



Office of the General Counsel

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October 8, 2014

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

**Re: Comments on Proposed Rules on Coverage of
Certain Preventive Services Under the Affordable Care Act**

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (“USCCB”), we respectfully submit the following comments on the proposed rules on coverage of certain preventive services under the Affordable Care Act (“ACA”). 79 Fed. Reg. 51118 (Aug. 27, 2014). The rules pertain to application of the contraceptive mandate to closely-held for-profit companies.¹

Our comments follow.

¹ We use the term “mandate” or “contraceptive mandate” as shorthand for the requirement that non-grandfathered health plans and policies provide coverage of drugs and devices that the FDA has approved as contraceptives (including those that can cause an abortion), sterilization procedures for women, and related education and counseling. We use the term “contraceptives” and “contraceptive coverage” to refer to these items and their coverage, respectively.

1. The Mandate

The proposed rules do not change the content of the contraceptive mandate. For reasons discussed more fully in our comments on the interim final rules,² and in our other previously-filed comments on this broader subject,³ we continue to believe that the contraceptive mandate should be rescinded.

2. The Limited Exemption

The proposed rules do not alter the fact that the vast majority of individual and institutional stakeholders with religious or moral objections to contraceptive coverage are subject to the mandate. This includes not only the many religious organizations that fail to qualify for the limited “religious employer” exemption, but nonprofit secular organizations, for-profit organizations, insurers and third party administrators (“TPAs”), and individuals enrolled in a group plan or purchasing health insurance policies on or off the exchanges for themselves and their minor children.

For the reasons set forth in our comments on the interim final rules and in our previously-filed comments, *see* notes 2 & 3, *supra*, we continue to believe that all stakeholders with a religious or moral objection to contraceptive coverage should be exempted from the contraceptive mandate.

In fact, the more restrictive policy that would be implemented here regarding the range of persons meriting protection for religious freedom and rights of conscience contradicts a longstanding tradition in federal law. The first major federal conscience clause relating to abortion and sterilization, commonly known as the Church Amendment of 1973,⁴ respects the “moral or religious convictions” on abortion and sterilization of any individual or “entity” providing health care. 42 U.S.C. § 300a-7. Under another federal law, Legal Services Corporation funds are

² The interim final rules were published the same day as the proposed rules. 79 Fed. Reg. 51092 (Aug. 27, 2014). Our comments on the interim final rules, filed on Oct. 8, 2014, are available at <http://www.usccb.org/about/general-counsel/rulemaking>.

³ Our previous comments, filed in September 2010, August 2011, May 2012, and March 2013, are available at <http://www.usccb.org/about/general-counsel/rulemaking>.

⁴ The amendment, named for its sponsor, Frank Church, was enacted the same year *Roe v. Wade*, 410 U.S. 113, was decided.

not to be used in litigation to compel “any individual or institution” to perform, assist in performing, or provide facilities for performing an abortion contrary to “the religious beliefs or moral convictions of such individual or institution.” 42 U.S.C. § 2996f(b). Federal protections against forced involvement in abortion training protect “any health care entity” regardless of nonprofit or for-profit status. 42 U.S.C. § 238n. In the Medicare and Medicaid programs, managed care organizations, regardless of nonprofit or for-profit status, are protected from having to provide or cover counseling or referral services to which they object on “moral or religious grounds.” 42 U.S.C. § 1395w-22(j)(3)(B) (Medicare); 42 U.S.C. § 1396u-2(b)(3) (Medicaid).

Even the contraceptive mandate in the Federal Employees Health Benefits Program exempts any plan if its carrier objects “on the basis of religious beliefs,” again without restricting this to nonprofit carriers or closely-held companies. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. E, § 726. The federal conscience clause allowing entities to receive grants under the major federal program for combating AIDS in developing nations exempts any “organization,” including but not limited to “a faith-based organization,” from being required to provide services to which the organization has a “religious or moral objection.” 22 U.S.C. § 7631(d).

And the Affordable Care Act itself states that “[n]othing in this Act shall be construed to have any effect on Federal laws regarding ... conscience protection” (42 U.S.C. § 18023(c)(2)(A)), such as the laws referenced above and other laws that respect conscience rights.⁵ Yet the proposed rules, claiming to be issued under the authority of ACA, advance a very different and much narrower policy on the kinds of organizations whose religious freedom is entitled to respect.

3. The “Accommodation”

Currently the federal government offers, as an alternative means to comply with the mandate, an “accommodation” to nonprofit religious organizations that fail to qualify for the “religious employer” exemption. The proposed rules would extend to closely-held for-profit organizations the same “accommodation” that is offered to religious nonprofits. The Administration states that this proposal is a

⁵ Relevant excerpts of the text of Federal laws cited here, and other Federal laws pertaining to conscience protection, are included in a compilation available at <http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf>.

response to the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), which held that the contraceptive mandate, as applied to three closely-held for-profit companies, violated the Religious Freedom Restoration Act (“RFRA”).

We offer three observations about the proposed extension of the “accommodation” to closely-held for-profit organizations.

First, the proposed rules would make the current situation *worse* for closely-held for-profit organizations with religious objections to contraceptive coverage. Currently, such organizations are exempt from the contraceptive mandate under RFRA, as *Hobby Lobby* holds. The proposed rules would again subject them to the mandate by means of the “accommodation.”

Second, because we believe the “accommodation,” as modified by the interim final rules, is insufficient to protect the religious liberty of organizations that are eligible for it (*see* our comments on the interim final rules at 7-13), extending the “accommodation” to a wider range of organizations with a religious objection to contraceptive coverage still entails a “substantial burden” on their religious exercise.

Third, the proposed rules do nothing to help other stakeholders with religious or moral objections to the mandate. For example, nonprofit organizations that do not hold themselves out as religious (or whose objection is in the nature of a moral rather than strictly religious conviction about respect for nascent human life), and individuals who for religious reasons seek health coverage that excludes contraceptives or abortifacients, would continue to be subject to the mandate and ineligible for any exemption or accommodation. If the Administration were to offer an accommodation that actually would relieve the “substantial burden” of the mandate (which it has not), that accommodation should not be conditioned on whether the stakeholder holds itself out as religious or operates as a closely-held for-profit.

On a related note, just as the exemption gerrymanders the religious community, the proposed rules create another gerrymander among those with religious objections. Now, among organizations without an express religious affiliation, only for-profits will be eligible for an accommodation. Oddly, in the space of one Supreme Court Term, the Administration has gone from arguing that being a for-profit *foreclosed* religious liberty protection, to claiming that a group

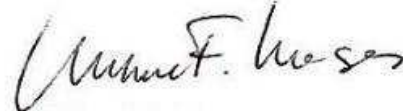
without religious affiliation *must* be a for-profit in order to secure the accommodation. *Hobby Lobby* rejected the former proposition; it did not embrace the latter. There is no legitimate, let alone compelling, reason to require a nonprofit pro-life organization, for example, to engage in profit-making activity to qualify for an accommodation of its religious objection to abortifacient drugs.

Thank you for considering these comments.

Respectfully submitted,

A handwritten signature in blue ink that reads "Anthony R. Picarello, Jr." in a cursive script.

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel

A handwritten signature in black ink that reads "Michael F. Moses" in a cursive script.

Michael F. Moses
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