September 25, 2008

VIA ELECTRONIC MAIL: http://www.regulations.gov

Office of Public Health and Science
Department of Health and Human Services
Attention: Brenda Destro
Hubert H. Humphrey Building
200 Independence Avenue, S.W., Room 728E
Washington, D.C. 20201

Re: Provider Conscience Proposed Rule; RIN 0991-AB48

Dear Ms. Destro:

The Society for Human Resource Management (SHRM) is pleased to submit the following comments in response to the Provider Conscience Regulation issued by the Department of Health and Human Services and published in the *Federal Register*. *See* 73 Fed. Reg. 50274 (August 26, 2008).

SHRM is the world's largest association devoted to human resource management. Our mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948, SHRM represents more than 245,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

The proposed rule seeks to provide further definition of the rights and responsibilities created by the Conscience Clauses/Church Amendments (42 U.S.C. 300a-7), the Public Health Service Act section 245 (42 U.S.C. 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Public Law No. 110-161, Div. G section 508 (d), 121 Stat. 1844, 2209 (Dec. 26, 2007)), addressing various health care provider conscience protections.

As HR professionals, SHRM's members are on the front lines of ensuring that employee legal protections are enforced and that workplace policy and practice comport with federal and state laws. As such, the proposed regulation is of great interest to our members. SHRM believes that the proposed regulation needs to be better coordinated with existing federal statutes and rules as well as state laws in order to avoid causing confusion that works against the stated objectives of the regulation. For these reasons, SHRM respectfully requests that the proposed regulation be withdrawn and that the Department conduct a thorough assessment of its relationship to existing protections for employees' religious beliefs and a more comprehensive vetting of the effect of the proposal with stakeholders, including other agencies and affected employer and employee groups, a process not possible under the current 30-day comment period.

Coordination with Title VII Requirements Needed

The proposed rule, as currently drafted, makes no reference to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits employment discrimination on the basis of religious beliefs and requires employers to reasonably accommodate employees' religious beliefs unless doing so would cause the employer undue hardship. Under Title VII, any employee—whether in a health care setting or other type of workplace—who feels that part of his or her job conflicts with his or her religion currently has the right to a host of options for alleviating those conflicts through reasonable accommodation—changes in job tasks, modifications in workplace procedures, etc.—unless doing so would pose an undue hardship. As such, Title VII strikes a careful balance between the needs of employees and employers: it requires employers to adjust workplace practices or requirements to enable employees to adhere to their religious beliefs, yet acknowledges that certain accommodation requests may unduly burden other employees or business operations--whether in a health care setting or other worksite. This statutory scheme has been in place for decades and has been tested and refined by, the courts.

SHRM is concerned that this proposed regulation, as drafted, will create unnecessary confusion and conflict with current religious protections under Title VII, as well as under guidelines promulgated by the U.S. Equal Employment Opportunity Commission—the primary federal agency charged with enforcing federal antidiscrimination law in the workplace. Indeed, the EEOC recently released a lengthy guidance document on religious discrimination, which discussed the very scenarios which this proposed rule seeks to address. *See, e.g.*, EEOC Compliance Manual Section 12 – Religious Discrimination, Example 43 (employer required to accommodate a pharmacist who objects on religious grounds to distributing or answering inquiries about contraceptives).

Given that the proposed rule does not reference Title VII, EEOC interpretive guidance, or state law, it is unclear how this proposed rule could be reconciled with current legal mandates. For example, the proposed regulation does not distinguish between reasonable accommodation and wholesale refusal to perform job duties. This not only contravenes

Title VII and EEOC guidelines, but it also creates a hardship for employers, particularly small employers who may not have sufficient staff to cover duties that have been refused. While problematic in many employment settings, the undue hardship considerations are of particular concern in health care settings where employers and clients rely on a limited pool of employees with specialized skill sets. Thus, SHRM urges that any rule addressing religious discrimination or the accommodation of religious beliefs in the workplace be first coordinated with other governmental entities such as EEOC to reduce confusion and facilitate employer compliance.

Vague and Overbroad Definitions Likely to Increase Uncertainly About Rights and Obligations

SHRM is particularly troubled by the vague and overly broad definition of "assist in the performance." As proposed, "assist in the performance" applies to any employee who has a "reasonable connection" to the procedure or activity to which they object. In a typical employment setting, each employee plays a role in achieving the objectives of the workplace. If one employee refuses to perform his or her job duties, the entire workplace suffers, particularly in the absence of provisions allowing for workplace accommodations that enable employees to adhere to their religious beliefs without unduly burdening workplace operations or other employees. As drafted, it is likely that the work of every employee of a health care entity, from the receptionist to the janitorial staff has a "reasonable connection" to a procedure that any one employee may find objectionable along the way. SHRM strongly recommends that this definition be more narrowly defined to ensure that the employee's religious objections can be protected while also protecting the employer's obligations to other employees, customers, and patients.

Similarly, the definition of "religious belief or moral conviction" is not addressed other than in the Department's admonition that it "seeks to avoid judging whether a particular action is genuinely offensive to an individual," (73 Fed. Reg. 50277, August 26, 2008). To manage workload appropriately among employees, employers and HR professionals need guidance on how "religious belief or moral conviction" comports with the definitions of protected religious beliefs under Title VII and other legal requirements.

Lastly, SHRM believes that the proposed rule will not help the Department achieve its stated objective of informing the public and health care providers of their rights under existing conscience statutes. In fact, the proposed rule is likely to cause greater confusion by creating new definitions and introducing new concepts into long-established employment-related statutes. SHRM respectfully suggests that a public information campaign is an appropriate undertaking to ensure that employers and employees are knowledgeable about the rights and obligations of the various provider conscience statutes. Providing information on the HHS website along with written material and other means of educating health care providers and employees of affected entities should be explored to supplement or to serve as an alternative to regulations.

In conclusion, the proposed rule affects health care entities both as providers of health care services to the public and as places of employment. A 30-day comment period does not allow sufficient time for all stakeholders to review the rule's potential impact on their worksites and employees. SHRM respectfully requests that the proposed rule be withdrawn and that the Department seek additional input from the public, employer and employee stakeholder groups, the Equal Employment Opportunity Commission and other federal agencies with oversight responsibilities for discrimination statutes.

Yours truly,

Michael P. Aitken
Director, Government Affairs