NEW YORK
CITY BAR

COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS

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BY ELECTRONIC MAIL: proposedrescission@hhs.gov
Acting Secretary Charles E. Johnson and Staff
Office of Public Health and Science
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW, Room 716G
Washington, D.C. 20201
Attn: Rescission Proposal Comments

Re: Provider Conscience Regulations, Rescission Proposal – RIN 0991-AB49
Department of Health and Human Services – Proposed Rule

Dear Secretary Johnson and Health and Human Services Department Staff:

We are writing on behalf of the Lesbian, Gay, Bisexual and Transgender Rights Committee (the "Committee") of the New York City Bar Association to submit comments on the proposed rule, published at 74 Fed. Reg. 10207-10211 (Mar. 10, 2009), proposing to rescind a rule made final on December 19, 2008, which expands the ability of health care providers, insurers and health care institutions to refuse to provide health care services, as well as information and referrals, to patients[1] (the "New Regulation"). The New Regulation is particularly problematic for lesbian, gay, bisexual and transgender ("LGBT") people, who often face obstacles in obtaining appropriate health care services and are already subjected to discrimination and anti-LGBT bias in the delivery of such services.

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[1] *See* 73 Fed. Reg. 78072 (Dec. 19, 2008) (codified at 45 C.F.R. Part 88).

The New Regulation limits access to a wide range of health care services and disturbs existing protections for patients, under the guise of providing further guidance about existing federal protection for health care providers who have religious or moral objections to providing certain health care services, such as abortion. In addition, the rule does not meet its stated goal and instead creates more confusion than clarity about existing federal conscience protections. We therefore support rescission of the New Regulation.

The comments provided here focus on the New Regulation's potential adverse impact on the LGBT community, with a particular focus on New York State. Please note that some of these points, as indicated below, are more fully developed in an April 6, 2009 letter to the Acting Secretary from Lambda Legal Defense and Education Fund and the National Coalition for LGBT Health ("Lambda Legal and Coalition Letter") addressing the proposed rescission.

1. The Regulation Impacts a Wide Range of Health Care Services

The Church Amendments,[2] Public Health Service Act Section 245,[3] and the Weldon Amendment[4] all provide protection under certain circumstances for health care providers and facilities to refuse to provide health care services on religious or moral grounds. Although all three laws focus principally on abortion, the New Regulation impacts a wide range of health care services. Subpart 88.4(d) of the regulation specifies that an individual health care provider is permitted to refuse to participate in the delivery of *any* health care service to which he or she objects. The Department of Health and Human Services (HHS) has confirmed that the new rule is intended to be exactly that expansive.[5] Moreover, despite serious concerns expressed by numerous individuals and organizations regarding the draft regulation's failure to define the term "abortion," HHS has declined to provide a definition, even while recognizing that "questions over the nature of abortion and the ending of a life are highly controversial and strongly debated."[6]

This lack of specificity invites health care providers to object to the provision of contraception as "abortion," allowing the regulation to reach far more broadly than the enabling statutes were intended to reach. In addition, the provision allows refusals to provide not only abortion care or even contraception, but also a host of other health care services, including end-of-life care, HIV/AIDS counseling and treatment, reproductive technology and fertility treatments and post-sexual assault care. The new rule undoubtedly limits the provision of health care for individuals who already are subject to discrimination in the delivery of health care, such as unmarried couples or single individuals, people living with HIV/AIDS, and LGBT individuals.

2. The Regulation Sacrifices Patients' Rights to Information and Care

Although the New Regulation includes language acknowledging that "patients are best served when their providers communicate clearly and early about any services they decline to provide or participate in,"[7] the regulation's broad definition of health services allows federally

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[2] 42 U.S.C. § 300a-7.
[3] 42 U.S.C. § 238n.
[4] Consolidated Appropriations Act, 2008, Pub. L. No. 110-61, § 508(d), 121 Stat. 1844, 2209.
[5] *See* 73 Fed. Reg. at 78076-77.
[6] *Id.* at 78077.
[7] *Id.* at 78081.

funded health care providers—both individuals and institutions—to withhold even basic information and counseling from their patients if the denial would be based on a providers' religious or moral objections.[8] Legal and ethical principles of informed consent require health care providers to inform patients about all treatment options, including those to which the provider objects or those which he or she does not provide. However, under the New Regulation, patients may never be able to access the refused health care – or even be made aware of their right or option to do so, or that the provider is withholding information on the basis of conscience.

Moreover, the final regulation states that requirements, such as those contained in Title X family planning regulations, that health care employees provide referrals for services that they object to would be unenforceable.[9] In finalizing the new rule, HHS confirmed that health care providers have no obligation to provide information about services refused under conscience protections.[10] HHS also declined to provide guidance to objecting providers or entities on how to notify patients of their particular conscience objections,[11] and declined to specify "what safeguards health care facilities were required to have in place" to maintain patients' access to those services when an individual provider refuses.[12] Thus, the new rule abandons patients in the face of a health care provider's refusal.

It also undermines important public health goals by threatening to decrease LGBT patients' access to health services. LGBT patients are already often reluctant to disclose their sexual orientation or gender identity to health care providers for fear of discrimination. The American Medical Association has emphasized that it is critical for care providers to be non-judgmental and to encourage patients' openness in order to provide optimal health care. The new rule reverses this trend by explicitly affirming health care providers' expressions of religiously motivated anti-LGBT bias, which not only ends open communication but also drives patients away, with potentially dangerous health consequences. Given widespread bias against the LGBT community, the rule makes a challenging public health situation worse.[13]

3. The Regulation Upsets the Careful Balance Between the Right of Conscience Refusals and Health Care Employers' Obligation to Provide Care

The New Regulation also threatens to upset the careful balance struck in current law between providers' rights of conscience and health care employers' obligation to provide care. The primary problem is the failure to define the term "discrimination in a manner that is consistent with existing law, such as Title VII of the 1964 Civil Rights Act. In fact, HHS explicitly declined to do so in the face of public comment noting the potential impact of failure to define this critical term.[14] Title VII of the 1964 Civil Rights Act, which prohibits

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[8] In the final regulation, HHS states: "We disagree that health care providers' consciences must be violated in order to meet requirements of informed consent in the provision of medical services." *Id.* at 78082.
[9] *See id.* at 78084, 78087.
[10] *See id.* at 78084.
[11] *See id.* at 78083.
[12] *Id.* at 78083-84.
[13] *See also* Lambda Legal and Coalition Letter which addresses this issue in more depth.
[14] *See* 73 Fed. Reg. at 78077.

discrimination in employment, requires evaluation of whether or not an employer can accommodate an employee's or potential employee's religious beliefs without causing undue hardship. The New York State Human Rights law requires a similar balancing test.

The agency's response to the comments explicitly rejected the application of Title VII to the health care context, asserting that in that context "Congress . . . imposed a choice not between reasonable accommodations and undue burden, but between accommodation of religious belief or moral convictions and federal funding."[15] In finalizing the new rule, HHS rejected the longstanding requirement that courts balance the rights of employees to raise religious objections with the employer's business needs.[16] HHS stated that Title VII's analysis applies only to the extent that employers will not be required to hire applicants whose conscience objections mean that they would be unwilling to perform "essential functions of the job."[17]

In other words, under the regulation, a health care employer has an absolute obligation to accommodate the religious objection of the individual provider which trumps both the needs of the patient and the mission of the health care agency. Although it is important to protect individuals' religious liberty, this should not come at the expense of patients' health care needs. By upsetting this careful balance, the regulation goes beyond the intent of Congress and thus beyond the agency's authority.

Critically, well-established law does not require employers to accommodate employees who object to treating certain patients in a respectful medically appropriate way, and recognizes that reasonable accommodation of employees' religion does not require allowing providers to make decisions about provision of health care or interactions with patients based on religiously-motivated objections to an individual's lifestyle.[18]

In finalizing the new rule, HHS rejected the argument that the rule is in conflict with state law authority barring doctors from refusing medical care to LGBT individuals or individuals with HIV based on their religious beliefs,[19] implying that federal law does not prohibit but would instead condone such refusals. This is at least contrary to protections afforded individuals with HIV under the Americans with Disabilities Act,[20] and clearly threatens the enforcement of state law protections for LGBT patients.

4. The Regulation Jeopardizes the Enforcement of a Range of Laws Protecting Patients' Access to Health Care

New York has many protections in place to ensure medical care for patients in need, such as professional misconduct laws prohibiting abandonment of a patient in need of care, and state laws requiring emergency treatment for patients at hospital emergency rooms. The regulation casts doubt on the state's continued authority to enforce such provisions. The commentary to the final regulation acknowledges that "the department is aware that some States may have laws that,

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[15] *Id.* at 78085.
[16] *See id.* at 78084.
[17] *Id.* at 78085.
[18] *See, e.g., Knight v. State of Connecticut Dep't of Pub. Health*, 275 F.3d 156, 168 (2d Cir. 2001). *See also* Lambda Legal and Coalition Letter.
[19] *See* 73 Fed. Reg. at 78089.
[20] *See* 42 U.S.C. § 12101 *et seq.*

if enforced, depending on the factual circumstances, might violate these federally protected rights," but states that "the Department is not aware of any particular instance where a State has done so in an inappropriate fashion."[21] However, the final regulation makes no effort to guide states on how they might continue to enforce their laws in the face of these admittedly conflicting regulatory requirements.

Indeed, the State of New York has joined a lawsuit challenging the implementation of the final regulation, in part on the ground that "as a result of the Regulation, before enforcing its emergency contraception law, New York must consider the threat of massive cuts in federal funding and the destruction of vital public health and safety programs, creating a chilling effect on the enforcement of these contraception laws and potentially encouraging certain licensed health care entities to violate applicable New York laws enacted to protect the fundamental constitutional right of women, including female sexual assault victims, to use contraception."[22]

5. Confusing and Undefined Terms Diminish Access to Care

The New Regulation, which purports to educate the public and health care providers on existing federal conscience protections, creates more confusion than clarification.[23] The Church Amendments, Public Health Service Act Section 245, and the Weldon Amendment each apply to different institutions and/or individuals.[24] The laws also differ in the type of health services covered: abortion,[25] sterilization, health services, or research activity.[26] Each law uses different terms, some of which are undefined.[27]

The New Regulation establishes one set of rules to apply to all three of these laws, despite these differences. The result is to increase confusion. For example, the new rule uses one broad definition for "health service/health service program," even though the Church Amendments treat these as two different terms.[28] Similarly, the new rule defines the terms "entity" and "health care entity" to include "an individual physician or other health care professional," and at the same time an "individual" as a "member of the workforce of an entity/health care entity," even though the Church Amendments outline different requirements for "individuals" versus "entities."[29]

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[21] 73 Fed. Reg. at 78088.

[22] *See* Complaint by Plaintiffs-Intervenors Commissioner of Health Richard F. Daines *et. al* in *State of Connecticut v. United States Department of Health & Human Services*, 09-CV-54 (Jan. 16, 2009).

[23] *See also* Lambda Legal and Coalition Letter for additional discussion related to these concerns.

[24] *E.g, compare* 42 U.S.C. § 300a-7(b) (outlining different dictates for "individuals" as compared to "entities") *with* 42 U.S.C. § 238n(c) (stating that the definition of "entity" includes "individuals").

[25] *See* Public Health Service Act Section 245, 42 U.S.C. § 238n and Weldon Amendment, Consolidated Appropriations Act, 2008, Pub. L. No. 110-61, § 508(d), 121 Stat. 1844, 2209.

[26] *See* Church Amendments, 42 U.S.C. § 300a-7.

[27] *See* 73 Fed. Reg. at 50277-50278.

[28] *See* 42 U.S.C. § 300a-7(c)(2); *cf.* 42 U.S.C. § 300a-7(d).

[29] 42 U.S.C. § 300a-7(b)-(e)

The breadth of these terms creates particular problems for the LGBT community. "Health care entity" and "health service program" have been defined very broadly.[30] Accordingly, individual health care providers could refuse to provide services to LGBT individuals or people living with HIV/AIDS, even in emergency situations.[31]

In addition, the failure to define key terms, including the term "discrimination," makes it difficult, if not impossible, for covered entities to understand what is necessary for compliance with the New Regulation. This uncertainty, coupled with the enormous amount of federal funding that is tied to compliance, requires overburdened health care providers and under-funded public health researchers subject to the regulation to adopt the broadest possible interpretation in order to reduce the risk of violation—thus significantly diminishing patients' access to care.

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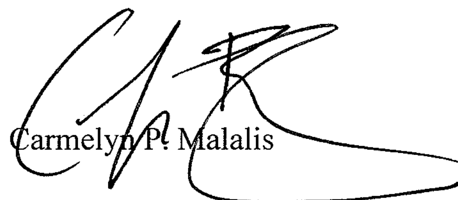
In sum, the new regulation has disastrous consequences for individual health care and public health overall. And because the regulation impacts publicly funded clinics, it targets the most vulnerable Americans, among them, LGBT individuals who already face many obstacles in obtaining optimal health care: anti-LGBT bias, lack of appropriate services, and overt discrimination.

At a time when the nation is in a health care crisis and Americans are struggling with soaring health care costs, the government should focus on increasing access to these critical prevention programs, not undermining it. We therefore fully support the rescission of the regulations that were finalized on December 12, 2008.

Very truly yours,



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[30] 73 Fed. Reg. at 78075-78076.

[31] *E.g.,* 73 Fed. Reg. at 78087.