

**Congress of the United States**  
**Washington, DC 20515**

August 1, 2019

The Honorable Alex M. Azar  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Secretary Azar:

We are requesting documents and information regarding the refusal of care rule, titled Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, which was finalized by the U.S. Department of Health and Human Services (HHS or Department) Office for Civil Rights (OCR) and published in the Federal Register on May 21, 2019.<sup>1</sup>

Refusal of care laws permit health care providers to deny care to patients on the basis of a religious or moral objection. This new HHS rule—which broadens the scope of existing refusal of care laws by redefining the type of care that may be refused, as well as the people who are permitted to deny that care—is an unprecedented and illegal expansion of OCR’s enforcement authority. In addition, the rule undermines the Department’s mission “to enhance the health and well-being of all Americans” and instead threatens the health and well-being of women, LGBTQ people, and others facing marginalization by entrenching and sanctioning discrimination in the health care system.<sup>2</sup>

**The Rule Expands Discrimination and Fails to Protect Patients**

The final rule adopts an overly expansive view of existing refusal of care laws. The rule expands what it means to “assist in the performance” of a service or a procedure to include “counseling, referral, training, or otherwise making arrangements for the procedure or health service program or research activity.”<sup>3</sup> This change, combined with an expanded definition of the term “health care entity,” expands the reach of the refusal of care laws to people only tangentially involved in patient care—permitting an expansive category of people to deny services based on any personal belief.

The final rule also fails to ensure that existing patient protection laws will not be undermined by expanded refusals of care. For example, the Emergency Medical Treatment and Labor Act (EMTALA) guarantees all patients the right to stabilizing treatment in emergency

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<sup>1</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 CFR Part 88).

<sup>2</sup> U.S. Department of Health and Human Services, Strategic Plan, (accessed Jun. 20, 2019) ([www.hhs.gov/about/strategic-plan/introduction/index.html#mission](http://www.hhs.gov/about/strategic-plan/introduction/index.html#mission))

<sup>3</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,189 (May 21, 2019) (to be codified at 45 CFR Part 88).

situations, regardless of their ability to pay.<sup>4</sup> Yet the final rule may allow a provider to refuse care for a patient experiencing a medical emergency based on the provider's personal belief, and HHS has provided no assurance of patients' rights under these circumstances other than to assert that "the Department would apply both EMTALA and the relevant law under this rule harmoniously to the extent possible."<sup>5</sup>

In issuing the final rule, the Department dramatically expanded the ways in which existing refusal of care laws can be used to sanction discrimination. For example, under this rule:

- An individual provider receiving federal funds, including Medicaid, could refuse to offer certain services, such as HIV and other sexually transmitted infection (STI) testing, pre-exposure prophylaxis (PrEP), reproductive health services, or gender reassignment surgery.
- A pharmacy or pharmacist could refuse to fill prescriptions for a patient experiencing a miscarriage.
- An emergency medical technician (EMT) could deny transportation to a woman seeking the standard course of treatment for an ectopic pregnancy.
- An insurance company could refuse to cover miscarriage management services.
- A hospital room scheduler could refuse to book a facility for a woman seeking an abortion.
- A volunteer at a medical provider could refuse to assist a transgender patient.

These examples are just some of the ways in which patients could face discrimination or otherwise face barriers to care under this rule. In particular, the refusal of care rule may leave women, LGBTQ people, people of color, and other historically underserved groups—including those who rely on federally funded health care—unable to access care across all health care settings.

### **The Rule Was Finalized Despite an Inadequate Rulemaking Process**

We are also concerned that the refusal of care rule was finalized without ensuring it satisfied the statutory and administrative requirements that provide for a fair and thorough rulemaking process.

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<sup>4</sup> 42 U.S.C. § 1395dd.

<sup>5</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,189 (May 21, 2019) (to be codified at 45 CFR Part 88).

The Administrative Procedure Act (APA) prohibits executive agencies from taking actions that are arbitrary and capricious. In interpreting the APA, the Supreme Court has held that a “basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions.”<sup>6</sup> To do so, the Court said, an agency must “examine the relevant data and articulate a satisfactory explanation for its action.”<sup>7</sup>

The refusal of care rule is based on insufficient and flawed data. For instance, HHS failed to provide any data whatsoever quantifying the purported benefits of expanding refusal of care exemptions, and it did not account for the negative health and economic impacts resulting from delays or refusals of care to patients. In the final rule, HHS dismissed concerns that the refusal rule will impact patient access to care without providing any supporting analysis, simply concluding that “the Department does not believe this rule will harm access to care.”<sup>8</sup>

The rule is also based on the flawed premise that current refusal of care laws are not being adequately enforced. In justifying the need for the rule, HHS cited just 44 complaints alleging discrimination in violation of refusal of care laws during a nearly ten-year period between 2008 and January 2018.<sup>9</sup> By contrast, HHS received approximately 3,000 complaints alleging discrimination in violation of civil rights laws each year.<sup>10</sup> That HHS based this significant regulatory change on so few complaints calls into question whether the rulemaking was motivated by ideology rather than an examination of the relevant data.

### **Requests for Information and Documents**

The refusal of care rule directly contradicts the Department’s mission “to enhance the health and well-being of all Americans” and raises questions about the ideological forces driving this rulemaking. Women, LGBTQ people, people of color, and other historically underserved groups already face widespread discrimination in our health care system, and this policy would only embolden discrimination against these groups. Everyone, regardless of race, color, national origin, sex (including sexual orientation and gender identity), age, or disability, should be treated as equals in our health care system.

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<sup>6</sup> *Encino Motorcars*, 136 S. Ct. 2117, 2120 (2016).

<sup>7</sup> *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 30 (1983).

<sup>8</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,180 (May 21, 2019) (to be codified at 45 CFR Part 88).

<sup>9</sup> Office for Civil Rights, Office of the Secretary, Department of Health and Human Services, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority* (proposed rule), 83 Fed. Reg. 3880 (Jan. 26, 2018) (available at [www.govinfo.gov/content/pkg/FR-2018-01-26/pdf/2018-01226.pdf](http://www.govinfo.gov/content/pkg/FR-2018-01-26/pdf/2018-01226.pdf)).

<sup>10</sup> Office for Civil Rights, Office of the Secretary, Department of Health and Human Services, *Nondiscrimination in Health Programs and Activities* (proposed rule), 80 Fed. Reg. 54207 (Sept. 8, 2015) (available at [www.govinfo.gov/content/pkg/FR-2015-09-08/pdf/2015-22043.pdf](http://www.govinfo.gov/content/pkg/FR-2015-09-08/pdf/2015-22043.pdf)).

For these reasons, we request that you respond to the following inquiries by August 15, 2019:

*Information Requests*

1. What is OCR doing to address discrimination against patients in health care settings, including discrimination against patients that face multiple forms of discrimination?
2. What is OCR doing to ensure patients, particularly those in rural areas or with limited access to health care providers, are able to access medical services when they are refused care based on a religious or conscience objection?
3. How will OCR ensure that patients continue to use OCR as a resource to file complaints regarding discrimination they face in health care settings, when OCR has signaled to the public that it is poised to prioritize so-called conscience protections for health care workers over patients' access to health care?
4. What impact does HHS believe the rule will have on patients who already disproportionately face discrimination in health care settings, including women, LGBTQ people, people of color, people living in rural areas, and other historically underserved groups?
5. Did HHS communicate or coordinate with external entities to solicit complaints in the year leading up to the issuance of the proposed rule in January 2018?
6. In seeking to comply with Executive Order 12866, how did OCR determine the effect of the rule on patients?
7. How many of the "more than 242,000 comments" submitted in response to the proposed refusal of care rule opposed any provision of the proposed rule?

*Document Requests*

1. All communications among HHS personnel and among any non-governmental organization, entity, or individual regarding the solicitation or submission of complaints to OCR.
2. All internal and external analyses of the potential impact of the refusal of care rule on patient access to health care services.
3. All communications between HHS personnel and personnel at the U.S. Office of Management and Budget or the Office of Information and Regulatory Affairs concerning the regulatory review of the proposed and final refusal of care rule.
4. All communications, excluding public comments, between HHS personnel and any

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non-federal organization, entity, or individual concerning the drafting and regulatory review of the proposed and final refusal of care rule.

An attachment to this letter provides additional instructions for responding to this request. If you have any questions, please contact Jesseca Boyer with the Democratic staff of the House Committee on Energy and Commerce at (202) 225-2927, Cathy Yu with the Democratic staff of the House Committee on Education and Labor at (202) 225-3725, Miles Lichtman with the Democratic staff of the House Committee on Oversight and Reform at (202) 225-5051, and Elizabeth Letter with the Democratic staff of the Senate Committee on Health, Education, Labor, and Pensions at (202) 224-5375.

Thank you for your attention to this matter.

Sincerely,



Frank Pallone, Jr.  
Chairman  
Committee on Energy and Commerce



Robert C. "Bobby" Scott  
Chairman  
Committee on Education and Labor



Elijah E. Cummings  
Chairman  
Committee on Oversight and Reform



Patty Murray  
Ranking Member  
Committee on Health, Education,  
Labor, and Pensions

Enclosure

cc: The Honorable Greg Walden, Ranking Member, Committee on Energy and Commerce  
The Honorable Virginia Foxx, Ranking Member, Committee on Education and Labor  
The Honorable Jim Jordan, Ranking Member, Committee on Oversight and Reform  
The Honorable Lamar Alexander, Committee on Health, Education, Labor, and Pensions