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Upholding the Principles of the Catholic Faith in the Science and Practice of Medicine

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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, D.C. 20201
April 9, 2009

Re: Notice of Proposed Rulemaking on Rescission of Conscience Clause
Regulation RIN 0991-AB49

Dear Sir/Madam:

The Catholic Medical Association is pleased to provide this official comment in support of the conscience rights of its members and of all health care providers. The comments below address the December 19, 2008 Conscience Protection Rule as a whole as well as respond to specific questions raised by HHS on March 10.

On December 19, 2008, in response to evidence of a lack of awareness of existing federal laws prohibiting discrimination or coercion against health care providers based on their religious beliefs or ethical convictions; of increasing threats and actions against individuals by organized bodies; and of thousands of comments and requests detailing experience with discrimination and the need for greater protection, the Department of Health and Human Services (HHS) issued Final Rule RIN 0991-AB48 (45 C.F.R. Part 88) ("Conscience Protection Rule). This Rule called for education about, certification of compliance with, and enforcement mechanisms for, existing federal laws protecting rights of conscience, including the Church Amendments (42 U.S.C. Section 300a-7(a)-(3)), Public Health Service Act Section 245 (42 U.S.C. Section 238n), and the Hyde-Weldon Amendment (most recently adopted in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law 110-329, Div. A, Sec.101, 122 Stat. 3574, 3575 (Sept. 30, 2008). The Conscience Protection Rule was and *is* necessary and appropriate given the centrality of respect for conscience to personal and human dignity; citizenship in American society and, above all, to the medical profession.

~ *Human Dignity.* The Catechism of the Catholic Church defines conscience as “a judgment of reason whereby the human person recognizes the moral quality of a concrete act” (#1778). While the Church has always recognized conscience as an essential feature of personhood and of the ethical and spiritual life, other major denominations and religions also recognize and respect the reality of conscience. Moreover, respect for conscience was a central tenet of the Enlightenment. A mark of the widespread, principled support for respect for conscience came with its inclusion in Section 18 of the Universal Declaration of Human Rights in 1948.

~ *American Constitutional and Social Order.* Respect for conscience is a central principle of American constitutional order. Founders, including Thomas Jefferson and James Madison, explicitly described respect for conscience as an essential element of the ordered liberty to be enjoyed in the new Republic. The first draft of the First Amendment explicitly referenced freedom of conscience (“nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, be infringed”). While this reference was removed for sake of brevity, the essential liberty to be protected was considered to be incorporated in the language remaining therein.

~ *The Profession of Medicine.* Modern medicine can trace its roots directly to the Hippocratic School. While many cite the adage “*primum non nocere*” (from the *Epidemics* in the Hippocratic corpus) as a founding principle of medical ethics, it is the Oath of Hippocrates which grounds the centrality of conscience in the medical profession. In the Oath, physicians pledge to apply their skill only for the benefit of their patients, to eschew all killing (even upon patient request) and to abjure any abuse of the power and privileges that derive to them. Several other oaths and codes from different cultures and times (including the “Oath of Asaph,” “The Advice of Haly Abbas,” and “The 17 Rules of Enjuin”) are consonant with the Oath of Hippocrates’ values of duty to the patient and rejection of killing. More recently, the Nuremberg Code explicitly called upon physicians to reject harming patients without their informed consent. And, while other subsequent codes and declarations have retreated from one of the core values of the medical profession – respect for unborn human life – there has been, and should be, no support to coerce the consciences of physicians and health care providers to act against human life.

In contemporary health care delivery, despite substantial advances in technological and organizational complexity, the

physician-patient relationship remains a meeting of persons in which the patient who is ill or injured seeks healing from a physician. The sine qua non of this relationship is the trust of the patient, on the one hand, and the conscientious commitment of the physician to the patient's true well-being, on the other. Enforcing a subordination of the ethical convictions of the physician (to patients' wants, to the demands of payors, governmental or private, or to passing fashions in politics or political correctness) would not only be an unethical violation of the physician's rights, it would undermine the physician-patient relationship and corrupt the medical profession.

Arguments in favor of limiting or denying rights of conscience in health care delivery today are based on two arguments (1) that conscience is a subjective, individual good that can and must yield to greater moral values; and (2) that limiting conscience rights is necessary to increase health care access (in particular for "reproductive services" such as abortion and contraception) (see, e.g., ACOG Committee on Ethics, "The Limits of Conscientious Refusal in Reproductive Medicine" (Nov. 7, 2007) and Julie D. Cantor, M.D., J.D., "Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine," *N.E.J.M.* 360:15 (Apr. 9, 2009)). We disagree with both of these arguments.

1. In fact, however, while conscience is a personal judgment, it is not merely "private" or relativistic. Conscientious judgments provide guidance both for good actions that should be done and unethical actions that should be refused. While conscientious judgments are at times accompanied by emotion, particularly in conflict cases, conscience is not a matter of feeling, as the ACOG Ethics Opinion suggests, but a judgment about moral truth. Moreover, far from being a selfish action, conscience often causes people to forgo short-term, individualistic interests and serve a higher, ethical good. St. Thomas More, Ghandi, and Martin Luther King are regularly and correctly held up as exemplars of conscientious judgment. Their example teaches that conscientious witness is an essential dimension both of moral integrity and commitment to justice even in the face of indifference, opposition, and threat of death. To some extent, great figures such as these stand out precisely because too many people were convinced or coerced to accept an unjust status quo.

2. Far from increasing access to health care services, attacking or attempting to coerce people with religious or ethical objections to procedures such as abortion will only drive out of the health care

field a large number of highly skilled professionals and institutions who provide desperately needed care. Catholic hospitals in particular, which the Catholic Medical Association supports, serve a disproportionate share of the poor and vulnerable in urban and rural settings.

HHS has asked in particular for comment on 4 specific issues. With regard to these questions, our replies can be found in italics, below

1. Information, including specific examples where feasible, addressing the scope and nature of the problems giving rise to the need for federal rulemaking and how the current rule would resolve those problems;

There have been persistent efforts over the last 35 years to coerce individuals and institutions into providing or facilitating actions which violated their religious beliefs or ethical convictions. Indeed, existing federal laws protecting conscience rights were enacted only after these persistent attacks (e.g., the Church Amendment was enacted only after an attempt by a Montana court to force a Catholic hospital to provide sterilization services). More recently, the Ethics Committee of the American College of Obstetricians and Gynecologists, together with the American Board of Obstetrics and Gynecology), tried to force ob-gyns to refer for abortions and obtain them in some circumstances).

Individuals have been subject to discrimination and harassment. CMA has collected multiple stories of students who have faced probing questions during interviews for medical school and/or residency programs. An online poll of Catholic Medical Association and Christian Medical Association members found that 32% have been pressured to refer a patient for a procedure to which they had ethical objections, and 33% have considered not pursuing a career in a particular medical specialty because of attitudes of intolerance expressed therein for their religious or ethical convictions.

2. Information, including specific examples where feasible, supporting or refuting allegations that the December 19, 2008 final rule reduces access to information and health care services, particularly by low income women;

We believe there is no credible information showing that access information or services has been reduced for anyone, rich or poor, men or women, since the issuance of the December 19, 2008 Final Rule. Moreover, the CMA holds that this question is not properly asked by HHS since the proper balance between respect for

fundamental human and constitutional rights, and convenience in health care access, has been raised and addressed in the context of existing federal law protecting conscience – laws passed with bipartisan political support.

3. Comment on whether the December 19, 2008 final rule provides sufficient clarity to minimize the potential for harm resulting from any ambiguity and confusion that may exist because of the rule; and

4. Comment on whether the objectives of the December 19, 2008 final rule might also be accomplished through non-regulatory means, such as outreach and education.

Education and outreach are entirely unsuited, both in principle and in practice, to achieving the objectives of conscience protection. As noted above, freedom of conscience is a fundamental human and constitutional right. As such, it deserves the same level of protection as other significant rights. And, given the level of hostility to rights of conscience in healthcare noted above and in other submissions to HHS, protection of conscience demands the same levels of commitment, and measures of enforcement, devoted to other fundamental civil rights.

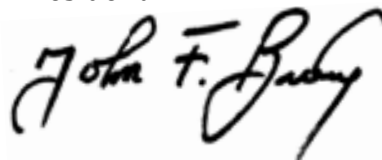
Accordingly, the Catholic Medical Association respectfully requests the Department to leave intact the Conscience Protection Rule. If any adjustments to the Rule are to be made, CMA respectfully requests that these adjustments in no way reduce the level of protection for rights of conscience, and in no way undermine support for existing laws.

Thank you.

Sincerely,



Louis C. Breschi, M.D.
President



John F. Brehany, Ph.D.
Executive Director