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

March 28, 2013

Submitted Electronically

Centers for Medicare and Medicaid Services
Department of Health and Human Services

Re: Notice of Proposed Rulemaking on Preventive Services, File Code CMS-9968-P

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

The proposed rulemaking, intended to largely complete the administration's response to the religious freedom and conscience concerns raised by the "contraceptives mandate,"[1] does not succeed in doing so but rather perpetuates those concerns.[2]

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

The NPRM proposes an "accommodation" for religious organizations that have conscience concerns about the contraceptives mandate but that are not exempt from the mandate because they do not fit the narrow definition of "religious employer" favored by the administration (whether the definition in the Code of Federal Regulations or the modified version proposed in the NPRM). 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

[1] "Contraceptives mandate" herein refers to the requirement that health plans, with some exceptions, must include coverage of all FDA-approved contraceptive services.
[2] Some of these comments were previously made by IRFA in response to the March, 2012, Advance Notice of Proposed Rulemaking (ANPRM) concerning an "accommodation" with respect to the contraceptives mandate.

Administration crafted: an exemption from the contraceptives mandate. Instead, they are to be offered only a lesser respect for their concerns, an "accommodation" that nevertheless implicates them and their employees in the contraceptive services to which the organizations have a deep religious or moral 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.[3] They should not be separated off into a second category for a lesser degree of religious-freedom protections.

The two-class scheme of religious organizations that the Administration is creating wrongly embeds in federal law the deeply erroneous and offensive idea that church-like activities—worship, religious instruction, prayer—are "really" religious, and thus the organizations engaged in them must be given the full religious-freedom protection of an exemption from the mandate, but that other religious activities—serving the poor and sick because of a divine calling, for example—are not authentically religious and thus the organizations dedicated to them do not merit the same protection and exemption.

Uploaded with this Comment is the IRFA letter sent on June 11, 2012, 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 from a wide range of religious organizations.[4]

The only remedy to this problem is to undo the attempted division of religious organizations into two classes. The exemption should be expanded to encompass all religious organizations by selecting an accurate definition of "religious employer" that does not wrongly write out of the category non-church religious organizations.

2. The proposed revision to the definition of "religious employer" is only a marginal improvement.

The NPRM proposes to modify the current four-prong definition of an exempt "religious employer"[5] by eliminating all but the fourth prong, such that a "religious employer" would be defined for the purposes of an exemption from the contraceptives mandate as "an organization that

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[3] The Administration suggests that employees of non-church religious organizations are less likely than church employees to share their employer's convictions about the mandated contraceptive services. 78 Fed. Reg. 8461 (Feb. 6, 2013). This is a mere supposition that surely is not comprehensively correct. Consider, on the one hand, that some significant proportion of non-church religious organizations require employees to share the organization's creed and conduct standards and that, on the other, that not all members of a religion—not even all those employed by houses of worship—agree in all details with the views of that religion.

[4] This letter was also previously uploaded as a supplement to IRFA's comment on the March, 2012, ANPRM.

[5] 45 CFR §147.130(a)(1)(iv)(B).

is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3))(A)(iii) of the Internal Revenue Code of 1986, as amended."[6]

This modification is a marginal improvement because it now affords the exemption to those houses of worship that provide "benevolent services to their communities" (to use the language of the NPRM).[7] This change is a welcome acknowledgement that houses of worship may, indeed often do, engage in service of neighbor as well as worship of God and that they should not lose their exemption—the full acknowledgement of their religious freedom—due to that (comparatively less primary) benevolent service of neighbor (which, in the Christian tradition, is as surely commanded by God as is worship of God).

Yet, the modification still leaves outside of the definition of "religious employer" the many religious organizations that, precisely because of their commitment to God, are not engaged in traditional worship but rather express their worship of God primarily via benevolent service to their neighbors. Such religious organizations—the thousands and thousands of religious hospitals and health clinics, K-12 schools and universities, pre-K programs and child care centers, organizations providing emergency food and shelter, groups dedicated to drug treatment or job training, and so many others—remain excluded from the definition of "religious employer" and thus excluded from the exemption. They wrongly remain second-class religious organizations in the eyes of the Administration.

It is possible that the modified definition might extend the exemption slightly: there may be some community-serving organizations that are so tightly connected with a house of worship that they fit the Internal Revenue Code's definition of an "integrated auxiliary" of a church and thus are identified in the IRC section referenced in the revised definition. At the same time, it appears that the Administration is now precluding the slightly broader reading of the exemption that the ANPRM suggested might be possible. The ANPRM suggested that if the employees of a non-exempt religious organization participated in the health plan of an exempt religious employer, then the entire health insurance plan would not be required to include the objectionable contraceptive coverage, in effect exempting the non-exempt organization from the mandate.[8]

But these marginal changes are of little consequence. The major problem remains: both the current definition of "religious employer" and the proposed modification of that definition are too restrictive. Most authentic religious employers fall outside of the definition and thus are ineligible for the exemption from the mandate. The definition of "religious employers" should be changed to encompass all actual religious organizations that are employers.

3. A revised definition of "religious employer" should not be based on IRC Sec. 414(e).

[6] 78 Fed. Reg. 8474 (Feb. 6, 2013).
[7] 78 Fed. Reg. 8461 (Feb. 6, 2013).
[8] 77 Fed. Reg. 16502 (Mar. 21, 2012).

Some commenters have suggested that an appropriate definition of "religious employer" can be designed on the basis of Internal Revenue Code Sec. 414(e). This would be a grave mistake.[9]

The many religious organizations that fall outside the current definition, and also outside the proposed modified definition, 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 argument. There plainly are 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 plainly are 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 the standards of any particular church or denomination. They are nevertheless 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. Some Catholic institutions of higher education, similarly, do not fit the requirements of the Sec. 414(e) concept.[10] And yet, though they would not fit a definition designed on the Sec. 414(e) model, these evangelical and Catholic organizations are treated by laws, regulations, and court decisions as religious organizations.

A definition of organizations eligible for the accommodation that requires a formal legal connection with a church or a denomination leaves out many actual religious organizations that are otherwise recognized in the law as religious organizations. This is a serious analytical mistake; worse, it wrongly would exclude from the exemption many religious organizations that should be exempted from the contraceptives mandate.

4. The proposed definition of organizations to be "accommodated" has some positive features, but it exists only within a fatally flawed framework.

The NPRM proposes that, to be eligible for the accommodation, a non-exempt religious organization must be an organization that: (1) is opposed for religious reasons to providing some or all

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[9] The ANPRM suggested that the category of non-exempt religious organizations that should be eligible for the "accommodation" might be based on IRC Sec. 414(e). 77 Fed. Reg. 16504 (Mar. 21, 2012). Sec. 414(e) is inadequate for this purpose, as well, both because of the definitional problems discussed and because the two-class scheme itself is irredeemably flawed.

[10] Catholic Education Daily blog (Cardinal Newman Society), "Sister Keehan, CHA Push Dangerous Compromise on HHS Mandate (Again)," June 15, 2012. http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/1268/sister-keehan-cha-push-dangerous-compromise-on-hhs-mandate-again.aspx

of the contraceptive services; (2) is organized and operated as a nonprofit; (3) holds itself out as a religious organization; (4) self-certifies that it fulfills criteria (1)-(3).[11]

This is a constructive definition in several ways. It is right that, to receive protection for its religious or moral convictions, an organization need object to only some, not necessarily all, of the mandated contraceptive services. The proposed definition is right to require only that an organization "hold itself out as a religious organization," without specifying exactly what the organization must do. Undoubtedly, there are many different ways that religious organizations communicate their religious identity to the world and to their own employees. Further, the proposed definition is right to rely on self-certification, rather than demanding that an organization submit a certification document to HHS or some other government agency for approval or rejection.

However, these are positive features of a fatally flawed conception. The fatal mistake, as detailed above, is the Administration's creation of a two-class system of religious organizations—those that are exempt and those that are only accommodated. The non-church religious organizations meant to be circumscribed by the proposed definition of organizations eligible for the accommodation have no less right than churches to an exemption, to full governmental recognition of their religious freedom and moral claims. The best-designed definition can only be inadequate, for it is a definition created exactly to set apart those organizations it circumscribes from the religious organizations that the Administration deems sufficiently religious to merit an exemption, relegating these supposedly less religious organizations to a wholly inadequate "accommodation."

5. The proposed "accommodation" is not an acceptable religious freedom provision.

The NPRM offers ideas for how an accommodation might be designed in the case of organizations that self-insure. These do not constitute actual proposed rules and so are here ignored.

On the other hand, the proposed accommodation for religious organizations that obtain insurance for their employees from a health insurance issuer is detailed in the NPRM. However, these proposed rules constitute a wholly inadequate response to the religious-freedom or conscience claims of these non-exempt religious organizations.

There has been considerable public commentary questioning the Administration's claim that the proposed accommodation actually will ensure that it is the insurer and not either the employer or the employees that will bear the full costs of providing the mandated contraceptives coverage. We do not weigh in on this important dispute.

Instead, we reject the Administration's supposition that the proposed mechanism of the accommodation offers meaningful religious freedom and conscience protections to religious organizations that object to providing coverage of some or all of the mandated contraceptive services.

The mechanism is this: An eligible objecting religious organization self-certifies its eligibility and documents those contraceptive services to which it objects, and then provides this infor-

[11] 78 Fed. Reg. 8462, 8473, 8474 (Feb. 6, 2013).

mation to its health insurance issuer. The issuer is *obligated* then to offer to the objecting organization health insurance for its employees that *excludes* those objectionable contraceptive services. So far, so good. However, the issuer is now in turn *obligated* to offer to the employees of the objecting organization separate individual policies that exactly *include* just those contraceptive services that the organization is determined to exclude from its health insurance coverage and that the issuer promised would not be included in that coverage. The issuer must "automatically" give, not offer, those separate individual contraceptives policies, and the issuer must give notice to the employees of this special contraceptives coverage at essentially the same time, if possible, that those employees learn the details of the employer's health plan.[12]

That notice will say that the contraceptives coverage is separate from the employer's health plan and that it is not connected "in any way" to that plan.[13] And yet it is precisely because these employees work for a religious employer that objects to including the contraceptives coverage that those same employees will get exactly that same contraceptives coverage in this alternative way. What the Administration proposes is a methodological distinction without a morally significant difference. Precisely *because* the religious organization *objects* to providing insurance coverage that includes one or more of the mandated contraceptive services, its health insurance issuer *must automatically* give exactly that coverage to those same employees.

The NPRM proposes the same flawed accommodation for the case that a religious institution of higher education purchases health insurance for its students. The religious college or university is assured by its student-plan insurer that it is purchasing health insurance without the contraceptive coverage that the institution believes is morally wrong to offer to its students. And then that insurer must provide precisely that objectionable contraceptive coverage to precisely those same students![14] Such a mechanism makes it impossible for the educational institution to arrange for its students to receive health benefits that are consistent with the religious convictions of the institution—the religious convictions that are taught to the students and that the institution desires to model and promote.

In the case of other non-exempt religious organizations, if the accommodation is to be meaningful at all as a mechanism to protect their religious freedom and moral concerns, then it must be modified so that the insurer only *offers*, and *does not automatically give*, coverage of the disputed contraceptive services to the employees.

This would be a meaningful change and a meaningful nod in the direction of governmental respect for the moral and religious concerns of non-exempt religious organizations. Is it sufficient? It would still leave this circumstance: objecting non-exempt religious organizations would still be powerless to ensure that the health insurance coverage that their employees receive—due to their being employees of this particular organization with its particular views about contraceptives—is health insurance that reflects the organization's views about contraceptives. And it will still leave this fundamental problem: a two-class scheme of religious organizations in which only churches receive full religious freedom protection, in the form of an actual

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[12] 78 Fed. Reg. 8463, 8464, 8473, 8474 (Feb. 6, 2013).
[13] 78 Fed. Reg. 8473 (Feb. 6, 2013).
[14] 78 Fed. Reg. 8467 (Feb. 6, 2013).

exemption. All other religious organizations would still only get a second-class "accommodation."

What the Administration should do is scrap the two-class scheme and redefine "religious employer" to encompass all religious organizations—not only churches but also faith-based service organizations. And it should seek a different mechanism—entirely separate from the employee (or student) relationship—by which to promote its goal of expanding cost-free access to contraceptive services.

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While the focus of IRFA and thus of our comments is the religious freedom of religious service organizations, we are well aware that others also have deep religious freedom or moral objections to the contraceptives mandate. These include: religious organizations that are for-profit entities, health insurance issuers, third party administrators of self-insurance plans, non-religious nonprofit organizations that have a moral concern about contraceptive services (such as organizations that work to prevent or eliminate abortions), and individuals not employed by exempt religious organizations. The administration proposes to do nothing to honor the religious freedom and moral concerns of such individuals and organizations. Our comments here are not meant to ignore or undermine their legitimate and pressing concerns. Rather, while we do not speak to those concerns here, we strongly encourage the Administration to consider the concerns and to offer the most robust protection of religious freedom possible.

Sincerely,

Stanley W. Carlson-Thies
President