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October 3, 2022

The Honorable Xavier Becerra  
Secretary, Department of Health and Human  
Services  
200 Independence Ave SW  
Washington, DC 20201

**Re: Section 1557, Nondiscrimination in Health Programs and Activities; Notice  
of proposed rulemaking (HHS-OS-2022-0012)**

Dear Secretary Becerra:

The American Kidney Fund appreciates the opportunity to provide comments on the proposed rule on Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities.

The American Kidney Fund (AKF) fights kidney disease on all fronts as the nation's leading kidney nonprofit. AKF works on behalf of the 37 million Americans living with kidney disease, and the millions more at risk, with an unmatched scope of programs that support people wherever they are in their fight against kidney disease—from prevention through transplant. Through programs of prevention, early detection, financial support, disease management, clinical research, innovation and advocacy, no kidney organization impacts more lives than AKF. AKF is one of the nation's top-rated nonprofits, investing 97 cents of every donated dollar in programs, and holds the highest 4-Star rating from Charity Navigator and the Platinum Seal of Transparency from GuideStar.

AKF supports many of the provisions in the proposed rule, and we support the overall approach proposed by the Department of Health and Human Services (HHS) that would reinstate many of the policies from the 2016 rule and reverse the policies in the 2020 rule that significantly weakened the nondiscrimination protections of Section 1557. We agree with the Department that reinstating the 2016 regulatory protections from discrimination are consistent with the statutory text of Section 1557 and congressional intent. We also appreciate the proposals that would add additional nondiscrimination protections to further ensure access to coverage and care for millions of Americans.

## **General Provisions – Application**

AKF supports the proposal to apply Section 1557 to every health program or activity, any part of which receives federal financial assistance directly or indirectly from the Department; every health program or activity administered by the Department; and every program or activity administered by a Title I entity. We support the proposed definition of federal financial assistance to include grants, loans, and other types of assistance from the federal government, including credits, subsidies, and contracts of insurance, in accordance with the statutory language of Section 1557. We also support the Department’s clarification that examples of HHS programs that provide federal financial assistance subject to Section 1557 include, but are not limited to, Medicaid and CHIP, Medicare Part A, Medicare Part B, Medicare Advantage, Medicare Part D, and HHS grant programs.

This proposed application is more consistent with the statute and the 2016 rule, and we urge the Department to finalize it. The 2020 rule narrowly interpreted Section 1557 to only cover programs and activities administered by the Department under Title I of the ACA. We agree with the Department that the reading of the statute in the 2020 rule was unpersuasive, and we commend the Department for this proposed application that will ensure many more Americans will be protected against discrimination in accessing health coverage and care.

## **Nondiscrimination in Health Insurance Coverage and Other Health-Related Coverage**

AKF strongly supports the proposal to prohibit discrimination on the basis of race, color, national origin, sex, age, or disability in the provision or administration of health insurance coverage and other health-related coverage. This would apply to all covered entities that provide or administer health insurance coverage or other health-related coverage that receive federal financial assistance, and the Department in the administration of its health-related programs. The 2020 rule incorrectly concluded that Section 1557 nondiscrimination protections did not generally apply to health insurers. We strongly support the Department’s proposal to reestablish, consistent with the 2016 rule and the statutory language of Section 1557, that covered entities providing or administering health insurance coverage or other health-related coverage are subject to the ACA’s core nondiscrimination provision.

We support the proposed provisions that clarify that a covered entity must not:

- Deny, cancel, limit, or refuse to issue or renew health insurance coverage or other health-related coverage, or deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability.
- Have or implement marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in health insurance coverage or other health-related coverage.

We agree with the Department in its proposal to interpret the terms “benefit design” and “marketing” broadly, and we appreciate the Department stating that benefit design features include, but are not limited to, coverage, exclusions, and limitations of benefits; prescription drug formularies; cost sharing (including copays, coinsurance, and deductibles); utilization management techniques (such as step therapy and prior authorization); medical management standards (including medical necessity standards); provider network design; and reimbursement rates to providers and standards for provider admission to participate in a network.

We recognize the Department notes that network adequacy is regulated by other departmental regulations, and it is outside the scope of Section 1557 to establish uniform or minimum network adequacy standards. However, we appreciate the Department also stating that to ensure compliance with Section 1557, payers must develop their networks in a manner that does not discriminate against enrollees on the basis of race, color, national origin, sex, age, or disability.

There have been recent issues related to network adequacy and benefit designs that AKF is concerned may negatively impact access to coverage options and care for people with kidney disease, particularly people with kidney failure who receive dialysis. These issues could have a disproportionate impact on people from communities of color since they are disproportionately affected by kidney disease. We commend the Department for proposing to reinstate the explicit prohibition on discriminatory benefit designs and marketing practices under Section 1557, and we urge the Department to closely monitor these issues to ensure equitable access to health coverage and needed care.

Additionally, AKF supports the proposal that Section 1557 nondiscrimination provisions apply to all operations of a covered entity that is principally engaged in the provision or administration of health programs or activities, which would also include a health insurance issuer’s excepted benefits and short-term limited duration products. We agree with the Department that because federal financial assistance is fungible, Section 1557, as written in the statute, specifically applies to “any health program or activity, any part of which is receiving federal financial assistance.”

### **Use of Clinical Algorithms in Decision-Making**

AKF agrees with the Department that clinical algorithms, as evidenced by recent studies, may create or contribute to discrimination on the bases protected by Section 1557, and as a result may lead to poorer health outcomes among people from historically marginalized communities. As the Department notes as an example in the preamble, kidney care providers and people living with kidney disease have experienced this issue with the use of a race factor in the estimation of glomerular filtration rate (eGFR).

We support the proposal to state that a covered entity must not discriminate against any individual on the basis of race, color, national origin, sex, age, or disability through the use of clinical algorithms in its decision-making. However, we recommend that for the final rule, the department should adopt a broad definition of clinical algorithms to include any automated

decision-making processes, to better capture the prevalence and variety of automated decision-making systems used by covered entities.

### **Change in Interpretation—Medicare Part B Meets the Definition of Federal Financial Assistance**

AKF fully supports the proposal to treat Medicare Part B funds as federal financial assistance to the providers and suppliers subsidized by those funds; therefore, Section 1557 nondiscrimination requirements would apply to the recipients of those funds. In 2019, 31% of the more than 800,000 people with end-stage renal disease (ESRD) had Medicare fee-for-service as their primary coverage. The proposal to include Medicare Part B funds as federal financial assistance will provide welcome clarification that people with Medicare Part B as their coverage for outpatient and physician services, including the thousands of Americans with ESRD, are protected from discrimination under Section 1557.

Thank you for the opportunity to provide comments on this proposed rule.

Sincerely,



Holly Bode  
Vice President of Government Affairs