



January 27, 2022

BY ELECTRONIC SUBMISSION

U.S. Department of Health and Human Services
Centers for Medicare & Medicaid Services
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Request for Public Comment Concerning Proposed Rule on Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023, File Code CMS-9911-P, RIN 0938-AU65

Dear Sir or Madam:

The Ethics & Religious Liberty Commission (ERLC) of the Southern Baptist Convention (SBC) respectfully submits the following comments regarding our concerns with the proposed rule “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023.”

The ERLC is the public policy and ethics entity for the SBC, which has 15.2 million members in over 46,000 churches across the world. We are charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom and the protection of consciences is an indispensable, bedrock value for Southern Baptists. The Constitution’s guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.



The stated intention of this proposed rule is to modify a number of Affordable Care Act (ACA) regulations, but the proposed rule raises significant questions and concerns, especially for the consciences of many Americans. The proposed rule would add sexual orientation and gender identity language to multiple nondiscrimination provisions including 45 CFR § 147.104(e), 45 CFR § 155.120(c), 45 CFR § 155.220(j), 45 CFR § 156.125(b), 45 CFR § 156.200(e) and 45 CFR § 156.1230(b).

It's also worth noting that the 2020 section 1557 final rule is the subject of ongoing litigation including *Franciscan Alliance, Inc. v. Azar*, *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020); *Asapansa-Johnson Walker v. Azar*, and *Religious Sisters of Mercy v. Azar*. Section 1557 is the antidiscrimination provision of the Patient Protection and Affordable Care Act (PPACA) and has been revised by both this current administration and the previous administration. On May 10, 2021, HHS released a Notice that HHS will interpret and enforce section 1557's and Title IX's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. The proposed rule states multiple times that "CMS possesses statutory authority independent of section 1557 of the ACA to prohibit discrimination...."

HHS's proposed rule mandates gender affirming care, and would impede the work of healthcare professionals and faith-based hospitals.

This proposed rule not only expands "sex" to include "sexual orientation and gender identity" in multiple nondiscrimination provisions, but it also, read in conjunction with the respective preambles, would require coverage



of gender affirming care, transitioning surgery and hormones. While religiously affiliated hospitals routinely serve patients of any background, including those who identify as LGBT, providers who hold moral or religious beliefs cannot perform every procedure a patient requests. For example, doctors and nurses who object to gender reassignment surgeries for moral, religious, or scientific reasons would be forced to provide the procedure or risk losing their jobs.

Medical professionals and providers who serve everyone would be forced to administer gender reassignment treatments if they provide the same underlying treatments for other conditions. That is, if a physician performs hysterectomies for cancer patients or hormone therapy for patients with hormone imbalances, HHS may force that physician to administer those same treatments for patients seeking gender reassignments.

Christian doctrine and Southern Baptist teaching require that faith govern every aspect of a Christian's life.

The Bible instructs that faith in Christ Jesus should suffuse all that we do (Romans 6:6–22; 12:1–2; 1 Cor. 4:1–2). Because God is the origin and Creator of all human endeavors (Psalm 24:1), Christians believe that God is concerned with all areas of life. Thus, Christians seek to follow Jesus in all areas of life and see their entire lives in relationship to God as a pointer to the saving work of God (Col. 3:17; 23–24; 1 Cor. 10:31). These fundamental principles are reflected in the Southern Baptist Convention's summary of beliefs, the Baptist Faith & Message. As described in the Baptist Faith & Message, "Christians have a spiritual debtorship to the whole world, a holy trusteeship in the gospel, and a binding stewardship in their possessions. They are therefore under obligation to serve Him with their time, talents,



and material possessions. . . . Christians should contribute their means cheerfully, regularly, systematically, proportionately, and liberally for the advancement of the Redeemer's cause on earth.”

Knowledge of God’s saving grace compels Christians to obey God’s commands in their deeds as well (James 2:17). The Baptist Faith & Message states that Christians should actively “seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.” Moreover, the Bible teaches that Christians should discern when to refrain from activities that would be unhelpful, or harmful, to their neighbor (1 Cor. 6:12; 10:23–11:1).

HHS’s proposed rule hinders Christians’ ability to honor their religious convictions regarding biological sex.

When the Bible reveals that God created two distinct and complementary sexes, male and female, Baptists and other Christians believe that these were an intentional act of God’s creative will and not an arbitrary assignment that man can change (Gen. 1:26–27). The fall of man into sin has introduced brokenness into God’s good and perfect creation. Attempts to understand human sexuality, individual experience, and self-determination have been part of our human history since the fall but have always been against God’s creative will. While we lament the nature of the conflict our fellow citizens experience between their biological sex and gender identity, we yearn for their ultimate good. The HHS’s proposed rule hinders the good and flourishing of our neighbors in expanding beyond the biblical truth of binary sexes and biological realities, such as primary and secondary sex characteristics, and conflates “sex” with “gender.” The HHS’s proposed rule discounts the human dignity of our fellow citizens.



HHS's proposed rule would not adequately protect American consciences or religious freedom

While the proposed rule states that “in enforcing the nondiscrimination provisions in the corresponding CMS regulations, HHS will comply with laws protecting the exercise of conscience and religion, including the Religious Freedom Restoration Act (RFRA) and all other applicable legal requirements,” there is no explanation as to how HHS will adequately protect Americans with conscience objections from the inclusion of sexual orientation and gender identity language in this proposed rule. It remains unclear if or how HHS will comply with RFRA to protect millions of Americans' consciences.

We strongly believe that the proposed rule could lead to violations of the consciences of religious individuals and entities as exchanges, issuers, agents, and brokers would be required to cover gender affirming procedures and unable to approach the issues of sexual orientation and gender identity as required by their religious beliefs.

Thank you for the opportunity to comment.

Respectfully submitted,

Brent Leatherwood
Acting President
Ethics & Religious Liberty Commission
of the Southern Baptist Convention