

The Federal Comments Process

Make Your Voice Heard!

How does the rulemaking process work?

- Federal agencies issue legally binding regulations interpreting federal law. Under the Administrative Procedure Act (APA), agencies are generally required to publish new rules as a Notice of Proposed Rulemaking (NPRM) and open them for public comment before finalizing the rule. Agencies are required to review, consider and respond to each argument made in the comments submitted prior to finalizing the rule, and often make changes to the rule in the process.

Why are public comments important?

- Comments help keep the administration accountable and provide agencies with information about how a proposed rule affects the public in practical, tangible ways. Submission of a large number and wide variety of comments demonstrates broad opposition or support for the regulation, and an agency's failure to meaningfully respond to comments, which are posted publicly and become part of the public record, can reveal an administration's intent and agenda.
- An agency's failure to respond meaningfully to comments can also help hold administrations accountable under the law, because the APA requires an agency to provide "adequate reasons" and justify its rulemaking with "a rational connection between the facts found and the choice made." Agency actions, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" violate the APA.

Where can I find information on regulations?

- The Center for Reproductive Rights tracks regulations related to reproductive health. If you're interested in learning more, email us at lawyersnetworkinfo@reprorights.org and we will let you know when an important rule is open for comment and provide background information to help you draft your comment.

Ready to take action?

- As experts in the law, lawyers and bar associations can contribute a unique and important perspective in their comments. You may also want to reach out to your local reproductive health organizations to offer assistance in writing a public comment on their behalf.

Helpful Tips

Personalize Your Comment.

The more unique, substantive comments an agency receives, the better! Agencies tend to group together, instead of counting individually, any comments that appear to be form letters rather than individual, unique comments. Note that comments are available for public review, so please be mindful of confidentiality, privacy concerns and timing.

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Be Specific.

Comments that express general support of or opposition to a rule are helpful, but specific arguments (with citations) help build the strongest record for or against a rule. A few things you may consider commenting on:

- Would the proposed rule disproportionately impact vulnerable communities and did the agency appropriately consider that impact?
- Is the proposed rule arbitrary and capricious?
- Is the proposed rule within statutory limitations or does it go beyond the text or purpose of relevant statutory authority?
- Are there clear constitutionality problems with elements of the rule?

Check for Special Instructions.

- Some regulations have special instructions for submission of comments on regulations.gov (such as requiring submission as a Word doc or citing the RIN number in the subject line).
- Unfortunately, some groups and individuals troll the site to respond to or attack submitted comments. The best way to minimize this is by submitting your comment closer to the deadline.
- If you are submitting on behalf of a bar association, the comment should include the association policy supporting this position, as well as reference any research, amicus briefs, and advocacy work the association has done in support of reproductive rights.

We want to support you in navigating the comment process. If you have questions, please contact us at lawyersnetworkinfo@reprorights.org to be connected to the Center's Lawyers Network.

Comment Writing

COMMENT TEMPLATE

August ____, 2019

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201

VIA ELECTRONIC SUBMISSION – <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities#open-comment>

Re: Comments on the Proposed Rule on Nondiscrimination in Health and Health Education Programs or Activities

As **[position and bar association, i.e. Past-President of Lawyers Association]**, I am writing to express my deep concern regarding the Proposed Rule: Nondiscrimination in Health and Health Education Programs or Activities published by the Centers for Medicare and Medicaid of the Department of Health and Human Services on June 14, 2019 concerning discrimination in healthcare. For decades, **[topic of rule]** has played a pivotal role in **[topic and relevant statistics]**. As a lawyer and bar leader I believe strongly in the **[select your reason of choice: Rule of Law, Human Rights, Reproductive Rights, all or others]** and therefore oppose any attempt to legalize discrimination in health care.

[Personal connection – why are you speaking out? What are your areas of expertise or personal experiences? How could this proposed rule impact your life and/or those for your community, as a lawyer and legal leader. Select your choice of topic. Below are helpful arguments and data points you can add to your comment.]

- **[Your story, your community]**
- **[Effect on women in the legal profession]**
- **[Effect on marginalized populations]**
- **[Effect on clients]**
- **[How this proposed rule is unconstitutional or is contrary to the rule of law]**
 - **Is there any claim this proposed rule violates due process?**
 - **Will there be equal access under this proposed rule?**
 - **Will there be equal justice under law under this proposed rule?**

[Call to Action – What do you want the agency to do with this rule? For example, “I therefore urge the Department to immediately withdraw this proposed Rule.”]

Comment Writing

ARGUMENTS THAT CAN BE ADDED TO YOUR COMMENT:

Key General Arguments:

1. The proposed rule removes the existing rule's definition of "sex," which defined discrimination on the basis of sex to include termination of pregnancy, gender identity, and sex stereotyping. It also offers no guidance on enforcement of discrimination on the basis of sex. In addition, the proposed rule seeks to eliminate language access requirements that help provide meaningful access to health care for individuals with limited English proficiency.
2. The proposed rule will cause harm to women, LGBTQI individuals, and people with limited English proficiency, embolden providers to deny care, and reduce access to necessary healthcare.
 - a. There are serious physical and socioeconomic consequences for patients who are denied a wanted abortion. A recent study following participants for five years found that women who were denied wanted abortions and gave birth had statistically poorer long-term health outcomes than women who received their abortions.
 - b. Over 66 million people in the United States speak a language other than English at home and approximately 25 million do not speak English "very well" and may be considered Limited English Proficient.¹ Current 1557 regulations require covered entities to take reasonable steps to provide meaningful access to individuals with limited English proficiency.
 - c. A 2017 nationally representative survey found that 8% of lesbian, gay, bisexual, and queer people and 29% of transgender people reported that a doctor or other healthcare provider had refused to see them because of their actual or perceived sexual orientation in the year before the survey.²
 - d. Nearly one in five LGBTQ people, including 31% of transgender people, said that it would be very difficult or impossible to get the healthcare they need at another hospital if they were turned away.³
 - e. For additional statistical information, please see the data sheet below.
3. The proposed rule goes against the intent of the Affordable Care Act to expand access to healthcare without discrimination and will reverse progress made under the current rule, which furthers the intent of Congress.
 - a. The ACA has improved access to coverage for millions of Americans and includes critical provisions ensuring full and equitable access to essential services without discrimination.

¹ American Community Survey, 2017; Table S1603, Characteristics of People by Language Spoken at Home, American Community Survey 1-Year Estimates,

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1603&prodType=e=table; Table S1601, Language Spoken at Home, American Community Survey, 1-Year Estimates,

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=e=table.

² See Jaime M. Grant et al., *Injustice at Every Turn: a Report of the National Transgender Discrimination Survey*, NATIONAL GAY AND LESBIAN TASK FORCE & NATIONAL CTR. FOR TRANSGENDER EQUALITY (2011),

http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

³ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Jan. 18, 2018, <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care>.

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Key Legal Arguments:

1. **The Administrative Procedure Act** requires courts to set aside agency action, findings, and conclusions that are “**arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law,**” “**contrary to a constitutional right,**” or “**in excess of statutory jurisdiction.**”⁴ “Normally, an agency rule would be arbitrary and capricious if the agency...entirely failed to consider an important aspect of the problem....” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).
 - a. **The proposed rule is contrary to law.**
 - i. By removing explicit protections against discrimination on the basis of termination of pregnancy, gender identity, and sex stereotyping, the proposed rule moves contrary to longstanding civil rights laws.
 - ii. In *Price Waterhouse v. Hopkins*, the Supreme Court held that Title VII’s protections against sex discrimination encompass discrimination based on sex stereotyping.⁵
 1. A growing number of federal courts have also recognized that Title VII sex-stereotyping discrimination encompasses discrimination connected to an individual’s gender identity because such discrimination is based on a failure to conform to stereotypical gender norms.⁶
 - iii. Health and Human Services cannot justify its proposed changes by relying on Department of Justice’s disputed litigation positions in pending lawsuits, including *Franciscan Alliance v. Azar*, which are still being litigated and are therefore unsettled.
 1. Other federal district courts have granted relief to individuals who claimed discrimination on the basis of gender identity under Section 1557.⁷
 - b. **The proposed rule is contrary to the plain text of Section 1557** because it improperly narrows the scope of application to health care programs and activities and to programs and activities administered by executive agencies.
 - i. Section 1557 applies to “any health program or activity, any part of which is receiving Federal financial assistance,” “any program or activity that is administered by an executive agency,” and “and entity established under this title.”⁸
 - ii. The proposed rule narrows covered “health program or activity” to include only entities that are “principally engaged in the business of health care” and specifically excludes “businesses principally or otherwise engaged in the business of providing health insurance” unless those insurers receive federal financial assistance.⁹

⁴ See 5 U.S.C.A. § 706(2)(b); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009).

⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁶ See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008).

⁷ See *Flack v. Wis. Dep’t of Health Servs.* 328 F. Supp. 3d 931 (W.D. Wis. 2018); *Prescott v. Rady Children’s Hospital – San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (holding that “...discriminating on the basis that an individual was going to, had, or was in the process of changing their sex—or the most pronounced physical characteristics of their sex—is still discrimination based on sex.”)

⁸ 42 U.S.C. §18116(a)

⁹ 84 Fed. Reg. 27891 (June 14, 2019)

Comment Writing

- iii. The proposed rule also limits the application of the nondiscrimination provisions to the portion of an entity's operations which receive Federal financial assistance, but not the entity's entire operations, making insurance access increasingly inaccessible to individuals who Section 1557 was intended to protect.¹⁰
2. Under the APA, **an agency must also “examine the relevant data and articulate a satisfactory explanation for its action including ‘a rational connection between the facts found and choices made.’”** *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).
 - a. **The proposed rule fails to engage in a proper cost-benefit analysis.**
 - i. The proposed rule fails to account for any impact on patients, including the costs to patients who are denied access to care.
 - ii. The proposed rule fails to weigh the cost of compliance with the proposed changes to the language access requirements. The proposed rule only weighs the cost of compliance with the Final Rule's language access requirements and does not consider the need for these requirements.

¹⁰ 84 Fed. Reg. 27863 (June 14, 2019)

Specific Research and Key Data Points

General Data Fact Sheet

Women & Minorities in the Law Statistics:

1. Women make up 38% of the legal profession.¹ Women make up 50% of the JDs awarded.²
2. Women overall make up 47% of the national workforce and contribute trillions of dollars to the American economy each year.³
3. Women are 47% of all law firm associates, 39% of counsel, and 57% of “other” attorneys.⁴
4. Women attorneys are compensated 80% of what a male attorney is paid weekly.⁵ For non-partner track attorneys, specifically counsel, the median man makes, on average, \$18,308 more a year than the median woman (\$237,500 vs. \$219,192, respectively).⁶
5. Women of color (including Black, Asian, and Hispanic/Latina women) are about 24% of law firm associates and 8% of non-partner track attorneys (made up of both counsel and other full-time attorneys).⁷
6. People of color make up about 8% of equity partners, and only 2% of equity partners are women of color.⁸
7. Openly LGBTQI attorneys represent only 2% of equity partners.⁹
8. Persons with disabilities represent less than 1% of equity partners.¹⁰

Composition of the Labor Force – 2017 Data

1. In 2017, the composition of the labor force was broken down by 78% white, 13% black/African American, 6% Asian, 1% American Indian/Alaska Native, <1% Native Hawaiian/Other Pacific Islander, and 2% two or more races.¹¹

Bureau of Labor Statistics 2014-16 Pre-Tax Income

1. The average household pretax income between 2014-16 was \$70,448. Broken down by race/ethnicity the average income for Asians was \$93,390, African Americans was \$48,871, Hispanic/Latino was \$55,447, American Indian/Alaska Native was \$60,320, multi-race was \$65,407, Native Hawaiian/other Pacific Islander was \$69,213, and white was \$77,974.¹²

¹ American Bar Association, *A Current Glance at Women in the Law*, 2 (April 2019) https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf.

² American Bar Association, *A Current Glance at Women in the Law*, 4 (April 2019) https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf.

³ Council of Economic Advisers, *Women’s Participation in Education and the Workforce*, 8 (Oct. 14, 2014), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/eleven_facts_about_family_and_work_final.pdf (showing that women make up 47 percent of the national workforce).

⁴ Destiny Peery, *Report of the 2018 NAWL Survey on Retention and Promotion of Women in Law Firms*, National Association of Women Lawyers, 3–4, 7 (2018), <https://www.nawl.org/p/cm/ld/fid=1163>.

⁵ American Bar Association, *A Current Glance at Women in the Law*, 2 (April 2019) https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf.

⁶ Destiny Peery, *Report of the 2018 NAWL Survey on Retention and Promotion of Women in Law Firms*, National Association of Women Lawyers, 3–4, 7 (2018), <https://www.nawl.org/p/cm/ld/fid=1163>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Bureau of Labor Statistics, *Labor force characteristics by race and ethnicity, 2017* (Aug. 2018), <https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm>.

¹² Reginal A. Noel, *Bureau of Labor Statistics: Race, Economics and Social Status*, 2–3 (May 2018), <https://www.bls.gov/spotlight/2018/race-economics-and-social-status/home.htm>.

Specific Research and Key Data Points

Statistics about Abortion

1. One in four women in the United States will have an abortion by the age of 45.¹³
2. Statistical breakdown of racial/ethnic groups who obtain abortions: 39% white, 28% black/African American, 25% Hispanic, 6% Asian/Pacific Islander, 3% other race or ethnicity.¹⁴
3. In 2014, 49% of abortion patients were living at less than the federal poverty level and 26% were living at 100-199% of the poverty level.¹⁵

Statistics of Discrimination in Healthcare

1. Data from Vitals in 2016 showed that on average, women pay 69% more for out-of-pocket healthcare costs than men.¹⁶ Responses to a 2017 survey also show that one in four women delay or forgo care in the past year due to costs.¹⁷
2. 32% of black Americans, 23% of Native Americans, 20% of Latinos, and 13% of Asian Americans have reported experiencing discrimination when going to a doctor or health clinic.¹⁸
3. 16% of LGBT people reported that they have experienced discrimination when going to doctor or health clinic;¹⁹ 18% of LGBT people say they avoid seeking medical care due to discrimination.²⁰
4. Among transgender people who visited a doctor or healthcare providers' office in 2017, 29% said a doctor/healthcare provider refused to see them because of their actual or perceived gender identity and 12% said a doctor/healthcare provider refused to give them healthcare related to gender transition.²¹

Non-English Speaker Statistics

1. In 2015, 64.7 million U.S. residents (age 5 and above) speak another language besides English at home. That means more than one in five U.S. residents, or 21.5%, speak another language besides English at home.²²
2. Of those who speak a foreign language at home, 26 million (40%) told the Census Bureau that they speak English less than very well. This figure is entirely based on the opinions of the respondents.²³

¹³ Guttmacher Institute, *United States: Abortion* (2019) <https://www.guttmacher.org/united-states/abortion>.

¹⁴ Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

¹⁵ Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

¹⁶ Macaëla Mackenzie, *You Won't Believe How Much More Women Pay For Healthcare Than Men*, Women's Health Magazine (May 20, 2016) <https://www.womenshealthmag.com/life/a19996668/women-pay-more-healthcare/>.

¹⁷ Kaiser Family Foundation, *Women's Coverage, Access, and Affordability: Key Findings from the 2017 Kaiser Women's Health Survey* (Mar. 13, 2018) <https://www.kff.org/womens-health-policy/issue-brief/womens-coverage-access-and-affordability-key-findings-from-the-2017-kaiser-womens-health-survey/>.

¹⁸ Harvard Opinion Research Program, *Discrimination in America*, NPR, Robert Wood Johnson Foundation & Harvard T.H. School of Public Health, 13 (Jan. 2018), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/01/NPR-RWJF-HSPH-Discrimination-Final-Summary.pdf>.

¹⁹ *Id.*

²⁰ Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Healthcare*, Center for American Progress (Jan. 18, 2018), <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

²¹ *Id.*

²² Steven A. Camarota & Karen Zeigler, *Nearly 65 Million U.S. Residents Spoke a Foreign Language at Home in 2015*, Center for Immigration Studies 1–2 (Oct. 18, 2016), <https://cis.org/Report/Nearly-65-Million-US-Residents-Spoke-Foreign-Language-Home-2015>.

²³ *Id.*

Specific Research and Key Data Points

LGBT Statistics in the US

1. In 2017, 4.5% of Americans identified as LGBT. This suggests that about eleven million people identify as LGBT in the United States.²⁴

²⁴ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, Gallup Polls (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx?g_source=link_NEWSV9&g_medium=TOPIC&g_campaign=item_&g_content=In%2520U.S.%2c%2520Estimate%2520o%2520LGBT%2520Population%2520Rises%2520to%25204.5%2525.