ETHICS AND PUBLIC POLICY CENTER

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EO 12866 Meeting
“Removal of Outdated Regulations”
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Thank you for the opportunity[1] to provide comments on OIRA’s review of the Department of Health and Human Services (HHS) Indian Health Service (IHS) rule, “Removal of Outdated Regulations.”[2]

My name is Natalie Dodson, and I am a Policy Analyst and scholar on the HHS Accountability Project at the Ethics and Public Policy Center. These remarks are written in part by Eric Kniffin, a fellow with EPPC’s HHS Accountability Project and former attorney in the U.S. Department of Justice’s Civil Rights Division.

This rule relates to regulations that prevent Indian Health Service funds from paying for abortion except to save the life of the mother. In its proposed rule, IHS proposed to remove 42 CFR sections 136.51 through 136.57 because these regulations are allegedly outdated.[3] However, to justify the removal of all these regulations, IHS pointed to the variation between the text of 42 C.F.R. § 136.54 and the text of the Hyde Amendment. However, the Hyde Amendment does not mandate IHS to fund abortion, necessitating eliminating section § 136.54, much less the removal of all the regulations, making the IHS’s proposal arbitrary and capricious. IHS failed to adequately consider alternatives to its proposal, failed to demonstrate why it is necessary to remove all of the regulations if the goal is to align the regulatory text with the law, and failed to address federalism concerns associated with preempting state abortion laws. Lastly, IHS must consider the economic implications associated with removing these regulations.

Today, I will provide five points of particular interest for OIRA.

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, I are glad you are willing to hear an EPPC scholar’s input on this rule. *See* Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.
[2] 89 Fed. Reg. 896 (Jan. 8, 2024), *available at* https://www.govinfo.gov/content/pkg/FR-2024-01-08/pdf/2023-28948.pdf.
[3] *Id.* at 896.

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I. IHS failed to establish a need for the proposed rule.

For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need.[4] IHS failed to do so in its proposed rule.

According to IHS, the proposed rulemaking is justified under the APA because the current regulations are "outdated" in light of 25 U.S.C. § 1676. That statute was enacted in 1988 to "explicitly extend[] any limitations on the use of funds included in HHS appropriations laws with respect to the performance of abortions to apply to funds appropriated to IHS."[5] IHS also noted in the proposed rule that "the current IHS regulation does not align with the current text of the Hyde Amendment," citing the most recent version of the Hyde Amendment.[6] These are the arguments IHS has contended justify its proposal "to remove these outdated regulations in their entirety."[7]

25 U.S.C. § 1676 states that the limits that Congress places on HHS appropriations "with respect to the performance of abortion" apply with equal force to IHS appropriations. Specifically, any limitations on the use. As I explain later, the thin justification provided in the proposed rule is inadequate as a matter of law. IHS has not and cannot show that each of these regulations is "outdated." To support its proposed removal, IHS stated that "current IHS regulation does not align with the current text of the Hyde Amendment or with 25 U.S.C. 1676."[8] But only one provision funds for appropriations to the Department of Health and Human Services also applies to IHS, and "[a]ny limitation pursuant to other Federal laws on the use of Federal funds appropriated to the Service shall apply with respect to the performance or coverage of abortions."

These limitations include the Hyde Amendment, which is a longstanding appropriations provision that restricts federal funding from paying for abortion.[9] The Amendment covers all abortions except when the pregnancy was a result of rape or incest or where a mother "suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed."[10] In such cases, the federal government is permitted *but not mandated* to pay for those procedures.

Notably, the Supreme Court upheld the constitutionality of the Hyde Amendment in the 1980 case *Harris v. McRae*, even under the now-defunct *Roe* regime.[11] In his brief defending the Hyde Amendment before the Court, Representative Hyde explained that "the Hyde Amendment

[4] EO 12866, § 1(b) (establishing the principles of regulation, including that "[e]ach agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem").
[5] *Ibid*.
[6] *Ibid*.
[7] *Id*. at 897.
[8] *Id*.
[9] Hyde Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. H., Tit. V, §§ 506–07 (Dec. 29, 2022), 136 Stat. 4908. (Current text of the Amendment).
[10] *Id*.
[11] 448 U.S. 297 (1980).

withholds governmental support for abortion decisions."[12] Until recently, the Hyde Amendment had bipartisan support.

IHS claims that because Hyde *permits* federal funding of abortion in the cases of rape or incest, IHS regulations *must* fund abortions in such cases consistent with its obligations under 25 U.S.C. § 1676. But IHS fails to properly understand the requirements of § 1676. Section 1676 requires that any abortion limitations on federal funds likewise apply to IHS. What § 1676 does not say is that IHS cannot apply additional abortion limitations not required under federal law, such as the Hyde Amendment.

Despite IHS's claim, there is no confusion because current IHS regulations do not violate the Hyde Amendment. Hyde is only a floor, not a ceiling. Hyde does not *require* funding for abortion; it merely limits funding for most abortions. Current IHS regulations are consistent with the Hyde Amendment and comply with its limitations. As such, the current regulatory text is not outdated, undermining the purported need for this rulemaking.

II. IHS's proposal to remove all regulations is arbitrary and capricious.

In the proposed rule, IHS claims that because 42 C.F.R. § 136.54 does not permit abortion in cases of rape and incest as permitted under the Hyde Amendment, *all* of the regulations—including those for definitions, ectopic pregnancy, recordkeeping, and confidentiality—are outdated and must be removed in their entirety. This is arbitrary and capricious.

A. IHS has not taken into account that the targeted regulations were reissued in 1999, post-25 U.S.C. 1676.

As an initial matter, IHS's attempt to justify the proposed rulemaking fails to take into account that the regulations it proposed to replace were not merely published in January 1982, as noted in the proposed rule's background section. (89 Fed. Reg. at 897). IHS also republished each of the targeted regulations in 64 Fed. Reg. 58322 (Oct. 29, 1999). This is important for two reasons.

First, the fact that IHS republished these regulations after Congress passed 25 U.S.C. § 1676 into law means that IHS cannot now point to 25 U.S.C. § 1676 as a reason to rescind them. The proposed rule is thus unlawful under the Administrative Procedure Act because IHS has failed to provide any rationale as to why it has proposed to overturn its 1999 decision to republish these regulations post-25 U.S.C. § 1676.

Second, the only purpose that IHS gives for passing these regulations is quoted from the 1982 final rule. The stated purpose of these regulations in 64 Fed. Reg. 58319 is different. There, IHS says that the purpose of the regulations in this part is to "establish general principles and program requirements for carrying out the Indian health programs."[13]

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[12] Reply Brief of Intervening Defendants-Appellees James L. Buckley, Jess A. Helms, Henry J. Hyde, and Isabella Pernicone in Support of Appellant Harris, *Harris v. McRae*, 448 U.S. 297 (1980), *available at* https://aul.org/wpcontent/uploads/2019/03/1980-Harris-v.-McRae-Reply-Brief.pdf.

[13] 64 Fed. Reg. at 58319.

We call on IHS to augment its efforts to justify the proposed rulemaking in light of the fact that the current regulations, which were introduced in 1982, were republished in 1999. If IHS believes that this republication is of no legal significance under the Administrative Procedure Act, we call on IHS to explain why it believes this is the case.

B. By IHS's own admission, only one—not all—of the targeted regulations is out of line with the current Hyde Amendment.

IHS acknowledges that this argument applies to only one of the targeted regulations. It notes that the "current IHS regulation does not align with the current text of the Hyde Amendment."[14] But in the very next sentence IHS inexplicably switches from the singular to the plural, claiming that it is justified in "remov[ing] these outdated regulations in their entirety."[15] This is a non sequitur, rendering the proposed rule arbitrary and capricious. As the proposed rule recognizes, its Hyde Amendment argument applies at most to only one regulation, not each one that IHS proposes to modify. IHS must recognize this error and adjust any final rule accordingly.

C. Section 136.54 is worded differently than, but is not in conflict with, the current Hyde Amendment.

We also find that IHS has overstated the tension between the current Hyde Amendment and section 136.54.

While the current regulation does not permit funding for abortion in all of the cases permitted by Hyde, the Hyde Amendment does not mandate funding for abortion. This means that under Hyde, IHS is not restricted from funding abortion in those rare cases, but it is also not required to do so. As such, the current regulatory text in § 136.54 does not conflict with the Hyde Amendment because IHS is not required to fund abortion in cases of rape and incest. As such, the current regulatory text is not outdated, undermining the purported need for its removal, and it should be maintained in its current form.

Congress has allowed federal funds to be used for abortions only in limited cases. These limited cases are delineated by 25 U.S.C. § 1676, which includes "appropriations for the Department of Health and Human Services" and "any limitation pursuant to other Federal laws on the use of Federal funds appropriated to the Service."[16] The longstanding Hyde Amendment is included in this set of appropriation limitations.

III. The proposed rule raises federalism concerns.

IHS asserts, without any analysis or argument, that the proposed rule "would not impose such costs or have any federalism implications."[17] This is difficult to understand. While many IHS facilities are on tribal lands, it appears that many facilities are located on state land. In fact, the 2022 circular that IHS issued shortly after the Supreme Court's *Dobbs* decision anticipates

[14] 89 Fed. Reg. at 897.
[15] *Id*.
[16] *Id*.
[17] *Id.* at 898.

that IHS facilities would be performing abortions that are illegal in the states where these facilities are located.

Those conflicts would seem to multiply under this proposed rule. Of the 22 states that have laws limiting abortions, 10 of them also advance the states' interests in protecting unborn children conceived through rape or incest.[18] More broadly, nearly every state has passed health and safety abortion regulations, including on informed consent, parental notification, reflection periods, ultrasounds, in-person evaluations, and abortion provider's medical training, qualifications, and certification. A recent final rule by the Department of Veterans Affairs on reproductive health services indicated that such state health and safety abortion regulations would be preempted by VA regulations providing abortion benefits for veterans and certain beneficiaries.[19]

In light of the above, we remind IHS of its obligation to perform a federalism analysis as required under Executive Order 13132. That executive order defines "[p]olicies that have federalism implications'" to include "actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The same order also states that the "national government should be deferential to the States when taking action that affects the policymaking discretion of the States."

In this case, as *Dobbs* makes clear, "the States may regulate abortion for legitimate reasons."[20] These "legitimate state interests" include "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[21]

It is arbitrary and capricious for IHS to claim that its proposal does not have federalism implications while claiming to preempt state abortion laws. We ask IHS to clarify whether it believes its regulations can preempt state law and, if so, address the federalism implications of its rule. This federalism analysis must be performed in a manner consistent with Executive Order 13132, which requires "strict adherence to constitutional principles. Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action." Additionally, "Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute."

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[18] *See* Mary E. Harned & Ingrid Skop, Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All State, Charlotte Lozier Inst. (July 26 2022), https://lozierinstitute.org/pro-life-laws-protect-momand-baby-pregnant-womens-lives-are-protected-in-all-states/.

[19] 89 Fed. Reg. 15,451, 15,462 (Mar. 4, 2024), https://www.federalregister.gov/documents/2024/03/04/2024-04275/reproductive-health-services.

[20] *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215, 300 (2022). !

[21] *Id*. at 301.

IHS must justify its attempt to authorize abortions that violate state laws under these and each of the other criteria set out in Executive Order 13132. A final rule that fails to perform a federalism analysis that satisfies this executive order would be contrary to law and arbitrary and capricious.

IV. The proposed rule violates IHS's obligation to conserve health.

IHS's program authority originates in part from the Snyder Act, 25 U.S.C. § 13, which allows the agency to provide and fund health services. This statutory language stipulates that funds may be used "for the benefit, care, and assistance of the Indians throughout the United States for the following purposes," which include the "conservation of health."[22] But killing innocent children conceived in an act of rape or incest does not support "conservation of health."[23]

V. IHS should consider alternatives to the rule.

Rather than updating 42 C.F.R. § 136.54 to reflect the current text of the Hyde Amendment, IHS proposes to eliminate all the regulations in the section because they are allegedly not necessary to implement IHS authority or to comply with statutory requirements. IHS claims that it cannot update the regulatory text to mirror the Hyde Amendment in case the Hyde Amendment's text changes again. But as we explained above, the Hyde Amendment is permissive, not mandatory, and does not require IHS to update its regulations.

In our comment on the proposed rule, we suggested the following alternatives:

- Not eliminating any of the regulations.
- Eliminating only 42 C.F.R. § 136.54, not all of the regulations.
- Updating the text of 42 C.F.R. § 136.54 to reflect the current exceptions in the Hyde Amendment.
- Incorporating a reference to the Hyde Amendment in 42 C.F.R. § 136.54.
- Updating the text of 42 C.F.R. § 136.54 to include a qualifier that if the limitations in the Hyde Amendment change, the regulations will as well.

Conclusion

We urge OIRA to ensure that the statutory and regulatory process is upheld and that IHS's rule has sufficient legal and economic analysis that reflects its obligations under the Constitution, the Administrative Procedure Act, and all other relevant legal authorities.

[22] 25 U.S.C § 13.
[23] *Id.*