

March 31, 2009

Office of Public Health and Science  
Department of Health and Human Services  
Attention: Rescission Proposal Comments  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W., Room 716G  
Washington, DC 20201



*Representing California's Catholic  
Health Systems and Hospitals*

**Re: Rescission Proposal Comments**

Dear Sir or Madam:

I am writing as president and chief executive officer of the Alliance of Catholic Health Care, to offer the following comments on the Department's proposal to rescind a regulation that it published last year. 74 Fed. Reg. 10207 (March 10, 2009) ("Rescission Proposal"). The Department issued the regulation to enforce three federal civil rights statutes that prohibit discrimination against health care professionals and institutions on the basis that they object on moral or religious grounds to performing and/or referring for abortion and certain other medical procedures. 73 Fed. Reg. 78072 (Dec. 19, 2008) (hereinafter the "Provider Conscience Regulation").

The Alliance of Catholic Health Care is a California-based, nonprofit health care association representing California's Catholic health care systems and hospitals. Each of its members is a "health care entity" within the meaning of Pub. L. 110-161, § Section 508(d) (the "Weldon Conscience Protection Amendment").

The Alliance's members include fifty-four (54) California Catholic and community-based affiliated hospitals, which represent over 16 percent of all California general acute care hospitals. The Alliance's California members include: Catholic Healthcare West, with approximately 9,800 active physicians, the largest not-for-profit hospital system in California and the eighth largest in the nation; Daughters of Charity Health Care System, with six hospitals and medical centers along the California coast; Providence Health & Services, with five medical centers in Southern California, as well as facilities in Alaska, Washington, Oregon and Montana; and St. Joseph Health System, with nine hospitals throughout California, as well as a regional health care system in Texas.

The Alliance's members provide health care services in accordance with the religious and moral tenets of the Catholic religious faith. Central to these beliefs is a firm commitment to the dignity of the human person from conception to natural death, and a deep concern for the health care needs of the poor and for those in spiritual need. Animated by these beliefs, Catholic health care providers in California have been making a broad range of quality health care services available to underserved communities, patients and families for more than 150 years.

While our members do not impose their religious and moral beliefs upon those they serve, they do hold themselves accountable, as health care providers, to Catholic ethical and moral standards.<sup>1</sup> As a consequence, the noble American tradition of religious tolerance and the nation's constitutional guarantee of religious liberty have been cornerstones upon which Catholic health care providers have relied as they serve their patients and communities. More recently, the Alliance's members have also come to rely on federal and state statutes that protect them from religious discrimination by political jurisdictions and other entities on the ground that their moral convictions preclude them from providing certain morally objectionable medical procedures, such as abortion and elective sterilization.

These statutes and the Department's "Provider Conscience Regulation" are especially important to religiously affiliated health care providers in California and other states, where influential policymakers and State officials have engaged in a decade-long campaign to coerce them, under penalty of law, to provide medical services in violation of their deepest moral convictions.

### **The "Provider Conscience Regulation" (Deleted "Protection")**

The Department issued the "Provider Conscience Regulation" not only to enforce existing federal conscience rights laws, but also to fulfill the Executive Branch's Constitutional duty to "take Care that the Laws be faithfully executed."<sup>2</sup> The regulation's purpose is to:

- a) Raise awareness in the public, in the health care community, among the recipients of federal funds, and among protected individuals and institutions of their rights and responsibilities under the above statutes;
- b) Ensure that federal funds do not support coercive or discriminatory practices or policies in violation of federal law; and
- c) Establish regulatory enforcement measures to ensure compliance with the statutes.

The regulation is similar to HHS regulations that raise awareness of and enforce other important federal civil rights laws. For example, under Title VI of the Civil Rights Act of 1964, when an entity elects to receive any amount of federal funds, that entity certifies that it will follow all federal conditions and rules that apply to the use of those funds or upon which receipt of the funds is conditioned.

In a similar manner, the HHS "Provider Conscience Regulation" coordinates and incorporates the various statutory requirements related to conscience rights, allows for greater clarity and awareness of the statutory protections, greater ease of administration, a HHS point of contact for complaints regarding violations of the statutes and regulation, a uniform mechanism for investigating complaints of

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<sup>1</sup> See "Ethical and Religious Directives for Catholic Health Care Services" (United States Catholic Conference of Bishops 2001).

<sup>2</sup> U.S. CONST. Art II, § 3, cls.4

noncompliance and, as a result, greater compliance with the laws protecting conscience rights.

The regulation and the federal laws on which it is based are consistent with the U.S. Supreme Court's acknowledgement in *Roe v Wade* of the right of physicians, hospitals, and other health care providers not to be discriminated against on the basis of their moral convictions against performing or facilitating abortion. In its decision, the Court cited with approval an American Medical Association (AMA) resolution that no "physician, hospital, nor hospital personnel shall be required to violate personally-held moral principles."<sup>3</sup> In other abortion-related decisions the Court has held that taxpayers do not have an obligation to pay for abortion, and that, as a matter of policy, the government can favor childbirth over abortion.<sup>4</sup>

### **Is the HHS "Provider Conscience Regulation" Necessary?**

The regulation is a necessary response to the emergence of an environment in certain sectors of government, health care and the media that is increasingly intolerant of individual and institutional objections to abortion and other individual and religious beliefs and moral convictions. This development:

- Promotes the mistaken belief that rights of conscience and self-determination extend to all persons, except health care workers and institutions.
- Challenges the ethical integrity (and ultimate existence) of religious and faith-based organizations; some of which have been providing health care in the United States since its inception. Some of these institutions are among the largest providers of health care in the nation.
- Potentially denies the millions of patients who conscientiously object to abortion and other medical practices access to doctors, hospitals and other providers who share their moral and religious beliefs. Patients should be confident that they will have access to providers who share their deepest convictions about the nature of human life.
- Discourages individuals who are conscientious objectors from entering the health care field, at a time when there is a shortage of primary care physicians, general surgeons, nurses and other health care professionals. A health care system that is intolerant of conscience rights, certain religious beliefs, ethnic and cultural traditions, or moral convictions serves to discourage individuals with diverse backgrounds and perspectives from entering the health care professions.

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<sup>3</sup> *Roe v Wade*, 410 U.S. 113, 114 and n.38 (1973)

<sup>4</sup> *Maher v Roe*, 432 U.S. 464 (1977) and *Planned Parenthood v Casey*, 505 U.S. 833, 872-73 (1992) respectively

## **Is There Evidence of Intolerance Towards and Discrimination Against Health Care Providers That Conscientiously Object to Abortion?**

Yes. There is substantial evidence of attempted and actual discrimination towards both individuals and faith-based health care institutions. For example:

### **Discrimination Against Individuals**

During the comment period on the “Provider Conscience Regulation,” the U.S. Department of Health and Human Services received many reports of what individuals believed to be violations of conscience, including health care workers suffering lost employment, adverse actions during medical training and discrimination in residency placement. Several states now compel pharmacists who conscientiously oppose abortion to dispense contraceptives they believe may produce an abortion. Failure to do so could lead to loss of licensure, and the freedom to earn a living in pharmacology.

### **Discrimination Against Institutions**

- In 1999, a bill (AB 525) was introduced in the California State Assembly that: a) required Catholic hospitals to provide or arrange for abortions or lose tens of millions of dollars in annual state assistance; b) imposed restrictions on mergers between non-profit health care institutions if access to abortion might be affected; and c) forced health insurers to “blacklist” Catholic hospitals in their marketing materials by singling them out as hospitals that don’t provide abortion. The Assembly Health Committee favorably reported AB 525 to the Assembly floor, where it failed by a mere ten votes.
- In April 2000, members of the California Medical Assistance Commission (CMAC) attempted to force Catholic hospitals to provide abortion and other reproductive services as a condition of receiving a Medi-Cal (Medicaid) contract.
- In 2000, the California Medical Association presented a resolution in the American Medical Association’s House of Delegates urging the enactment of laws to strip hospitals that decline to participate in abortion from receiving tax-exempt financing or participating in state-supported health care programs. The resolution failed.
- In 2003, two bills were introduced in the New York legislature (A. 4945 and S. 4031) to allow the state health commissioner in licensing decisions to discriminate against hospitals that do not participate in abortion.
- In 2005, the California Attorney General sued in U.S. District Court in San Francisco to overturn the federal Weldon Amendment as an unconstitutional infringement on the State of California’s right to enforce its own abortion statutes. In his suit the attorney general made the extraordinary claim that California law defines every abortion as “medically necessary,” as, in his judgment, pregnancy is an inherent threat to a woman’s life. The AG’s suit also alleged that two Catholic hospitals had denied a woman a “medically

necessary” abortion; a claim that was disproven following an investigation by the California Department of Health Services. This suit was dismissed on procedural grounds in 2008.

- In 2007, the American College of Obstetricians and Gynecologists (ACOG) issued an opinion that it is unethical for ob-gyns to decline to provide or refer for abortion. When it became apparent that this discriminatory policy might affect board certification requirements, the HHS Secretary wrote the American Board of Obstetrics and Gynecology noting that the ACOG opinion contradicted several of the federal conscience laws cited above.
- In 2008, a California regulatory agency attempted to force a faith-based health care provider to include abortion coverage in its employee health insurance plan, in violation of the provider’s religious beliefs. The regulator was either unaware or unconcerned that this action violated the provider’s civil rights under federal law.
- In 2008, more than 50 so-called “pro-choice” organizations issued guidance to newly elected president Obama in *“Advancing Health and Reproductive Rights in a New Administration: Steps for the First 100 Days.”* Among other things, the document urged the president to: a) include in his first budget a repeal of the “Weldon Amendment,” and b) take immediate steps to repeal the HHS “Provider Conscience Regulation.” If successful, these actions will make it easier for such groups to pass state laws that discriminate against health care providers based on their moral objections to providing or referring for abortion.
- In 2009, a member of the state agency that oversees Massachusetts’ subsidized health insurance program objected to including a faith-based provider in the program because it does not provide abortion. The state agency was either unaware or unconcerned that this action violated the provider’s civil rights under federal law.
- In 2009, the attorneys general of California, Illinois, Massachusetts, New Jersey, Oregon, Rhode Island and Connecticut filed suit in the U.S. District Court in Connecticut seeking to have the HHS “Provider Conscience Regulation” struck down. This effort appeared to be carefully coordinated with so-called “pro-choice” groups, as the Planned Parenthood Federation of America and the National Family Planning and Reproductive Association simultaneously filed separate lawsuits against the regulation in the same court – a contemporary example of “massive state resistance” to the federal government’s effort to enforce important civil rights protections.
- Organizations such as the American Civil Liberties Union, Merger Watch and others have developed web-based advocacy programs designed to block mergers and joint ventures involving hospitals that have ethical policies against performing and referring for abortion.

### **Does the HHS “Provider Conscience Regulation” Limit Patient Access to Reproductive Health Care Services, Including Contraceptive Services?**

Several of the conscience statutes on which the regulation is based have been in effect for more than thirty years. During that time no objective evidence has emerged to suggest that providers’ reliance on these laws not to provide services to which they morally object has decreased the availability of abortion, sterilization or contraceptives; nor have the statutes limited the availability of reproductive services provided by publicly funded clinics, or health care services provided in emergency situations. These procedures and services have been and remain readily available in most areas of the United States. Opponents of the conscience laws and regulation allege otherwise, but their claims are hypothetical or anecdotal and have never been substantiated. Some rural areas may lack access to some reproductive services; unfortunately, they may also lack immediate access to other, arguably more vital, health care services such as cardiology, oncology, emergency medicine, or even primary care. Finally, the regulation does not expand the scope of the statutes on which it is based; and it does not change the obligations of the federal Title X program or Medicaid to deliver contraceptives to eligible patients.

As a practical matter, improved access to reproductive services cannot be achieved by employing state power to coerce health care providers to engage in conduct contrary to their moral or religious beliefs. Doing so will produce the opposite result: The range of available health care services will be diminished, not enlarged, as health care providers committed to their moral and religious beliefs stop providing services altogether, or decline to enter the health professions in the first place; an outcome that would be especially detrimental to health care services in rural and low-income communities.

### **Does the HHS “Provider Conscience Regulation” Permit Health Care Providers to Discriminate Against Patients, Such As Illegal Immigrants, Drug and Alcohol Users, Patients with Disabilities, HIV Patients, or on the Basis of Race or Sexual Preference?**

No. To reiterate, several of the statutes on which the regulation is based have been in existence for more than three decades, and there is no evidence that they have led providers to use them as a pretext to discriminate against certain classes of patients. Furthermore, the regulation does not expand the scope of the statutes on which it is based in a way that would permit such discrimination.

The health care conscience protection laws exist as one part of a network of federal civil rights laws that address discrimination on a variety of grounds. Actions that violate these federal laws, continue to violate them. There is no conflict between the operation of the health care conscience protection laws and other federal laws.

Several federal civil rights laws protect individuals from discrimination in programs receiving federal financial assistance or in public accommodations based on their individual characteristics (e.g., race, color, national origin, disability, age, sex and religion). The health care conscience protection laws have a different

purpose, protecting individual health care workers and entities from discrimination in connection with particular practices such as abortion, or from compulsion to perform health care activities that they find morally or religiously objectionable. As such, these two sets of laws are intended to protect different populations and on different grounds. On their face, there is no inherent inconsistency or conflict between them; they are, in fact, complementary.

Entities subject to these laws are responsible for ensuring against illegal discrimination in providing health care to the public, while also protecting the conscience rights of the health care workers who are affiliated with these entities.

### **Does the HHS “Provider Conscience Regulation” Place Excessive Administrative Burdens on Providers?**

No. Providers who are recipients of federal funds must already certify or assure their compliance with certain federal non-discrimination laws as part of existing funding applications. Adding one more requirement to the non-discrimination representations will not measurably increase administrative burdens on providers. Those who claim that the regulation imposes excessive administrative burdens need to explain why conscience rights should be treated differently than other compliance representations, such as those related to non-discrimination on the basis of race or disability.

The federal provider conscience protection laws are not new. They are existing requirements on certain federal funds that recipients should be following already.

### **Can the Regulation’s Objectives Be Met By Non-Regulatory Means Such As Outreach and Education?**

As the repeated instances of actual and attempted discrimination cataloged above demonstrate, there is a need for both regulatory enforcement and outreach and education. By itself, education would be insufficient to deter certain policymakers and their private-sector allies from their oft stated mission to discriminate against health care providers on the basis of their moral or religious convictions against providing and referring for abortion.

No thoughtful observer would seriously suggest that the government rely solely on education and outreach to deter discrimination covered by other important federal civil rights laws.

Finally, and as noted above, the Executive Branch has a Constitutional duty to execute the conscience rights laws that have been enacted during the past thirty-six years.

## **What Effect Will Rescission of the “Provider Conscience Regulation” Have?**

Rescinding the regulation will have several detrimental effects:

- 1) It will reduce awareness of the federal conscience laws, their requirements, protections and responsibilities among the public, recipients of federal funds and protected health care providers;
- 2) It will leave unclear how and even whether the Obama Administration intends to enforce these important civil rights laws; and
- 3) It will leave unclear to what federal office complaints of discrimination should be directed and whether or not the federal government will investigate such complaints.

Instead of rescinding the “Provider Conscience Regulation,” the Department indicated that it may modify it. That could have the effect of narrowing the Executive Branch’s interpretation of the statutory protections against discrimination, make it more difficult to report complaints of discrimination and have them investigated, and create administrative barriers to enforcing the laws.

As with other civil rights laws, if the government signals that it does not consider them important – by ignoring or administratively weakening its interpretation and enforcement of them – it will also weaken compliance with such laws and invite new instances of discrimination. For example, in the wake of weakened federal enforcement of the conscience rights laws some states would likely attempt to condition licensure on a provider’s agreement to perform and/or refer for procedures to which the provider morally objects.

## **Conclusion**

In promulgating the “Provider Conscience Regulation” the U.S. Department of Health and Human Services was not granting a “privilege” to health care providers who object on moral or religious grounds to providing or referring for abortion. It was fulfilling the government’s duty to create an administrative framework for enforcing important civil rights laws that protect provider conscience rights. It was also fulfilling its duty to protect an even more fundamental right – the free exercise of religion – the first freedom embodied in the Bill of Rights to the United States Constitution. In so doing, the government advanced an enlightened national policy that furthers tolerance, religious freedom and pluralism.

But these rights and freedoms have formidable opponents. The decade-long campaign by professional accrediting agencies, state legislators, state regulators, state attorneys general, and “pro-choice” organizations to ignore, undermine or attack provider conscience rights and laws, emphatically demonstrates the need for the “Provider Conscience Regulation.”

The Alliance and its members urge the Department to retain the “Provider Conscience Regulation” in its current form. We are prepared to provide further comments or information that might assist the Department in doing so.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. J. Cox".

William J. Cox  
President and Chief Executive Officer  
Alliance of Catholic Health Care