INSTITUTIONAL
RELIGIOUS FREEDOM ALLIANCE
SAFEGUARDING THE FAITH OF FAITH-BASED ORGANIZATIONS

June 18, 2012

Re CMS-9968-ANPRM

Comment on the ANPRM concerning the design of an accommodation for religious organizations that are not exempt under the definition of "religious employer" implemented as part of the so-called contraceptives mandate.

The Institutional Religious Freedom Alliance works with a multi-faith group of faith-based organizations involved in a wide range of types of services, taking initiatives to preserve a public square in which the organizations are free to make their *uncommon* contributions to the common good.

1. The best possible accommodation cannot undo the grave harm caused by the creation of a two-class system of religious organizations.

The ANPRM solicits comments on an accommodation for religious organizations that are not exempt from the contraceptives mandate because they do not fit the narrow definition of "religious employer" that has been written in the Code of Federal Regulations. The Administration proposed the original exemption in acknowledgement of the need to protect the religious freedom of religious organizations that have a deep objection to including the mandated contraceptive services in the health insurance they offer to their employees. Those organizations that fit the definition of "religious employer" are rightly given an exemption from the mandate.

Yet the definition is so narrow that most religious organizations—essentially, all religious organizations other than houses of worship, seminaries, and religious orders—do not fit within its minimal boundaries. Because they do not fit, they are not afforded the religious freedom remedy the Administration crafted: an exemption from the contraceptives mandate. Instead, they are to be offered only a second-order scheme, an "accommodation" that in one way or another implicates them and their employees in the contraceptive services to which the organizations have a deep religious objection.

And yet the non-church organizations are not any less religious than the organizations that fit the narrow "religious employer" definition and their religious freedom claims are not any less weighty. They should not be separated off into a second category for a lesser degree of religious-freedom protections.

The only remedy is to reverse the attempted division of religious organizations into two classes. The original exemption should be expanded to encompass all religious organizations by selecting a different definition of "religious employer."

I have uploaded with this Comment the letter sent on June 11 to HHS Secretary Sebelius, protesting the two-class scheme of religious organizations. The letter is signed by nearly 150 Protestant and Catholic leaders and supporters of a wide range of religious organizations.

2. A definition of organizations eligible for an accommodation should not be based on IRC Sec. 414(e).

The ANPRM, and some other Commenters, have suggested that a definition of organizations eligible for an accommodation can be designed on the basis of Internal Revenue Code Sec. 414(e). This would be a grave mistake for two reasons.

First, as noted above, the two-class scheme of religious organizations is fatally flawed and should be abandoned. The Administration should not be attempting to define one class of religious organizations—churches and the like—that will receive full religious freedom protections, and another class of religious organizations—however defined—that will receive only an accommodation that provides, by design, a lesser degree of religious freedom protection. A second definition is not needed; rather, the initial definition needs to be drastically revised to encompass all religious organizations.

Second, the many religious organizations beyond the narrow group currently exempted (i.e., churches and church-like entities) cannot be adequately encompassed by a definition that uses as the key criterion whether the entity is controlled by or associated with a church. The inadequacy of such a definition requires no elaborate analysis. There are plainly religious organizations that have a multifaith or ecumenical character—they are connected or associated with multiple churches or denominations and not controlled by nor associated with one church or denomination.

Furthermore, there are plainly many religious organizations that are not controlled by nor associated with a church or denomination, or even multiple churches or denominations. Rather, such religious organizations are in themselves religious organizations and do not receive their religious character by being controlled some other entity. They may have, for example, their own set of theological standards that is not identical with any particular church. They nevertheless regard themselves to be religious, use religious criteria in making some or many of their decisions, and hold themselves out to the public as religious organizations. Many evangelical Christian organizations have this character of independently religious organizations, drawing much of their support and their employees from various religious communities but not being controlled by or associated with any particular one. They are treated by laws, regulations, and court decisions as religious organizations, though they would not fit a definition designed on the Sec. 414(e) model.

A definition of organizations eligible for the accommodation that requires a tie with a church leaves out many actual religious organizations that are recognized in the law as religious organizations. This would be a serious mistake.

3. To be meaningful in religious-freedom terms, at a minimum the mechanism of the accommodation must not require insurers *automatically* to provide coverage of contraceptive services to the employees of a religious organization and the employees' dependents.

In announcing on February 10, 2012, that an accommodation would be designed for non-exempt religious organizations, the Administration said that a mechanism or system would be created through which insurers would "offer" to the women employees the contraceptive services coverage (see the Feb. 10 White House Fact Sheet: Women's Preventive Services and Religious Institutions, and President Obama's Feb. 10 "Remarks" in the Brady Press Briefing Room).

This promised scheme is itself deeply troubling, as many religious organizations and leaders have said. It is not obvious how insurers can be in fact forced to pay for the contraceptive services, rather than transferring some of the costs to the employer via premiums. Worse, in this scheme it is exactly *because* a religious organization objects to having the contraceptive services covered in its health insurance that the insurer will give exactly that coverage to the organization's women employees—albeit while telling the organization that its insurance contains no such coverage. Is this anything better than make believe?

And then the ANPRM promises to burden the religious freedom of the religious organizations further. It proposes making even less substantial the "break" between the employers and the contraceptives services coverage to which they object than what the President promised. The ANPRM says that the insurers will be required automatically to give to the women employees of the organizations the contraceptives coverage, rather than only "offering" it to them—permitting them to decline the coverage if they so choose. The ANPRM says that the accommodation to be created by the eventual rulemaking will require the insurance issuers to "provide contraceptive coverage directly to the participants and beneficiaries covered under the organization's plan with no cost sharing" (77 Fed. Reg. 16503).

Thus, even if all of the employees of a religious organization have the same objection to the contraceptive services coverage that the religious organization itself has, the ANPRM contemplates that the insurance company will give contraceptives coverage to all of those employees and their dependents—even though the organization and the employees all have a deep religious objection to some or all of the contraceptive services! This is not a significant "accommodation" to religious freedom concerns at all.

At a minimum, any scheme of "accommodation" must not require the insurers to automatically give contraceptives coverage to the employees of a religious organization that objects to covering contraceptives in its health insurance policy.

Thank you for the opportunity to submit these brief comments.

Sincerely,

Stanley Carlson-Thies, President