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1 Draft regulation being considered by the Department of Health and Human Services, which is
2 aimed at protecting health care workers who do not want to provide care that runs counter for
3 their religious or personal beliefs.

4 **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

5 **45 C.F.R. Part _____**

6 **RIN_____**

7 **[Title]**

8 **AGENCY: Office of the Secretary**

9 **ACTION: Proposed Rule**

10

11 **SUMMARY:** The Department of Health and Human Services proposes to promulgate
12 regulations to ensure that, in accordance with the Church Amendments (42 U.S.C. § 300a-7),
13 Public Health Service (PHS) Act §245 (42 U.S.C. § 238n), and the Weldon Amendment
14 (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209),
15 Department funds do not support morally coercive or discriminatory practices or policies in
16 violation of federal law. This notice of proposed rulemaking proposes to define key terms, and to
17 ensure that recipients of Department funds know about their legal obligations under these
18 nondiscrimination provisions, the Department proposes to require written certification by
19 recipients that they will comply with all three statutes.

20

21 **DATES:** Submit written or electronic comment on the regulations proposed by this document
22 by [OFR—insert (x) days from date of display].

23 **ADDRESSES:**

24 **FOR FURTHER INFORMATION CONTACT:**

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1 **SUPPLEMENTARY INFORMATION:**

2 **I. Background**

3 Religious liberty and freedom of conscience have long been protected in the Constitution
4 and laws of the United States. The U.S. Congress and State legislatures have enacted, and
5 Presidents and State governors have signed, laws making it illegal for institutions to discriminate
6 against individuals on the basis of religion in hiring, promotion, and benefit practices; requiring
7 employers to provide reasonable accommodation for employees' religious beliefs in the
8 workplace; protecting conscientious objectors in time of war, regardless of whether they objected
9 on religious or philosophical grounds; protecting objecting individuals from participating in
10 executions; protecting individuals' consciences in health service programs and research activities
11 funded by the federal government; and protecting the rights of all health care entities, individual
12 or institutional, from being forced to participate in certain activities.

13 Workers in all sectors of the economy enjoy legal protection of their consciences and
14 religious liberties. In the health care industry, there are several statutory provisions that
15 specifically address individuals' religious and conscience rights. These federal statutes prohibit
16 recipients of certain federal funds from coercing individuals into participating in actions they
17 find religiously or morally objectionable. These same provisions also prohibit discrimination on
18 the basis of one's objection to or participation in specific procedures, including abortion or
19 sterilization, or one's participation in or refusal to participate in abortion or sterilization
20 procedures. More recently, statutory provisions and appropriations riders have been enacted that
21 prohibit federal programs and State and local governments from discriminating against
22 individuals and institutions that refuse to, among other things, provide, refer for, pay for, or
23 cover, abortion.

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Conscience Clauses/Church Amendments [42 U.S.C. § 300a-7]

The conscience provisions contained in 42 U.S.C. § 300a-7 (collectively known as the “Church Amendments”) were enacted at various times during the 1970s in response to debates over whether receipt of federal funds required the recipients of such funds to provide abortions or sterilizations. The first conscience provision in the Church Amendments, 42 U.S.C. § 300a-7(b), provides that “[t]he receipt of any grant, contract, loan, or loan guarantee under [certain statutes implemented by the Department of Health and Human Services] . . . by any individual or entity does not authorize any court or any public official or other public authority to require”: (1) the 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; (2) the entity to make its facilities available for sterilization procedures or abortions, if the performance of sterilization procedures or abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions; or (3) the entity to provide personnel for the performance of sterilization procedures or abortions if it would be contrary to the religious beliefs or moral convictions of such personnel.

The second conscience provision in the Church Amendments, 42 U.S.C. § 300a-7(c)(1), prohibits any entity which receives a grant, contract, loan, or loan guarantee under certain Department-implemented statutes from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or the extension of staff or other privileges because the individual either “performed or assisted in the performance of a lawful sterilization procedure or abortion,” or “because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in

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1 the performance of the procedure or abortion would be contrary to his religious beliefs or moral
2 convictions, or because of his religious beliefs or moral convictions respecting sterilization
3 procedures or abortions.”

4 The third conscience provision, contained in 42 U.S.C. § 300a-7(c)(2), prohibits any
5 entity which receives a grant or contract for biomedical or behavioral research under any
6 program administered by the Department from discriminating against any physician or other
7 health care personnel in employment, promotion, termination of employment, or extension of
8 staff or other privileges “because he performed or assisted in the performance of any lawful
9 health service or research activity,” or “because he refused to perform or assist in the
10 performance of any such service or activity on the grounds that his performance of such service
11 or activity would be contrary to his religious beliefs or moral convictions, or because of his
12 religious beliefs or moral convictions respecting any such service or activity.”

13 The fourth conscience provision, 42 U.S.C. § 300a-7(d), provides that “[n]o individual
14 shall be required to perform or assist in the performance of any part of a health service program
15 or research activity funded in whole or in part under a program administered by [the Department]
16 if his performance or assistance in the performance of such part of such program or activity
17 would be contrary to his religious beliefs or moral convictions.”

18 The final conscience provision contained in the Church Amendments, 42 U.S.C. § 300a-
19 7(e), prohibits any entity that receives a grant, contract, loan, or loan guarantee under certain
20 Departmentally implemented statutes from denying admission to, or otherwise discriminating
21 against, “any applicant (including for internships and residencies) for training or study because
22 of the applicant’s reluctance, or willingness, to counsel, suggest, recommend, assist, or in any

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1 way participate in the performance of abortions or sterilizations contrary to or consistent with the
2 applicant’s religious beliefs or moral convictions.”

3

4 **Public Health Service Act § 245 [42 U.S.C. § 238n]**

5 Enacted in 1996, section 245 of the Public Health Service Act (PHS Act) prohibits the
6 Federal government and any State or local government receiving federal financial assistance
7 from discriminating against any health care entity on the basis that the entity refuses to: (1)
8 receive training in abortion; (2) provide abortion training; (3) perform abortions; (4) provide
9 referral for such abortions; or (5) provide referrals for abortion training. In addition, PHS Act
10 section 245 requires that, in determining whether to grant legal status to a health care entity
11 (including a State’s determination of whether to issue a license or certificate such as a medical
12 license), the Federal government and any State or local government receiving federal financial
13 assistance deem accredited any post-graduate physician training program that otherwise would
14 be accredited but for the reliance on an accrediting standard that requires an entity: (1) to
15 perform induced abortions; or (2) to require, provide, or refer for training in the performance of
16 induced abortions, or make arrangements for such training.

17

18 **Weldon Amendment [Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, §**
19 **508(d), 121 Stat. 1844, 2209]**

20 The Weldon Amendment, originally adopted as section 508(d) of the Labor-HHS
21 Division (Division F) of the 2005 Consolidated Appropriations Act, Pub. L. 108-447 (Dec. 8,
22 2004), has been readopted (or incorporated by reference) in each subsequent HHS appropriations
23 act. [Title V of the Departments of Labor, Health and Human Services, and Education, and

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1 Related Agencies Appropriations Act, 2006, Pub. L. 109-149, § 508(d), 119 Stat. 2833, 2879-80;
2 Revised Continuing Appropriations Resolution of 2007, P.L 110-5 §2, 121 stat 8, 9
3 ;Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209]
4 The Weldon Amendment provides that “[n]one of the funds made available under this Act
5 [making appropriations for the Departments of Labor, Health and Human Services, and
6 Education] may be made available to a Federal Agency or program, or to a State or local
7 government, if such agency, program, or government subjects any institutional or individual
8 health care entity to discrimination on the basis that the health care entity does not provide, pay
9 for, provide coverage of, or refer for abortions.” It also defines “health care entity” to include
10 “an individual physician or other health care professional, a hospital, a provider-sponsored
11 organization, a health maintenance organization, a health insurance plan, or any other kind of
12 health care facility, organization, or plan.”

13

14 **The Laws in the Courts**

15 The federal courts have recognized the breadth and importance of statutory and other
16 conscience protections for health care professionals and workers. Shortly after its passage, a
17 federal appellate court decision characterized the importance of conscience protections contained
18 in the Church Amendments. Faced with the question of a denominational hospital’s right to
19 refuse to perform sterilization procedures, the Ninth Circuit affirmed a lower court decision
20 protecting the hospital’s right to refuse to perform sterilizations and abortions on religious or
21 moral grounds: “If [a] hospital’s refusal to perform sterilization [or, by implication, abortion]
22 infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed
23 by the need to protect the freedom of religion of denominational hospitals ‘with religious or

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1 moral scruples against sterilizations and abortions.’” *Taylor v. St. Vincent’s Hospital*, 523 F.2d
2 75, 77 (9th Cir. 1975) (citations omitted).

3

4 **The Problem**

5 Despite the fact that several conscience statutes protecting health care entities from
6 discrimination have been in existence for decades, recent events suggest the public and people in
7 the health care industry are largely uninformed of the protections afforded to individuals and
8 institutions under these provisions. This lack of knowledge in the health professions can be
9 detrimental to conscience and other rights, particularly for individuals and entities with moral
10 objections to abortion and other medical procedures.

11 A recent *New England Journal of Medicine* (NEJM) study surveyed doctors’ attitudes
12 toward treatments like euthanasia, abortion, and the issuance of contraception to minors without
13 parental consent. They found that, although many physicians oppose the procedures (52%
14 objected to abortion for failed contraception, for example), 86% felt they were obligated to
15 present all options regardless of their own objections and 71% believed physicians were
16 obligated to assist objectionable procedures by referring the patient to another clinician.¹

17 A *New York Times* editorial commenting on the *NEJM* study criticized physicians who
18 refuse to present treatment options they deem immoral:² “Any doctors who cannot talk to
19 patients about legally permitted care because it conflicts with their values should give up the

¹ Farr A. Curlin, M.D., Ryan E. Lawrence, M.Div., Marshall H. Chin, M.D., M.P.H., and John D. Lantos, M.D. *Religion, Conscience, and Controversial Clinical Practices*, *New England Journal of Medicine*. Volume 356:593-600, Number 6 (February 8, 2007).

² *Doctors Who Fail Their Patients*, N.Y. TIMES, February 13, 2007, at <http://www.nytimes.com/2007/02/13/opinion/13tue3.html?ex=1329022800&en=e19265912d278899&ei=5124&part=permalink&exprod=permalink>. See appendix for full article.

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1 practice of medicine.”³ Several letters to the editor concurred in *The New York Times’s*
2 conclusion.⁴

3 Recently both New York and California have passed laws requiring employers offering
4 employee prescription drug benefits to pay for contraception.⁵ Both statutes have narrow
5 religious exceptions, yet they do not protect faith-based charities, hospitals, or other faith-based
6 organizations.

7 Under a bill recently considered in the Colorado legislature, the attorney general of
8 Colorado would be allowed to consider “reductions in the availability and accessibility of health
9 care services in the communities served by the hospital,” in determining whether he or she will
10 allow such a transaction to continue as the parties originally planned.⁶ Some have interpreted the
11 provisions of this bill to empower the State attorney general: (1) to prevent hospitals with
12 policies against providing abortions from acquiring hospitals that do provide abortions; or (2) to
13 require those hospitals that do not provide abortions to provide abortions, if the acquisition of the
14 other hospital will result in the loss of abortion services in the hospital being purchased.⁷

15 In 2005, Illinois Governor Rod Blagojevich issued executive orders requiring “a retail
16 pharmacy serving the general public [... to] dispense the contraceptive, or a suitable alternative

³ *Id.*

⁴ *Doctors’ Beliefs and Good Medicine (6 Letters)*, N.Y. TIMES, February 18, 2007, at <http://www.nytimes.com/2007/02/18/opinion/118docs.html?ex=1173502800&en=bf0fc6b8ee1085b8&ei=5070> [“It is the height of hypocrisy for a doctor to engage in immoral acts like withholding accurate information (or deliberately misinforming a patient by exaggerating risks) in the name of ‘morality.’ Fundamentalist religious beliefs may be an explanation for why these doctors feel the way they do, but religious beliefs should not be an excuse for unethical behavior.”].

⁵ NY CLS Ins § 3221 (2007); Cal Health & Saf Code § 1367.25 (2006); Cal Ins Code § 10123.196 (2006).

⁶ Colo. Gen. Assemb. 66- 08-1203, 2nd Sess., (Colo. 2008).

⁷ Michael Baggot, *Colorado Bills Could See Catholic Hospitals Forced to Provide Abortions or Close Down*, LIFESITENEWS.NET, March 17, 2008 at <http://www.lifesitenews.com/ldn/2008/mar/08031704.html>.

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1 permitted by the prescriber, to the patient or the patient's agent without delay,” over the objection
2 of pharmacist groups.⁸

3 In May 2007, Connecticut passed a law requiring all hospitals to distribute Plan B to rape
4 victims, despite religious organizations’ objections to the abortifacient nature of the drug.⁹

5 A New Jersey law requires pharmacies to fill prescriptions “despite any conflicts of
6 employees to filling a prescription and dispensing a particular prescription drug or device due to
7 sincerely held moral, philosophical or religious beliefs.”¹⁰

8 Massachusetts¹¹ and New Mexico¹² have passed laws similar to the laws and executive
9 orders in Connecticut, Illinois, and New Jersey.

10 In May 2005, the Catholic Medical Association, an organization of Catholic physicians in
11 the United States and Canada, reported “receiv[ing] numerous reports of pressure and persuasion
12 being exerted on medical students, clerkships, and residents in public and private hospitals to

⁸ See 68 Ill. Adm. Code 1330.91 (j) (2008). See also *Pharmacist Resists Illinois Rule on Contraceptives*, FOXNEWS.COM, August 22, 2005, at <http://www.foxnews.com/story/0,2933,166426,00.html>, Letter to the Honorable Rod R. Blagojevich, Governor, State of Illinois, from Michael Patton, Executive Director of Illinois Pharmacists Association, John A Gans, Executive Vice President, American Pharmacists Association, and Henri Manasse, Executive Vice President and Chief Operating Officer, American Society of Health-System Pharmacists (April 5, 2005) (on file in appendix, available at <http://www.aphanet.org/AM/Template.cfm?Section=Home&CONTENTID=3201&TEMPLATE=/CM/ContentDisplay.cfm>) (“[T]he order requires pharmacists and pharmacy operations to comply with one specific set of beliefs. Our profession is composed of individuals, not automatons.”).

⁹ “(b) The standard of care for each licensed health care facility that provides emergency treatment to a victim of sexual assault shall include promptly[...]

(3) Providing emergency contraception to such victim of sexual assault at the facility upon the request of such victim, except that a licensed health care facility shall not be required to provide emergency contraception to a victim of sexual assault who has been determined to be pregnant through the administration of a pregnancy test approved by the United States Food and Drug Administration.” Conn. Gen. Stat. § 19a-112e (2007).

¹⁰ N.J. Stat. § 45:14-67.1 (2008).

¹¹ “Facilities that provide emergency care shall promptly offer emergency contraception at the facility to each female rape victim of childbearing age, and shall initiate emergency contraception upon her request.” ALM GL ch. 111, § 70E (i)(4) (2008).

¹² “A hospital that provides emergency care for sexual assault survivors shall [...] provide emergency contraception at the hospital to each sexual assault survivor who requests it.” N.M. Stat. Ann. § 24-10D-3 (A)(3) (2008).

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1 conform to institutional policies and ‘accept their share’ of duties requiring performance of
2 participation in activities contrary to Catholic ideology.”¹³

3 Lawsuits, editorials, and media reports have appeared throughout the United States
4 detailing efforts to require individuals and institutions to provide controversial medicine or
5 services in violation of their conscience and describing instances of discrimination against those
6 who act according to their conscience.¹⁴

7 The foregoing examples appear to indicate an increasingly pervasive attitude toward the
8 health care professions—namely, that health care personnel and institutions should be required to
9 violate their consciences by providing or assisting in the provision of controversial medicine or
10 procedures, or else face being blacklisted, excluded from practice, terminated from their jobs, or
11 otherwise subjected to discrimination.

12

13 **The Department’s Response**

14 In general, the Department is concerned that the development of an environment in the
15 health care industry that is intolerant of certain religious beliefs, ethnic and cultural traditions,

¹³ *Report of the Task Force on Issues of Conscience*, The Linacre Quarterly, May 2005, at 134. Available at <http://www.cathmed.org/publications/Conscience.pdf>.

¹⁴ See, e.g., *Moralists at the Pharmacy*, N.Y. TIMES, April 3, 2005 (“Any pharmacist who cannot dispense medicines lawfully prescribed by a doctor should find another line of work.”), and response: Letter from The Academy of Managed Care Pharmacy, The American College of Clinical Pharmacy, The American Pharmacists Association, The American Society of Health-System Pharmacists, The New York State Council of Health-System Pharmacists, The Pharmacists Society of the State of New York to the N.Y. Times (April, 2005) (available at <http://www.aphanet.org/AM/Template.cfm?Section=Home&CONTENTID=3462&TEMPLATE=/CM/ContentDisplay.cfm>) (“[T]he editorial seeks to transform pharmacists from thinking health care professionals into robots or automatons forbidden from having personal beliefs, and from exercising their considerable professional judgment gained during years of education and practice.”). See also, Li Fellers, *Ambulance Firm Faces Bias Suit; Worker Fired After Refusing to go to Abortion Clinic*, CHICAGO TRIBUNE, May 9, 2004 at C3 (“An ambulance worker who was fired after she refused to transport a woman to an abortion clinic filed a religious-discrimination lawsuit against her employer Friday... ‘I just felt really strongly it was something that I couldn’t do,’ said Adamson, a devout Christian who is adamantly anti-abortion. ‘It would be against everything that I believe in and everything that I support.’”); Steven Ertelt, *Appeals Court Rules Wal-Mart Can Ignore Pharmacist’s Conscience Plea*, LIFESITENEWS.NET, May 5, 2007, at <http://www.lifenews.com/state2269.html>, Stabile, Susan, *State attempts to define religion: the ramifications of applying mandatory prescription contraceptive coverage statutes to religious employers*, 28 Harv. Journ. Law & Pub. Policy. 741 (Jun. 2005); NY CLS Ins § 3221 (2007); Cal Health & Saf Code § 1367.25 (2006); Cal Ins Code § 10123.196 (2006).

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1 and moral convictions may discourage individuals from underrepresented and diverse
2 backgrounds from entering health care professions. Additionally, religious and faith-based
3 organizations have a long tradition of providing medical care in the United States, and continue
4 to do so today. A trend that isolates and excludes some among various religious, cultural, and
5 ethnic groups from participating in the health care industry is especially troublesome when
6 considering current and anticipated shortages of health care professionals in many medical
7 disciplines facing the country.

8 More importantly, the various branches of the federal government have considered these
9 issues and have repeatedly reached the same resolution. This is true in the executive agencies,¹⁵
10 the federal courts, and in Congress, as described above. Individuals and entities are free to hold
11 and express an attitude that is intolerant of others' beliefs that they should refrain from certain
12 practices based on their religious beliefs or moral convictions. A violation of federal law occurs,
13 however, when individuals and entities, while at the same time receiving certain federal funds,
14 express this attitude in actions that discriminate against others. The examples above and others
15 demonstrate the need for the Department to educate the public and the health care industry on
16 long-standing federal conscience and other protections and to take steps to better ensure the
17 enforcement of these protections.

18 The Department also notes that, while many recipients of Department funds currently
19 must certify compliance with federal nondiscrimination laws, federal conscience protections are
20 not mentioned in existing forms. For example, Form PHS-5161-1, required as part of Public

¹⁵ The [...] suggestion that the requirement to provide options counseling [including abortion counseling] should not apply to employees of a grantee who object to providing such counseling on moral or religious grounds, is likewise rejected[...] [S]uch a requirement is not necessary: under 42 U.S.C. 300a-7(d), grantees may not require individual employees who have such objections to provide such counseling. 65 FR 41270 at 41274 (2000).

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1 Health Service grant applications, requires applicants to certify compliance with all federal
2 nondiscrimination laws, including laws prohibiting discrimination on the basis of race, color,
3 national origin, religion, sex, handicap, age, drug abuse, alcohol abuse or alcoholism, and other
4 federal nondiscrimination laws. The Department seeks to raise awareness of federal conscience,
5 laws by specifically including reference to the nondiscrimination provisions contained in the
6 Church Amendments, PHS Act §245, and the Weldon Amendment in certifications currently
7 required of most existing and potential recipients of Department funds.

8 Toward these ends, the Department has concluded that regulations and related efforts are
9 necessary, in order to (1) educate the public and the health care industry on the obligations
10 imposed and protections afforded by federal law; (2) work with State and local governments and
11 other recipients of funds from the Department to ensure compliance with the nondiscrimination
12 requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon
13 Amendment; (3) when such compliance efforts prove unsuccessful, to enforce these
14 nondiscrimination laws through the various Department mechanisms to ensure that Department
15 funds do not support morally coercive or discriminatory practices or policies in violation of
16 federal law; and (4) to otherwise take an active role in promoting open communication within the
17 healthcare industry, and between providers and patients, fostering a more inclusive, tolerant
18 environment in the health care industry than may currently exist.

19 These proposed actions are consistent with the Administration's current efforts to ensure
20 that community and faith-based organizations are able to participate in federal programs on a
21 level playing field with other organizations. More importantly, they are intended to promote
22 compliance with federal conscience and other protections for health care personnel and entities
23 and to ensure that recipients of federal funds are not discriminating in violation of federal law.

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II. Summary of the Proposed Rule

This proposed rule sets out, and provides further definition of, the rights and responsibilities created by the federal nondiscrimination provisions. This proposed rule would also require recipients of Department funds to certify compliance with these requirements as a prerequisite to the receipt of funds. This proposed rule, in order to ensure proper enforcement, would define certain terms for the purposes of this proposed regulation.

The Department of Health and Human Services Office for Civil Rights has been designated to receive complaints of discrimination based on the nondiscrimination provisions and this proposed regulation. It will coordinate handling of complaints with the staff of the Departmental programs from which the entity receives funding. Enforcement of the requirements proposed in this proposed regulation will be conducted through the usual and ordinary program mechanisms, in addition to False Claims Act enforcement mechanism available to the public. At this point, the Department does not intend to conduct compliance reviews on the specific issue of compliance with the nondiscrimination provisions and this proposed regulation when finalized. However, compliance with the requirements proposed herein would be examined as part of any broader compliance reviews conducted by Department staff. If the Department becomes aware that a State or local government or an entity may be in violation of the requirements or prohibitions proposed herein, the Department would work with such government, or entity to assist such government, or entity to come into compliance with such requirements or prohibitions. If, despite the Department’s assistance, compliance is not achieved, the Department will consider all legal options, including termination of funding and

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1 retrieval of previous funding under 45 C.F.R. 74, claims under the Program Fraud Civil
2 Remedies Act, and other measures.

3

4 III. Statutory Authorities

5 On the basis of the following statutory authority, the Secretary proposes to promulgate
6 these regulations, requiring certification of compliance with anti-discrimination statutes as a
7 precondition to receipt of Department funds.

8 5 U.S.C. § 301 empowers the head of an Executive department to prescribe regulations
9 “for the government of his department, the conduct of its employees, the distribution and
10 performance of its business, and the custody, use, and preservation of its records, papers, and
11 property.”

12 The Church Amendments, 42 U.S.C. § 300a-7 (2000), prohibit recipients of Department
13 funding under the PHS Act and several other statutes from discriminating against employees and
14 others who participate in health service programs or research activities funded in whole or part
15 by the Department who refuse to perform certain medical services, including sterilization,
16 abortion, or research activities because of religious or moral beliefs. Specifically, section 300a-
17 7(c)(1)(A) and (B) provides that recipients may not discriminate in the employment of or the
18 extension of staff privileges to any health care professional because he refused, because of his
19 religious beliefs or moral convictions, to perform or assist in the performance of any sterilization
20 or abortion procedures. Section 300a-7(d) provides that no individual shall be required to
21 perform or assist in the performance of *any* health service program or research activity funded in
22 whole or part by the Department contrary to his religious beliefs or moral convictions.¹⁶

¹⁶Section 300a-7(c)(1) provides that “[n]o entity which receives a grant, contract, loan, or loan guarantee under the [Act] . . . may (A) discriminate in the employment, promotion, or termination of employment of any physician or

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1 Public Health Service (PHS) Act § 245, 42 U.S.C. § 238n (1996), prohibits the Federal
2 government and any State or local government that receives federal financial assistance from
3 discriminating against any health care entity (including both individual and institutional
4 providers) on the basis that the entity refuses to (1) receive training in abortion; (2) provide
5 abortion training; (3) perform abortions; (4) provide referral for such abortions; and (5) provide
6 referrals for abortion training. 42 U.S.C. §238n(a).

7 The Weldon Amendment, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161,
8 § 508(d), 121 Stat. 1844, 2209 (2008), prohibits a federal agency or program, or any State, or
9 local government from receiving Department funds if such agency, program, or government
10 subjects any institutional or individual health care entity to discrimination on the basis that the
11 health care entity does not provide, pay for, provide coverage of, or refer for abortions.

12 These statutory provisions require that recipients of Department funds refrain from
13 discriminating against institutional and individual health care entities for their participation or
14 refusal to participate in certain medical services or research activities funded by the federal

other health care personnel, or (B) . . . in the extension of staff or other privileges to any physician or other health care personnel . . . because he refused to perform or assist in the performance of . . . [an] abortion” on the grounds that doing so “would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(c)(1). Section 300a-7(c)(2) provides that “[n]o entity which receives . . . a grant or contract for biomedical or behavioral research under any program administered by [HHS]” may discriminate in the employment of or the extension of staff privileges to any health care professional “because he refused to perform or assist in the performance of” “any lawful health service” based on religious belief or moral conviction. 42 U.S.C. § 300a-7(c)(2). Section 300a-7(d) provides that “[n]o individual [may] be required to perform or assist in the performance of any part of a health service program . . . funded in whole or in part under a program administered by the Secretary of Health and Human Services” if doing so “would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(d). Section 300a-7(e) prohibits any entity that receives funding under the PHS Act from denying admission to, or otherwise discriminating against, “any applicant (including for internships and residencies) for training or study because of the applicant’s reluctance . . . to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions . . . contrary to or consistent with the applicant’s religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(e). In addition, section 300a-7(b) provides in part that “[t]he receipt of any grant, contract, loan, or loan guarantee under the [PHS Act] . . . by any individual or entity does not authorize any court or any public official or other public authority to require” (1) the individual to perform or assist in an abortion if it would be contrary to his/her religious beliefs or moral convictions; or (2) the entity to make its facilities available for abortions, if the performance of abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or provide personnel for the performance of abortions if it would be contrary to the religious beliefs or moral convictions of such personnel. 42 U.S.C. § 300a-7(b).

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1 government. They empower the Department to promulgate regulations to enforce these
2 prohibitions. Finally, the Department also has the legal authority to require that such recipients
3 certify their compliance with these proposed requirements and to require their subrecipients to
4 likewise certify their compliance with these proposed requirements.

5 6 III. Provisions of the Proposed Rules

7 § 45 CFR x.1 Definitions

8 *Abortion:* An abortion is the termination of a pregnancy. There are two commonly held
9 views on the question of when a pregnancy begins. Some consider a pregnancy to begin at
10 conception (that is, the fertilization of the egg by the sperm), while others consider it to begin
11 with implantation (when the embryo implants in the lining of the uterus).¹⁷ A 2001 Zogby
12 International *American Values* poll revealed that 49% of Americans believe that human life
13 begins at conception.¹⁸ Presumably many who hold this belief think that any action that destroys
14 human life after conception is the termination of a pregnancy, and so would be included in their
15 definition of the term “abortion.”¹⁹ Those who believe pregnancy begins at implantation believe
16 the term “abortion” only includes the destruction of a human being after it has implanted in the
17 lining of the uterus.

18 Both definitions of pregnancy inform medical practice. Some medical authorities, like
19 the American Medical Association and the British Medical Association, have defined the term

¹⁷ *Merriam-Webster’s Dictionary* defines pregnancy as “the condition of being pregnant,” and defines “pregnant” as “containing a developing embryo, fetus, or unborn offspring within the body.” MERRIAM-WEBSTER’S DICTIONARY at <http://www.merriam-webster.com/dictionary/pregnancy>.

¹⁸ ZOGBY INTERNATIONAL, *AMERICAN VALUES VOLUME V*, 15 (January 16, 2001).

¹⁹ Medical dictionaries support this view. For example, *Stedman’s Medical Dictionary* Defines “abortion” as the “[e]xpulsion from the uterus of an embryo or fetus before viability[...].” STEDMAN’S MEDICAL DICTIONARY 4 (28th ed. 2006).

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1 “established pregnancy” as occurring after implantation.²⁰ Other medical authorities present
2 different definitions. *Stedman’s Medical Dictionary*, for example, defines pregnancy as “[t]he
3 state of a female after conception and until the termination of the gestation.”²¹ *Dorland’s*
4 *Medical Dictionary* defines pregnancy, in relevant part, as “the condition of having a developing
5 embryo or fetus in the body, after union of an oocyte and spermatozoon.”²²

6 Because the statutes that would be enforced through this regulation seek, in part, to
7 protect individuals and institutions from suffering discrimination on the basis of conscience, the
8 conscience of the individual or institution should be paramount in determining what constitutes
9 abortion, within the bounds of reason. As discussed above, both definitions of pregnancy are
10 reasonable and used within the scientific and medical community. The Department proposes,
11 then, to allow individuals and institutions to adhere to their own views and adopt a definition of
12 abortion that encompasses both views of abortion. Therefore, for the purpose of these proposed
13 regulations, and implementing and enforcing the Church Amendment, Public Health Service Act
14 §245, and the Weldon Amendment, the Department proposes to define abortion as “any of the
15 various procedures—including the prescription and administration of any drug or the
16 performance of any procedure or any other action—that results in the termination of the life of a
17 human being in utero between conception and natural birth, whether before or after
18 implantation.”

²⁰ See e.g., *FDA Rejection of Over-The-Counter Status for Emergency Contraception Pills*, AMA House of Delegates Resolution 443, (2004), at http://www.ama-assn.org/ama1/pub/upload/mm/15/res_hod443_a04.doc (The Plan B pill is a post-coital contraception method which [...] induce(s) minor changes to the endometrium to inhibit ovum implantation; therefore, it cannot terminate an established pregnancy...”); BRITISH MEDICAL ASSOCIATION, ABORTION TIME LIMITS: A BRIEFING PAPER FROM THE BMA 1 (2005) (“The term “abortion” is used [...] to refer to the induced termination of an established pregnancy [i.e. after implantation].”) at [http://www.bma.org.uk/ap.nsf/AttachmentsByTitle/PDFAbortionTimeLimits/\\$FILE/Abortiontimelimits.pdf](http://www.bma.org.uk/ap.nsf/AttachmentsByTitle/PDFAbortionTimeLimits/$FILE/Abortiontimelimits.pdf).

²¹ STEDMAN’S MEDICAL DICTIONARY 1553 (28th ed. 2006).

²² DORLAND’S MEDICAL DICTIONARY at http://www.mercksource.com/pp/us/cns/cns_hl_dorlands_split.jsp?pg=/ppdocs/us/common/dorlands/dorland/seven/000086088.htm

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1 *Assist in the Performance:* The Department, in considering how to interpret the term
2 “assist in the performance,” seeks to provide broad protection for individuals’ consciences. The
3 Department seeks to avoid judging whether a particular action is genuinely offensive to an
4 individual. At the same time, the Department wishes to guard against potential abuses of these
5 protections, limiting the definition of “assist in performance” only to those actors who have a
6 logical connection to the procedure, health service or health service program, or research activity
7 to which they object.

8 Therefore, the Department proposes to interpret this term broadly, as encompassing
9 individuals who are members of the workforce of the Department-funded entity performing the
10 objectionable procedure. When applying the term “assist in the performance” to members of an
11 entity’s workforce, the Department proposes to include participation in any activity with a
12 logical connection to the objectionable procedure, including referrals, training, and other
13 arrangements for offending procedures. For example, an operating room nurse would assist in
14 the performance of surgical procedures, and an employee whose task it is to clean the
15 instruments used in a particular procedure, would be considered to assist in the performance of
16 the particular procedure.

17 *Health Care Entity / Entity:* While both PHS Act § 245 and the Weldon Amendment
18 provide exemplary lists of specific types of protected individuals and health care organizations,
19 neither statute provides an exhaustive list of such health care entities. PHS Act §245 defines
20 “health care entity” as “includ[ing] an individual physician, a postgraduate physician training
21 program, and a participant in a program of training in the health professions.” As the
22 Department has previously indicated, the definition of “health care entity” in PHS Act § 245

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1 encompasses institutional entities, such as hospitals and other entities.²³ The Weldon
2 Amendment defines the term “health care entity” as “includ[ing] an individual physician or other
3 health care professional, a hospital, a provider-sponsored organization, a health maintenance
4 organization, a health insurance plan, or any other kind of health care facility, organization, or
5 plan.” The Church Amendment does not define the term “entity,” and does not use the term
6 “health care entity.”

7 In keeping with the definitions in PHS Act §245 and the Weldon Amendment, the
8 Department proposes to define “health care entity” to include the specifically mentioned
9 organizations from the two statutes. It is important to note that the Department does not intend
10 for this to be a comprehensive list of relevant organizations for purposes of the regulation, but
11 merely an exemplary list.

12 *Health Service / Health Service Program:* One of the provisions in the Church
13 Amendments uses the term “health service,” another uses the term, “health service program.”
14 Neither define the terms, nor does the PHS Act define “health service program.” In developing
15 an appropriate definition for “health service program,” we have looked at the Social Security
16 Act. Section 1128B(f)(1) of the Social Security Act, 42 U.S.C. §1320a-7b(f)(1) defines the
17 similar term “federal health care program” as “any plan or program that provides health benefits,
18 whether directly, through insurance, or otherwise, which is funded directly, in whole or in part,
19 by the United States Government.”

20 Accordingly, the term “health service program” should be understood to include an
21 activity related in any way to providing medicine, health care, or any other service related to
22 health or wellness, including: programs where the Department provides care directly (e.g., Indian
23 Health Service); programs where grants pay for the provision of health services (e.g., HRSA

²³ See Letter from Secretary Tommy G. Thompson to Hon. W.F. Tauzin, September 24, 2002.

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1 programs such as community health centers); programs where the Department reimburses
2 another entity that provides care (e.g., Medicare); and health insurance programs where federal
3 funds are used to provide access to health coverage (e.g., SCHIP, Medicaid, and Medicare
4 Advantage). Similarly, we propose that the term “health service” means any service so provided.

5 *Individual:* For the purposes of this part, the Department proposes to define “individual”
6 to mean a member of the workforce (see definition of “workforce” below) of an entity or health
7 care entity. One conscience clause of the Church Amendments, 42 U.S.C. §300a-7(d), provides
8 that “[n]o *individual* shall be required to perform or assist in the performance of any part of a
9 health service program or research activity funded in whole or in part under a program
10 administered by the Secretary of Health, Education and Welfare [Secretary of Health and Human
11 Services] if his performance or assistance in the performance of such part of such program or
12 activity would be contrary to his religious beliefs or moral convictions (emphasis added).”

13 *Instrument:* We propose to use “instrument” to mean the variety of means by which the
14 Department conveys funding and resources to organizations, including: grants, cooperative
15 agreements, contracts, grants under a contract, and memoranda of understanding. The definition
16 of “instrument” is intended to include all means by which the Department conveys funding and
17 resources.

18 Later in the document, rather than repeating a specific list of examples whenever the
19 regulation mentions a source of funding or resources, the drafters have included the word
20 “instrument” in brackets.

21 *Recipients:* This term is used to encompass any entity that receives Department funds
22 directly.

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1 *Sub-recipients:* This term is used to encompass any entity that receives Department funds
2 indirectly.

3 *Workforce:* We propose to define “workforce” as including employees, volunteers,
4 trainees, and other persons whose conduct, in the performance of work for an entity, is under the
5 control or authority of such entity, whether or not they are paid by the Department-funded entity.
6 The definition is drawn from the “Administrative Data Standards and Related Requirements”
7 rules implementing Health Insurance Portability and Accountability Act (HIPAA), 45 CFR Parts
8 160, 162, and 164 (2006) at 45 C.F.R. 160.103.

9 In defining both “individual” and “workforce,” the Department proposes definitions that
10 provide a reasonable scope for the natural persons protected by 42 U.S.C. § 300a-7(d) and the
11 corresponding provisions of these regulations. By limiting the scope of persons protected by
12 these regulations to those who are under the control or authority of an entity that implements a
13 health services program or research activity funded in whole or in part under a program
14 administered by the Department, we provide the bright line necessary for Department-funded
15 entities subject to the Church Amendment provisions to set policies or otherwise take steps to
16 secure conscience protections within the workplace and, thus, to comply with the Church
17 Amendment and these regulations.

18

19 x.2 Applicability

20 The proposed “Applicability” section of the regulation outlines the certifications various
21 entities must provide in order to receive Department funds. This section would direct entities to
22 the appropriate sections that contain the relevant requirements from the three statutes that form
23 the basis of this regulation.

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1

2 x.3 Requirements and Prohibitions

3 The “Requirements and Prohibitions” section explains the obligations that the Church
4 Amendments,²⁴ PHS Act §245, and the Weldon Amendment impose on entities which receive
5 funding from the Department. These provisions are taken from the relevant statutory language
6 and make up the elements of the certification provided by the entities. We intend for the
7 proposed requirements and prohibitions to be interpreted using the definitions proposed in
8 section x.1.

9

10 x.4 Written Certification of Compliance

11 In the “Written Certification of Compliance” section of the regulation, the Department
12 seeks to require recipients and sub-recipients of Department funds to certify compliance with the
13 Church Amendments, PHS Act § 245, and the Weldon Amendment, as applicable.

14 We have noted above the reported attitudes of many commentators and others within the
15 health care industry toward health care personnel who desire to avoid performing or assisting in
16 the performance of certain services. We are concerned that these reported attitudes may indicate
17 a lack of knowledge on the part of States, local governments, and the health care industry of the
18 rights of health care entities created by, and the corresponding obligations imposed upon the
19 recipients of certain federal funding by, the non-discrimination provisions.

²⁴ In researching and drafting the current proposed rule, the Department became aware that the Church Amendments reference in two places the Developmental Disabilities Services and Facilities Construction Act, which was repealed on October 30, 2000, and on the same day replaced with the Developmental Disabilities Assistance and Bill of Rights Act of 2000. While section (e) of the Church Amendments was changed to reflect this replacement, sections (b) and (c)(1) were left unchanged. It seems unlikely that Congress would knowingly continue to cite to a repealed statute; accordingly, the Department has tentatively concluded that this discrepancy was likely a result of a drafting error. The proposed rule assumes that Congress intended to substitute the Developmental Disabilities Assistance and Bill of Rights Act of 2000 in instances where the Developmental Disabilities Services and Facilities Construction Act is mentioned.

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1 The proposed regulation requires that entities certify in writing that, as a material
2 prerequisite to the receipt of certain federal funds, entities will operate in compliance with the
3 Church Amendment, PHS Act §245, and the Weldon Amendment. Certification provides a
4 demonstrable way of ensuring that the recipients of such funding know of, and attest that they
5 will comply with, the applicable nondiscrimination provisions. Sub-recipients of federal funds—
6 entities that will receive federal funds indirectly through another entity—are required to provide
7 certification as set out in the “Certification of Compliance” section. This certification by sub-
8 recipients is a certification made directly to the Department, and is a material prerequisite to the
9 payment of funds by the Department to the principal recipient of funds.

10 If a recipient or a sub-recipient of federal financial assistance violates the
11 antidiscrimination protections, the fact that it has certified that it would not so discriminate may
12 provide additional remedies for the Department, as well as the affected entity or entities,
13 including actions brought under the False Claims Act and the Program Fraud Civil Remedies Act
14 of 1986.

15 The False Claims Act allows anyone with knowledge of a fraud against the federal
16 Government to bring a claim against the defrauding individual or organization on behalf of the
17 Government. Successful litigants are eligible to receive up to 30% of the collected damages,
18 which includes fines of up to \$10,000 and three times the actual damages suffered by the
19 government.²⁵

20 The Program Fraud Civil Remedies Act of 1986 (PFCRA) enables agencies to bypass
21 courts and create administrative procedures to combat fraud. Under the PFCRA, the Department
22 created a regulatory scheme to handle fraudulent claims. 45 C.F.R. Part 79 sets up guidelines

²⁵ See 31 U.S.C. 3729 (a) (2007).

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1 and procedures before an Administrative Law Judge in the case of fraud arising when an entity
2 applies for any contract, grant, loan, or benefit from the Department.

3 *Note: When providing certification, recipients and applicants should substitute the*
4 *appropriate means of funding or resources where the bracketed word “instrument” appears.*

5
6 **IV. Request for Comment**

7 The Department, in order to craft its final rule to best reflect the environment within the
8 health care industry, seeks comment on several matters related to this Proposed Rule. In
9 particular, the Department seeks the following:

- 10 • Comment on all issues raised by the proposed regulation.
- 11 • Information with regard to general knowledge or lack thereof of the protections
12 established by these nondiscrimination provisions, including any facts, surveys, audits,
13 reports, or any other evidence of knowledge or lack of knowledge on these matters in the
14 general public, as well as within the healthcare industry and educational institutions.
- 15 • In the years following *Roe v. Wade*, there was some confusion about whether the receipt
16 of federal funds permitted public officials to require entities to provide abortions or
17 perform sterilizations. The debate was resolved, and statutory provisions like Section (b)
18 of the Church Amendments were promulgated to protect entities from public authorities
19 who would claim that the receipt of federal funds creates a legal obligation for the entity
20 to provide abortions. The Department seeks information, including any facts, surveys,
21 audits, or reports on whether this remains an issue, that is, do public authorities continue
22 to claim that the receipt of federal funds is sufficient basis for entities to be required to

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1 provide abortions or perform sterilizations. If so, how, if at all, should the Department
2 address this problem?

- 3 • As noted above, it is unclear to what extent there is knowledge of the protections afforded
4 by the nondiscrimination provisions, and the Department is specifically seeking comment
5 on the issue. The Department also seeks comment on what are the most effective
6 methods of educating recipients of Department funds, their employees, and participants
7 of the protections against discrimination found in the Church Amendments, (PHS) Act
8 §245, and the Weldon Amendment. What is the best method for communicating to the
9 public the protections afforded by these statutes, and any regulation implementing them?

- 10 ○ One option is to require the physical posting of notices of nondiscrimination
11 protections in conspicuous places within the buildings of recipients of funds, and
12 on applications to educational programs that are recipients of funds. Have notices
13 been effective educational tools with respect to individuals' rights under federal
14 law?

- 15 ○ Another option is to require inclusion of nondiscrimination protections in
16 applications for training, residency, and educational programs.

- 17 ○ Another option is requiring notice of nondiscrimination protections on websites
18 and in employee / volunteer handbooks of recipients.

19 The Department seeks further comment on this matter—both on the merit of the options
20 mentioned, and on new ideas for educating the public.

21
22 *Executive Order 13132—Federalism*

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1 Executive Order 13132 establishes certain requirements that an agency must meet when it
2 promulgates a proposed rule (and subsequent final rule) that imposes substantial direct
3 requirement costs on state and local governments, preempts State law, or otherwise has
4 Federalism implications.

5 All three acts enforced in this proposed regulation— the Church Amendments, PHS Act
6 §245, and the Weldon Amendment—impose restrictions on states, local governments, and public
7 entities receiving funds under certain Department-implemented statutes. Insofar as these
8 regulations impact state and local governments, they do so only to the extent that States, local
9 governments, and public entities are out of compliance with existing federal conscience statutes.
10 Since we expect the recipients of Department funds to comply with existing federal law, we
11 anticipate the impact on States and local governments to be negligible.

12 On the other hand, the proposed regulation may suggest interpretations of statutory terms
13 that are broader than the interpretations many states or local governments may have followed to
14 date. In particular, the terms “abortion” and “assist in the performance” have been defined by
15 this proposed regulation to provide broad conscience protections for health care entities. While
16 the proposed regulatory action does not preempt any state laws, it seeks to enforce federal law
17 restricting the expenditure of funds among all current recipients of Department funds, including
18 States, to entities that comply with federal law.

19 The Government can, without violating the Constitution, selectively fund a
20 program to encourage certain activities it believes to be in the public interest,
21 without at the same time funding an alternative program which seeks to deal with
22 the problem in another way. In so doing, the Government has not discriminated
23 on the basis of viewpoint; it has merely chosen to fund one activity to the
24 exclusion of the other[...] There is a basic difference between direct state
25 interference with a protected activity and state encouragement of an alternative
26 activity consonant with legislative policy. *Rust v. Sullivan*, 500 U.S. 173,193
27 (1991) (citations omitted).

28

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1 In this instance, the Department is proposing to fund programs in a way that ensures
2 compliance with federal conscience protections for health care entities. At the same time, the
3 Department seeks to avoid funding programs that engage in illegal discrimination. The proposed
4 regulation does so without infringing on any state or local statutes, and will have an impact on
5 state and programs only insofar as they engage in illegal discrimination according to the
6 definitions set out in the statutes. The Department will consult with States and local
7 governments to seek ways to minimize any burden imposed on the States and local governments
8 by these proposed regulations, consistent with meeting the Department’s objectives of ensuring:
9 (1) knowledge of the obligations imposed, and the rights and protections afforded, by these
10 federal nondiscrimination provisions; and (2) compliance with the nondiscrimination provisions.

11

12 ANALYSIS OF IMPACTS

13 *Executive Order 12866—Regulatory Planning and Review*

14 HHS has examined the economic implications of this proposed rule as required by
15 Executive Order 12866 (as amended September 30, 1993). Executive Order 12866 directs
16 agencies to assess all costs and benefits of available regulatory alternatives and, when regulation
17 is necessary, to select regulatory approaches that maximize net benefits (including potential
18 economic, environmental, public health and safety, and other advantages; distributive impacts;
19 and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a
20 number of specified conditions, including: having an annual effect on the economy of \$100
21 million, adversely affecting a sector of the economy in a material way, adversely affecting
22 competition, or adversely affecting jobs. A regulation is also considered a significant regulatory

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1 action if it raises novel legal or policy issues. HHS has determined that this proposed rule is not
2 a significant regulatory action as defined by Executive Order 12866.

3 An underlying assumption of this regulation is that the health care industry, including
4 entities receiving Department funds, will benefit from more diverse and inclusive workforces by
5 informing health care workers of their rights and fostering an environment in which individuals
6 from many different faiths and philosophical backgrounds are encouraged to participate. As a
7 result, we cannot accurately account for all of the regulation's future benefits, but the
8 Department is confident that the future benefits will exceed the costs of complying with the
9 regulation.

10 We estimate that each of the 503,904 funding recipients will spend 15 minutes reviewing
11 the certification language and reviewing files before signing. According to BLS wage data, the
12 mean hourly wage for a Medical and Health Services Manager is \$40.86. We estimate the
13 loaded rate to be \$61.29. Thus, the cost associated with the act of certification is \$7.7 million
14 (503,904 x .25 x \$61.29).

15 Indirect costs associated with the certification requirement might include costs for such
16 actions as staffing/scheduling changes and internal reviews to assess compliance. Potential
17 liability costs for certifiers include the defense costs, paying settlements or judgments, and
18 paying fines resulting from actions brought by individuals claiming discrimination. There is
19 insufficient data to estimate the number of funding recipients not currently compliant with the
20 Church Amendments, PHSA § 245, or the Weldon Amendment, as applicable. However,
21 because together these three federal statutes have been in effect for many years, we expect
22 indirect certification costs and potential liability costs for Department funding recipients to be
23 minimal.

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1 The total quantifiable costs of the proposed regulation, if finalized, are estimated to be
2 \$7.9 million in the first year. We anticipate the costs to be lower in subsequent years; we believe
3 that very few new entities will be required to implement the requirements of this regulation.

4

5 *Regulatory Flexibility Act*

6 HHS has examined the economic implications of this proposed rule as required by the
7 Regulatory Flexibility Act (5 U.S.C. 601-612). If a rule has a significant economic impact on a
8 substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze
9 regulatory options that would lessen the economic effect of the rule on small entities. This
10 proposal, if finalized, will not impose significant costs on small entities. Therefore, the Secretary
11 certifies that this rule will not result in a significant impact on a substantial number of small
12 entities.

13

14 *Unfunded Mandates Reform Act of 1995*

15 Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires cost-
16 benefit and other analyses before any rulemaking if the rule would include a “Federal mandate
17 that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by
18 the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year.” The
19 current inflation-adjusted statutory threshold is about \$115 million. HHS has determined that
20 this proposed rule would not constitute a significant rule under the Unfunded Mandates Reform
21 Act.

22

23 **LIST OF REFERENCES**

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1 **LIST OF SUBJECTS IN 45 C.F.R. Part X**

2 **[add list of subjects per F.R. conventions]**

3 Therefore, under the Church Amendment, 42 U.S.C. § 300a-7, Public Health Service Act § 245,
4 42 U.S.C. § 300a-7, 42 U.S.C. § 238n, and the Weldon Amendment, Consolidated
5 Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209, the Department
6 of Health and Human Services proposes to adopt part x as follows:

7

8 PART X—[Title of Regulation]

9 1. The authority citation for 45 C.F.R. part x is adopted to read as follows: Authority: 42
10 U.S.C. § 300a-7, 42 U.S.C. §238n, 109 P.L. 119; 119 Stat. 2883 § 508 (d), 31 U.S.C.
11 6306, 41 U.S.C. 253, and 40 U.S.C. § 471.

12 2. Section x.1 is adopted to read as follows:

13

14 § x.1 Definitions

15 For the purposes of this part:

16 “*Abortion*” means any of the various procedures—including the prescription, dispensing,
17 and administration of any drug or the performance of any procedure or any other action—that
18 results in the termination of the life of a human being in utero between conception and natural
19 birth, whether before or after implantation.

20 “*Assist in the Performance*,” means to participate in any activity with a logical
21 connection to a procedure, health service or health service program, or research activity, so long
22 as the individual involved is a part of the workforce of a [Department-funded] entity. This

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1 includes referral, training, and other arrangements for the procedure, health service, or research
2 activity.

3 “*Health Care Entity*” includes an individual physician or other health care professional, a
4 participant in a program of training in the health professions, a post graduate physician training
5 program, a hospital, a provider-sponsored organization, a health maintenance organization, a
6 health insurance plan, laboratory or any other kind of health care organization or facility.

7 “*Entity*” includes an individual physician or other health care professional, a participant
8 in a program of training in the health professions, a post graduate physician training program, a
9 hospital, a provider-sponsored organization, a health maintenance organization, a health
10 insurance plan, laboratory or any other kind of health care organization or facility. It may also
11 include components of State or local governments.

12 “*Health Service / Health Service Program*” includes any plan or program that provides
13 health benefits, whether directly, through insurance, or otherwise, which is funded, in whole or
14 in part, by the Department. It may also include components of State or local governments.

15 “*Individual*” means a member of the workforce of an entity / health care entity.

16 “*Instrument*” is the means by which federal funds are conveyed to the recipient, and
17 includes grants, cooperative agreements, contracts, grants under a contract, memoranda of
18 understanding, and any other funding or employment instrument or contract.

19 “*Recipient*” means an organization receiving financial assistance directly from the
20 Department awarding agency to carry out a project or program. The term includes public and
21 private institutions of higher education, public and private hospitals, commercial organizations,
22 and other quasi-public and private nonprofit organizations such as, but not limited to, community
23 action agencies, research institutes, educational associations, and health centers. The term may

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1 include foreign or international organizations (such as agencies of the United Nations) which are
2 recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the
3 discretion of the Department awarding agency.

4 “*Sub-recipient*” means an organization receiving financial assistance indirectly from the
5 Department awarding agency to carry out a project or program. The term includes public and
6 private institutions of higher education, public and private hospitals, commercial organizations,
7 and other quasi-public and private nonprofit organizations such as, but not limited to, community
8 action agencies, research institutes, educational associations, and health centers. The term may
9 include foreign or international organizations (such as agencies of the United Nations) which are
10 recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the
11 discretion of the Department awarding agency.

12 “*Workforce*” includes employees, volunteers, trainees, and other persons whose
13 conduct, in the performance of work for a Department-funded entity, is under the control or
14 authority of such entity, whether or not they are paid by the Department-funded entity.

15

16 3. Section x.2 is adopted to read as follows:

17

18 x.2 Applicability

19 (a) Any State or local government that receives federal funds through the Department of Health
20 and Human Services is required to comply with subsections x.3(a), x.4, and x.5(a) below.

21 (b) Any State or local government, any part of any State or local government, or any other
22 public entity that receives Department funds must comply with subsection x.3(e) below.

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1 (c) Any entity that receives federal funds from the Department of Health and Human Services to
2 implement any part of any federal program is required to comply with subsections x.3(a) and x.4
3 below.

4 (d)(1) Any entity, including a State or local government, that receives a grant, contract, loan, or
5 loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act,
6 or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, must comply with
7 subsections x.3(c)(1) and x.4.

8 (2) In addition to complying with the provisions set forth in (c)(1), any such entity that is an
9 educational institution, teaching hospital, program for the training of health care professionals or
10 health care workers shall comply with subsections x.3(a)(2) and x.4 below.

11 (e)(1) Any entity, including a State or local government, that carries out any part of any health
12 service program or research activity funded in whole or in part under a program administered by
13 the Secretary of Health and Human Services must comply with subsections x.3(d)(1) and x.4
14 below.

15 (2) In addition to complying with the provisions set forth in (d)(1), any such entity that
16 receives grants or contracts for biomedical or behavioral research under any program
17 administered by the Secretary of Health and Human Services is required to comply with
18 subsection x.3(d)(2) below.

19

20 x.3 Requirements and Prohibitions

21 (a) Entities to whom this subsection x.3 (a) applies shall not:

22 (1) subject any institutional or individual health care entity to discrimination for refusing: (A) to
23 undergo training in the performance of induced abortions, or to require, provide, refer for, or

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1 make arrangements for training in the performance of induced abortions; (B) to perform, refer
2 for, or make other arrangements for, induced abortions; and / or (C) to refer for abortions;

3 (2) subject any institutional or individual health care entity to discrimination for attending or
4 having attended a post-graduate physician training program, or any other program of training in
5 the health professions, that does not or did not require attendees to perform induced abortions or
6 require, provide, or refer for training in the performance of induced abortions, or make
7 arrangements for the provision of such training;

8 (3) For the purposes of granting a legal status to a health care entity (including a license or
9 certificate), providing such entity with financial assistance, services or benefits, fail to deem
10 accredited any postgraduate physician training program that would be accredited but for the
11 accrediting agency's reliance upon an accreditation standard or standards that require an entity to
12 perform an induced abortion or require, provide, or refer for training in the performance of
13 induced abortions, or make arrangements for such training, regardless of whether such standard
14 provides exceptions or exemptions;

15 (b) Entities to whom this subsection x.3 (b) applies shall not:

16 (1) require any individual to perform or assist in the performance of any sterilization procedure
17 or abortion if performing or assisting in the performance of such activity would be contrary to his
18 religious beliefs or moral convictions; or

19 (2) require an entity to make its facilities available for the performance of, or provide personnel
20 for the performance or assistance in the performance of sterilization procedure or abortion
21 procedures if such actions are prohibited by the entity based on religious beliefs or moral
22 convictions, or if the performance or assistance in performance with the procedure would be
23 contrary to the religious beliefs or moral convictions of the personnel;

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(c) Entities to whom this subsection x.3(c) applies shall not:

(1) discriminate against any member of the workforce in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves;

(2) discriminate against or deny admission to any applicant for training or study because of reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant’s religious beliefs or moral convictions.

(d) The entities to whom this subsection x.3(d) applies shall not:

(1) require any individual to perform or assist in the performance of any part of a health service program or research activity if such service or activity would be contrary to his religious beliefs or moral convictions.

(2) The entities to whom this part applies shall not discriminate in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he performed, assisted in the performance, refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his

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1 religious beliefs or moral convictions, or because of the religious beliefs or moral convictions
2 concerning such activity themselves.

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4 (e) The entities to whom this subsection (e) applies shall not, on the basis that the individual or
5 entity has received a grant, contract, loan, or loan guarantee under the Public Health Service Act,
6 the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and
7 Bill of Rights Act of 2000, require (A) such individual to perform or assist in the performance of
8 any sterilization procedure or abortion if his performance or assistance in the performance of
9 such procedure or abortion would be contrary to his religious beliefs or moral convictions, or (B)
10 such entity to (i) make its facilities available for the performance of any sterilization procedure
11 or abortion if the performance of such procedure or abortion in such facilities is prohibited by the
12 entity on the basis of religious beliefs or moral convictions, or (ii) provide any personnel for the
13 performance or assistance in the performance of any sterilization procedure or abortion if the
14 performance or assistance in the performance of such procedure or abortion by such personnel
15 would be contrary to the religious beliefs or moral convictions of such personnel.

16

17 x.4 Written Certification of Compliance:

18 (a) **Certification Requirement.** As a material prerequisite to payment of Department funds
19 administered as part of any Department activity, program, or research activity (including
20 biomedical or behavioral research), recipients shall include the following written certifications
21 and any certifications by sub-recipients in the application for the grant, cooperative agreement,
22 contract, grant under a contract, memorandum of understanding or other funding or employment
23 instrument or contract, as applicable. Certifications shall be made by an officer or other

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1 individual authorized to bind the recipient or sub-recipient. No organizations or entities shall
2 receive Department funds directly or indirectly without providing the Certification of
3 Compliance as set out in this regulation.

4
5 **(b) Notification of Certification Requirement.** The Department shall notify recipients of
6 funding of the certification requirement at the time of award through the Request for Proposal,
7 Request for Agreement, or other public announcement of the availability of the funding.
8 Recipients shall not construe anything in this paragraph to mean that an entity or organization is
9 in any way exempt from providing the certification in the event the Department should fail to
10 provide notification.

11
12 **(c) Certification by Sub-recipients.** Organizations or entities that are sub-recipients of the
13 organization or entity providing the initial Certification of Compliance must provide the
14 Certification of Compliance as set out in Section x.4 (e)(2) of this regulation, submitted as part of
15 the recipient’s application for the [grant, cooperative agreement, contract, grant under a contract,
16 memorandum of understanding or other funding] or in a separate writing signed by the sub-
17 recipients’ officer or other person authorized to bind the sub-recipient. Certification of
18 compliance by sub-recipients is a material prerequisite to the payment of funds by the
19 Department to recipients.

20
21 **(d) Renewal of Certification.** Recipients and sub-recipients of funds must file a renewed
22 certification upon any renewal, extension, amendment, or modification of the grant, cooperative
23 agreement, contract, grant under a contract, memorandum of understanding or other funding or

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1 employment instrument or contract that extends the term of such instrument or adds additional
2 funds to it. Recipients that are already recipients and sub-recipients as of the effective date of
3 this regulation must file a certification upon any extension, amendment, or modification of the
4 grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or
5 other funding instrument that extends the term of such instrument or adds additional funds to it.

6

7 **(e) Certification.**

8 **(1) For Recipients.** All recipients of Department funds shall provide the following
9 certification:

10 “As the duly authorized representative of the recipient I certify that the recipient of funds made
11 available through this [instrument] will not discriminate on the basis of an entity’s past
12 involvement in, or refusal to assist in the performance of, the practices of abortion or
13 sterilization, and will not require involvement in procedures that violate an individual’s
14 conscience as part of any part of any health service program, in accord with all applicable
15 sections of 45 C.F.R. ____.

16

17 I further certify that the recipient acknowledges that these certifications are a material
18 prerequisite to payment of U.S. Government funds in connection with this [instrument], and that
19 any violation of these certifications shall be grounds for termination by the Department of any
20 grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or
21 other funding or employment instrument or contract prior to the end of its term and recovery of
22 appropriated funds expended prior to termination. I further certify that the recipient will include
23 this identical certification requirement in any [instrument] to a sub-recipient of funds made

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1 available under this [instrument], and will require such sub-recipient to provide the same
2 certification that the organization or entity provided, and that these certifications by sub-
3 recipients are material prerequisites to receipt of Department funds by the recipient.”

4 (2) **For sub-recipients.** All sub-recipients of Department funds shall provide the following
5 certification, as a material prerequisite of receipt of Department funds by the recipient:

6 “As the duly authorized representative of the recipient I certify that the recipient of funds made
7 available through this [instrument] will not discriminate on an entity’s past involvement in, or
8 refusal to assist in the performance of, the practices of abortion or sterilization, and will not
9 require involvement in procedures that violate an individual’s conscience as part of any part of
10 any health service program, in accord with all applicable sections of 45 C.F.R. ____.

11
12 I further certify that the recipient acknowledges that these certifications by the sub-recipient of
13 funds are certifications made directly to the Department, as a material prerequisite to payment of
14 U.S. Government funds to the primary recipient in connection with this [instrument], and that
15 any violation of these certifications shall be grounds for termination by the Department of the
16 recipient’s grant, cooperative agreement, contract, grant under a contract, memorandum of
17 understanding or other funding or employment instrument or contract prior to the end of its term
18 and recovery of appropriated funds expended prior to termination”

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