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November 9, 2015

The Honorable Sylvia M. Burwell
Secretary of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Re: Nondiscrimination in Health Programs and Activities, RIN 0945-AA02

Dear Secretary Burwell:

The American Lung Association recognizes the important work the Department of Health and Human Services (HHS) is engaged in implementing the Affordable Care Act (ACA), which is transforming healthcare in this country. The Lung Association appreciates the opportunity to comment on the proposed rule on Nondiscrimination in Health Programs and Activities. While this proposal adequately addresses discrimination in the healthcare system on the basis of race, color, national origin, sex, age or disability; it does not address discrimination based on pre-existing condition, health status, or presence of a chronic condition. The Lung Association views this as a major weakness of this proposal, and urges HHS to address this type of discrimination in the final rule.

Many patients with asthma, chronic obstructive pulmonary disease (COPD) and lung cancer, and addiction to tobacco, have new access to healthcare because of the ACA and its prohibition on plans denying coverage based on pre-existing conditions. This hallmark patient protection took a big step in preventing harmful discrimination in healthcare, but more steps are needed. As the ACA acknowledges, discrimination does not only occur in acceptance or denial of an insurance policy. Plans can also use benefit design and marketing practices to discourage certain types of patients from enrolling – which underscores the dire need for increased transparency among plans in the enrollment process. These discriminatory practices can result in fewer quality and affordable choices for patients with chronic diseases, and can disrupt the overall insurance market.

Lung disease patients and tobacco users have experienced discriminatory practices in many ways, including plans:

- Placing all medications to treat a certain condition, such as new targeted lung cancer therapies on a high cost-sharing tier

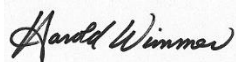
- Requiring prior authorization, a stepped care protocol, or other barriers for all medications to treat a certain condition
- Excluding or not clearly listing medications that treat a certain condition from public formularies or preferred drug lists –even when the plans cover these medications
- Stepped care or treatment protocols that do not follow accepted treatment guidelines
- Inadequate specialist provider networks that limit access to treatments for particular conditions, like oncologists or pulmonologists.
- Inadequate access to pulmonary rehabilitation or other patient education and disease management services
- Not providing full access to a comprehensive tobacco cessation benefit to help tobacco users quit. This is especially important since tobacco addiction is one of the only pre-existing condition for which premium differentials are permitted under the ACA

Additional Issues for Consideration in the Final Rule
In its 2016 Letter to Issuers, HHS cautioned issuers from discouraging enrollment of individuals with chronic health needs and provided examples of plan designs that "may be discriminatory," including "if an issuer places most or all drugs that treat a specific condition on the highest cost tiers." More than a caution and a statement that something "may" be discriminatory is needed. HHS needs to state clearly its definition of what constitutes discrimination, particularly discrimination against patients with chronic conditions. This will provide much needed clarity to state regulators, patients and insurers. Part of this rulemaking should include a prohibition on the practice highlighted in the 2016 Letter to Issuers: plans must not be allowed to place all drugs in a class on a specialty tier. Patients should be able to access at least one drug per class on a non-specialty tier.

Additionally, HHS must clarify that the definition of who is protected under Sec. 1557 of the ACA is not only limited to beneficiaries who are "disabled" under the definition in the Americans with Disabilities Act, but to all beneficiaries with chronic health conditions or serious illness.

Finally, HHS must enforce its discrimination provisions by acting on any discrimination complaints that have been filed, monitoring plan benefit design for discriminatory practices and requiring corrective actions where warranted, and educating state regulators and insurers about these provisions.

Thank you,



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