



August 13, 2019

Secretary Alex Azar  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue SW.  
Washington, D.C. 20201

Re: Covered California comments on Nondiscrimination in Health and Health Education Program Activities; HHS-OCR-2019-0007 (RIN 0945-AA11)

Secretary Azar,

Covered California is submitting comments in response to proposed regulations that would revise the Department of Health and Human Services (HHS) prior interpretation of Section 1557 of the Patient Protection and Affordable Care Act. In their current form, the proposed rules would make abortion services potentially more difficult to obtain, and remove potentially life-saving protections for individuals based on their gender identity or sexual orientation. We encourage HHS to wait for the *Franciscan Alliance v. Burwell* lawsuit to work through the courts prior to issuing these regulations.

### **Removing the Definition of “Sex”**

In 2016, HHS released the original Section 1557 regulations which extended various nondiscrimination protections to health coverage and care based on race, color, national origin, age, disability, and sex. Specifically, the regulation defined discrimination “on the basis of sex” to cover discrimination based on sex stereotyping, gender identity, and termination of pregnancy. The proposed regulation would eliminate these protections altogether. According to HHS, due to ongoing litigation, it is not proposing a definition of “sex” for the purposes of discrimination, but rather relying on a memorandum issued by the United States Department of Justice which states that “sex” is ordinarily defined to mean biologically male or female and that “Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, ‘gender identity’

discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination on the basis of ‘sex’ or ‘gender’.”<sup>1</sup>

Covered California is concerned that this proposed regulation would limit civil rights protections for lesbian, gay, bisexual, and transgender (LGBT) individuals by limiting the protections available to them under current federal law. This rule, should it be finalized, would allow individuals to be discriminated against based on their sexual orientation or gender identity. By proactively removing the protections for these individuals, health care providers may be legally allowed to refuse service to individuals who are transgender. This action is in conflict with the administration’s stated desire in previously released executive orders<sup>2</sup> to improve patient access to affordable, quality healthcare. LGBT and other individuals, such as pregnant women<sup>3</sup>, may face inadequate, limited, and more expensive healthcare due to refusals to provide such individuals with the same quality of care provided to non-LGBT and non-pregnant women. In fact, such refusals to offer care, a result of the repeal of sex discrimination protections with this proposal, could be life-threatening to members of the LGBT community, and pregnant women and their unborn babies.

Under current regulations, an individual is protected from differential coverage or cost-sharing for services based on an individual’s gender identity. Under this proposed regulation, HHS is eliminating this protection and would now allow a health plan or provider to deny coverage or impose greater cost-sharing on certain individuals.

### Nondiscrimination in Health Coverage

In the 2016 final regulation, HHS introduced a general nondiscrimination requirement that prohibited covered entities from denying, cancelling, limiting, or refusing to issue or renew a health-related insurance plan or policy, denying or limiting coverage of a claim, imposing additional cost-sharing or other limitation or restrictions, on the basis of an enrollee’s or prospective enrollee’s race, color, nation origin, sex, age, or disability. Additionally, covered entities were prohibited from using marketing practices or benefit designs that discriminate on these bases.<sup>4</sup> Now, HHS’s proposed rule seeks to remove these federal protections by eliminating this section in its entirety under this proposed regulation. This would

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<sup>1</sup> [Memorandum of the Attorney General](#) (October 4, 2017)

<sup>2</sup> Promoting Healthcare Choice and Competition Across the United States:  
<https://www.govinfo.gov/content/pkg/FR-2017-10-17/pdf/2017-22677.pdf>

Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal: <https://www.govinfo.gov/content/pkg/FR-2017-01-24/pdf/2017-01799.pdf>

<sup>3</sup> By eliminating the current definition of sex-based discrimination which includes on the basis pregnancy, people in need of an abortion could be denied services based on a provider’s religious beliefs.

<sup>4</sup> § 92.207 (b)(1)-(5)

allow a covered entity to cover a certain procedure for men, but not for women<sup>5</sup>, as well as make HIV medication more difficult to obtain.<sup>6</sup> Creating such barriers to medication is contrary to the administration's efforts to broaden access to care, as expressed in recent executive orders<sup>7</sup>, and ongoing efforts to make prescription medications more accessible and affordable.

In addition to proposing to eliminate basic, yet necessary, nondiscrimination protections, HHS is also proposing to eliminate all current Section 1557 nondiscrimination notice and grievance procedure requirements. Current regulations require covered entities that employ 15 or more persons to designate a responsible employee to coordinate the entity's compliance with the rule and adopt a grievance procedure. Covered entities that meet this requirement must provide notice of their nondiscrimination policies in significant communications (such as handbooks and outreach publications), physical locations where the entity interacts with the public, and on their website homepage. HHS is now stating that their reason for eliminating this regulation is the provisions are seen as "duplicative." The reason for the sudden reversal in policy is not clear from the regulations given that the 2016 regulations described ways in which duplicative processes could be reduced.<sup>8</sup>

## Language Access

Citing the need to remove duplicative processes and procedures, HHS also proposes to narrow the current Section 1557 regulation on language access. Additionally, HHS justifies the narrowing of protections by stating that the 2016 regulation is now confusing and costly, not required by law, and inconsistent with other requirements. As proposed, patients with limited English proficiency may experience barriers in effectively communicating with health care providers, which is contrary to the administration's goals of better patient access to healthcare with broadened care options and transparency, as stated in previously released executive orders.<sup>9</sup> Similar to HHS's proposal to eliminate protections for individuals based on their sexual orientation, this proposed regulation will put patients at risk as they may not properly understand information and services

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<sup>5</sup> 81 Federal Register 31375-31473 (May 18, 2016) provides the example of covering inpatient treatment for eating disorders for men but not for women.

<sup>6</sup> 81 Federal Register 31375-31473 (May 18, 2016)

<sup>7</sup> Promoting Healthcare Choice and Competition Across the United States:

<https://www.govinfo.gov/content/pkg/FR-2017-10-17/pdf/2017-22677.pdf>

Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal: <https://www.govinfo.gov/content/pkg/FR-2017-01-24/pdf/2017-01799.pdf>

<sup>8</sup> Section 504 of the Rehabilitation Act of 1973

<sup>9</sup> Promoting Healthcare Choice and Competition Across the United States:

<https://www.govinfo.gov/content/pkg/FR-2017-10-17/pdf/2017-22677.pdf>

Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal: <https://www.govinfo.gov/content/pkg/FR-2017-01-24/pdf/2017-01799.pdf>

Improving Price and Quality Transparency in American Healthcare To Put Patients First: <https://www.govinfo.gov/content/pkg/FR-2019-06-27/pdf/2019-13945.pdf>

being provided by a health care provider, which could have costly and negative health consequences.

HHS articulates a stated goal of this proposed rule and elimination of various nondiscrimination protections is to save money.<sup>10</sup> Current Section 1557 regulations are necessary and the importance of the protections provided under the current regulations outweigh the value of savings realized by removing such protections. HHS should maintain its commitment to vigorous enforcement of civil rights and nondiscrimination laws as directed by Congress.<sup>11</sup>

The proposed regulation relies heavily on pending litigation to justify the removal of various nondiscrimination protections and argues that the Supreme Court is likely to address the issue of whether sex-based discrimination includes gender identity and sexual orientation in the next term.<sup>12</sup> Given this, HHS should leave in place current nondiscrimination protections provided under Section 1557 and allow the legal proceedings to play out. Too much progress has been made to end discrimination in health care and this proposed regulation would roll back much of that progress.

Thank you for your consideration of our comments. If you have any questions or would like more information, please feel free to contact me.

Sincerely,



Peter V. Lee  
Executive Director

cc: Covered California Board of Directors

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<sup>10</sup> HHS estimates that the health care industry will save \$3.6 billion over the first 5 years of the regulation 84 Federal Register at 27849

<sup>11</sup> 84 Federal Register at 27874

<sup>12</sup> 84 Federal Register at 27855