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U.S. Department of Health and Human Services
Office for Civil Rights
ATTN: 1557 NPRM (RIN 0945-AA02)
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Public Comment on the Department of Health and Human Services' Notice of Proposed Rulemaking on Section 1557 of the Affordable Care Act

Submitted electronically at Regulations.gov on November 9, 2015.

Dear Colleagues,

We write to comment on the Department of Health and Human Services' Notice of Proposed Rulemaking regarding nondiscrimination in health programs and activities in Section 1557 of the Affordable Care Act.

The Fenway Institute works to make life healthier for those who are lesbian, gay, bisexual, and transgender (LGBT), as well as people living with HIV/AIDS and the larger community. We do this through research and evaluation, education and training, policy analysis, and public health advocacy. We are the research division of Fenway Health, a federally qualified health center that serves about 26,000 patients each year.

We would like to commend HHS on the explicit inclusion of gender identity under the sex nondiscrimination protections in Section 1557. The inclusion of gender identity is clearly necessary for enhancing the health and wellbeing of transgender people. According to a study conducted by the Fenway Institute with 452 transgender and gender nonconforming people in Massachusetts, 24% of respondents reported being discriminated against in health care settings in the past 12 months.¹ When this discrimination occurred in health care settings, 19% of respondents reported that they postponed or did not try to get medical care when sick or injured, and 24% of respondents did not seek routine health care. The proposed rule by HHS would help better the health and wellbeing of transgender people by prohibiting discrimination based on gender identity in many health care settings.

¹ Reisner, S., Hughto, J., Dunham, E., Heflin, K., Begenyi, J., Coffey-Esquivel, J., & Cahill, S. (2015). "Legal Protections in Public Accommodations Settings: A Critical Public Health Issue for Transgender and Gender-Nonconforming People." *Milbank Quarterly*, 93(3), 484-515. doi: 10.1111/1468-0009.121278. www.milbank.org

The Fenway Institute also supports the proposed rule's prohibition of many private health insurance plans, as well as state Medicaid programs, from categorically denying coverage for treatments related to gender transition. The American Medical Association, the World Health Organization, and other medical and health-related organizations recognize that gender dysphoria is a significant medical condition that can cause clinically significant impairment in functioning in all aspects of life for transgender people. As such, gender reassignment surgery and/or cross-sex hormone treatment are considered medically necessary by many physicians for their transgender patients. However, many transgender people cannot access these treatments because some insurance plans categorically refused to cover them. The proposed rule would help more transgender people access the treatments that are medically necessary for them to live healthy and fulfilling lives.

We are pleased to see that HHS supports an evolving definition of sex discrimination that involves sex stereotyping. As mentioned in the proposed rule, court decisions on whether discrimination based on sex stereotyping also covers sexual orientation have been mixed, but recent decisions by the U.S. Equal Employment Opportunity Commission Office of Federal Operation (EEOC OFO) have ruled that discrimination "on the basis of sex" encompasses sexual orientation discrimination. For example, in *Couch v. Department of Energy* (August 13, 2013), the EEOC OFO found that anti-homosexual slurs directed against an employee in the workplace constituted a form of "sex-based epithets" which falls within the scope of Title VII as a form of "gender stereotyping" sex discrimination. These decisions likely indicate how courts will interpret and rule on sex discrimination cases in the future. **As such, in order to ensure that the final rule includes the most robust set of protections supported by courts in an ongoing basis, we urge HHS to explicitly include sexual orientation alongside gender identity and sex stereotyping in the definition of discrimination on the basis of sex.**

Having sexual orientation stated explicitly in the rule would help protect lesbian, gay, and bisexual (LGB) people from discrimination by making the intent of the rule clearer and easier to understand. LGB people still frequently face discriminatory treatment in health care facilities. A study done by Lambda Legal found that just over 10% of LGBT respondents reported that health care professionals used harsh language toward them; 11% reported that health care professionals refused to touch them; and more than 12% reported being blamed for their health problems.² As the rule stands now, people without a working knowledge of court cases and the EEOC decisions may not understand that the proposed rule is actually in support of prohibiting discrimination on the basis of sexual orientation. Having sexual orientation stated explicitly along with gender identity and sex stereotyping would make it easier to understand the rule by all, which in turn would likely lessen the discrimination that LGB

² Lambda Legal. (2010). *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV*. Available at: <http://www.lambdalegal.org/publications/when-health-care-isnt-caring>

people may face. In addition, having sexual orientation explicitly stated in the rule may make LGB people more comfortable in self-disclosing their sexual orientation to their providers. Self-disclosure of sexual orientation and the tracking of such data in electronic health records is a critical step toward better understanding and reducing the health disparities that LGB people face.

In addition to explicitly including sexual orientation alongside gender identity and sex stereotyping in the definition of discrimination on the basis of sex, we also recommend that HHS clarify the definition of discriminatory practices in plan benefit design as it relates to beneficiaries with chronic conditions.

Beneficiaries who have chronic conditions, such as people living with HIV/AIDS, often rely on prescription medications to remain healthy. Some marketplace plans currently place all or almost all medications to treat certain conditions on the highest cost tier, which puts undue burden on people living with those chronic conditions. HHS has also gone on record as stating that these practices could be discriminatory. In order to protect beneficiaries, especially those with chronic conditions, we recommend that HHS clearly define what practices in insurance plan benefit design are discriminatory.

Thank you for the opportunity to comment. Should you have any questions or require more information on any of the suggestions made here, please feel free to contact Sean Cahill, PhD, Director of Health Policy Research, at scahill@fenwayhealth.org or Tim Wang, MPH, LGBT Health Policy Analyst, at twang@fenwayhealth.org.

Sincerely,

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