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Representing *California's  
Catholic Health Systems  
and Hospitals*



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Health Systems and Hospitals

September 16, 2008

The Honorable Michael Leavitt, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

***Subj: Provider Conscience Regulation Public Comments of the  
Alliance of Catholic Health Care Concerning 45 CFR Part 88,  
Proposed Regulations Ensuring that Department of Health and  
Human Services Funds do not Support Coercive or  
Discriminatory Policies or Practices in Violation of Federal Law***

Dear Secretary Leavitt:

I am writing as president and chief executive officer of the Alliance of Catholic Health Care in support of 45 CFR Part 88, the U.S. Department of Health and Human Services' (HHS's) proposed "Provider Conscience Regulation." The proposed regulation would help ensure that federal funds do not support morally coercive practices in violation of federal non-discrimination laws related to abortion.

The Alliance of Catholic Health Care is a California-based, nonprofit health care association representing California's Catholic health care systems and hospitals. Each of its members is a "health care entity" within the meaning of Pub. L. 110-161, § Section 508(d) (the "Weldon Conscience Protection Amendment").

The Alliance's members include fifty-three (53) California Catholic and community-based affiliated hospitals, which represent nearly 16 percent of all California acute care in-patient hospitals. The Alliance's California members include: Catholic Healthcare West, with approximately 9,600 active physicians, the largest not-for-profit hospital system in California and the eighth largest in the nation; Daughters of Charity Health Care System, with six hospitals and medical centers along the California coast; Providence Health & Services, with four medical centers in Southern California, as well as facilities in Alaska, Washington, Oregon and Montana; and St. Joseph Health System, with ten hospitals throughout California, as well as a regional health care system in Texas.

The Alliance's members provide health care services in accordance with the religious and moral tenets of the Catholic religious faith. Central to these beliefs is a firm commitment to the dignity of the human person from conception to natural death, and a deep concern for the health care needs of the poor and for those in spiritual need. Animated by these beliefs, Catholic health care providers in California have been making a broad range of quality health care services available to underserved patients and families for more than 150 years.



While our members do not impose their religious and moral beliefs upon those they serve, they do hold themselves accountable, as health care providers, to Catholic ethical and moral standards.\* As a consequence, the noble American tradition of religious tolerance and the nation's constitutional guarantee of religious liberty have been cornerstones upon which Catholic health care providers have relied as they serve their patients and communities. More recently, the Alliance's members have also come to rely on federal and state statutes that protect them from religious discrimination by political jurisdictions and other entities on the ground that their moral convictions preclude them from providing certain morally objectionable medical procedures, such as abortion and elective sterilization.

These statutes and the Department's proposed regulation are especially important to religiously affiliated health care providers in California, where several influential policymakers and State officials have engaged in a decade-long campaign to coerce them, under penalty of law, to provide medical services in violation of their deepest moral convictions. The following are but a few such examples:

- In 1999, California State Assembly Bill 525, as approved by the Assembly Judiciary and Health Committees, would have: a) required Catholic hospitals to provide or arrange for abortions or lose tens of millions of dollars in annual state assistance. (The loss of this support would have required our hospitals to increase their charges or reduce charity care to make up the difference.); b) permitted the state attorney general to review and impose restrictions on mergers between nonprofit health care institutions if services such as in-patient abortions were affected. Further, the bill permitted reviews even if such services were left unchanged, as would be the case in the merger of two Catholic hospitals. AB 525 permitted the attorney general to hold up mergers, impose requirements that could violate Catholic ethical principles and charge our hospitals for the state's cost of doing so; and c) required all health plans that contract with Catholic hospitals to single them out in their marketing materials for identification as providers that do not provide abortions or certain other reproductive services. (This provision did nothing to achieve its stated purpose of informing patients where such services are available; it simply attempted to "blacklist" Catholic institutions and their religious beliefs.) AB 525 was aimed directly at Catholic health care providers. The bill's principal author issued a press release that stated, "AB 525 was created in response to a growing threat to reproductive health care services as a result of mergers between religiously affiliated health care systems" and other systems. The press release identified the "Ethical and Religious Directives for Catholic Health Care" and its prohibitions on abortion and certain other services as the targets of the bill. AB 525 failed on the Assembly floor by a mere ten votes.

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\* See "Ethical and Religious Directives for Catholic Health Care Services" (United States Catholic Conference of Bishops 2001).



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- Earlier in this decade, several commissioners on the California Medical Assistance Commission (CMAC) made repeated, but unsuccessful, attempts to force Catholic hospitals to provide abortion and other reproductive services as a condition of receiving a Medi-Cal (Medicaid) contract.
- Following enactment of the federal Weldon Conscience Amendment in 2005, California's attorney general filed suit in federal district court to have the new statute declared an unconstitutional infringement on the state's ability to enforce its own abortion laws. He was the only state attorney general to do so. Apparently, he viewed the Weldon Amendment as an effective impediment to the future enactment of legislation such as AB 525. The attorney general's suit alleged that two Catholic hospitals in California had denied a patient treatment for an emergency abortion. This claim was subsequently investigated by the California Department of Health Services, which found no basis for the allegation. The court ultimately found against the attorney general on procedural grounds. *California v. The United States*, No. C 05-00328 JSW, 2008 WL 744840 (N.D. Cal. March 18, 2008).

Each of these efforts to employ the power of the state to compel Catholic hospitals to violate their religious and moral beliefs was promoted as an attempt to improve access to abortion and other reproductive services. The truth is that they were not about access, but intolerance. Despite the claims that Catholic health care providers threaten the availability of abortion and sterilization in California, the sponsors of these measures have never produced objective evidence that such a threat exists; and, in fact, the procedures remain widely available. Further, the sponsors' approach stands in stark contrast to the meaning and spirit of the 1971 California conscience clause statute that was adopted in the wake of enactment of State's therapeutic abortion law in 1968.

These assaults on freedom of conscience not only run counter to our nation's commitment to religious tolerance and liberty, they conclusively demonstrate the urgent need for the proposed regulation. The proposed regulation is intended to ensure compliance with the Church Amendments, the Public Health Service Act, and the Weldon Amendment, and to ensure that the Department of Health and Human Services (HHS) does not support coercive or discriminatory practices by supplying funds to a state or other entity that enacts policies in violation of federal non-discrimination laws related to abortion. Several of these federal conscience protection statutes have been in existence for more than thirty years but, by themselves, they have not deterred influential California public officials from attempting to contravene them. Enforcing these important and necessary statutes through the proposed regulatory protections will help ensure that health care professionals and institutions in California, and elsewhere, will be able to serve their patients and clients free from religious and moral discrimination.

Currently, while many recipients of federal funds must certify compliance with federal nondiscrimination laws, federal conscience protection laws are not mentioned in the forms that are used. These draft regulations would specifically include reference to the nondiscrimination provisions of the Church Amendments,



the PHS Act, and the Weldon Amendment. The proposed regulations would require recipients and sub-recipients of certain federal funds to certify compliance with these laws as a material prerequisite to receiving federal funding. The certification must be done in writing and is intended to ensure the recipients know of, and will comply with, the nondiscrimination laws. This certification will serve to remind and emphasize that discrimination based upon religious and moral beliefs is prohibited under federal law and that such conscience-based conduct is entitled to the same deference as are our nation's other important civil rights protections. As demonstrated above, the Alliance believes that this certification process is necessary to protect our member institutions from the very real threat of discriminatory treatment by public and other entities. Moreover, for these same reasons, we believe that written certification of compliance with nondiscrimination provisions should contain language specifying that the certification is a material prerequisite to the payment of Department funds.

The proposed regulation would limit the scope of protected persons to those who are under the control or authority of an entity that implements a health service program or research activity funded in whole or part under a program administered by the Department, "whether or not they are paid by the Department-funded entity." And the proposed rule would allow broad discretion for individuals' consciences by avoiding judging whether a particular action is genuinely offensive to an individual. This principle of conscientious objection should include every stage of pregnancy from the initiation of conception.\*\* The proposed rule would apply the term "assist in the performance" to members of a recipients' workforce who have a "reasonable connection" to the objectionable procedure including its performance, referrals, training and other arrangements. Clearly, these definitions broadly protect religious liberty and freedom of conscience, and would deter recipients from engaging in discrimination based upon the exercise of these fundamental freedoms and rights.

We also believe that it is entirely appropriate for the Department's Office for Civil Rights to examine complaints of discrimination under the proposed rule. Discrimination based upon the exercise of religious liberty and freedom of conscience is a denial of basic civil rights and warrants the same level of scrutiny, investigation, and enforcement as, for example, discrimination based upon race, sex, or physical disability warrants under the civil rights laws. To this end, we are concerned that, because HHS would not conduct reviews with regard to specific issues of compliance, the lack of such review might leave potential noncompliance undetected. Thus, we believe that more extensive compliance review would be appropriate in order to ensure the laws are followed. Waiting for complaints of noncompliance to be filed may not achieve the desired result of compliance, as many individuals may not be fully aware of their conscience rights or the extent to which such rights are protected under federal law. We do note, with appreciation, that if HHS is informed of any specific compliance issues in a state, local government or other entity, HHS would work with such entity to come into

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\*\* The American Medical Association defines conception as the "fertilization of an egg by a sperm that initiates conception." AMA COMPLETE MEDICAL ENCYCLOPEDIA 392 (2003)



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compliance and, if compliance is not achieved, HHS may employ all legal avenues to remedy non-compliance, including termination of funding and return of funds paid out.

Finally, the Department has requested comments on what constitutes the most effective methods of making recipients of HHS funds, their employees, and participants aware of the protections against discrimination found in the Church Amendments, PHS Act, and the Weldon Amendment. To be sure, requiring the physical posting of notices of nondiscrimination protections in conspicuous places within the buildings of recipients of funds, and on applications to educational programs that are recipients of funds, is a good starting point. Likewise, requiring the inclusion of nondiscrimination protections in notices of applications for training, residency, educational programs and private health insurance plans that receive federal funds to provide access to health care coverage (e.g., SCHIP, Medicaid, and Medicare Advantage) is another prudent measure to promote nondiscrimination, as would be requiring notice of nondiscrimination protections on recipients' websites and in their employee handbooks. Knowledge is power. By instilling an awareness of religious liberty and freedom of conscience, and the right to be free from discrimination based upon the exercise of these rights, the proposed regulation will empower employees and other protected persons. We fully support the proposed rule.

The Alliance and its members commend you for proposing this necessary rule and hope the foregoing comments are helpful. We are prepared to provide further comments or information that might assist the Department in promulgating the final regulation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. J. Cox". The signature is fluid and cursive, written over a light blue horizontal line.

William J. Cox  
President and Chief Executive Officer  
Alliance of Catholic Health Care