

March 27, 2026

Harold Henderson, Paperwork Reduction Act Official
Office of the Secretary/Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Re: Assurance of Compliance, Form HHS-690,
OMB Control No. 0945-0008
Published for 60-day public comment at 91 Fed. Reg. 3205 (Jan. 26, 2026)

Via *OCRassuranceofcomplianceform@hhs.gov*

Dear Mr. Henderson:

Democracy requires that government place obligations on its citizens only based on law, and not the caprice of unelected executive branch officials. The proposed additions of Paragraphs 6 and 7 to the Department of Health and Human Services' Assurance of Compliance Form 690 are not authorized by law. These paragraphs demanding assurances regarding the Conscience Protection Statutes and the Religious Nondiscrimination Authorities may not be included in the form because there is no statutory authority for the Department to require such a far-reaching assurance. It is pure executive branch overreach.

Further, the proposed Information Collection Request leaves many unanswered questions about who must submit this form and how often – elements that are critical for the public to provide meaningful feedback on the assurance form's utility and the Department's burden estimates. Frustrating meaningful public participation by failing to provide such basic information undermines the democracy-enhancing functions the Paperwork Reduction Act was intended to advance. In any event, it is clear that the Department has significantly understated the burden an Assurance of Compliance with the Conscience Protection Statutes and the Religious Nondiscrimination Authorities would pose on applicants for and recipients of federal financial assistance from the Department. Properly measured, the burden exceeds any putative benefit, which is nowhere identified.

1. HHS Lacks Legal Authority to Require an Assurance for Statutes related to Conscience Protection and Religious Nondiscrimination

The Department points to no regulation or statute that authorizes the Department to require applicants or recipients to assure that they will comply with all the Conscience Protection Statutes or Religious Nondiscrimination Authorities identified. And there is none.

This notably contrasts with the first five paragraphs of the proposed Assurance of Compliance regarding Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act, and Section 1557 of the Affordable Care Act. Those assurances are specifically required by Departmental regulations for each particular nondiscrimination statute.¹ Each of those regulations, in turn, is founded on a federal nondiscrimination law authorizing substantive rules.² Thus, the proposed 2026 supporting statement is correct in asserting that, for those statutes, “[s]uch an assurance is required by the federal civil rights laws enforced by the Office for Civil Rights.”³

There is no similar regulation or statute that would support an assurance requirement for all the Conscience Protection Statutes or Religious Nondiscrimination Authorities identified. The Department tried to adopt a regulatory assurance requirement in 2019 for the Conscience Protection Statutes.⁴ That regulation was vacated by several courts as exceeding the Department’s authority and as arbitrary and capricious. *See Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019), *government appeal voluntarily dismissed*, No. 20-35044 (9th Cir.); *San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), *government appeal voluntarily dismissed*, Nos. 20-15398 et al. (9th Cir.); *New York v. HHS*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019), *government appeal voluntarily dismissed*, Nos. 19-4254 et al. (2d Cir.). The federal court in the *New York* case specifically held that the 2019 regulation’s attempt to add an assurance requirement “impose[d] new obligations and duties on employers and providers” that were “substantive in nature,” 414 F. Supp. 3d at 526, and that the regulation was not backed by any statute authorizing substantive rulemaking, *id.* at 527.

That court was clearly correct. According to the proposed Assurance of Compliance itself, the inclusion of Conscience Protection Statutes and Religious Nondiscrimination Authorities provisions creates a new remedy, allowing judicial enforcement of those provisions by the Department: “The Applicant further recognizes and agrees that the United States shall have the right to seek judicial enforcement of this assurance.”⁵ This type of substantive effect, authorizing

¹ See 45 C.F.R. §§ 80.4 (requiring recipients to assure compliance with HHS Title VI regulations), 86.4 (requiring recipients to assure compliance with HHS Title IX regulations), 84.5 (requiring recipients to assure compliance with HHS Section 504 regulations), 91.33 (requiring recipients to assure compliance with the Age Discrimination Act and HHS implementing regulations), 92.5 (requiring recipients and entities created under Title I of the Affordable Care Act to assure compliance with Section 1557 and the HHS implementing regulation)..

² 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 29 U.S.C. §§ 794 & 794a (Section 504); 42 U.S.C. § 6103 (Age Discrimination Act); 42 U.S.C. § 18116(c) (Section 1557).

³ Proposed 2026 Supporting Statement A at 1 (under Heading “Need and Legal Basis”).

⁴ See 84 Fed. Reg. 23,170 (May 21, 2019).

⁵ Proposed 2026 Assurance of Compliance at 2; *see also* Brief for Federal Appellants, *City and County of San Francisco v. Azar*, Nos. 20-15398 et seq., 2020 WL 3455309, at *24 (9th Cir. June 15, 2020) (federal defendants noting in litigation about the 2019 Conscience Protection Statutes regulation that United States’ right to sue is based on the contractual assurances).

an additional way of enforcing a statute's provisions, must be based on a statute granting substantive regulatory authority.⁶ And there is none.

In response to these vacatur, OMB approved this Department's Assurance of Compliance in 2019 only "in connection with various other longstanding authorities that are unaffected by the litigation involving the [Conscience Protection Statutes] final rule, including 45 CFR 80.4, 84.5, 86.4, 91.33, and 92.5."⁷ That is, OMB approved the form to the extent it required, as authorized by regulations, a judicially-enforceable promise to comply with Title VI, Title IX, Section 504, the Age Discrimination Act, and Section 1557.

But OMB did not approve, and could not have approved, an assurance regarding the Conscience Protection Statutes because there was not a valid underlying regulatory requirement that a recipient provide an assurance of compliance for all those Conscience Protection Statutes. And in 2024, the Department removed any pretense of authority by rescinding the already-vacated 2019 regulation's assurance requirement for the Conscience Protection Statutes.⁸

There is no statute that authorizes the Department to require an assurance of compliance with all the Conscience Protection Statutes or the Religious Nondiscrimination Authorities identified. To impose a substantive requirement in the absence of statutory authority is a fundamental violation of the rule of law, and the democratic values that underlie it. The Department cannot simply append to an assurance for 5 statutes that it indisputably does have the power to require applicants and recipients to sign (i.e., Title VI, Title IX, Section 504, the Age Discrimination Act, and Section 1557) an additional 37 statutes by executive caprice.

For these reasons, proposed Paragraphs 6 and 7 of the Assurance of Compliance are ultra vires and must be removed.

2. The Proposed HHS Assurance Lacks Requisite Certainty

Even if the Department had authority to require an assurance of compliance with each of the specific statutes identified in Paragraphs 6 and 7 in the absence of a valid regulation, which it does not, the description of statutes in proposed Paragraphs 6 and 7 is too indefinite to permit a recipient to understand what it is agreeing to. Such vagueness raises democratic legitimacy problems because it vests unbridled discretion in unelected officials.⁹

⁶ See 5 U.S.C. § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."); see also, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

⁷ Notice of Office of Management and Budget Action, ICR Reference No. 201906-0945-003 (Dec. 2, 2019), [https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-0945-003#:~:text=Retrieve%20Notice%20of%20Action%20\(NO\).](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-0945-003#:~:text=Retrieve%20Notice%20of%20Action%20(NO).)

⁸ See 89 Fed. Reg. 2078 (Jan. 11, 2024).

⁹ See *Sessions v. Dimaya*, 584 U.S. 148, 182-183 (2018) (Gorsuch, J., concurring in judgment).

Proposed Paragraph 6 defines “Conscience Protection Statutes” as “including” certain statutes “among others.” And proposed Paragraph 7 defines “Religious Nondiscrimination Authorities” as “including” certain “funds” and certain statutes “among others.” These open-ended phrases, absent from any earlier version of the assurance, have no limiting principle and potentially sweep in any provision the Department chooses to enforce, without identifying them for the signatory. As proposed, a signatory would be asked to certify compliance with an undefined set of authorities. That is not permissible under the Constitution or under basic contract law.¹⁰

3. The Supporting Statement Contains Unsupported and Inaccurate Burden Estimates

This collection is much more burdensome than the Department claims, but it’s impossible to know how much so because the Department has not consistently described when and how often applicants and recipients must sign this Assurance of Compliance form. It is clear, though, that the Department relies on grossly deflated time estimates and wage rates. For these reasons as well, proposed Paragraphs 6 and 7 of the Assurance of Compliance should not be adopted.

a. Significant uncertainty as to who has to sign the form and how often

The Department must provide a clear statement of who is required to submit this Assurance and how often (*e.g.*, with every application or reapplication, annually, only once). Absent this clarity, the public cannot provide meaningful comments on whether the proposed assurance “is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility” or address the “accuracy of the agency’s estimate of the burden of the proposed collection of information.”¹¹ This deprives the public of the meaningful opportunity to comment that the Paperwork Reduction Act requires the Department to provide.

The Department must also provide clarity as to whether the addition of a new Paragraph 7 regarding the Religious Nondiscrimination Authorities means that every applicant and recipient must file a new assurance, or whether a previously-signed Assurance, without Paragraph 7, is sufficient. Resolution of that issue is also critical to assessing initial burden.

Previous statements by the Department have been inconsistent about the required frequency of this collection. In the preamble to the vacated-and-then-rescinded 2019 final rule, the Department estimated almost 160,000 respondents would file annual assurances regarding the Conscience Protection Statutes (a low-ball estimate based on certain exemptions the Department adopted in the vacated-and-later-rescinded 2019 regulation).¹² The Department’s estimate associated with the Assurance’s 2019 information collection request, which did not rely on the

¹⁰ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (a recipient cannot accept a condition tied to receipt of federal funds if the recipient “is unable to ascertain what is expected of it”); *Restatement (Second) of Contracts* § 33 (there is no contract if terms of contract are not “reasonably certain”).

¹¹ 44 U.S.C. § 3506(c)(2)(A).

¹² 84 Fed. Reg. at 23,259-260; see also *id.* at 23,236 (tbl. 3).

exemptions in the vacated-and-later-rescinded 2019 regulation, more than tripled the estimate to over 500,000 respondents annually.¹³

In 2023, however, the Department reduced its estimate from more than half a million respondents to fewer than ten thousand (9,595),¹⁴ and its proposed 2026 supporting statement continues the downward trend (8,486).¹⁵ The only explanation provided is that the Department received “a lower number of submissions through the OCR website and mail than previously anticipated.”¹⁶ But if more recipients are required to respond than are actually responding, the Department must account for resources needed by the Department to obtain responses from more of those recipients,¹⁷ as well as the burden on those recipients. The Department cannot reduce a burden estimate based on a third-party failure to comply with a paperwork requirement.

b. Significantly underestimates burden hours

The Department’s proposed 2026 estimate of how much burden a respondent would experience in completing the Assurance of Compliance is significantly understated.

i. More statutes specifically identified in 2026: The proposed 2026 supporting statement treats the addition of Paragraph 7’s statutes as having no burden impact whatsoever. That cannot be right.

In 2019, the Department estimated that the per-respondent burden for the conscience-specific assurance would be 4 hours, which was calculated as 10 minutes per statutory provision (25 provisions x 10 minutes).¹⁸

When the Department sought approval of the 2019 Information Collection Request (ICR), which added Title VI, Title IX, Section 504, the Age Discrimination Act, and Section 1557 assurances to the assurances for the 25 conscience statutes, the Department continued to rely on an estimate of 10-minutes per statutory provision, resulting in an estimated per-respondent burden of 5 hours (30 provisions x 10 minutes).¹⁹

¹³ Supporting Statement A, ICR Reference No. 201906-0945-003, at 14-15 (Nov. 2019), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201906-0945-003#:~:text=Revised%20clean%200945%2D0008%20Supporting%20Statement%20AoC%20Nov222019%20%2D%2011%2D26%20rev.docx.

¹⁴ 88 Fed. Reg. 2362, 2363 (Jan. 13, 2023). For some reason, the summary burden chart on reginfo.gov identified 360,231 responses. https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202302-0945-001.

¹⁵ Proposed 2026 Supporting Statement A at 6 (under Heading “Estimated Annualized Burden Hours”).

¹⁶ Proposed 2026 Supporting Statement A at 6 (under Heading “Estimated Annualized Burden Hours”).

¹⁷ Cf. 44 U.S.C. § 3506(c)(3)(H) (Department must show that it “has planned and allocated resources for the efficient and effective management and use of the information to be collected”).

¹⁸ See 84 Fed. Reg. at 23,240-241.

¹⁹ 2019 Supporting Statement A at 15.

The 2023 ICR reduced the burden from 5 hours to 4 hours without explanation for the change.²⁰

The proposed 2026 ICR continues to maintain an estimate of 4 hours.²¹

Under the methodology adopted in 2019, however, the total burden hours would be 7 hours (42 provisions x 10 minutes). This is because the proposed revisions would add to the 30 previously identified statutes an additional 12 new identifiable statutory authorities in the Religious Nondiscrimination Authorities.

ii. Unidentified statutes included in 2026: Simply relying on the 2019 methodology, however, would understate the burden of the proposed assurance form. Both Paragraph 6 and Paragraph 7 in the proposed 2026 Assurance now use “among others” as a catch-all, making the true number of statutes a recipient is assuring compliance with indeterminate. A signatory would be certifying compliance with an undefined set of authorities. Any competent lawyer advising on whether to sign would need to identify the full scope of “others” – which requires independent legal research beyond the face of the form. That research burden is entirely unaccounted for in the proposed supporting statement.

iii. More legal obligations in 2026: The proposed 2026 Assurance introduces a False Claims Act acknowledgment. Signing a form that now explicitly warns of treble-damages liability under 31 U.S.C. § 3729 can only be expected to be viewed as qualitatively different from signing one without that warning. A lawyer reviewing the form may feel the need to spend additional time assessing whether the applicant is in compliance with these unlisted provisions that could potentially fall within the assurance’s scope, because the stakes of signing have seemed to increase. The proposed supporting statement doesn’t account for this additional burden at all.

²⁰ Supporting Statement A, ICR Reference No. 202302-0945-001, at 6 (Feb. 2023)

https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202302-0945-001#:~:text=0945%2D0008%20Supporting%20document%20for%20690%20complaint%20form_proofed%2002%2D28%2D23%20rev.docx.

²¹ Proposed 2026 Supporting Statement A at 6 (under Heading “Estimated Annualized Burden Costs”).

c. Significantly understates the wage rate

The proposed 2026 supporting statement adopts a wage rate that expressly excludes “benefits and overhead.”²² That is error. OMB has been clear that, in estimating burden under the Paperwork Reduction Act, “[a]ll wages need to be fully-loaded, meaning they reflect the full cost of labor, including benefits.”²³ This means the wage rate should be doubled, in the absence of other evidence.²⁴

In sum, this proposed information collection request is significantly more burdensome than estimated and, with regard to the “Conscience Protection Statutes” or “Religious Nondiscrimination Authorities,” is unauthorized by any law or regulation. Paragraphs 6 and 7 of the proposed Assurance, which add those statutes and authorities to the Assurance, must be removed.

Sincerely:

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²² Proposed 2026 Supporting Statement A at 6 (under Heading “Estimated Annualized Burden Costs”).

²³ OMB, *A Guide to the Paperwork Reduction Act: How to estimate burden*, <https://pra.digital.gov/burden/estimation/>; see also OMB, *Estimating Paperwork Burden*, 64 Fed. Reg. 55,788, 55,790 (Oct. 14, 1999) (“In estimating the appropriate wage rate, it is critical that the wage be properly ‘loaded’ to include overhead and fringe benefit costs associated with the employee’s time. For example, although a technical employee’s wage may be \$20 per hour, she may also receive benefits from her firm such as health and life insurance, paid vacation, and contributions to a retirement plan. To support her work activities, her employer must also purchase office supplies and services, including office space, furniture, heat and air conditioning, electricity, a telephone and telephone service, a personal computer, printer and photocopier access, and various office supplies. These costs need to be accounted for when assessing the overall impact of the Federal information collection on the resources of the respondent.”).

²⁴ HHS, Office of Science and Data Policy, *HHS Standard Values for Regulatory Analysis*, 2024, at 5 (Jan. 25, 2024) (“As a default assumption when industry- or program-specific data are not readily available, analysts may assume that the sum of these additional costs are equal to pre-tax wages, and calculate a fully loaded wage rate by multiplying pre-tax wages by 2.”), https://www.ncbi.nlm.nih.gov/books/NBK611043/pdf/Bookshelf_NBK611043.pdf.

²⁵ Institutional affiliations are given for purposes of identification only. This comment does not reflect the views of the Board of Regents, the University, or any unit within the University.