

November 6, 2015

**BY ELECTRONIC DELIVERY**

U.S. Department of Health and Human Services,  
Office for Civil Rights  
Attention: 1557 NPRM (RIN 0945-AA02)  
Hubert Humphrey Building, Room 509F  
200 Independence Avenue SW.  
Washington, D.C. 20201

**Re: Exchange and Insurance Market Standards for 2015 and Beyond**

Dear Director Samuels:

The staff of Connect for Health Colorado greatly appreciates the opportunity provided by the Office for Civil Rights (“OCR”) and Health and Human Services (“HHS”) to comment on the proposed rule, “Nondiscrimination in Health Programs and Activities.” The specific provisions that we request clarification on or which would have a particular impact on the Connect for Health Colorado are listed below according to the order in which they appear in the Code of Federal Regulations.

I. Background

Connect for Health Colorado, the state-based health insurance marketplace for Colorado, is a non-profit entity established by a Colorado state law and the Patient Protection and Affordable Care Act. The organization, legally known as the Colorado Health Benefit Exchange, provides access to qualified health plans and financial assistance in the form of advance premium tax credits and cost share reductions for qualified individuals. As such, Connect for Health Colorado is a covered entity under the proposed rule.

II. Specific Comments

A. Definitions

Section 92.4 provides three definitions that will require some changes in Connect for Health Colorado’s operations. Connect for Health Colorado does not object to the definitions, but does seek clarification that would assist in implementing processes to avoid potential discrimination.

Within Section 92.4, “gender identity” is defined as “an individual’s internal sense of gender, which may be different from the individual’s sex assigned at birth.” Sex stereotypes are defined in the same section as “notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms or body characteristics.”

In order to operationalize compliance with the proposed rule, Connect for Health Colorado seeks clarification as questions might be permissible to include on an application for insurance. For instance, would it be appropriate to ask an applicant if they choose to identify with a gender, if any? Additionally, Connect for Health Colorado would like OCR to clarify that asking an individual if they identify with a gender would not be a form of discrimination against individuals who may believe their gender to be self-evident, albeit through the common sex stereotypes defined above or other representations.

#### B. Remedial Action and Voluntary Action.

Section 92.6(a)(2) of the proposed rule would require that where one recipient of federal financial assistance (or a covered entity) exercises control over another recipient, the Director may require either or both entities to take remedial action. Connect for Health Colorado requests clarification on the means of control implicated in the regulation. Does the term control indicate governmental (as in an agency with rule making powers), contractual control, or both?

Section 92.6(b) allows a covered entity to take voluntary action, in addition to that required under Section 1557 of the ACA, to overcome effects of conditions that result or resulted in limited participation in the covered entities health programs. Connect for Health Colorado seeks clarification as to whether said voluntary action may proceed simultaneously with any required action requested by the Director.

#### C. Designation of Responsible Employee and Adoption of Grievance Procedures.

Section 92.7 would require each covered entity with 15 or more employees to designate at least one employee to coordinate compliance activities under Section 1557. Connect for Health Colorado seeks clarification as to whether the 15 employees are the total number working for a covered entity or just those employees working in a program subject to Section 1557. For instance a county operating a Navigator assistance program under 45 CFR §155.210 will likely have more than 15 employees, but may have less than 15 employees working as Navigators.

Regarding the OCR's request for input on whether all covered entities, or just those with 15 or more employees, should be required to designate a responsible employee and establish grievance procedures, Connect for Health Colorado appreciates the potential to create a more informal resolution process that would be less burdensome than an OCR investigation. However, we believe that without a minimum threshold, the OCR may create a situation in which a small covered entity may not have sufficient staff to perform an objective review of the claimed discrimination.

#### D. Notice Requirement

Within Section 97.8, the proposed rule would require covered entities to provide contact information for the designated employee as well as the availability of a grievance procedure. §97.8(b) requires the covered entity provide information on how to file a claim with the OCR. Connect for Health Colorado would like clarification on whether the notice should instruct an aggrieved individual to first attempt use of the grievance procedure prior to requesting an OCR investigation. Alternately, Connect for Health Colorado would like to know if the individual should be instructed that both the grievance procedure and OCR investigation may occur simultaneously.

Regarding the request for comment as to whether covered entities should be allowed to combine the required information under §97.8 with other required notices, Connect for Health Colorado believes that the combination of notices is preferable. A combination with eligibility notices, such as those required in 45 CFR §155.230, would allow exchanges to provide the necessary information at a time most pertinent to the individual applicant. Further, some clarification regarding how information in the notice is presented, such as ensuring the §97.8

notice is printed on a separate page or is in a readable font, may help ensure that the information is presented clearly.

For paragraph (c), Connect for Health Colorado requests clarification as to whether the “top 15 languages spoken by individuals with limited English proficiency nationally” would be updated in accordance with the most recent Census or American Community Survey data.

#### E. Meaningful Access for Individuals with Limited English Proficiency

In Paragraph (e) of §92.201, the proposed rule prohibits a covered entity from requiring an individual to provide their own interpreter — save for select exceptions. Connect for Health Colorado supports these exceptions as we have often found that individuals applying for health insurance who are able to bring a competent adult interpreter of their own choice are more comfortable with the process. If an individual is not able to provide an adult interpreter, the use of an interpretation service by phone has proved effective.

Regarding the alternative approaches that OCR considered for the requirement to provide meaningful access to individuals with limited English proficiency, Connect for Health Colorado believes that the approaches outlined in the proposed rule provide sufficient and flexible access to individual applicants needing language assistance.

#### F. Employer Liability for Discrimination in Employee Health Benefit Programs

Connect for Health Colorado seeks clarification as to whether a participating employer receiving tax credits through the Small Business Health Options Program is subject to §92.208.

#### G. Procedures for Health Programs and Activities Conducted by Recipients and State-based Marketplaces

Paragraph (c) of §92.302 creates a cause of action in which an aggrieved individual can bring suit for a violation of Section 1557 or the proposed rule in United States District Court. Connect for Health Colorado seeks clarification as to whether this claim may be brought at any time or if an aggrieved individual must first either utilize the grievance process outlined in §92.7 or by requesting an investigation by the OCR.

### III. Conclusion

Connect for Health Colorado supports HHS and OCR in their efforts to ensure fair and equal access to health services. We believe that with the requested clarifications, Connect for Health will be better positioned to comply with the proposed rule.

Regards,

Connect for Health Colorado Staff