

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: May 22, 2018
ATTENTION: Members, Medical Board of California (Board)
SUBJECT: Federal Rule Titled: Protecting Statutory Conscience
Rights in Health Care; Delegations of Authority
84 Fed. Reg. 23170
STAFF CONTACT: Kerrie Webb, Staff Counsel

REQUESTED ACTION:

After review and consideration of the attached federal rule titled Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Rule), 84 Fed. Reg. 23170 (May 21, 2019), make a motion to take an oppose position on this rule, and delegate authority to the Board's president to assist the Office of the Attorney General in opposing it.

BACKGROUND:

The attached Rule promulgated by the Office for Civil Rights within the Department of Health and Human Services (Department) creates a broad exemption that permits any individual, entity, or provider, ranging from physicians to front office staff, to deny patients health care on the basis of "religious, moral, ethical or other reasons." (84 Fed. Reg. at 23263.) This Rule significantly broadens existing federal conscience protections and will permit refusals of any health care services by almost any individual in the health care industry, even those not involved in the provision of the care. Moreover, there is no exception for medical emergencies. Consequently, this Rule is in conflict with several federal and California laws, as well as the Board's primary mission of consumer protection.

For instance, this Rule disregards the Emergency Medical Treatment and Labor Act (EMTALA) enacted by Congress in response to growing concern about the provision of adequate medical services to individuals, particularly the indigent and the uninsured, who seek care from hospital emergency rooms. (42 U.S.C. § 1395dd(a).) Instead, the Rule places conscience protection over patient care without exception, even for emergencies. The American College of Emergency Physicians (ACEP), commented that the proposed rule failed to reflect the moral and legal duty of emergency physicians to treat everyone "who comes through our doors," stating that "[b]oth by law and by oath, emergency physicians care for all patients seeking emergency medical treatment," and concluding that "[d]enial of emergency care or delay in providing emergency services on the basis of race, religion, sexual orientation, gender identity, ethnic background, social status, type of illness, or ability to pay, is unethical." (ACEP comment at 1, available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-71219>.)

The Department failed to meaningfully address these concerns, and summarily dismissed them, stating that “[w]ith respect to EMTALA, the Department generally agrees with its explanation in the preamble to the 2008 Rule that the requirement under EMTALA that certain hospitals treat and stabilize patients who present in an emergency does not conflict with Federal conscience and anti-discrimination laws.” (84 Fed. Reg. at 23183.)

Under California law, a health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience (but not on the basis of discrimination). (Cal. Prob. Code § 4734(a).) Also, a health care institution may decline to comply with an individual health care instruction when it is contrary to a policy of the institution that is expressly based on reasons of conscience, if the policy was timely communicated to the patient. (Cal. Prob. Code § 4734(b).) However, a health care provider or institution that declines to comply with an individual health care instruction must (1) promptly so inform the patient; (2) immediately make all reasonable efforts to assist in the transfer of the patient to another provider or institution that is willing to comply with the instruction; and (3) provide continuing care to the patient until the transfer is accomplished or until it appears that a transfer cannot be accomplished. (Cal. Prob. Code § 4736.)

California laws also carefully balance provisions for conscience protections and a woman’s right to reproductive health. For example, California law provides that no employer or other person shall require a physician, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion “if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate.” (Cal. Health & Safety Code § 123420(a).) Additionally, no employee or person shall be subject to any penalty or discipline for refusing to participate in the induction or performance of an abortion. *Id.* However, this provision does not apply to “medical emergency situations and spontaneous abortions” (Cal. Health & Safety Code § 123420(d); Cal. Health & Safety Code § 1317(a) & (e).)

Further, pursuant to California Business and Professions Code section 125.6, a California licensed health care professional is subject to discipline “if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code [sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status], he or she refuses to perform the licensed activity or aids or incites the refusal to perform that licensed activity by another licensee, or if, because [of such characteristics], he or she makes any discrimination, or restriction in the performance of the licensed activity.”

Under the Rule, however, physicians and other health care providers may be emboldened to disregard California’s anti-discrimination protections, and interfere with patients’ access to health care due, in part, to how broadly the Rule defines terms. (See, 84 Fed. Reg. at 23263-23264.)

The American Medical Association (AMA) commented that the proposed Rule “would undermine patients’ access to medical care and information, impose barriers to physicians and health care institutions’ ability to provide treatment, impede advances in biomedical research, and create confusion and uncertainty among physicians, other health care professionals, and health care institutions about their legal and ethical obligations to treat patients.” The AMA further stated that the proposed Rule “would legitimize discrimination against vulnerable patients and in fact create a right to refuse to provide certain treatments or services.” (AMA comment at 1, available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-70564>.)

The American Congress of Obstetricians and Gynecologists (ACOG) commented that under the AMA’s Code of Medical Ethics, responsibility to the patient is paramount for all physicians, and that providers with moral or religious objections should ensure that processes are in place to protect access to and maintain a continuity of care for all patients; but in an emergency in which referral is not possible or might negatively impact the patient’s physical or mental health, providers have an obligation to provide medically indicated and requested care. (ACOG comment at 1-2, available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-70647>.)

The consequences of this Rule are expected to disproportionately impact access to care for women, sexual abuse victims, religious minorities, people living with HIV/AIDS, and lesbian, gay, bisexual, and transgender (LGBT) people. Individuals in rural and other underserved communities may experience even more barriers to obtaining care. Under the Rule, patients could be denied care, without explanation or referral. In light of the above, this Rule is in conflict with the Board’s mission:

The mission of the Medical Board of California is to protect health care consumers through the proper licensing and regulation of physicians and surgeons and certain allied health care professionals and through the vigorous, objective enforcement of the Medical Practice Act, and to promote access to quality medical care through the Board's licensing and regulatory functions.

STAFF RECOMMENDATION:

Staff recommends this Board take an oppose position on this Rule, and delegate authority to the Board’s president to assist the Office of the Attorney General in opposing it.

Students, Technical assistance, Tribal Organizations.

■ For the reasons set forth in the preamble, the Department of Health and Human Services revises 45 CFR part 88 to read as follows:

PART 88—PROTECTING STATUTORY CONSCIENCE RIGHTS IN HEALTH CARE; DELEGATIONS OF AUTHORITY

Sec.

- 88.1 Purpose.
- 88.2 Definitions.
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- 88.5 Notice of rights under Federal conscience and anti-discrimination laws.
- 88.6 Compliance requirements.
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Appendix A to Part 88—Model Text: Notice of Rights Under Federal Conscience and Anti-Discrimination Laws

Authority: 42 U.S.C. 300a–7 (the Church Amendments); 42 U.S.C. 238n (Coats-Snowe Amendment); the Weldon Amendment (*e.g.*, Pub. L. 115–245, Div. B, sec. 507(d)); 42 U.S.C. 18113 (Section 1553 of the Affordable Care Act); Medicare Advantage (*e.g.*, Pub. L. 115–245, Div. B, sec. 209); the Helms, Biden, 1978, and 1985 Amendments, 22 U.S.C. 2151b(f) (*e.g.*, Pub. L. 116–6, Div. F, sec. 7018); 22 U.S.C. 7631(d); 29 U.S.C. 669(a)(5); 42 U.S.C. 300gg–92; 42 U.S.C. 1302(a); 42 U.S.C. 18041(a) (Section 1321 of the Affordable Care Act); 42 U.S.C. 18081 (Section 1411 of the Affordable Care Act); 42 U.S.C. 18023 (Section 1303 of the Affordable Care Act); 26 U.S.C. 5000A(d)(2); 42 U.S.C. 18031; 42 U.S.C. 280g–1(d); 42 U.S.C. 290bb–36(f); 42 U.S.C. 1315; 42 U.S.C. 1315a; 42 U.S.C. 1320a–1; 42 U.S.C. 1320c–11; 42 U.S.C. 1395cc(f); 42 U.S.C. 1395i–3; 42 U.S.C. 1395i–5; 42 U.S.C. 1395w–22(j)(3)(B); 42 U.S.C. 1395w–26; 42 U.S.C. 1395w–27; 42 U.S.C. 1395x; 42 U.S.C. 1396a; 42 U.S.C. 1396a(w)(3); 42 U.S.C. 1396f; 42 U.S.C. 1396r; 42 U.S.C. 1396s(c)(2)(B)(ii); 42 U.S.C. 1396u–2(b)(3)(B); 42 U.S.C. 1397j–1(b); 42 U.S.C. 5106i(a); 42 U.S.C. 14406; 5 U.S.C. 301; 40 U.S.C. 121(c); 42 U.S.C. 263a(f)(1)(E); 45 CFR parts 75 and 96; 48 CFR chapter 1; 48 CFR parts 300 thru 370; 2 CFR part 376.

§ 88.1 Purpose.

The purpose of this part is to provide for the implementation and enforcement of the Federal conscience and anti-discrimination laws listed in § 88.3. Such laws, for example, protect the rights of individuals, entities, and health care entities to refuse to perform, assist in the performance of, or undergo certain health care services or research activities to which they may object for religious, moral, ethical, or other reasons. Such laws also protect patients from being subjected to certain health

care or services over their conscientious objection. Consistent with their objective to protect the conscience and associated anti-discrimination rights of individuals, entities, and health care entities, the statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes.

§ 88.2 Definitions.

For the purposes of this part: *Assist in the performance* means to take an action that has a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity. This may include counseling, referral, training, or otherwise making arrangements for the procedure or a part of a health service program or research activity, depending on whether aid is provided by such actions.

Department means the Department of Health and Human Services and any component thereof.

Discriminate or discrimination includes, as applicable to, and to the extent permitted by, the applicable statute:

(1) To withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny any grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, title, or other similar instrument, position, or status;

(2) To withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny any benefit or privilege or impose any penalty; or

(3) To utilize any criterion, method of administration, or site selection, including the enactment, application, or enforcement of laws, regulations, policies, or procedures directly or through contractual or other arrangements, that subjects individuals or entities protected under this part to any adverse treatment with respect to individuals, entities, or conduct protected under this part on grounds prohibited under an applicable statute encompassed by this part.

(4) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to any prohibition in this part shall not be regarded as having engaged in discrimination against a protected entity where the entity offers and the protected entity voluntarily accepts an effective accommodation for the exercise of such protected entity's protected conduct, religious beliefs, or moral convictions. In determining

whether any entity has engaged in discriminatory action with respect to any complaint or compliance review under this part, OCR will take into account the degree to which an entity had implemented policies to provide effective accommodations for the exercise of protected conduct, religious beliefs, or moral convictions under this part and whether or not the entity took any adverse action against a protected entity on the basis of protected conduct, beliefs, or convictions before the provision of any accommodation.

(5) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to any prohibition in this part may require a protected entity to inform it of objections to performing, referring for, participating in, or assisting in the performance of specific procedures, programs, research, counseling, or treatments, but only to the extent that there is a reasonable likelihood that the protected entity may be asked in good faith to perform, refer for, participate in, or assist in the performance of, any act or conduct just described. Such inquiry may only occur after the hiring of, contracting with, or awarding of a grant or benefit to a protected entity, and once per calendar year thereafter, unless supported by a persuasive justification.

(6) The taking of steps by an entity subject to prohibitions in this part to use alternate staff or methods to provide or further any objected-to conduct identified in paragraph (5) of this definition would not, by itself, constitute discrimination or a prohibited referral, if such entity does not require any additional action by, or does not take any adverse action against, the objecting protected entity (including individuals or health care entities), and if such methods do not exclude protected entities from fields of practice on the basis of their protected objections. Entities subject to prohibitions in this part may also inform the public of the availability of alternate staff or methods to provide or further the objected-to conduct, but such entity may not do so in a manner that constitutes adverse or retaliatory action against an objecting entity.

Entity means a "person" as defined in 1 U.S.C. 1; the Department; a State, political subdivision of any State, instrumentality of any State or political subdivision thereof; any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State; or, as applicable, a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Federal financial assistance includes:

(1) Grants and loans of Federal funds;
 (2) The grant or loan of Federal property and interests in property;
 (3) The detail of Federal personnel;
 (4) The sale or lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale or lease to the recipient; and

(5) Any agreement or other contract between the Federal government and a recipient that has as one of its purposes the provision of a subsidy to the recipient.

Health care entity includes:

(1) For purposes of the Coats-Snowe Amendment (42 U.S.C. 238n) and the subsections of this part implementing that law (§ 88.3(b)), an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; or any other health care provider or health care facility. As applicable, components of State or local governments may be health care entities under the Coats-Snowe Amendment; and

(2) For purposes of the Weldon Amendment (*e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Pub. L. 115–245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018)), Patient Protection and Affordable Care Act section 1553 (42 U.S.C. 18113), and to sections of this part implementing those laws (§ 88.3(c) and (e)), an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; a provider-sponsored organization; a health maintenance organization; a health insurance issuer; a health insurance plan (including group or individual plans); a plan sponsor or third-party administrator; or any other kind of

health care organization, facility, or plan. As applicable, components of State or local governments may be health care entities under the Weldon Amendment and Patient Protection and Affordable Care Act section 1553.

Health service program includes the provision or administration of any health or health-related services or research activities, health benefits, health or health-related insurance coverage, health studies, or any other service related to health or wellness, whether directly; through payments, grants, contracts, or other instruments; through insurance; or otherwise.

Instrument is the means by which Federal funds are conveyed to a recipient and includes grants, cooperative agreements, contracts, grants under a contract, memoranda of understanding, loans, loan guarantees, stipends, and any other funding or employment instrument or contract.

OCR means the Office for Civil Rights of the Department of Health and Human Services.

Recipient means any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, and any person or any public or private agency, institution, organization, or other entity in any State, including any successor, assign, or transferee thereof, to whom Federal financial assistance is extended directly from the Department or a component of the Department, or who otherwise receives Federal funds directly from the Department or a component of the Department, but such term does not include any ultimate beneficiary. The term may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Referral or *refer for* includes the provision of information in oral, written, or electronic form (including names, addresses, phone numbers, email or web addresses, directions, instructions, descriptions, or other information resources), where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving funding or financing for, training in, obtaining, or performing a particular health care service, program, activity, or procedure.

State includes, in addition to the several States, the District of Columbia. For those provisions related to or relying upon the Public Health Service Act, the term “State” includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands,

the U.S. Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands. For those provisions related to or relying upon the Social Security Act, such as Medicaid or the Children’s Health Insurance Program, the term “State” shall be defined in accordance with the definition of “State” found at 42 U.S.C. 1301.

Sub-recipient means any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, or any person or any public or private agency, institution, organization, or other entity in any State, including any successor, assign, or transferee thereof, to whom there is a pass-through of Federal financial assistance or Federal funds from the Department through a recipient or another sub-recipient, but such term does not include any ultimate beneficiary. The term may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Workforce means employees, volunteers, trainees, contractors, and other persons whose conduct, in the performance of work for an entity or health care entity, is under the direct control of such entity or health care entity, whether or not they are paid by the entity or health care entity, as well as health care providers holding privileges with the entity or health care entity.

§ 88.3 Applicable requirements and prohibitions.

(a) *The Church Amendments, 42 U.S.C. 300a–7—(1) Applicability.* (i) The Department is required to comply with paragraphs (a)(2)(i) through (vii) of this section and § 88.6 of this part.

(ii) Any State or local government or subdivision thereof and any other public entity is required to comply with paragraphs (a)(2)(i) through (iii) of this section.

(iii) Any entity that receives a grant, contract, loan, or loan guarantee under the Public Health Service Act (42 U.S.C. 201 *et seq.*) after June 18, 1973, is required to comply with paragraph (a)(2)(iv) of this section and §§ 88.4 and 88.6 of this part.

(iv) Any entity that receives a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services after July 12, 1974, is required to comply with paragraph (a)(2)(v) of this section and §§ 88.4 and 88.6 of this part.

(v) The Department and any entity that receives funds for any health

service program or research activity under any program administered by the Secretary of Health and Human Services is required to comply with paragraph (a)(2)(vi) of this section and §§ 88.4 and 88.6 of this part.

(vi) Any entity that receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C. 15001 *et seq.*] is required to comply with paragraph (a)(2)(vii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 300a–7(b)(1), the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any individual does not authorize entities to which this paragraph (a)(2)(i) applies to require such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.

(ii) Pursuant to 42 U.S.C. 300a–7(b)(2)(A), the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any recipient does not authorize entities to which this paragraph (a)(2)(ii) applies to require such recipient to make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the recipient on the basis of religious beliefs or moral convictions.

(iii) Pursuant to 42 U.S.C. 300a–7(b)(2)(B), the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any recipient does not authorize entities to which this paragraph (a)(2)(iii) applies to require such recipient to provide personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(iv) Pursuant to 42 U.S.C. 300a–7(c)(1), entities to which this paragraph (a)(2)(iv) applies shall not discriminate against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges because such physician or other health care personnel performed or assisted in the performance of a lawful sterilization

procedure or abortion, because he refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(v) Pursuant to 42 U.S.C. 300a–7(c)(2), entities to which this paragraph (a)(2)(v) applies shall not discriminate against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges because such physician or other health care personnel performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

(vi) Pursuant to 42 U.S.C. 300a–7(d), entities to which this paragraph (a)(2)(vi) applies shall not require any individual to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if the individual's performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(vii) Pursuant to 42 U.S.C. 300a–7(e), entities to which this paragraph (a)(2)(vii) applies shall not deny admission to or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's 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.

(b) *The Coats-Snowe Amendment (Section 245 of the Public Health Service Act), 42 U.S.C. 238n—(1) Applicability.* (i) The Department is required to comply with paragraphs

(b)(2)(i) through (ii) of this section and § 88.6 of this part.

(ii) Any State or local government or subdivision thereof that receives Federal

financial assistance, including Federal payments provided as reimbursement for carrying out health-related activities, is required to comply with paragraphs (b)(2)(i) through (ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 238n(a)(1), (2), and (3), entities to which this paragraph (b)(2)(i) applies shall not subject any health care entity to discrimination on the basis that the health care entity—

(A) Refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;

(B) Refuses to make arrangements for any of the activities specified in (b)(2)(i)(A); or

(C) Attends or attended a post-graduate physician training program or any other program of training in the health professions that does not or did not perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(ii) Pursuant to 42 U.S.C. 238n(b), entities to which this paragraph (b)(2)(ii) applies shall not, for the purposes of granting a legal status to a health care entity (including a license or certificate), or providing such entity with financial assistance, services, or benefits, fail to deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon accreditation standards that require an entity to perform an induced abortion or that require an entity to require, provide, or refer for training in the performance of induced abortions or make arrangements for such training, regardless of whether such standards provide exceptions or exemptions. Entities to which this paragraph (b)(2)(ii) applies and which are involved in such matters shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this paragraph.

(c) *Weldon Amendment (See, e.g., Pub. L. 115–245, Div. B, sec. 507(d))—*

(1) *Applicability.* (i) The Department and its programs, while operating under an appropriations act that contains the Weldon Amendment, are required to comply with paragraph (c)(2) of this section and § 88.6 of this part.

(ii) Any State or local government that receives funds under an appropriations act for the Department that contains the Weldon Amendment is required to

comply with paragraph (c)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibition.* The entities to which this paragraph (c)(2) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.

(d) *Medicare Advantage (See, e.g., Pub. L. 115–245, Div. B, sec. 209)—(1) Applicability.* The Department, while operating under an appropriations act that contains a provision with respect to the Medicare Advantage program as set forth by Public Law 115–245, Div. B, sec. 209, is required to comply with paragraph (d)(2) of this section and § 88.6 of this part.

(2) *Prohibition.* The entities to which this paragraph (d)(2) applies shall not deny participation in the Medicare Advantage program to an otherwise eligible entity (including a Provider Sponsored Organization) because that entity informs the Secretary that it will not provide, pay for, provide coverage of, or provide referrals for abortions.

(e) *Section 1553 of the Affordable Care Act, 42 U.S.C. 18113—(1) Applicability.* (i) The Department is required to comply with paragraph (e)(2) of this section and § 88.6 of this part.

(ii) Any State or local government that receives Federal financial assistance under the Patient Protection and Affordable Care Act (or under an amendment made by the Patient Protection and Affordable Care Act) is required to comply with paragraph (e)(2) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any health care provider that receives Federal financial assistance under the Patient Protection and Affordable Care Act (or under an amendment made by the Patient Protection and Affordable Care Act) is required to comply with paragraph (e)(2) of this section and §§ 88.4 and 88.6 of this part.

(iv) Any health plan created under the Patient Protection and Affordable Care Act (or under an amendment made by the Patient Protection and Affordable Care Act) is required to comply with paragraph (e)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibition.* The entities to which this paragraph (e)(2) applies shall not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy

killing. Nothing in this paragraph shall be construed to apply to, or to affect, any limitation relating to:

(i) The withholding or withdrawing of medical treatment or medical care;

(ii) The withholding or withdrawing of nutrition or hydration;

(iii) Abortion; or

(iv) The use of an item, good, benefit, or service furnished for the purpose of alleviating pain or discomfort, even if such use may increase the risk of death, so long as such item, good, benefit, or service is not also furnished for the purpose of causing, or the purpose of assisting in causing, death, for any reason.

(f) *Section 1303 of the Affordable Care Act, 42 U.S.C. 18023—(1) Applicability.*

(i) The Department is required to comply with paragraph (f)(2)(i) of this section and § 88.6 of this part.

(ii) Qualified health plans, as defined under 42 U.S.C. 18021, offered through any Exchange created under the Patient Protection and Affordable Care Act, are required to comply with paragraphs (f)(2)(i) and (ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 18023(b)(1)(A)(i), entities to which this paragraph (f)(2)(i) applies shall not construe anything in Title I of the Patient Protection and Affordable Care Act (or any amendment made by Title I of the Patient Protection and Affordable Care Act) to require a qualified health plan to provide coverage of abortion or abortion-related services as described in 42 U.S.C. 18023(b)(1)(B)(i) or (ii) as part of its essential health benefits for any plan year.

(ii) Pursuant to 42 U.S.C. 18023(b)(4), entities to which this paragraph (f)(2)(ii) applies shall not discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.

(g) *Section 1411 of the Affordable Care Act, 42 U.S.C. 18081—(1) Applicability.*

The Department shall comply with paragraph (g)(2) of this section and § 88.6 of this part.

(2) *Requirement.* The Department shall provide a certification documenting a religious exemption from the individual responsibility requirement and penalty under the Patient Protection and Affordable Care Act and shall coordinate with State Health Benefit Exchanges in the implementing of the certification requirements of 42 U.S.C.

18031(d)(4)(H)(i) where applicable to:

(i) Any applicant for such a certificate for any month who provides

information demonstrating that the applicant:

(A) Is an adherent of religious tenets or teachings by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act), or

(B) Is an adherent of religious tenets or teachings that are not described in paragraph (g)(2)(i)(A) of this section, who relies solely on a religious method of healing, and for whom the acceptance of medical health services would be inconsistent with the religious beliefs of the individual, and the application for the certificate includes an attestation that the individual has not received medical health services during the preceding taxable year.

(1) For purposes of this paragraph (g)(2)(i)(B), “medical health services” does not include routine dental, vision and hearing services, midwifery services, vaccinations, necessary medical services provided to children, services required by law or by a third party, and such other services as the Secretary may provide in implementing section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act; and

(ii) Any applicant for such a certificate for any month who provides information demonstrating that the applicant is a member of a “health care sharing ministry,” as defined in 26 U.S.C. 5000A(d)(2)(B)(ii), for the month.

(h) *Counseling and referral provisions of 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B)—(1) Applicability.* (i) The Department is required to comply with paragraphs (h)(2)(i) and (ii) of this section and § 88.6 of this part.

(ii) Any State agency that administers a Medicaid program is required to comply with paragraph (h)(2)(ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 1395w–22(j)(3)(B), entities to which this paragraph (h)(2)(i) applies shall not construe 42 U.S.C. 1395w–22(j)(3)(A) or 42 CFR 422.206(a) to require a Medicare Advantage organization to provide, reimburse for, or provide coverage of, a counseling or referral service if the organization offering the plan:

(A) Objects to the provision of such service on moral or religious grounds, and

(B) In the manner and through the written instrumentalities such organization deems appropriate, makes

available information on its policies regarding such service to prospective enrollees before or during enrollment and to enrollees within 90 days after the date that the organization adopts a change in policy regarding such a counseling or referral service.

(ii) Pursuant to 42 U.S.C. 1396u-2(b)(3)(B), entities to which this paragraph (h)(2)(ii) applies shall not construe 42 U.S.C. 1396u-2(b)(3)(A) or 42 CFR 438.102(a)(1) to require a Medicaid managed care organization to provide, reimburse for, or provide coverage of, a counseling or referral service if the organization:

(A) Objects to the provision of such service on moral or religious grounds, and

(B) In the manner and through the written instrumentalities such organization deems appropriate, makes available information on its policies regarding such service to prospective enrollees before or during enrollment and to enrollees within 90 days after the date that the organization adopts a change in policy regarding such a counseling or referral service.

(i) *Advance Directives, 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406—(1) Applicability.* (i) The Department is required to comply with paragraph (i)(2) of this section and § 88.6 of this part with respect to the Medicare and Medicaid programs.

(ii) Any State agency that administers a Medicaid program is required to comply with paragraph (i)(2) of this section and §§ 88.4 and 88.6 of this part with respect to its Medicaid program.

(2) *Prohibitions.* The entities to which this paragraph (i)(2) applies shall not:

(i) Construe 42 U.S.C. 1395cc(f) or 1396a(w)(3) to require any provider or organization, or any employee of such a provider or organization, to inform or counsel any individual regarding any right to obtain an item or service furnished for the purpose of causing, or the purpose of assisting in causing, the death of the individual, such as by assisted suicide, euthanasia, or mercy killing; or to apply to or affect any requirement with respect to a portion of an advance directive that directs the purposeful causing of, or the purposeful assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing; or

(ii) Construe 42 U.S.C. 1396a to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive.

(j) *Global Health Programs, 22 U.S.C. 7631(d)—(1) Applicability.* (i) The

Department is required to comply with paragraph (j)(2) of this section and § 88.6 of this part.

(ii) Any entity that is authorized by statute, regulation, or agreement to obligate Federal financial assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b-2), under Chapter 83 of Title 22 of the U.S. Code or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such Federal financial assistance is administered by the Secretary, is required to comply with paragraph (j)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibitions.* The entities to which this paragraph (j)(2) applies shall not:

(i) Require an organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b-2), under Chapter 83 of Title 22 of the U.S. Code, or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such assistance is administered by the Secretary, for HIV/AIDS prevention, treatment, or care to, as a condition of such assistance:

(A) Endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(B) Endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection.

(ii) Discriminate against an organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b-2), under Chapter 83 of Title 22 of the U.S. Code, or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such assistance is administered by the Secretary, for HIV/AIDS prevention, treatment, or care, in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (j)(2)(i) of this section.

(k) *The Helms, Biden, 1978, and 1985 Amendments, 22 U.S.C. 2151b(f); see, e.g., Consolidated Appropriations Act, 2019, Public Law 116-6, Div. F, sec. 7018—(1) Applicability.* (i) The

Department is required to comply with paragraph (k)(2)(i) of this section and § 88.6 of this part.

(ii) Any entity that is authorized by statute, regulation, or agreement to obligate or expend Federal financial assistance under part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151b-2), to the extent administered by the Secretary, is required to comply with paragraph (k)(2)(i) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any entity that receives Federal financial assistance under part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151b-2), to the extent administered by the Secretary, is required to comply with paragraph (k)(2)(ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibitions.* (i) The entities to which this paragraph (k)(2)(i) applies shall not:

(A) Permit Federal financial assistance identified in paragraph (k)(1)(ii) of this section to be used in a manner that would violate provisions in paragraphs (k)(2)(ii)(A)(1) through (5) of this section related to abortions and involuntary sterilizations.

(B) Obligate or expend Federal financial assistance under an appropriations act that contains the 1985 Amendment and identified in paragraph (k)(1)(ii) of this section for any country or organization if the President certifies that the use of these funds by any such country or organization would violate provisions in paragraphs (k)(2)(ii)(A)(1) through (5) of this section related to abortions and involuntary sterilizations.

(ii) The entities to which this paragraph (k)(2)(ii) applies shall not:

(A) Use such Federal financial assistance identified in paragraph (k)(1)(iii) of this section to:

(1) Pay for the performance of abortions as a method of family planning;

(2) Motivate or coerce any person to practice abortions;

(3) Pay for the performance of involuntary sterilizations as a method of family planning;

(4) Coerce or provide any financial incentive to any person to undergo sterilizations; or

(5) Pay for any biomedical research that relates in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.

(B) Obligate or expend Federal financial assistance under an appropriations act that contains the 1985 Amendment and identified in paragraph (k)(1)(iii) of this section for

any country or organization if the President certifies that the use of these funds by any such country or organization would violate provisions in paragraphs (k)(2)(ii)(A)(1) through (5) of this section related to abortions and involuntary sterilizations.

(l) *Newborn and Infant Hearing Loss Screening, 42 U.S.C. 280g-1(d)*—(1) *Applicability.* The Department is required to comply with paragraph (l)(2) of this section and § 88.6 of this part.

(2) *Requirement.* The Department shall not construe 42 U.S.C. 280g-1 to preempt or prohibit any State law that does not require the screening for hearing loss of children of parents who object to the screening on the grounds that it conflicts with the parents' religious beliefs.

(m) *Medical Screening, Examination, Diagnosis, Treatment, or Other Health Care or Services, 42 U.S.C. 1396f*—(1) *Applicability.* The Department is required to comply with paragraph (m)(2) of this section and § 88.6 of this part.

(2) *Requirements and prohibitions.* The Department shall not construe anything in 42 U.S.C. 1396 *et seq.* to require a State agency that administers a State Medicaid Plan to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in case such person is a child, his parent or guardian objects) thereto on religious grounds.

(n) *Occupational Illness Examinations and Tests, 29 U.S.C. 669(a)(5)*—(1) *Applicability.* (i) The Department is required to comply with paragraph (n)(2) of this section and § 88.6 of this part.

(ii) Any recipient of grants or contracts under 29 U.S.C. 669, to the extent administered by the Secretary, is required to comply with paragraph (n)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements.* Entities to which this paragraph (n)(2) applies shall not deem any provision of 29 U.S.C. 651 *et seq.* to authorize or require medical examination, immunization, or treatment, as provided under 29 U.S.C. 669, for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others.

(o) *Vaccination, 42 U.S.C. 1396s(c)(2)(B)(ii)*—(1) *Applicability.* (i) The Department is required to comply

with paragraph (o)(2) of this section and § 88.6 of this part.

(ii) Any State agency that administers a pediatric vaccine distribution program under 42 U.S.C. 1396s is required to comply with paragraph (o)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirement.* The entities to which this paragraph (o)(2) applies shall ensure that, under any State-administered pediatric vaccine distribution program under 42 U.S.C. 1396s, the provider agreement executed by any program-registered provider, as defined under 42 U.S.C. 1396s(c)(1), includes the requirement that the program-registered provider will provide pediatric vaccines in compliance with all applicable State law relating to any religious or other exemption. Such State law may include State statutory, regulatory, or constitutional protections for conscience and religious freedom, where applicable.

(p) *Specific Assessment, Prevention and Treatment Services, 42 U.S.C. 290bb-36(f), 5106i(a)*—(1) *Applicability.*

(i) The Department is required to comply with paragraphs (p)(2)(i) through (iii) of this section and § 88.6 of this part.

(ii) Any State, political subdivision, public organization, private nonprofit organization, institution of higher education, or tribal organization actively involved with the State-sponsored statewide or tribal youth suicide early intervention and prevention strategy, designated by a State to develop or direct the State-sponsored Statewide youth suicide early intervention and prevention strategy under 42 U.S.C. 290bb-36 and that receives a grant or cooperative agreement thereunder, is required to comply with paragraph (p)(2)(iii) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any federally recognized Indian tribe or tribal organization (as defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*)) or an urban Indian organization (as defined in the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*)) that is actively involved in the development and continuation of a tribal youth suicide early intervention and prevention strategy under 42 U.S.C. 290bb-36 and that receives a grant or cooperative agreement thereunder is required to comply with paragraph (p)(2)(iii) of this section.

(iv) Any entity that receives funds under 42 U.S.C. chapter 67, subchapters I or III is required to comply with paragraphs (p)(2)(i) and (ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Entities to which this paragraph (p)(2)(i) applies shall not construe the receipt of funds under or anything in 42 U.S.C. chapter 67, subchapters I or III as establishing any Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian.

(ii) Entities to which this paragraph (p)(2)(ii) applies shall not construe the receipt of funds under or anything in 42 U.S.C. chapter 67, subchapters I or III as requiring a State to find, or prohibiting a State from finding, child abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.

(iii) Entities to which this paragraph (p)(2)(iii) applies shall not construe anything in 42 U.S.C. 290bb-36 to require suicide assessment, early intervention, or treatment services for youth whose parents or legal guardians object based on the parents' or legal guardians' religious beliefs or moral objections.

(q) *Religious nonmedical health care, 42 U.S.C. 1320a-1(h), 1320c-11, 1395i-5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j-1(b)*—(1) *Applicability.* (i) The Department is required to comply with paragraphs (q)(2)(i) through (iv) of this section and § 88.6 of this part.

(ii) Any State agency that makes an agreement with the Secretary pursuant to 42 U.S.C. 1320a-1(b) is required to comply with paragraph (q)(2)(i) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any entity receiving Federal financial assistance from participating in Medicare is required to comply with paragraphs (q)(2)(ii) of this section and §§ 88.4 and 88.6 of this part.

(iv) Any entity, including a State, receiving Federal financial assistance from participating in Medicaid, including any entity receiving Federal financial assistance through CHIP that is used to expand Medicaid, is required to comply with paragraphs (q)(2)(iii) of this section and §§ 88.4 and 88.6 of this part.

(v) Any entity, including a State or local government or subdivision thereof, receiving Federal financial assistance under subtitle B of Title XX of the Social Security Act (42 U.S.C. 1397j-1397m-5) is required to comply with paragraph (q)(2)(iv) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) The entities to which this paragraph (q)(2)(i) applies shall not apply the provisions of 42 U.S.C. 1320a-1 to a

religious nonmedical health care institution as defined in 42 U.S.C. 1395x(ss)(1).

(ii) With respect to a religious nonmedical health care institution as defined in 42 U.S.C. 1395x(ss)(1), the entities to which this paragraph (q)(2)(ii) applies shall not:

(A) Fail or refuse to make a payment under part A of subchapter XVIII of chapter 7 of Title 42 of the U.S. Code for inpatient hospital services, post-hospital extended care services, or home health services furnished to an individual by a religious nonmedical health care institution that is a hospital as defined in 42 U.S.C. 1395x(e), a skilled nursing facility as defined in 42 U.S.C. 1395x(y), or a home health agency as defined in 42 U.S.C. 1395x(aaa), respectively, if the condition under 42 U.S.C. 1395i-5(a)(2) is satisfied and an individual makes an election pursuant to 1395i-5(b) that:

(1) Such individual is conscientiously opposed to acceptance of medical care or treatment other than medical care or treatment (including medical and other health services) that is:

(i) Received involuntarily, or

(ii) Required under Federal or State law or law of a political subdivision of a State; and

(2) Acceptance of such medical treatment would be inconsistent with such individual's sincere religious beliefs, or

(B) In administering 42 U.S.C. 1395i-5 or 1395x(ss)(1):

(1) Require any patient of a religious nonmedical health care institution to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient (or legal representative of the patient) objects to such service on religious grounds, or

(2) Subject a religious nonmedical health care institution or its personnel to any medical supervision, regulation, or control, insofar as such supervision, regulation, or control would be contrary to the religious beliefs observed by the institution or such personnel, or

(C) Subject religious nonmedical health care institution to the provisions of part B of subchapter XI of Chapter 7 of Title 42 of the U.S. Code.

(iii) Pursuant to 42 U.S.C. 1396a(a), the entities to which this paragraph (q)(2)(iii) applies shall not fail or refuse to exempt a religious nonmedical health care institution from the Medicaid requirements to:

(A) Meet State standards described in 42 U.S.C. 1396a(a)(9)(A);

(B) Be evaluated under 42 U.S.C. 1396a(a)(33), on the appropriateness and quality of care and services;

(C) Undergo a regular program, under 42 U.S.C. 1396(a)(31), of independent professional review, including medical evaluation, of services in an intermediate care facility for persons with mental disabilities; and

(D) Meet the requirements of 42 U.S.C. 1396(b)(i)(4) to establish a utilization review plan consistent with, or superior to, the utilization review plan criteria under 42 U.S.C. 1395x(k) for Medicare.

(iv) Pursuant to 42 U.S.C. 1397j-1(b), the entities to which this paragraph (q)(2)(iv) applies shall not construe subtitle B of Title XX of the Social Security Act (42 U.S.C. 1397j-1397m-5) to interfere with or abridge an elder's right to practice his or her religion through reliance on prayer alone for healing when this choice:

(A) Is contemporaneously expressed, either orally or in writing, with respect to a specific illness or injury which the elder has at the time of the decision by an elder who is competent at the time of the decision;

(B) Is previously set forth in a living will, health care proxy, or other advance directive document that is validly executed and applied under State law; or

(C) May be unambiguously deduced from the elder's life history.

§ 88.4 Assurance and certification of compliance requirements.

(a) *In general*—(1) *Assurance*. Except for an application or recipient to which paragraph (c) of this section applies, every application for Federal financial assistance or Federal funds from the Department to which § 88.3 of this part applies shall, as a condition of the approval, renewal, or extension of any Federal financial assistance or Federal funds from the Department pursuant to the application, provide, contain, or be accompanied by an assurance that the applicant or recipient will comply with applicable Federal conscience and anti-discrimination laws and this part.

(2) *Certification*. Except for an application or recipient to which paragraph (c) of this section applies, every application for Federal financial assistance or Federal funds from the Department to which § 88.3 of this part applies, shall, as a condition of the approval, renewal, or extension of any Federal financial assistance or Federal funds from the Department pursuant to the application, provide, contain, or be accompanied by, a certification that the applicant or recipient will comply with

applicable Federal conscience and anti-discrimination laws and this part.

(b) *Specific requirements*—(1) *Timing*. Entities who are already recipients as of the effective date of this part or any applicants shall submit the assurance required in paragraph (a)(1) of this section and the certification required in paragraph (a)(2) of this section as a condition of any application or reapplication for funds to which this part applies, through any instrument or as a condition of an amendment or modification of the instrument that extends the term of such instrument or adds additional funds to it. Submission may be required more frequently if:

(i) The applicant or recipient fails to meet a requirement of this part, or

(ii) OCR or the relevant Department component has reason to suspect or cause to investigate the possibility of such failure.

(2) *Form and manner*. Applicants or recipients shall submit the assurance required in paragraph (a)(1) of this section and the certification required in paragraph (a)(2) of this section in the form and manner that OCR, in coordination with the relevant Department component, specifies, or shall submit them in a separate writing signed by the applicant's or recipient's officer or other person authorized to bind the applicant or recipient.

(3) *Duration of obligation*. The assurance required in paragraph (a)(1) of this section and the certification required in paragraph (a)(2) of this section will obligate the recipient for the period during which the Department extends Federal financial assistance or Federal funds from the Department to a recipient.

(4) *Compliance requirement*. Submission of an assurance or certification required under this section will not relieve a recipient of the obligation to take and complete any action necessary to come into compliance with Federal conscience and anti-discrimination laws and this part prior to, at the time of, or subsequent to, the submission of such assurance or certification.

(5) *Condition of continued receipt*. Provision of a compliant assurance and certification shall constitute a condition of continued receipt of Federal financial assistance or Federal funds from the Department and is binding upon the applicant or recipient, its successors, assigns, or transferees for the period during which such Federal financial assistance or Federal funds from the Department are provided.

(6) *Assurances and certifications in applications*. An applicant or recipient may incorporate the assurances and

certifications by reference in subsequent applications to the Department or Department component if prior assurances or certifications are initially provided in the same fiscal or calendar year, as applicable.

(7) *Enforcement of assurances and certifications.* The Department, Department components, and OCR shall have the right to seek enforcement of the assurances and certifications required in this section.

(8) *Remedies for failure to make assurances and certifications.* If an applicant or recipient fails or refuses to furnish an assurance or certification required under this section, OCR, in coordination with the relevant Department component, may effect compliance by any of the mechanisms provided in § 88.7.

(c) *Exceptions.* The following persons or entities shall not be required to comply with paragraphs (a)(1) and (2) of this section, provided that such persons or entities are not recipients of Federal financial assistance or other Federal funds from the Department through another instrument, program, or mechanism, other than those set forth in paragraphs (c)(1) through (4) of this section:

(1) A physician, as defined in 42 U.S.C. 1395x(r), physician office, pharmacist, pharmacy, or other health care practitioner participating in Part B of the Medicare program;

(2) A recipient of Federal financial assistance or other Federal funds from the Department awarded under certain grant programs currently administered by the Administration for Children and Families, the purpose of which is either solely financial assistance unrelated to health care or which is otherwise unrelated to health care provision, and which, in addition, does not involve—

- (i) Medical or behavioral research;
- (ii) Health care providers; or
- (iii) Any significant likelihood of referral for the provision of health care;

(3) A recipient of Federal financial assistance or other Federal funds from the Department awarded under certain grant programs currently administered by the Administration on Community Living, the purpose of which is either solely financial assistance unrelated to health care or which is otherwise unrelated to health care provision, and which, in addition, does not involve—

- (i) Medical or behavioral research;
- (ii) Health care providers; or
- (iii) Any significant likelihood of referral for the provision of health care.

(4) Indian Tribes and Tribal Organizations when contracting with the Indian Health Service under the

Indian Self-Determination and Education Assistance Act.

§ 88.5 Notice of rights under Federal conscience and anti-discrimination laws.

(a) *In general.* In investigating a complaint or conducting a compliance review, OCR will consider an entity's voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance with the applicable substantive provisions of this part, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.

(b) *Placement of the notice text.* In evaluating the Department's or a recipient's compliance with this part, OCR will take into account whether, as applicable and appropriate, the Department or recipient has provided the notice under this section:

(1) On the Department or recipient's website(s);

(2) In a prominent and conspicuous physical location in Department or recipient establishments where notices to the public and notices to its workforce are customarily posted to permit ready observation;

(3) In a personnel manual or other substantially similar document for members of the Department or recipient's workforce;

(4) In applications to the Department or recipient for inclusion in the workforce or for participation in a service, benefit, or other program, including for training or study; and

(5) In any student handbook or other substantially similar document for students participating in a program of training or study, including for post-graduate interns, residents, and fellows.

(6) Such that the text of the notice is large and conspicuous enough to be read easily and is presented in a format, location, or manner that impedes or prevents the notice being altered, defaced, removed, or covered by other material.

(c) *Content of the notice text.* The recipient and the Department should consider using the model text provided in Appendix A for the notice, but may tailor its notice to address its particular circumstances and to more specifically address the laws that apply to it under this rule.

(d) *Combined nondiscrimination notices.* The Department and each recipient may post the notice text provided in appendix A of this part, or a notice it drafts itself, along with the content of other notices (such as other non-discrimination notices).

§ 88.6 Compliance requirements.

(a) *In general.* The Department and each recipient has primary responsibility to ensure that it is in compliance with Federal conscience and anti-discrimination laws and this part, and shall take steps to eliminate any violations of the Federal conscience and anti-discrimination laws and this part. If a sub-recipient is found to have violated the Federal conscience and anti-discrimination laws, the recipient from whom the sub-recipient received funds may be subject to the imposition of funding restrictions or any appropriate remedies available under this part, depending on the facts and circumstances.

(b) *Records and information.* The Department, each recipient, and each sub-recipient shall maintain complete and accurate records evidencing compliance with Federal conscience and anti-discrimination laws and this part, and afford OCR, upon request, reasonable access to such records and information in a timely manner and to the extent OCR finds necessary to determine compliance with the Federal conscience and anti-discrimination laws and this part. Such records:

(1) Shall be maintained for a period of three years from the date the record was created or obtained by the recipient or sub-recipient;

(2) Shall contain any information maintained by the recipient or sub-recipient that pertains to discrimination on the basis of religious belief or moral conviction, including, without limitation, any complaints; statements, policies, or notices concerning discrimination on the basis of religious belief or moral conviction; procedures for accommodating employees' or other protected individuals' religious beliefs or moral convictions; and records of requests for such religious or moral accommodation and the recipient or sub-recipient's response to such requests; and

(3) May be maintained in any form and manner that affords OCR with reasonable access to them in a timely manner.

(c) *Cooperation.* The Department, each recipient, and each sub-recipient shall cooperate with any compliance review, investigation, interview, or other part of OCR's enforcement process, which may include production of documents, participation in interviews, response to data requests, and making available of premises for inspection where relevant. Failure to cooperate may result in an OCR referral to the Department of Justice, in coordination with the Department's Office of the General Counsel, for

further enforcement in Federal court or otherwise. Each recipient or sub-recipient shall permit access by OCR during normal business hours to such of its books, records, accounts, and other sources of information, as well as its facilities, as may be pertinent to ascertain compliance with this part. Asserted considerations of privacy or confidentiality may not operate to bar OCR from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance reviews, investigations, or other enforcement activities shall not be disclosed except as required in formal enforcement proceedings or as otherwise required by law.

(d) *Reporting requirement.* If a recipient or sub-recipient is subject to a determination by OCR of noncompliance with this part, the recipient or sub-recipient must, in any application for new or renewed Federal financial assistance or Departmental funding in the three years following such determination, disclose the existence of the determination of noncompliance. This includes a requirement that recipients disclose any OCR determinations made against their sub-recipients.

(e) *Intimidating or retaliatory acts prohibited.* Neither the Department nor any recipient or sub-recipient shall intimidate, threaten, coerce, or discriminate against any entity for the purpose of interfering with any right or privilege under the Federal conscience and anti-discrimination laws or this part, or because such entity has made a complaint or participated in any manner in an investigation or review under the Federal conscience and anti-discrimination laws or this part.

§ 88.7 Enforcement authority.

(a) *In general.* OCR has been delegated the authority to facilitate and coordinate the Department's enforcement of the Federal conscience and anti-discrimination laws, which includes the authority to:

- (1) Receive and handle complaints;
- (2) Initiate compliance reviews;
- (3) Conduct investigations;
- (4) Coordinate compliance within the Department;
- (5) Seek voluntary resolutions of complaints;
- (6) In coordination with the relevant component or components of the Department and the Office of the General Counsel, make enforcement referrals to the Department of Justice;
- (7) In coordination with the relevant Departmental funding component, utilize existing regulations for

involuntary enforcement, such as those that apply to grants, contracts, or CMS programs; and

(8) In coordination with the relevant component or components of the Department, coordinate other appropriate remedial action as the Department deems necessary and as allowed by law and applicable regulation.

(b) *Complaints.* Any entity, whether individually, as a member of a class, on behalf of others, or on behalf of an entity, may file a complaint with OCR alleging any potential violation of Federal conscience and anti-discrimination laws or this part. OCR shall coordinate handling of complaints with the relevant Department component(s). The complaint filer is not required to be the entity whose rights under the Federal conscience and anti-discrimination laws or this part have been potentially violated.

(c) *Compliance reviews.* OCR may conduct compliance reviews or use other similar procedures as necessary to permit OCR to investigate and review the practices of the Department, Department components, recipients, and sub-recipients to determine whether they are complying with Federal conscience and anti-discrimination laws and this part. OCR may initiate a compliance review of an entity subject to this part based on information from a complaint or other source that causes OCR to suspect non-compliance by such entity with this part or the laws implemented by this part.

(d) *Investigations.* OCR shall make a prompt investigation, whenever a compliance review, report, complaint, or any other information found by OCR indicates a threatened, potential, or actual failure to comply with Federal conscience and anti-discrimination laws or this part. The investigation should include, where appropriate, a review of the pertinent practices, policies, communications, documents, compliance history, circumstances under which the possible noncompliance occurred, and other factors relevant to determining whether the Department, Department component, recipient, or sub-recipient has failed to comply. OCR shall use fact-finding methods including site visits; interviews with the complainants, Department component, recipients, sub-recipients, or third-parties; and written data or discovery requests. OCR may seek the assistance of any State agency.

(e) *Failure to respond.* Absent good cause, the failure of an entity that is subject to this part to respond to a request for information or to a data or document request within 45 days of

OCR's request shall constitute a violation of this part.

(f) *Related administrative or judicial proceeding.* Consistent with other applicable Federal laws, testimony and other evidence obtained in an investigation or compliance review conducted under this part may be used by the Department for, and offered into evidence in, any administrative or judicial proceeding related to this part.

(g) *Supervision and coordination.* If as a result of an investigation, compliance review, or other enforcement activity, OCR determines that a Department component appears to be in noncompliance with its responsibilities under Federal conscience and anti-discrimination laws or this part, OCR will undertake appropriate action with the component to assure compliance. In the event that OCR and the Department component are unable to agree on a resolution of any particular matter, the matter shall be submitted to the Secretary for resolution. OCR may from time to time request the assistance of officials of the Department in carrying out responsibilities in connection with the enforcement of Federal conscience and anti-discrimination laws and this part, including the achievement of effective coordination and maximum uniformity within the Department.

(h) *Referral to the Department of Justice.* If as a result of an investigation, compliance review, or other enforcement activity, OCR determines that a recipient or sub-recipient is not in compliance with the Federal conscience and anti-discrimination laws or this part, OCR may, in coordination with the relevant Department component and the Office of the General Counsel, make referrals to the Department of Justice, for further enforcement in Federal court or otherwise. OCR may also make referrals to the Department of Justice, in coordination with the Office of the General Counsel, concerning potential violations of 18 U.S.C. 1001 or 42 U.S.C. 300a-8 for enforcement or other appropriate action.

(i) *Resolution of matters.* (1) If an investigation or compliance review reveals that no action is warranted, OCR will so inform any party who has been notified of the existence of the investigation or compliance review, if any, in writing.

(2) If an investigation or compliance review indicates a failure to comply with Federal conscience and anti-discrimination laws or this part, OCR will so inform the relevant parties and the matter will be resolved by informal means whenever possible. Attempts to resolve matters informally shall not preclude OCR from simultaneously

pursuing any action described in paragraphs (a)(5) through (7) of this section.

(3) If OCR determines that there is a failure to comply with Federal conscience and anti-discrimination laws or this part, compliance with these laws and this part may be effected by the following actions, taken in coordination with the relevant Department component, and pursuant to statutes and regulations which govern the administration of contracts (*e.g.*, Federal Acquisition Regulation), grants (*e.g.*, 45 CFR part 75) and CMS funding arrangements (*e.g.*, the Social Security Act):

(i) Temporarily withholding Federal financial assistance or other Federal funds, in whole or in part, pending correction of the deficiency;

(ii) Denying use of Federal financial assistance or other Federal funds from the Department, including any applicable matching credit, in whole or in part;

(iii) Wholly or partly suspending award activities;

(iv) Terminating Federal financial assistance or other Federal funds from the Department, in whole or in part;

(v) Denying or withholding, in whole or in part, new Federal financial assistance or other Federal funds from the Department administered by or through the Secretary for which an application or approval is required, including renewal or continuation of existing programs or activities or authorization of new activities;

(vi) In coordination with the Office of the General Counsel, referring the matter to the Attorney General for proceedings to enforce any rights of the United States, or obligations of the recipient or sub-recipient, under Federal law or this part; and

(vii) Taking any other remedies that may be legally available.

(j) *Noncompliance with § 88.4.* If a recipient of Federal financial assistance or applicant therefor fails or refuses to furnish an assurance or certification required under § 88.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, OCR, in coordination with the relevant Department component, may effect compliance by any of the remedies provided in paragraph (i) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings brought under such paragraph.

§ 88.8 Relationship to other laws.

Nothing in this part shall be construed to preempt any Federal, State, or local law that is equally or more protective of religious freedom and moral convictions. Nothing in this part shall be construed to narrow the meaning or application of any State or Federal law protecting free exercise of religious beliefs or moral convictions.

§ 88.9 Rule of construction.

This part shall be construed in favor of a broad protection of the free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the Constitution and the terms of the Federal conscience and anti-discrimination laws.

§ 88.10 Severability.

Any provision of this part held to be invalid or unenforceable either by its terms or as applied to any entity or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be severable from this part, which shall remain in full force and effect to the maximum

extent permitted by law. A severed provision shall not affect the remainder of this part or the application of the provision to other persons or entities not similarly situated or to other, dissimilar circumstances.

Appendix A to Part 88—Model Text: Notice of Rights Under Federal Conscience and Anti-Discrimination Laws

[Name of recipient, the Department, or Department component] complies with applicable Federal conscience and anti-discrimination laws prohibiting exclusion, adverse treatment, coercion, or other discrimination against individuals or entities on the basis of their religious beliefs or moral convictions. You may have the right under Federal law to decline to perform, assist in the performance of, refer for, undergo, or pay for certain health care-related treatments, research, or services (such as abortion or assisted suicide, among others) that violate your conscience, religious beliefs, or moral convictions.

If you believe that [Name of recipient, the Department, or Department component] has failed to accommodate your conscientious, religious, or moral objection, or has discriminated against you on those grounds, you can file a conscience and religious freedom complaint with the U.S. Department of Health and Human Services, Office for Civil Rights, electronically through the Office for Civil Rights Complaint Portal, available at <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf> or by mail or phone at: U.S. Department of Health and Human Services, 200 Independence Avenue SW, Room 509F, HHH Building Washington, DC 20201, 1-800-368-1019, 800-537-7697 (TDD). Complaint forms and more information about Federal conscience and anti-discrimination laws are available at <http://www.hhs.gov/conscience>.

Dated: May 2, 2019.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

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State of California

BUSINESS AND PROFESSIONS CODE

Section 125.6

125.6. (a) (1) With regard to an applicant, every person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to that person if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, he or she refuses to perform the licensed activity or aids or incites the refusal to perform that licensed activity by another licensee, or if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, he or she makes any discrimination, or restriction in the performance of the licensed activity.

(2) Nothing in this section shall be interpreted to prevent a physician or health care professional licensed pursuant to Division 2 (commencing with Section 500) from considering any of the characteristics of a patient listed in subdivision (b) or (e) of Section 51 of the Civil Code if that consideration is medically necessary and for the sole purpose of determining the appropriate diagnosis or treatment of the patient.

(3) Nothing in this section shall be interpreted to apply to discrimination by employers with regard to employees or prospective employees, nor shall this section authorize action against any club license issued pursuant to Article 4 (commencing with Section 23425) of Chapter 3 of Division 9 because of discriminatory membership policy.

(4) The presence of architectural barriers to an individual with physical disabilities that conform to applicable state or local building codes and regulations shall not constitute discrimination under this section.

(b) (1) Nothing in this section requires a person licensed pursuant to Division 2 (commencing with Section 500) to permit an individual to participate in, or benefit from, the licensed activity of the licensee where that individual poses a direct threat to the health or safety of others. For this purpose, the term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids and services.

(2) Nothing in this section requires a person licensed pursuant to Division 2 (commencing with Section 500) to perform a licensed activity for which he or she is not qualified to perform.

(c) (1) “Applicant,” as used in this section, means a person applying for licensed services provided by a person licensed under this code.

(2) “License,” as used in this section, includes “certificate,” “permit,” “authority,” and “registration” or any other indicia giving authorization to engage in a business or profession regulated by this code.

(Amended by Stats. 2007, Ch. 568, Sec. 2. Effective January 1, 2008.)