

# ISSUE BRIEF

A Series Examining Critical Issues in Faithful Catholic Higher Education

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## Questions and Answers About What the Latest HHS Mandate Rule Means for Catholic Colleges

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This *Issue Brief* takes a look at the new<sup>1</sup> “Notice of Proposed Rulemaking” issued on February 1, 2013, by the Department of Health and Human Services concerning the federal mandate that health insurance plans, including those provided or arranged by Catholic colleges, must include coverage of early abortion pills, contraception, sterilization, and related education and counseling for women with a reproductive capacity.

### **What was the government’s intent with the February 1<sup>st</sup> “Notice of Proposed Rulemaking”?**

The Notice of Proposed Rulemaking (“NPRM”)<sup>2</sup> sets forth a proposed (not final) structure for public comment on whether or how the government will respect religious objections to its coverage mandate of early abortion pills, contraception, and sterilization. It concerns three categories of entities with objections to the mandate. Generally, these categories are: (1) houses of worship; (2) all other religious non-profits; and (3) all other objectors.

### **Is this the final rule?**

No, it will be finalized by August 1, 2013. The public may submit comments by April 8, 2013.

### **Who would be exempt from the mandate under the NPRM?**

The NPRM proposes that basically only houses of worship would be exempt from the mandate. Exempt entities are called “religious employers,” and these must be either “churches, their integrated auxiliaries, and conventions or associations of churches,” or “the exclusively

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1 It follows an advance notice of proposed rulemaking (ANPRM) published on March 21, 2012 (77FR 16501). Alliance Defending Freedom submitted comments to the ANPRM on May 30, 2012 on behalf of The Center for the Advancement of Catholic Higher Education and 19 institutions or organizations of higher education. See <http://www.cardinalnewmansociety.org/LinkClick.aspx?fileticket=OumXvpMXLZk%3d&tabid=707>.

2 <http://www.gpo.gov/fdsys/pkg/FR-2013-02-06/pdf/2013-02420.pdf>.

religious activities of any religious order.” These categories are narrow and well-established in Internal Revenue Code section 6033(a)(3)(A)(i) and (iii). Most Catholic colleges know that they do not fall into these categories. They should consult with an attorney or tax advisor to review whether or not they qualify.

### **Is this a change from the existing exemption?**

In one respect, the NPRM proposes a change from the existing mandate exemption. Under the existing exemption, houses of worship are still the only entities eligible for an exemption, but in addition those houses of worship must function to inculcate beliefs, and must primarily hire and serve only those of their own faith. The NPRM proposes to remove the latter three requirements from the definition of exempt “religious employers,” but retain the fourth criteria by which the entity must be a house of worship, church, religious order, or the like as listed above. The NPRM insists that this change is a clarification, not a broadening of the exemption. Since houses of worship are still the only entities that qualify for an exemption, the NPRM’s changes “would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended” in the existing rule.

### **Is this a very narrow definition of “religious employer,” or one that is used commonly by the federal government?**

This definition is extremely narrow compared to other federal laws providing for conscience exemptions. The 40-year-old bipartisan standard established throughout federal law, including in health and insurance coverage of items such as contraception, is to exempt any person or group with moral or religious objections. The Religious Freedom Restoration Act in particular requires the federal government to exempt any religious objector from rules such as this Mandate. The administration has instead constrained religious freedom by using a category in tax law that has no relationship to conscience, but instead relates to whether a group files its own 990 tax form. Even within that code section, the administration gerrymandered this rule by selecting subparts (i) and (iii) but not (ii) which includes other non-profits. The administration apparently selected a category with the smallest possible scope it could find. This is consistent with its view that religious freedom really only inheres in worship and not in the exercise of religion outside a house of worship.

### **How would the NPRM deal with objections from colleges and other non-profits?**

The NPRM proposes to apply the coverage mandate to all non-exempt entities, including religious groups. But for some religious non-profit groups, the NPRM proposes to accomplish this through what it calls an “accommodation.” The accommodation is a complex arrangement designed to create the impression that the religious organization is not involved in giving its employees access to objectionable items such as early abortion pills, while at the same time insisting that the employees will receive those items seamlessly with their employer’s own provision of coverage.

Their employees would still receive objectionable coverage from those groups’ own insurers or plan administrators, and would receive it “automatically,” so that the employees could not opt out of the coverage for themselves or their female family members.

### **What qualifies an organization for this “accommodation”?**

The NPRM applies its accommodation to non-exempt “eligible organizations.” These should not be confused with exempt “religious employers” discussed above. (Exempt religious em-

ployers – houses of worship – are not subject to the accommodation scheme.) A non-exempt “eligible organization” is one that meets the following criteria:

The organization opposes providing coverage for some or all of the contraceptive services required to be covered under section 2713 of the PHS Act on account of religious objections.

The organization is organized and operates as a nonprofit entity.

The organization holds itself out as a religious organization.

Again, these “religious organizations” are those that do not fall within the exempt category of houses of worship discussed above.

### **How does the “accommodation” work for non-exempt “eligible organizations”?**

The organization must sign a certification asserting that it meets the above-described criteria, keep the certification in its records “for examination upon request so that regulators, issuers, third party administrators, and plan participants and beneficiaries,” and provide the certification to the insurance issuer(s) and/or its self-insurance plan administrator(s) that the group pays for their ordinary duties.

Under the accommodation, once the religious group’s insurer or administrator receives that certification, the insurer or administrator is required to “automatically” provide the religious group’s employees and plan beneficiaries with insurance covering the objectionable items.

If the religious group uses an insurer, that insurer also becomes the insurer for the objectionable items. The NPRM claims that this insurance plan will be “separate” and will not be charged to the religious group. But it admits that there are up-front costs to the items, and it claims that these costs will be offset by the benefits of the primary insurance that the religious group is paying for (since, it theorizes, fewer childbirths will lead to lower costs).

### **What about self-insured non-profit religious groups?**

If the religious group is self-insured, the NPRM proposes that it be required to use a plan administrator (even if it does not presently have one). When that plan administrator receives the certification it will take on the additional duties of finding an external insurance company to “automatically” issue insurance coverage of objectionable items to the religious group’s employees. The NPRM does not address the privacy implications of releasing employee health information to an insurance company with which the religious group never contracted, for a purpose to which the religious group objects.

The NPRM proposes that the costs of the objectionable items will be offset by rebates that the federal government will offer those insurers in the health “exchanges” otherwise implicated by the Affordable Care Act.

### **Is the NPRM correct that the “accommodation” does not implicate an objecting entity?**

The NPRM imposes what is essentially a moral judgment that the “accommodation” frees objecting entities from culpability for coverage of objectionable items. Entities are not allowed to disagree with this moral judgment set forth by the government. Several factors might lead objecting entities to differ from the government’s moral viewpoint. Under the accommodation, the Affordable Care Act will still be requiring objecting entities with 50 or

more full-time employees to provide health insurance coverage, and that coverage will be the trigger for the objectionable items to flow to its employees. The objectionable coverage will come from the same insurers or plan administrators that the religious group is paying. The provision of objectionable coverage will be triggered specifically by the religious group's mandated delivery of its religious certification to its insurer or plan administrator. For insured entities, the costs of the objectionable items will allegedly be offset by the main plan the objecting entity is buying. For self-insured entities, the NPRM does not fully explain how costs will be offset. Unprecedented burdens and fiduciary duties will fall on insurers and plan administrators with whom religious groups contract, because of that contract. The NPRM does not fully explain how these additional burdens will not eventually be reflected in the ability of religious groups to contract with insurers or administrators in the first place.

### **What religious freedom allowances does the NPRM provide to other objectors?**

None.

Neither an exemption nor a feigned accommodation is provided under the NPRM for: employees of religious non-profit groups who do not want free abortion-pill, contraception, sterilization and counseling coverage for themselves, their spouses or their daughters; non-profit groups that object to abortion-pills or contraception for non-religious reasons; insurance companies or plan administrators that object; religious families that earn a living running a business; or individuals that arrange for their own insurance coverage not through an employer.

Notably, the Affordable Care Act uses secular reasons to refrain from applying this mandate to tens of millions of other Americans, such as because a plan is "grandfathered" from many ACA regulations. Yet the government refuses to exempt most religious objectors.

### **How does the NPRM treat student health plans?**

Student health plans that are arranged by "eligible organizations" are subject to the same "accommodation" that applies to employee health plans established by such organizations.

### **Is the NPRM still subject to comment?**

Yes. The NPRM is not final and the government will accept public comments until April 8, 2013, about any aspect of the proposal. The Alliance Defending Freedom work with The Cardinal Newman Society to prepare a formal comment and other institutions are welcome to join that comment. Individual organizations may also submit their own electronic comments to [www.regulations.gov](http://www.regulations.gov). All comments should reference file code CMS-9968-P.

### **If I have more questions, whom do I contact?**

General questions can be address to Bob Laird at the Cardinal Newman Society's Center for the Advancement of Catholic Higher Education, (703) 367-0333 x 106 or [blaird@Cardinal-NewmanSociety.org](mailto:blaird@Cardinal-NewmanSociety.org). Specific questions about legal actions should be directed to Matt Bowman at Alliance Defending Freedom, 1-800-835-5233.