

5 August 2019

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

**Re: Proposed rule RIN 0945-AA11, Docket ID number HHS-OCR-2019-0007**

Dear Secretary Azar,

On behalf of the undersigned state insurance commissioners, the primary regulators of insurance markets in the United States, we write to urge the U.S. Department of Health and Human Services to abandon the changes in its recent notice of proposed rulemaking (NPRM) that would amend regulations that implement Section 1557 of the Affordable Care Act (RIN 0945-AA11). The proposed rule, as outlined in the NPRM, would undermine the civil rights protections for millions of consumers, generate confusion and an uneven playing field for regulated entities, and negatively affect state insurance markets.

Many of the undersigned insurance commissioners previously sent a letter to then-Acting Secretary Hargan to express our concern with the Department's plan to change the 2016 rule and eliminate explicit nondiscrimination protections based on sex, including gender identity and sex stereotyping.<sup>1</sup> In that letter, we outlined why these protections are critical to state insurance markets and the consumers we serve.

These protections remain just as important today. We are disappointed that the Department has moved forward in proposing these changes and want to reiterate the importance of these protections for millions of consumers and state insurance markets.

States have long led the way in making clear to regulated entities that discrimination on the basis of gender identity or transgender status is prohibited in our jurisdictions.<sup>2</sup> We implemented these

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<sup>1</sup> A copy of this letter is available at:

<https://transequality.org/sites/default/files/docs/Insurance%20Commissioners%20Section%201557%20Joint%20Letter%20to%20HHS%20Sec%20%282%29.pdf>.

<sup>2</sup> See, for example: 10 Cal. Code Reg. § 2561.2 (2012); Cal. Dep't of Managed Health Care, Letter No. 12-K, Gender Nondiscrimination Requirements (2013); Div. of Ins., Colo. Dep't of 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-34, Gender Identity Nondiscrimination Requirements (2013); Hawaii. H.B. 2084 (2016); 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) and 50 Ill. Adm. Code 2603 and 50 Ill. Adm. Code 2001.4(e); 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.Y. Department of Financial Services, Insurance Circular Letter No. 7 (2014); Or. Div. of Fin. Reg, Bulletin No. DFR 2016-1, Nondiscrimination Related to Transgender Persons in the Transaction of Insurance in Oregon; Chapter 285, 2019 Or. Laws; Penn. The Pennsylvania Bulletin, Notice Regarding Nondiscrimination; Notice 2016-05 (2016); R.I. Health Ins. Comm'n,

protections based on state law, state regulations, and federal law, including Section 1557 and other federal regulations that prohibit discrimination in insurance.<sup>3</sup> States have had to take this action because of an absence of federal guidance on this issue and in response to consumer concerns and complaints.

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 transition, which for years has been recognized by the medical community as medically effective and necessary for many individuals,<sup>4</sup> as well as routine tests and treatment that have sometimes been denied to transgender individuals based on their association with a specific gender (such as pap smears or prostate cancer screenings). Consumer protection is a core part of our mission and responsibility as regulators, and includes ensuring that no person, transgender or not, is treated unfairly or is subject to discrimination.

The proposed changes to the 2016 rule will generate considerable uncertainty for the consumers we serve and the companies we regulate. The vast majority of regulated entities across the country, including those we regulate, have already come into compliance with Section 1557.<sup>5</sup> Undoing the rule and its clarification of federal requirements would impose an additional regulatory burden on these entities and our staff, and the absence of clear and well-understood federal requirements could result in an uneven playing field among insurers. We are also aware that the proposed changes to the rule are inconsistent with several federal court rulings that have explicitly found that the sex nondiscrimination protections in Section 1557 prohibit discrimination based on sex stereotyping or transgender status.<sup>6</sup>

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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); Wash. Comm'r of Ins., Letter to Health Insurance Carriers in Washington State (June 25, 2014); 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); 18 Del. C. § 2304(22) (2013); Delaware Insurance Department, Domestic/Foreign Insurers Bulletin No. 86, the Gender Identity Nondiscrimination Act of 2013 (2016); VT Dep't of Fin. Regulation, Ins. Bulletin No. 174 (Revised), Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (2013); NM Office of Superintendent of Insurance Bulletin 2018-013, Transgender Non-Discrimination in Health Insurance (2018).

<sup>3</sup> Including, for example: 45 C.F.R. §156.200(e), 45 C.F.R. §156.125(b), and 45 C.F.R. §156.125.

<sup>4</sup> 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).

<sup>5</sup> See Out2Enroll, *Summary of Findings: 2019 Marketplace Plan Compliance with Section 1557*, available at: <https://out2enroll.org/out2enroll/wp-content/uploads/2018/11/Report-on-Trans-Exclusions-in-2019-Marketplace-Plans.pdf>.


<sup>6</sup> See, e.g., *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); *Boyd 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).

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 transition, are 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.

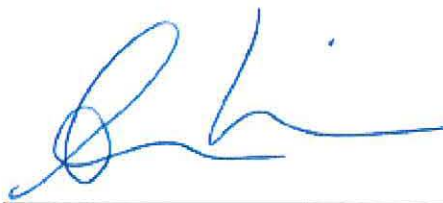
We are committed to prohibiting discrimination in our states and are deeply concerned about the proposed rule's impact on the companies we regulate and consumers nationwide. For these reasons, we urge you to abandon the proposed rule's changes regarding the unfair treatment of transgender consumers. In its current form, the proposed rule would undermine the civil rights protections for millions of consumers, generate confusion, and negatively affect state insurance markets.

Please do not hesitate to call on us to provide additional information.

Sincerely,



**Ricardo Lara**, Commissioner  
California Department of Insurance



**Andrew N. Mais**, Commissioner  
Insurance Department, State of Connecticut



**Michael Conway**, Commissioner  
Colorado Division of Insurance



**Trinidad Navarro**, Commissioner  
Delaware Department of Insurance

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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).



**Stephen C. Taylor**, Commissioner  
District of Columbia Department of Insurance,  
Securities and Banking



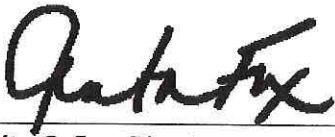
**Marlene Caride**, Commissioner  
New Jersey Department of Banking and  
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**Robert H. Muriel**, Director  
Illinois Department of Insurance



**Linda A. Lacewell**, Superintendent  
New York State Department of Financial  
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**Anita G. Fox**, Director  
Michigan Department of Insurance and  
Financial Services



**Andrew R. Stolfi**, Administrator  
Oregon Division of Financial Regulation




**Steve Kelley**, Commissioner  
Minnesota Department of Commerce



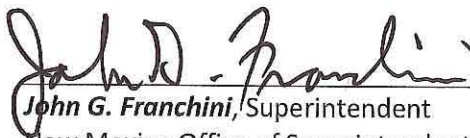
**Jessica K. Altman**, Commissioner  
Pennsylvania Insurance Department



**Barbara Richardson**, Commissioner  
Nevada Department of Insurance



**Marie L. Ganim**, Commissioner  
Rhode Island Office of the Health Insurance  
Commissioner



**John G. Franchini**, Superintendent  
New Mexico Office of Superintendent of  
Insurance

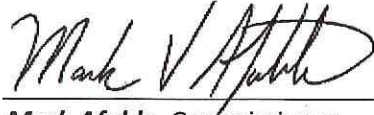


**Michael S. Pieciak**, Commissioner  
Vermont Department of Financial Regulation



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**Mike Kreidler**, Commissioner  
Washington State Office of the Insurance  
Commissioner



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**Mark Afable**, Commissioner  
Wisconsin Office of the Commissioner of  
Insurance