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**Submitted Electronically**

September 23, 2011

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-9992-IFC2  
PO Box 8010  
Baltimore, Maryland 21244-8010



*Representing California's Catholic  
Health Systems and Hospitals*

Re: **Interim Final Rule on Preventive Services  
File Code CMS-9992-IFC2**

Dear Sir or Madam:

I am writing on behalf of the members of the Alliance of Catholic Health Care to offer comments on the interim final rule relating to coverage of preventive services under the Patient Protection and Affordable Care Act. 76 Fed. Reg. 46621 (Aug. 3, 2011). The Alliance of Catholic Health Care is a California-based, nonprofit health care association representing California's Catholic health care systems and hospitals.<sup>1</sup>

**Catholic Health Care Ministry**

Catholic health care systems and hospitals exist to carry out the healing mission of Jesus. As such, they are essential ministries of the Catholic Church. Central to their mission is a deep commitment to providing a broad range of health care services to all who are in need, especially to the poor and sick – regardless of race, creed, sex, age, economic status, or national origin. This commitment is anchored in the religious belief that it is necessary to engage in corporal works of mercy by living out Jesus' call to care for all persons, not just Catholics. This faith tradition dates back to the very dawn of Christianity. And is exemplified by Catholic health care providers in California and elsewhere that have been making quality health care services available to underserved patients, families and their communities for more than 150 years.

Catholic hospitals do not seek to inculcate their religious and moral beliefs in their patients, and their employees reflect the broad religious diversity of the communities they serve. When a Catholic hospital hires an employee, he or she accepts such employment with the understanding that the hospital is part of the

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<sup>1</sup> The Alliance's members include fifty-four (54) California Catholic and community-based affiliated hospitals, which represent over 16 percent of all California general acute care hospitals. The Alliance's California members include: Catholic Healthcare West, the largest not-for-profit hospital system in California and the eighth largest in the nation; Daughters of Charity Health Care System, with six hospitals and medical centers along the California coast; Providence Health & Services, with five medical centers in Southern California, as well as facilities in Alaska, Washington, Oregon and Montana; and St. Joseph Health System, with nine hospitals throughout California, as well as a regional health care system in Texas.

Catholic Church and conducts its operations in conformity with the moral and doctrinal teachings of the Church.

Moreover, Catholic hospitals provide and ensure access to quality health care services with the understanding that, while the services themselves are not religious in nature, they do so motivated by profound religious convictions and clear moral standards.<sup>2</sup> Thus, Catholic hospitals have long relied, both as care providers and employers, on the noble American tradition of religious tolerance and the nation's constitutional guarantee of religious liberty. HHS's interim final rule runs fundamentally counter to both.

### **California's Contraceptive Mandate vis-à-vis HHS Interim Final Rule**

The substantial legal flaws in the U.S. Department of Health and Human Services' mandate that all health plans cover prescription contraceptives, sterilization, and related patient education and counseling ("HHS mandate" or "mandate") have been well described elsewhere,<sup>3</sup> so these comments will focus primarily on substantial defects in the mandate's exceedingly narrow religious employer exemption ("HHS exemption" or "exemption"). The exemption provides no protection whatsoever to *individuals* or *insurers* with a moral or religious objection to contraceptives or sterilization, who will experience burdens to conscience under the new mandate. Instead, it provides protection only to *employers* with similar objections – and, even then, only to a very small subset of religious employers.

The HHS exemption reduces the definition of religious employer to a radically secular and inappropriate understanding of what constitutes a religious employer (i.e., one that solely inculcates religious beliefs in its co-religionists and employs them within the four walls of a church building). In doing so, the exemption excludes Catholic health care systems and their hospitals, which are committed by their religious mission to serving the health care needs of all and employing people of good will, regardless of religious belief, no religious belief, or denominational preference. Thus, the HHS definition of religious employer is discriminatory and burdensome upon constitutionally protected religious belief and expression.

This is hardly surprising, given that the HHS exemption is based on an American Civil Liberties Union (ACLU)-drafted<sup>4</sup> religious employer exemption to

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<sup>2</sup> See "Ethical and Religious Directives for Catholic Health Care Services (ERDs)," Fifth Edition, United States Catholic Conference of Bishops, 2009.

<sup>3</sup> See Comments on Interim Final Rule on Preventive Services, File Code CMS-9992-IFC2, USCCB, August 31, 2011, available at [www.usccb.org/conscience](http://www.usccb.org/conscience).

<sup>4</sup> Press Release, ACLU, Supreme Court Denies Review of California Law Requiring Employers That Provide Prescription Drug Benefits to Include Contraceptive Coverage (October 4, 2004) ("The ACLU crafted the statutory exemption at issue, balancing the fundamental rights of gender equity, reproductive freedom, and religious liberty."), available at [www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=16639&c=224](http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=16639&c=224).

California's contraceptive drug insurance mandate.<sup>5</sup> Unfortunately, the ACLU's constricted understanding of religion and religious practice incorporates serious cultural misimpressions that, when codified in law or regulation, result in impermissible discriminatory treatment of religious belief and religiously motivated conduct.

Like California's statute, under HHS's interim final rule a "religious employer" is exempt from the HHS mandate if, and only if, the employer meets all of the following criteria: 1) its purpose is the inculcation of religious values; 2) it primarily hires people who share its religious tenets; 3) it primarily serves persons who share its religious tenets; and 4) it is a non-profit organization under Internal Revenue Code section 6033(a)(3)(A)(i) or (iii), (i.e., it is a "church" or "integrated auxiliary of a church").<sup>6</sup>

It is important to note that while California was the first state to adopt this crabbed definition of "religious employer," its mandate is more narrowly focused than is HHS's mandate. California law requires health care and disability insurance plans to include coverage for prescription contraceptive methods *only if* they also provide coverage for outpatient prescription drug benefits.

In contrast, HHS's mandate imposes an unprecedented requirement that **all** types of health plans – including ERISA plans<sup>7</sup> – not only include all FDA-approved contraceptive methods, it also broadens the mandated services to include sterilization procedures, as well as patient education and counseling for all women with reproductive capacity. Moreover, at least one drug approved by the FDA for "contraceptive use," a close analogue to the abortion drug RU-486 (mifepristone), can cause an abortion when taken to interrupt a pregnancy.

Hence, the HHS mandate is, by far, more sweeping than California's law, or any other state's law, both in the scope of plans covered and in its mandated services. Combined with a religious exemption that narrowly defines a "religious employer" to exclude almost any religious entity other than a church, HHS has set itself on a path that substantially burdens and infringes upon the basic religious freedom rights of the health care, social services and higher educational ministries of the Catholic Church. These religious freedoms are not statutory privileges created by Congress, but rather, fundamental freedoms protected by the First Amendment to the U.S. Constitution.

### **Religious Freedom and Religious Discrimination**

A fundamental principle of religious freedom is the right of religious institutions

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<sup>5</sup> California Health & Safety Code § 1367.25 (2000).

<sup>6</sup> The legislative record from the California General Assembly clearly establishes that the authors and sponsors of the California religious employer exemption specifically designed it to exclude Catholic religious institutions, especially Catholic hospitals, universities and social service agencies. (*Catholic Charities of Sacramento Inc. v Superior Court* 32 Cal. 4th 527, 541-47 (2004).)

<sup>7</sup> The Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. 93-406, 88 Stat. 829, enacted September 2, 1974)

to autonomy in their self-definition and governance. Simply stated, churches and religious institutions have the right to define and govern themselves free from government interference and entanglement. The HHS exemption violates this right by redefining Catholic institutional ministries in a manner that excludes central elements of their faith. HHS simply lacks the constitutional capacity to establish a definition of religious ministry that runs counter to a religious organization's understanding of it – absent a compelling governmental interest that warrants state interference in a manner narrowly tailored to avoid burdening the exercise of this right. HHS's interim final rule has identified no such compelling interest.

Of all the nation's religious employers, only Catholic institutional ministries (i.e., health care, social services and higher education) are likely to be substantially burdened as a result of the HHS mandate and exemption. This is because Catholic institutional ministries all share distinct characteristics that include: 1) an unqualified commitment to Christian service not calculated to inculcate religious values; 2) a commitment to invite all people of good will, regardless of their religious beliefs, to serve with them in the operation of these ministries, and 3) an outreach to serve all people in need, regardless of race, creed, or economic status.

The narrow character of the HHS exemption offers Catholic institutional ministries a Hobson's choice: either cooperate under governmental compulsion with conduct that is inconsistent with their religious and moral beliefs, or cease functioning altogether. This "choice" is the direct product of HHS's misguided attempt to redefine "religious employer" in a manner that fairly and reasonably reflects the Catholic understanding of "religious works" and the centrality of those works to the larger church of which it is an integral part. Rather, only those religious organizations HHS deems "religious enough" may invoke its exemption. It is ironic, to say the least, that HHS is substantially burdening Catholic religious belief precisely because, in the operation of its institutional ministries, it respectfully avoids inculcating religious beliefs through proselytization and deliberately includes, and compassionately reaches out to serve, persons of all faith traditions and those having no faith tradition.

HHS is also proposing to provide only some religious organizations the benefits of its exemption. The government simply cannot decide which religious organizations merit accommodation of their constitutionally protected rights to religious freedom and which ones do not – particularly based upon a governmental definition of what constitutes religious ministry and what does not.

Finally, by adopting its exemption, HHS is acknowledging that the interest of certain religious employers acting in accordance with their religious beliefs is trumped by the interest of their employees in having certain medical benefits financed by that religious employer. Having recognized that some institutions merit an exemption that will allow them to act in accordance with their religious beliefs, HHS has no compelling reason to prohibit other religious institutions

from receiving equal treatment. Accordingly, to bring its definition into compliance with the U.S. Constitution and settled case law, HHS must expand it to permit all religious institutions to receive equal access to it.

## **EXPANDING THE DEFINITION OF RELIGIOUS EMPLOYER**

Title 26, section 414 of the Internal Revenue Code<sup>8</sup> contains language that could substitute for the HHS exemption. Section 414 contains the definition of a “church plan” for purposes of retirement plans regulated under the Employee Retirement Income Security Act (ERISA). Organizations offering retirement plans that meet the requirements in section 414 can elect to be regulated by either federal law or state law, with the intent to avoid conflicts between the law and the organization’s religious beliefs.

With slight modifications, an exemption modeled on section 414 would appropriately and equitably encompass all religious organizations that will

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<sup>8</sup> The relevant text of Title 26 section 414 is as follows:

**(e) Church plan**

**(1) In general.** For purposes of this part, the term “church plan” means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches, which is exempt from tax under section 501.

**(2) Certain plans excluded.** The term “church plan” does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

**(3) Definitions and other provisions.** For purposes of this subsection—

(A) Treatment as church plan

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

**(B) Employee defined.** The term employee of a church or a convention or association of churches shall include—

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E).

**(C) Church treated as employer.** A church or a convention or association of churches which is exempt from tax under section 501 shall be deemed the employer of any individual included as an employee under subparagraph (B).

**(D) Association with church.** An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

experience significant conflicts between their religious and moral beliefs and HHS's contraception and sterilization mandate. Moreover, this "church plan" language has been in effect (albeit in the retirement plan context) for over 30 years; as such, it provides precedent in current law.

While the language in section 414 is instructive as an example of a religious exemption that has withstood the tests of administrative and judicial scrutiny, a slightly broader exemption would protect *health plans* offered by religiously based organizations, not just religious *employers*. As such, the exemption in the HHS mandate should be worded in the following, or in a substantially similar, manner:

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and shall establish exemptions from such guidelines with respect to *health plans and policies established or maintained by a church, by a convention or association of churches, or by an organization associated with a church or a convention or association of churches which is exempt from tax under section 501* with respect to any requirement to cover contraceptive services under such guidelines.

(B) *An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.*

The proposed exemption would respect religious organizations' right to offer health plans that comply with their religious beliefs, while preserving the right of women to obtain coverage of contraceptives and sterilization outside of those plans.

Exempting health plans provided by religious universities, not-for-profit insurers, health care providers, social welfare organizations, and others, also would allow those organizations, consistent with their religious beliefs, to continue covering vital health and social services for the nation's poor and vulnerable populations. Conversely, if HHS does *not* broaden the exemption in the final rule, these organizations may be forced to drop employee and private coverage altogether, exacerbating the number of uninsured and underinsured.

It is important to emphasize that the above proposal for broadening the definition of religious employer would emphatically not protect *individuals* and *non-religious employers* who conscientiously object to elements of the HHS mandate.

In revising its exemption, HHS should do so in a manner that protects them, as well. In doing so, HHS should rely on the Illinois *Health Care Right of Conscience Act*.<sup>9</sup> This broadly worded protection of conscience law for employers, health care providers, insurers and workers, is one of the most comprehensive in the United States. There is no evidence that the operation of this statute has caused a reduction in the availability of, or insurance coverage for, contraceptive drugs, sterilizations or abortion procedures.

## CONCLUSION

Religious freedom, manifested in the notion of liberty of conscience, is a fundamental right of individuals, as well as their collective right through the organizations they create as vehicles for cooperation in the expression of their religious faith. Religious organizations, as well as individuals, are protected by the First Amendment's free exercise clause. Religiously affiliated health care organizations bring vital and unique perspectives and values to the provision of critical human services – the values that animate the services they provide clearly benefit the people they serve, who are often facing critical crossroads in their lives. For example, Catholic hospitals are committed to serving their communities by providing health services not always available in other hospitals. Catholic hospitals in California exemplify this by being leaders in the provision of palliative care programs that promote quality of life for patients living with serious, chronic or terminal illness – 86 percent of California Catholic hospitals have palliative care programs compared to 43 percent of all California hospitals. Other services that are more often found in California Catholic hospitals include neonatal intensive care units (NICU), pediatric care beds, maternity care and coronary care units.<sup>10</sup> Moreover, a recent Thompson Reuters survey<sup>11</sup> found that on eight key measures Catholic-owned systems are “significantly more likely to provide higher quality performance and efficiency to the communities served” than their nonprofit and investor-owned counterparts. Thus, a *religious ambience* that informs and animates the provision of medical services makes a critical difference; until now, the federal government has never questioned the right of a religious organization to maintain such an ambience.

Religious belief is not a department of life, but a totality of vision and perspective. The substantive and radical value of religious freedom is not individual choice,

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<sup>9</sup> 745 ILCS 70/1. Section 3 of this act, “Findings and Policies,” states: “The [Illinois] General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.” The complete statute is available at: *Health Care Right of Conscience Act*.

<sup>10</sup> California Office of Statewide Health Planning and Development, 2007.

<sup>11</sup> *Differences in Health System Quality By Ownership Type*, Thomson Reuters, August 2010.

but the liberty to believe in human life as a transcendent totality and to act upon that belief, whether individually or in cooperative endeavors. Religious ministry to the sick, the injured, and the dying is not peripheral, nor are the particularized moral conclusions directing medical interventions unrelated to the core content of faith. When free exercise is in the balance, the issue is not whether or not a particularized constraint is reasonable, or exceptions may be drawn to it, or whether the majority of other health care providers do (or do not) go along with it, but, rather, whether the religious organization providing services may be free of the burden of the government to make practical decisions guided by the core religious vision it espouses. The freedom to make decisions grounded in conscience and guided by core religious principles warrant protection. One way to protect such important rights is to ensure that those who exercise them are free from governmental discrimination.

Ninth Circuit Judge John T. Noonan, Jr., an eminent church-state scholar and law professor has wisely observed that “[r]espect for the religious beliefs of others is particularly difficult when one does not share these beliefs ...The First Amendment is an effort, not entirely forlorn, to interpose a bulwark between the prejudices of any official ... and the stirrings of the spirit.” Catholic religious beliefs – in this case, beliefs that HHS apparently perceives depart from the secular norms it views as orthodoxy in the current political culture – seem particularly difficult for secular government to understand, much less respect. Yet, the First Amendment *demand*s such respect, interposing just such a “bulwark” between the secular preferences of government and the freedom to engage in ethical health care decisions that result from the stirrings of religious belief.

The HHS exemption aggressively seeks to breach this fundamental bulwark. This breach cannot be tolerated and HHS must substantially revise its religious employer exemption, if these fundamentally important religious freedom rights are to have any meaning or relevance.

Sincerely,



William J. Cox  
President and CEO