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November 9, 2015

The Honorable Sylvia Mathews Burwell
HHS Office of the Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Re: RIN Number 0945-AA02

Dear Secretary Burwell:

The Secular Policy Institute is a Washington, DC-based think tank that focuses on public policy with an emphasis on reason and science. We also run the world's largest coalition of secular and scientific groups. Our fellows are thought leaders and scientists that are experts in a variety of fields.

Thank you for the opportunity to submit comments in response to the Notice of Proposed Rule Making for Section 1557 of the Affordable Care Act (ACA). We commend the Department of Health and Human Services (HHS) and the Office of Civil Rights (OCR) for issuing proposed regulations that take critical steps toward realizing the promise of Section 1557 in ending sex discrimination in health care.

Sex discrimination in health care results in women paying more for health care,[i] receiving improper diagnoses more frequently,[ii] being provided less effective treatments,[iii] and sometimes being denied care altogether.[iv] Further, numerous surveys, studies, and reports have documented the widespread discrimination experienced by LGBT individuals and their families in the health system.[v] In response, the ACA included broad protections against sex discrimination in health programs and activities, with Section 1557, which prohibits discrimination in federally funded and operated health programs and activities, as the cornerstone of this protection. Strong regulations implementing Section 1557, paired with robust enforcement, are necessary to ensure that all women can access quality, affordable health care.

We commend HHS for proposing a strong rule that establishes many of the principles necessary to end sex-discrimination in health care. Specifically, we commend HHS for:

- Making clear that all tax credits created by Title I of the ACA, as well as any funds extended by HHS to pay for health insurance coverage, are considered Federal financial assistance;

- Relying on the approach of the Civil Rights Restoration Act in defining "health program or activity." This approach makes clear that Section 1557 reaches *all* the operations of an entity principally engaged in providing or administering health services or health insurance coverage, including employee health benefits;[vi] importantly, as a result, if a health insurance issuer participates in the Marketplaces or receives Medicare Part D payments for any of its plans, then all the plans sold by that issuer will be covered by Section 1557;
- Making clear that sex discrimination includes discrimination on the basis of "pregnancy, false pregnancy, termination of pregnancy or recovery therefrom, childbirth or related medical conditions, sex stereotyping, or gender identity"—and setting out explicit, detailed protections against discrimination on the basis of gender identity, in particular; and
- Recognizing a private right of action to challenge discrimination by federally funded health programs and activities or by the Marketplaces.

Although the proposed rule will go a long way towards ending sex discrimination in health care, we urge HHS to further strengthen the rule as set out below and move expeditiously in finalizing and implementing the regulations, delivering on Section 1557's new protections. As lead agency for enforcement of Section 1557, HHS must also work aggressively to ensure that Section 1557 is broadly implemented across all federally-funded and operated health programs and activities. The final regulations should address how HHS will ensure this broad enforcement.

I. The Final Rule Must Not Create Exceptions from the Prohibition on Discrimination on the Basis of Sex.

The proposed rule appropriately does not incorporate any of the exceptions from Title IX. The preamble to the proposed rule seeks comment as to whether exceptions such as those set out in Title IX's protection from sex discrimination in education programs and activities should be added to Section 1557's broad protection against sex discrimination.[vii] HHS further asks if the rule "appropriately protects religious beliefs" and if any additional exception from the protection against sex discrimination should be created to address religion.[viii] No such exceptions are appropriate.

Section 1557's statutory language does not incorporate any of the Title IX exceptions. It references Title IX solely for the grounds on which it prohibits discrimination (sex) and for its enforcement mechanisms.[ix] Section 1557's ban against discrimination in health programs or activities includes a single exception: it applies "[e]xcept as otherwise provided" in Title I of the ACA. The plain language of the statute bars incorporating the Title IX exceptions or any other exceptions to the prohibition of sex discrimination.[x] Moreover, as the preamble to the proposed rule acknowledges, Title IX's exceptions make little sense in the context of health programs and activities.[xi]

Nor does the text of Section 1557 authorize the creation of a religious exemption—and certainly no law or policy rationale justifies singling out sex as the sole basis of discrimination for such an exemption. Moreover, any such exception, from Section 1557's antidiscrimination requirement

in general and from the sex discrimination prohibition in particular, would be contrary to the express purpose of Section 1557 and has the potential to cause great harm. Prior to Section 1557, no broad federal protections against sex discrimination in health care existed. The ACA was intended to remedy this, as evidenced not only by the robust protection provided by Section 1557 itself, but also by the ACA's particular focus on addressing the obstacles women faced in obtaining health insurance and accessing health care.[xii] A religious exemption would undermine the important, necessary, and intended protections against discrimination provided by the ACA and threaten harm to individuals, including the outright denial of services critical to women's health and to the health of LGBT individuals.

The potential harm posed to individuals by religious exemptions from antidiscrimination laws is a key reason courts have long rejected arguments that religiously- affiliated organizations can opt out of anti-discrimination requirements. Instead, courts have held the government has a compelling interest in ending discrimination and that anti-discrimination statutes are the least restrictive means of forwarding that interest.[xiii] Indeed, the majority opinion in *Burwell v. Hobby Lobby Stores, Inc.* makes it clear that the decision should not be used as a "shield" to escape legal sanction for discrimination in hiring on the basis of race because such prohibitions further a "compelling interest in providing an equal opportunity to participate in the workforce without regard to race" and are narrowly tailored to meet that "critical goal."[xiv] The same principles apply here. Section 1557 was narrowly tailored to end longstanding discrimination in health care and must not include a religious exemption. For all these reasons, the only exceptions permitted to Section 1557's sex discrimination prohibition are those exceptions expressly stated in Title I of the ACA.

II. The Final Rule Must Eliminate the Employment Discrimination Exception and Fully Cover Employee Health Benefit Programs.

The proposed rule would not apply to employment discrimination by a health program or activity except for discrimination in some employee health benefit programs—and would provide only piecemeal coverage for these employee health benefit programs.[xv] These exclusions misread and improperly narrow Section 1557.

A civil rights statute should be read as broadly as possible to effectuate its purpose.[xvi] This includes determining "what activities or circumstances are subject to a prohibition against discrimination," as well as finding exceptions from the prohibition against discrimination.[xvii] Section 1557 prohibits all "discrimination" under any covered health program or activity.[xviii] The statute uses broad terminology, extending to any "individual" (not limited to a participant or a beneficiary) "under" (not limited to those participating or enrolled in) "any health program or activity."[xix] To carve out employment discrimination by health programs and activities would contradict the plain language of the statute.[xx] While HHS notes that Title VI does not reach employment discrimination in many instances, this limitation on Title VI's reach is explicitly set out in Title VI itself.[xxi] In contrast, Title IX and Section 504 have no such statutory exemption and have been consistently interpreted to bar discrimination in employment by covered entities.[xxii] Section 1557 is drafted like Title IX and Section 504, without an employment

discrimination exemption, and should be interpreted to reach employment discrimination just as these laws have been interpreted to reach employment discrimination. There is a particular need for this protection given the discrimination that female health care providers continue to face. For example, research published in the Journal of the American Medical Association in 2013 found that a gap in earnings between male and female physicians has not only persisted over the last 20 years but actually has grown.[xxiii] The final rule should eliminate this exclusion and make clear that Section 1557's prohibition against discrimination applies to employment discrimination by a health program or activity.

In addition, employee health benefit programs are indisputably health programs and activities, and HHS acknowledges as much by proposing that 1557 reaches these programs when operated by an entity principally engaged in providing health services or health insurance; when an entity receives federal funding with a primary objective of funding the employee health benefit program; and for those employees of a health program or activity that receives federal funding in an entity not principally engaged in providing health services or health insurance. These are important protections, but there is ultimately no justification for providing more limited protection for discrimination in employee health benefit programs than other health programs and activities. The final rule should make clear that an employee health benefit program is covered to the same extent as any other health program or activity, thus ensuring that covered entities cannot continue discriminatory practices such as denying maternity coverage to dependents or categorically excluding services related to gender transition for dependents.

III. The Final Rule Must Make Clear that Discrimination on the Basis of Sex Includes Discrimination on the Basis of Sexual Orientation.

The proposed rule rightly recognizes that Section 1557's prohibition of discrimination on the basis of sex includes discrimination based on pregnancy, gender identity, and sex stereotypes. We commend HHS for these clear statements and specifically commend its clear affirmation of the key principle recognized across the federal government and by many federal courts: discrimination based on gender identity, gender expression, gender transition, or transgender status is necessarily a form of sex discrimination. The proposed rule will be a powerful weapon in the ongoing fight to overcome discriminatory barriers to health care for transgender individuals. However, the proposed rule does not explicitly state that discrimination on the basis of sexual orientation is also a form of sex discrimination. HHS has invited comment on this issue.

We urge in the strongest terms that the final rule should recognize that, as the Equal Employment Opportunity Commission and several federal courts have held, sexual orientation discrimination is inherently based on sex.[xxiv] Sexual orientation discrimination is based on a sex stereotype that a woman's intimate partner should be a man and a man's intimate partner should be a woman. Sexual orientation bias cannot occur without consideration of a person's sex—and unfortunately such bias still all too often compromises the health care offered to LGBT individuals.

IV. The Final Rule Must Provide Clear Guidance as to the Reach of the Sex Discrimination Prohibition.

The proposed Section 1557 regulations set out core sex discrimination prohibitions by incorporating certain implementing regulations for Title IX. However, the cross-referenced Title IX regulations reflect the different educational context for which they were created and accordingly do not reach the full breadth of discriminatory actions that are prohibited by Section 1557. For example, the referenced Title IX regulation prohibits "[a]pply[ing] any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition" on the basis of sex[xxv]—a rule that has clear applicability to education programs and activities and limited relevance for health programs and activities. Therefore, in addition to the referenced Title IX provisions, the final regulations should also draw from the incorporated prohibitions for Title VI, Section 504, and Age Act. Such an approach would more fully address discrimination on the basis of sex in health programs and activities. Specifically, the final rule should prohibit the utilization of criteria or methods of administration that have the effect of subjecting individuals to discrimination on the basis of their sex or substantially impairing program objectives on the basis of sex.[xxvi] The final rule should also specify that in the absence of a finding of discrimination, a covered entity may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons on the basis of sex.[xxvii]

V. Conclusion

We appreciate the efforts by the Department of Health and Human Services (HHS) and the Office of Civil Rights (OCR) to end discrimination in health care. Following the recommendations set forth above will ensure that Section 1557 provides strong anti-discrimination protections.

Sincerely,

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[i] DANIELLE GARRETT ET AL., NAT'L WOMEN'S LAW CTR., TURNING TO FAIRNESS: INSURANCE DISCRIMINATION TODAY AND THE AFFORDABLE CARE ACT 3 (March 2012), http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf. *See also* BRIGETTE COURTOT & JULIA KAYE, NAT'L WOMEN'S LAW CTR., STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION (Oct. 2009), http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf.

[ii] N. Maserjian et al., *Disparities in Physician's Interpretations of Heart Disease Symptoms by Patient Gender: Results of a Video Vignette Factorial Experiment*, 18 J. OF WOMEN'S HEALTH 1661 (2009).

[iii] Richard J. McMurray et al., *Gender Disparities in Clinical Decision Making*, 266 JAMA 559 (1991).

[iv] See NAT'L WOMEN'S LAW CTR., HEALTH CARE REFUSALS HARM PATIENTS: THE THREAT TO REPRODUCTIVE HEALTH CARE (Jan. 2013), http://www.nwlc.org/resource/health-care-refusals-harm-patients-threat-reproductivehealth-care.a

[v] Liza Baskin, *LGBT patients find little patience in health care*, DAILY RX (July 11, 2012), http://www.dailyrx.com/lgbt-friendly-health-care-remains-out-reach-most.

[vi] However, as discussed in more detail in Section III, we do not support the proposed rule in exclusion of other forms of employment discrimination.

[vii] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172, 54,173 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

[viii] *Id.*

[ix] The Supreme Court held in a similar context that the incorporation by reference of protections from one civil rights statute into another does not mean that the limitations of the first apply to the second. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (holding that Section 504's reference to Title VI's remedies, procedures, and rights did not import limitations from Title VI not expressly provided in Section 504).

[x] While the proposed regulations incorporate "exceptions" from Title VI, Section 504, and the Age Act set out at 45 C.F.R. §§ 80.3(d), 84.4(c), 85.21(c), 91.12-.15, 91.17-.18 (2015), these incorporated provisions by and large do not actually set out exceptions from the relevant antidiscrimination mandates. Rather, they clarify that certain federal programs targeted to meet the particular needs of specific protected groups within the protected class are not properly considered discrimination. *See, e.g.*, 45 C.F.R. § 84.4(c) (2015).

[xi] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54,173. For example, Title IX exempts social fraternities and sororities, Boys State and Girls State conferences, and beauty pageants offering scholarship prizes from its nondiscrimination rule. 20 U.S.C. § 1681(a)(6), (7), (9) (2012). Incorporating such exceptions into Section 1557 would be nonsensical at best.

[xii] *See* 42 U.S.C. § 300gg(a) (2015) (allowing rating based only on family size, tobacco use, geographic area, and age, but not sex); 45 C.F.R. § 147.104(e) (2015) (prohibiting discrimination in marketing and benefit design, including on the basis of sex); *see also, e.g.*, 156 CONG. REC. H1632-04 (daily ed. March 18, 2010) (statement of Rep. Lee) ("While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system. Too many women are locked out of the health care system because they face discriminatory insurance practices and cannot afford the necessary care for themselves and for their children."); 156 CONG. REC. H1891-01 (daily ed. March 21, 2010) (statement of Rep. Pelosi) ("It's personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition."); 155 CONG. REC. S12026 (daily ed. Oct. 8, 2009) (statements of Sen. Mikulski) ("[H]ealth care is a women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue because . . . when it comes to health insurance, we women pay more and get less."); 155 CONG. REC. S10262-01 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) ("Women have even more at stake. Why? Because they are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform."); 156 CONG. REC. H1854-02 (daily ed. March 21, 2010) (statement of Rep. Maloney) ("Finally, these reforms will do more for women's health . . . than any other legislation in my career.").

[xiii] *See e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the government's interest in eliminating racial discrimination in education outweighed any burdens on religious beliefs imposed by Treasury Department regulations); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (holding that plaintiff could not refuse to comply with the Civil Rights Act of 1964 based on his religious beliefs); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (holding plaintiffs cannot compensate women less than men based on the belief that "the Bible clearly teaching that the husband is the head of the house, head of the wife, head of the family"); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right to fire teacher for becoming pregnant outside of marriage).

[xiv] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

[xv] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54,180.

[xvi] 2A Sutherland Statutory Construction § 76:6 (7th ed.).

[xvii] *Id.*; *See, e.g., Pullen v. Otis Elevator Co.*, 292 F. Supp. 715, 717 (N.D. Ga. 1968) ("In construing a remedial statute, it is felt that limitations which would take away a right from one for whom the statute was passed must be express and not subject to varying interpretations.").

[xviii] 42 U.S.C. § 18116 (2012).

[xix] *Id.*; *See also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

[xx] *See Swarts v. Siegel*, 117 F. 130 (8th Cir. 1902) ("There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, ...").

[xxi] 42 U.S.C. § 2000d-3 (2012).

[xxii] *See North Haven Bd. of Educ.*, 456 U.S. at 530 (1982) (finding Title IX reaches employment discrimination and noting that if Congress meant to incorporate Title VI's employment exemption, it would have included similar language in Title IX, stating, "For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 635 (1984) (finding same with respect to Section 504 and noting that it would be "anomalous" to conclude that Section 504 "silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination.").

[xxiii] Seth A. Seabury, et al., *Trends in the Earnings of Male and Female Health Care Professionals in the United States, 1987 to 2010*, 173 JAMA INTERNAL MED. 1748 (Oct. 14, 2013).

[xxiv] *Couch v. Chu*, EEOC Appeal No. 0120131136, 2013 WL 4499198, at * 7 (Aug. 13, 2013).

[xxv] *See* 45 C.F.R. § 86.31(6) (2015).

[xxvi] *See* 45 C.F.R. § 80.3(b)(2) (2015); 45 C.F.R. § 84(b)(4) (2015); 45 C.F.R. § 91.11(b) (2015).

[xxvii] *See* 45 C.F.R. § 80.3(b)(6)(ii) (2015); 45 C.F.R. § 86.3(b) (2015); 45 C.F.R. § 91.16 (2015).