other federal courts have found that similar federal sex discrimination laws also prohibit anti-transgender discrimination. See, e.g., *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017) (Title IX and Equal Protection Clause); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Grimm v. Gloucester County School Board*, No. 4:15-cv-54 (E.D. Va. May 22, 2018) (holding that denying a transgender boy access to school restrooms matching his gender violated Title IX and the Equal Protection Clause of the U.S. Constitution); *M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. March 12, 2018) (holding that prohibiting a transgender boy from boys' locker room based on transgender status is a Title IX sex-discrimination claim as well as a gender-stereotyping claim).

Thank you for your leadership and attention to this important matter, and please do not hesitate to call on us to provide additional information.

Sincerely,




Ricardo Lara, Commissioner
California Department of Insurance



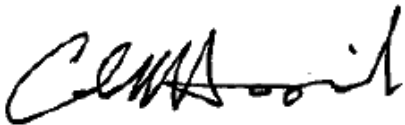
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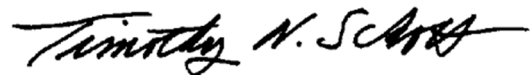
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