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

RE: RIN 0991-AC16, Revision of certain regulatory provisions of the Department of Health and Human Services (HHS), Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards

Dear Secretary Azar:

On behalf of the physician and medical student members of the American Medical Association (AMA), I am writing in response to the Notice of Proposed Rulemaking (NPRM) to re-promulgate or revise certain regulatory provisions of the HHS Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards (Award Terms). The HHS grants impacted by this NPRM include $500 billion in funding for community health centers, mental health and opioid treatment programs, youth homelessness programs, care for unaccompanied migrant children, HIV prevention groups, and adoption agencies, among others.[1] The Award Terms "set standard requirements for financial management of Federal awards across the entire federal government" and were updated in 2016 to codify a prohibition in the provision of services of discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity.[2]

In response to this proposal, HHS received 12 comments, all of which were "strongly supportive of the codification of the nondiscrimination provisions" in the Award Terms.[3] HHS now seeks to revise these nondiscrimination provisions to bar discrimination to the extent "prohibited by federal statute." **We oppose empowering grantees to discriminate against lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals on the basis of sexual orientation and gender identity (SOGI). This is another attempt by the administration to dismantle protections for LGBTQ individuals and dramatically impact the health and well-being of hundreds of thousands of people across the country.** For example, adoption agencies will be able to refuse to place foster children with LGBTQ couples (regardless of marriage status); HIV prevention or opioid treatment programs may refuse to see LGBTQ (or those perceived as LGBTQ) patients; and early childhood education programs, such as Head Start, would be able to exclude LGBTQ children (or those perceived as LGBTQ) from participating.

[1] The Wall Street Journal, *Trump Administration Stops Enforcing Some Nondiscrimination Provisions in Federal Grants* (Nov. 1, 2019), available at https://www.wsj.com/articles/trump-administration-stops-enforcing-some-nondiscrimination-provisions-in-federal-grants-11572632036.
[2] 81 Fed. Reg. 75270, 45271 (July 13, 2016); *see also* 45 CFR 75.300(c).
[3] 81 Fed. Reg. 89393 (Dec. 12, 2016).

Similar to a recent proposal from the HHS Office for Civil Rights (OCR) to eliminate a host of anti-discrimination protections, including those based on SOGI, this NPRM again attempts to remove civil rights protections and legitimize government-funded unequal treatment of individuals. We reiterate our previous comments in response to OCR: this proposal deems certain classes of people less worthy of care, compassion, access, and good health than others. Such policy should not be permitted by the U.S. government, let alone proposed by it.

HHS states that it has received several complaints, requests for exceptions, and lawsuits concerning the ability of faith-based programs to provide services and claims it is making this change to "make compliance more predictable and simpler for federal grant recipients." We do not agree, however, that there is compelling evidence to support this approach. The existence of **four** regulatory comments submitted in response to a Request for Information, an injunction in a federal district court for one subgrantee, and one granted waiver request (all cited by HHS in the NPRM as support for its position) do not indicate that an entire non-discrimination framework is unpredictable or unwarranted. Additionally, there are existing mechanisms to address potential conflicts of religion with civil rights, which HHS mentions in the NPRM: the courts, the Religious Freedom Restoration Act (RFRA), and HHS-issued waivers. HHS claims that because some grantees would rather not provide services at all than provide services that conflict with their faith, the agency should remove protections for LGBTQ individuals. **HHS has neither sufficiently justified the need to make such a major shift in policy that would only serve to harm LGBTQ children and families in need of health care, education, and housing, nor has HHS exhausted all alternative, less drastic approaches under existing laws and regulations.**

As for HHS' claim that removing this provision will increase predictability and stability, we again disagree. HHS noted in its Proposed Rule from July 2016 that the non-discrimination provision codified for all HHS service grants what is already applicable for all HHS service contracts, as required by the HHS Acquisition Regulation (HHSAR) 352.237-74, which makes explicit HHS' non-discrimination policy when obligating appropriations for solicitations, contracts, and orders that deliver service under HHS's programs directly to the public.[4] HHS sought to explicitly ensure that the same provision applied equally to grants to increase consistency, yet by now seeking to remove the provision from the HHS grant Award Terms, HHS will reduce consistency.[5]

Moreover, there are decades of case law recognizing anti-discrimination protections based on gender identity and sex stereotypes that may now be viewed as in conflict with HHS' proposed provision, leading to confusion about applicable law. The AMA strongly believes that discrimination on the basis of sex includes discrimination on the basis of gender identity and sexual orientation. Courts and many federal agencies agree.[6] Since 2012, OCR has interpreted section 1557 of the Affordable Care Act's sex discrimination prohibition to extend to claims of discrimination based on gender identity or sex stereotypes and accepted such complaints for investigation.[7] Additionally, the U.S. Department of Justice, U.S. Department of Labor, U.S. Department of Education, and the U.S. Department of Housing and

[4] https://www.hhs.gov/grants/contracts/contract-policies-regulations/hhsar/part-352-solicitation-provisions-contract-clauses/index.html#352.237-74.

[5] 81 Fed. Reg. 75270, 45271 (July 13, 2016).

[6] *See, e.g., Rumble v. Fairview Heath Servs.*, Civ. No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Section 1557) (order denying motion to dismiss); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.), cert. denied, 546 U.S. 1003 (2005)(Title VII); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (Title VII); *Schroer v. Billington*, 577 F.Supp.2d 293, 304 (D.D.C. 2008) (Title VII).

[7] As noted earlier in this letter, OCR is currently involved in rulemaking in an effort to remove this protection as part of the administration's attempts to eliminate protections for LGBTQ individuals.

Urban Development, have previously interpreted sex discrimination to include discrimination on the basis of gender identity. The NPRM disregards these interpretations and even disregards the Supreme Court's holding in *Price Waterhouse v. Hopkins* (1989), which states that discrimination based on stereotypical notions of appropriate behavior, appearance, or mannerisms for each gender constitutes sex discrimination.[8] Given HHS' proposal in 45 CFR 75.300(d) that HHS follow all applicable Supreme Court decisions in administering its award programs, HHS should specify in its final rule that discrimination based on stereotypical notions of appropriate behavior, appearance, or mannerisms for each gender is prohibited under anti-sex discrimination policies.

Federal protections against SOGI discrimination are critical. Transgender, nonbinary, 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, and 23 percent did not seek health care when they needed it due to fear of being disrespected or mistreated as a transgender person.[9] These rates tend to be higher for non-white respondents and individuals with disabilities.[10] An early 2017 Freedom of Information Act (FOIA) request to HHS for complaints of discrimination in health care found that the most common complaints involved individuals being denied care or insurance coverage because of their gender identity or transgender status.[11] Examples include a transgender woman being denied a mammogram, a transgender man being refused a screening for a urinary tract infection, an insurer not covering reproductive health care because of an individual's gender identity, and an insurer not covering genetic testing for breast cancer for a transgender man despite the testing being recommended by the complainant's physician.[12]

Respect for the diversity of individuals is a fundamental value of the medical profession. There is no basis for the denial to any human being of equal rights or privileges because of an individual's sex, sexual orientation, gender, gender identity or transgender status, race, religion, disability, ethnic origin, national origin, or age. **Based on longstanding policy, the AMA strongly opposes any discrimination based on an individual's sex, sexual orientation, gender identity, race, religion, disability, ethnic origin, national origin or age and any other such policies.** As advocates for our patients, we strongly support patients' access to comprehensive social and health care services. Physicians are expected to provide care in emergencies, respect basic civil liberties, and not discriminate against individuals in deciding whether to enter into a professional relationship with a new patient. We expect the same for the rest of the health care system and for the federal government's social welfare and health care activities and programs. **In sum, the AMA strongly opposes the proposed modification to the SOGI protections in 45 CFR 75.300(c) and, accordingly, we urge HHS to maintain the current regulatory language.**

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[8] 490 U.S. 228 (1989).

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

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

[11] Sharita Gruberg and Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, Center for American Progress (March 7, 2018), available at https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/.

[12] Sharita Gruberg and Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, Center for American Progress (March 7, 2018), available at https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/.

Thank you again for the opportunity to submit comments on the proposed rule. Should you have any questions or wish to discuss these issues, please contact Laura Hoffman, Assistant Director of Federal Affairs, at laura.hoffman@ama-assn.org or 202-789-7414.

Sincerely,

James L. Madara, MD