

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

EAST TEXAS BAPTIST UNIVERSITY,
and
HOUSTON BAPTIST UNIVERSITY,

Plaintiffs,

v.

Civil No. 12-3009

KATHLEEN SEBELIUS, *et al.*

Defendants.

Plaintiffs' Status Report

Pursuant to this Court's order, Dkt. No. 25, Plaintiffs hereby report:

On February 1, 2013, Defendants issued a Notice of Proposed Rulemaking¹ ("NPRM" or "proposal") amending the existing religious exemption to the preventive services mandate ("Mandate") that is the subject of this litigation. Instead of including Plaintiffs in the religious exemption, the NPRM proposes an "accommodation" for religious nonprofits like Plaintiffs.

The Religious Exemption. The NPRM proposes certain changes to the definition of a "religious employer." None of these proposals would expand the exemption to include Plaintiffs.²

¹ Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 147, 147, and 156); *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-02-06/pdf/2013-02420.pdf> (last visited Feb. 6, 2013).

² 78 Fed. Reg. at 8474 (to be codified at 26 C.F.R. 147.131(a)) ("a 'religious employer' is an organization that is . . . referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986").

The Proposed Accommodation. Rather than expanding the exemption to religious universities like ETBU and HBU, the NPRM instead proposes an “accommodation.” Under the proposed accommodation, an eligible employer would be required by law to send a certification to its insurance carrier that it qualifies for the accommodation.³ The carrier must then automatically enroll all of the eligible entity’s plan participants (whether or not they wish to be enrolled) into a new health insurance policy covering the objectionable drugs and devices, and it must send annual notices to all plan participants (including, apparently, their dependents) reminding them of the coverage.⁴ The carrier may not charge the eligible entity or the plan participants for the additional policy through increased premiums, copayments, coinsurance, or deductibles.⁵

The NPRM raises numerous legal, practical, and economic questions that make it difficult to assess how the accommodation would work in actual practice (assuming it is finalized as proposed after the comment period). More importantly however, the proposal fails to address Plaintiffs’ conscientious objections to the Mandate because, under any interpretation of the NPRM, Plaintiffs would remain the conduit through which abortifacient drugs are channeled. The same drugs would be provided by the same insurer to the same employees, all as an automatic result of Plaintiffs’ offering health insurance. According to Plaintiffs’ sincere religious beliefs, there is no moral difference between the present state of affairs

³ 78 Fed. Reg. at 8462.

⁴ 78 Fed. Reg. at 8462-64.

⁵ 78 Fed. Reg. at 8462.

(being forced by the government to provide *insurance* that will include abortifacients) and the proposed future state of affairs (being forced by the government to provide *an insurer* who will provide abortifacients).

Whether the NPRM becomes law or not, the underlying dispute will not change: the federal government is forcing ETBU and HBU to provide employee health insurance they cannot provide without violating their religion.

Respectfully submitted,

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Dated: February 15, 2013

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, the foregoing Status Report was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ Eric C. Rassbach
Eric C. Rassbach