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: Public Comments in Regard to Non-Profit Religious Organizations
With Sincere Religious Objections to Compliance with the HHS Mandate
File Code: CMS-9939-IFC

Dear Sir or Madam,

The Patient Protection and Affordable Care Act (Pub. L. 111–148/PPACA) was enacted in March 2010. Statutory requirements found in PPACA (commonly known as "Obamacare") led the U.S. Department of Health and Human Services (HHS) to require employers to provide their employees with insurance coverage of certain "preventive services," free of cost, including contraceptives, surgical sterilization, and drugs and devices that can kill week-old embryos. The HHS Mandate (or "Mandate") requires individuals to violate their consciences or pay crippling fines.

The Family Research Council (FRC) respectfully submits the following comments on the Interim Final Rules (79 Fed. Reg. 51,092, August 27, 2014) regarding coverage of certain preventive services under Obamacare. We give voice to the large body of Americans who oppose the HHS Mandate itself on the basis of the grave threat it imposes to religious liberty and respectfully submit that the modified accommodation presented in the Interim Final Rules does not alleviate the violation of religious liberty we believe inherent to them. We ask that either the HHS Mandate be rescinded or that non-profit organizations and all those with a sincere religious objection be given a full exemption to the HHS Mandate.

The HHS Mandate

On January 20, 2012, HHS published its Mandate requiring employers to provide employees with health insurance coverage of contraceptives and sterilization procedures for women.[1] Among the drugs and devices mandated are "Plan B," and "ella," and two types of IUD

[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.

(intrauterine device); these drugs and devices can kill week-old embryos (and are therefore often referred to as "abortifacients").[2]

A narrow category of employer is completely exempt from the HHS Mandate: Religious employers defined in Sections 6002 and 6033 of the Internal Revenue Code, referring primarily to churches and other houses of worship.

Non-profit organizations with or without a religious affiliation (such as religious charities, religious non-profit hospitals, health care providers, universities and colleges), religious and non-religious for-profit organizations, insurers, third party administrators (TPAs), and individuals in group plans or those purchasing individual policies still are not exempt, leaving without relief the vast majority of those with sincere religious objections to the Mandate.

After much public outcry over the extremely narrow religious exemption, the federal government created an "accommodation" for non-profit religious employers ineligible for the exemption, thereby purportedly "satisfying" the religious objections of these employers while guaranteeing their continued compliance with the Mandate.[3] In reality, this "accommodation" does not satisfy the non-profits' religious objections, as it fails to understand and address the nature of those objections.

On June 30, 2014, the Supreme Court ruled in *Burwell v. Hobby Lobby* 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.[4] The government has reacted to this ruling by proposing to expand the "accommodation" to closely-held for-profit employers like those at issue in *Hobby Lobby.*

However, both non-profit religious organizations and closely-held for-profit employers must be given full exemption from the HHS Mandate because neither the 2013 nor the 2014 rules presented as an "accommodation" protect employers with sincere religious objections from violating their consciences. Alternatively the HHS Mandate must be rescinded.

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[2] While these drugs and devices are categorized as FDA-approved "contraceptives," the Family Research Council's previous comments (submitted June 8, 2012) discuss how they can function *after conception* to destroy a living embryo. Even the Obama Administration has admitted that Plan B can prevent the implantation of an embryo. *See* Petition for Writ of Certiorari at 10 n.5, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).
[2] 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).
[3] Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013).
[4] 134 S. Ct. 2751 (2014). Rules have been proposed which would reverse the effect of this ruling and make closely-held for-profit employers comply with the Mandate once again. Public comments on these proposed rules can be found at: http://www.frc.org/mandateresources.

The "Accommodation" in the July 2013 Final Rules

The July 2013 final rules purported to provide an "accommodation" to non-profit religious organizations that object to providing coverage to their employees of contraceptive and potentially embryo-killing drugs and devices.

For an organization to be eligible under the July 2013 final rule it must: 1) oppose providing coverage for some or all of any contraceptive services otherwise required to be covered on account of religious objections; 2) be organized and operate as a non-profit entity; 3) identify as a religious organization; and 4) self-certify that it meets these criteria by filling out EBSA Form 700, issued by HHS and the Department of Labor (DOL).

In regard to insured health plans, the organization must provide a copy of its self-certification to its health insurance issuer. The issuer must then provide "separate" payments for the objectionable drugs and devices for the women in the health plan of the organization.

In regard to self-insured health plans, an eligible organization must provide a copy of its self-certification to its TPA. The TPA must then provide or arrange "separate" payments for the objectionable drugs and devices for the women in the health plan of the organization.

The Modified "Accommodation" in the August 2014 Interim Final Rules

On August 22, 2014, in light of the Supreme Court's interim order in *Wheaton College vs. Burwell*,[5] another interim final rule was issued giving an additional notification option in the "accommodation" for eligible non-profit religious organizations that object to providing coverage of the mandated drugs and devices on moral or religious grounds. This second option, like the first, does nothing to satisfy the non-profits' religious objections because it also fails to understand and address the nature of those objections.

This second notification option requires that an eligible organization notify HHS in writing of its religious objection to providing coverage of any or all of the mandated drugs and devices required under the HHS Mandate. HHS will then notify the insurer for an insured health plan, or the DOL will notify the TPA for a self-insured plan, that the organization objects to providing coverage of the drugs and devices and that the insurer or TPA will provide enrollees in the health plan "separate" no-cost payments for these drugs and devices for as long as they remain enrolled in the health plan.

The 2013 and 2014 "Accommodations" Impose a Burden on Religious Liberty to Non-Profit Religious Organizations

This new "accommodation" does not alleviate the burden to the religious liberty of non-exempt non-profit religious employers but merely provides an additional method by which the organizations are forced to violate their religious beliefs in virtually the same way as the old "accommodation." This new "accommodation" allows non-profit employers to 1) choose between the previous self-certification by filling out EBSA Form 700 and registering their

[5] *Wheaton College v. Burwell*, 573 U.S.___ (2014) (slip op.).

objection to their insurance company themselves/TPAs or 2) notifying HHS directly, which would in turn notify the insurer of their religious objections to coverage of all or a subset of the mandated drugs and devices.

However, the non-profit employers still remain the legal gateway for transmission of free coverage to their employees of drugs which can destroy a human embryo, sterilization services and contraception under their healthcare plan. Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules or provides notice to HHS in accordance with the August 2014 interim final rules, the effect is still the same. The insurance issuer/TPA would then notify employees that their employer objects to covering a certain drug or device but that they will have free coverage of it under a "separate" policy. The insurers and/or TPAs then have an obligation to provide or arrange "separate" payments for contraceptive services. However, the non-profit employer is still paying for a legal contract with an insurer, or processing claims through a TPA, to cover health benefits, and this contract is the legal basis for providing free coverage of objectionable services to its employees – thereby forcing employers to be involved in and play an integral role in a transaction that violates their sincere religious beliefs.

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 without it. The insurance issuer is obliged to comply with the "accommodation" only because it is already under contract to provide insurance services for the employer. That underlying insurance contract is the legal basis for this new obligation to provide free drug and device coverage. Without the contract, there are no free drugs.

If the employer neglects to pay the 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, she can't take the special "accommodation" policy with her, nor is the insurance issuer obliged to provide it. She receives the special policy, and the insurance issuer provides it, *because* she is employed by this particular employer with which this particular insurance issuer has a legal relationship.

Wheaton College, Eternal Word Television Network, Little Sisters of the Poor, Priests for Life and other non-profit religious organizations which have sincere religious objections remain morally and legally implicated in the dispensation of free insurance coverage of the objectionable drugs and devices. It requires their *initial action of notification*, either *to* the insurance issuer or *to* HHS, so that coverage of the very same drugs and devices to which they objected in the first place can be provided to their employees *through* their insurance issuer and *because* of their contract with that insurance issuer. These non-profit religious organizations will be forced materially to cooperate in an action that goes against their sincerely-held religious beliefs. There currently are 53 lawsuits filed by employers of non-profit religious organizations because of their religious objections to this "accommodation."[6]

[6] *See* The Becket Fund for Religious Liberty, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last accessed Oct. 17, 2014).

The new notification option contained in this rule, along with the prior rule containing the "accommodation," force employers to be involved and play an integral role in a transaction that violates their sincere religious beliefs. This is the crux of the matter, and is why these interim final rules do not satisfactorily alleviate the intense burdens on religious liberty for the affected non-profit organizations.

Compliance with the "Accommodation" or Else Crippling Fines

Employers of non-profit religious organizations do not have much of an option. If they do not comply with the Mandate outright or through the so-called "accommodation" they are subject to crippling fines of $100 per employee per day. This is massive discrimination against employers with religious objections. Employers of non-profit religious organizations should not have to choose between violating their consciences by participating in what amounts to an accounting gimmick or bankrupting their organizations by having to pay harsh fines.

The HHS Mandate Violates the First Amendment and RFRA

The HHS Mandate violates both the First Amendment of the Constitution and the Religious Freedom Restoration Act (RFRA), which was enacted by Congress in 1993. FRC previously wrote in comments[7] that RFRA requires that the substantial burdening of religion serve a compelling governmental interest, and that the government use the least restrictive means of achieving its goal.[8] FRC believes that the HHS Mandate violates RFRA because it places a substantial burden on employers by forcing them either to violate their religious convictions or face massive fines which could well put them out of business.

Second, the HHS Mandate does not serve a compelling governmental interest. Pregnancy is not a "disease" to be prevented. Moreover, increased access to contraceptives and abortifacients, and having others pay for them, does not reduce unplanned pregnancies, abortion, or STDs.

Third, the HHS Mandate is not the least restrictive means possible for the government to achieve its goals. Contraceptive drugs and devices are already widely available, inexpensive, and heavily subsidized by the federal government. If the government has an interest in increasing access to contraceptives and abortifacient drugs and devices, it must do so apart from burdening non-profit religious employers and all other entities that have religious objections.

[7] FRC Comment April 8, 2013: http://downloads.frc.org/EF/EF13D34.pdf, and June 8, 2012: http://downloads.frc.org/EF/EF13D34.pdf

[8] 42 U.S.C. § 2000bb-1(b).

Conclusion

Employers of non-profit religious organizations and others who have religious objections should not have to choose between violating their consciences and paying crippling fines in order to be able to continue operating. The current HHS Mandate stands in direct violation to RFRA and places a substantial burden on employers. The Family Research Council calls on the Obama Administration to rescind the HHS Mandate or provide the full exemption to non-profit religious organizations and others which have sincere religious objections.

Respectfully Submitted,

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