



**DATE:** November XX, 2021

**TO:** Xavier Becerra, Secretary

**Through:** Melanie Fontes Rainer, Counselor to the Secretary  
Karuna Seshasai, Executive Secretary

**FROM:** Lisa J. Pino, Director, Office for Civil Rights

**SUBJECT:** **DECISION** – Sign Delegation of Authority on the Religious Freedom Restoration Act and the Religion Clause of the First Amendment to the U.S. Constitution

### **ACTION REQUESTED**

The Office for Civil Rights (OCR), in consultation with the Office of the General Counsel (OGC) and Counselor to the Secretary, requests the Secretary's signature to rescind the Delegation of Authority for the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*) granted to OCR on December 7, 2017 and the Religion Clause of the First Amendment to the U.S. Constitution granted to OCR on January 15, 2021.

### **RECOMMENDATION**

OCR recommends that the Secretary sign the attached Federal Register Notice rescinding a prior delegation to OCR under the previous Administration for the Religious Freedom Restoration Act (RFRA) and the First Amendment to the U.S. Constitution.

### **EXECUTIVE SUMMARY**

On December 7, 2017, then Acting Secretary for the Department of Health and Human Services (HHS) Eric Hargan granted OCR authority to enforce a range of conscience and religious freedom statutes, including RFRA. Specifically, the delegation gives the OCR Director authority to:

- Accept and investigate complaints filed by individuals or entities alleging a failure by any departmental component to comply with RFRA;
- conduct RFRA compliance reviews of departmental programs or activities;
- provide technical assistance to departmental components regarding RFRA compliance;
- evaluate the effectiveness of RFRA complaint processing by OCR and provide reports to appropriate oversight organizations; and
- initiate such other actions as may be necessary to facilitate and ensure compliance with

## RFRA.

On January 15, 2021, then Secretary Alex Azar signed a delegation which granted additional authorities to OCR, including the Religion Clause of the First Amendment. Given the timing of this delegation, no action has been taken under this authority.

Under the 2017 delegation, the prior Administration adopted an expansive interpretation of RFRA and a mechanism for enforcing RFRA compliance within the Department that had significant policy and legal implications. The prior Administration's policy view of RFRA was that, even in the absence of a claim made clear to the Department or a legal action in federal court, RFRA authorized the Department proactively to require its agencies to take certain actions where such actions would, in its view, violate RFRA – even in the absence of any entity claiming RFRA rights and the need for an accommodation based on a substantial burden to its religious belief or exercise. Acting pursuant to this delegation, the OCR Director ordered other HHS agencies to take various actions that the OCR Director determined would otherwise violate RFRA, including issuing waivers from nondiscrimination requirements.

While some case law may support the prior Administration's view of RFRA, OGC advises that the best interpretation of RFRA is that it provides third parties the ability to make a claim, or present a defense, in response to a Government action. While nothing in RFRA legally restricts an agency to work proactively to address a complainant's (or "would be" complainant's) religious needs or rights, there is a serious concern that such an approach broadens the effect of RFRA in a way that may not be legally required and while causing significant detriment to civil rights and public health protections.

No agency within the Department had been delegated authority over RFRA prior to the 2017 delegation and OCR believes this delegation is best handled by each HHS funding component. RFRA by its own terms neither creates the right to administrative claims nor authorizes any federal agency to have affirmative enforcement authority. Returning the Department to its previous state with regard to processing RFRA objections or claims better aligns with this Administration's interpretation of the application of RFRA and its commitment to protecting and advancing public health and civil rights.

In lieu of OCR handling all RFRA matters for the Department, we recommend that this be a shared responsibility among all divisions, working in consultation with OGC. Each division will be responsible for addressing RFRA issues through its programmatic or policy work, consulting with OGC on what, if any, action should or must be taken to resolve the matter.

In order to effectuate this new policy, we recommend that you rescind the current delegation of RFRA and the First Amendment to OCR, so that all divisions will share responsibility for addressing these matters, working in close consultation with OGC.

### **Notable Timing Factors:**

The agency recommends that the Secretary sign this action as soon as possible.

## **Noteworthy Elements about Equity:**

As noted, the prior Administration took an expansive view of the use of RFRA that resulted in negative impacts for underserved communities. For example, the decision by the prior Administration to use RFRA to grant broad-based exemptions from nondiscrimination requirements to child welfare agencies challenges the ability of children and youth to obtain safe and loving foster and adoptive homes. It also clearly sent the signal to LGBTQ+ communities that the Department did not recognize their civil rights, including the right to marry. While the Department will need to continue to comply with RFRA, removing this delegation demonstrates our belief that RFRA is meant to be a shield to protect the freedom of religion, not a sword to impose religious beliefs on others without regard for third party harms, including civil rights.

## **DISCUSSION**

**Proposal:** Sign the Federal Register Notice rescinding the Delegations of Authority granted to OCR to process requests under RFRA and the First Amendment.

**Discussion:** Prior to the delegation in 2017, no division was singularly responsible for the Department's compliance with RFRA or the First Amendment. That model recognized that all components of HHS had a responsibility for compliance and that OGC was a central partner in providing key legal advice on RFRA and defending the Department when RFRA claims were raised. Rescinding the delegation to OCR does not lessen the commitment of the Department to compliance, but ensures that it is not misused by any one agency to enact a broad, proactive agenda.

### **Key Pros:**

- Re-establishes that RFRA is not an affirmative law enforcement tool, but instead is an important federal law with which all agencies of the federal government must comply.
- Re-distributes the Department's compliance with RFRA back to each division, who are best situated to make policy and programmatic decisions in accordance with the balancing test set out in RFRA; all HHS divisions will work closely with OGC regarding RFRA determinations.

### **Key Cons:**

- Will be criticized as an indication the Department does not take seriously its compliance with RFRA or the First Amendment.
- Will increase pressure from stakeholders to articulate the process through which the Department will handle requests for exemptions or other challenges to Departmental actions brought under RFRA.

## **ANTICIPATED REACTION**

Delegation of authority is a power reserved for the Secretary and so we do not anticipate any successful legal challenges to this action. The action will likely be well-received among civil rights advocates and litigators, as well as groups advocating for the separation of church and

state. Groups who share the prior Administration's broad view of the application of RFRA or who will interpret this action as an indication that the Department is abdicating its responsibility for compliance with RFRA will likely issue strong negative reactions. This includes members of Congress who have been outspoken about OCR's conscience and religious freedom activities and who have repeatedly asked questions about changes to OCR's organizational structure and legal authorities.

## **ROLLOUT**

The rescission of the delegation of authority will be published in the Federal Register. No formal rollout is planned for this action but we will need to provide confidential alerts to the White House and some members of Congress who work on civil rights and related issues.

/S/ Lisa J. Pino

---

## **DECISION**

Moving forward to sign the Federal Register Notice rescinding the Delegation of Authority granted to OCR to process requests under the Religious Freedom Restoration Act and the First Amendment.

Approved [  ]

Disapproved [  ]

Briefing Needed [  ]

Additional Comments:

---

/S/ Xavier Becerra

Date

Attachments:

- TAB A: Religious Freedom Restoration Act and the First Amendment of the U.S. Constitution
- TAB B: Delegation Memo to the Director, Office for Civil Rights
- TAB C: Federal Register Notice