CATHOLICS FOR CHOICE

IN GOOD CONSCIENCE

Department of Health and Human Services
Office of Public Health and Science
Attn: Brenda Destro
Hubert Humphrey Building
200 Independence Avenue SW, Room 728E
Washington, DC 20201

Re: Provider Conscience Regulation (RIN 0991-AB48)

Dear Secretary Leavitt:

Catholics for Choice is writing to oppose the "Provider Conscience Regulation" proposed on August 26, 2008, by the Department of Health and Human Services (HHS). The proposed regulation is unnecessary, uses the guise of religious freedom to create unreasonable barriers for women and men to access reproductive health care and threatens to significantly undermine patients' access to critical health-care services and information.

Catholics for Choice is a nonprofit organization founded in 1973 to serve as a voice for Catholics who believe that the Catholic tradition supports a woman'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. Over the last several years, 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.

This proposed 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. If implemented, however, the proposed regulation would not eliminate this need. It would instead significantly expand 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 would also leave the door open for entire health-care organizations, including insurance plans and hospitals, to deny access to or even information about reproductive health services, including birth control. As drafted, the proposed rule is certain to result 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 religious freedom, the proposed rule will limit access and keep information out of the hands of patients. We strongly urge you to end all efforts to move this proposed regulation forward.

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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. HHS claims that the proposed regulation is 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 proposed rule, 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 negating 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 is in line with their moral and religious beliefs and the right of patients to have access to the medical care they need.

Expansion to an Array of Services, as well as Individuals and Institutions, Goes too Far

The expansion of these clauses goes beyond protecting the religious and moral beliefs of health-care providers; they act as a means to refuse treatments and medications to all. The proposed regulation expands the universe of health-care workers and institutions that may refuse to provide services. 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 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 in a safe, convenient and timely manner. If implemented as drafted, the proposed regulation would significantly expand 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 proposed rule is so broadly written that it will allow 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.

Patients' Access to Information, Counseling and Referrals Could be Undermined
Under the proposed rule, employees of HHS-funded entities can refuse not only to perform any given health-care service, they can also deny patients access to information about or referrals for such services—without regard for the impact it will have on patients.

The proposed 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. While existing statute appears to allow certain providers to opt out of providing referrals for abortion services, this proposed regulation could potentially cut patients off completely from critical information about their health care. 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 proposed rule must not stand 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.

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. This will likely most often happen in cases related to abortion. In these situations, women seeking an abortion 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 professional 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 patients receive continuity of care without facing an undue burden, such as traveling long distances or encountering additional barriers to obtaining the desired services.

As drafted, the proposed 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 Careful Balance Struck under Civil Rights Law Fails to be Considered
The proposed 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 proposed rule fails to 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 HHS claims that the proposed rule is needed to clarify the existing laws, its expansive language and ambiguity will likely 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 proposed 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 result of this expansion in refusal clauses is that women and men seeking sexual and reproductive health-care services may be routinely denied access to or have great difficulty in receiving care. 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 negating the right to conscience of the person seeking care.

Patients' Access to Health-Care Services Would Be Seriously Threatened

The proposed 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, could significantly jeopardize patients' access to a wide range of health-care services.

The proposed rule could make 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. As drafted, the rule may be interpreted so as to affect referrals and counseling on issues seemingly unrelated to abortion. For example, the proposed 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 their beliefs. Similarly, it may encourage a physician or physician's assistant to deny a 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.

Women's Access to Birth Control Would Be in Jeopardy

The proposed regulation could be especially problematic for women's access to reproductive health care. Under a previously leaked draft of this rule in mid-July, HHS defined the term "abortion" to include commonly used FDA-approved methods of birth control. Rather than allay concerns over this language by including a definition of abortion consistent with the consensus within the medical community and existing federal policy, the proposed rule drops the abortion definition entirely. When asked to clarify that the regulation does not apply to birth control, HHS Secretary Leavitt stated: "This regulation does not seek to resolve any ambiguity in that area." The potential implications of this ambiguity are far-reaching. Like the leaked draft, the proposed rule leaves 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 could be denied access to birth control services, including counseling and information, even if there are other protections in place.

For example, if adopted, the proposed rule could undermine a state's ability to enforce its own law requiring insurance plans that cover other prescription drugs to also cover birth control. It could create confusion for states administering Medicaid and the Title X programs because of existing program requirements ensuring access to contraceptive counseling and services; and it could create an opening for hospitals to refuse to comply with state laws requiring that sexual assault survivors be offered emergency contraception. In short, the proposal may well

complicate the administration of long-standing and vital federal family planning programs, as well as state laws adopted to protect access to contraception.

Conclusion
The guise 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, individuals and institutions should not seek to impose ideology and should instead defer to the individual conscience of the patient by respecting her or his right to necessary comprehensive health care.

By HHS's own estimate, the proposed regulation will impact 584,294 health-care entities, including hospitals, private physician offices and health centers. This proposed regulation could have a debilitating effect on these health-care entities and on the millions of individuals and families who rely on them for health care. Again, we urge you to end all efforts to move this rule forward.

Thank you for giving us the opportunity to comment. If we can provide you with any additional information, do no hesitate to contact me at (202) 986-6093.

Sincerely,

Jon O'Brien
President