



October 21, 2014

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-P
P.O. Box 8010, Baltimore,
MD 21244-1850

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

Dear Sir or Madam:

Alliance Defending Freedom (“ADF”) respectfully submits 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.

ADF is a non-profit, public interest legal organization dedicated to protecting religious liberty. We have been extensively involved in the litigation over the HHS Contraceptive Mandate, representing both for-profit, closely held corporations, as well as non-profit religious organizations.¹ Our client Conestoga Wood Specialties was a plaintiff in *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014). The rights of many for-profit, closely held corporations, including some of our clients, are implicated by the Mandate (finalized at 77 Fed. Reg. 8725 (Feb. 15, 2012)), which illegally requires religious objectors to cover “contraception” in their health plans (including some drugs that can cause the demise of embryos both after and before uterine implantation), as well as sterilization, and associated patient education and counseling. The Mandate poses a direct violation of the rights of entities and individuals not to participate in such activities to which they have a religious objection.

The recent interim final rules do not alleviate the violation of religious freedom that the mandate imposes on many of our clients. This is true for several reasons.

¹ See, e.g., *Conestoga Wood Specialties Corp. v. Burwell*, No. 13-356 (U.S. June 30, 2014); *Newland v. Burwell*, 881 F. Supp. 2d 1287 (D. Colo. July 27, 2012); *Grote Indus. LLC v. Burwell*, 2013 WL 5960692 (7th Cir. Nov. 8, 2013); *Tyndale House Publishers, Inc. v. Burwell*, 904 F. Supp. 2d 106 (D.D.C. Nov. 16, 2012); *Seneca Hardwood Lumber v. Burwell*, No. 2:12-cv-00207-JFC (W.D. Pa.); *Trijicon, Inc. v. Burwell*, No. 1:13-cv-01207-EGS (D.D.C.); *Briscoe v. Burwell*, No. 1:13-cv-00285-WYD-BNB (D. Colo.); *Armstrong v. Burwell*, No. 1:13-cv-00563-RBJ (D. Colo.).

The Proposed Rule Still Imposes the Mandate and Denies Exemptions to Family Businesses

The proposed rule does not change the underlying terms of the Mandate, which violates the right to religious freedom protected under federal law, including under the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb-1(c), and the First Amendment to the U.S. Constitution. That Mandate still requires family businesses to provide health plans that deliver contraceptive coverage to their employees.

The narrow scope of the “religious employer” exemption still only applies to churches and houses of worship under the proposed rule. Thus a true exemption is denied to businesses run by and in accordance with religious beliefs. The “accommodation” is not an “exemption” from the Mandate, both in reality and in the government’s own nomenclature.

The proposed rule actually makes closely held for-profit corporations worse off than they are under the *Hobby Lobby* ruling. They are currently exempt from the contraceptive mandate under RFRA due to *Hobby Lobby*. The proposed rules would attempt to reimpose the Mandate on closely held businesses under the moniker of an “accommodation.”

The “Accommodation” Is Another Way to Impose the Mandate, and to Many Families It May Be Just Another Coercion of their Religious Beliefs

Although our clients have not necessarily taken a position on this question, for many families running businesses the proposed rules do not assuage their religious objections. Many people hold beliefs that prevent them from aiding in the procurement of abortion-inducing and/or contraceptive drugs and devices. The proposed rule still requires entities to provide a health plan through which employees receive such items, and to take affirmative action through either EBSA Form 700 or by notifying the government in writing of its objection and its insurer’s name. Both methods hijack an entity’s own plan and insurance contract to provide the same coverage of morally objectionable drugs and devices. It is not clear what authority the government has to coerce third party administrators of self-administered plans at all, or even insurance issuers separate from the plans they provide. These points are explained in greater detail in our comments to be submitted on October 27, 2014 on the interim final rules for non-profit entities.

“Closely-Held” Cannot Be Narrowed to Withhold Religious Exercise from Some Entities

Any rule that this administration adopts to offer an “accommodation” to “closely-held” businesses cannot define such businesses in a narrow way in an effort to deny them the ability to exercise religion. In *Hobby Lobby*, the Supreme Court ruled that closely-held entities can exercise religion under RFRA, but it chose no strict definition of which entities are “closely held.” Any attempt by this administration to define “closely held” in a narrow way, such as by a strict limit on the number, kind, or percentage holding of its owners, or by definitions used in the Internal Revenue Code, and therefore to impose the Mandate on excluded entities without even the sham “accommodation,” will violate RFRA and *Hobby Lobby*.

In corporate law, there is no bright line test for which entities are closely held. Instead a “close corporation” is merely “typified” by a number of characteristics such as “(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation.” *Donahue v. Rodd Electrotpe Co. of New England, Inc.*, 367 Mass. 578, 586, 328 N.E.2d 505, 511 (1975).

Entities can meet this flexible criteria in a multitude of ways based on the diversity of circumstances in which people and associations closely manage their businesses. Some might, for example, be owned not by natural persons at all, but by non-profit religious corporations or trusts, which nonetheless exercise religion in their management of the company. Others are owned by families that have a large number of members. For example, a family business might be owned by three or four members of one generation and a dozen or more children, both adults and minors, of the next generation. Yet it is still a close corporation under the *Donahue* standard. Family businesses cannot be denied the right to exercise religion based on their large family size.

Not only did *Hobby Lobby* not impose artificial limits on the definition of a close corporation, it did not even say that publicly traded corporations cannot exercise religion. Indeed, if publicly traded corporations in the 1980’s had boycotted apartheid South Africa, or if today they boycott regimes that commit other human rights abuses, and if they do so by using the ordinary means of corporate decision making (*e.g.*, shareholder or board voting) and in the course of that decision declare that their actions are explicitly religious, then such activities would indeed be corporate religious exercise. RFRA, and the Dictionary Act’s inclusion of corporations in religious exercise, would not allow federal agencies to declare otherwise.

RFRA outlawed this administration’s previous attempt to declare that only non-profit groups may exercise religion. It likewise would outlaw any attempt to narrowly declare that some close corporations do not meet an artificially narrow definition of “closely held” that is crafted in this rulemaking process. This administration needs to stop picking and choosing who can and cannot exercise religion, always trying to deny religious exercise to some Americans. It needs to offer the “religious employer” exemption to all entities with a religious or moral objection to the HHS Contraceptive Mandate.

For all of these reasons, ADF urges the government to reconsider these proposed rules and revise them to fully respect religious freedom for all persons and entities.

Sincerely,
s/
Matthew S. Bowman
Senior Legal Counsel
Alliance Defending Freedom