

The new conscience regulation: gutting protections, laying landmines

Following are direct quotes excerpted from the new conscience regulation, which included discussion sections of explanations and interpretations by Obama administration HHS officials. The regulation can be viewed in its entirety at:
http://www.ofr.gov/OFRUpload/OFRData/2011-03993_PI.pdf

Comments in *italics* by CMA VP for Government Relations Jonathan Imbody follow the quoted excerpts from the regulation.

The new conscience regulation: gutting protections, laying landmines	1
Gutting the regulation	1
"Abortion" does not include contraception	1
"Informed consent" required.....	2
Original reg poses a threat to healthcare access.....	2
Comments received.....	3
Reporting provision retained.....	3
Outreach education planned.....	3
Concern asserted about wholesale discrimination against patients	3
Catholics still have the laws.....	4
Certification is too costly	4

Gutting the regulation

"Sections 88.2 through 88.5 of the 2008 Final Rule have been removed. Section 88.2 contains definitions of terms used in the federal health care provider conscience statutes.

"The preamble to the August 26, 2008 Notice of Proposed Rulemaking (73 FR 50274) and the preamble to the December 19, 2008 Final Rule (73 FR 78072) addressing these sections are neither the position of the Department, nor guidance that should be relied upon for purposes of interpreting the federal health care provider conscience protection statutes."

These few sentences in the new regulation cut the heart out of the original conscience regulation. The definitions in the original regulation were the key to making sure the law was interpreted correctly, providing concrete examples of conscience protections backed by law. Examples included definitions of what constitutes "discrimination"; what it means to "assist in the performance of abortion"; what is a "health care entity" and who within a healthcare institution "workforce" enjoys protection under the law.

"Abortion" does not include contraception

"The 2008 Final Rule did not provide that the term "abortion," as contained in the federal health care provider conscience protection statutes, includes contraception. However, the comments

reflect that the 2008 Final Rule caused significant confusion as to whether abortion also includes contraception. The provision of contraceptive services has never been defined as abortion in federal statute. There is no indication that the federal health care provider conscience statutes intended that the term "abortion" included contraception. "

This is one of the most alarming sections of the new regulation. It seems entirely possible that this language is laying a foundation for disallowing conscientious objections to prescribing or providing contraception and abortifacients. Abortion advocates have been tirelessly pushing legislation to mandate such provision and prescriptions, and this language appears to be tailored to that drive to remove ethical choices from healthcare professionals.

"Informed consent" required

"Many comments expressed concern that the 2008 Final Rule would prevent a patient from being able to give informed consent, because the health care provider might not advise the patient of all health care options. Partial rescission of the 2008 Final Rule should clarify any mistaken belief that it altered the scope of information that must be provided to a patient by their provider in order to fulfill informed consent requirements."

Politicians and bureaucrats often speak in code, and good words too often cover up bad intentions. Every healthcare professional values informed consent. In this context, however, the concern is that insuring informed consent could be interpreted to mean requiring referrals for abortions and other controversial procedures and prescriptions.

Original reg poses a threat to healthcare access

"The Department received several comments suggesting that the 2008 Final Rule could limit access to reproductive health services and information, including contraception, and could impact a wide range of medical services, including care for sexual assault victims, provision of HIV/AIDS treatment, and emergency services. Additionally, a number of commenters expressed concern that the 2008 Final Rule could disproportionately affect access to health care by certain sub-populations, including low income patients, minorities, the uninsured, patients in rural areas, Medicaid beneficiaries, or other medically-underserved populations.

"The Department agrees with comments that the 2008 Final Rule may negatively affect the ability of patients to access care if interpreted broadly. Accordingly, the Department partially rescinds the 2008 Final Rule based on concerns expressed that it had the potential to negatively impact patient access to contraception and certain other medical services without a basis in federal conscience protection statutes."

The regulation had been in effect for over two years. No evidence was presented indicating that any of these claims were valid. The real threat to patient access to healthcare-- particularly for the poor and those in medically underserved areas and populations--is the loss of faith-based healthcare professionals and institutions if they lose the ability to practice medicine according to conscientiously held ethical standards.

Comments received

"The Department received more than 300,000 comments addressing its notice of proposed rulemaking proposing to rescind in its entirety the 2008 Final Rule. More than 97,000 individuals and entities submitted comments generally supportive of the proposal to rescind the 2008 Final Rule. Nearly 187,000 comments expressed opposition to the Department's proposal to rescind the 2008 Final Rule."

Note that public comments, including those submitted by CMA members, supporting the original conscience regulation and opposing the Obama administration's plan to rescind it outnumbered those supporting the administration by a margin of 2-1.

Reporting provision retained

"While the longstanding federal health care provider conscience protection statutes have provided protections for health care providers, there was no clear mechanism for a health care provider who believed his or her rights were violated to seek enforcement of those rights. To address these comments, this final rule retains the provision in the 2008 Final Rule that designates the Office for Civil Rights (OCR) of the Department of Health and Human Services to receive complaints of discrimination and coercion based on the federal health care provider conscience protection statutes."

It is good that the new regulation retains the very important provision for reporting cases of discrimination to the HHS Office of Civil Rights. Please do so. Besides addressing your need to rectify the discrimination, such reports also give us a chance to see if the administration will aggressively pursue allegations despite the President's position.

Outreach education planned

"The Department received many comments expressing concern about the lack of knowledge about the federal health care provider conscience protection statutes in the health care industry. Many commenters opposed to rescission related anecdotes of hospitals and other health care entities failing to respect the conscience rights of health care providers. The Department believes it is important to provide outreach to the health care community about the federal health care provider conscience protection statutes."

The Bush administration had planned an educational outreach but ran out of time. My concern now with this plan is having a radically pro-abortion HHS Secretary, President and administration officials interpreting and explaining laws designed to protect pro-life healthcare professionals.

Concern asserted about wholesale discrimination against patients

The Department agrees with concerns that the 2008 Final Rule may have caused confusion as to whether the federal statutory conscience protections allow providers to refuse to treat entire groups of people based on religious or moral beliefs.

The phrase, "the Department agrees with concerns," is in this case revealing; HHS political appointees are simply agreeing with the undocumented assertions of the pro-abortion allies of the administration. Federal agency officials are supposed to make regulations based on

evidence--not unfounded allegations. Believe me, if "entire groups of people" actually were being denied health care "based on religious or moral beliefs," you would have heard about it on every media and political outlet.

Catholics still have the laws

A substantial number of comments in opposition to rescinding the 2008 Final Rule maintained that Roman Catholic hospitals would have to close, that rescission of the rule would limit access to pro-life counseling, and that providers would either leave the health care industry or choose not to enter it, because they believed that they would be forced to perform abortions. Under this partial rescission of the 2008 Final Rule, Roman Catholic hospitals will still have the same statutory protections afforded to them as have been for decades.

Catholic and other faith-based institutions have had protection in law for decades. The problem is that without a clear implementing regulation, the law remains subject to wide misinterpretation. This new regulation actually has the potential to weaken the interpretation of conscience rights, for example, by asserting that no contraception--even those with potential abortifacient action--falls under the definition of abortion.

Certification is too costly

"The Department received several comments addressing the costs to providers of the 2008 Final Rule. Commenters stated that the new certification requirement imposed substantial additional responsibilities on health care entities, and that the burden analysis did not sufficiently account for the cost of collecting information for, submitting, and maintaining the written certifications required by the 2008 Final Rule. The Department agrees with these commenters, and believes that the certification requirements in the 2008 Final Rule are unnecessary to ensure compliance with the federal health care provider conscience protection statutes, and that the certification requirements created unnecessary additional financial and administrative burdens on health care entities. The Department believes that amending existing grant documents to require grantees to acknowledge that they will comply with the provider conscience laws will accomplish the same result with far less administrative burden."

All of a sudden the people who brought us over a hundred new agencies through healthcare "reform" legislation are now concerned about excessive bureaucracy and paperwork? The original regulation required certification of compliance with the law for a reason: it shows that the federal government is serious about enforcing civil rights laws, and that institutions that flout the law will be noticed and addressed accordingly.