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November 9, 2015

Ms. Jocelyn Samuels  
Director, Office for Civil Rights  
U.S. Department of Health and Human Services  
Hubert H. Humphrey Building, Room 509F  
200 Independence Avenue S.W.  
Washington, DC 20201

**ATTN: 1557 NPRM (RIN 0945-AA02)**

Dear Ms. Samuels:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, labor unions, non-profit organizations, and health care providers across the country. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members. NILC submits the following comments in response to the notice of proposed rulemaking (NPRM) concerning § 1557 of the Patient Protection and Affordable Care Act.

We strongly support the proposed rule's nondiscrimination protections in all federally funded, supported and conducted health programs and activities. Discrimination in health coverage and care prevents many individuals from getting the care they need to stay healthy and directly contributes to healthcare disparities in our communities. We strongly support the rule's prohibition on discrimination on the basis of race, color, national origin (including immigration status and language), sex (including sex stereotyping and gender identity), sexual orientation, disability, and age. The goal of these comments is to strengthen the scope and enforcement procedures for § 1557 as it relates to immigrant communities.

**I. Addressing Nondiscrimination Based on National Origin and for Families that Include Immigrants**

Immigrants as a group face unique challenges when accessing health care programs and may require special attention to prevent discrimination from occurring against them. Strong nondiscrimination protections for immigrants under the § 1557 regulations would ensure that immigrants are not disadvantaged as they seek to obtain health care services for themselves

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and their families. The following recommendations focus on the need to protect immigrants from various forms of discrimination that may arise with requests for personal and confidential information, in the availability and access to language services for limited-English proficient individuals, and in the treatment of LGBT immigrants. We also recommend that the proposed regulation clarify that § 1557 permits judicial claims for disparate impact discrimination.

*A. The Importance of the Tri-Agency Guidance Principles in § 1557 Regulations*

It is essential to the effectiveness of § 1557 in addressing health disparities for immigrants and their families that regulations promote the principles of the Tri-Agency-Guidance prohibiting processes and requirements that have the effect of deterring or preventing eligible individuals in mixed-immigration status families from securing access to programs and services. We appreciate that the statute and promulgated regulations have built in protections for confidentiality and limited collection of information into the exchange, Medicaid, and Children’s Health Insurance Program (CHIP), but we believe it is critical that all of these programs be brought under the rubric of §1557 rulemaking to make available to these families the accountability and enforceability mechanisms of the HHS Office for Civil Rights. OCR must have the authority to use civil rights mechanisms to prohibit states from enacting or otherwise enforcing policies or practices that frustrate the ACA’s purpose or its ability to reach eligible applicants.

*B. Clarification of HHS’s Authority Under § 1557 to Enforce Tri-Agency Guidance Principles*

To be effective, HHS should clarify in regulations implementing § 1557 that it has the explicit authority to enforce the statutory and regulatory provisions that are based on the principles articulated in the Tri-Agency Guidance.<sup>1</sup> The Guidance, which limits inquiries regarding the citizenship, immigration status and Social Security numbers of family members not applying for assistance, invokes the federal civil rights laws when it notes, “[t]o the extent that states’ application requirements and processes have the effect of deterring eligible applicants and recipients who live in immigrant families from enjoying equal participation in and access to those benefit programs based on their national origin, states inadvertently may be violating Title VI.” In § 1557, the authority to address disparate, effect-based discrimination resides in the invocation of Title VI and other civil rights statutes.<sup>2</sup>

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<sup>1</sup> Dept. Health and Human Services and Department of Agriculture, Policy Guidelines Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Application for Medicaid, State Children’s Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits.

<sup>2</sup> Dept. of Justice, *Title VI Legal Manual* (2001), available at <http://www.justice.gov/crt/about/cor/coord/vimanual.php#B> (stating that Title VI regulations “may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.” (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 582 (1983) and *Alexander v. Choate*, 469 U.S. 287, 293 (1985))).

The regulations should provide explicit oversight for protecting confidentiality and limiting the inappropriate collection, use, and disclosure of personally identifiable information from non-applicants, such as Social Security numbers or citizenship or immigration status information, that deter ineligible immigrants from applying on behalf of eligible family members.

**RECOMMENDATION:** We recommend amending § 92.101(a)(1) to include the following language:

Except as provided in Title I of the ACA, an individual shall not, on the basis of race, color, national origin, sex, age, or disability, be excluded *or deterred* from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any health program or activity to which this part applies.

**RECOMMENDATION:** We recommend amending § 92.101(b)(1) to include the following language:

Each covered entity must comply with the regulation implementing Title VI, at § 80.3(b)(1) through (6) of this subchapter, *as well as 42 USC 18081(g) and 45 C.F.R. § 155.260(a)(1), § 155.260(a)(2), § 155.305(f)(6), § 155.310(a)(2), and § 435.907(e).*

**RECOMMENDATION:** We recommend amending § 92.209 to include the following language:

A covered entity shall not exclude *or deter* from participation in, deny the benefits of, or otherwise discriminate against an individual or entity in its health programs or activities on the basis of the race, color, national origin, age, disability, or sex of an individual with whom the individual or entity is known or believed to have a relationship or association.

### *C. Collection of Immigration Status Data*

For reasons similar to those that gave rise to the Tri-Agency Guidance, we strongly discourage the collection of immigration status information as part of any collection of demographic information by any entity covered under § 1557 unless doing so is required to determine eligibility for program participation, such as for Medicaid, CHIP and the exchanges. The collection of immigration status information, especially when made mandatory, may deter immigrants and persons in mixed-immigration status families from seeking health-related services, raising civil rights concerns rather than assisting an agency in compliance with § 1557 and civil rights laws.

### *D. Language Access Concerns for Immigrants*

The availability of language services is vitally important to immigrants and their families as they try to access health care services, and we support the rule's specific requirements

to ensure meaningful access for individuals with limited English proficiency. In particular, we support the definition of qualified interpreter, and we suggest including a definition of a qualified translator. Further, we strongly support including specific thresholds for translating written documents to ensure minimum standards exist that would directly aid evaluating compliance and enforcement. We also support requirements regarding taglines but recommend that covered entities include taglines in the top 15 languages in their state/service area rather than the proposal to only include the top 15 languages nationally. In many states, the top 15 languages nationally will not be useful for informing local limited-English proficient communities. Finally, we oppose continuing the exclusion of Medicare Part B providers from coverage under Section 1557.

#### *E. Discrimination on the Basis of Sex and Sexual Orientation*

Immigrants are doubly at risk of facing discrimination when they identify as LGBT. We support the rule's new prohibitions on discrimination on the basis of sex and the definition included. We support the rule's inclusion of sex stereotyping and gender identity in the definition of sex discrimination, and we strongly urge HHS to include sexual orientation as well. Women's access to reproductive health care is a matter of sex equality, and health care refusals (also known as conscience clauses) involving reproductive health care and services constitute impermissible sex discrimination. We also strongly oppose any new exemption that would permit discrimination based on religious views against any person, especially women, people with disabilities, or LGBT people.

#### *F. Enforcement*

We strongly support Section 1557's inclusion of both administrative and judicial remedies for discrimination. In particular, we recommend that the rule better reflect the statutory language by clarifying and strengthening judicial enforcement opportunities and by directly recognizing that Section 1557 permits judicial claims for disparate impact discrimination. Further, as the statutory language of Section 1557 authorized the Secretary of HHS to promulgate regulations, we recommend the proposed rule apply to **all** federally funded, supported and conducted activities and not just those of HHS.

## **II. Incorporation of Other Comments**

#### *Leadership Conference on Civil and Human Rights (LCCR)*

NILC strongly supports the comments and recommendations submitted by the Leadership Conference on Civil and Human Rights. These recommendations address the discrimination concerns of various groups impacted by the ACA and actors implementing the law, beyond immigrants.

#### *National Health Law Program (NHLP)*

NILC strongly supports the recommendations submitted by the National Health Law Program. In particular, NILC supports NHeLP's comments regarding HHS's enforcement authority under § 1557.

*Asian & Pacific Islander American Health Forum (APIAHF)*

NILC strongly supports the recommendations submitted by the Asian & Pacific Islander American Health Forum (APIAHF) related to language access. In particular, we support APIAHF's recommendations on the definition of an individual with limited English proficiency (LEP); the addition of threshold requirements and mandatory minimums for translating written vital documents; and its recommendation that notices and taglines be translated into the top 15 languages as determined by the state.

We appreciate the continued efforts made by HHS to advance nondiscrimination protections for protected classes, including based on national origin. Key to protecting immigrants against discrimination are the principles embodied in the Tri-Agency Guidance and we urge HHS to better promote these principles in its final rule. The proposed rule should be even stronger to better protect all people at risk of discrimination in health coverage or care. There is no excuse for discrimination in health care by entities and programs using federal funds or operated by federal agencies.

Thank you for the opportunity to provide feedback on this proposed rule. Please direct any questions about our comments to Angel Padilla at [padilla@nilc.org](mailto:padilla@nilc.org).

Sincerely,

/s/

Angel Padilla  
Health Policy Analyst  
National Immigration Law Center