

April 9, 2009

Charles Johnson
Acting Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
Room 716G
200 Independence Avenue, SW
Washington, DC 20201
Attn: Rescission Proposal Comments

By E-mail: proposedrescission@hhs.gov

Re: Rescission Proposal – RIN 0991-AB49 Department of Health and Human Services –
Proposed Rule

Dear Acting Secretary Johnson:

Catholics for Choice is writing in support of the rule proposed by the Department of Health and Human Services (HHS) that would rescind the “Provider Conscience Regulation.” The rescission of this unnecessary and harmful rule is critically needed in order to ensure access to safe, high quality reproductive health care for women and men, and to ensure patient access to critical health-care services and information. We are also including in our comments our publication, ***In Good Conscience: Respecting the Beliefs of Health Care Providers and the Needs of Patients***, which provides background on the evolution of conscience clauses that may be helpful as the Department moves forward with the proposed rule to rescind the regulation.

Catholics for Choice is a nonprofit organization founded in 1973 to serve as a voice for Catholics who believe that the Catholic tradition supports an individual’s moral and legal right to follow her conscience in matters of sexuality and reproductive health. Catholics for Choice shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women’s well-being and respect and affirm the moral capacity of women and men to make decisions about their lives.

Based on this commitment, we believe that women and men should be able to access safe and legal sexual and reproductive health services. During the previous administration, those opposed to reproductive freedom have become more creative in placing hurdles in front of women seeking safe and legal reproductive health services. The tactic of significantly expanding the concept of refusal clauses beyond protecting the religious and moral beliefs of health-care providers is one of these hurdles, in effect, acting as a means to refuse some treatments and medications to all comers. We strongly support the reasonable accommodation of employees’ religious beliefs in the workplace, but individuals, regardless of their religion, age, income, race or geographic location must have access to the health-care services they need, including the full range of sexual and reproductive health options and information.

The current rule puts ideology before health care—broadening the scope and reach of existing federal refusal laws beyond congressional intent. There exists a sincere struggle for institutions to formulate policies that balance the needs of patients with the beliefs of providers. The regulation does not eliminate this need and instead significantly expands the ability of health-care providers to withhold treatment, counseling or medical information based on their religious or moral beliefs—without any regard for the needs of patients. It also leaves the door open for entire health-care entities, including insurance plans and hospitals, to deny access to or even information about reproductive health services, including

contraception. The rule has resulted in confusion and uncertainty about the rights and obligations of patients, doctors and health-care institutions throughout the US health-care system.

Under the guise of protecting religious freedom, the regulation limits access to health-care services, medication and referrals, and keeps information out of the hands of patients, and we strongly urge you to rescind it.

Background on Conscience Clauses

Conscience clauses have gone through many permutations since they first appeared after the *Roe v. Wade* decision. Traditionally, these clauses sought to protect health-care workers who refused to participate in certain health-care practices such as the provision of sterilization or abortion, claiming that participation in these services violated their consciences. Last year, many commenters stated that the regulation was needed to educate recipients of department funds about their legal obligations under the three statutes—often referred to as the Church Amendment (42 USC 300a-7), the Coats Amendment (42 USC 238n) and the Weldon Amendment (Consolidated Appropriations Act 2008, PL 110-161, Div. G, 508d). These laws are intended to give individuals and institutions the ability to refuse to provide, and to prohibit requiring the performance of or participation in, abortion and sterilization services. However, while these statutes attempt to balance freedom of conscience for the provider and the patient and protect health-care workers who refuse to participate in certain health-care practices, they can result in women’s access to vital health-care services being threatened. There is no existing stipulation that ultimately guarantees the provision of an abortion or sterilization to a patient.

The concept of conscience has been repeatedly manipulated, especially in the context of reproductive health and rights. While some have pointed to Catholic teaching and the support of the US Conference of Catholic Bishops and the Catholic Health Association (the trade association of the Catholic health industry), to support the imposition of ever-more restrictive refusal clauses, such as those in the existing regulation, they do not, in fact, reflect the Catholic position. Catholic teachings on conscience are much more nuanced than is usually presented in legal and policy debates.

While there are many definitions of conscience, nearly everybody recognizes it as an internal moral compass, a place where truth and guidance are revealed through the lens of personal values and an understanding of right and wrong. It is a central element of Catholic moral teaching and is derived from our free will which allows us to make truly voluntary choices. Yet, while conscience has a vital internal aspect, in order for it to be fully exercised we must also be fully aware of how our decisions affect and are affected by external reality.

For any individual provider or institution to lay claim to be the arbiters of any person’s good conscience is clearly disingenuous. If conscience truly is one’s “most secret core and his sanctuary [where] he is alone with God, whose voice echoes in his depths,” as the Catholic *Catechism* states, how can anyone, or any institution for that matter, justify coercing someone into acting contrary to her or his conscience? Health-care providers must not dismiss the conscience of the person seeking care. In fact, Catholic teaching requires due deference to the conscience of others in making decisions—meaning that, for examples, the pharmacist must not dismiss the conscience of the person seeking emergency contraception or the doctor dismiss the conscience of the woman seeking an abortion. One does not need to deny a patient emergency contraception or abortion in order to remain a good Catholic. When a pharmacist refuses to fill prescriptions for contraception, they are denying the right to conscience of the woman, or man, standing in front of them. This does not fall under anybody’s definition of what a good conscience is.

The goal of any reasonable conscience clause must be to strike the right balance between the right of health-care professionals to provide care that does not offend their moral and religious beliefs and the right of patients to have access to the medical care they need.

The Regulation Reduces Patient's Access to Information, Counseling and Referrals

The Rescission Proposal recognizes that the regulation goes too far in expanding the universe of health-care workers and institutions that may refuse to provide services, thereby denying patients access to information about or referrals for such services—without regard for the impact it will have on patients. It also broadens the scope of services that may be refused under the applicable laws. For example, the statutory term “assist in the performance” has been defined broadly to include “*any* activity with a reasonable connection to a procedure, health service, or health service program, or research activity” and includes “counseling, referral, training, and other arrangements.”

The regulation significantly expands the ability of health-care providers to withhold treatment, counseling or medical information based on their religious or moral beliefs—without regard for the needs of patients. The rule is so broadly written that it allows entire health-care organizations and workers, including those at hospitals and insurance plans, to deny access to and information about birth control pills, emergency contraception and other contraceptive methods.

Within the field of medical ethics, the accepted resolution to a conflict of values is to allow the individual to act on his or her own conscience and for the institution (the hospital, clinic or pharmacy) to serve as the facilitator of all consciences. When an institution rejects this role and instead asserts its own “conscience-based” refusal to provide services, it violates the rights of both patients and health-care providers—who may well consider the services the institution is denying to be profoundly moral and medically necessary—to make conscience-based decisions.

The regulation allows a provider to refuse to counsel patients for services or provide medical information and options for *any medical treatment* without any mechanism to ensure patients get the information they need to make informed health-care decisions. Health-care professionals might rely on this rule to justify their refusal to provide information or counseling on services from fertility services to vaccination to blood transfusion to end-of-life pain management. This rule stands in the way of the information patients need to make health-care decisions for themselves and their families, nor should it undermine providers’ legal and ethical requirements to obtain patients’ informed consent.

The ethical preference of ensuring that patients have the primary opportunity to act on their conscience should be continued. Any institution should, thus, be obligated to provide doctors and nurses who will provide services that patients deem moral and that are legal, while allowing an individual medical professional who chooses to opt out to do so. In order to accommodate the rights of the patient, individuals or institutions that refuse to provide a certain service consistently must have systems in place so that proper arrangements can be made in a timely manner for patients who seek that service. This must include both immediate notice from institutions to individuals regarding the services that those entities refuse to provide and accurate and timely communication about where individuals can access those services.

There is no doubt that there are times when the conscience of an individual doctor, nurse or pharmacist may conflict with the needs of a patient. In these situations, women should not be concerned that the religious and moral beliefs of their providers will interfere in their receiving the best possible care—so it is in their best interests that only medical professionals committed to providing such services do so. However, when this is not possible, the ethical and reasonable fallback is for the institution to provide the patient with a meaningful referral that will ensure that the patient receives continuity of care without

facing an undue burden, such as traveling long distances or encountering additional barriers to obtaining the desired services.

The rule threatens to fundamentally undermine the relationship between providers and patients, who will have no way of knowing which services, information or referrals they may have been denied.

The Regulation Fails to Consider the Careful Balance Struck under Civil Rights Law

The rule allows any employee of a health-care provider to refuse to treat any individual if doing so would violate his or her religious beliefs or moral convictions—without any mention of the religious beliefs, moral conviction or medical needs of the patient. In doing so, the rule does not address serious questions as to whether its purpose is to upset the careful balance between respecting employees' religious beliefs and respecting employers' ability to provide their patients with access to health care currently maintained in federal law under Title VII of the Civil Rights Act of 1964.

While many commenters claimed that the rule was needed to clarify the existing laws, its expansive language and ambiguity have the opposite effect. Title VII, coupled with existing federal conscience clauses, provides a balance between employers' need to accommodate their employees' religious beliefs and practices—including their refusal to participate in specific health-care activities to which they have religious objections—with the needs of the people the employer might serve.

Behind this regulation is a claim that it will protect individuals who feel they are being denied rights. However, in doing so, it goes too far and tramples the rights of those who will be consequently denied medically appropriate treatment. Current federal conscience clauses already provide more than enough protection for those medical professionals who refuse to provide services to which they object. There is no need to introduce any more such clauses that may conflict with existing law and will undoubtedly lead to confusion among employees, employers and patients regarding their right surrounding these refusals. The expansion of refusal clauses will result in the denial of access to women and men seeking sexual and reproductive health-care services. When the government, through regulation and support of those who are willfully denying necessary medical treatment to individuals, is party to such an expansion, it is denying the right to exercise conscience of the person seeking care.

The ability to deny the provision of even counseling or referrals becomes an infringement on the conscience of the patient by denying her the means to obtain an abortion or contraception in a safe, convenient and timely manner and we are pleased that the proposed rule would remedy this situation.

The Regulation Threatens Patients' Access to Health-Care Services

The regulation focuses much of its attention on reproductive health care; however, parts of the proposed rule apply to any health-care service or research activity. The expansive definition and broad application of the rule, coupled with its failure to discuss Title VII, significantly jeopardize patient's access to a wide range of health-care services.

The rule makes it more difficult for patients to receive a broad spectrum of health-care services, including contraceptive care, HIV/AIDS care and treatment, fertility care and mental health services. The rule may be interpreted so as to affect referrals and counseling on issues seemingly unrelated to abortion. For example, the regulation may encourage a pharmacist to deny access to HIV/AIDS medications at a HHS-funded pharmacy or a physician to deny contraceptive counseling to an HIV-positive patient because of his or her beliefs. Similarly, it may encourage a physician or physician's assistant to deny an unmarried patient access to the cervical cancer vaccine because the individual does not agree with sexual activity outside of marriage. Or it may allow a physician to deny the provision of fertility services to gays and lesbians because they state that homosexuality is against their religion.

The Regulation Jeopardizes Women's Access to Birth Control

The regulation is especially problematic for women's access to reproductive health care because it does not include a definition of abortion consistent with the consensus within the medical community and existing federal policy, thus leaving the door open for insurance plans, hospitals and other entities to define abortion in any way they choose—including in ways that would include common forms of birth control. As a result, women may be denied access to birth control services, including counseling and information, even if there are other protections in place.

For example, the rule undermines a state's ability to enforce its own law requiring insurance plans that cover other prescription drugs to also cover contraception. It causes confusion for states administering Medicaid and Title X programs because of existing program requirements ensuring access to contraceptive counseling and services; and it creates an opening for hospitals to refuse to comply with state laws requiring that sexual assault survivors be offered emergency contraception. In short, the regulation complicates the administration of long-standing and vital federal family planning programs, as well as state laws adopted to protect access to contraception.

Conclusion

Catholics for Choice wholeheartedly supports the Administration's Rescission Proposal, because the pretext of religious freedom should not be used to create unreasonable barriers for women and men to access sexual and reproductive health care. Regardless of what allowances may be made for the individual conscience of a medical professional, individual providers and institutions should defer to the conscience of the patient by respecting her or his right to access to comprehensive health care. We strongly reiterate that the current rule significantly broadens the scope and reach of existing federal refusal laws beyond congressional intent, and therefore is entirely unnecessary.

This regulation has a debilitating effect on an estimated 584,294 health-care entities, including hospitals, private physician offices and health centers and on the millions of individuals and families who rely on them for health care. Again, we urge you to move forward with the proposed rule and rescind the regulation.

Thank you for giving us the opportunity to comment. If we can provide you with any additional information, please do not hesitate to contact me at (202) 986-6093.

Sincerely,

Jon O'Brien
President

Encl:

In Good Conscience: Respecting the Beliefs of Health-Care Providers and the Needs of Patients
<http://www.catholicsforchoice.org/topics/contraception/documents/CFCInGoodConscience.pdf>