To: The Department of Health and Human Services  
From: Mandi Campbell, Director of Public Policy, Liberty Counsel Action  
Date: May 10, 2012  
Re: HHS Final Rule, CMS-9992-F  

Introduction

August 1, 2011, the Department of Health and Human Services (HHS) issued guidelines, in accordance with the Patient Protection and Affordable Care Act, mandating that all health plans cover FDA-approved contraception and sterilization procedures without cost sharing and also issued an interim final rule that provided a narrow exemption to that mandate. The exemption applies only to group health insurance plans maintained by churches, their integrated auxiliaries, and conventions or associations as well as to the exclusively religious activities of any religious order that also “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; [and,] (3) primarily serves persons who share its religious tenets.” February 10, 2012, HHS issued a final rule, which made no changes to the interim final rule, and issued guidance that announced a one year delay in implementation of the mandate on religious employers that object to offering contraception and sterilization to their employer-sponsored health insurance plans. Thus, all religious employers who do not meet the exemption requirements and are not grandfathered in shall provide health insurance that covers all contraceptives approved by the Food and Drug Administration (FDA), including abortion-inducing drugs like Ella and Plan B, and sterilization procedures beginning August 1, 2013.

There are multiple problems with the HHS mandate and its associated, narrow exemption, two of the most important problems are that the mandate and exemption violate the Religious Freedom Restoration Act and they inequitably treat similarly situated religious organizations, creating bad public policy that deviates from longstanding policy regarding public funding of elective abortions.

I. The Final Rule Violates the Religious Freedom Restoration Act, as is not the Least Restrictive Means to Further a Compelling Government Interest.

The Final Rule, in reference to the exemption, states its “approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the least restrictive means to further a compelling government interest.” The Final Rule cites “public health and
gender equity goals” as the compelling interests of the federal government and further discusses 
women’s “unique health care needs and burdens,” and the government’s attempt to improve the 
social and economic status of women “by reducing the number of unintended and potentially 
unhealthy pregnancies … allowing women to achieve equal status as healthy and productive 
members of the job force.” However, by admission of the Final Rule, “[t]wenty-eight States now 
have laws requiring health insurance insurers to cover contraceptives” thus raising a question as 
to whether the federal government can actually have a compelling interest in also such coverage.

Additionally, while the Final Rule cites an interest in public health, the Supreme Court has found 
that even when the government’s interests are health interests, its interests do not indubitably 
satisfy the requirement that the government’s interests be compelling. Gonzales v. O Centro 

While the government may have noble goals in attempting to preserve the health and equality of 
women, these are not compelling interests and will not satisfy the Court, which looks “beyond 
broadly formulated interests justifying the general applicability of government mandates and 
scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious 
claimants.” Gonzales v. O Centro Espirita, 546 U.S. 418, 431 (2006). In one case, the Supreme 
Court explained that the State needed to show how its “admittedly strong” or “paramount” 
interest “would be adversely affected by granting an exemption….” Wisconsin v. Yoder, 406 
U.S. 205, 236 (1972). Thus, even if the government can prove a compelling interest, the Final 
Rule must provide an adequate exemption – the Final Rule must be the least restrictive means of 
furthering the government interest. The Final Rule states the following:

The religious employer exemption in the final regulations does not undermine the 
overall benefits… A group health plan (and health insurance coverage provided in 
connection with such a plan) qualifies for the exemption if, among other 
qualifications, the plan is established and maintained by an employer that 
primarily employs persons who share the religious tenets of the organization. As 
such, the employees of employers availing themselves of the exemption would be 
less likely to use contraceptives even if contraceptives were covered under their 
health plans.

In accordance with the Final Rule, group health plans established and maintained by some 
religious employers are not required to cover contraceptive services. The problem is that the 
Final Rule narrowly defines “religious employer.”

The amended interim final regulations specified that, for purposes of this 
exemption, a religious employer is one that: (1) Has the inculcation of religious 
values as its purpose; (2) primarily employs persons who share its religious tenets; 
(3) primarily serves persons who share its religious tenets; and (4) is a non-profit 
organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) 
of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches,
their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.

The Final Rule’s admission that “employees of employers availing themselves of the exemption would be less likely to use contraceptives even if contraceptives were covered under their health plans” proves that the requirements that a religious employer have “the inculcation of religious values as its purpose, … primarily serve[] persons who share its religious tenets, and [be] a non-profit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code” impose unnecessary restrictions on the exemption. The only questions should be (1) whether the employer has religious objections to providing coverage for all contraceptives that are “FDA-approved” and (2) whether the employer “primarily employs persons who share its religious tenets.” Any additional requirements for qualifying for an exemption as a religious employer unnecessarily imposes a burden on religion and is not the least restrictive means of furthering the government’s interest.

Not only does the HHS’s justification for the religious exemption undermine the criteria it sets forth for qualifying for said exemption, but HHS also undermines its efforts by touting its attempt to help religious employers against their will. The Final Rule cites the “significant cost savings to employers from the coverage of contraceptives,” stating “it would cost employers 15 to 17 percent more not to provide contraceptive coverage.” However, if religious employers are willing to incur the additional costs of not providing contraceptive coverage in order to preserve their consciences and their fidelity to their faith, the government should mandate contraceptive coverage. Requiring religious employers to compromise their beliefs in order to force religious employers to save their own money also imposes an unnecessary burden on religion.

II. Providing Exemptions for Some Religious Organizations and Not Others Inequitably Treats Religious Organizations and is Bad Public Policy.

HHS only provides an exemption for “churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order.” This exhibits a gross misunderstanding of the Christian church. The Church is the body of Christian believers, not simply organizations or institutions and the Church is not confined to the non-profit sector either. Religious people who object to the provision of abortion-inducing drugs, like Plan B and Ella, certified by the FDA as contraceptives, operate many different kinds of organizations and enterprises. While there may be a foreseeable accommodation for “non-exempted, non-profit religious organizations with religious objections to [coverage of contraceptive services],” including those with “self-insured group health plans,” for many religious objectors, there is no foreseeable exemption or accommodation.

However, even this foreseeable accommodation, in which issuers are required to “offer insurance without contraception coverage to such [religious] employer[s] (or plan sponsor[s]) and simultaneously to offer contraceptive coverage directly to the employers’ plan participants (and their beneficiaries) who desire it, with no cost-sharing” undermines the employers and will likely result in unnecessary employment disputes between employers who expect their employees to
share their objections to contraceptives and employees who seek coverage of contraceptives directly from the issuer in accordance with this accommodation.

Additionally, the requirement that exempted organizations “primarily serve[] persons who share [their] religious tenets” effectively excludes those religious organizations that have the primary purpose of serving their communities, which may or may not share the employers’ religious tenets. This causes disparate treatment between similarly situated organizations that have similar policies with regard to their employees, but who serve different demographics of a community. In fact, HHS’s refusal to grant an exemption to religious employers because of those who the religious organizations serve may cause many faith-based service organizations to close their doors, as in a choice between violating his religious convictions regarding the provision of abortion-inducing drugs and serving the public, a religious employer will likely choose fidelity to his convictions. A requirement that religious employers primarily serve people who agree with their religious convictions seems to be an overt and deliberate attack on faith-based service organizations, which will ultimately have a detrimental impact on communities throughout the country.

Lastly, it is illogical to differentiate between institutions that meet certain criteria and individuals working for institutions that meet those same criteria. While group plans provided by churches and other organizations that meet the criteria for exemption may be exempted, if individuals who work for such exempted organizations want to obtain an individual plan, he or she cannot obtain such an exemption from contraceptive coverage and is therefore forced to pay for that with which he or she disagrees.

III. The Final Rule Departs from Longstanding Policy Preventing Taxpayer Funding of Elective Abortions

As a result of the Final Rule, it is inevitable that faith-based institutions will be forced to subsidize services they regard as inherently immoral because the additional costs of meeting the mandate will ultimately be passed on to religious organizations in the form of higher insurance premiums.

Additionally, HHS regulations (Section 156.280 Segregation of funds for abortion services) set forth an accounting arrangement that requires insurers to collect an abortion surcharge of at least $1 per month from each premium payer for qualified health plans that cover abortion. The enrollee, whether male or female, will make two payments, at least $1 per month for abortion coverage and another payment for the rest of the services covered. The notice requirements in the Final Rule, as well as the underlying law, state such a surcharge can only be disclosed to the enrollee at the time of enrollment; and, furthermore, insurance plans may only advertise the total cost of the premiums without disclosing that enrollees will be charged a $1 per month fee to directly subsidize abortions. This direct payment requirement will shock the consciences of many religious employees whose employers do not qualify for an exemption.

Taxpayers consciences may also be shocked if multi-state plans, subsidized by taxpayers, cover abortion. The Hyde-Weldon Amendment has been attached to appropriations bills for decades to ensure American taxpayers are not paying for the elective abortions of others. The policy that resulted in Hyde-Weldon should be taken into consideration in the promulgation of rules
regarding the multi-state plans. Thus, such plans should not provide coverage for elective abortions.

**Conclusion**

The Final Rule promulgated by the Department of Health and Human Services mandating coverage of FDA-approved contraceptives and sterilization in all health plans that do not meet a narrow exemption and are not grandfathered violates the Religious Freedom Restoration Act and evidence a fundamental misunderstanding of faith-based institutions. These regulations are grounded in bad public policy that departs from the historic positions of Congress and the will of the American people, especially with regard to the possible subsidization of elective abortions.