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August 13, 2019

VIA ELECTRONIC SUBMISSION

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

RE: Docket ID HHS-OCR-2019-0007, RIN 0945-AA11, Nondiscrimination in Health and Health Education Programs or Activities

Dear Secretary Azar:

The Massachusetts Medical Society submits these comments in response to the Department of Health and Human Services' ("HHS", "the Department") and the Center for Medicare and Medicaid Services ("CMS") Notice of Proposed Rulemaking ("proposed rule," "NPRM") to express our concerns with the proposed rule entitled "Nondiscrimination in Health and Health Education Programs or Activities" published in the Federal Register on July 14, 2019.

The Massachusetts Medical Society is the largest physician-led organization in Massachusetts, with more than 25,000 members representing physicians, residents and medical students across all clinical disciplines, organizations and practice settings. We are a proactive organization that advocates for the shared interests of patients and our profession and takes a leadership role in the development of health care policy. We advocate to enhance and protect the physician-patient relationship and preserve physicians' ability to make clinical decisions for the benefit of patients. The Medical Society's code of ethics recognizes that the physician's responsibility to the patient is paramount. Our code of ethics also tells us that a physician shall respect the law but recognizes the responsibility to seek changes to requirements which are contrary to the best interest of the patient. That responsibility compels us today to write today in opposition the NPRM. The Medical Society is deeply concerned by the substance and likely effects of this proposed rule, which would undermine health care nondiscrimination protections and disproportionately affect the most vulnerable patients in Massachusetts, especially transgender and gender nonconforming people, the entire LGBTQ community, people needing abortion services, and people whose first language is not English.

While Section 1557 is still the law, this proposed rule attempts to change the administrative implementation in a way that is antithetical to the plain language of the law. The NPRM's proposed changes pose significant risks to those the law is intended to protect, including lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people; people who need

reproductive health care, including abortion; women of color; people living with disabilities and/or chronic conditions; and people whose primary language is not English–all people who already experience significant barriers to accessing health care. The proposed changes could create additional barriers and potentially lead to worse health outcomes, with a disproportionate impact those living at the intersections of these identities.

The Medical Society believes that health care is a human right and maintains a long-standing policy to strive for universal access to health care and nondiscrimination in health care settings for all people. To that end, the Medical Society is committed to working for the best possible health care for every patient in the Commonwealth regardless of racial identification, national or ethnic origin, sexual orientation, gender identity, religious affiliation, disability, immigration status, or economic status. As such, the Medical Society vehemently opposes the proposed elimination or rollback of critical protections guaranteed by Section 1557 of the Affordable Care Act ("ACA") and the 2016 Nondiscrimination in Health Programs or Activities final rule ("2016 final rule"). Discrimination has no place in health care and this rule will only serve to worsen health outcomes for patients who have historically faced barriers to accessing care. We urge that this NPRM be rescinded in its entirety.

I. **The Proposed Rule Impermissibly Attempts to Narrow the Scope of Section 1557**

The 2016 final rule that implemented Section 1557 applies to all health programs and activities that receive federal financial assistance from the Department, all health programs and activities administered by the Department, and state-based marketplaces. The 2016 final rule defines health programs and activities to include all operations of an entity receiving federal financial assistance that is principally engaged in the provision or administration of health-related services or health-related insurance coverage.

The proposed rule attempts to reduce the number of health insurance plans that are covered by claiming that if the issuer of a health plan is "not principally engaged in the business of providing health care (as opposed to health insurance), only its Marketplace plans would be covered and any plans it offers outside the marketplace would not be subject to Section 1557."[1] Additionally, the proposed rule improperly attempts to narrow that application of Section 1557's protections to only the portion of a health care program or activity that received federal financial assistance. These changes unlawfully narrow the scope of Section 1557's application. The statute is clear that the law's provisions apply broadly to "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." 42 U.S.C. § 18116(a).

[1] MaryBeth Musumeci et al., *HHS's Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/.

This proposed change is illegal. If it were nevertheless implemented, it would have significant consequences, particularly for consumers who purchase short-term limited duration insurance ("STDLI"). The proposed rule would generally not apply nondiscrimination protections to STDLI plans because insurers would no longer be considered health care entities, and these specific plans do not receive federal financial assistance.

A 2018 study, for example, found that not a single short-term plan covered maternity care.[1] Short-term plans also discriminate based on gender identity, such as by excluding coverage for transition-related services and erecting barriers for people needing primary care services that insurers view as not corresponding to an individual's gender marker (such as trans man needing a pap smear because he still has female reproductive organs). Short-term plans are notorious for discriminating against consumers based on gender, age and disability. If implemented, the proposed rule would embolden short-term plans to discriminate against women by refusing to cover reproductive health services, such as maternity, contraceptive care or fertility care and coverage, or deny coverage altogether for other conditions, such as breast or cervical cancer.

The Proposed Rule Impermissibly Attempts to Narrow the Definition of Sex Discrimination

Sex discrimination in health care has a disproportionate impact on women of color, LGBTQ people and individuals living at the intersections of multiple identities -- resulting in them paying more for health care, receiving improper diagnoses at higher rates, being provided less effective treatments and sometimes being denied care altogether. As the first broad prohibition against sex-based discrimination in health care, Section 1557 is crucial to ending gender-based discrimination in the health care industry. In addition to personal stories, there have been surveys, studies, and reports documenting discrimination in health care against these communities and their families.

The proposed rule would have a disproportionate impact on LGBTQ people -- especially transgender, non-binary and gender nonconforming people, who already face unique barriers to accessing care, such as high un-insurance rates, discrimination and harassment. The 2016 final rule implementing Section 1557 had clarified that health care providers cannot refuse to treat someone because of their gender identity. The proposed rule illegally purports to allow a health care provider to refuse to treat someone because of their gender identity. For example, a doctor could refuse to treat a transgender person for a cold or a broken bone, simply because of their gender identity. The Massachusetts Medical Society strongly supports legal protections against discrimination for transgender individuals and recognizes the significant negative health outcomes and health care disparities caused by discrimination against transgender individuals based on their gender identity and expression.

[1] Karen Pollitz et al., *Understanding Short-Term Limited Duration Health Insurance*, Kaiser Family Foundation (Apr. 23, 2018), https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance/.

The 2016 final rule also clarified that insurance companies cannot categorically exclude or deny coverage for gender-affirming care. The proposed rule illegally attempts to again open the door to insurance companies categorically excluding coverage of gender-affirming care from their plans or denying individuals coverage of procedures used for gender affirmation. Moreover, under the proposed rule, transgender, non-binary and gender nonconforming people assigned female at birth whose gender marker is male or non-binary could be denied coverage for necessary care such as a pap smear or mammogram. Similarly, transgender nonbinary, and gender nonconforming people assigned male at birth whose gender marker is female or nonbinary could be denied coverage for necessary care, such as a prostate exam.

Transgender, non-binary and gender nonconforming people already experience high rates of discrimination and harassment in health care. According to the 2015 U.S. Transgender Survey, 33 percent had at least one negative experience in a health care setting relating to their gender identity in the past year.[2] According to a 2018 study from the Center for American Progress, 23 percent had a provider intentionally mis-gender or use the wrong name for them, 21 percent had a provider use harsh or abusive language when treating them[3] and 29 percent experienced unwanted physical contact from a health provider, such as fondling, sexual assault or rape.[4] The proposed rule could impermissibly open the door to further discrimination.

The 2016 final rule made clear that sex discrimination under Section 1557 includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related conditions. The proposed rule attempts to roll back these protections. Although HHS acknowledges in the preamble to this proposed rule that Title IX prohibits discrimination based on pregnancy, including termination of pregnancy, it refuses to state whether the Department would enforce those protections. While the scope of protection under Section 1557 is clear, without unambiguous implementing regulations, and enforcement, illegal discrimination is likely to flourish.

The proposed rule would have a disproportionate impact on women and other people who are pregnant, especially those living in rural areas. Women of color already face unique barriers to accessing pregnancy-related and/or abortion care, such as a discrimination, harassment and refusals of care, and experience high rates of pregnancy-related

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[2] S.E. James, et al., Nat'l Ctr. for Transgender Equality, Report Of The 2015 U.S. Transgender Survey 96-97 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[3] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Ctr. for Am. Progress (Jan. 18, 2018, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

[4] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Ctr. for Am. Progress (Jan. 18, 2018, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

complications. For example, Black women are 3-4 times more likely to die from pregnancy related complications than white women.

The proposed unlawful incorporation of Title IX's exemptions would cause further harm to LGBTQ people and women of color. For example, the proposed rule impermissibly tries to add Title IX's religious exemption to Section 1557's protection against sex discrimination, which could embolden providers to invoke personal beliefs to deny access to a broad range of health care services, including birth control, sterilization, certain fertility treatments, abortion and gender-affirming care. Similarly, the Administration once again attacks abortion access by impermissibly incorporating the "Danforth Amendment", which carves out abortion care and coverage from the ban on discrimination of sex in the education context. Both attempts to incorporate exemptions from other laws violate the plain language of Section 1557.

II. The Proposed Rule Impermissibly Attempts to Amend Unrelated Regulations to Exclude Sexual Orientation and Gender Identity Protections

The 2016 final rule did not touch other HHS health care regulations. The proposed rule attempts to erase all references to gender identity and sexual orientation in all HHS health care regulations. If implemented, this rule would eliminate express prohibitions on discrimination based on gender identity and sexual orientation from regulations that govern a range of health care programs, including private insurance and education programs. This could result in less health care and poorer health outcomes for communities across the country.

Prior to the passage of the ACA, being transgender was treated as being a pre-existing condition. As a result, transgender people often could not get or afford insurance coverage. Under the proposed rule, states and health insurance marketplaces could discriminate against LGBTQ people in eligibility determinations, enrollment periods, and more. Similarly, agents and brokers who assist with enrollment in marketplace plans could discriminate against LGBTQ people.

Under the proposed rule, Programs of All-Inclusive Care for the Elderly ("PACE") organizations, which serve people ages 55+, could discriminate against LGBTQ people.[5] There are more than 3 million LGBTQ people age 55+ in the U.S. That number is expected to double within the next 20 years.[6] Many older LGBTQ adults already feel reluctant to discuss their sexual orientations and gender identities with health providers due to fear of

[5] MaryBeth Musumeci et al., *HHS's Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/.

[6] Robert Espinoza, Servs. & Advocacy for Gay, Lesbian, Bisexual, & Transgender Elders, Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual, and Transgender Older Adults, Ages 45-75, 5 (2014), https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-out-visible-lgbt-market-research-full-report.pdf.

judgment and/or substandard care.[7] The proposed rule would only further discourage older LGBTQ adults from sharing information that may be relevant to the health services they need.

A member of the Medical Society who is an OBGYN provider with over 35 years of clinical experience and over 24 years as a member of the LGBTQ community put it very succinctly: this rule will push people back into the proverbial closet and negatively impact their lives and health, with a direct public health impact. The Medical Society believes that a physician's nonjudgmental recognition of sexual orientation, behavior, and gender identity enhances the ability to render optimal patient care in health as well as in illness. A patient's reluctance to report his or her sexual orientation and behavior can lead to failure to screen, diagnose, or treat important medical problems. Implementation of this rule will harken back to a time when LGBTQ people were so afraid of discrimination that they would avoid medical care or if they had medical contacts, not reveal sexual orientation information that is medically critical to give the correct care, such as HIV and STD screening. It is vital to maintain the protections currently contained in Section 1557, which have had a direct positive impact on the ability of LGBTQ people to live full lives participating in all aspects of society, including the ability to access health care.

III. The Proposed Rule Impermissibly Attempts to Eliminate Language Access Protections

The proposed rule would illegally pull back on language access protections for people with Limited English proficiency ("LEP") individuals and those who have LEP family members by proposing to roll back requirements for the inclusion of taglines on significant documents and remote interpreting standards and by proposing to eliminate recommendations that entities develop language access plans. The Medical Society recognizes the importance of language barriers and cultural sensitivity and supports the use of interpreter services, whether for reasons of language, culture, or physical disability. In fact, MMS collaborated with health plans in Massachusetts to provide coverage for increased costs of interpreter services, in recognition of the necessity of such services in providing high-quality medical care to patients who have significant language and/or cultural barriers or physical disabilities.

Discrimination on the basis of national origin, which encompasses discrimination on the basis of language, creates unequal access to health care. Over 25 million Americans are limited English proficient. An estimated 19 million LEP adults are insured. Language assistance is necessary for LEP persons to access federally funded programs and activities in the health care system.

For LEP individuals, language differences often compound existing barriers to access and receiving appropriate care. LEP often makes it difficult for many to navigate an already

[7] Robert Espinoza, Servs. & Advocacy for Gay, Lesbian, Bisexual, & Transgender Elders, Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual, and Transgender Older Adults, Ages 45-75, 8 (2014), https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-out-visible-lgbt-market-research-full-report.pdf.

complicated healthcare system, especially when it comes to medical or insurance terminology. Moreover, these barriers are often compounded by discrimination based on national origin, immigration status, race, ethnicity, sexual orientation, and gender/gender identity.

The proposed rule would have a disproportionate impact on people with LEP who are low income and/or are people of color. For example, Latinx people make up 63% of those considered LEP in the U.S., while Asian Americans and Native Hawaiian and Pacific Islanders ("AANHPIs") make up 22%. LEP individuals are more likely to live in poverty than their English proficient counterparts. The proposed rule could further exacerbate these disparities and will disproportionately burden LEP individuals with health care costs.

We strongly disagree that nondiscrimination notice, taglines and language access plan language in the 2016 Final Rule were not justified by need, were overly burdensome and created inconsistent requirements. The notice requirement is consistent with the long history of civil rights regulations requiring the posting of notice of rights. The notice is not redundant as OCR created the option of using one consolidated civil rights notice to minimize burden on covered entities. Without the notice, members of the public will have limited means of knowing that language services and auxiliary aids and services are available, how to request them, what to do if they face discrimination, and their right to file a complaint.

Taglines are well supported by existing federal and state regulations, guidance and practice. Taglines are a cost-effective approach to ensure that covered entities are not overly burdened. In the absence of translated documents, taglines are necessary "to ensure that individuals are aware of their protections under the law and are grounded in OCR's experience that failures of communication based on the absence of auxiliary aids and services and language assistance services raise particularly significant compliance concerns under Section 1557, as well as Section 504 and Title VI."

We oppose removing all references to language access plans because under the 2016 Final Rule, they are voluntary, not required by law and only a factor to be considered. We oppose changes in the NPRM that would shift the inquiry of meaningful access away from the individual LEP person to that of the entity, as doing so would weaken the standard.

Finally, the regulatory impact analysis is insufficient and fails to identify and quantify costs to protected individuals. OCR has provided no tangible analysis on the costs and burdens to protect individuals from removal of the notice and tagline requirements. The costs are not only reduced awareness of language services by LEP persons, but also reduced awareness by the general public about their rights as protected by 1557.

IV. The Proposed Rule Impermissibly Attempts to Eliminate Prohibitions on Discrimination in Insurance Plan Benefit Design and Marketing

Before the ACA, people with serious and/or chronic health conditions were often denied health insurance coverage or paid high prices for substandard plans with coverage exclusions, leaving many people unable to afford the health care they needed. Under the ACA, insurers can no longer charge higher premiums or deny coverage for people with pre-existing conditions. These protections have been lifesaving for many people. The Medical has pledged to work to ensure that no health carrier or its designee may adopt or implement a benefit that discriminates on the basis of health status, race, ethnicity, color, national origin, age, sex, gender identity, sexual orientation, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.

Under the 2016 final rule, covered entities are prohibited from designing benefits that discourage enrollment by persons with significant health needs. For example, insurers are prohibited from placing all or most prescription drugs used to treat a specific condition, such as HIV prescriptions, on a plan's most expensive tier.[8] Additionally, covered entities are prohibited from using discriminatory marketing practices, such as those "designed to encourage or discourage particular individuals from enrolling in certain health plans."[9] The proposed rule improperly attempts to eliminate these prohibitions.

The proposed rule will have a disproportionate impact on LGBTQ people and people of color who live with disabilities and/or chronic conditions. Due to systemic barriers to health care and the stress of stigma and discrimination, people of color and LGBTQ people, and especially gay, bisexual, and queer men of color and transgender women of color, are at a higher risk of developing chronic conditions and have a higher prevalence of disabilities.

V. The Proposed Rule Impermissibly Attempts to Undermine Notice and Enforcement Requirements and Remedies

The proposed rule also impermissibly seeks to limit the enforcement mechanisms available under Section 1557 for patients who have experienced discrimination, including by attempting to eliminate notice and grievance procedure requirements, private rights of action, opportunities for money damages, and by claiming that the remedies and enforcement mechanisms for each protected characteristic (race, color, national origin, age, disability or sex) are different and limited to those available under their referenced statute.

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[8] MaryBeth Musumeci et al., *HHS's Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/.

[9] MaryBeth Musumeci et al., *HHS's Proposed Changes to Non-discrimination Regulations under ACA Section 1557*, Kaiser Family Foundation (Jul. 1, 2019), https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/.

As a result, the proposed rule would create a confusing mix of legal standards and available remedies under a single law, and could limit claims of intersectional discrimination, going against the text and intent of Section 1557. Ultimately, the proposed rule will make it harder for those who are discriminated against to access meaningful health care and to enforce their rights.

VI. **Conclusion**

This proposed rule could create significant harm, particularly for our most underserved populations who already struggle to access health care. The proposed rule will erect barriers to care for transgender people and the LGBTQ community; people seeking reproductive health care, including abortion services; individuals with LEP, including immigrants; those living with disabilities and people of color. Moreover, this rule would embolden compounding levels of discrimination against those who live at the intersection of these identities. The proposed rule is dangerous and contravenes the plain language of Section 1557, specifically, and the ACA broadly.

For the reasons detailed above, HHS and CMS should not finalize the proposed rule.

Sincerely,

Maryanne C. Bombaugh, MD, MSc, MBA, FACOG