5 August 2019

Secretary Alex M. Azar, I I
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. 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. We implemented these

1 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
protections based on state law, state regulations, and federal law, including Section 1557 and other federal regulations that prohibit discrimination in insurance.\(^3\) 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,\(^4\) 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.\(^5\) 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.\(^6\)

---


\(^3\) Including, for example: 45 C.F.R. §156.200(e), 45 C.F.R. §156.125(b), and 45 C.F.R. §156.125.


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

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); Dudds v. U.S. Dep’t of Educ., 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection Clause); Glenn v. Brumby, 683 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 G. Taylor, Commissioner
District of Columbia Department of Insurance, Securities and Banking

Madeleine Garide, Commissioner
New Jersey Department of Banking and Insurance

Robert H. Murriel, Director
Illinois Department of Insurance

Linda A. Lacewell, Superintendent
New York State Department of Financial Services

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. Atman, 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
Mike Kreidler, Commissioner
Washington State Office of the Insurance Commissioner

Mark Afable, Commissioner
Wisconsin Office of the Commissioner of Insurance