COMMITTEE ON
LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS

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Secretary Sylvia Mathews Burwell
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Notice of Proposed Rulemaking on Section 1557 of the Affordable Care Act

Dear Secretary Burwell:

The Lesbian, Gay, Bisexual, and Transgender Rights Committee of the New York City Bar Association appreciates the opportunity to submit comments in response to the Notice of Proposed Rulemaking ("NPRM") on Nondiscrimination in Health Programs and Activities under Section 1557 of the Affordable Care Act (the "ACA"). The New York City Bar Association is a voluntary association of lawyers and law students with over 24,000 members. The NYC Bar Association's Committee on Lesbian, Gay, Bisexual and Transgender Rights addresses legal and policy issues as well as employment rules and procedures in legal institutions and in the court system affecting lesbians, gay men, bisexuals and transgender individuals. The Committee is comprised of a diverse group of attorneys from private practice, the corporate sector, public interest, government and academia.

The LGBT Rights Committee offers comments on the questions raised in the NPRM as they relate to ensuring that transgender and gender non-conforming people are not discriminated against in health programs and activities covered by the ACA. Specifically, the Committee supports the adoption of the proposed regulations defining "sex" to include gender identity, ensuring transgender people are not barred from treatments that are traditionally sex-specific, and prohibiting categorical exclusions of treatments related to gender transition. The Committee also opposes creating any religious exemptions in Section 1557 with respect to the requirements of the proposed rule relating to sex discrimination.

I. The Committee Applauds and Urges Adoption of the Proposed Regulations Regarding Equal Access to Health Care for Transgender People

The LGBT Rights Committee supports the critical guidance in the NPRM related to transgender health care. The proposed definition of sex and regulations regarding transgender care will improve access to health care and health outcomes for transgender people.

Transgender people face formidable barriers to receiving adequate health care. These include discrimination in the form of: a) bias-based treatment and denial of care unrelated to gender transition; b) refusal of care typically deemed sex-specific; and c) refusals of transition-related care.[1] As a result, transgender people endure the physical and financial harms of forgoing medically necessary care or paying for it out of pocket. Furthermore, roughly a third of transgender people have postponed necessary care due to past discrimination based on transgender status.[2] The regulations as proposed have the potential to alleviate all of these problems.

a) Definition of Sex

The proposed rule defines "discrimination on the basis of sex" to include discrimination on the basis of sex stereotyping and gender identity. Proposed 45 C.F.R. 92.4. The Committee supports this definition. The inclusion of gender identity in the definition of sex is consistent with a growing body of legal precedent.[3] It also reflects the fact that gender identity is a core component of sex.[4] Transgender people report verbal abuse, degradation, and even physical assault by health care providers.[5] They are also refused care due to bias at unacceptable rates, even life-saving care in emergency situations.[6] By expressly placing gender identity and sex stereotyping within the ambit of sex discrimination, the proposed rule clarifies that these repugnant practices are also unlawful.

It is important to note that, as a practical matter, a covered entity may not know a transgender person's gender identity, but instead act based on a person's gender expression, body, or other visible gendered attributes, which may or may not conform to sex stereotypes. Therefore,

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[1] Pfizer, Jennifer C. et al., Letter from Lambda Legal to US Dep't of Health and Human Services Regarding Request For Information Regarding Non-Discrimination In Certain Health Programs and Activities (Sept. 30, 2013), available at http://www.lambdalegal.org/sites/default/files/ltr_hhs_20130930_discrimination-in-health-services.pdf.

[2] Jaime M. Grant, Ph.D., et. al., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, 76 (2011) (hereinafter "Grant, NTDS"), http://transequality.org/PDFs/NTDS Report.pdf (twenty-eight percent of respondents reported delaying care for illness or injury and thirty-three percent reported delaying preventative care due to past discrimination).

[3] See e.g. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C., 2008); *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012).

[4] See e.g., Levasseur, M. Dru, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is the Key to Transgender Rights*, 39 Vt. Law. Rev. 943 (2015); Brief for Me. Chapter of the Am. Acad. of Pediatrics et al. as Amici Curiae Supporting Appellants at Doe v. Clenchy, 2014 ME 11, 86 A.3d 600 (No. PEN-12-582), 2013 WL 8349676; Greenberg, Julie A., THE ROAD LESS TRAVELED: AN INTERDISCIPLINARY AND CROSS-CULTURAL ANALYSIS OF BINARY SEX CATEGORIES, IN TRANSGENDER RIGHTS 51 (Paisley Currah, Richard M Juang, Shannon Minter eds., Univ. of Minnesota Press 2006).

[5] Grant, NTDS, *supra*, note 1 at 72; LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV (2010) (hereinafter "Lambda Legal"), http://data.lambdalegal.org/publications/downloads/whcic-report when-health-care-isnt-caring.pdf.

[6] Grant, NTDS, *supra*, note 1 at 72 (19% of respondents reported having been refused care by a doctor or hospital due to bias); Lambda Legal, *supra*, note 3 (nearly 27% of transgender and gender non-conforming respondents reported having been refused care); Pfizer, Jennifer C. et al., *supra* note 1 (describing instances of transgender people being refused care upon Emergency Medical Technicians learning they are transgender).

inclusion of both gender identity and sex stereotypes in the NPRM is critical. For similar reasons, the final rule would be improved by defining sex to explicitly include gender expression and the status of being transgender.

The Committee also supports an interpretation of the definition of sex discrimination that includes sexual orientation. Sexual orientation is inextricably linked to sex because a person's sexual orientation turns on both the person's sex and the sex of the person to whom they are physically or emotionally attracted. Discrimination on the basis of sexual orientation can manifest as sex discrimination in a number of ways, including: when a person is treated differently or less favorably because of their sex (such as when a lesbian employee is treated differently from a male heterosexual employee for displaying a photo of a female spouse); for associating with (including dating or marrying) a person of the same sex; and for failing to conform to gender-based stereotypes, such as the expectation that individuals should be attracted only to a person of the opposite sex. The U.S. Equal Employment Opportunity Commission (EEOC) recently issued a decision explaining how these manifestations of discrimination are prohibited under federal anti-discrimination law because they are inextricably linked to sex.[7]

The EEOC's decision is supported by a growing number of federal court decisions that have similarly recognized that gay or lesbian employees can state a sufficient claim of sex discrimination when they allege that an adverse employment decision involved gender stereotyping, when an employee is treated differently based on the sex of the employee's partner or spouse, or when an employer takes the employee's sex into account when making an employment decision.[8] To protect lesbian, gay and bisexual people in gaining access to health insurance coverage and appropriate health care, the same standards should apply to the definition of sex discrimination under Section 1557.

b) Sex-specific Treatment

The proposed rule explicitly requires covered entities to treat individuals consistent with their gender identity, while also prohibiting the denial of health services usually limited to one gender because the individual's sex assigned at birth or gender otherwise recorded in a medical record or insurance plan is different from the one to which health services are ordinarily or exclusively available. Proposed 45 C.F.R. 92.206, 92.207(b)(3). The Committee supports this part of the regulation. Treating a person in a manner consistent with her gender identity is a requisite part of providing adequate and non-discriminatory care for all people, particularly transgender people.[9] Moreover, a transgender person may require care typically indicated for someone with her

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[7] *Complainant v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (July 15, 2015).

[8] *See, e.g., Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Deneffe v. SkyWest, Inc.*, 2015 WL 2265373 (D. Colo. May 11, 2015); *Boutillier v. Hartford Public Schools*, 2014 WL 4794527 (D. Conn. Sept. 25, 2014); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002).

[9] Coleman & Bockting, et al., *Standards of Care for the Health of Transgender, Transsexual and Gendernonconforming People*, version 7, World Professional Organization of Transgender Health (WPATH) (2012) available through www.wpath.org. (Asserting that living and in turn being recognized as one's gender is a core part of treatment for Gender Dysphoria).

gender identity, sex assigned at birth, or both. For example, a transgender woman may need a mammogram and a prostate cancer screening.

Historically, transgender people have been routinely denied care, or denied insurance coverage for such sex-specific care. The tragic example of Robert Eads, a transgender man who died because multiple health care providers refused to treat him for ovarian cancer, illustrates that such denials can be a matter of life or death.[10] The NPRM clarifies that covered entities have a legal obligation both to respect transgender people's gender identities and to end discriminatory health care refusals.

c) Coverage for Transgender Care

The proposed rule explicitly recognizes that a categorical exclusion of coverage for all health services related to gender transition is unlawful. 25 C.F.R. 92.207(b)(4). The Committee supports this element of the regulation. Categorical exclusions are blatant sex discrimination that cause immense physical and financial harm to transgender people. They make the same medically-necessary treatments that are routinely available to non-transgender people unavailable to transgender people simply because they are transgender. It is well established that hormone replacement therapy and sex-affirming surgeries are medically necessary for many transgender people.[11] Leading health organizations, including the American Medical Association, the American Psychiatric Association, and the American College of Physicians, affirm the necessity of and support insurance coverage for transgender care.[12] An increasing number of states including New York prohibit categorical exclusions.[13] Lastly, research by the California Department of Insurance found that the benefits of eliminating exclusions of transgender care in the state would have an "immaterial" impact on health insurance costs and "may produce longer term cost savings and health benefits for transgender people."[14] The study

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[10] 6 SOUTHERN COMFORT (Kate Davis, director and producer, 2001).

[11] Whittle & Bockting et al., WPATH Clarification on the Medical Necessity of Treatment, Sex Reassignment and Insurance Coverage in U.S.A., WPATH (2008) available at http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf.

[12] Am. Med. Ass'n, Resolution 122: Removing Financial Barriers To Care For Transgender Patients (June 2008), http://www.ama-assn.org/resources/doc/hod/a08resolutions.pdf ("Resolved, That our American Medical Association support public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician."); American Psychiatric Association, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals*, (2012) available at: http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06d_APA_ps2012_Transgen_Disc.pdf; Daniel & Butkus et al., *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians,* Annals of Internal Medicine, Vol. 63 No. 2 (2015) available at http://annals.org/article.aspx?articleid=2292051. For a complete list of health organizations that support insurance coverage of transgender care see *Background Information on Trans Health Care Discrimination and Coverage for Transition-Related Care,* National Center For Transgender Equality (2015) available at: http://www.transequality.org/sites/default/files/docs/HHS_1557Rule_Backgrounder.pdf.

[13] *See Insurance Circular Letter No. 7 2014: Health Insurance Coverage for the Treatment of Gender Dysphoria*, New York State Department of Financial Services (2014), *available at*: http://www.dfs.ny.gov/insurance/circltr/2014/cl2014_07.pdf.

[14] Zaker-Shahrak, & Chio et al., Economic Impact Assessment: Gender Non-Discrimination in Health Insurance, California Department of Insurance (2012) available at: http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

found that the predicted benefits of covering transgender care, "included reduced suicide risk, lowered rates of substance abuse, improved mental-health outcomes, and increased adherence to HIV-treatment regimens for many transgender patients."[15] Proposed 25 C.F.R. 92.207(b) will make it possible for many more transgender people to access vital health care.

Recommendation. Proposed 25 C.F.R. 92.207(b)(4) prohibits denials or limitation in coverage for gender transition "if such denial or limitation results in discrimination against a transgender individual." The Committee supports the language of the regulation itself. However, the Committee is concerned that the language in the NPRM explaining how 25 C.F.R. 92.207(b)(5) should be interpreted is too narrow. See NPRM, 80 Fed. Reg. 173 at 7354190. The commentary states that the inquiry into whether denial of care was discriminatory will begin by looking at whether the coverage is available when not related to a gender transition. The Committee agrees that covering care except when related to gender transition is compelling evidence of sex discrimination. Even so, this formulation is under inclusive. Defining what may be covered only with reference to what may be covered for non-transgender people perpetuates discrimination. Procedures that may be considered cosmetic for non-transgender people may be medically necessary for many transgender people. A covered entity's decision to refuse or limit transition related care for a transgender person could be because of sex, regardless of whether the care is covered when unrelated to gender transition. Therefore, the Committee urges HHS to clarify upon promulgation of the final rule that it will base the agency's inquiry in whether sex or transgender status was a motivating factor in the denial of care.

II. The Committee Opposes the Inclusion of a Religious Exemption to Section 1557 of the Affordable Care Act

The NPRM specifically requests comments on whether Section 1557 should include any specific religious exemptions for covered entities with respect to the proposed regulations relating to sex discrimination. While the Committee firmly believes in protecting religious liberty as it is embodied in the First Amendment of the United States Constitution, religious freedom cannot and should not be used to discriminate against or harm others. For this reason, we oppose the inclusion of a religious exemption in the Section 1557 regulations.

As an initial matter, the preamble to the proposed rule points out that Section 1557 includes only one exception: it applies "[e]xcept as otherwise provided" in Title I of the ACA. There is no support in the language of the statute that permits any other limitations or exceptions regarding the application of Section 1557. For this reason alone, a religious exemption should not be included in the regulations.

The text of Section 1557 does not authorize the creation of a religious exemption and no law or policy reasons justify singling out sex as the sole basis of discrimination for a religious exemption. Any such exemption would undermine the important and necessary protections against discrimination the ACA is intended to provide and has the potential to harm individuals, including by allowing denial of services critical to the health of lesbian, gay, bisexual and transgender individuals.

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[15] Baker, Kellan & Andrew Cray, Why Gender Identity Non-Discrimination in Insurance Makes Sense, Center For American Progress, (2013) available at: https://www.americanprogress.org/issues/lgbt/report/2013/05/02/62214/why-gender-identity-nondiscrimination-in-insurance-makes-sense/.

Moreover, it is the Committee's position that the proposed regulations prohibiting sex discrimination do not infringe on the constitutional right to religious liberty. It is well-established constitutional law that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[16] These regulations apply to health care provided by secular and religiously affiliated institutions alike on a neutral basis.

Even when applying the statutory test set forth in the Religious Freedom Restoration Act of 1993 ("RFRA"), which provides greater protections for religious liberty than the First Amendment, there are clearly compelling grounds for these regulations that render any religious exemption both unnecessary and harmful. To be deemed invalid under RFRA, a court first examines whether the law places a substantial burden on religious exercise and, if so, whether the law furthers a compelling interest using the least restrictive means. The government undoubtedly has a compelling interest in ensuring that vital health care services are broadly available and, in particular, accessible to those people – such as transgender or gender non-conforming people – who both historically and currently face huge barriers to medical services.[17] In the face of such pervasive discrimination, there is a long history of courts rejecting challenges to anti-discrimination laws in the name of religion.[18]

Indeed, this principle was affirmed in *Burwell v. Hobby Lobby Stores, Inc.*, in which the Supreme Court held that the ACA contraceptive coverage provision violated RFRA as applied to for-profit closely-held corporations that have religious objections to specific types of contraceptives.[19] The Court's decision is narrowly-tailored to the facts of the case and does not provide a shield for discrimination cloaked as religious practice. For example, the majority opinion explicitly rejects the possibility that its decision could be interpreted to permit discrimination in hiring, for instance, under the shield of religion. It recognizes that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[20] The same principle applies to Section 1557, which is narrowly tailored to end longstanding discrimination on the basis of sex in the provision of healthcare.

For these reasons, no religious exemptions should be included in the final regulations.

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[16] *Emp't Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

[17] *See* Grant, NTDS.

[18] *Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983) (finding that the Government has a fundamental, overriding interest in eradicating racial discrimination in education); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (rejecting claim that Baptist Church that equal pay laws violated religious liberty); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (application of Title VII and Equal Pay Act to prohibit discriminatory health insurance practice by Christian school did not violate free exercise clause); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right to fire teacher for becoming pregnant outside of marriage).

[19] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

[20] *Id.* at 2783.