National Center for TRANSGENDER EQUALITY

May 3, 2018

Proposed rule on "Nondiscrimination in Health Programs and Activities" (RIN: 0945-AA11)

The 2016 final rule on Section 1557's nondiscrimination provisions (81 FR 31375) was the result of years of consultations and of HHS's careful balancing of substantive stakeholder input. The rule's nondiscrimination protections have a solid legal basis on over twenty years of federal case law and is broadly supported by medical associations, including the AMA and the APA, insurance commissioners, and several insurance groups. Changing the rule less than two years after it was adopted is arbitrary and capricious, will cause confusion among all affected, is unnecessary, does not decrease regulatory burdens (and might in fact increase them), and would go against federal law.

- **Transgender people face discrimination in health care**: Over 1.5 million people in the United States are transgender, and many continue to face routine discrimination in health care delivery and coverage. The 2015 U.S. Transgender Survey, a study of nearly 28,000 transgender adults, revealed that:

    - **One in three (33%)** of respondents who saw a health care provider during the year prior to taking the survey were harassed or assaulted in health care settings, denied care, or faced others forms of mistreatment because of being transgender.
    - Nearly **one in four (23%)** avoided going to a doctor when sick or injured out of fear of discrimination.
    - **One quarter (25%)** said they experienced problems with their insurance company related to being transgender, like being denied coverage for transition-related care or being denied coverage for other types of health care because of being transgender.

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- **The robust enforcement of the 2016 rule on nondiscrimination protections under Section 1557 is critical to ensure that transgender people are able to access affordable, nondiscriminatory care**:

    - In recent years, we have seen the positive and often life-saving impact that 2016 implementing rules have had on communities around the country, including transgender Americans and their loved ones.
    - Section 1557 and the 2016 rule clarifying its scope have given many transgender people meaningful health care options where they previously had few or none at all, have helped address the pervasive discrimination transgender people often face in health care and coverage, and have made it possible for many transgender and non-transgender people alike to access essential care.
    - **The ACA's implementing rules, including the Section 1557 rule, have been essential** in protecting and empowering consumers and increasing the health care and coverage choices available to them, including by **increasing transgender people's access to essential and often life-saving care**. The impact of these protections is reflected in the growth of insurance coverage among transgender people.

- The 2016 Section 1557 implementing final rule is the **product of a lengthy process of deliberation and public input**. The rule was developed over the course of six years of study and following two comment periods, with over 25 thousand comments from stakeholders, which were overwhelmingly supporting. HHS engaged stakeholders through listening sessions, participation in conferences, and other outreach prior to taking regulatory action.

- The 2016 final rule is **legally**, **medically**, **economically** and **socially sound**: the Department based its rule on legal interpretations of the **majority of courts** addressing the relevant issues; the interpretations of **other federal agencies** over several years; regulatory approaches taken by **states** (including insurance commissioners and agencies running the Medicaid program); the positions of **major medical associations**; documented **experiences of discrimination from transgender consumers** as well as **complaints and investigations of discriminatory practices**; and **medical and cost research**.

- **The 2016 Section 1557 rule reflects the mandatory requirements of federal law as interpreted by a clear majority of federal courts, and does not impede or interfere with the traditional regulatory authority of states.** Changing the rule to state that Section

1557's sex discrimination provisions do not include discrimination based on transgender status would **go against over 20 years of solid federal case law** and **raise serious concerns under the Administrative Procedures Act**.

- The overwhelming majority of federal courts – including appeals courts in five different circuits – have found that sex discrimination laws like Title IX and Section 1557 include discrimination on the basis of transgender status. Likewise, discrimination based on sex stereotypes, which the 2016 rule also addressed, has strong legal precedent dating back to 1989, including at the Supreme Court. It would be inconsistent with the law to change that
- Most courts that have been presented with the question of whether Section 1557's sex discrimination prohibition specifically cover anti-transgender discrimination have firmly ruled that it does
- The injunction in the *Franciscan Alliance v. Burwell* case was intended to temporarily pause HHS' own enforcement of the 2016 rule while the case proceeded, and did not change the meaning of the underlying law or the ability of private individual to enforce their rights under the law
- This preliminary *Franciscan Alliance* ruling from a single district court conflicts with the overwhelmingly majority view of the federal courts over many years, and the federal government should accordingly be defending this legally sound rule in court instead of trying to change it
- Even after the injunction, Courts have continued to find that Section 1557's sex discrimination provision includes discrimination based on transgender status without relying on HHS' rule or its enforcement

- **Adding new religious exemptions to the proposed rule is unnecessary, harmful, and outside the scope of the Department's authority**

  - The 2016 final rule already incorporates a range of existing religious exemptions excepting covered entities from requirements that conflict with their religious or moral beliefs in a wide variety of circumstances. Adding additional exemptions, from requirements related either to sex discrimination or to discrimination based on any other ground, is unnecessary, harmful to consumers, and exceeds the Department's authority under the ACA. Existing federal law – including the ACA – already addresses religious exemptions.

- The proposed rule on Religious Exemptions for Health Care Entities (RIN 0945-ZA03) is also addressing this issue. The proposed rule received over 200,000 comments, the majority of them opposing the rule for being too broad, unnecessary, going against the ACA and HHS' mission. This includes comments by members of Congress, state Attorney Generals, and major medical associations.

- **Existing consumer protections under the current rule** have provided clarity, certainty, and a **level playing field for insurers**, and was an incentive for uninsured individuals to obtain coverage by eliminating discriminatory policies across the board. Weakening these core consumer protections would be **disruptive for insurers who have already taken significant steps to come into compliance with the Section 1557 rule and would create an uneven playing field**. It would also create uncertainty for consumers, who will no longer have clarity about the extent of coverage they can expect, and would **discourage enrollment by transgender consumers and their families**, along with many others who depend on the protections of Section 1557.

  - Covered entities throughout the health care sector have overwhelmingly and successfully come into compliance with the rule. A 2017 study of private marketplace plans in several states found that over 90% of plans have eliminated discriminatory exclusions targeting transgender consumers. These findings, though limited to coverage in the individual market, are consistent with significant momentum to offer coverage for transition-related care in the group market
  - 73% of the employers rated in the 2017 Corporate Equality Index—including 50 percent of fortune 500 businesses—offered transgender-inclusive health coverage, up from only 9% in 2010.
  - At least 18 states and D.C. have adopted affirmative coverage standards for transition-related care to help ensure that their Medicaid programs do not discriminate against transgender beneficiaries
  - In at least 18 states officials have adopted bulletins or taken legislative action to ensure private plans do not discriminate against transgender people
  - Private and public employers that have covered transition-related care for their employees **have found it to be highly cost-effective**. Numerous studies have shown that eliminating transgender exclusions has no significant effect on medical expenditures or premiums and can provide long-term savings.

- Failing to adequately treat gender dysphoria can result in negative health outcomes that are not only personally adverse, but costly for plans and ultimately for all consumers through their premiums.

- **OMB should ensure that the rule provides an adequate Regulatory Impact Analysis** (per EOs 12866 and 13563) or assessment of costs and benefits, that **substantially addresses the potential harms to transgender patients that would result from increase in discriminatory practices**. This analysis should also take into consideration the impact to those who will not be able to access or will avoid accessing health care due to discrimination, as well as the substantial increase in potential litigation around Section 1557 as a result of a rule that would go against decades of federal court rulings.

- By creating confusion among providers, insurers and patients who already changed their practices to abide by the 2016 rule and proposing changes that go against what the majority of courts have held leading to increased litigation, **this proposed rule will not meet the goal of reducing regulatory burdens or "imposing the least burden on society".**

- **HHS failed to follow normal rulemaking procedures in issuing the proposed rule.** We are very concerned that this rule is being published **without being published in the 2017 Fall Regulatory Plan/Unified Agenda** and despite an RFI earlier in the year specifically on reducing regulatory burdens in the health care field. Under longstanding Executive Orders governing the rulemaking process, proposed rules must first appear in the agency's Regulatory Agenda (EOs 13771, 12866).
    - We are aware of no circumstance that would justify the Director approving an exception to this normal process in this instance. We are concerned that the failure of HHS to comply with these requirements reflects a hasty development of the rule that lacked sufficient review of its impact and factual and legal basis.
    - This unexpected change will take insurers, patients and providers by surprise – the majority of whom have taken important steps to comply with the ACA – cause confusion, create an uneven playing field and rollback important protections for consumers.

Conclusion: Reopening such a recent rule following years of consideration and study, particularly without a change in the underlying law or facts, would create unnecessary uncertainty and significant burden for covered entities, patients, and their families. In these

circumstances, such a reversal would also raise serious concerns under the Administrative Procedures Act. We respectfully urge OMB to:

- Consider carefully the potential impact that any changes to the rule would have on transgender patients, their families, and other vulnerable groups that would be affected by setting back or restricting anti-discrimination protections
- Ensure that the rule complies with the law, taking into consideration the significant legal and medical analysis and findings developed over the past two decades
- Ensure a comment period of at least 60 days or longer when the proposed rule is made public.