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March 16, 2018

Submitted Electronically

Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM
RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

**Subj: Protecting Statutory Conscience Rights in Health Care,
Dep't of Health & Human Services, Office for Civil Rights,
RIN 0945-ZA03**

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (“USCCB”), National Association of Evangelicals, Southern Baptist Ethics & Religious Liberty Commission, Catholic Medical Association, Christian Legal Society, and Family Research Council, we submit the following comments on the proposed rule to protect conscience rights in health care. 83 Fed. Reg. 3880 (Jan. 26, 2018).

We strongly commend the Department for publishing these proposed regulations and we urge their adoption. For over four decades, through enactments such as the Church Amendment (42 U.S.C. § 300a-7), Congress has sought to ensure that health care institutions and professionals will not have to choose between abandoning medicine and violating their conscience, particularly with respect to abortion and sterilization. The proposed regulations will implement these and other longstanding federal statutory protections, and thereby help guarantee that health care institutions and professionals are not pushed into this Hobson's choice.

1. The Proposed Regulations Are Much Needed and Long Overdue.

The preamble provides ample documentation of the record of violations of the federal conscience statutes in the United States. 83 Fed. Reg. at 3887-89. Sadly, hostility to conscience rights in health care is not only continuing, but increasing, as demonstrated by the rise in the rate of complaint filings. *Id.* at 3887 (noting 34 complaints between November 2016 and mid-January 2018, compared to 1.25 complaints per year from 2008 until November 2016); *see also* Jessie Hellmann, *New HHS Office that Enforces Health Workers' Religious Rights Received 300 Complaints in a Month*, THE HILL, Feb. 20, 2018 (noting that “[m]ore than 300 individuals filed a complaint with [HHS] over the last month”), <http://thehill.com/policy/healthcare/374725-hhs-new-office-that-enforces-religious-moral-rights-of-health-workers>.

Some states and local governments and advocacy groups seem to have grown more determined in their opposition to federal conscience laws. Ironically, many of these groups speak of “choice” and non-discrimination, but their objective is precisely the opposite, the elimination of choice and the imposition of rules that force people to participate in these procedures, as well as the targeted exclusion of those whose religious convictions impel and shape their provision of medical care. Many advocates speak as if the conscience laws were the invention of the current administration. They are not. Three of the most important protections—the Church, Coats-Snowe, and Weldon amendments—go back to 1973, 1996, and 2004, respectively.

Though these laws have been on the books for years, legislators and advocates are becoming more emboldened to violate them. There are reports this year of efforts to pass a bill in Maine “that would require all nurse practitioners to provide the abortion pill to patients upon request” in violation of the Church and Weldon amendments. Jessie Hellmann, *Planned Parenthood Announces Nationwide Push for Abortion, Birth Control Legislation*, THE HILL (Feb. 13, 2018), <http://thehill.com/policy/healthcare/373619-planned-parenthood-announces-nationwide-push-or-abortion-birth-control>. Washington State legislators have passed a bill that would require health plans to cover abortion if they cover maternity care, in violation of the Weldon amendment. Washington State Substitute Sen. Bill 6219 (Mar. 3, 2018), <http://lawfilesexxt.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6219-S.PL.pdf#page=1>.

We commend the Department for proposing these regulations, which are much needed and long overdue.

2. The Proposed Regulations’ Broad Interpretation of Conscience Laws Is Consistent with the Remedial Purpose of the Statutes They Enforce.

Proposed section 88.1 states that “[c]onsistent with their objective to comprehensively protect the conscience and associated anti-discrimination rights of persons, entities, and health care entities, the statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes.” 83 Fed. Reg. at 3923. Similarly, proposed section 88.9 states that the regulations “shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the terms of the Federal health care conscience and associated antidiscrimination statutes implemented by the Constitution.” *Id.* at 3931.

We agree with HHS that such a broad construction is warranted. Courts and administrative agencies have long recognized that non-discrimination laws should be construed broadly to give full effect to their remedial purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (it is a “familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes”); *see, e.g., Disabled in Action v. Southeastern Pa. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008) (the Americans with Disabilities Act “‘is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society,’ and as such, ‘it must be broadly construed to effectuate its purposes’”). It is entirely appropriate, therefore, that HHS adopt a broad construction here.

Consistent with rules of construction referenced in sections 88.1 and 88.9, the proposed regulations define particular statutory terms with commendable breadth. To take a few examples, in proposed section 88.2, the Department defines the phrase “assist in the performance” to include any “articulable connection to a procedure, health service, health program, or research activity...” 83 Fed. Reg. at 3923. In the same section, “refer” is defined to mean the provision of “any information ... by any method” pertaining to a health care service, activity, or procedure. *Id.* at 3924. The term “discrimination” is defined in terms of any action having any adverse effect, including the withholding or revocation of funds. *Id.* at 3923-24. These and other definitions in section 88.2 are helpfully detailed and will provide much needed guidance as to the meaning of the conscience statutes.

Regarding the proposed regulations’ definitions, we have one remaining comment. We are aware of at least one instance in which a State agency declined to follow the Weldon amendment because that particular agency was not a direct recipient of federal funds, even though the State was a recipient of such funds. HHS should make clear in the regulations that when federal law forbids discrimination by a State that receives federal funds (as in the case of the Weldon amendment), and a particular State receives such funds, then *all* government agencies and offices of that State are obliged to follow the non-discrimination rule. Otherwise States, contrary to Congress’s intent, could avoid federal nondiscrimination laws simply by creating separate agencies and offices that do not directly receive federal funds, which thereafter could violate conscience protection laws with impunity.

Subject to this recommendation, we urge HHS to adopt the proposed sections 88.1, 88.2, and 88.9 in the final rule.

3. The Proposed Regulatory Requirements Correctly Mirror the Requirements of the Statutes They Enforce.

Proposed section 88.3 sets out the requirements of the conscience statutes. This provision closely tracks, and often borrows verbatim from, the statutes they are designed to enforce. We commend HHS for its careful attention and adherence to the statutory text, and we urge the Department to adopt the proposed section 88.3 in the final rule.

4. The Proposed Regulations Properly Require Assurances and Certifications of Compliance.

Assurances and certifications are a long-established means of ensuring knowledge of, and compliance with, federal funding requirements. We agree that those requirements are properly imposed here because, as the Department notes, it will help ensure that funded entities understand and recognize that they must abide by the conscience laws and regulations. 83 Fed. Reg. at 3928-29, proposing 45 C.F.R. § 88.4. Posting and notice requirements are a common regulatory feature of nondiscrimination statutes. We agree with the proposed notice and compliance requirements here. 83 Fed. Reg. at 3929-30, proposing 45 C.F.R. §§ 88.5, 88.6.

We urge HHS to adopt the proposed sections 88.4, 88.5, and 88.6 in the final rule.

5. The Proposed Regulations Provide Critical Enforcement Mechanisms.

Proposed section 88.7 is perhaps the most important part of the proposed regulation because it provides means of enforcing the conscience laws and regulations. Section 88.7(j)(3) is particularly helpful in spelling out the various means by which OCR will enforce the conscience regulations, to include withholding funds, referring the matter to the Attorney General, or taking other remedies that may be legally available.

It is noteworthy and laudatory that the Department has delegated to OCR “full enforcement authority over a significantly larger universe of Federal statutes” than was previously the case. 83 Fed. Reg. at 3891. We commend the Department for this more inclusive approach.

We urge HHS to adopt the proposed section 88.7 in the final rule.

6. The Administration Has Taken an Important Step in Correcting an Earlier Misinterpretation of the Weldon Amendment.

We agree with, and commend, the Department for acknowledging that its interpretation of the Weldon amendment under the previous administration was incorrect. The Department now correctly acknowledges that the text of the Weldon amendment is controlling, and that there

is nothing in the text of the amendment that would limit its enforcement to insurers or only to those with religious or moral objections. 83 Fed. Reg. at 3890-91.

Conclusion

We strongly commend the Department for taking these necessary steps to implement and enforce the federal conscience laws in health care.

Sincerely,

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