

March 13, 2026

Via Federal eRulemaking Portal

Robert F. Kennedy, Jr.
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

RE: HHS Proposed Rule “Patient Protection and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2027; and Basic Health Program”; File Code CMS-9883-P; RIN 0938-AV62

Dear Secretary Kennedy:

We write to offer brief comment on the Department of Health and Human Services’ (HHS) proposed rule “Patient Protection and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2027; and Basic Health Program.”¹ Rachel Morrison is a Fellow at the Ethics and Public Policy Center (EPPC), director of EPPC’s Administrative State Accountability Project (ASAP), and a former attorney with the Equal Employment Opportunity Commission. Samuel Lucas is a Legal Associate with ASAP.

The proposed rule contains many proposals to improve implementation of the Patient Protection and Affordable Care Act (ACA). Relevant to our comment, HHS proposes to remove language from 45 CFR § 155.220(j)(2)(i) that defines the term “sex” to include “sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; gender identity; and sex stereotypes.”² (This language was originally added in 2016.³) Proposed 45 CFR § 155.220(j)(2)(i) would state, in relevant part: “... or discriminates based on race, color, national origin, disability, age, or sex.”⁴ **We support the proposal to remove this language.**

The proposed change would conform 45 CFR § 155.220 with the text of the Affordable Care Act.⁵ Section 1557 of the ACA prohibits discrimination “on the ground prohibited under” Title VI of

¹ 91 Fed. Reg. 6292 (Feb. 11, 2026), <https://www.federalregister.gov/d/2026-02769>.

² 91 Fed. Reg. at 6338.

³ HHS, Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2017, 81 Fed. Reg. 12204 (Mar. 8, 2016), <https://www.federalregister.gov/d/2016-04439>.

⁴ 91 Fed. Reg. at 6473.

⁵ Cf. EPPC Scholars Comment Opposing “Nondiscrimination in Health Programs and Activities,” RIN 0945-AA17, at 6-24 (Oct. 3, 2022), <https://media.eppc.org/2022/10/EPPC-Scholars-Comment-Opposing-1557-Proposed-Rule.pdf> (opposing Biden Section 1557 rule and explaining why “sex” under Section 1557 refers to male and female, not other concepts like gender identity or sexual orientation); *Tennessee v. Kennedy*, 807 F. Supp. 3d 613 (S.D. Miss. 2025) (vacating Biden Section 1557 rule to the extent that it expands sex discrimination to include gender-identity discrimination).

the Civil Rights Act of 1964 (race, color, national origin), Title IX of the Education Amendments of 1972 (sex), the Age Discrimination Act of 1975 (age), and Section 504 of the Rehabilitation Act of 1973 (disability).⁶

As HHS points out, this proposed change is consistent with President Trump’s Executive Order 14168 on “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”⁷ The executive order (like the proposed rule) rightly recognized that there are “two sexes, male and female,” “these sexes are not changeable,” and the sexes are “grounded in fundamental and incontrovertible reality.”⁸ The executive order further directed agencies like HHS to “enforce all sex-protective laws to promote this reality.”⁹

We applaud HHS for opposing gender ideology and recognizing biological truth. There are two sexes—male and female. While “gender” historically was used synonymously with sex, the term is now often used to mean something other than binary, biological sex. Biology is not bigotry. As Supreme Court Justice Ruth Bader Ginsburg recognized, “Physical differences between men and women ... are enduring,” “inherent,” and “remain cause for celebration”: “[T]he two sexes are not fungible.”¹⁰

We agree with HHS that “it is not necessary to address ancillary issues of gender ideology in a regulation governing the activities of State-licensed agents, brokers, and web-brokers.”¹¹ The proposed change would provide clarity, protect sex-based rights, and reflect biological reality, not subjective self-perception.

We also agree with HHS that the proposed change would not “result in or facilitate any discrimination against consumers.”¹² Importantly, proposed 45 CFR § 155.220 would still prohibit discrimination “based on race, color, national origin, disability, age, or sex”¹³—the discrimination grounds prohibited by Congress in Section 1557. **HHS should adopt this proposal.**

Sincerely,

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⁶ 42 U.S.C. § 18116.

⁷ Exec. Order 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 20, 2025), <https://www.federalregister.gov/d/2025-02090>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (second alteration in original) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

¹¹ 91 Fed. Reg. at 6338-39.

¹² 91 Fed. Reg. at 6339.

¹³ 91 Fed. Reg. at 6473.