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PUBLIC COMMENT

To: The Department of Health and Human Services
From: Mark Trammell, Director of Public Policy, Liberty Counsel Action
Date: April 5, 2013
Re: HHS Proposed Rule, CMS-9968-P

Introduction

On August 1, 2011, the Health Resources and Services Administration (HRSA) issued guidelines, in accordance with the Patient Protection and Affordable Care Act, mandating that all health plans cover FDA-approved contraception and sterilization procedures without cost sharing. Contemporaneous with these guidelines, the Departments of Health and Human Services, Treasury and Labor ("Departments") amended 2010 interim final rules to provide "HRSA with the authority to exempt group health plans established or maintained by religious employers from the requirement to cover contraceptive services pursuant to the HRSA Guidelines."[1]

On February 6, 2013, the Departments released CMS-9968-P, a proposed accommodation to the Departments' 2011 amended interim rule. The current amendment is "designed to enhance coverage of important preventive services for women without cost sharing while accommodating the religious objections to contraceptive coverage of eligible organizations."[2] Unfortunately, the proposed accommodation fails to accomplish its purpose, and contravenes religious freedom.

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 ("RFRA"), protects citizens' religious freedom from improper governmental intrusion. RFRA provides that a governmental enactment that substantially burdens the free exercise of religious is impermissible unless the government can show that (1) it is in the furtherance of a compelling government interest, and (2) it is the least restrictive means of achieving that compelling government interest. The proposed accommodation released on February 6, 2013 does not satisfy the strict scrutiny test under RFRA and, therefore, is impermissible.

I. The HHS Proposed Accommodation, CMS-9968-P, Substantially Burdens the Free Exercise of Religion of Most Religious Organizations

[1] "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8458 (Proposed February 6, 2013).
[2] "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8460 (Proposed February 6, 2013).

As Americans, the freedom of religion is one of our most precious liberties. Our forefathers believed it so precious that they gave their lives on the battlefield so that we could enjoy it today. Unfortunately, that freedom is under attack. Even after the Departments' proposed accommodation, the Affordable Care Act tramples the conscience rights of most religious organizations.

The sanctity of life is a central component of the Christian faith. It refers to Christians' fundamental understanding of creation and their duties owed to the Creator God. Forcing Christians, whether on an individual or organizational level, to fund and/or participate in a coordinated effort to provide employees or students with contraceptives, sterilization procedures, and abortifacients is a substantial burden on the free exercise of religion.

Prior to the current proposed accommodation, the Departments provided a four-part test to determine whether an organization, qualified as a "religious employer," entitled to an exemption from the contraceptive mandate:

> A religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) and (iii) of the Code.[3]

The proposed accommodation eliminates the first three requirements, leaving an exemption available only for nonprofit organizations described in 26 U.S.C.§6033,(churches, their auxiliaries and conventions). The Departments explained that the change leaves no question "as to whether group health plans of houses of worship that provide educational, charitable, or social services to their communities qualify for the exemption."[4] However, the clarification did nothing to address the religious liberty interests of faith-based organizations which are not houses of worship and which face the same choice of conscience or penalty faced by "houses of worship."

A. Religious Institutions of Higher Education are substantially burdened.

The February 6, 2013 proposal establishes a new classification, "eligible organization," that is not exempt from the contraceptive mandate, but might be able to qualify for an "accommodation."[5] To qualify as an "eligible organization," an organization must meet four specified criteria:

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[3] "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8458 (Proposed February 6, 2013).

[4] "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8461 (Proposed February 6, 2013).

[5] "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8460 (Proposed February 6, 2013

(1) The organization opposes providing coverage for some or all of the contraceptive services required to be covered under section 2713 of the PHS Act on account of religious objection;
(2) The organization is organized and operates as a nonprofit entity;
(3) The organization holds itself out as a religious organization; and
(4) The organization self-certifies that it satisfies the first three criteria.[6]

If an organization satisfies these criteria, then it is eligible for the "accommodation," which provides that a third party will arrange for separate individual health insurance policies for contraceptive coverage from an issuer providing such policies."[7]

The proposal alludes to various scenarios for how this third party arrangement will be funded, but none of these scenarios provides actual protection from funding or participating in the funding of abortifacient drugs and devices. The regulations require that the "contraceptives" be provided without cost to the employees. The contraceptives, however, are not free and must be paid for by someone. If a "third party insurer" buys the contraceptives that are then given to employees, then who will pay the third party insurer? If the "eligible organization" is self-insured, as is Liberty University and hundreds of other similar institution, then the institution will have to pay the third party either directly or indirectly by paying its administrator which in turn pays the third party. The organization is still participating in providing for these drugs and devices in violation of its religious beliefs. Even if an organization is not self-insured, it pays a health insurance provider, which in turn pays the third party provider for the contraceptives. Either way, the organization's religious beliefs are not being accommodated and they continue to face the impermissible choice of obeying the law or obeying God.

Furthermore, the premise by which the Departments justifies forcing religious institutions of higher education, like Liberty University, to provide contraceptive services to students is incorrect. The Departments stated, "Student enrollees and their covered dependents…may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers to share such religious objections of the eligible organizations." As a graduate of Liberty University School of Law, I can attest that students are not attracted to Liberty University in spite of its sincerely held religious beliefs, but *because* of its sincerely held religious beliefs. As a result, there is no distinction to be made between the sincerity of a seminary professor's religious beliefs, and that of a student; both beliefs are sincerely held and both are substantially burdened by requiring the university to comply with the contraceptive mandate.

B. For-profit organizations, with deeply held religious beliefs, are substantially burdened.

[6] "The self-certification would also specify the contraceptive services for which the organization will not establish, maintain, administer, or fund coverage." "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8462 (Proposed February 6, 2013

[7] "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8463 (Proposed February 6, 2013

The February 6, 2013 proposal expressly denies either an exemption or accommodation to for-profit faith-based organizations.[8] This establishes a hierarchy of religious belief that itself violates religious liberty under both RFRA and the First Amendment. The Departments have determined that only "houses of worship" are "religious enough" to be exempt from the contraceptive mandate. Non-profit faith-based organizations are sufficiently religious to warrant a purported "accommodation" for their beliefs. For-profit faith-based organizations are deemed not "religious enough" to qualify for even an accommodation of their beliefs. This creates an artificial limitation on religious rights that ignores the substantial burden placed on a significant number of Christian individuals and organizations.

For example, a publisher of religious text or study materials can be organized for-profit, but still have a closely held religious belief that does not allow for contraceptives, abortifacients, and sterilization procedures. Similarly, a for-profit Catholic-owned business would also have closely held religious convictions against contraceptives, abortifacients, and sterilization procedures.

The tax status of an organization has no bearing on the sincerity of one's religious beliefs. Furthermore, the notion that the February 6, 2013 proposal protects the religious freedom of Christians is faulty. The proposal is based on the faulty premise that "religion" is limited to a "houses of worship." This could not be further from the truth. The Church is the body of Christian believers, not simply organizations or institutions that can be defined by a tax designation. People of faith who object to the provision of abortion-inducing drugs, like Plan B and Ella, which are both certified by the FDA as contraceptives, can be found throughout the economy, not merely in the nonprofit realm or in "houses of worship. "

In order to comply with RFRA, the Departments must extend the Religious Employer Exemption to all organizations that have a sincerely held religious belief against paying for or participating in the payment for "contraceptive services" that include abortifacient drugs and devices. If the Departments fail to extend the exemption, then faith-based employers and individuals will be compelled to choose between a duty to government and a duty to God. Such choices are precisely what the Founding Fathers fought to prevent by enacting the First Amendment and what Congress declared impermissible by enacting RFRA.

II. The HHS Proposed Accommodation, CMS-9968-P, is Not the Least Restrictive Means of Achieving a Compelling Government Interest.

A. *Providing Free "Contraceptive Services" Does Not Serve a Compelling Government Interest.*

The Departments argue that the contraceptive mandate is necessary to serve its compelling government interest in preserving women's health. The Supreme Court has found that even when the government's interests are health interests, its interests do no indubitably satisfy the

[8] "Accordingly, the Departments believe it would be appropriate to define eligible organizations to include nonprofit religious organization, but not to include for-profit secular organizations." "Coverage of Certain Preventive Services Under the Affordable Care Act" 78 Fed. Reg. 8456, 8462 (Proposed February 6, 2013).

requirement that the government's interests be compelling.[9] In this instance, the purported interest in protecting women's health is not compelling in that it is not supported by increasing scientific evidence showing that contraceptives are detrimental to, not protective of, women's health.[10] Consequently, the government has a greater interest in protecting religious freedom than providing women with free contraceptive services.

Therefore, the Departments have no interest, much less a compelling interest, in mandating contraceptive coverage, and consequently no interest in limiting religious exemptions to houses of worship. The Departments have endorsed disparate treatment between similarly situated organizations that have similar policies regarding their employees, but who serve different demographics of a community. By not allowing all organizations with sincerely held religious beliefs to seek exemption, the Departments are creating a religious caste system where organizations are identified by characteristics and then granted a varying level of religious freedom based on aforementioned characteristics. The beauty and brilliance of our Bill of Rights is that it protects the rights of all Americans, not just the rights of a select few. The proposed accommodation, unlike the Bill of Rights, only protects a select few.

B. *The Proposed Accommodation Fails the Least Restrictive Means Requirement.*

When examining whether a proposal is the "least restrictive means," the Court looks beyond broadly formulated interests justifying the general applicability of government mandates and scrutinizes the asserted harm of granting specific exemptions to particular religious claimants.[11] The government needs to show how its "admittedly strong" or "paramount" interest "would be adversely affected by granting an exemption..."[12] Thus, even if the government can prove a compelling interest, which it cannot, it would have to establish that that interest cannot be adequately served by granting all faith-based organizations exemptions from the contraceptive mandate.

Here, the proposed accommodation fails the least restrictive means requirement because the Departments cannot establish that exempting only churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order and not other faith-based organizations somehow is more protective of its purported interest. If the Departments were to broaden the scope of the religious exemption, then an accommodation could satisfy the government's purported interest in public health without trampling on the religious freedom of most religious organizations. When deciding which organizations qualify for this religious exemption, the only question should be whether the employer has any closely held religious beliefs that are opposed to contraceptive services, not whether the organization is a "house of worship," nonprofit or for-profit.

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[9] Gonzales v. O Centro Espirita, 546 U.S. 418, 436-37 (2006).
[10] National Cancer Institute: *Oral Contraceptives and Cancer Risk*, (March 21, 2012); Centers for Disease Control, *Cancer Statistics by Cancer Type*, http://www.cdc.gov/cancer/dcpc/data/types. htm
[11] Gonzales v. O Centro Espirita, 546 U.S. 418, 436-37 (2006).
[12] Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

Conclusion

The federal government is sending the message to American people that it does not value religious liberty, by forcing faith-based institutions to provide services they regard as inherently immoral. An individual's conscience rights are of paramount interest to the vitality of our nation and must be protected. The Departments proposed accommodation, mandating coverage of FDA-approved contraceptives and sterilization in all health plans that do not meet a narrow exemption and are not grandfathered violates the Religious Freedom Restoration Act. The proposed accommodation does nothing to protect the religious freedom of most religious organizations and shows that the Departments have a fundamental misunderstanding of faith-based institutions.