Congress of the United States
Washington, DC 20515

June 17, 2013

The Honorable Kathleen Sebelius
Secretary of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Secretary Sebelius,

The Affordable Care Act is a major step forward in helping Americans access affordable health care that meets their needs, and we strongly commend and support the Department's efforts to successfully achieve the goals of health reform.

We are concerned, however, that the regulations implementing a key provision of the law—namely, the rule promulgated in February 2013 by the Centers for Medicare & Medicaid Services (CMS) setting forth nondiscrimination standards for the Essential Health Benefit (EHB) Standard—do not: a) clearly identify the types of exclusions or benefit designs that would be considered discriminatory under the Affordable Care Act, or b) adequately establish regulator and carrier responsibilities with regard to rectifying instances of discriminatory benefit design.

Without clear guidance about what constitutes discriminatory benefit design and the ways in which regulators and carriers should address it, we are concerned that the law's promise of comprehensive coverage for all Americans will not be realized. We are particularly concerned about the number of exclusions in EHB base-benchmarks that violate these nondiscrimination protections by arbitrarily targeting the transgender population for denial of essential services that are available to non-transgender individuals.

As you are aware, the EHB regulations prohibit the use of benefit designs and coverage determination techniques that discriminate against discrete classes of people by reducing the availability of any benefit based on factors such as disability, health condition, sex, or gender identity rather than on current clinical standards.[i] As the American Medical Association recognizes, "the denial of…otherwise covered benefits for patients suffering from gender identity disorder [the medical diagnosis associated with a transgender identity] represents discrimination based solely on a patient's gender identity."[ii]

Recognizing that transgender exclusions are both discriminatory and not reflective of current medical standards,[iii] several states have taken the initiative to address insurance discrimination against transgender people. Oregon's Insurance Commissioner, for example, recently issued a bulletin clarifying that nondiscrimination protections, including gender identity protections, prohibit insurers from excluding coverage for any treatment or procedure solely on the basis that the insured is a transgender individual or because the treatment is related to gender reassignment.[iv] Regulators in California,[v] [vi] Colorado,[vii] the District of Columbia,[viii] and Vermont[ix] have taken similar steps.

Although we laud the efforts of regulators in these states to put an end to discriminatory exclusions, the goal of the EHB provision is to ensure that individuals have access to an adequate standard of benefits regardless of where they live. Because transgender individuals cannot afford to have the benefits they need denied or interrupted based on their location, national guidance is necessary to address this issue across the country.

To clarify the application of the nondiscrimination protections in the EHB regulations to insurance discrimination against transgender individuals and to provide meaningful guidance to states in monitoring and enforcing ACA § 1302 and pursuant regulations, we therefore request that HHS release guidance that identifies transgender exclusions

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as discriminatory benefit designs and directs plans to remove these exclusions from plans offering the essential benefits.

Regarding transgender-specific exclusions, this guidance should direct plans offering the EHBs to:

- Ensure that individuals are not denied access to medically necessary care because of the individual's sex or gender identity;
- Revise current health plan documents to remove benefit and coverage exclusions and limitations related to gender transition services;
- Revise current health plan documents to remove benefit and coverage exclusions and limitations based upon an individual's sex, gender identity, or diagnosis of gender identity disorder or related condition; and
- Ensure that individuals are not denied access to internal and external appeals processes because of the individual's sex or gender identity.

Discrimination in benefit design is unfortunately a persistent practice in the insurance industry, and eradicating discrimination that disproportionately affects vulnerable populations remains a challenging process. We are confident, however, that the reforms the Department is undertaking as part of implementing the Affordable Care Act have the potential to revolutionize the ability of ordinary Americans—including transgender people and others who have historically been excluded from coverage—to access the coverage and care that they need, when they need it. We appreciate your consideration of our proposal, and thank you for your hard work and dedication to the success of the health reform effort.

Sincerely,

Suzanne Bonamici
Member of Congress

Earl Blumenauer
Member of Congress

Lois Capps
Member of Congress

Matt Cartwright
Member of Congress

Judy Chu
Member of Congress

David Cicilline
Member of Congress

Keith Ellison
Member of Congress

Raúl Grijalva
Member of Congress

Alcee Hastings
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Jared Huffman
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Carolyn Maloney
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[i] CMS-9980-F, Final Rule Patient Protection and Affordable Care Act Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation

[ii] American Medical Association, "Policy Statement on Care for Transgender Persons," available at http://www.gires.org.uk/assets/Medpro-Assets/AMA122.pdf

[iii] World Professional Association for Transgender Health, "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version" (2012).

[iv] Oregon Insurance Division, "Oregon Insurance Division Bulletin INS 2012-01" (2012), available at http://www.cbs.state.or.us/ins/bulletins/bulletin2012-01.html

[v] California Department of Managed Health Care, "Gender Nondiscrimination Requirements" (2013), available at http://transgenderlawcenter.org/wp-content/uploads/2013/04/DMHC-Director-Letter-re-Gender-NonDiscrimination-Requirements.pdf

[vi] California Department of Insurance, "Amended Text of Regulation" (2012), available at http://www20.insurance.ca.gov/epubacc/REG/167830.htm