August 9, 2011

The Honorable Timothy F. Geithner
Secretary of the Treasury
REG-120391-10
Internal Revenue Service
Washington, DC 20044
via http://www.regulations.gov

The Honorable Hilda L. Solis
Secretary of Labor
RIN 1210-AB44
U.S. Department of Labor
Washington, DC 20210
via E-OHPSCA2713.EBSA@dol.gov

The Honorable Kathleen Sebelius
Secretary of Health and Human Services
CMS-9992-IFC2
Department of Health and Human Services
Baltimore, MD 21244-8010
via http://www.regulations.gov

Dear Secretary Geithner, Secretary Solis, and Secretary Sebelius:

This letter presents comments of The Heritage Foundation[1] ("Foundation") on the Interim Final Rules with Request for Comments on "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act" published jointly by your departments in the *Federal Register* (76 *Fed. Reg.* 46621, August 3, 2011). The interim final rules, which were effective on August 1, 2011, provide a limited religious exemption from otherwise applicable rules that require group health plans offered by employers to include no-cost coverage for contraceptive services. The limited religious exemption is too narrow to accommodate properly the interests protected by First Amendment freedoms. For the reasons set forth in this letter and in the attached memorandum,[2] the

[1] The Foundation is a District of Columbia nonprofit corporation that is recognized as exempt under section 501(c)(3) of the Internal Revenue Code, with the mission "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." The Foundation submits these comments as permitted by law (5 U.S.C. 553(c), 2 U.S.C. 1602(8)(B)(x), and 26 U.S.C. 4911(d)(2)(E)).

[2] Charles A. Donovan, "HHS's New Health Guidelines Trample on Conscience," Heritage *Web Memo* No. 3332 (August 2, 2011). Although this letter addresses only the "religious employer" exemption in the interim final rules in light of the right of religious liberty, the memorandum points out that "the HHS guidelines reinforce the mistaken notion that freedom of conscience either does not exist or is not worthy of protection unless it is religiously motivated or expressed within a strictly religious institution." Thus, HHS should consider adding a "conscientious objection" exemption from the interim final rules for such groups.

Foundation requests that the Department of Health and Human Services (HHS) revise its interim final rules to broaden the exemption as set forth below and make any necessary conforming changes in departmental regulations.

The First Amendment protects the free exercise of religion, and the Religious Freedom Restoration Act provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. The HHS interim final rules that require employers to include, in the group health plans they offer employees, no-cost coverage for contraceptive services is a rule of general applicability, but the rules substantially burden the exercise of religion of a religious employer whose religion does not permit contraception, and the rules neither further a compelling governmental interest nor are the least restrictive means of furthering such an interest. The government cannot and should not compel a religious employer to make available to its employees group health insurance plans that cover services (here contraception) whose sole purpose is to facilitate conduct prohibited by that religion (here the prevention of conception of human life through the use of contraception).

For the reasons set forth above and in the attached memorandum, the Foundation urges HHS to amend section 147.130(a)(1)(iv) of title 45 of the Code of Federal Regulations by:

(1) in sub-subparagraph (A), striking "may establish exemptions" and inserting in lieu thereof "shall establish exemptions"; and

(2) striking sub-subparagraph (B) and inserting in lieu thereof:

"(B) For purposes of this subsection, a 'religious employer' is an organization that meets all of the following criteria:

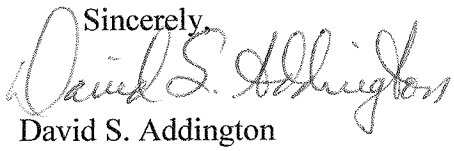
"(1) the organization is organized and operated not for profit; and

"(2) an officer or the equivalent of the organization files with the Secretary of Health and Human Services a written certification that, because of a sincere exercise of religion, the organization will not offer to its employees group health plans with coverage for contraceptive services."

The above-recommended revision of section 147.130 would mandate exemption of religious employers whose sincere exercise of religion dictates that they not offer to their employees group health plans with coverage for contraceptive services, such as pro-life churches, religious orders, or religious providers of charitable services. The False Statements Act (18 U.S.C. 1001) provides a safeguard against false certifications from an organization to obtain "religious employer" status to which the organization is not entitled. Nothing in the recommended revision would infringe upon the liberty of employees of a religious employer to obtain contraceptive services, to obtain insurance covering contraceptive services from other than their religious employer, or to seek employment with other than a religious employer.

The Foundation urges the Department of Health and Human Services to revise section 147.130 of title 45 of the Code of Federal Regulations as set forth above, to protect religious liberty.

Sincerely,



David S. Addington
Vice President for Domestic and Economic Policy

WebMemo

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August 2, 2011

HHS's New Health Guidelines Trample on Conscience

Charles A. Donovan

The Department of Health and Human Services' (HHS) new preventive services guidelines are a disaster for freedom of conscience and a fresh illustration of the political hammerlock "reproductive rights" organizations have on the Obama Administration.

Forcing private insurance plans to pay for morally controversial offerings such as contraception, sterilization, and abortifacients raises obvious questions regarding freedom of conscience. Federal law requires respect for the conscience of health care providers on many of these issues. Unfortunately, the new HHS guidelines show disrespect for freedom of conscience.

Background. The Obamacare legislation adopted in March 2010 included an amendment proposed by Senator Barbara Mikulski (D–MD) that required private insurance coverage of women's "preventive services" on a mandatory and preferential basis—without deductibles, coinsurance, or patient co-pays. The amendment did not define the particular "preventive services" to be covered, raising immediate concerns that it was intended, or would be interpreted, to cover drugs, devices, and procedures that would infringe on the moral and religious beliefs of institutions and individuals.

The amendment provided an avenue around the already-existing process for identifying effective treatments and preventive services through the U.S. Preventive Services Task Force. Planned Parenthood and other groups lobbied the Institute of Medicine (IOM) for months, urging it to include contraceptives, abortifacients, and sterilization as mandatory benefits with no cost-sharing.

The IOM fully complied with Planned Parenthood's wishes, recommending that "preventive services" encompass not only diabetes and HIV prevention but drugs, devices, and procedures that can prevent conception and terminate pregnancy. Treating organ- and tissue-destroying diseases as equivalent to the natural processes involved in begetting and bearing a child is a gross distortion of reality. In addition to the morally debatable aspects of these services, there are social questions concerning them that continue to divide the public, including the provision of these drugs and devices to minor children and issues of conscience for providers, insurers, and the insured alike. But these concerns did not trouble HHS; the new guidelines make first-dollar coverage of these items mandatory for all health insurance policies to be issued in the United States after August 1, 2012.

Not Much Protection. The new HHS guidelines contain a conscience protection, but it is offensively narrow. Only "certain religious employers" qualify for the protection, and the guidelines make clear that a religious employer is only one that:

- Has the inculcation of religious values as its purpose;

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http://report.heritage.org/wm3332

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There are at least four serious problems with this "protection" for conscience.

1. First, it protects only an entity that has the "inculcation of religious values as its purpose." This limitation reinforces the erroneous idea that only entities formed to inculcate religious values deserve protection for conscience. If this requirement is interpreted to apply only to traditional houses of worship, seminaries, and similar institutions, for example, it might exclude a wide range of religious institutions that provide a variety of socially beneficial services that do not include the inculcation of religious values. This reality is so obvious that the only reasonable conclusion is that the Obama Administration has purposefully targeted personal and institutional conscience on morally controversial issues such as sterilization, contraception, and abortifacients.
2. Second, the HHS "protection" applies only to an entity that "primarily serves persons who share its religious tenets." On its face, this requirement appears to deny protection to certain religious nonprofits—particularly certain social service agencies—that offer their assistance to needy people without regard to religious affiliations or creed. Indeed, for many of these agencies, the mandate to assist all in need and not impose a religious test on recipients is itself a core part of their religious and charitable mission. Providing service without respect to creed is also sometimes a condition of eligibility for public funds for social services.[1] Accordingly, this requirement could force charities and other organizations to make an impossible choice: stop serving people without regard to creed or abandon employee health insurance plans. The issue is so obvious that it is impossible to view the new guideline as anything less than a premeditated squeeze on conscience.
3. Third, the HHS "protection" fails to protect entities that fulfill a religiously inspired social mission but do not staff primarily with coreligionists. The protection might not apply, for example, to church schools, hospitals, and health plans that do not "primarily" employ members of their religion but nevertheless consider their mission to be a natural extension of their faith traditions and communities.
4. Fourth, the new HHS guidelines reinforce the mistaken notion that freedom of conscience either does not exist or is not worthy of protection unless it is religiously motivated or expressed within a strictly religious institution. But the conscience of an individual or group opposed to abortion or any other practice whose medical character is debatable is also worthy of consideration, as is the operation of conscience for the many men and women who bring their moral convictions to bear on their places of work, both for-profit and nonprofit. The most obvious groups affected by this omission in the guidelines are pro-life nonprofit organizations that are not connected to any church or religious entity—including public policy groups that oppose abortion and social service agencies that provide alternatives to it.

Make a Stand for Conscience. Certain federal conscience protections have recognized both religious and moral objections to certain controversial procedures, as shown by the text of the 1973 Church Amendment, which protects the conscience rights of individuals and entities that receive certain federal funds. The HHS guidelines should have met this same standard.

For these reasons and more, the HHS guidelines released on August 1 deserve intense scrutiny inside Congress and out. Social conservatives should make a stand for conscience protections for all people and institutions—religious and non-religious alike.

—Charles A. Donovan is Senior Research Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation.

1. See U.S. Department of Health and Human Services, "Grants & Funding—FAQs," at *http://answers.hhs.gov/categories/65* (August 2, 2011).