

How HHS's New Division in the Office for Civil Rights Will Enforce Rights of Conscience and Religious Freedom

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When the U.S. Department of Health and Human Services (“HHS”) announced a new Conscience and Religious Freedom Division in the HHS Office for Civil Rights (“OCR”), it framed a problem and a solution. The press release stated that “fundamental and unalienable rights of conscience and religious freedom” are not being fully enforced on a

federal level, and that as part of President Trump’s promise to uphold such rights a new division in OCR will be tasked with vigorous and effective enforcement.^[1] What was less immediately clear in the announcement was how the new division of OCR will improve enforcement of conscience and religious freedom rights. Here we provide an overview of the history and cites to various laws in the conscience and religious freedom space that OCR may use for enforcement, as well as a summary of the recent proposed regulations that OCR issued on this topic on January 26, 2018

Religious Discrimination Against Federal Healthcare Beneficiaries

The new OCR division cites several laws prohibiting discrimination against recipients of HHS assistance on the basis of religion. OCR enforces the following:

1. Section 508 of the Social Security Act, for the Maternal and Child Health Services Block Grant
2. Section 533 of the Public Health Services Act, for the Projects for Assistance in

Transition from Homelessness

3. Section 1908 of the Public Health Service Act, for the Preventive Health and Health Services Block Grants
4. Section 1947 of the Public Health Service Act, for the Community Mental Health Services Block Grant and the Substance Abuse Prevention and Treatment Block Grants
5. The Family Violence Prevention and Services Act, for programs, services and activities under the Act
6. The Communications Act of 1934, for federally-funded public telecommunication entities^[2]

Existing Conscience Laws

Since the 1970s, several statutes have been enacted that protect the rights of providers, entities and beneficiaries of federal health care programs to object in a variety of ways to certain health care services. OCR reviews complaints under these laws and can take action to enforce them. In its recently proposed rule, OCR details several laws it intends to enforce.^[3]

Some of the earliest conscience protections, which are called the “Church Amendments”, prohibit a person from being required to perform abortions or sterilizations if contrary to his or her religious or moral beliefs. Entities are provided similar protection. Discrimination in employment of physicians and other personnel, and in residency and internship programs based on a person’s religious or moral beliefs regarding abortion and sterilization is also prohibited. The Church Amendments apply to grants, contracts, loans and loan guarantees under the Public Health Service Act and in some instances, under the Developmental Disabilities Assistance and Bill of Rights Act.^[4]

The Coats-Snowe Amendment extends abortion-related nondiscrimination provisions to federal, state and local governments receiving federal financial assistance. It protects conscience rights of entities, which includes physicians, physician trainees and residents.^[5]

The Weldon Amendment attached to an HHS appropriation bill similarly prohibits funds going to any government, agency or program that requires individuals or entities to provide, pay for, cover, or refer for abortions.^[6]

The Consolidated Appropriations Act of 2017 expands Weldon Amendment protections to the Medicare Advantage program.^[7]

The Affordable Care Act includes a variety of conscience protections related to assisted suicide, abortion, and the individual mandate to carry insurance.^[8]

Revised Conscience Rule

In January 2018, OCR announced a proposed rule to strengthen conscience-based protections for individuals and entities with objections to certain activities based on religious belief and moral convictions.^[9] The proposed rule is not entirely new, however.

It would make significant changes to 45 CFR part 88 (entitled: “ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICES FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES IN VIOLATION OF FEDERAL LAW”), which stems originally from a 2008 Bush-era rule.^[10] The Bush-era rule was itself revised substantially in 2011 during the Obama administration.^[11]

OCR now proposes to return much of 45 CFR part 88 to its 2008 Bush-era form, adding a requirement that certain recipients of HHS funds certify they comply with conscience protection laws and notify individuals of their rights thereunder.^[12] The proposed rule details OCR’s enhanced investigative and enforcement abilities and expands its enforcement authority to more conscience-protection laws than the 2008 or 2011 iterations.^[13] The rulemaking states that OCR will “handle complaints [both formal and not], perform compliance reviews, investigate, and seek appropriate action,” including terminating funding and requiring repayment.^[14] OCR states that a more centralized approach to enforcement of conscience protections is necessary in part due to rapidly rising complaints. OCR notes that ten conscience-related complaints were filed from implementation of 45 CFR part 88 in 2008 until the November 2016 presidential election.^[15] However, since President Trump’s election, thirty-four complaints have been filed.^[16] We will continue to monitor the development of this rule as it proceeds through the rulemaking process.

[1] <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>

[2] <https://www.hhs.gov/conscience/religious-freedom/index.html>

[3] 83 Fed. Reg. 3880.

[4] Id. at 3882.

[5] Id. at 3882-83.

[6] Id. at 3883.

[7] Id.

[8] Id.

[9] <https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html>

[10] 83 Fed. Reg. at 3885.

[11] Id.

[12] Id. at 3891.

[13] Id.

[14] Id. at 3899.

[15] Id. at 3886.

[16] Id.