

New Federal Initiatives Project

**The Obama Administration Signals
Intent to Change Conscience Clause Rule**

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On March 10, 2009, the United States Department of Health and Human Services (“HHS”) under President Obama issued a notice of proposed rule making to rescind the conscience protection regulations promulgated by President Bush. The Bush rule was finalized December 19, 2008 and took effect January 20, 2009. It contains requirements that certain recipients of federal healthcare funds provide certification of compliance with three existing federal conscience protection laws; provides definitions; and attempts to clarify the scope of the conscience protections under these laws. The rule has attracted broad attention because, among other things, of the implication that hospitals that receive federal funding could have funding cut off if they require any healthcare personnel to perform or “assist in” abortions, and the potential conflict with states or national medical societies that presumably now cannot require doctors to perform or refer for abortions as a condition of medical licensure.

The conscience clause rule implements three laws relating to the provision of medical services: (i) the Church amendments (42 U.S.C. 300a-7); (ii) Public Health Service Act Section 245 (42 U.S.C. 238n) (“PHS 245”); and (iii) the Weldon Amendment, which is passed annually as part of Congressional appropriations (this year, the Weldon Amendment is Consolidated Appropriations Act, 2008, Public Law 110-161, Div. G, Sec. 508(d), 121 Stat. 1844, 2209). Each of the laws covers different areas, but all relate to whether a healthcare professional can be required to participate in medical procedures or research activities against his or her religious beliefs or moral convictions.

The Church amendments, sponsored by the late Senator from Idaho, Frank Church, contain multiple prohibitions on use of federal funds or guarantees regarding abortions, sterilizations and other medical procedures and activities. The amendments prohibit recipients of HHS funds from requiring an individual “to perform or assist in a sterilization procedure or an abortion, if it would be contrary to his/her religious beliefs or moral convictions”. Entities also cannot be required to furnish facilities or personnel for sterilizations or abortions, if that is contrary to the entity’s or personnel’s religious or moral beliefs. The amendments also prohibit discrimination in employment against healthcare personnel because they either participated, or refused to participate, in lawful sterilization procedures or abortions. And they also prohibit discrimination in admission (including for internships or residencies) because of an applicant’s reluctance or willingness to “counsel, suggest, recommend, assist, or in any way participate” in abortions or sterilizations, based on the applicant’s religious beliefs or moral convictions.

However, the Church amendments go beyond the area of abortions or sterilizations. They also prohibit any entity receiving federal contracts or grants for research from discriminating in employment against healthcare personnel “because he performed or assisted in the performance of any lawful health service or research activity, or because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance of any such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.” And finally, they provide that no individual “shall be required to perform or assist in the performance of any part of a health service program or research activity [funded in part or in whole by HHS] if his performance or assistance...would be contrary to his religious beliefs or moral convictions.” Thus, the Church amendments are very broad in their protection of conscience, and go far beyond abortion and sterilization issues to protect the right of the individual to refuse to participate in any health service or research if it is contrary to his or her religion or morals.

PHS 245 was enacted by Congress, and provides protections for entities that refuse to participate in abortion. It provides that none of the federal government or any state or local governments may discriminate against entities because they (i) refuse to receive, provide or require abortion training; (ii) refuse to provide abortions; (iii) refuse to provide referrals for abortions or abortion training; or (iv) attended a training program that did or does not require attendees to perform abortions or require, provide

or refer for training in the performance of abortions or make arrangements for such training. Thus, a state may not require an entity to provide training in abortions for accreditation of post-graduate physician training programs or as a requirement for issuing any license or certificate, such as a medical license.

The Weldon Amendment became an appropriations rider in 2005, and provides that no federal moneys may be made available to any federal, state or local entity that subjects any institutional or individual healthcare entity to discrimination based on the fact that the entity does not “provide, pay for, provide coverage of, or refer for abortions.”

The Bush Administration announced its concern that these laws were not being honored, and that illegal discrimination was occurring. To raise awareness of these laws and to remedy this possible discrimination, HHS proposed the conscience clause rule in August 2008 in order to provide a regulatory vehicle to enforce the three conscience laws.

The rule generated a great number of comments, with many positive comments asserting that discrimination does take place against healthcare personnel who refuse to provide, assist in or refer abortions. Many negative comments on the proposed rule centered on the breadth of its definitions, such as “assist in the performance”; “individual”, “workforce”; “health care entity”; “entity”; “health service”; and “health service program”, among others. Central concerns of the negative commenters included the concern that non-physician staff, including pharmacists, nurses, occupational therapists, technicians or janitors, for example, could rely on the rule to avoid assisting in the performance of an activity against their religious beliefs or morals. Negative commenters were also concerned that a healthcare provider could be allowed to refuse abortions and also not provide referrals for an abortion, which was alleged to be a denial of the patient’s rights. Some changes were made in the final rule in response to comments, but the conscience clause rule remained substantially the same in its final form.

The rule making by President Obama seeks to rescind the regulation entirely. HHS solicited public comment on rescission until April 9, 2009, specifically inviting comment as to the necessity and effectiveness of the Bush rule, as well as comment regarding the potential impact of the rule in reducing “access to information and healthcare services” among low-income women, ambiguity in the language of the previous regulations, and the feasibility of protecting conscience through non-regulatory means. The solicitation of comment regarding “access” and “ambiguity” echo concern expressed in the previous comment period by abortion and contraceptive rights advocates that some healthcare personnel, such as pharmacists, have recently balked at providing contraception (that may have an abortifacient effect) and that substantial numbers of new OB/GYNs are not learning how to perform abortions and are refusing to perform them.

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