March 27, 2018

Alex Azar, Secretary
U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

Attention: Office for Civil Rights, Conscience NPRM, RIN 0945–ZA03

Dear Secretary Azar,

I am writing on behalf of the American Society for Reproductive Medicine (ASRM), which represents nearly 8000 professionals dedicated to the advancement of the science and practice of reproductive medicine. ASRM accomplishes its mission through the pursuit of excellence in education and research and through advocacy on behalf of patients, physicians, and affiliated health care providers. I am writing in response to the Office for Civil Rights (OCR) proposed rule “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” published in the Federal Register on January 26, 2018. (83 F.R. 3880).

Through this rulemaking, OCR proposes to revise regulations interpreting a number of long-standing statutory provisions aimed at protecting conscience-based objections of individuals and entities that are opposed to participating in certain activities based on religious belief or moral convictions. These protections generally apply to federally funded programs, but some would broadly apply to any entity that receives a grant or contract for biomedical research under any program administered by the Secretary of Health and Human Services (DHHS) and any entity that carries out any part of any health service program or research activity funded in whole or in part under a program administered by DHHS.
As health care providers, we have an ethical obligation to provide our patients with complete and objective information about their health and the diagnostic and treatment options available to them, and to ensure that they have access to any legal healthcare and treatment options they choose to pursue, whether that is through providing the services directly or referring patients to other providers. We have serious concerns that under the proposed rule, the conscience-based “rights” of health care providers (both individuals and entities) have been reinterpreted and expanded at the expense of patient rights, and that patients will be denied access to information necessary to understand all of their treatment options, and to referrals for care to which they’re entitled.

As employers and managers, we also are concerned about conflicts between the proposed rule and the established interpretation of Title VII, the primary federal law barring employment discrimination. Title VII, and guidance issued by the Equal Employment Opportunity Commission (EEOC), has long-required employers to make reasonable accommodations for employees’ sincerely held religious beliefs and practices, unless such an accommodation would impose an undue hardship on the employer. Under the proposed rules, however, we as concerned employers could be faced with the untenable scenario of having to protect the rights of an employee who, on religious grounds, refuses to provide certain information or perform certain duties even if these are essential elements of their job description, because the duty is interpreted to constitute “assisting in the performance” or “referral” to a service or activity to which the employee objects.

For example, individuals may refuse to assist in the performance of certain activities based on conscience grounds, and the proposed rule would broadly define “assist in the performance” to mean “to participate in any program or activity with an articulable connection to a procedure, health service, health program, or research activity… This includes but is not limited to counseling, referral, training, and other arrangements.” If an assisted reproductive technology practice hired a nurse who then objected, on religious grounds, to providing care to unmarried or same sex couples, would the practice have to protect that nurse’s “conscience rights” even though that would result in discrimination against a subset of the practice’s patients, and conflict with an essential element of the job the nurse was hired to do?

While a health care provider shouldn’t be required to participate in actually providing services that are in conflict with their religious or moral beliefs, these beliefs also shouldn’t be imposed on patients, and shouldn’t be allowed to determine the information or care that a patient receives. The proposed rule defines too broadly the scope of health care providers’ conscience rights, while failing to protect the rights of patients to be provided with objective and unbiased information regarding their health care, and to at least be
referred elsewhere for information or services the provider is unable, on conscience grounds, to provide themselves.

We appreciate the opportunity to comment on this proposed rule, and believe DHHS can continue to respect the conscience rights of health care providers without sacrificing the rights of patients to have complete information about their options, and access to the care they choose.

Sincerely,

Christos Coutifaris, MD, PhD
President ASRM