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September 30, 2011

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-9992-IFC2
P.O. Box 8010
Baltimore, MD 21244-8010

Re: Interim Final Rules on Preventative Services File Code CMS-9992-IFC2

Dear Sir or Madam:

The Becket Fund for Religious Liberty submits the following comments on the Interim Final Rule on Preventative Services published in the Federal Register on August 3, 2011 (76 Fed. Reg. 46621) (“HHS mandate” or “the mandate”).¹

Introduction

The Becket Fund is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions. It has successfully represented clients from a wide variety of religious traditions—including Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and Zoroastrians—in religious liberty litigation around the world.

The Becket Fund takes no position on the morality of any particular medical procedure (whether abortion, sterilization, contraception, stem-cell research, or euthanasia), though the

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¹ The Becket Fund’s comments do not pertain to the entire list of preventative services, but only to the requirement that health plans cover contraceptives, sterilization, and related education and counseling. Our references to the HHS mandate and the HHS exemption should be taken as applying to all three departments that issued the interim rule: HHS, the Department of Labor, and the Department of the Treasury. Any relief requested here from HHS is sought from all three departments.

morality of such procedures is a profoundly important question. Rather, The Becket Fund focuses on a single issue: the basic human right of every individual to follow his or her conscience, and the corollary right of religious institutions to live in accordance with conscience. That right has not only been protected in the health care context ever since *Roe v. Wade*,² but also has a long and storied place in American history—from the conscientious refusal of 18th-century Quakers to bear arms, to the conscientious refusal of 20th-century Jehovah’s Witnesses to pledge allegiance to the American flag.

Last January, The Becket Fund expressed our concern that “without a robust exemption, mandated coverage for prescription contraceptives and sterilization would pose an unprecedented threat to the rights of conscience of religious employers and others who have religious or moral objections to these procedures.”³ Unfortunately, the exemption adopted by the government is far from robust—indeed, it barely exists at all. Because the HHS mandate—especially in light of the extremely narrow exemption for “religious employers”—represents an unprecedented imposition on rights of conscience, The Becket Fund strongly opposes it.

Comments of The Becket Fund for Religious Liberty

1. The HHS mandate is remarkably broad.

Under the Affordable Care Act of 2010 (“the ACA”),⁴ all employer health care plans must provide—at no cost to the employee—certain preventative services for women.⁵ The ACA itself does not specify which preventative services must be covered, but deferred that decision to the Health Resources and Services Administration (“HRSA”), an agency of the Department of Health and Human Services (“HHS”).

On August 1, 2011, HHS, under the direction of Secretary Kathleen Sebelius, issued an interim final rule stating that, beginning in August 2012, employer health care plans must cover all preventative services listed in HRSA’s guidelines.⁶ The

² See Letter from The Becket Fund to HHS re: Rescission Proposal Comments (April 8, 2009) (“BF Rescission Comments”), available at <http://www.becketfund.org/wp-content/uploads/2011/09/Rescission-Proposal-Becket-Fund-Comments.pdf>.

³ Eric N. Kniffin, The Becket Fund, Remarks to IOM Committee on Preventative Services for Women, January 12, 2011. From the author’s notes.

⁴ The Affordable Care Act is actually two laws: the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010).

⁵ 42 U.S.C. § 300gg-13(a)(4).

⁶ 76 Fed. Reg. 46623 (Aug. 3, 2011).

HRSA guidelines require plans to pay for “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”⁷

The HHS mandate is unprecedented in federal law, and broader than any state contraception mandate to date.⁸ On its face, the mandate covers sterilization and “all FDA-approved contraceptives.” However, “FDA-approved contraceptives” includes a number of drugs that scientists believe interfere with a human embryo, both before and after implantation in the uterus—most notably Plan B and Ella. Many Americans believe that such drugs are more accurately called abortifacients. Thus, the mandate infringes on the rights of organizations with conscientious objections to sterilization, contraception, and abortion.

2. The exemptions to the HHS mandate are vanishingly small.

The HHS mandate would be less remarkable if only it came accompanied with the sort of accommodations for conscience that have been the custom and pride of our nation since its birth. However, this is not the case: beginning in August 2012, *virtually every employer regardless of conscientious objection* will be required to fund contraceptives, sterilizations, and drugs that many believe are chemical abortions.

After receiving voluminous comments asking them to consider the burden this mandate would present for religious organizations, HHS did create an exemption for so-called “religious employers.” But, in doing so, HHS chose the stingiest definition of a “religious” organization ever to appear in federal law. Under the regulations, the only organizations religious enough to receive an exemption are those that meet *all* of the following criteria:

- (1) its purpose is the inculcation of religious values,
- (2) it employs “primarily” persons who share the organization’s religious tenets;
- (3) it serves “primarily” persons who share the organization’s religious tenets; *and also*
- (4) it qualifies under the IRS code as a church or religious order.⁹

⁷ HRSA, *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, available at <http://www.hrsa.gov/womensguidelines/>.

⁸ For an overview of state contraception mandates and accommodations, see National Conference of State Legislatures, *Insurance Coverage for Contraception Laws* (updated August 2011), available at <http://www.ncsl.org/default.aspx?tabid=14384>.

⁹ 76 Fed. Reg. 46623 (Aug. 3, 2011).

This exemption is of little solace to religious employers for two primary reasons. First, because the regulation merely states that HRSA “*may* establish exemptions,”¹⁰ it is possible that the federal government will decide not to provide any religious exemptions at all.

Second, HRSA has this discretion with respect to only a vanishingly small class of religious employers. Under this definition, no religious college or university we know of would qualify, because these institutions exist not just to inculcate religious values, but also to teach students. Further, no homeless shelter, soup kitchen, or adoption agency we know of would qualify, because these organizations exist to serve anyone in need, not just those that profess a certain religious creed.

The only other exemption available under the ACA is for “grandfathered” plans. However, here too the law is terribly misleading. Under the new regulations, any one of a number of changes, *even if immaterial*, will cause a plan to lose its grandfathered status.¹¹ Thus, although President Obama promised throughout the health reform debate that “if you like your health plan, you can keep it,” religious organizations will soon be forced to abandon health plans that reflect their deepest convictions unless they: (1) stopped modifying their health care plans nearly a year and a half *before* the HHS mandate was announced; *and* (2) henceforth avoid any triggering condition. These conditions, of course, may have already been violated, will become increasingly difficult to meet, and in any case are unacceptable.

The final alternative for an employer with moral objections to the HHS mandate is to stop providing health care benefits altogether. But this too places religious employers in an unacceptable double bind: either they must pay for contraception, sterilization, and what they understand are abortifacients; or they must stop providing their employees with health care. The first option forces religious employers to violate their moral convictions. The second option forces them to create enormous hardships for their co-laborers, some of whom have very limited means to purchase health insurance on their own.

Further, the ACA *punishes* religious employers that refuse to violate their conscience with a *fine*. For example, a charitable organization with 100 employees will have to pay the federal government *\$140,000 per year* for the “privilege” of not underwriting medical services it believes are immoral.¹²

¹⁰ 76 Fed. Reg. 46626 (Aug. 3, 2011).

¹¹ See 2010-2 C.B. 186 (I.R.S. 2010); 75 Fed. Reg. 34538 (June 17, 2010).

¹² See Nat’l Fed’n of Indep. Business, *The Free Rider Provision: A One-Page Primer*, available at <http://www.nfib.com/Portals/0/PDF/AllUsers/Free%20Rider%20Provision.pdf>.

3. The HHS mandate is inconsistent with our nation's longstanding commitment to rights of conscience.

Our nation has a proud tradition of providing protections for conscientious objectors.¹³ Moreover, our greatest leaders have consistently stood up for rights of conscience even in the face of the most compelling state interests:

- General Washington excused Quakers from compulsory militia service in the Revolutionary War, encouraging them to return home to their families. *Id.* at 7.
- President Lincoln directed his War Department to accommodate those with religious objections to taking up arms in the Civil War. He permitted them instead to serve in hospitals or other community service (where at that time they were of course free to serve their fellow man in good conscience). *Id.* at 8.
- Amidst the darkest days of World War II, our Supreme Court held that government could not compel citizens to pledge allegiance to our nation's flag. *Id.* at 9.

Further, the need to respect rights of conscience in the health care context has been a matter of strong bipartisan consensus. Almost before the ink dried on *Roe v. Wade*, Congress in 1973 enacted the first "Church Amendment," which promised that the government would not pressure a health care professional to participate in a sterilization or abortion against her conscience.¹⁴ Another federal statute prohibits the recipients of certain federal research funds from taking adverse employment action against any health care practitioner who conscientiously refuses to perform or assist in "*any* lawful health service or research activity."¹⁵ Additionally, the Federal Employees Health Benefits Program exempts religiously affiliated health plans from any contraceptive mandate.¹⁶

The HHS mandate, as it now stands, flies in the face of our nation's commitment to respecting rights of conscience, as represented in the foregoing examples.

¹³ *See, generally*, BF Rescission Comments at 7-9.

¹⁴ *Id.* at 2, citing 42 U.S.C. § 300a-7(c)(1).

¹⁵ *Id.* at 3, citing 42 U.S.C. § 238n.

¹⁶ Sec. 728 of Title VII of Division C (Financial Services and General Government Appropriations Act) of the Consolidated Appropriations Act, 2010, Pub. L. No. 111-117. ("any plan . . . may not subject any individual to discrimination on the basis that the individual refuses to prescribe or otherwise provide for contraceptives because such activities would be contrary to the individual's religious beliefs or moral convictions.")

Further, we believe the mandate violates rights guaranteed by the United States Constitution and federal law.

In sum, if our country's greatest leaders found fit to accommodate conscientious objectors even when the nation's very existence was at stake, how much more should the government accommodate conscientious objectors under these circumstances, where nearly every employer *already* provides coverage for prescription contraceptives?¹⁷ The government does not have a compelling interest in coercing religious organizations into funding medicines and procedures against their conscience. Our best traditions, our laws, and common sense all demand that the HHS reconsider this drastic imposition on rights of conscience.

4. HHS can easily avoid this confrontation by issuing a robust exemption.

As it turns out, this conflict is entirely unnecessary. A robust exemption from the HHS mandate would be a workable way for the federal government to advance both its interest in women's health and its commitment to respecting the legitimate autonomy and convictions of religious institutions.

In particular, expanding the existing religious employer exemption into a religious institution exemption would eliminate the conflict entirely. Specifically, the exemption should be expanded to include nonprofit charitable religious institutions other than churches and religious orders. It should also exempt institutions that have religious leadership and identity, but that do not necessarily hire, teach, or serve predominantly people of their own faith tradition. In addition, the exemption should be expanded to cover student health plans to accommodate religious colleges and universities. These changes to the existing exemption would also help carry out the purposes of the Affordable Care Act by ensuring that employees and students can remain part of their existing healthcare plans.

We therefore respectfully ask that the Department reconsider the scope of the Affordable Care Act regulations to accommodate the call of conscience and expand the exemption for religious institutions.

¹⁷ Nine in ten employer-based insurance plans cover a full range of prescription contraceptives, which is three times the proportion that did so just a decade ago. The Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010), available at http://www.guttmacher.org/pubs/fb_contr_use.html (citing Sonfield A et al., U.S. insurance coverage of contraceptives and the impact of contraceptive coverage mandates, 2002, *Perspectives on Sexual and Reproductive Health*, 2004, 36(2):72-79).

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Conclusion

The Becket Fund urges HHS to reconsider current regulations which will require nearly all religious organizations to fund sterilizations and all FDA-approved contraceptives, regardless of their conscientious objections. We call on the Administration to adopt a robust exemption to the HHS mandate that honors our nation's long-standing commitment to protecting the rights of conscientious objectors.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric N. Kniffin". The signature is written in a cursive style with a large initial "E".

Eric N. Kniffin
Legal Counsel
The Becket Fund for Religious Liberty