Council for Christian Colleges & Universities®

OUR MISSION:
To advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth.

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April 8, 2013

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health & Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Ave. SW
Washington, DC 20201

Re: Notice of Proposed Rulemaking on Preventative Services: File Code No. CMS-9968-P

Dear Secretary Sebelius:

On behalf of the 172 higher education institutions which comprise the Council for Christian Colleges and Universities, we must comment as a matter of conscience on the February 6, 2013, Notice of Proposed Rulemaking (78 Fed. Reg. 8456) entitled "Coverage of Certain Preventative Services Under the Affordable Care Act" (CMS-9968-P). While the CCCU acknowledges that your Department has made some modest attempts to respond to the religious liberty objections of our schools and other faith-based organizations as it pursues your stated goal of providing for all women "preventative health services, including contraceptive services," we must declare that the NPRM still does not go far enough to protect religious liberty.

Let us be clear here that the principle at issue is the very constitutional religious liberty of faith-based entities and individuals, such as Christian colleges and universities. When one group's constitutional religious liberty is jeopardized, the religious liberty of all people and the entire nation

is ultimately at risk. This is why we are compelled to object to the HHS mandate, even as modified, on behalf of Christian higher education and for the sake of the nation.

Faith-based institutions, like our CCCU Christian colleges and universities, perform a critical and irreplaceable role and provide invaluable service for our nation and society, precisely because they are faith-based. This is why the federal government has historically respected their character and protected their religious liberties. Specifically, CCCU Christian colleges and universities provide exceptional higher education service, integrating academic excellence with faith, to more than 400,000 students a year in this nation alone, most of them from families of modest means. Faith-based colleges go back to the very founding of the nation (and even before). In fact, higher education began in this country as a faith-based endeavor.

As your Department knows, your stated policy goals regarding contraceptive services run contrary to the religious beliefs of many people and faiths throughout the United States. Many faiths, including much of the Christian faith, believe that certain of the "contraceptive" services required, particularly abortifacients from the perspective of Evangelical Christian colleges, violate their religious beliefs about life and conception. Throughout this lengthy regulatory process, we, along with many others, have expressed the constitutional concerns that this intersection of policy and religious beliefs presents. We appreciate the Department's willingness to hear these concerns in various meetings and venues. Yet, while we do see that the current NPRM contains a few improvements, it does not address the most fundamental constitutional issues that we presented in our previous

correspondence. The NPRM simply does not go far enough to offer proper protection for religious beliefs.

The failure of the NPRM to properly offer the most robust protection possible for religion stems in large part from a fundamental philosophical and legal disconnect between the regulations offered in the NPRM and the constitution: namely, these regulations attempt to create the narrowest protection for religious beliefs, while the constitution demands that they be broadly and robustly protected. We urge the Department to expand and build upon the modest movement in the NPRM in order to finalize regulations that comport with constitutionally required protections for the religious beliefs of large portions of the American public as well as the churches and faith-based institutions that they support.

The Department should treat religious institutions equally by expanding the parameters of the exemption to include all faith-based institutions.

Our most fundamental concern remains the fact that the Department, by creating two different classes of religious groups in these regulations, does not respect the religious beliefs of faith-based organizations equally. By offering an exemption to some groups, but merely an accommodation to others, the Department makes a distinction about religion that it is constitutionally prohibited from making. We are encouraged that the NPRM references the Department's recognition of the potential for excessive entanglement in its elimination of three of the previous criteria for exemption; yet we remain convinced that these regulations do not avoid these constitutional violations because the exemption/accommodation

structure creates arbitrary and unfounded distinctions about religious expression and sincerity.

In this regard the NPRM itself admits to the largely cosmetic nature of the changes when it states that they do not "expand the universe" of exempted employers beyond the original narrowly-defined group, primarily "houses of worship."

The NPRM states the rationale for such distinction: "The Departments believe these proposed accommodations, as opposed to the exemption that is provided to religious employers, are warranted given that participants and beneficiaries in group health care plans established or maintained by eligible organizations … **may be less likely than participants and beneficiaries in group health care plans established or maintained by religious employers to share such religious objections of the eligible organizations."** It is not the prerogative or right of government to make the determination about how "religious" a faith-based organization is or the degree to which its constituency embraces its core religious convictions. That in itself is the very definition of excessive government entanglement.

The CCCU is particularly frustrated by that rationale for the exemption-accommodation paradigm, **because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution.** Obviously our administrators and faculty do share the deeply held religious convictions of their employers, contrary to the Department's view. Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in

this scheme. This exposes why this is not a coherent criterion – rather, the religious mission of the organization should drive the distinction.

This is the hazard, we would caution, of using a section from the tax code intended to govern reporting requirements to instead determine whether an employer is religious or not. Sections 6033(a)(3)(A)(i) and (iii) of the Code, were not designed for such purpose. To do so is to assign arbitrary legislation constitutional weight. Rather, it seems to us, when constitutional concerns for religious liberty are at stake, it is best to cast the widest net, and to include the broadest protections possible for the largest number of groups, instead of trying to develop the option that threads the thinnest constitutional needle.

CCCU institutions as faith-based entities **are** "religious employers." Yet, under the current NPRM they are not designated as such. Instead, their employees and students will receive products and services that they are religiously opposed to through the health care relationship that they have arranged on their behalf. The incongruity of this cannot be overstated. **Therefore, the CCCU restates its opposition to the two-tier system created by this NPRM and urges the Department to expand the definition of a religious employer so that all CCCU institutions, and other faith-based entities, which are religious employers, will be treated accordingly**.

<u>If, however, the Department disregards the constitutional concerns above and insists upon an accommodation approach, the CCCU urges the Department to further remove the provision of objectionable services from the Christian college or university or other faith-based entity (ie. the religious employer).</u>

Though the NPRM describes a process whereby insurance companies will contact employees and students directly, which we acknowledge is better than employers being obligated to include these services in their own plan – which almost certainly would have been found to be unconstitutional – the fact remains that the relationship these insurance companies have with the employees and students is only because of the insurance that is arranged and paid for by the faith-based institution. The faith-based institution will effectively be providing contact information on its employees and students, either directly or indirectly, for the purpose of offering them services religiously objectionable to the employer and college community.

There are other relationships that the Department could instead utilize to ensure that contraceptive services are made available to all. For instance, the NPRM proposes using the Federally-facilitated Exchange to provide the required mandatory services for those accommodated groups that self-insure. These could also be used to provide such services to the employees of faith-based employers that do not self-insure. Or the Department could choose to rely on other government health plans to provide this supplemental coverage. An option such as this would help further remove the provision of services that these faith-based organizations find violative of their religious conscience from the insurance policies that they provide their employees. The fact remains that other options for

providing this coverage are available to the Department rather than exploiting the insurance relationship provided by the religious employer. If the Department will not broaden the definition of the religious exemption, which we maintain that it should, the Department should at very least select an option for contraceptive coverage that creates as much distance as possible between the employer and the coverage to which they religiously object.

The Department has asked also for feedback on its proposed approach whereby accommodated institutions would self-certify their eligibility for the accommodation directly to the insurance company. If the Department insists on an accommodation approach despite the persuasive constitutional objections, the proposed approach of self-certifying to the insurance company would at least mitigate the excessive intrusion and entanglement that would occur if institutions were required to report directly to and be certified by the government itself.

While we believe that creating more space between the employer and employee would help improve the accommodation as it currently exists for employee and student plans alike, we must reiterate our belief that the only full and complete relief for our institutions will be when they are treated as religious employers and are exempted from the requirements of this mandate altogether. The government remains free to provide these services to citizens in ways other than employer based health care plans, and it seems clear that only by doing so can the government fully respect the constitutional concerns and religious liberty of faith-based employers.

We must also note that the proposed regulation leaves much confusion and concern for faith-based institutions which are self-insured, because of the NPRM's lack of clarity and specificity in this area. The critical constitutional principles and protections, and our compelling call for full respect of religious liberties, in the preceding comments must be realized in the context of self-insured settings as well.

We appreciate your attention to the concerns and comments offered here and urge you and your Department to do everything in your power to protect the constitutional rights of our institutions and the constitutional principles of our nation.

Sincerely,

Edward O. Blews, Jr., J.D.
President