(202) 466-3234 (phone)
(202) 466-2587 (fax)
info@au.org

1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005

June 19, 2012

Attn: CMS-9968-ANPRM
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert Humphrey Building
200 Independence Ave., SW
Washington, DC 20201

To Whom it May Concern:

Americans United for Separation of Church and State writes to submit comments for the Advanced Notice of Proposed Rulemaking regarding "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act" (hereinafter "ANPR"), which was published in the Federal Register on March 21, 2012.

Founded in 1947, Americans United is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to worship as they see fit without government interference, compulsion, support, or disparagement. Americans United has more than 120,000 members and supporters across the country.

The Obama Administration is currently in the process of expanding upon its February 15, 2012 final rule, which exempts certain religious employers from the requirement that they provide insurance coverage for contraceptives under the Patient Protection and Affordable Care Act (hereinafter "Final Rule"). The Administration has expressed its intent to create a new category of religious organizations that would not qualify for the original exemption, but would be granted an accommodation—they would not be required to provide, pay for, or inform employees about how to access other insurance coverage for contraceptives. It is through this ANPR that the Administration is gathering comments on how to implement this proposed policy.

Americans United continues to believe that expansion of the original exemption is unnecessary. The original exemption for houses of worship and similar religious organizations is sufficient. Indeed, two courts have already upheld religious exemptions

that are nearly identical to the one adopted by the Final Rule.[1] In both cases, the courts concluded that the exemption violates neither the Establishment Clause nor the Free Exercise Clause of the United States Constitution. The real constitutional danger is a broad expansion of the exemption or a new accommodation. As religious accommodations and exemptions become more expansive they also become more likely to violate the Establishment Clause.

As the Administration engages in its effort to establish this new religious accommodation and define which organizations qualify for the accommodation, Americans United urges the Administration to do the following:

(1) define the new category of religious organizations eligible for an accommodation narrowly so as to not violate the Establishment Clause;

(2) limit the definition of "religious organization" to non-profit groups;

(3) deny the accommodation to religious groups that provide coverage for some, but not all, FDA-approved contraceptives; and

(4) prohibit religious organizations that accept direct government funds through contracts and grants from utilizing the exemption.

In addition, we agree with the Administration's position that, in this context, the states may not offer exemptions and accommodations broader than the federal law. But state laws that provide no or more narrow exemptions should control.

Adopting an Overly Broad Religious Accommodation Is Not Required By the Constitution and Instead Could Violate the Constitution.

Last year, Americans United submitted comments to the proposed rule, "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act."[2] In those comments we emphasized that expansion of that rule's original exemption for "religious organizations" was not justified by the Constitution or public policy concerns.[3] It is for those same reasons that we warn against granting a new accommodation to an even broader category of religious organizations.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. Such

---

[1] *Catholic Charities of Sacramento v. Superior Court*, 85 P. 3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E. 2d 459 (N.Y. 2006).
[2] 77 Fed. Reg. 8725 (Feb. 15, 2012).
[3] For an explanation of why there is no constitutional justification for expanding the original exemption, please see our original comments, attached.

accommodations, however, must not be applied more broadly than is necessary to protect religious freedom. One danger of granting overly expansive religious exemptions is that they may have a negative impact on innocent third parties, such as women seeking access to contraceptive coverage.

<u>Overly Broad Accommodations for Religious Organizations Violate the Establishment Clause.</u>

Contrary to the claims of those seeking a new, broad accommodation provision, it is the more expansive exemptions—rather than the narrowly tailored religious exemptions and accommodations—that are most likely to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[4] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[5] For example, in *Texas Monthly, Inc. v. Bullock*,[6] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms." Adoption of a new accommodation, therefore, is not only unnecessary; it may actually increase the likelihood that the scheme will be found unconstitutional.

<u>What Entities Should Be Eligible For the New Accommodation?</u>

<u>Only Non-Profit Organizations Should Qualify for the Accommodation.</u>
For-profit organizations have entered into commercial activity as a matter of choice and as a way to earn money. For-profit organizations should not be allowed to reap the benefits and profits of a commercial enterprise and also be exempted from the rules, restrictions, and regulations placed on all other for-profit entities. In short, "voluntary commercial activity" should not receive the same treatment as "directly religious activity."[7]

As explained by the Supreme Court in *United States v. Lee*:[8]

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in

---

[4] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[5] *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[6] 480 U.S. 1, 18 n. 8 (1989).
[7] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994).
[8] 455 U.S. 252, 261 (1982).

> that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.

For-profit organizations and business owners, whether religious or secular, are subject to a myriad of federal, state and local laws, ranging from sales and use [9] and social security taxes,[10] to Sunday closing[11] and nondiscrimination laws.[12] These obligations are part of doing business in the commercial sector. For-profit entities should not be exempt from the general rules covering business entities simply because they assert a religious objection. This is especially true where granting such exemptions trample on the civil rights and liberties of others.

Furthermore, granting for-profit organizations a "conscience exemption" threatens to erode the reach of other public safety, non-discrimination, and public health laws that apply to businesses. If the government justifies this exemption, the reach of future exemptions could be unlimited.

For-profit companies should not be allowed to both line their pockets and be exempt from laws established to protect the health of others.

Organizations that Provide Coverage for Some, But Not All, FDA-Approved Contraceptives Should Be Denied the Accommodation.

Extending the new accommodation to organizations that provide coverage for some, but not all, FDA-approved contraceptives could limit women's access to the full range of contraceptives that they may need or want to utilize. In short, the split process of gaining coverage—some from her employer-provided insurance, the rest from a supplemental insurance plan—is likely to create confusion. Women would have to piece together the various coverage plans and understand that although their first plan claims to cover contraception it does not cover the full range to which they are entitled. Under this accommodation, of course, their employer would not even be required to explain this. The split process would likely end in confusion and women could inadvertently deny the additional coverage because they believe their employer already provides such coverage.

In addition, there is danger in allowing religious organizations to define what constitutes "contraception" in accordance with their doctrines, rather than having the government define "contraception" based on science and medical research.

---

[9] *Swaggart v. California Equalization Bd.,* 493 U.S. 378 (1990) (upholding a sales and use tax placed on the sale of Bibles and other religious materials).
[10] *U.S. v. Lee*, 455 U.S. 252.
[11] *Braunfeld v. Brown*, 366 U.S. 599 (1961).
[12] *Swanner*, 874 P.2d 274; *Smith v. Fair Employment and Hous. Comm'n*, 51 Cal.Rptr.2d 700 (Cal. 2001).

Religious Organizations that Accept Direct Grants and Contracts from the Government Should Not Be Eligible for the Exemption.
The government should not grant a religious organization the new accommodation if the organization accepts direct government funds. Religious organizations that accept federal funds should have to adhere to the same rules as other organizations that receive federal funds. It defies common sense to think that the government would *loosen* the rules regarding insurance coverage for religious organizations that wish to receive the benefit of public tax dollars. Along with government funds comes certain requirements and, even if the group accepting the funds is a religious organization, those rules must continue to apply.

Furthermore, it is unfair for the government to create two tiers of government workers—those whose jobs are funded by the government and those whose jobs are funded by the government but whose positions are overseen by religious organizations. A worker should not be denied direct insurance coverage for contraceptives simply because the government grant funding her position is overseen by a religious organization opposed to contraceptives.

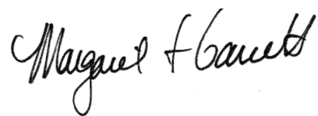
Accordingly, organizations that reap the benefits of federal funding should undoubtedly be denied an exemption or accommodation from the insurance mandate.

Conclusion

Neither the Free Exercise Clause nor the Establishment Clause requires that the Proposed Regulations provide religious entities an exemption from the insurance coverage mandate. Clearly then the law does not require that the Administration expand the exemption's definition of "religious employer." Indeed, the more expansive the exemption, the more likely it is to fail constitutional muster. If the Administration does create a new accommodation for an additional category of religious organizations, however, it should limit that privilege to non-profit organizations. Further, it should deny the exemption to organizations that offer some forms of contraceptives but not others, and organizations that accept direct government funds.

Please feel free to contact me with any questions you may have about these comments (202-466-3234). Your attention to this matter is greatly appreciated.

Sincerely,



Maggie Garrett
Legislative Director

(202) 466-3234 (phone)
(202) 466-2587 (fax)
info@au.org

1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005

September 30, 2011

Attn: CMS-9992-IFC2
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert Humphrey Building
200 Independence Ave., SW
Washington, DC 20201

To Whom it May Concern:

We write to submit comments regarding the proposed rule entitled "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act" (hereinafter "Proposed Rule"), which was published in the Federal Register on August 3, 2011. The Administration undoubtedly will receive numerous comments that focus on various aspects of the regulation. Our comments, therefore, will focus solely on refuting assertions that the religious exemption is unconstitutionally narrow and urge the Administration to reject arguments supporting its expansion.

Americans United supports the use of reasonable and appropriately tailored accommodations to ease burdens on the practice of religion in certain circumstances. Such accommodations, however, must not be applied more broadly than is necessary to protect religious freedom. One danger of granting overly expansive religious exemptions is that they may have a negative impact on innocent third parties.

For example, the Proposed Rule seeks to provide women better healthcare by providing insurance for and thus access to contraceptives. Adoption of the proposed religious exemption would deny some women this access. Expansion of the exemption would further increase the number of women who would be denied access to contraceptives and lessen any connection the exemption has to easing any potential religious burden. Accordingly, the Administration should reject arguments urging expansion of this exemption.

Courts have already upheld two nearly identical religious exemptions against claims that they were unconstitutionally narrow.[1] In both cases, the courts concluded that these exemptions from insurance mandates for contraceptives violate neither the Establishment Clause nor the

[1] *Catholic Charities of Sacramento v. Superior Court*, 85 P. 3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E. 2d 459 (N.Y. 2006).

Free Exercise Clause of the United States Constitution. There is no legal justification, therefore, for claiming that the exemption in the Proposed Rule should be expanded.

To the contrary, more expansive exemptions are actually more likely to violate the Constitution. Although the government may offer religious accommodations even where it is not required to do so by the Constitution,[2] its ability to provide religious accommodations is not unlimited: "At some point, accommodation may devolve into an unlawful fostering of religion."[3] For example, in *Texas Monthly, Inc. v. Bullock*,[4] the Supreme Court explained that legislative exemptions for religious organizations that exceed free exercise requirements will be upheld only when they do not impose "substantial burdens on nonbeneficiaries" or they are designed to prevent "potentially serious encroachments on protected religious freedoms." Expansion, therefore, is not only unnecessary; it may actually increase the likelihood that the exemption will be found unconstitutional.

The Proposed Religious Exemption

The Affordable Care Act (The Act) requires that group health insurance plans include benefits for preventative care services, including contraceptives. Although not required by the United States Constitution nor the Act, the Proposed Regulation includes an exemption from this mandate for any "religious employer" 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 under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.

The Free Exercise Clause Does Not Require Expansion of the Religious Exemption

In accordance with the Free Exercise Clause,[5] religious beliefs do not excuse compliance with valid and neutral laws of general applicability. Such laws are subject only to rational review—the lowest level of scrutiny—and not strict scrutiny.[6] The Proposed Rule, which mandates all group health insurance plans to include coverage for contraceptives, is clearly neutral and generally applicable and would survive rational review.

---

[2] Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[3] *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted).
[4] 480 U.S. 1, 18 n. 8 (1989).
[5] *Employment Division v. Smith,* 494 U.S. 872, 879 (1990).
[6] *Id.*; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Courts deem laws neutral unless they "target religious beliefs" or "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation."[7] The Proposed Rule, on its face, does not single out religious organizations for disfavored treatment, nor does it contain a masked hostility towards religion. To the contrary, the bill mandates insurance coverage with the religiously neutral aim of improving women's health.

The religious exemption, of course, references religion. But, the reference serves to grant religious organizations *preferred* treatment—an exemption. The Supreme Court, in determining whether a law is neutral for purposes of the Free Exercise Clause, "has never prohibited statutory references to religion for the purpose of accommodating religious practice."[8] Such an application of *Smith* would defy common sense and would render all statutes with religious accommodations subject to strict scrutiny. Indeed, "a rule barring religious references in statutes intended to relieve burdens on religious exercise would invalidate a large number of statutes."[9]

The court in *Catholic Charities of the Diocese of Albany v. Serio*[10] examined an exemption that defined "religious employer" in almost identical terms. It explained that the "neutral purpose of the law," which was also to "make contraceptive coverage broadly available to . . . women—is not altered because the Legislature chose to exempt some religious institutions and not others."[11] It continued: "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions."[12]

The Proposed Rule is also generally applicable: It does not "in a selective manner impose burdens only on conduct motivated by religious belief."[13] The law is not underinclusive in a way that suggests the government targeted one religion for disfavored treatment. And, it cannot be said that "the burden of the [Proposed Rule], in practical terms, falls on [certain religious] adherents but almost no others."[14] As explained above, religious organizations are granted *preferential* treatment, in the form of an exemption. "That the exemption is not broad enough to cover" all organizations affiliated with a religious entity "does not mean that the exemption discriminates" against religion.[15]

Because the law is neutral and generally applicable, the government need only justify the mandate and the narrow scope of the exemption as being rationally related to the government interest. Mandating that group insurance policies cover contraceptives, unquestionably, is

---

[7] *Lukumi*, 508 U.S. at 533.
[8] *Catholic Charities of Sacramento*, 85 P.3d at 83.
[9] *Id.* at 84. Included among these statutes that provide a religious exemption for religious organizations is Title VII of the Civil Rights Act, which exempts religious organizations from privately funded employment decisions.
[10] 859 N.E. 2d 459.
[11] *Id.* at 522.
[12] *Id.*
[13] *Lukumi*, 508 U.S. at 543.
[14] *Id*. at 536.
[15] *Catholic Charities of Sacramento County,* 85 P.3d at 84.

rationally related to the legitimate government interest of improving women's health. Indeed, both *Serio* and *Catholic Charities of Sacramento County v. Superior Court* concluded that the state has a "substantial interest in fostering the equality between the sexes, and in providing women with better health care."[16]

Accordingly, the Free Exercise Clause does not require the government to grant religious organizations an exemption from the law, let alone provide one that is even more expansive than what is already proposed. Indeed, "*Smith* is an insuperable obstacle to [a] federal free exercise claim" that the exemption must be expanded.[17]

Neither the Mandate Nor the Exemption is Required by the Establishment Clause

The Proposed Rule Does Not Need to Be Expanded to Avoid the Targeting of Certain Denominations for Unfavorable Treatment

Another argument used by those who seek to expand the exemption is that it unconstitutionally targets certain faiths for unfavorable treatment in violation of the Establishment Clause. In accordance with *Larson v. Valente*,[18] laws that target certain denominations for unfavorable treatment are subject to strict scrutiny.

But again, the Proposed Rule does not single out certain religions. Instead, it imposes the same rule on all religious denominations—it does not pick and choose among them based upon their beliefs or popularity. In short, it does not play favorites with religion. As explained in *Serio*, a governmental "decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause."[19]

A contrary reading of *Larson* would actually run counter to the interests of those seeking expansion of the exemption, as it would "call into question any limitations placed by the [government] on the scope of any religious exemption—and thus would discourage the [government] from creating any such exemptions at all."[20] Accordingly, strict scrutiny is also not triggered under the Establishment Clause and expansion of the exemption is not justified.

The Religious Exemption Does Not Need to Be Expanded to Avoid Excessive Entanglement

Those supporting expansion of the exemption also argue that application of the exemption requires the government to make determinations about an entity's religious character and operations in such a manner so as to cause excessive entanglement in violation of the Establishment Clause.[21] Applying the exemption, however, does not require the government to parse religious doctrine, define religious practices, or interrogate employees about their faith.

---

[16] *Serio*, 859 N.E. 2d at 468.
[17] *Id.* at 466.
[18] 456 U.S. 228 (1982).
[19] *Serio*, 859 N.E. 2d at 469.
[20] *Id*. at 526.
[21] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Indeed, the Courts are frequently required to make determinations about the religious character of an organization to the extent required by this exemption. For example, the Free Exercise Clause requires Courts to determine whether an individual has a "sincerely held religious belief"; the Establishment Clause requires Courts to determine whether activities are secular or religious; and any statute with a religious exemption requires courts to determine whether an entity falls within its parameters. Expansion of the exemption, therefore, is not required to prevent excessive entanglement.

Expansion of the Exemption is Not Required to Prevent Intrusion into Church Autonomy
Proponents of expanding the exemption argue that the mandate interferes with matters of faith, doctrine, and church government. But, the Proposed Rule does nothing to interfere with a religious institution's decisions regarding its theological position on contraceptives or its teachings on the matter.[22] Nor does this Proposed Rule require the government to resolve internal church disputes involving the interpretation of church doctrine and regulations. Even application of the religious exemption does not turn on church policy regarding contraceptives. It instead turns on neutral terms that require no inquiry into the application or interpretation of church doctrines or regulations. Like in *Serio*, church autonomy "is not at issue"[23] when applying the mandate or the exemption. The Proposed Rule "merely regulates one aspect of the relationship between plaintiffs and their employers."[24] Once again, the law does not support expanding the exemption.

Even if the Proposed Rule Were Subject to Strict Scrutiny, Expansion of the Exemption Would Not Be Legally Required

Earlier, these comments discussed why neither the Free Exercise nor the Establishment Clause justifies the application of strict scrutiny to the question of whether the exemption is too narrow.[25] Even if a court were to determine that strict scrutiny applied, however, such scrutiny would still not require that the exemption be expanded.

The connection between a religious employer not subject to the exemption and its employee's ultimate use of that plan to cover contraception is far too attenuated to place a substantial burden on that employer. It is the individual employees who will make the independent private choice whether to avail themselves of prescription contraception as one of the many services under the group insurance plan. The intervening private choice that an employee makes breaks the circuit between the employer and any utilization of contraception, thereby vitiating any "burden" on the employer. In fact, under this Proposed Rule an employer may even formally communicate that it disapproves of the usage of contraceptives, whether to the public or to the

---

[22] *Catholic Charities of Sacramento County,* 85 P.3d at 77-78.
[23] *Serio*, 859 N.E. 2d at 465.
[24] *Id*.
[25] Proponents of an expanded exemption also argue that substantial burden test of strict scrutiny is justified under the Religious Freedom Restoration Act and the Free Speech Clause. We believe that none of these doctrines trigger strict scrutiny in this instance.

employees themselves. In the end, the provision of a comprehensive set of healthcare benefits is really no different than the provision of a paycheck; employees are free to utilize both kinds of benefits in any manner that they wish, and the employer cannot reasonably be perceived to support or endorse any particular use thereof. Therefore, the requirement that entities include coverage for contraceptives as part of group insurance plans places no substantial burden on the employer.

If there were a substantial burden, it surely would be overcome by a compelling state interest. As stated above, courts have already concluded that the state's interest in "fostering equality between the sexes, and in providing women with better healthcare" is sufficient to justify the law.[26]

The Policies of the Faith-Based Initiative Do Not Justify Expansion of the Exemption

One of the most troubling arguments is that the exemption should be expanded because entities that seek to use the exemption would have to forgo federal funding provided under the framework of the Faith-Based Initiative. Indeed, organizations should have to forgo federal funding if they refuse to offer health insurance benefits that the government deems important to women's health.

Some have noted that only entities that primarily serve persons of their own faith may utilize the exemption, but only organizations that serve persons regardless of faith may obtain funds under the Faith-Based Initiative. Proponents of expanding the exemption claim that organizations should be allowed to both receive federal funds under the Faith-Based Initiative *and* utilize the exemption in the Proposed Rule.

To the contrary, religious organizations that accept federal funds should have to adhere to the same rules as other organizations that receive federal funds. And, the federally funded workers hired by religious organizations should be extended the same benefits and rights provided to other workers. It defies common sense to think that the government would *loosen* the rules regarding insurance coverage for religious organizations that wish to receive the benefit of public tax dollars. Along with government funds comes certain requirements and when a religious organization accepts taxpayer dollars those rules must continue to apply. Accordingly, organizations that reap the benefits of federal funding should undoubtedly be denied an exemption from the insurance mandate.

Conclusion

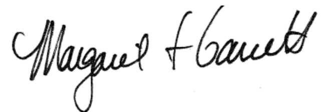
Neither the Free Exercise Clause nor the Establishment Clause requires that the Proposed Regulations provide religious entities an exemption from the insurance coverage mandate. Clearly then the law does not require that the Administration expand the exemption's

[26] *Serio*, 859 N.E. 2d at 468.

definition of "religious employer." Indeed, the more expansive the exemption, the more likely it is to fail constitutional muster. Accordingly, the Administration is under no legal obligation to expand the exemption and it should reject calls for expansion.

Please feel free to contact me with any questions you may have about these comments (202-466-3234). Your attention to this matter is greatly appreciated.

Sincerely,



Maggie Garrett
Legislative Director