Key Points: New Federal Notice on Implementation of HHS Mandate

On March 21 the Obama administration published a new "advance notice of proposed rulemaking" (ANPRM) suggesting various ways to apply its new contraceptive mandate for private health plans to a wide array of religious organizations (*Fed. Register*, March 21, 2012, pp. 16501 ff.). The detailed proposals are both tentative and complex, and demand further study; the Administration has requested public comment on them before June 19. In the meantime, however, we offer a few key points that seem clear even after an initial analysis, particularly in light of the recent statement of the USCCB Administrative Committee, "United for Religious Freedom." In sum, we are still faced with the same fundamental issues identified in that statement.

1. The Administration's extremely narrow four-part test for deciding which organizations are "religious enough" to warrant an exemption from the mandate remains unchanged by the ANPRM. It remains USCCB's position that the government has no place defining religion and religious ministry, and that the government's attempt to do so here is unconstitutional. So no matter what new rules may be proposed to apply this distinction, it remains radically flawed. Even at their best, these proposed rules would grant in some cases, determined by the government, a more limited form of religious freedom. But we contend that we already have that freedom in full and do not need to receive it as a "grace" from the federal government.

2. The application of the mandate outside the exemption still forces us to act against our conscience and teaching. The recent ANPRM does not propose to alter the Administration's inclusion of sterilization, contraceptives, and abortifacient drugs in the "preventive services" mandate. Those falling outside the government definition of "religious employer" will be forced by government to violate their own teachings within their very own institutions. Whatever funding and administrative mechanisms are ultimately chosen, it remains that many deeply religious institutions and individuals will be forbidden to provide even their own employees (or, in the case of educational institutions, their own students) with health coverage consistent with their values.

3. The ANPRM says the narrow four-part definition of a "religious employer" will not "set a precedent for any other purpose" (p. 16502). Yet the Administration has no power to prevent the definition from being used again in future regulations or legislation. And even if the definition would not be used elsewhere in the future, it remains illegitimate and unconstitutional now.

4. The advance notice also contradicts a commitment the Administration made in its February 10 rule, which proposed to have insurers "*offer* contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who *desire* it" (*Fed. Register*, February 15, p. 8728). Now, the Administration says third parties can be required to "provide this coverage *automatically* to participants and beneficiaries covered under the organization's plan (for example, *without an application or enrollment process*), and protect the *privacy* of participants and beneficiaries covered under the plan who use contraceptive services" (March 21, p. 16505). While some have said the Administration wants to vindicate individual women's choice over the religious values of their employers, it now seems women will have no freedom of choice either—not even the freedom to keep their own minor children from being offered "free" and "private" contraceptive services and related "education and counseling" without their consent. The mandate now poses a threat to the rights not only of religious employers but of parents as well. It is even proposed that this intervention into the family may be delegated to "nonprofit" organizations, potentially including groups such as Planned Parenthood, who volunteer for the task.

5. The Administration's more detailed proposals, on which public comment is requested, seem intended to lessen the degree of "cooperation in evil" required of non-exempt religious organizations. But they do so by depriving these organizations of the ability to determine their employee and student benefits in accordance with their faith and moral teaching. For example, the government may delegate these responsibilities instead to other parties, potentially including parties which are hostile to religious principles and the rights of parents. We will be commenting on these proposals in more detail and inviting others to do likewise. But in general, protecting a religious organization from being forced to act in conflict with its teaching by depriving it of the ability to act at all is no way to serve religious freedom.

While USCCB representatives will continue to meet with representatives of the Administration to discuss these new proposals, it must also be very clear that the Church, together with other religious groups and faith-based entities, will simultaneously continue to seek relief from the legislature and redress in the courts.