EXHIBIT E

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
EDMUND G. BROWN JR.
ATTORNEY GENERAL

September 25, 2008

Office of Public Health and Science
Department of Health and Human Services
Attention: Brenda Destro
Hubert H. Humphrey Building,
Room 728E
200 Independence Avenue, SW
Washington, D.C. 20201

RE: Provider Conscience Regulation

COMMENTS OF EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

As Attorney General of the State of California, I submit the following comments on the regulation proposed by the Department of Health and Human Services (HHS) to implement the Church Amendments (42 U.S.C., § 300a-7), Public Health Service Act sec. 245 (42 U.S.C., § 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209). Efforts to implement these statutes are of critical interest to the states, including California, which could lose billions of dollars in federal funding if at some future time HHS determines that they have failed to comply with any of these statutes. The proposed regulation, apparently, is intended to ensure that those with religious, moral or ethical objections to participating in the delivery of abortion or contraceptive services are not compelled, contrary to conscience, to participate in the provision of such services. While I do not quarrel with this goal, I believe that the regulation, as proposed, is seriously flawed. I would, therefore, strongly recommend that this regulation not be adopted unless and until it is revised to clarify that a woman's access to necessary health care and information about health care choices is preserved and that a state's ability to protect such access is not impaired.

The proposed regulation leaves many critical questions unanswered and, by doing so, invites the misapplication of the laws to be implemented by the regulation. This ambiguity is compounded by the fact that Section 88.1 of the regulation — the "Purpose" section— states that

the provisions of the Church Amendments, sections 245 of the Public Health Service Act and the Weldon Amendment, along with this implementing regulation, are to be "interpreted and implemented broadly to effectuate their protective purpose." Thus, for example, the regulation defines "assist in the performance" as including "counseling, referral, training, and other arrangements for the procedure, health service, or research activity." The introductory language goes on to state that this definition would encompass "an employee whose task it is to clean the instruments used in a particular procedure." Because HHS intends to apply the regulation very broadly, it is imperative that any regulation adopted adequately address the important issues.

The current version of the proposed regulation responds to the widespread criticism of the overbroad definition of "abortion" contained in an earlier draft by simply deleting the definition of the term. This, however, does not ensure that the term will not be improperly extended beyond the scope of the authorizing statutes and does not afford any meaningful protection for a woman's access to other health care services, including those involving contraception and fertility treatments.

Likewise, the regulation fails to provide guidance on the application of the regulation to situations requiring emergency medical care. This silence on such a critical issue is a significant deficiency in the proposed regulation. The regulation should, at a minimum, clarify that nothing in the federal statutes at issue allows a health care provider or entity to deny emergency services to any woman needing them on the basis of a religious, moral or ethical objection. Similarly, the regulation should accord due respect to the right of states to protect the well-being of the people within its borders by making it clear that a state is not prohibited from taking appropriate action against any health care provider or entity that does deny emergency care for such reasons.

The regulation, as proposed, also leaves open the possibility that medical personnel may refuse to discuss or refer for abortion or contraception information and thereby undermine a patient's informed consent. Again, a health care entity or provider is not entitled, by virtue of his or her religious, moral or ethical beliefs, to deny a patient relevant information necessary to informed decision-making. Any regulation adopted should clearly reflect this.

Finally, the proposed regulation also creates ambiguity regarding an employer's ability to reasonably accommodate a person's religious objections by assigning him or her to duties that would avoid a potential conflict with conscience. California's "conscience" law does not prohibit a medical facility that permits the performance of abortions from "inquiring whether an employee or prospective employee would advance a moral, ethical, or religious basis for refusal to participate in an abortion before hiring or assigning that person to that part of a . . . facility . . . where abortion patients are cared for." (Health & Saf. Code, §123420, subd. (a).) The proposed regulation should likewise clarify that accommodating a person's religious or moral objections by

moving her or him to a job where the offending procedures are not likely to arise does not violate the relevant federal statutes.

I have identified some, but by no means all, of the deficiencies in the proposed regulation. Based on these and other flaws in this proposal, I urge the Secretary of HHS to withdraw the subject regulation.

Sincerely,

Edmund G. Brown Jr.

EDMUND G. BROWN JR.
Attorney General