



# CATHOLIC MEDICAL ASSOCIATION

*Upholding the Principles of the Catholic Faith in the Science and Practice of Medicine*

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September 29, 2011

## Submitted Electronically

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-9992-IFC2  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

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

Dear Sir or Madam:

We are writing on behalf of the Catholic Medical Association to provide comment on the interim final rule on preventive services, 76 Fed. Reg. 46621 (Aug. 3, 2011). The Catholic Medical Association is the largest association of Catholic physicians in the United States, with over 1,600 members in all 50 states, representing over 75 specialties in medicine. In making these comments, the Catholic Medical Association (CMA) joins with and will incorporate comments from the United States Conference of Catholic Bishops (USCCB) and the Catholic Health Association (CHA), with whom CMA members collaborate to offer health care services consistent with the example and teachings of Jesus Christ.

We find the decision of HHS to mandate certain preventive services for women—and above all the mandate that all health insurance plans and issuers must provide “The full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity”—to be internally inconsistent and inexplicably vague. Worse, this mandate expressly violates current legislation, current and longstanding public policy, and important constitutional rights. We respectfully urge HHS to rescind this mandate in its entirety or, barring that, to provide the broadest possible exemption to those provisions of the mandate related to “Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity”—not only to all “religious employers,” but also to any and all who have ethical objections to being compelled to participate in such actions. Our comments below will support this conclusion.

First, while HHS has requested comments only on the definition of “religious employer,” it is important to note that this HHS policy is substantially flawed on its face. Defining contraceptives as “preventive services” fails the tests of logic and sound science. “Preventive services,” by definition and as designated by the U.S. Preventive Services Task Force (USPSTF), prevent serious disease, dysfunction and/or injury

which would require treatment to restore health or function. Fertility is a natural feature of human nature; pregnancy is a natural human condition, not a disease; and abortion cannot be considered a cure in terms of medicine, ethics, or law. Contraceptives and sterilization do not prevent disease or serve human health because they temporarily or permanently suppress fertility, a normal function of a healthy men and women. Moreover, designating contraceptives as “preventive services” does not constitute good clinical medicine, as contraceptives can pose substantive risks to otherwise healthy women. Mandating contraceptives in order to reduce unplanned pregnancies is unsound public policy, as this effort has failed in the past and will fail in the future. Finally, this mandate sets a dangerous precedent in public policy. As the National Catholic Bioethics Center pointed out in a July 22, 2011, press release, the Institute of Medicine included no formal public testimony from any Catholic health care institution or expert, despite the fact that Catholic health care is effectively the largest provider of non-governmental health care in the United States. Instead, the IOM commissioned public testimony from Planned Parenthood and other advocacy groups that will receive a substantial financial benefit from such a mandate. This flawed process will undoubtedly contribute to the increased politicization of health care financing decisions.

Second, this mandate is inconsistent and inexcusably vague in defining the terms of the services for which some religious employers and health care providers will be forced to pay. With regard to the latter point, while “The full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,” are mandated, the interim final rule notes, in two separate places, that the Health Resources and Services Administration (“HRSA”) “may establish exemptions from [its] guidelines ... with respect to any requirement to cover *contraceptive services* under such guidelines” 76 Fed. Reg. at 46,626 (emphasis added). Thus, it is not clear whether even those religious employers who manage to meet the narrowly restricted definition will be protected from being compelled to pay for sterilizations and reproductive counseling. This mandate is internally inconsistent in that it claims to uphold and implement existing definitions used by most states regarding exemption of some religious employers from state contraceptive mandates. However, even a cursory review of the facts shows that this is not the case. As the CHA and the USCCB have pointed out, many states have no contraceptive mandate at all and, even of the ones that do, none is as sweeping as the new language proposed by HHS.

Third, as both the USCCB and the CHA have documented, this mandate contradicts current federal legislation, public policy precedents, and even public policy statements of the Obama Administration.

With regard to legislation:

- By requiring drugs such as Ulipristal (“ella”), the mandate violates the express terms of the Weldon Amendment which protects “health care entit[ies],” including “a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan” from discrimination on the basis that they do not pay for or provide coverage of abortion.
- The mandate violates several sections of the Patient Protection and Affordable Care Act (PPACA), including sec. 1303(b)(1)(A) (stating that “nothing in this title shall be construed to require a qualified health plan to provide coverage of [abortion services] ... as part of its essential health benefits for any plan year) and sec. 1303(c)(1) (which holds that nothing in the Act preempts, or has any effect on, any State law regarding abortion coverage)—as already eleven states have restricted abortion coverage in all health insurance plans or all exchange-participating plans.

- As the USCCB established in its comments in section I.D.3 and E, this mandate violates the Religious Freedom Restoration Act because it substantially burdens the exercise of religion of Catholic institutions, providers, individuals, and agencies.

With regard to public policy precedents, this mandate violates both venerable and recent public policy precedents with regard to respect for conscience. In 1790, George Washington famously wrote to a Hebrew congregation in Newport, R.I. that “All possess alike liberty of conscience and immunities of citizenship” and in 1804, Thomas Jefferson assured a community of Ursuline nuns that their “institution will be permitted to govern itself according to its [sic] own voluntary rules, without interference from the civil authority, whatever diversity of shade may appear in the religious opinions of our fellow citizens.” Until this mandate, no federal law has prevented private health care insurers from respecting the requests of plan purchasers or sponsors to include or exclude services based on moral or religious beliefs or even compelled insurers to cover services to which they had ethical or conscientious objections. This unprecedented mandate threatens to overturn not only such recent respect for conscience, but an entire venerable legal tradition of respect for conscience in American governance and society.

With regard to public policy statements of the Obama administration, this mandate expressly contradicts important assurances given in the past. In comments to the Catholic press on July 2, 2009, President Obama professed himself to be “a believer in conscience clauses,” and told those present to expect “a robust conscience clause” following a review of the 2008 Conscience Protection Rule issued by the Bush administration. Both before and after passage of PPACA, the Administration provided assurances (later formalized in Executive Order #13535, “Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act,” (Mar. 24, 2010)), that PPACA would not be construed to provide coverage of abortion. Moreover, the Obama administration has stated that it “fully supports these strong federal conscience laws [including the Church Amendments], many of which have been in existence for more than 30 years.” As demonstrated above, this mandate violates several of these laws and public policy statements of the current Administration.

Fourth, as the USCCB has amply documented, by coercing religious organizations and institutions to subsidize conduct that they teach is seriously wrong; by interfering with the rights of such organizations and institutions to govern themselves (by mandating that they subsidize, for their own employees, activities that expressly contradict their religious tenets); and by attempting to define which religious organizations and institutions are “religious enough” to qualify for an exemption from such coercion, this mandate expressly denies religious health care providers and employers important constitutional rights and protections provided by the Free Speech and Religion Clauses of the First Amendment.

Apart from the significant harms noted above, the CMA is concerned that this HHS mandate, together with a narrow definition of “religious employer,” will soon be followed by a mandate that health care providers, both individual and institutional, must participate in providing or referring for all contraceptive methods, sterilization procedures, and reproductive counseling. Once these essentially elective services are defined as compulsory health care insurance benefits, it is only a question of when, not if, an attempt will be made to compel health care providers to participate in providing them.

Indeed, the CMA sees a disturbing pattern in public policy decisions, beginning in early 2009, that have eroded respect for rights of conscience and religious freedom which have been central to law and public policy in America since its founding. For example:

- In April 2009, an amendment offered by Senator Coburn to add a ninth principle to guide health care reform (to the eight principles identified by the Obama administration)—namely, “that

health reform should protect, rather than limit, the freedom of conscience of patients and providers”—was defeated on a party-line vote;

- Provisions in the PPACA addressing respect for rights of conscience are inexcusably vague. For example, the provisions of the Weldon amendment were excluded from PPACA, omitting an important bar to governmental discrimination against health care entities based on their refusal to participate in abortion. In addition, vagaries in the text, which could and should have been corrected prior to passage, leave in doubt whether PPACA would be construed to preempt federal conscience laws on issues other than abortion and/or state laws regarding respect for rights of conscience;
- In March 2009, the Obama administration announced that it was rescinding Final Rule RIN 0991-AB48 (45 C.F.R. Part 88) (“2008 Conscience Protection Rule). Almost exactly one year later, the Administration announced a “partial rescission” of the 2008 Conscience Protection Rule; however, what was removed from the Rule were all provisions defining (1) the terms related to discrimination and protection; (2) the applicability of the Rule to federal, state and local governments; (3) the specific requirements and prohibitions related to discrimination; and (4) certification of compliance with the law—namely, all the provisions that would have provided clear standards for behavior and predictable processes of protection for perpetrators and for victims of discrimination; and
- Now, most recently, comes this breathtaking mandate which constitutes an unprecedented assault on the conscience rights of specific individuals and institutions, and upon the law and legal tradition of respect for conscience in the United States.

In conclusion, CMA recommends that:

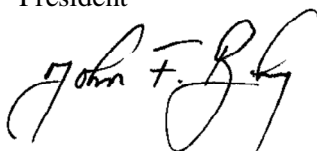
1. The August 1, 2011, Interim Final Rules on Preventive Services be rescinded in their entirety;
2. Barring that, that HHS and HRSA provide the broadest possible definition of and scope of conscience protection to “religious employers”
3. In addition, that HHS and HRSA provide the broadest possible exemption to those provisions of the mandate related to “Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity”—not only to all “religious employers,” but also to any and all who have ethical objections to being compelled to participate in such actions.

Thank you.

Sincerely,



Jan R. Hemstad, M.D.  
President



John F. Brehany, Ph.D., S.T.L.  
Executive Director and Ethicist