Summary of the Final Rule on Protecting Statutory Conscience Rights in Health Care
May 29, 2019

On May 21, 2019, the HHS Office of Civil Rights (OCR) published a final rule focused on enforcement of existing statutory conscience protections for workers involved in providing HHS-funded programs. These statutes protect workers from being coerced into participating in activities that violate their consciences. OCR’s role is expanded under the proposed rule, particularly as it relates to enforcement authority over federal health care conscience and associated anti-discrimination laws. The rule strengthens protections for health care workers with moral and/or religious objections to providing particular services.

The final rule will be effective on July 22, 2019.

The proposed rule was published in the Federal Register on January 26, 2018. AHIP submitted comments based on member input.

The final rule’s definition of “health care entity” includes health insurance plans (both group and individual), a plan sponsor, issuer, or third-party administrator. The final rule includes new clarification, not provided in the proposed rule, as to which of the statutes referenced in the rule apply to health plans.

Applicable Requirements and Prohibitions (§ 88.3)
The final rule clarifies how the proposed rule intersects with the following exiting laws and affirms that HHS does not fund or administer programs that would violate conscience and associated anti-discrimination laws.

Statutes of Interest to Health Plans

a) The Weldon Amendment (PL 115-31). The Weldon amendment prohibits federal entities from using federal funds to discriminate against health care entities, including health plans, because they do not provide, pay for, provider coverage of, or refer for abortions. The final rule affirms that any entity that receives funds through a program administered by the Secretary is required to comply.

b) Medicare Advantage, Consolidated Appropriations Act of 2017 (PL 115-31). The final rule states that health care entities shall not deny participation in the MA program to
an otherwise eligible entity because that entity will not provide, pay for, provide coverage of, or provide referral for abortions.

c) **The Affordable Care Act Provider Conscience Protections (Section 1553, 42 USC 18113).** The ACA included new health care provider conscience protections within health insurance exchange programs. Section 1553 prohibits government entities that receive financial assistance under the ACA from discriminating against a health care entity because of an objection to providing services related to assisted suicide. The final rule affirms that any health plan created under the ACA is required to comply with this.

d) **The Affordable Care Act Special Rules Regarding Coverage of Abortions (Section 1303, 42 USC 18023).** Section 1303(b)(4) affirms that qualified health plans cannot discriminate against health care providers because of their unwillingness to provide, pay for, provide coverage of, or refer for abortions. The final rule affirms that any qualified health plan created under the ACA and offered on any Exchange is required to comply with this. Further, HHS cannot require a health plan to provide coverage of abortion or abortion-related services as a part of its essential health benefits for any plan year.

e) **The Affordable Care Act (Section 1411, 42 USC 18081).** Section 1411 exempts individuals with certain religious objections to health insurance and members of health care sharing ministries from the individual mandate penalty.

f) **Counseling and Referral Provisions of 42 USC 1395w.** The final rule states HHS cannot require a MA organization or Medicaid managed care organization to offer a plan that provides, reimburses for, or provides coverage of, a counseling or referral services if the organization objects to that service on moral or religious grounds.

g) **Advance Directives (42 USC 1395cc).** Medicare and Medicaid plans cannot require any provider or organization, or any employees, to inform or counsel any individual regarding assisted suicide. Entities cannot require employees inform our counsel individuals with respect to a portion of an advance directive that may relate to assisted suicide. Entities cannot prohibit the application of any applicable State law which allows for an objection on the basis of conscience for any health care provider to implement an advance directive.

h) **Newborn and Infant Hearing Loss (42 U.SC 280g).** HHS and its contracted health plans cannot preempt or prohibit State laws that do not require screening for hearing loss of newborn infants or young children when parents have religious objections.

i) **Medical Screening, Examination, Diagnosis, Treatment, etc. (42 USC 1396f).** The Department cannot require a State agency that administers a state Medicaid plan to compel any person to undergo medical screenings, examinations, or treatments if the person has religious objections.

j) **Occupational Illness Examinations and Tests (29 USC 669(a)(5), 29 USC 651).** This section of existing law authorizes the Department to require tests, examinations and
treatments to identify and address workplace health issues. The final rule clarifies that such tests, examinations and treatments cannot be required for individuals who object on religious grounds, unless the required test, treatment or examination is needed to protect the health and safety of others.

k) **Vaccination (42 USC 1396s)**. HHS and any state agency that administers a pediatric vaccine distribution program shall comply with state laws related to religious or other exemptions.

l) **Religious Nonmedical Health Care (42 USC 1320a-1, 1320c-11, 1395i-5, 1395x(e), 1396(a), 1397j-1(b), and 5106(a)(2))**. Programs funded under these provisions are subject to the final rule and include: Medicare, Medicaid, CHIP, Social Services Block Grants, Elder Justice Block Grants. The final rule includes a number of specific provisions related to religious exemptions by which recipients of such funding must abide.

**Other Statutes**

m) **The Church Amendments (42 USC § 300a-7)**. The Church amendments protect the conscience rights of individuals and health care entities that object to performing or assisting in abortion or sterilization procedures if doing so would be contrary to the provider’s religious beliefs or moral convictions. The provision also extends to protections to personnel decisions (e.g., entities cannot discriminate against employees who may have religious or moral objections to performing abortion or sterilization procedures).

n) **Coates-Snow Amendment (42 USC 238n)** The Coates-Snow amendment prohibits government entities that receive federal funds from discriminating against health care entities that refuse to undergo abortion training or provide referrals for abortion or abortion training.

o) **Global Health Programs (22 USC 7631(d))**. Recipients of foreign aid to combat HIV/AIDS cannot be required to (1) endorse or utilize a multisectoral or comprehensive approach to combatting HIV/AIDS; or (2) participate in activity to which the organization has a religious or moral objection.

p) **The Helms Amendment (22 USC 2151b(f))**. Prohibits federal funds provided to other countries under Part I of the Foreign Assistance Act of 1961 from being used for: abortion or to coerce a person to practice abortion; or to perform involuntary sterilization or to coerce people to undergo sterilization. It also prohibits the use of federal funds for biomedical research related to abortion or involuntary sterilization as a means of family planning.

q) **Specific Assessment, Prevention and Treatment Services (42 USC 290bb-36(f), 5106i)**. These codes specify parameters for state and tribal programs that receive federal funds to prevent teen suicide and state that nothing in the code should be construed to
require participants of such programs to undergo assessments or treatments that violate their parents’ or guardians’ religious beliefs or moral objections. The final rule would clarify that these laws do not require a state to or prohibit a state from finding child abuse or neglect when a parent or guardian relies solely or partially on spiritual rather than medical treatment.

**Assurance and Certification (§88.4)**
Every application for federal must include both an assurance document and a certification document affirming that the applicant or recipient will comply with applicable federal conscience laws and anti-discrimination law. The new assurance and certification will take place during the next renewal or modification of the funding arrangement. OCR will specify the form and manner for the assurance and certification in collaboration with other agencies or departments that are relevant to the specific program.

**Notifications (§88.5 and Appendix A)**
Voluntary posting of a notice of nondiscrimination will be considered by OCR in the investigation of any complaints, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.

OCR recommends covered entities voluntarily post a notice about federal conscience laws to the public, patients and employees on the entity’s website and in a prominent and conspicuous physical location. OCR also recommends including the notice in personnel manuals, handbooks, and job applications. Model notification text is included in the appendix. OCR encourages entities to use model text, tailored to an entity’s particular circumstances and the laws applicable to it.

**Compliance (§88.6)**
Requires recipients and HHS to comply with federal conscience and associated anti-discrimination laws. OCR requires that recipients and HSS maintain records of their compliance and cooperate with compliance reviews and investigations. Should a recipient be subject to a compliance review or investigation, the recipient is required to include the review and/or investigation on any application for Federal financial assistance or Departmental funding. Recipients shall maintain records for three years.

**Enforcement (§88.7)**
Describes OCR’s enforcement authority and outlines potential mechanisms for enforcement (e.g., informal resolution, termination of federal funding, suspended awards, referral to Department of Justice, etc.).