

Congress of the United States

House of Representatives

Washington, D.C. 20515

March 27, 2018

The Honorable Alex M. Azar
Secretary
U.S. Department of Health & Human Services
200 Independence Ave, SW
Washington, DC 20201

RE: *RIN 0945-ZA03, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*

Dear Secretary Azar:

We are writing in response to the Department of Health and Human Services (HHS), Office for Civil Rights' (OCR) proposed rule, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*.¹ As Ranking Members of the Energy and Commerce Committee and the Education and the Workforce Committee, we strongly oppose the proposed rule because it would ultimately allow for greater discrimination in our health care system and in HHS-funded programs and services.

The core mission of the HHS Office for Civil Rights is “to improve the health and well-being of people across the nation; to ensure that people have equal access to and the opportunity to participate in and receive services from HHS programs without facing unlawful discrimination; and to protect the privacy and security of health information in accordance with applicable law.”² However, the proposed rule contradicts this critically important mission. Instead of ensuring that individuals have “equal access” to services, the proposed rule would only exacerbate inequities in our health care system by effectively allowing any individual or entity even remotely involved in a patient’s care to refuse services based on religious beliefs. Furthermore, we are deeply concerned that OCR’s decision to create a new and distinct Conscience and Religious Freedom Division to enforce the policies outlined by the proposed rule will undermine activities related to civil rights and privacy oversight under the agency’s purview. Troublingly, the Administration’s Fiscal Year 2019 budget proposes a 20 percent cut in OCR’s budget and no additional funding for the new division.³ This suggests that OCR intends to shift

¹ *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880 (January 26, 2018) (to be codified at 45 C.F.R. 88)

² Department of Health and Human Services, *OCR's Mission and Vision*, (accessed March 2018) available at: <https://www.hhs.gov/ocr/about-us/leadership/mission-and-vision/index.html>.

³ Department of Health and Humans Services, *Budget in Brief*, (FY 2019) available at: <https://www.hhs.gov/sites/default/files/fy-2019-budget-in-brief.pdf>.

resources from other initiatives in order to fund the new division – at the expense of other statutorily required activities and legal protections.

The proposed rule attempts to expand existing refusal of care laws in unprecedented and illegal ways and contravenes Congressional intent. The proposed rule goes well beyond the Bush Administration’s controversial 2008 rule, which the Obama Administration ultimately rescinded, and would only create more barriers to health care and services. First, the proposed rule redefines the term “assist in performance” to mean “participate in any activity with an articulable connection to a procedure.” The term “articulable connection” is unreasonably broad and ill-defined for this context. The proposed rule also appears to be attempting to expand existing refusal of care laws by broadly defining the term “entity” as “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” and also “a State, political subdivision of any State, instrumentality of any State or political subdivision thereof, or any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State.” The significant changes to the meaning of this term is beyond what Congress intended and would weaken patient access to care. For example, under this proposed rule, a hospital or individual provider could refuse to offer certain services, such as reproductive health services or gender reassignment surgery. Similarly, a pharmacy or pharmacist could refuse to fill prescriptions for birth control or emergency contraception, or an insurance company could refuse to cover miscarriage management services. Furthermore, individuals only tangentially involved in patient care, such as hospital room schedulers, individuals providing transportation services, or laboratory technicians, could deny services based on religious beliefs.

Additionally, the proposed rule fails to clearly articulate the relationship between existing patient protection laws and the attempted expansion of refusal of care laws, further threatening access to care. For instance, under the Emergency Medical Treatment and Labor Act (EMTALA) patients have a right to stabilizing treatment in emergency situations, regardless of their ability to pay. However, under the proposed rule it could be possible for a patient experiencing a medical emergency to be denied care based on a provider’s religious beliefs.

The proposed rule also intentionally seeks to undermine or preempt state laws that guarantee coverage and protect patients’ access to services by encouraging states to enact new laws that would further expand existing refusal of care laws. The proposed rule intends to override state laws that are not “equally or more protective of religious freedom and moral convictions.” This is a direct attack on states with progressive laws designed to ensure access to comprehensive care. For example, the proposed rule specifically references state laws in California and New York that require comprehensive coverage for reproductive health services, including abortion coverage, in health insurance plans. These laws protect women’s health and ensure that women have coverage for the care they need, as well as the economic security that coverage provides. States have the legal authority to ensure heightened protections for their citizens, and the proposed rule attempts to undermine this authority and roll back access to care.

Moreover, the proposed rule conflicts with Title VII of the Civil Rights Act. Title VII is the preeminent federal law that addresses employment discrimination, requiring employers to

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reasonably accommodate employees' religious beliefs unless doing so would impose an undue hardship on employers. For decades, Title VII has established the legal framework for religious accommodations in the workplace, including when a health care worker requests an accommodation. Title VII ensures that employers can consider the effect an accommodation would have on coworkers, customers, and patients, as well as factors such as public safety, patient health, and other legal obligations. Introducing another standard, as proposed under the rule, would create confusion for health care employers that would still be subject to Title VII and its requirements. As a result, it is highly likely that the proposed rule will undermine compliance with Title VII.

We also note that the Establishment Clause of the First Amendment requires the government to adequately account for burdens a religious accommodation may impose on others – including patients – and prohibits granting accommodations when they would detrimentally affect any third party. Any extension of religious accommodation should be accompanied by equally extensive protections for patients to ensure that their health needs remain paramount, and that they are able to receive both accurate information and quality health services. The proposed rule fails to provide any safeguards and conflicts with this constitutional bar.

The new division and the proposed rule are just the latest in a long list of attacks by the Administration to erode civil rights under the guise of religious liberty. Religious liberty is a fundamental American value, but religion should not permit a person to cause harm to others or subvert the rights of others.

Women, minorities, members of the LGBTQ community, and other marginalized groups already face widespread discrimination in our health care system and this policy would only make this worse by offering an extensive group of individuals and entities a license to discriminate. The proposed rule contradicts the Office for Civil Rights' core mission and should be rejected. Everyone, regardless of race, color, national origin, sex (sexual orientation and gender identity), age, or disability, should be treated as equals in our health care system. We urge you to withdraw this harmful, unnecessary proposed rule.

Sincerely,



Frank Pallone, Jr.
Ranking Member
Committee on Energy
and Commerce



Robert C. "Bobby" Scott
Ranking Member
Committee on Education
and the Workforce