AMERICAN CIVIL LIBERTIES UNION of OREGON

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April 9, 2009

Department of Health and Human Services
Office of Public Health and Science
Attn: Mahak Nayyar
Hubert Humphrey Building
200 Independence Avenue SW
Room 716G
Washington, DC 20201

Re: RIN 0991-AB49

Dear Acting Secretary Johnson:

The ACLU of Oregon submits these comments in strong support of your proposal to rescind the regulation entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law" (the "Rule").

The ACLU has a long history of vigorously defending both religious liberty and reproductive rights. While the ACLU works tirelessly to expand access to reproductive health services, we also believe that, in many instances, individual religious and moral objections can and should be accommodated without undermining patient access to care. As explained below, however, the Rule is entirely unnecessary to safeguard the religious and moral beliefs of health care providers, which are already strongly protected under federal law. Moreover, by inviting individuals and institutions to refuse to provide basic reproductive health care services, the Rule seriously and needlessly jeopardizes women's health and welfare. Indeed, not only is the Rule unnecessary, but its deliberately confusing and ambiguous scope is detrimental to the health and safety of women, men and families throughout the country.

The ACLU of Oregon strongly opposed the promulgation of the Rule because the Rule failed to strike the appropriate balance between patient access and religious liberty. And, as the Department is aware, the ACLU—on behalf of the National Family Planning & Reproductive Health Association—challenged the Rule in federal court because it is contrary to law and violates the rights of health care providers and their patients.

For all of these reasons, the ACLU of Oregon believes the Rule should be rescinded. However, because the Notice of Proposed Rulemaking has specifically sought comments on (1) the need for federal rulemaking in this area; (2) the extent to which the Rule reduces access to information and health

care services, particularly by low-income women; and (3) the potential for harm resulting from the ambiguity and confusion created by the Rule, we focus our comments on these topics.

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Rescinding the Rule is Appropriate Because Federal Law Already Safeguards the Religious and Moral Beliefs of Health Care Providers

Based on our longstanding commitment to religious liberty and freedom of conscience, the ACLU is uniquely positioned to comment on existing legal safeguards for religious and moral beliefs. We are confident that prompt rescission of the Rule is both necessary and justified.

The Department's proposed rescission does not alter the obligation of entities to comply with longstanding provisions of federal law that protect the religious and moral beliefs of health care providers. For example, the Church, Coats, and Weldon Amendments, which the Rule purports to implement, have long shielded individual health care professionals, as well as certain institutions, from being forced to provide certain health care services to which they have a religious or moral objection. *See* 42 USC § 300a-7; 42 USC § 238n; Consolidated Appropriations Act 2008, PL 110-161, Div. G, 508d. In addition, for more than forty years, Title VII of the Civil Rights Act of 1964 has required employers to accommodate current and prospective employees' refusals to provide *any* health care service on the basis of their religious or moral beliefs, unless accommodation imposes an undue hardship on the employer. *See* 42 U.S.C. § 2000e *et seq*. Indeed, the Equal Opportunity Employment Commission ("EEOC"), the body charged with protecting employees against discrimination, called the Rule unnecessary to protect the religious and moral beliefs of health care providers. *See* Comments from Legal Counsel for EEOC, to Secretary Leavitt, HHS (Sept. 24, 2008). And the Department itself has recognized as much. Although it received more than 200,000 comments during the public comment period on the Rule, the Department admitted that it received "no Comments indicating that there were any [federal] funding recipients not currently compliant with [the underlying statutes.]" 73 Fed. Reg. 78,072, 78,095. Thus, there is simply no call for any regulation; much less a Rule which so blatantly, and harmfully, undermines access to basic health services.

Rescinding the Rule is Critical Because the Rule Seriously Jeopardizes the Health and Well-Being of Americans, particularly Low-Income Americans

Not only is the Rule unnecessary, but it also poses serious, detrimental, even life-altering risks for patients and their families. And, because the Rule affects, in large part, health care services supported by federal funds, its devastating impact will be felt most acutely by low-income women, men, and families, particularly in communities of color, who all too often have no alternative means to access the health care services they need. Thus, to ensure continued access to essential health care services, the Department should quickly move forward with its proposal to rescind the Rule.

Because the Rule threatens access to essential family planning services, the effects of the Rule will be felt throughout the nation. As of 2006, more than 17 million women in the United States were unable to afford basic reproductive health care and were in need of publicly supported contraceptive services. *See Women in Need of Contraceptive Services and Supplies*, 2006 (Guttmacher Institute 2008), *available at* http://www.guttmacher.org/pubs/win/WIN2006.pdf . Given

this widespread need, publicly-funded reproductive health care provides a crucial safety net for women and families. Yet, despite this demonstrated need, the Rule invites refusals to provide contraceptive services and information and contains no protections for patients. *See, e.g.*, 73 Fed. Reg. at 78,077 (refusing to clarify that contraception in not considered an abortion under the Rule). At a time when more and more Americans are either uninsured or struggling with the soaring costs of health care, rescission of the Rule will help to ensure that these essential services are available to those in need.

This could not be more critical. The inability to access comprehensive, timely reproductive health care services can be devastating for women and their families. Access to safe and effective contraception is a critical component of basic health care for women. More than 90% of American women will use contraceptives at some point in their lives. Mosher WD et al., Use of Contraception and Use of Family Planning Services in the United States: 1982-2002, Advance Data from Vital Health Statistics, No. 350 (2004). From a public health perspective, access to contraception services reduces both maternal and infant mortality rates. *See* Achievements in Public Health, 1900-1999: Family Planning, 48 Morbidity & Mortality Wkly. Rep. 1073 (1999); *see also* Ten Great Public Health Achievements – United States, 1900-1999, 48 Morbidity & Morality Wkly. Rep. 241, 242 (1999). Indeed, the Centers for Disease and Control have called access to family planning and contraceptive services one of the ten great public health achievements of the twentieth century. *Id*.

Moreover, as the Supreme Court has recognized, the denial of access to reproductive health services has severe repercussions for women's dignity, equality, and ability to shape a meaningful life. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Access to comprehensive reproductive health care is essential to "the ability of women to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. For that reason, matters relating to use of contraception "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Id*. at 851. Because the Rule jeopardizes the ability of women and families to make decisions that are "central to personal dignity and autonomy," the Department should move forward with its proposal to rescind.

The Department Should Rescind the Rule Because its Deliberately Confusing and Ambiguous Scope Threatens Access to Critical Health Services

In addition to the gratuitous risks it creates for patients, the Rule is tremendously confusing. For example, after the Department generated tremendous confusion by drafting a Rule that re-defined abortion in a medically inaccurate way to include common methods of contraception (such as birth control pills, IUDs, and emergency contraception), tens of thousands of commenters demanded the Department clarify the scope of the Rule. The Department refused, stating only that:

> After the full consideration of Comments on this issue, the Department declines to add a definition of abortion to the rule. As indicated by the Comments, such questions over the nature of abortion and the ending of a life are highly controversial and strongly debated. The Department believes it can enforce the federal health care conscience protection laws without an abortion definition just as the Department has enforced Hyde Amendment, abortion funding restrictions without a formal definition.

73 Fed. Reg. at 78,077 (internal citation omitted). The Rule thus continues to leave open the possibility that it could be interpreted to include contraception within the definition of abortion and to provide new immunities for institutions and individuals who refuse to provide women with information about and access to contraceptive services.

Similarly, the Rule has generated significant confusion with respect to longstanding requirements under Title VII. Under Title VII, most health care providers must already accommodate religious and moral objections unless doing so would result in the imposition of an undue hardship. *See* 42 U.S.C. § 2000e-(2)(a)(1); 42 U.S.C. § 2000e(j). This careful balance between the needs of employees and employers is critical to ensuring that health care employers are able to provide services to their patients. However, the Rule states that its "protections" are "distinct from, and extend beyond, those under Title VII." 73 Fed. Reg. at 78,085. In so doing, the Rule leaves health care providers without sufficient guidance as to what actions they can take to protect patient access without losing critical federal funds – funds essential to their ability to offer quality, affordable, and accessible care to low-income patients. *See also* Comments from Stuart J. Ishimaru & Christine M. Griffin, EEOC Commissioners, to Secretary Leavitt, HHS (Sept. 25, 2008) (stating that the Rule "would throw [an] entire body of law into question, resulting in needless confusion and litigation in an attempt to redefine religious freedom rights for employees in the healthcare sector"). Moreover, as noted above, the resulting confusion is altogether unnecessary as religious and moral conflicts are well protected under Title VII. *See* Comments from Legal Counsel for EEOC, *supra*.

The Rule also creates tremendous uncertainty about whether states can enforce laws that protect and expand access to family planning services, such as laws that require prescription drug plans to include the full range of FDA-approved prescription contraceptive drugs and devices ("contraceptive equity" laws) and laws requiring emergency care facilities to offer emergency contraception to rape victims who come to them for treatment ("EC in ER" laws). During the public comment period, numerous state Attorneys General and executives raised concerns that the Rule would interfere with their enforcement of these laws.[1] The Rule notes these comments, and seems to acknowledge that States would have problems enforcing these laws, but provides no guidance as to how and when these laws may be enforced. Instead, the Rule simply states "[w]hile the Department is aware that some States may have laws that, if enforced, depending on the factual circumstances, might violate these federally protected rights, the Department is not aware of any particular instance where a State has done so in an inappropriate fashion." 73 Fed. Reg. at 78,088. The Rule, however, also cautions that states "should avoid" enforcing their laws in this undefined "inappropriate fashion" or "risk the loss of federal funds." *Id*. To the extent the Rule does bar states from enforcing these laws, it runs counter to the very purpose of the Department and could have enormous public health consequences.

For example, the Rule threatens Oregon's ability to enforce its law that requires emergency

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1 *See* Comments of Governors: M. Jodi Rell (Conn.), Rod. R. Blagojevich (Ill.), John E. Baldacci (Me.), Chester J. Culver (Iowa), Christine D. Gregoire (Wash.), Jim Doyle (Wis.); Lieutenant Governor Diane D. Denish (N.M.); Attorneys General: Richard Blumenthal (Conn.), Edmund G. Brown Jr. (Cal.), Martha Coakley (Mass.), Douglas F. Gansler (Md.), Terry Goddard (Ariz.), Gary K. King (N.M.), Patrick C. Lynch (R.I.), Lisa Madigan (Ill.), Mike McGrath (Mont.), Anne Milgram (N.J.), Tom Miller (Iowa), Hardy Myers (Or.), G. Steven Rowe (Me.), Mark Shurtleff (Utah),William H. Sorrell (Vt.), Lori Swanson (Minn.).

facilities to provide EC to rape survivors. [See ORS 435.250 to 435.256] By inviting hospitals and other facilities treating rape survivors to refuse to provide EC, the Rule unacceptably imposes a devastating emotional burden and leaves these women at risk of becoming pregnant as a result of assault.

Likewise, under the Rule, Oregon may not be able to enforce its law that prevents insurance companies or employers from excluding coverage of contraception in prescription drug plans. [See ORS 743A.066] Before the passage of contraceptive equity laws in states across the country, only half of the nation's employer-based prescription drug plans covered any prescription contraceptives and only one-third covered oral contraceptives. The Department should thus promptly rescind the Rule, which by undermining the ability of women to decide whether and when to have a child, could lead to a significant increase in unintended pregnancies.

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Because the Rule seriously and needlessly undermines the health and well-being of women, men and families across the country, we urge the Department to quickly move forward with its proposal to rescind the Rule. Thank you for your consideration.

Sincerely,

David Fidanque
Executive Director
ACLU of Oregon