



Office of the General Counsel

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MEMORANDUM

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Re: HHS Regulation and Bulletin on Sterilization/Contraception Mandate

Date: March 7, 2012

On February 10, 2012, the Department of Health and Human Services (“HHS”) released the text of a final regulation concerning its previously-announced mandate that health plans must cover contraceptives (including abortifacients), sterilization procedures, and related education and counseling. On the same day, HHS issued a bulletin with related information.¹

This memo briefly describes, and explains the consequences of, these regulatory actions.

I. Background

Last summer, HHS issued a nationwide mandate requiring health plans to cover all FDA-approved contraceptives (including some abortifacient drugs), sterilization procedures, and education and counseling about these. Two sorts of plans were to be exempt from the contraceptive mandate.²

¹ The regulation is at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-15/pdf/2012-3547.pdf> (hereinafter, “Final Rule”). It was published in the Federal Register on February 15, 2012. 77 Fed. Reg. 8725. The bulletin is at <http://cciiio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf> (hereinafter, “Bulletin”).

² We assume for purposes of this analysis that the Administration’s use of the term “contraceptive coverage” in the 2011 guidelines and the February 2012 regulation is intended (and we will use that term here as well) as shorthand for coverage, without cost-sharing, for all FDA-approved contraceptive methods as well as sterilization procedures, and patient education and counseling on both, for all women with reproductive capacity. We think it essential that the Administration clarify, in the context of the “religious employer” exception to the mandate, that its use of the term “contraceptive coverage” is intended also to include sterilization, education and counseling. If, instead, the term is meant narrowly, to describe only contraception itself, then even employers who satisfy the four-part test would still be subject to the mandate to cover sterilization and related counseling and education.

- Plans offered by organizations that meet HHS’s narrow definition of “religious employer.”³ This definition is problematic and unlawful for all the reasons set out in the [comments we filed last summer](#).

- Grandfathered plans are exempt, but grandfathered status is lost when a significant change is made in the plan. Of course, all plans undergo change over time. Thus, the exemption for grandfathered plans is a temporary fix, not a permanent one.

As a result of HHS’s 2011 regulation, all non-exempt, non-grandfathered plans were required to include contraceptive coverage for plan years beginning on or after August 1, 2012.

II. What Did the February 10, 2012 Regulatory Actions Do?

Fundamentally, two things happened as a result of the HHS Final Rule and Bulletin issued on February 10, 2012.

First, the Administration finalized its controversial 2011 regulation “without change,” as the rule itself states in four places.⁴ That means:

- HHS did not rescind or otherwise curtail the scope of the mandate. As a result, that mandate still compels coverage of all the same “services” as the 2011 regulation.

- HHS has not expanded the narrow four-part definition of “religious employers” that are exempt from the mandate. *See* n.3, *supra*. Accordingly, religious organizations that directly serve the common good—such as Catholic charities, schools, and hospitals—are still subject to the mandate.

Second, in addition to finalizing the 2011 regulation, the Administration has proposed what it characterizes as an “accommodation” for certain entities that fall outside the exemption. Close review of the Final Rule and Bulletin reveals, however, that they promise very little accommodation, if any at all. Based on the text of those two regulatory documents, the following is clear:

- To qualify for the “accommodation,” the “non-exempt” entity must be a non-profit organization with a religious objection to the mandated items and must not have covered them as of February 10, 2012, consistent with state law.

³ To satisfy this definition, an exempted “religious employer” (1) must have the inculcation of religious values as its purpose, (2) must primarily hire those who share its religious tenets, (3) must primarily serve those who share its religious tenets, and (4) must be a church, convention or association of churches, integrated auxiliary, or religious order. 76 Fed. Reg. 46621 (Aug. 3, 2011).

⁴ Final Rule at 1, 16, 19, 20; 77 Fed. Reg. at 8725, 8729, 8730.

- Such an organization may obtain a stay of enforcement of the mandate for one year—August 1, 2013, instead of August 1, 2012—if it certifies in writing that it fits the above description, and if it provides its employees with a statement, written by the government, informing employees that the organization does not offer the coverage for that one year. This one year “temporary enforcement safe harbor,” as the Administration calls it (Bulletin at 3), only delays the enforcement of the mandate for a year, and only for those organizations that qualify. This is not an additional exemption, but simply a temporary postponement of enforcement against certain objecting organizations that are still subject to the mandate.

- By the end of the one-year period ending August 1, 2013, HHS has stated its intention to develop an additional regulation that will allow non-exempt religious organizations not to expressly offer the objectionable coverage to their employees.⁵ The additional regulation has not yet been proposed for comment, and no timeframe has been identified for when that initial proposal will be made.

- Under this additional regulation, as described by the Administration, all insurers will be required to offer contraceptive coverage to employees and pay for that coverage. But that raises this question: what funds will the insurer use to pay for contraceptives and sterilization procedures? The insurer cannot draw from funds paid directly by the employee for the purpose of contraceptive coverage because the Administration has made explicit that there will be “no charge for the contraceptive coverage” and no cost-sharing by employees. Final Rule at 13 (emphasis added); 77 Fed. Reg. at 8728. By process of elimination, the only funds from which the insurer could draw would be premiums paid by employers and their employees for the overall plan. As a consequence, where those premium-payers have a religious objection to paying for that coverage, the government is still forcing them to make the payment over their objection.

For self-insured plans, the compulsion is even more direct. There, the objecting employer’s and employees’ premiums do not merely purchase a plan from an insurer, from which claims for contraceptives will be paid; instead, the premiums are the very dollars used directly to pay those claims.

Thus, given the Administration’s own statements about what the future regulation will do (and, specifically, its disallowance of any charge or cost-sharing for contraceptive coverage), it is unclear how the promised future regulations could eliminate the coercion of objecting religious employers against their religious beliefs. To eliminate the coercion, the Administration would, at a minimum, have to identify a source of payment that does not include the funds of the objecting premium payers (employer or employee).

Finally, even if someone else were footing the entire bill, the burden on religious exercise would remain, because that burden goes beyond the mere use of money. The religious employer must still maintain a plan that facilitates gravely immoral actions as an integral feature of that

⁵ While non-profit organizations (religious and secular) may take advantage of the one-year temporary enforcement safe harbor if they meet the requisite criteria, the regulatory materials indicate that only non-exempt religious organizations may take advantage of the future “accommodation.”

plan—the coverage is not a separate plan or even a rider. Thus, for example, if a third party somehow covered the entire cost of the employer’s plan, the employer’s decision to offer the plan would still make available to its employees the objectionable coverage, directly from the insurer—employer-based coverage that would otherwise be unavailable to those employees.

III. Conclusion

In sum, the August 2011 regulation was finalized “without change,” and the additional regulations which the Administration has stated it intends to propose and finalize before August 2013—even if its promise is fulfilled entirely—would be insufficient for the following reasons:

- The August 2011 regulation’s nationwide mandate and problematic distinction among religious employers—those deemed “religious enough” to satisfy the four-part exemption, and those not—remain “without change.” As we explained in our original comments to HHS, this is the narrowest conscience provision ever adopted in federal law, and it violates federal constitutional and statutory law. It results in unprecedented government coercion against conscience for those not exempted, and it creates second-class citizens among religious institutions.
- The Administration purports to confer a benefit, under an additional, future regulation, on non-profit religious organizations that it deems insufficiently “religious” to qualify for the four-part exemption. But the only immediate benefit to those organizations is a one-year delay in enforcement. In August 2013, assuming the regulation issues as intended, those employers covered by it will still be forced to fund and facilitate the objectionable coverage. Payments for sterilizations and contraception, including abortifacients, will still be made as a part of the employer’s policy, which is still funded by the premiums of the employer and its employees. Where the employer is self-insured, it will still be forced to make an express offer of the coverage to its employees,⁶ and it will be forced to pay directly for those “services.” Finally, in all events, the employer’s provision of any plan is a but-for cause of its employees’ access to the “free” coverage of objectionable items.
- All the other stakeholders in the health insurance process—all for-profit religious employers, all non-profit and for-profit secular employers, all religious and secular insurance companies, and all individual business owners, policyholders and premium payers—who have a moral or religious objection to participating in providing or financing the illicit coverage will still face government compulsion to participate.

⁶ It has been suggested—orally, but not in the regulatory materials—that self-insurers will ultimately not be required to make the same express and direct offer of contraceptive coverage to employees that other insurers will be required to make. But if the employer is not required to make that offer, and the insurer is not required to make that offer, then who is left to do so? And even if someone else were to make that offer, then the question becomes who delivers on it—that is, who pays for, administers, and (expressly) provides the coverage—if not the self-insured employer? These logical problems leave us skeptical of the oral representations that have been made in tension with the written regulatory materials.