Catholic Health Association of the United States

A Passionate Voice for Compassionate Care

September 22, 2011

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

Re: Interim Final Rule defining Religious Employer Exception for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, RIN 0938-AQ07

Dear Sir or Madam:

I am writing on behalf of the Catholic Health Association of the United States concerning the Interim Final Rule on Preventive Services published in the Federal Register on August 3, 2011 (76 Fed. Reg. 46621). CHA is the national leadership organization for the Catholic health ministry, consisting of more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities, and related organizations. Our ministry is represented in all 50 states and the District of Columbia, and one in every six patients in the United States is cared for in a Catholic Hospital each year.

CHA has long insisted on and worked for the right of everyone to affordable, accessible health care. We welcomed the enactment of the Patient Protection and Affordable Care Act (ACA), and support the ACA's requirement that preventive services, including certain preventive services for women, be provided at no cost to the individual. We are deeply concerned, however, with the approach taken by the Department of Health and Human Services (HHS) in the Health Resources and Services Administration's Guidelines on Women's Preventive Services: Required Health Plan Coverage (HRSA Guidelines) with respect to contraceptive services and sterilization.

The religious and moral objections of the Catholic Church and others to contraception and sterilization are well known. The Interim Final Rule (IFR) acknowledges these objections and attempts to accommodate them by creating a religious employer exemption to the mandated coverage for contraceptive services. While we appreciate the recognition of the need for such an exemption, the proposed definition of religious employer is wholly inadequate to protect the

conscience rights of Catholic hospitals and health care organizations in their role as employers. It is imperative that the definition of religious employer in the regulation be broadened to provide sufficient conscience protections to religious institutional employers.[1] The reference to "contraceptive services under such guidelines," from which religious employers are exempted, also needs to be clarified and aligned with the language in the HRSA Guidelines.[2]

Catholic health care providers are participants in the healing ministry of Jesus Christ. Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of the human person and the sanctity of human life from conception to natural death. These values form the basis for our steadfast commitment to the compelling moral implications of our heath care ministry, whether it be caring with compassion for all persons, throughout all stages of life; insisting on the right of all to accessible, affordable health care; or defending and preserving the conscience rights of health care providers, including but not limited to Catholic facilities. Our religious and moral convictions are the source of both the work we do and the limits on what we will do.

The explicit recognition of the right of Catholic organizations to perform their ministries in fidelity to their faith is almost as old as our nation itself. In 1727, French Ursuline nuns arrived in New Orleans, called by their faith to come to serve the city's sick and poor and to educate its children. Shortly after the United States took possession of the Louisiana territory from the French in 1803, the sisters worried whether this new government would allow them to continue their ministry in accord with their religious faith. President Thomas Jefferson reassured them by letter on May 15, 1804:

… that your institution will be permitted to govern itself according to it's [sic] own voluntary rules, without interference from the civil authority, whatever diversity of shade may appear in the religious opinions of our fellow citizens, the charitable objects of your institution cannot be indifferent to any; and it's [sic] furtherance of the wholesome purposes of society…cannot fail to ensure it the patronage of the government it is under. be [sic] assured it will meet all the protection which my office can give it.

The Catholic Church's ministries – its hospitals, schools, universities, social service agencies - continue today their work in "furtherance of the wholesome purposes of society" by serving

[1] As the representative of Catholic hospitals and health care providers which will be impacted by the contraceptive mandate in their role as employers, CHA focuses its comments on the adequacy of the "religious employer" exemption. Accordingly, we will not address here the issues of whether the mandate itself is appropriate and whether the exemption should apply to other entities, such as insurers, or to individuals. The United States Conference of Catholic Bishops has persuasively addressed these points in its comments.

[2] The IFR when referring to the "religious employer" exemption uses the undefined term "contraceptive services." The HRSA Guidelines (http://www.hrsa.gov/womensguidelines/), under the heading "Contraceptive methods and counseling" require health insurance coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." The IFR should be clarified to make sure the religious employer exemption covers all the methods, procedures and education and counseling services required by the HRSA Guidelines.

persons of all ages, races and religious faiths. Through its ministries the Church serves millions of people each year, regardless of their faith or lack of faith. As the late James Cardinal Hickey said, "We serve [them] not because they are Catholic, but because we are Catholic. If we don't care for the sick, educate the young, care for the homeless, then we cannot call ourselves the church of Jesus Christ."[3] Men and women of any or no faith who are willing to serve with us in a manner faithful to the teachings of the Catholic Church are welcomed to join us as colleagues and employees. We communicate our religious values through our deeds and our actions.

Our country has acknowledged and respected the rights of conscience since its founding, and our society's commitment to pluralism lies at the heart of our diverse and vibrant nation. Jefferson's promise to the Ursuline sisters that their work could continue according to their own rules is reflected now in the many federal and state laws protecting individuals and organizations from being required to participate in, pay for, or provide coverage for certain services that are contrary to their religious beliefs or moral convictions. Requiring our members to cover contraceptive services, including sterilization and drugs with an abortifacient effect, would put them in an untenable situation. Consistent with the principle underlying existing conscience protections, the proposed religious employer exemption must be expanded to allow Catholic hospitals and health care providers to continue their ministry in fidelity to their religious beliefs and values.

The proposed religious employer exemption in the IFR would be available only to organizations that meet **all** of these criteria: (1) the inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization; and (4) the organization is a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) and (iii) of the Internal Revenue Code of 1986, as amended.

This definition is unacceptable for multiple reasons, as set forth in more detail below.

CONTRARY TO THE IFR, THE PROPOSED RELIGIOUS EMPLOYER DEFINITION IS NOT CONSISTENT WITH THE STATES'

The Interim Final Rule states that the proposed language is "based on existing definitions used by most States that exempt certain religious employers" from state contraceptive mandates. In fact, the proposed exemption does **not** reflect the current approach followed in the states.

First, only three of the 28 states with contraceptive mandates have religious employer exemptions that are as narrow as that proposed by HHS.[4] Most states with mandates provide religious employers with exemptions that are broader in some or all respects than the one

[3] Murphy, Caryle (2004-10-25). "A Steadfast Servant of D.C. Area's Needy". *The Washington Post*. http://www.washingtonpost.com/wp-dyn/articles/A58599-2004Oct24.html.

[4] It should be noted that this narrow exemption language was originally drafted by the ACLU and was not the result of efforts to work with the faith-based community to address their conscience concerns.

proposed here. Even those religious employers that are located in states with exemptions that are not broad enough to cover them are currently able to offer plans consistent with their beliefs to their employees by becoming self-insured ERISA plans to which state mandates do not apply.

Given this, most of our members and other religious employers are currently free to follow their beliefs and provide health care coverage to their employees that does not include contraceptive and sterilization coverage. The new federal contraceptive mandate, with its broad inclusion of sterilization procedures and drugs that can cause abortion and its extremely limited "religious employer" exemption, represents an unacceptable change in the protection of conscience that has long been afforded to religious organizations in this country. Contrary to the implication contained in the IFR, the proposed exemption does **not** maintain the status quo that exists in the states, but instead attempts for the first time to force religious organizations to violate their conscience and provide coverage for items and services they believe to be morally objectionable.

THE PROPOSED EXEMPTION IS NOT CONSISTENT WITH EXISTING FEDERAL CONSICENCE LAWS

The proposed exemption also is inconsistent with existing federal conscience laws which protect those with religious or moral objections to providing certain services, including family planning services. For example, every year for over a decade Congress has included an exemption to the contraceptive mandate in the federal employees health plan to allow the participation of any health plan whose carrier "objects to such coverage on the basis of religious beliefs." Discriminating against individual health care providers who decline to prescribe contraceptives because of their "religious beliefs or moral convictions" also has been prohibited in the federal health benefits program.

Federal law also provides broad conscience protections in the context of abortion and sterilization. Section 245 of the Public Health Service Act and the Weldon Amendment to the annual Labor, Education and Health and Human Services appropriations legislation protect organizations from discrimination because they object to providing, paying for, covering, referring for or being trained to provide, abortions. Notably, the Church Amendment, which was enacted in 1973, forbids discrimination by recipients of federal funding against any entity that declines to perform or assist in an abortion or sterilization procedure on the basis of religious beliefs or moral convictions.

The proposed exemption is narrower than any conscience clause ever enacted in federal law and reflects an unacceptable change in federal policy regarding religious beliefs. Accordingly, the definition of religious employer should be rewritten to make clear that religious institutional employers, including Catholic hospitals and health care organizations, are exempt from any contraceptive mandate.

THE BROAD SCOPE OF THE MANDATE COMPELS BROAD CONSCIENCE PROTECTION

As noted previously, it is especially important that the religious employer exemption cover Catholic organizations because of the breadth of the mandate. The HRSA Guidelines call for health plans to cover as preventive services for women all FDA-approved contraceptive methods. Among the drugs approved by the FDA for use as a contraceptive is ulipristal acetate, commonly known as "ella." Studies of ulipristal's mechanism of action have indicated that the drug can interfere with implantation of a fertilized egg.[i] The Catholic Church considers a drug which interferes with the implantation of a fertilized egg to be abortifacient, based upon the known science of reproduction and the Church's belief that human life begins at the moment of fertilization. Moreover, there could be other drugs approved by the FDA as contraceptives in the future which operate as abortifiacients. For a Catholic employer to participate in abortion in any way, including by paying for an abortifacient drug through its health plan, is a grave violation of the moral teachings of the Catholic Church.

The HRSA Guidelines also require the coverage of sterilization in health plans. As noted above, the Church Amendment protects those who refuse to perform sterilization procedure. Failing to broaden the religious employer exemption would yield the ironic result of Catholic hospitals having to pay for, through their health plans, procedures which, under the Church amendment, they need not perform.

THE PROPOSED "RELIGIOUS EMPLOYER" DEFINITION RAISES SERIOUS CONSTITUTIONAL QUESTIONS

The proposed religious employer exemption raises several constitutional concerns under the Religion and Free Speech Clauses of the First Amendment. For example, the four criteria included in the exemption essentially define what the government views to be a "sufficiently religious" organization deserving of the exemption. Under this test, HHS has concluded that a religious organization that primarily serves and employs those who do not share its religious tenets is not a "religious employer." In doing so, the government is unconstitutionally parsing a bona fide religious organization into "secular" and "religious" components solely to impose burdens on the secular portion. This is particularly problematic as Catholic teaching calls our members to serve those in need and the most vulnerable regardless of their faith.[5]

THE PROPOSED "RELIGIOUS EMPLOYER" DEFINITION SHOULD BE REVISED TO COVER ENITITES "ASSOCIATED WITH A CHURCH"

The IFR states that HHS will be accepting comments on the "religious employer" exemption "as well as those that have been developed under Title 26 of the United States Code." For the reasons described above, we believe that the proposed definition is unacceptable. We do agree,

[5] For a more detailed analysis of the serious constitutional problems with the proposed religious employer exemption, see the comments filed by the United States Conference of Catholic Bishops.

however, that Title 26 of the Internal Revenue Code (the "Code") contains concepts that are helpful in crafting an appropriate religious employer exemption in this context. Throughout the years, the Code has been a key area of federal law where Congress has sought to balance the church-state relationship. In doing so, Congress has rejected tests which turn on determining "how religious" an organization is (like the proposed religious employer exemption), and instead has adopted more objective standards. In fact, Congress has already dealt with this issue in the context of employer health plans offered by religious organizations in Section 414(e) of the Code, which was developed specifically to avoid church-state entanglements in religious governance relative to pension, health and welfare plans offered by religious entities.

For this reason, we strongly believe that the concepts contained in Section 414(e) are instructive for developing an appropriate religious employer exemption to the contraceptive mandate to be applied to employer health plans. To be clear, we are not suggesting that the exemption be applied only to plans that are "church plans" under Section 414(e), nor are we intending to impact the interpretation of Section 414(e) in the "church plan" context. Instead, we are suggesting that the principles that Congress developed in 1980 to define organizations that are "associated with a church" serve as an appropriate model for the religious employer exemption applicable to the contraceptive mandate. Under those principles, an organization would be covered by the exemption if it "shares common religious bonds and convictions with a church." This definition would exempt from the contraceptive mandate Catholic hospitals and health care organizations as well as other ministries of the Church. To make it easier to understand our approach, we have drafted the following language:

§ 147.130

(a) * * *
(1) * * *
(IV) (B)(1) For purposes of this subsection, a "religious employer" is

> **(a) a church or a convention or association of churches (hereinafter included within the term "church") which is exempt from tax under 26 USC § 501; or**
>
> **(b) an organization, whether a civil law corporation or otherwise, which is exempt from tax under 26 USC § 501 and which is either controlled by or associated with a church.**
>
> **(2) For purposes of this subsection**
>
> **(a) The term "church" includes a religious order or religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether a civil law corporation or otherwise.**
>
> **(b) An organization is associated with a church if it shares common religious bonds and convictions with the church.**

It should be noted that we did look at other provisions of the Code that deal with churches and religious organizations to determine whether those might be helpful in crafting an exemption in this context. Those included Section 6033(a)(3)(A)(i) and (iii) (which deal with entities exempt from filing Form 990) and Section 3121(w)(1) (which deals with entities exempt from withholding FICA taxes). Unlike Section 414(e), those sections were developed to deal with issues that are not relevant to health benefits plans and thus, are not helpful in this context. Such research solidified our belief that the principles of Section 414(e) should be used for the religious employer exemption to the contraceptive mandate in employer health benefit plans under the Affordable Care Act.

CONCLUSION

The proposed "religious employer" definition contained in the IFR is not drawn from current federal law and is instead lifted from the narrowest state definition of a religious employer—found only in three states in the nation. For the reasons detailed in this letter, we request that the definition be rewritten using the principles behind Section 414(e) of the Internal Revenue Code. Under this approach, organizations and institutions that "share common religious bonds and convictions with a church" will qualify as a "religious employer" entitled to the exemption from the contraceptive mandate. This would cover our members in the Catholic health ministry as well as other ministries of the Catholic Church. We also ask you to ensure that the religious employer exemption applies to the full range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counselling required by the HRSA Guidelines.

Thank you for your attention to our concerns.

Sincerely,

Sr. Carol Keehan, DC
President and CEO

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[i] Brenner, Robert et al., "Intrauterine administration of CDB-2914 (ulipristal) suppresses the endometrium of rhesus macques," *Contraception* 81, no. 4 (April 2010): 336-342.

Fine, Paul et. al., "Ulipristal acetate taken 48-120 hours after intercourse for emergency contraception," *Obstetrics and Gynecology* 115, no. 2 (February 2010): 257-263.

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Keenan, J. A., "Ulipristal acetate: contraceptive or contragestive?" *Annals of Pharmacotherapy* 45, no. 6 (June 2011): 813-815.

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McKeage, K and J. Croxtall, "Ulipristal acetate: a review of its use in emergency contraception," *Drugs* 71, no. 7 (May 7, 2011): 935-45.

Sarkar, Narendra Nath, "The state-of-the-art of emergency contraception with the cutting edge drug," *German Medical Sciences* 9 (July 2011), Doc 16.

Stratton, Pamela, et al., "Endometrial effects of a single early luteal dose of the selective progesterone receptor modulator CDB-2914," *Fertility and Sterility* 93, no. 6 (April 2010): 2035-2041.