

Legal Update from Flagler Law Group



Our Mission is to serve the legal needs of Christian publishing organizations by leveraging focused expertise into practical solutions.

Brian Flagler founded Flagler Law Group in the spring of 2006 to serve the legal needs of publishers, designers, producers, and distributors of Christian media. With a combined 20+ years in the industry, we know Christian publishing. We believe that our experience handling matters for a diverse variety of Christian publishers, ministries, and other organizations **from the publishing perspective** significantly contributes to the value that we offer our clients.

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February 2013

Health Care Law Revises Contraception Requirements for Religious Employers

By Craig Gipson and Brian Flagler

Some nonprofit publishers may receive a religious accommodation to the controversial health care mandate requiring employers to cover certain contraceptives. On February 1, the Treasury, Labor, and Health and Human Services Departments (HHS) released a proposal of revised regulations to expand the number of organizations entitled to an exemption or accommodation based on religious objections.

Who is Eligible for the Accommodation?

If finalized, the proposed regulations would establish a four-part test to qualify for an accommodation. To be eligible, an organization must: (1) oppose some or all of the contraceptive services provided in the law; (2) be organized and operate as a nonprofit entity; (3) hold itself out as a religious organization; and (4) self-certify that the organization qualifies under the first three criteria and specify the contraceptive services which the organization will not cover.[1]

In essence, the new regulations create four types of categories applicable to ECPA publishers: (1) publishing houses that are part of a denomination or other religious order; (2) for-profit publishers; (3) nonprofit publishers with insured health plans; and (4) nonprofit publishers with self-insured health plans.

For the first category, a denomination's publishing house or similar organization may receive a complete exemption depending on the corporate structure of its parent religious organization. In the second category, for-profit publishers do not receive an exemption or accommodation of any kind. For nonprofit publishers with insured group health plans, the procedure to receive the religious accommodation is fairly simple: the organization must furnish self-certification of meeting the criteria in the four-part test above to its health insurance issuer. The self-certification is the only requirement of the nonprofit organization. The health insurance issuer must then automatically enroll plan participants in a separate individual health policy, which covers only those contraceptive services objected to by the organization, at no additional cost to the participant or the organization.

For nonprofit publishers with self-insured plans, the regulations remain far from final. If a nonprofit publisher has a third party administrator for its plan, it must provide the administrator with its self-certification. The regulations do not outline a specific process for third party administrators to obtain contraception coverage for participants of the plan at no additional cost. The regulations also fail to provide any guidance for nonprofit organizations without a third party administrator. How HHS will ultimately implement the accommodation for these nonprofit religious organizations is still unclear.

Why Were the Changes Made From Prior Proposed Regulations?

Under the originally proposed rules, only organizations that served individuals sharing the organization's religious tenets could be exempt. HHS received numerous complaints that religiously affiliated hospitals, universities, and even churches that offered services, such as soup kitchens, to people of different faiths would not qualify. The proposed regulations seek to exempt all organizations that fall under a nonprofit tax exemption for churches and religious orders.[2] The new rules also include the accommodation for nonprofit organizations holding themselves out as religious, such as religious universities and in some instances, publishers.

What Happens Next?

Whether the regulations will ultimately apply to other Christian organizations and even secular organizations remains in the hands of the courts. Numerous organizations including a national arts and crafts chain, Tyndale House Publishers, and a group of Christian universities have challenged the health care regulations as violating religious liberty law [[October 16, 2012 Legal Update](#)][3]. Religion law expert and University of Virginia law professor Douglas Laycock told *The New York Times* that "[t]his is highly likely to end up at the Supreme Court. There are so many cases, and we are already getting strong disagreements among the circuit courts." [4]

The proposed regulations are not finalized and HHS is seeking public comment on whether additional or different language should be used to define the exemption. ECPA may submit comments on behalf of the industry and welcomes your input. The public comment period will remain open through April 8, 2013.

(1) Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456-76 (proposed Feb. 1, 2013) (to be codified at 26 C.F.R. § 54, 29 C.F.R. § 2590, and 45 C.F.R. §§ 147, 148, 156).

(2) I.R.C. § 6033(a)(3)(A)(i) and (iii) (2013).

(3) See *Tyndale House Publishers, Inc. v. Sebelius*, Cause No. 12-1635 (RBW) (D. D.C. Nov. 16, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, Cause No. CIV-12-1000-HE. (W.D. Okla. Nov. 19, 2012); *Colorado Christian University v. Sebelius*, Cause No. 11-CV-03350-CMA-BNB (D. Colo. Jan. 7, 2013).

(4) Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, THE N.Y. TIMES, Jan. 27, 2013, at A1.



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