October 3, 2022

VIA ELECTRONIC SUBMISSION

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: Comment on Nondiscrimination in Health Programs and Activities (RIN 0945-AA17), Respectfully Submitted by Interfaith Alliance Foundation

To Whom It May Concern:

Interfaith Alliance Foundation provides the following comments in response to Nondiscrimination in Health Programs and Activities, a proposed rule published by the Department of Health and Human Services ("HHS") in the Federal Register on August 4, 2022.

Interfaith Alliance Foundation ("IAF") is a national policy and advocacy organization that champions an inclusive vision of religious freedom. The only national interfaith organization dedicated to protecting the integrity of both religion and democracy, Interfaith Alliance works to advance federal policy initiatives and key legislation that protect freedom of belief and ensure that all Americans receive equal treatment under law. Through policy research, public education, grassroots activism, and advocacy on Capitol Hill, Interfaith Alliance leverages our unique perspective and expertise to advance our policy agenda.

While the notion of religious freedom has been used – and misused – by various groups over the course of our history, IAF's work remains true to the foundational promise of the U.S. Constitution: that every American has the right to believe as we choose, with the secure knowledge that the government will not play favorites or favor religion over non-religion. Through our federal policy programs, we champion the rights all Americans to follow the faith of their choosing, or no faith, and to be free from discrimination in public life.

For the reasons detailed below, we welcome the changes presented by the Proposed Rule to realign the rule with the statute's original intent. By bringing the rule in line with recent developments under federal law and correcting changes made by the past administration in 2020 – which posed a profound threat to the religious freedom of patients and providers across the country and removed nondiscrimination protections for historically disadvantaged communities – the Proposed Rule will bolster the religious freedom and civil rights of Americans of all faiths and none.

I. The Impact of the ACA

The Patient Protection Affordable Care Act, (hereinafter "ACA")[1] had a transformative impact on all aspects of health care, increasing the scope of benefits and improving access to coverage for millions of Americans. The ACA has reduced health care costs for individuals and employers while at the same time reducing uncompensated care by more than $7.4 billion.[2] In addition, the ACA included critical provisions ensuring full and equitable access to essential services without discrimination.

The ACA is an essential source of health care coverage for America's traditionally underserved communities including individuals and families living in poverty, people of color, women, immigrants, LGBTQ+ individuals, individuals with disabilities, seniors, and individuals with limited English proficiency. Moreover, the ACA reduced the number of individuals without insurance to historic lows, including a reduction of 39 percent among the lowest income individuals.[3]

Furthermore, the ACA has been instrumental in covering a wide range of preventive services, ensuring that patients have access to life-saving cancer care and access to affordable contraception and reproductive health care services. Similarly, plans are sharply limited in their ability to impose formularies, prior authorization requirements, and other administrative barriers to preventive care services or to benefit designs that may discriminate against persons with specific disease states.

Section 1557 is the heart of the ACA. This critical mechanism ensures that all patients have meaningful access to healthcare, regardless of who they are. Section 1557 prohibits hospitals, doctors, and insurers from discriminating against persons seeking health care services or health care coverage. It specifically prohibits discrimination on the basis of race, color, national origin, sex, age, or disability by any programs or activities that receive federal financial assistance, such as credits and subsidies (monetary and nonmonetary).

Yet, under former President Trump, the Department radically curtailed these protections and, correspondingly, impaired access to critical services by communities who need them the most. As the Proposed Rule notes, the 2020 Rule caused significant confusion and distress by undoing key components of the healthcare nondiscrimination provisions, leaving millions of patients at risk of being denied of care. The COVID-19 pandemic has further strained our healthcare infrastructure and exposed the urgent need for meaningful engagement around health disparities and accessibility. The Proposed Rule comes not a moment too soon.

II. The Proposed Rule Clarifies the Definition of "Sex" to Include Sexual Orientation, Gender Identity, and Pregnancy Status

[1] Pub. L. No. 111-148, 124 Stat. 119–1025 (2010).
[2] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, New Report Details Impact of the Affordable Care Act (Dec. 13, 2016), https://www.hhs.gov/about/news/2016/12/13/new-report-details-impact-affordable- careact.html (available at http://wayback.archive-it.org/3926/20170127135924/https://www.hhs.gov/about/news/2016/12/13/new-report-details-impact-affordable-care-act.html).
[3] Kelsey Avery, Kenneth Finegold and Amelia Whitman, *Affordable Care Act Has Led to Historic, Widespread Increase in Health Insurance Coverage*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ASPE ISSUE BRIEF, (Sep. 29, 2016) https://aspe.hhs.gov/system/files/pdf/207946/ACAHistoricIncrease Coverage.pdf.

Across religious traditions, we honor the common tenet that every person has inherent dignity and worth. And wherever we call home, we share the desire to be treated with respect within the public sphere – including when we seek medical care. Rooted in our commitment to ensure that every person receives equal treatment under the law, Interfaith Alliance commends the Department for articulating a clear and expansive explanation of discrimination on the basis of sex.

We welcome the explicit recognition that Sec. 1557's prohibition on sex discrimination includes discrimination on the basis of sex stereotypes, sexual orientation, gender identity and sex characteristics, including intersex traits. This follows settled federal law, including *Price Waterhouse v. Hopkins* and *Bostock v. Clayton County*, and it is critical the final rule consistently includes these bases as discrimination in healthcare has led to large disparities in insurance coverage and health outcomes for the LGBTQ+ community. While the terms "gender identity" and "transgender status" are often used interchangeably, there have been instances in which those seeking to permit discrimination against transgender people have justified it by pressing distinctions between the two concepts. Therefore, explicit language is needed to prevent this discrimination and consistency throughout the final rule is important. We therefore recommend also including "transgender status" in § 92.206(b)(1), (b)(2) and (b)(4), and in §92.207(b)(3).

Furthermore, access to comprehensive reproductive healthcare – including abortion – depends on robust nondiscrimination protections for patients across the country. Due to a coordinated effort by anti-abortion policymakers to restrict access to abortion care and coverage, many were not able to access abortion care prior to the *Dobbs* decision. In the fallout of the *Dobbs* decision, individuals, especially people of color, people with low incomes, immigrants, young people, people with disabilities, and LGBTQ+ individuals are facing numerous logistical and legal barriers to accessing care with an increased threat of arrest and prosecution as states seek to criminalize abortion care.

The consequences of the *Dobbs* decision will fall especially heavily on those who experience intersectional discrimination, such as transgender men who must navigate compounded stigma when seeking abortion care. In the wake of *Dobbs*, it is critical that abortion care is clearly and consistently included with "pregnancy or related conditions" throughout the final rule. Thus, we encourage you to strengthen your approach to defining sex discrimination related to pregnancy or related conditions at § 92.101(a)(2) and throughout the regulatory text. Given the pervasive nature of discrimination related to abortion, particularly post-*Dobbs*, we urge the Department to specifically include termination of pregnancy in this definition.

III. The Proposed Rule Protects Religious Freedom by Establishing a Clear Eligibility Standard, Provider Application Process, and Beneficiary Notifications

As the Proposed Rule makes clear, the very purpose of Sec. 1557 is to address discrimination that undermines patients' civil rights and their wellbeing. Yet, as Interfaith Alliance wrote in our comments on the 2020 Proposed Rule, RIN 0945-AA11, changes made by the past administration "unconstitutionally interfere with the rights of individuals to make healthcare decisions consistent with their own faith, not that of their doctor or insurance provider. And, for many patients, this rule would prevent them from even getting through the door."

We are heartened that the Department shares the view that "the 2020 Rule creates substantial obstacles to the Department's ability to address discrimination across the health programs and activities it financially supports or administers, thereby undermining the statutory purpose of Section 1557 and hindering the Department's mission of pursuing health equity and protecting public health." By requiring a substantive application process for entities to seek a religious exemption and offering meaningful notice to beneficiaries of their rights, including any approved exemption, the Proposed Rule can establish necessary safeguards to protect the religious freedom rights of all involved in healthcare provision.

a. Religious Exemptions (§ 92.302)

Discrimination or other violations of an individual's civil rights should not be permissible based on religious or conscience exemptions.[4] Religious exemptions have been used to discriminate against individuals seeking sexual and reproductive health care, LGBTQ+ competent care, and end of life care. These exemptions also actively exacerbate health disparities while undercutting patients' freedom to access care consistent with their own religious or moral beliefs.

Under the Religious Freedom Restoration Act (RFRA), if a regulation places a substantial burden on religious exercise the government must prove they have a compelling interest and are using the least restrictive means possible. To adhere to further the stated goals of Sec. 1557, the Office for Civil Right's review process for exemptions must address this compelling interest in each case-by-case analysis. Determinations must clearly explain how any exemption granted does not further discrimination and any exemption denied would have undermined the Section's goals. Additionally, determinations of discrimination should not be unduly delayed as patients who experience health care discrimination are often dealing with increased negative health outcomes or are forced to forgo care entirely.

Patients refused care because of the religious or moral beliefs of providers or the asserted "beliefs" of hospitals and clinics may suffer devastating health consequences.[5] These consequences extend far beyond those services most associated with reproduction or gender identity that providers may believe they are allowed to deny to individuals under rules such as the Proposed Rule. For example, nearly 60% of women use contraception to help treat several medical conditions specific to women, not necessarily for contraceptive purposes.[6]

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[4] *Cf. Miller v. Davis*, 123 F. Supp. 3d 924, 941 (E.D. Ky. 2015) (finding it unlikely that clerk refusing to issue marriage licenses to same-sex couples would succeed in establishing a violation of her constitutional rights if required to do so, and instead that allowing her to refuse to issue such licenses would likely violate others' constitutional rights); *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719,1727 (2018) ("Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

[5] For documented instances where religious health care providers denied care to patients on the basis of religious beliefs, *see* Compl. 2, *ACLU of Mich. v. Trinity Health Corp*., 2016 U.S. Dist. LEXIS 30690 (E.D. Mich. Mar. 10, 2016); Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUBLIC HEALTH 1774 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458/; National Women's Law Center, *Refusals to Provide Health Care Threaten the Health and Lives of Patients Nationwide*, https://nwlc.org/resources/refusals-to-provide-health-care-threaten-the-health-and-lives-of-patients- nationwide/ (last visited Oct. 20, 2017).

[6] Jones, R.K. (2011). Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills. Retrieved from http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf. Over 99% of sexually-active women using at least one method of contraception at some point during their lifetime. Guttmacher Institute, *Contraceptive Use in the United States,* (September 2016) https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

Transition and other gender identity-related care are likewise vital to the health of a historically disadvantaged group. The Section 1557 Final Rule relied on research demonstrating the barriers confronted by LGBTQ+ individuals, including refusal from medical treatment, lack of protection from gender identity discrimination, and challenges in obtaining health insurance coverage.[7]

One such survey, cited by the Section 1557 Final Rule, found that a quarter of transgender individuals reported being subject to harassment in medical settings.[8] In fact, "the data show that health care providers most often discriminate against transgender people *simply for being who they are* –not based on the care they need."[9] HHS received "many comments expressing anecdotal evidence of these statistics."[10] Additional research confirms the pervasiveness of these barriers. Eight percent of lesbian, gay, bisexual, and queer people and twenty-nine percent of transgender people reported that a doctor or other healthcare provider had refused to see them because of their actual or perceived sexual orientation in the year before the survey.[11]

In another recent study, nearly one in five LGBTQ+ people, including thirty-one percent of transgender people, said that it would be very difficult or impossible to get the healthcare they need at another hospital if they were turned away.[12] That rate was substantially higher for LGBTQ+ people living in non-metropolitan areas, with forty-one percent reporting that it would be very difficult or impossible to find an alternative provider.[13] In the Proposed Rule, HHS provides no reasoned explanation for disregarding these factual underpinnings of the previous policy, nor do they provide any facts, studies, or data to refute the findings in the Section 1557 Final Rule.

These concerns are not hypothetical: the Center for American Progress documented a case where a transgender man was denied insurance coverage for genetic testing for breast cancer—*even where the testing was recommended by the patient's doctor*.[14] HIV-positive individuals have also been denied care—even a simple flu shot.[15] These types of circumstances have resulted in transgender individuals avoiding seeking care altogether, for fear of discrimination.[16]

In a profession guided by the directive to "do no harm," authorizing or permitting discrimination against women and LGBTQ+ individuals would have precisely that effect. A clear and timely process for entities

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[7] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,460 (codified at 45 C.F.R. pt 92).
[8] *Id.*
[9] Sharita Gruberg & Frank J. Bewkes, CENTER FOR AMERICAN PROGRESS, "The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial" (Mar. 7, 2018), https://cdn.americanprogress.org/content/uploads/2018/03/06122027/ACAnondiscrimination-brief2.pdf (emphasis added).
[10] *Id.*
[11] *See* Jaime M. Grant et al., *Injustice at Every Turn: a Report of the National Transgender Discrimination Survey*, NATIONAL GAY AND LESBIAN TASK FORCE & NATIONAL CTR. FOR TRANSGENDER EQUALITY (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.
[12] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care,* 2016, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq- people-accessing-health-care.
[13] *Id.*
[14] Gruberg & Bewkes, *supra* n.18.
[15] *Id.* at 6.
[16] *Id.* at 7.

seeking a religious exemption from Sec. 1557 nondiscrimination requirements will limit the harm to individuals' financial, physical, and overall wellbeing in conjunction with clear notice of patients' rights.

b. Patient Notices of Nondiscrimination (§ 92.10)

We are often at our most vulnerable when we seek medical assistance. Even for patients with deep knowledge of the healthcare system, their familiarity with nondiscrimination protections may be challenging to bring to bear in the midst of a crisis. For many more, the rights outlined in Sec. 1557 may be entirely new. We therefore strongly support the Department's reintroduction of a notice of nondiscrimination rescinded in the 2020 Rule. When this provision was removed in prior rulemaking, many individuals never received information about their rights; did not know how to access interpreters, auxiliary aids and services; and did not know how to file a complaint or a grievance.

In addition to the current requirements, we urge the Department to clearly outline a notice requirement for any entity receiving a religious exemption under proposed section 92.302. This notice should include the existence and scope of the exemption to ensure patients can make informed decisions about how and where they seek care. Without this information, a required nondiscrimination notice would be misleading if an entity that states it does not discriminate *does* do so in certain circumstances with the Department's authorization.

IV. Conclusion

As a national advocacy organization committed to advancing true religious freedom for all, Interfaith Alliance commends the Department for restoring essential protections to Sec. 1557 of the Affordable Care Act under the Proposed Rule. By clarifying key definitions and requiring beneficiary notification of the existence and extent of an entities' approved religious exemptions, the Proposed Rule will further the stated goals of the section and facilitate individuals' ability to access care consistent with their own beliefs and needs.