

Congress of the United States
Washington, DC 20515

November 5, 2015

Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA02)
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Director Samuels:

Thank you for your leadership and efforts in advancing health equality for all Americans. As you know, the Affordable Care Act highlighted efforts to address health disparities and barriers to high quality health care. We share in your commitment to protecting populations that are most vulnerable to discrimination in matters involving health care and health coverage, including the lesbian, gay, bisexual, and transgender (LGBT) population, and we write to express our support for a strong interpretation and rule to implement Section 1557 of the Affordable Care Act, *Nondiscrimination in Health Programs and Activities*, that explicitly protects individuals from discrimination based on their sex, gender identity, or sexual orientation.

We are pleased the Department's rule recognizes the injustice in categorically denying healthcare coverage for those who are transgender, gender non-conforming or who are undergoing gender transition. We support this proposal and ask that the Department of Health and Human Services (HHS) follow through in banning this explicit and facially discriminatory exclusion in coverage and care. Many Americans continue to face barriers to care on the bases of sex and gender identity. For this reason, we strongly support the inclusion of gender identity and sex stereotyping within the definition of "sex" for purposes of the anti-discrimination provision. The sections of the proposed rule that address discrimination against transgender individuals (§ 92.207(b)(3)-(5)) are incredibly important for members of the transgender community who all too often face discrimination and inappropriate care. If implemented, this rule would take a monumental step forward in the fight for health equity and would create a paradigm for equal treatment within our healthcare system.

Nonetheless, it is critical that we continue to clarify the scope of equal access to healthcare and work to diminish the discrimination or fear of discrimination that deters so many LGBT people from retrieving necessary preventative care or sometimes emergency services. With this, we believe that the Department should include in the rule explicit protections on the basis of sexual

orientation. Although many same-sex couples should be protected under sex stereotyping, limiting the nondiscrimination protections under the definition of “sex” within Section 1557 to sex stereotyping and gender identity fails to fully protect everyone in the LGBT community. Including sexual orientation within the definition of “sex” under Section 1557 would ensure that all LGBT individuals and families have access to healthcare they need and rightfully deserve, without fearing discrimination and denial of care.

This interpretation would also be consistent with recent federal court decisions, as well as the policies of other federal agencies. This summer, in *Baldwin v. Foxx* the Equal Employment Opportunity Commission (EEOC) ruled in favor of a federal employee who alleged that he did not receive a promotion because of his sexual orientation¹. The EEOC held that discrimination on the basis of sexual orientation constitutes sex discrimination under Title VII because sexual orientation is inseparably linked to sex-based considerations. In January 2015 the EEOC published a final determination with this interpretation of Title VII in the case *Cote v. Wal Mart*². In this case, the EEOC found that Wal Mart had discriminated against an employee when it denied the employee the opportunity to enroll her same-sex spouse in company provided healthcare benefits. The EEOC explicitly stated in the determination that the employee had experienced discrimination on the basis of sex under Title VII. In *Hall v. BNSF Ry, Co.*, a federal judge reached a similar conclusion in late 2014 when an employee was denied same-sex spousal coverage on the company health plan³. In this case the judge allowed a plaintiff's claim of sex discrimination under Title VII and the Equal Pay Act to proceed to the next step of litigation. If HHS fails to incorporate this clear legal trajectory into the final regulation, new rulemaking to update the regulation to reflect the law may be necessary within a matter of years.

In addition, we are concerned about the Department's invitation for comments involving the inclusion of religious exemptions or accommodations within the discrimination provision. A religious exemption would explicitly expose members of the LGBT community, as well as women in general and other individuals seeking vitally important healthcare services, to legally-sanctioned discrimination. This would put LGBT individuals and families in a dangerously vulnerable position that is contrary to the entire purpose of anti-discrimination regulations, which is to create a nondiscriminatory environment for each and every population needing healthcare. We understand and recognize that religious beliefs are fundamental; however a religious exemption in the context of healthcare services would undermine the spirit of the Affordable Care Act and would put the health and well-being of all patients at risk.

Again, we thank you and the Department for your leadership on this issue and support this groundbreaking rulemaking. It is imperative that HHS clarify with this rule that discrimination on all accounts of sex, gender identity, sexual orientation, and sex stereotyping is prohibited and

¹ Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015).

² Charge No. 523201400916.

³ 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).

that LGBT Americans, just like every other American looking to live a healthy life, deserve equal rights when it comes to services and conduct in healthcare settings. We thank you for giving attention to this matter and we look forward to working together with the purpose of protecting civil rights within our nation's healthcare system.

Sincerely,

Lois Capps

MVJ

Chaka Fattah

Marcy Kaptur

Pete Ahjz

Wm A.wt

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Leut. W. K. K.

Ron Kind

List of Signatories

Letter to Office for Civil Rights

**Re: Proposed Rule Addressing Nondiscrimination in Health Programs and Activities;
Implementation of Section 1557 of the Affordable Care Act**

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Rep. Pete Aguilar
Rep. Donald S. Beyer Jr.
Rep. Earl Blumenauer
Rep. Suzanne Bonamici
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Rep. André Carson
Rep. Matt Cartwright
Rep. Kathy Castor
Rep. Judy Chu
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