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October 27, 2008

The Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Mr. Secretary:

I am writing with regard to a rule proposed on August 26, 2008, by the Department of Health and Human Services (HHS).¹ The rule, which purports to shield healthcare providers from discrimination, would in fact threaten access to reproductive and other health services across the country. On September 25, I joined over one hundred of my colleagues in writing to HHS to express our concerns about the health implications of the rule.²

Since that time, it has come to my attention that the rule was issued in apparent violation of an executive order that requires interagency coordination and review. I am writing to request an explanation of this lapse and a description of how HHS will redress this lack of coordination in conjunction with the Office of Management and Budget and other affected federal agencies. My concerns are detailed below.

Executive Order 12866

Executive Order 12866, "Regulatory Planning and Review," was issued in 1993 to "reform and make more efficient the regulatory process." Among other principles, it states that "[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies."³

¹ Department of Health and Human Services, 45 CFR Part 88, RIN 0991-AB48, *Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices In Violation of Federal Law* (Aug. 26, 2008).

² Letter from Rep. Nita Lowey et al. to Brenda Destro, Department of Health and Human Services, Comment Re: RIN 0991-AB48 (Sept. 25, 2008).

³ Exec. Order No. 12866, *Regulatory Planning and Review* (Oct. 4, 1993).

The order charges the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA) with the role of facilitating interagency coordination, noting that “[c]oordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive Order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency.” It further defines OIRA’s role in this process as follows:

If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President’s priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

Under the Executive Order, this OMB review is supposed to occur when regulatory actions are “planned” — before anything is issued in either proposed or final form.

Failure to Notify or Coordinate with the EEOC

Despite the principles and directives of E.O. 12866, HHS and OMB failed to undertake appropriate coordination with other agencies in the promulgation of the August 26 rule.

Specifically, it appears that neither HHS nor OMB consulted or even notified the Equal Employment Opportunity Commission (EEOC) about the proposed rule. EEOC has for over forty years enforced Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of religion. Because the HHS rule deals in large part with the rights of healthcare employees to make certain refusals on the basis of religious or moral beliefs, there is a clear and substantial overlap between its scope and that of EEOC’s religious discrimination work.

If there had been consultation with the EEOC as required by the executive order, the proposal submitted for public comment might have been significantly different — or might not have been issued at all. After the proposal was released, the EEOC submitted comments for the record that essentially opposed the rule. EEOC Legal Counsel noted the substantial overlap in the area of employment discrimination and called that element of the HHS rule “unnecessary for protection of employees and applicants,” “potentially confusing to the regulated community,” and “a burden on covered employers, particularly small employers.”⁴ EEOC concluded its comments by recommending:

⁴ Comments from EEOC Re: Provider Conscience Regulation (Sept. 24, 2008) (attached).

Given these legal and practical concerns, Title VII should continue to provide the legal standards for deciding all workplace religious accommodation complaints. HHS's mandate to protect the conscience rights of health care professionals could be met through coordination between EEOC and HHS's Office for Civil Rights, which have had a process for coordinating religious discrimination complaints under Title VII for over 25 years.

At the request of Committee Staff, Congressional Research Service (CRS) made inquiries regarding the treatment of this rule prior to its release. Kevin Neyland, the Deputy Director of OMB's Office of Information and Regulatory Affairs (OIRA), told CRS that the rule was only in OIRA for a day because, subsequent to a leak of an earlier draft of the rule, HHS had decided to release the rule quickly. Mr. Neyland stated that consequently, OIRA did not disseminate the rule to any other agencies.⁵ The OMB website confirms this rapid turnaround, indicating that the rule was both submitted to OIRA by HHS and approved on August 21.⁶

Mr. Neyland recommended that CRS ask HHS if the department had shared the rule with any other federal agencies. CRS staff contacted HHS and were referred to Andrew Bremberg, Senior Advisor, Office of the Assistant Secretary for Public Health. Mr. Bremberg said that "nothing comes to mind" with regard to circulating the rule other than sending the rule to OMB for review, and he told CRS he would check if the rule had indeed been shared. No further information has been provided.⁷

Conclusion

It is understandable that at times, two agencies within an Administration might disagree. What is problematic under the executive order is that these disagreements were not discussed and resolved prior to the proposal of the HHS rule. The purpose of E.O. 12866 was to make agency rulemaking more coordinated, streamlined, and efficient. If appropriate consultation with the expert federal agency on workplace discrimination had occurred, HHS might have issued a very different rule than the one the public was able to comment on — or it might have chosen to issue no rule at all.

⁵ Committee Staff communication with CRS Staff (Oct. 22, 2008).

⁶ Office of Management and Budget, *Historical Reports: OIRA Conclusion of EO 12866 Regulatory Review, RIN 0991-AB48* (Aug. 21, 2008) (online at www.reginfo.gov/public/do/eoDetails?rrid=116176).

⁷ Committee Staff communication with CRS, *supra* note 5.

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If HHS did in fact consult with EEOC on the substance of this rule prior to its issuance, please provide documentation of that process. If not, please describe steps that HHS and OMB will take, prior to any further rulemaking action, to review and respond to EEOC's stated concerns. I request a response by October 31, 2008.

Sincerely,

A handwritten signature in black ink that reads "Henry A. Waxman". The signature is written in a cursive, flowing style.

Henry A. Waxman
Chairman

cc: Tom Davis
Ranking Minority Member