

MEMORANDUM

TO: CLS Members

FR: Kim Colby, Senior Counsel, Center for Law and Religious Freedom

DT: June 8, 2012

RE: Opportunity to Comment on HHS Mandate's Restrictions on Religious Liberty

Purpose of this memorandum: In its Advance Notice of Proposed Rulemaking (ANPRM), issued March 21, 2012, the Obama Administration has invited comments on a *possible* accommodation to protect religious employers from compliance with the Health and Human Services contraceptives mandate (HHS mandate), which requires religious employers to pay for drugs and services to which they have religious objections. The purpose of this memorandum is to equip CLS members who are interested in submitting their own comments with basic information about the HHS mandate. Comments need not be lengthy, exhaustive, or comprehensive. They may be made by attorneys or any person, as individuals or on behalf of religious organizations that will be affected by the mandate. A list of the ANPRM's specific questions is found in the last section of this memorandum.

Comments must be filed on or before June 19, 2012. Commenters should be aware that HHS is not required to read the comments submitted in response to an ANPRM. Nonetheless, there is value in providing the Administration with comments on the need to accommodate religious employers' conscience rights. Such comments not only may enlighten the Administration regarding the serious religious liberty threat posed by the HHS mandate, but also may better inform the public debate.

How to submit comments: The ANPRM describes the various methods by which comments may be submitted. If sent overnight, they must be received on June 19. One way to submit either prepared or spontaneous comments, is to go to www.regulations.gov, enter "CMS-9968-ANPRM" in the search box, and click on the "comment now" link in the right-hand column.

Brief history of controversy: The Affordable Care Act of 2010 requires all employers to provide employees with insurance coverage of certain "preventive services" without cost-sharing. In July 2011, HHS identified the "preventive services" for female employees that must be covered, including all FDA-approved contraceptives (including Plan B and *ella*, which some regard as abortifacients), sterilization procedures, and reproductive education and counseling.

In August 2011, HHS proposed an exemption for an extraordinarily narrow set of religious employers. To qualify for the exemption, a religious employer must meet all four of the following criteria: 1) its purpose must be to inculcate religious values; 2) it must primarily employ members of its own faith; 3) it must serve primarily members of its own faith; and 4) it must be a nonprofit organization described in Internal Revenue Code § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii). (Note that § 501(c)(3) status in itself does not qualify for the exemption.)

In response to the sustained outcry from the Catholic, Evangelical Christian, and Orthodox Jewish communities against the mandate and the too-narrow exemption, HHS Secretary Sebelius announced in January 2012 that religious employers who do not qualify for the exemption would have an additional year to come into compliance with the mandate, if they qualified for a “temporary enforcement safe harbor.” This announcement merely intensified the religious community’s protest because it seemed that the Administration believed that religious employers would abandon their religious convictions at the end of the additional year.

On February 15, 2012, the Administration announced that it was finalizing into law the too-narrow religious employer regulation, despite widespread protest. The Administration further announced that it would propose, at a future date, an accommodation for some additional religious employers. Ostensibly, under this still nonexistent accommodation, some religious employers would not be compelled to pay for contraceptives coverage. Instead, insurance companies would furnish free contraceptives coverage to the religious employers’ employees without charging the employer or the employees. No concrete accommodation language has yet been proposed.

On March 21, 2012, the Administration issued an Advance Notice of Proposed Rulemaking (ANPRM), seeking comments on how such an accommodation might be structured. Basically, the ANPRM asks for comments as to 1) which religious employers should be offered an accommodation of their religious convictions, and 2) how to pay for the accommodation if neither the religious employers nor their employees are to pay for the contraceptives coverage.

Six basic facts regarding the HHS mandate: The public debate regarding the mandate can be confusing because a number of side issues have been swept into the debate, but the critical facts are fairly straightforward:

- **Imminent timing:** In approximately nine weeks, beginning August 1, 2012,¹ the HHS mandate requires religious employers to provide employees with insurance coverage, with no cost-sharing, by which the employer must pay for drugs and services that violate the employers’ religious convictions, unless the religious employer’s plan is grandfathered or the employer qualifies for the narrow religious employer exemption.
- **The mandate:** The HHS mandate requires all non-grandfathered plans to cover all FDA-approved drugs, including Plan B and *ella*, that many (although not all) evangelical Christians believe act as abortifacients, as well as contraceptives and sterilization that violate Catholic teaching, and reproductive education and counseling.
- **The too-narrow exemption:** The current exemption for religious employers covers *only* religious employers who meet *all four* criteria:
 1. Its purpose is the inculcation of religious values;
 2. It primarily employs persons who share its religious tenets;
 3. *It serves primarily persons who share its religious tenets;*

¹ An insurance plan must comply with the mandate when its next insurance year begins after August 1, 2012.

4. It is a nonprofit organization described in Internal Revenue Code § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii). (Note that § 501(c)(3) status alone does not qualify for the exemption.)

- **Are churches and other religious ministries exempt?** While the Administration claims that the exemption covers churches, some churches may not, in fact, meet all four criteria. It is possible that churches with robust community outreach may be disqualified if they do not serve primarily persons who share their religious tenets. Furthermore, religious colleges, schools, homeless shelters, pregnancy crisis centers, food pantries, hospitals, and health clinics do not qualify for the exemption because they serve persons of different faiths or no faith. Furthermore, to be exempt an organization must meet the definition in IRC § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii).
- **A narrow and temporary safe harbor for one year:** A religious employer who does not qualify for the exemption *may* invoke a “temporary enforcement safe harbor” from the mandate’s enforcement for one year, until August 1, 2013, *but only if it takes affirmative action* to certify that it meets *all* the following criteria:
 1. It is organized and operated as a non-profit entity;
 2. It has not provided contraceptive coverage *as of February 10, 2012*, because of its religious beliefs;
 3. It provides notice (on a form provided by HHS) to its employees that contraceptive coverage is not provided for the plan year beginning on or after August 1, 2012;
 4. By the first day of its plan year, it self-certifies that the first three criteria have been met.
- **No other exemption or accommodation exists:** While there has been much talk about a broader accommodation, no such accommodation yet exists. Right now, if a religious employer does not 1) have a grandfathered plan, 2) qualify for the exemption, or 3) take steps to qualify for the temporary safe harbor, the religious employer must provide insurance coverage for all FDA-approved contraceptives, including Plan B and *ella*, sterilization procedures, and reproductive counseling, regardless of the employers’ religious convictions.² While the Administration has promised a further accommodation, no concrete accommodation language has been unveiled. The ANPRM merely asks for comments as to the scope of a *possible* accommodation.

The Administration’s questions regarding the scope of a possible accommodation: Commenters may choose to address one, a handful, or all questions raised by the ANPRM. Commenters may also take the opportunity to criticize the narrowness of the existing religious

² An employer with fewer than 50 full-time employees may drop all health insurance coverage for its employees; however, the employees are then required by the individual mandate to purchase health insurance that includes contraceptives coverage, even if they have religious objections to such coverage. If employees do not purchase the objectionable insurance, they must pay a costly penalty. Employers of 50 or more full-time employees do not have the option of dropping coverage without paying heavy penalties.

employer exemption or address any other issue a commenter believes is relevant to the religious liberty concerns or economic practicality raised by the HHS mandate.

The ANPRM basically requests comments on 1) which religious employers should be given an accommodation and 2) how to pay for an accommodation if neither the religious employers nor their employees are to pay for contraceptives coverage. Specific questions that the ANPRM asks include:

Who qualifies for the possible accommodation?

- What entities should be eligible for the new accommodation, *i.e.*, what is a religious organization?
- Should an accommodation apply to all groups that qualify for the “temporary enforcement safe harbor”?
- Should government adopt the definition of religious organization used in some other federal or state statute or regulation?
- Specifically, should the definition of “church plans” in IRC Sec. 414(e) and ERISA Sec. 3(33) be used, thereby limiting the accommodation to religious organizations that are controlled by or associated with a church or a convention of churches? (Obviously, this would not cover many religious organizations, for example, independent Christian colleges and schools that are not controlled by a church.)
- Should for-profit religious employers be accommodated?
- Are there problems with a self-certification process by which the religious organization is required to put its insurer on notice that it is not providing contraceptive coverage?
- How should the insurer provide notice to the beneficiaries that it is providing contraceptive coverage?
- Should the definition of religious organization include religious organizations that provide coverage for some, but not all, FDA-approved contraceptives? (Obviously, this is an important question for religious organizations that do not oppose coverage of some contraceptives, but oppose abortifacients.)

Who pays for the possible accommodation if the religious employer and the beneficiaries are not to be charged?

- What are the possible approaches that an insurer or third-party administrator could use to fund the contraceptive coverage without using funds provided by the religious organization or the employees?

- The government asks that comments address the ways in which insurers and third-party administrators generally receive funding to pay benefits, other flows of funds that could be diverted to paying for the accommodation, the extent to which funding from other sources may be available for payment of claims, and the monitoring responsibilities and oversight that would be associated with such arrangements.