Contraceptives/Abortifacients Mandate, Religious Freedom, & Parachurch Ministries

April 27, 2012

EXECUTIVE SUMMARY

Morally troubling drugs. The federal contraceptives mandate requires group and individual insurance plans, as of plan years that begin on or after August 1, 2012, to cover without copays or deductibles the full range of FDA-approved contraceptives, including the abortion-inducing "morning after" (Plan B) and "week after" (*ella*) pills. The mandate applies whether or not your ministry receives government funds.

Two classes of religious organizations. Only churches, not parachurch ministries, are exempt from the mandate. Ministries do not fit into the category of exempt "religious employers" because they serve people beyond their own faith and offer help beyond spiritual activities (see the definition on p. 3). An "accommodation," not exemption, is promised for parachurch ministries, but no details are available and no firm deadline has been announced. The "accommodation" will require the insurer to provide contraceptives coverage even though the parachurch organization supposedly is buying insurance that does not cover contraceptives.

Religious freedom. Even if you regard the promised accommodation to be acceptable, you should be deeply concerned that the federal government is creating two categories of religious organizations in which parachurch ministries receive second-class religious-freedom protection for their faith-shaped practices.

The law right now.

If your ministry's employee health plan	then . . .
included contraceptives on Feb. 10, 2012	it must comply with the mandate in plan years beginning on or after Aug. 1, 2012
covered no contraceptives on Feb. 10, 2012	it is shielded from the mandate until the plan year that begins on or after Aug. 2013
is grandfathered, with no contraceptives	it is shielded from the mandate until it loses its grandfathered status
is self-insured, with no contraceptives on Feb. 10, 2012	it is shielded from the mandate until the plan year that begins on or after Aug. 2013
is self-insured, included contraceptives on Feb. 10, 2012	it must comply with the mandate in plan years beginning on or after Aug. 1, 2012

The promised religious "accommodation." The administration has promised to develop a regulation for parachurch ministries. On March 16, 2012, it published only ideas and a request for comments; there exists no regulation to protect parachurch ministries. An "accommodation," not an exemption, is promised. Parachurch organizations are to be able to buy employee health insurance that does not cover contraceptives—however, if you buy such insurance, then your insurer will automatically offer your employees the full range of contraceptives for free, and supposedly without charging your ministry, either. A similar scheme is planned for self-insured organizations—they cannot avoid the mandate by self-insuring.

Reasons for concern. You should consider objecting to the mandate because:

1. ***you object*** for religious or moral reasons to including abortifacients, contraceptives, or sterilization in your health plan and your organization does not qualify for the exemption;

2. ***you object*** to an "accommodation" in which the insurance company will provide contraceptives to your employees' minor children without their parents' knowledge or consent;
3. ***you object*** to the federal government's insistence that, because you serve people beyond your own faith and do not restrict your help simply to religious activities, your ministry is not a fully religious organization that deserves to be fully exempt;
4. ***you object*** to the creation in federal law of the precedent of two classes of religious organizations: churches, dedicated to worship and religious teaching, which are fully exempt, and parachurch ministries, dedicated to serving others, whose conscience concerns receive less protection;
5. ***you object*** because, if the government successfully imposes the contraceptives/abortifacients mandate, it may be emboldened to include surgical abortion in a future mandate;
6. ***you stand in solidarity*** with other religious communities that have a deep moral objection to the use of contraceptives and/or to drugs that can induce abortions.

What you can do about your health insurance:

- **Drop health insurance** to escape the mandate (you may have to pay a costly penalty);
- Work to **maintain a grandfathered plan** that excludes objectionable items;
- Work with a benefits consultant to **construct a self-insured plan** that does not include abortion-inducing drugs (both you and your employees may be penalized for the non-conforming plan);
- Explore whether a **health sharing ministry** is a viable alternative for your employees.

What you can do to advocate against the mandate:

- **Ask Congress** for relief;
- **Sign a letter of protest** to the HHS Secretary;
- **Comment on the proposed "accommodation"**;
- **Sue the federal government** for relief.

Your first action should be to ensure that your current insurance does not cover drugs and procedures to which you have a religious or moral objection.

THE MANDATE AND PARACHURCH MINISTRIES

What is the contraceptives/abortifacients mandate? Health insurance plans, for plan years beginning on or after August 1, 2012, must cover, without deductibles or co-pays, "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." The FDA-approved drugs include Plan B (*levonorgestrel*), the so-called "morning after pill," and *ella* (*ulipristal acetate*), the "week-after pill." Both drugs can cause abortions because they can prevent the implantation of a fertilized egg. *Ella* can kill an embryo already implanted in the uterus.

All group and individual health plans, unless grandfathered or specifically excused (see below), must cover all of the contraceptive drugs and services. Note that, as of 2014, all employers of 50 or more FTEs must offer health insurance or else pay a penalty. Smaller employers need not offer health insurance, but if they do, the insurance must comply with the contraceptives mandate.

The federal mandate is more sweeping than the contraceptives mandate that many states currently have. Some states have a much broader exemption. In states without a broad exemption,

non-exempt religious organizations have been able to avoid the state mandate by dropping prescription drug coverage without penalty, by self-insuring, or by coming under federal rules that will now be superseded.)

Exempt organizations—definition in the health insurance regulations

A "religious employer"—an organization that is exempt from the mandate—"is an organization that meets all of the following criteria:

> (*1*) The inculcation of religious values is the purpose of the organization.
>
> (*2*) The organization primarily employs persons who share the religious tenets of the organization.
>
> (*3*) The organization serves primarily persons who share the religious tenets of the organization.
>
> (*4*) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."
>
> [45 CFR §147.130(a)(1)(iv)(B)]

Note: these sections of the Internal Revenue Code refer to churches, their integrated auxiliaries, and conventions or associations of churches, and to the exclusively religious activities of religious orders. If your organization is required to file a Form 990, 990-EZ, or 990-N, it does not fall into these sections and is not exempted from the mandate.

Which employee health plans are exempted from the mandate?

- Health plans offered by **churches**, their integrated auxiliaries (such as a seminary or mission society), and religious orders are exempt.
- **Grandfathered plans** that as of March 23, 2010, did not cover contraceptives are exempt until they lose their grandfathered status by being materially changed (the federal government expects most plans not to keep grandfathered status very long).

Which religious organizations are *not* exempted from the mandate?

- **Parachurch ministries** are **not exempt** because their purpose goes beyond the "inculcation of religious values" and/or they do not limit their services to "persons who share the religious tenets of the organization," and/or they hire some or many people of another faith, and because they are organized under a different Internal Revenue Code section.
- **Self-insuring parachurch ministries** are **not exempt**.
- **Community-serving churches**—that to a significant extent offer non-religious services to people beyond the congregation—are by definition **not exempt**.

What temporary relief exists right now for parachurch ministries?

- Ministries whose insurance or self-insurance plans as of Feb. 10, 2012, for religious reasons, **did *not* include contraceptives** —
  - are eligible for a "temporary enforcement safe harbor" protecting them from the mandate until their plan year that starts on or after August 1, 2013;
  - must certify that their insurance did not include contraceptives for religious reasons and must inform their employees that the health insurance does not cover contraceptives;
  - will be subject to a promised new regulation (see below), not an exemption.

- Ministries whose health insurance on February 10, 2012, ***did cover*** **contraceptives** are ***not*** **eligible for the safe harbor** and are subject to the contraceptives mandate as of plan years beginning on or after August 1, 2012.

What religious accommodation is promised for parachurch ministries?

- The administration says it will develop a new regulation with this central feature:
  - the ministry can buy insurance that does not include contraceptives coverage—*however*
  - that organization's insurer automatically will provide its employees and their dependents no-cost coverage of the contraceptives (supposedly without any charge to the employer).
- As of March 16, 2012, the administration has only published a set of possibilities, asking for public comment. It says that it intends to develop a new or amended regulation to apply to plan years starting on or after August 1, 2013. *There exists no actual regulation providing an accommodation for parachurch ministries.*
- Unanswered questions include:
  - Will all parachurch organizations be eligible for the accommodation, including those whose health insurance in the past covered all or some FDA-approved contraceptives?
  - Will insurers agree to pay for contraceptives without charging the employer?
  - Will the arrangement made for self-insuring organizations adequately deal with their conscience concerns?
  - How will the government determine that an employer's religious objection is sincere?
  - Is it an acceptable that the employees of objecting ministries and their dependents automatically will be given full contraceptives coverage by the insurers?

Note: No matter what the accommodation is, the problem remains that the federal government has created a two-class system of religious organizations: churches, which are religious enough to be exempt, and parachurch organizations, which receive only a lesser degree of religious-freedom protection.

WHAT CAN YOUR MINISTRY DO ABOUT YOUR HEALTH INSURANCE?

- **Keep your grandfathered plan**, if it is acceptable, by avoiding all significant plan changes. Consider seeking the advice of a benefits consultant before making changes.
- **Drop your current employee health insurance plan:**
  - If fewer than 50 FTEs, you can drop the insurance without penalty (but the health insurance your employees will buy is subject to the mandate anyway).
  - If 50 or more FTEs, you'll be penalized for dropping the insurance (and the only health insurance your employees can buy is subject to the mandate).
- Ask a benefits consultant to help you **construct a self-insurance plan** that does not cover abortifacients and/or contraceptives (however, both the ministry and your employees may be penalized for the non-conforming health insurance).
- **Switch to a health-sharing ministry** (but your employees will have to join the ministry individually, and not all may qualify).

WHAT CAN YOU DO TO ADVOCATE AGAINST THE MANDATE/EXEMPTION?

- **Call Congress.** Press your Senators and your Representative to adopt legislation that extends the exemption to all religious organizations or that modifies or repeals the contraceptives mandate. Consider advocating for legislation that will override the mandate for all employers and individuals with a religious objection to the required coverage.
- **Comment.** Through June 19, 2012, you can comment on the various ideas for an accommodation for parachurch organizations that have been proposed by the administration. See the "To Comment" section below for details and suggestions.
- **Sue the federal government.** Join an existing lawsuit or initiate a new lawsuit. The Becket Fund for Religious Liberty (contact Kyle Duncan, kduncan@becketfund.org) and the Alliance Defense Fund (contact Greg Baylor, gbaylor@telladf.org) are offering pro bono legal help to organizations that decide to sue.
- **Sign the Letter to HHS Secretary Kathleen Sebelius** from faith-based organizations to protest the federal government's presumption that parachurch ministries are second-class religious organizations. See the "Letter" section below to sign on.
- **Speak publicly** about the mandate/narrow exemption and its impact on your organization—for example, will you stop providing employee health insurance? Will you be subject to penalties? Equip your board and staff to speak up. Write to your local newspaper, go on local radio shows, comment on internet stories. Help the public to understand the religious freedom issues at stake.

Research your insurance. Does the health insurance you currently offer your employees pay for abortion-inducing drugs and other contraceptives? **Research your insurance and, if it does, take action to remove that coverage as soon as possible.** If you regard the coverage as immoral, stopping it as soon as you become aware of it is the way of integrity. Stopping it also puts your organization in a stronger position to challenge the contraceptives mandate.

Your right to speak up. A 501(c)(3) organization may speak up on regulatory matters such as the contraceptives mandate but may not devote a substantial part of its activities to attempting to influence specific legislation. http://www.irs.gov/charities/article/0,,id=163392,00.html

For further information on the contraceptives/abortifacients mandate and on protecting the religious freedom of faith-based service organizations, **go to**:

- Institutional Religious Freedom Alliance: www.irfalliance.org
- Christian Legal Society: www.clsnet.org
- Becket Fund for Religious Liberty: www.becketfund.org
- National Association of Evangelicals: www.nae.net
- US Conference of Catholic Bishops: www.usccb.org

This document does not constitute legal advice.

To Comment

To comment, go to www.regulations.gov, enter "CMS-9968-ANPRM" in the search box, and click on the "Submit a comment" link in the right-hand column.

To find the March 16 Advance Notice of Proposed Rulemaking: Certain Preventive Services Under the Affordable Care Act, go here: http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/pdf/2012-6689.pdf

To comment effectively, focus on the issues you are most concerned about. State your interest: you write as the leader or a board member of an affected faith-based organization, or as a citizen and believer concerned to protect religious freedom and a flourishing and diverse civil society, or . . . If the mandate and its narrow exemption directly affects you (because you lead a faith-based social-service, education, or health organization or donate to or volunteer for one), explain clearly what problems have been caused for the organization. Encourage your colleagues (other staff, board members, church members) also to comment.

Points you might make:

- It is not acceptable to create in federal law two classes of religious organizations: churches, which are considered religious enough to receive an exemption; and faith-based service organizations, which are not afforded the same exemption but only a lesser "accommodation." Even the best designed accommodation cannot overcome the grave flaw of writing into federal law a view of religious organizations that is flawed by treating worship of God as religiously more important than service to neighbors as commanded by God.

- The harm of creating two classes of religious organizations in federal law is not overcome by stating that no precedent is intended nor by denying any implication that faith-based services are less sincere or more secular. The harm has already been done by putting into the federal regulations the narrow exemption and by promising only a lesser "accommodation" for faith-based service organizations.

- The nature of the "accommodation" is unacceptable. The promise was that religious organizations can buy health insurance that does not cover objectionable contraceptive procedures and drugs, while the insurer will offer those same procedures and drugs for free to the objecting religious organization's employees who desire them. There are multiple flaws: (a) The ANPRM states that the insurer will automatically give the contraceptives/abortifacients coverage to the employees, whether or not they desire it (p. 16505). (b) Those employees will gain contraceptives coverage by virtue of the fact that their employer provides health insurance—this is a simple cause and effect. (c) The contraceptives will have to be paid for in some way—how else than through the employer premiums? (d) Notwithstanding the "accommodation," a religious employer with a religious objection to the mandated contraceptives is prevented from offering what it desires: employee health insurance that provides positive coverage without including religiously objectionable drugs and procedures.

- Employees should be able to decline contraceptives coverage for their minor children, or to be informed in advance of any requests by them for contraceptive products or services.

- The two-class scheme rewards those religious organizations focused on activities inside steepled buildings on the corner while punishing religious organizations that engage in service outside the walls of worship buildings. The scheme honors acts of worship while burdening those whose faith leads them to service in our common life. Among its many troublesome

aspects, the scheme moves us further toward an unconstitutional, unhistorical, and unhealthy naked public square.

- Faith-based service organizations ought to be included in the "religious employer" exemption by redefining that exemption to include all religious organizations, not only churches, so that those providers with a religious objection to some or all of the contraceptive drugs and services can exclude those from its employee health insurance. A broadened exemption must not require a faith-based service organization to be associated with or controlled by a church or denomination in order to be counted as a "religious employer." Faith-based ministries and schools not formally connected to a denomination or church are common in our society.

- Any "accommodation" or expanded exemption must be available to all faith-based service organizations, not only those eligible for the "temporary enforcement safe harbor" or that on some arbitrary date in the past had health insurance coverage that excluded some or all FDA-approved contraceptive procedures and drugs.

LETTER

To add your name to this letter, contact the Institutional Religious Freedom Alliance by May 31, 2012, with your name, title (could be board member), and organization (info@irfalliance.org**). Put "HHS letter" in the Subject line. Thank you.**

June 4, 2012

The Honorable Secretary Kathleen Sebelius
The U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Sebelius:

As leaders of faith-based service organizations, we write to express our grave concern about the two-class concept of religious organizations that has been created by your department and other federal agencies in connection with contraceptives/abortifacients mandate of the health insurance regulations for preventive services for women.

Our organizations, and we ourselves, do not all share the same view of the moral acceptability of the contraceptive drugs and services that comprise the contraceptives/abortifacients mandate. We have varied views on the adequacy of the "accommodation" that the administration has promised for religious organizations with deep objections to the contraceptives mandate but that are not eligible for the narrow religious employer exemption. Our organizations are involved in different areas of service. We belong to different faiths.

But we are united in opposition to the creation in federal law of two classes of religious organizations: churches—considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations—outwardly oriented and given a lesser degree of protection. It is this two-class system that the administration has em-

bedded in federal law via the February 15, 2012, publication of the final rules providing for an exemption from the mandate for a narrowly defined set of "religious employers" and the related administration publications and statements about a different "accommodation" for non-exempt religious organizations.

And yet both worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that "pure religion" is "to look after orphans and widows in their distress" (James 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes true religion and authentic ministry.

This two-class scheme rewards those religious organizations focused on activities inside steepled buildings on the corner while punishing religious organizations that engage in service outside the walls of worship buildings. The scheme honors acts of worship while burdening those whose faith leads them to service in our common life. Among its many troublesome aspects, the scheme moves us further toward an unconstitutional, unhistorical, and unhealthy naked public square.

The administration has said that the narrow definition of "religious employer" is not intended to be a precedent in federal law and that the two-class system is not meant to disparage the mission or motivation of non-exempt religious organizations. Yet these are only intentions, whereas the narrow definition of religious employer and the narrow scope of the exemption have been inserted, despite widespread protest, into actual federal law. We note, as well, that the administration itself has justified the narrow exemption by its use in the insurance rules of several states. The presence of the narrow exemption in federal regulations can only make it more likely to be used in additional federal policies, notwithstanding any current promises.

Secretary Sebelius, we believe that there is one adequate remedy: eliminate the two-class scheme of religious organization in the preventive services regulations. Extend to faith-based service organizations the same exemption that the regulations currently limit to churches. This would bring the preventive services regulations into line with the long-standing, respected, and court-tested provisions of Title VII of the 1964 Civil Rights Act [§§702, 703(e)] which provide a specific employment exemption for every kind of religious organization, whether they be defined as "a religious corporation, association, educational institution, or society."

Secretary Sebelius, please restore the federal government's full respect for faith-based educational, social-service, and health organizations as authentic vehicles for religious service.

Sincerely,

Stanley Carlson-Thies, President, Institutional Religious Freedom Alliance
[other signer] [other title] [other organization]
[other signer] [other title] [other organization]
[other signer] [other title] [other organization]

SOURCES

- The current regulation, discussion of objections to the narrow exemption, and the promise of a second regulation for parachurch ministries: 77 *Federal Register* 8725 (Feb. 15, 2012). http://www.gpo.gov/fdsys/pkg/FR-2012-02-15/pdf/2012-3547.pdf

- The March 16th additional details on the proposed "accommodation": "Advance notice of proposed rulemaking (ANPRM): Certain Preventive Services Under the Affordable Care Act," as published in the Federal Register: 77 *Federal Register* 16501 (March 21, 2012). http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/pdf/2012-6689.pdf

- The "safe harbor" document: HHS Health Bulletin, "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code," Feb. 10, 2012. http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf

- HRSA Guidelines: Health Resources and Services Administration, "Women's Preventive Services: Required Health Plan Coverage Guidelines." http://www.hrsa.gov/womensguidelines/