ADVANCING FAITH, FAMILY AND FREEDOM

October 21, 2014

Submitted Electronically
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
200 Independence Avenue SW.
Washington, DC 20201

Re: Proposed Rules Regarding Closely-Held For-Profit Employers
With Sincere Religious Objections to Compliance with the HHS Mandate
File Code: CMS-9940-P

Dear Sir or Madam,

The Family Research Council respectfully submits the following comments on the Notice of Proposed Rulemaking (79 Fed. Reg. 51118, August 27, 2014) regarding coverage of certain preventive services under the Patient Protection and Affordable Care Act, commonly known as "Obamacare."

The proposed rulemaking pertains to regulations, published by the Department of Health and Human Services (HHS), that require employers to provide their employees with insurance coverage of certain "preventive services" free of cost to the employee; the "services" include contraceptives, surgical sterilization, and drugs and devices that can destroy week-old embryos. (We refer to this provision herein as the "HHS Mandate" or "Mandate.")

On June 30, 2014 the Supreme Court in the case of *Burwell v. Hobby Lobby* ruled that closely-held for-profit employers with sincere religious objections have no legal obligation to comply with the HHS Mandate. The proposed rules bypass this Court-directed relief and make closely-held for-profit employers with sincere religious objections subject to the Mandate once again.

The proposed rule makes closely-held for-profit employers eligible to invoke the "accommodation," previously offered only to non-profit employers with sincere religious objections, as a means of complying with the Mandate. These employers would be deemed in compliance either by sending an official self-certification form objecting to providing coverage of certain drugs, devices, or procedures to their insurance issuer or**,** under the Interim Final Rule published August 27, 2014, by sending their objections to HHS. The "accommodation" then directs their insurance issuer to provide free coverage of the drug, device, or procedure to their employees anyway. The accommodation forces employers to be involved and play an integral role in a transaction that violates their sincere religious beliefs, as we discuss below.

The HHS Mandate should be rescinded or a full exemption should be provided to closely-held for-profit employers and all others with sincere religious objections.

I. THE HHS MANDATE

On January 20, 2012, the Department of Health and Human Services published the HHS Mandate requiring employers to provide their employees with health insurance coverage of contraceptives and sterilization procedures for women.[1] Some of the drugs and devices can end the life of a week-old embryo (and are therefore often referred to as "abortifacients"), namely "Plan B," "ella," and two types of IUD (intrauterine device).[2] The Department of Justice has admitted in recent court filings that Plan B can prevent the implantation of a living embryo.[3]

There is no evidence that HHS scrutinized the impact on religious liberty and conscience rights prior to issuing this sweeping Mandate. Indeed, Secretary Sebelius admitted in congressional testimony on April 26, 2012 that no legal memorandum ever was written on the topic and that she personally was unfamiliar with major religious liberty jurisprudence.

The Department granted an exemption from compliance to houses of worship,[4] leaving without relief the vast majority of employers with sincere religious objections to the Mandate such as non-profit organizations with or without a religious affiliation, religious and non-religious for-profit organizations, insurers, third party administrators, and individuals in group plans or purchasing individual policies.

II. THE SO-CALLED "ACCOMMODATION"

After much public outcry over the extremely narrow religious exemption, the federal government created an "accommodation" for non-profit religious employers**,** a paper-work accounting gimmick they could follow that would deem them in compliance with the Mandate.[5] In previous comments the Family Research Council explained why the so-called "accommodation" does not alleviate the "grave threat to religious liberty" to these non-profit religious employers.[6] The dozens of lawsuits filed by these employers support our position.

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[1] Information Reporting for Affordable Insurance Exchanges, 78 Fed. Reg. 39,644 (July 2, 2013) (to be codified at 26 C.F.R. pt. 1). See Comments submitted by the Family Research Council (September 30, 2011) discussing the proposed regulations.

[2] See Comments submitted by the Family Research Council (June 8, 2012) explaining that, while these drugs and devices are categorized as FDA-approved "contraceptives," they can function *after conception* to destroy a living embryo**.**

[3] Petition for Writ of Certiorari at 10 n.5, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

[4] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725 (Feb. 15, 2012).

[5] Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013).

[6] See Comments submitted by the Family Research Council (June 8, 2012). These Comments also discussed additional regulatory changes which aggravate religious liberty and conscience rights. Previously, the drugs and devices under the HHS Mandate were to be "offered" to employees and their dependents giving employees the ability to object to their inclusion, but the new regulations eliminated the ability of employees to object by "automatically" providing coverage for all drugs and devices in employee plans. Certain Preventative Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,505 (Mar. 21, 2012). Also, the new regulations extended

Under the basic protocol of the "accommodation," non-profit religious employers notify their health insurance issuer of objections to coverage of certain drugs, devices, or procedures required by the Mandate, and the insurance issuer ignores their objections and provides the coverage anyway, bearing the cost of such coverage without shifting it back to the employer. (As we explained in previous comments,[7] cost-shifting may still occur.)

Under the Interim Final Rule published August 27, 2014 such employers may notify HHS of their objections so that HHS can notify their insurance issuer (so that their insurance issuer can ignore their objections and provide the coverage to their employees anyway). The Family Research Council provides a more detailed analysis regarding the Interim Final Rule in comments submitted separately.

III. MAKING CLOSELY-HELD FOR-PROFITS WITH RELIGIOUS OBJECTIONS COMPLY

The Supreme Court ruled in *Burwell v. Hobby Lobby*[8] that a closely-held for-profit employer with sincere religious objections need not comply with the HHS Mandate because the Mandate imposes a substantial burden on its religious beliefs and is not the least restrictive means of furthering the government's interest in providing free insurance coverage of the mandated drugs and devices.

The government has reacted to this ruling by proposing that closely-held for-profit employers like those involved in the *Hobby Lobby* litigation be legally bound to comply with the Mandate once again, making them eligible for the "accommodation" as a means of compliance.

The proposed rule would undermine the relief granted by the Court to closely-held for-profit employers with sincere religious objections. Bringing these employers back under the Mandate would reverse the ruling's remedial effect and constitute an obvious diminishment of their religious freedom. Neither the previous "accommodation" protocol nor the protocol in the August 27, 2014 Interim Final Rule would right this wrong.

The "accommodation" would require a closely-held for-profit employer to "self-certify" that it opposes coverage of a certain drug, device, or procedure required by the HHS Mandate and to send this self-certification to its health insurance issuer (or directly notify HHS so that HHS can notify its health insurance issuer). Some commentators have called this notice a "permission slip," and the metaphor is apt because the notice causes the employer's health insurance issuer "automatically" to notify employees that their employer objects to coverage of a certain drug, device, or procedure but that the insurance issuer will offer free coverage of it under a "separate" policy.

But pronouncing it "separate" does not make it so. In fact, this policy is based entirely on the underlying insurance contract between the employer and the insurance issuer and cannot exist

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the automatic free coverage of these drugs and devices to minor dependents of employees "privately" – that is, without any notice to their parents.

[7] See Comments submitted by the Family Research Council (June 8, 2012).

[8] 134 S. Ct. 2751 (2014).

without it. The insurance issuer is obliged to comply with the "accommodation" protocol only because it is already under contract to provide insurance services for the employer and receiving financial compensation from the employer. That underlying insurance contract is the legal basis for this new obligation to give out free drug and device coverage. No contract, no free drugs.

If the employer neglects to pay its premiums or otherwise breaches the contract, the contract becomes null and void, the legal relationship between that employer and that insurance issuer disappears, and so does the insurance issuer's obligation to offer the special "accommodation" policy to that employer's employees.

Likewise, if an employee quits her job and takes another position, she can't take the special "accommodation" policy with her, nor is the insurance issuer obliged to follow her. She receives the special policy, and the insurance issuer provides it, because she is employed by this particular employer who is making payments to the insurance issuer under a legal contract.

In the case of the Green family and its Hobby Lobby business, if the proposed rule becomes final the Greens will have to forfeit their Supreme Court victory and be forced to comply with the HHS Mandate once again. If they choose to follow the "accommodation," they will be required to notify their health insurance issuer (or HHS) that they have a sincere religious objection to providing their employees with coverage of Plan B, "ella," and IUDs (the drugs and devices that propelled them to seek legal relief in the *Hobby Lobby* litigation). The Greens' insurance issuer then automatically will send a notice to all Hobby Lobby employees informing them that the Greens have a religious objection to providing insurance coverage for Plan B, "ella," and IUDs, but that they will get free coverage of them anyway in a "separate" policy.

The burden on the Greens' sincere religious belief is not lifted by the "accommodation." The insurance company will provide Hobby Lobby employees coverage of these drugs and devices *because* it is being paid by the Greens to provide health insurance to their employees under a legal contract with them and is obligated to provide this special policy only *for as long as* it is under such contract. Likewise, the Hobby Lobby employee will receive this special coverage of these drugs and devices *because* she is a Hobby Lobby employee and *for as long as* she is a Hobby Lobby employee.

Despite the "accommodation," closely-held for-profit employers with religious objections will be deeply involved in, and play an integral role in, the provision of a special insurance policy with free coverage of the precise drug, device, or procedure to which they object. They will provide the ultimate cause for its transmission (compensation to the insurance issuer and a legal contract with the issuer, as well as employment of the person receiving it) and the proximate cause for its transmission (the "permission slip" notice to the insurance issuer or to HHS).

Closely-held for-profit employers in the United States should not have to forfeit relief granted to them by the Supreme Court on June 30, 2014 in order to comply with a federal health insurance regulation. The proposed rule should be rescinded.

IV. EMPLOYERS STILL FACE CRIPPLING FINES

Even under the proposed rule, closely-held for-profit employers with sincere religious objections to the HHS Mandate face an untenable choice: If they follow the dictates of their religious beliefs and omit even one drug or device, or decline to follow the "accommodation" accounting gimmick, they will be subject to punitive fines of $100 per employee per day – a crippling penalty that bears no relation to the cost of providing the coverage. This is massive discrimination against employers with religious objections. No employer in America should have to choose between violating sincere religious beliefs or paying harsh fines that will cripple or bankrupt its business.

V. THE HHS MANDATE VIOLATES THE FIRST AMENDMENT AND RFRA

The HHS Mandate violates the First Amendment of the Constitution and the Religious Freedom Restoration Act (RFRA).[9] RFRA allows the government to place a substantial burden on sincere religious beliefs only if it is employing the least restrictive means to further a compelling interest.[10] As we outlined in previous comments,[11] the substantial burden placed on employers by the HHS Mandate is clear: violate your religious convictions or face massive fines which will put you out of business. Moreover, the Mandate does not serve a compelling governmental interest -- the federal government has no legitimate, let alone compelling, interest in reducing the incidence of pregnancy in America because pregnancy is not a disease, whether it is "planned" or "unplanned." Even if pregnancy were somehow considered a "disease," free insurance coverage of contraceptives or abortifacients will not reduce its incidence. Finally, even if providing free insurance coverage of contraceptives and abortifacients was a compelling interest of the federal government, conscripting unwilling religious objectors to provide it is not the least restrictive means possible to accomplish this goal.

The federal government, which frequently provides benefits and services at no cost, certainly it can find a way to give free contraception insurance policies without conscripting unwilling conscientious objectors to do so on the government's behalf. For example, it could distribute free contraception insurance through its many Title X-funded clinics, which have been giving out free or substantially reduced-cost contraceptives for decades. It already allows tax deductible benefits for prescription contraceptives and drugs that can destroy human embryos, and Medicaid spends more than $2 billion annually on such. We are merely pointing out that it is eminently possible for the government to find a way to accomplish its stated goals on its own, without forcing private individuals to do the government's bidding in violation of their deeply-held religious and moral beliefs.

VI. CONCLUSION

The Notice of Proposed Rulemaking states that the proposed rules are aimed at "respecting" closely-held for-profit employers' "religion-based objections." Not only do the proposed rules

[9] 42 U.S.C. § 2000bb et seq.
[10] 42 U.S.C. § 2000bb-1(b).
[11] See Comments submitted by the Family Research Council (April 8, 2013).

fail to respect the religious freedom rights of these job-creating Americans, they severely diminish them.

No employer in the United States should be made to violate his religion in order to obey a federal health insurance mandate. The Family Research Council calls on the Obama Administration to leave the Hobby Lobby ruling intact and not attempt to undermine the religious freedom protections the Court recognized by attempting to apply the HHS Mandate to closely-held for-profit employers with new regulatory schemes.

Respectfully submitted,

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