

June 18, 2012

Centers of Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9968-ANPRM
P.O. Box 8016
Baltimore, MD 21244-1850

Re: Response to Regulatory Advance NPRM on the Patient Protection and Affordable Care Act, Code # CMS-9968-ANPRM

Dear Sir or Madam:

Regis University is a Jesuit Catholic University located in Denver, Colorado.

On September 21, 2011, Regis University sent a letter to the Department of Health and Human Services strongly opposing the mandate requiring private health plans to provide contraceptive coverage to employees and students. Regis University continues to object strenuously to that mandate. As it is currently written, the mandate violates religious liberty by superseding the ability of a faith-based employer to offer health coverage consistent with its religious beliefs. Neither the "temporary safe harbor from enforcement" nor the proposed accommodations changes that essential flaw.

The Association of Jesuit Colleges and Universities ("AJCU") responded to the referenced ANPRM. A copy of that response is included with this letter. Regis University supports the positions taken by AJCU.

Regis wishes to echo the position of AJCU on four specific points in particular. First, the ANPRM does not change the administration's overly narrow definition for "religious employers" that are exempt from the mandate. The definition of "religious employer" needs to be expanded so that institutions such as Regis that share common bonds and convictions of a religion are included, whether or not it has a majority of employees or students of that religion. We maintain it is a religious obligation to serve both Catholics and non-Catholics in our Church affiliated institutions, whether colleges and universities or hospitals. This is part of our mission and part of our religious identity.

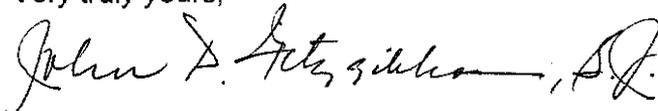
Second, Regis agrees that the most suitable definition for the purpose of the accommodation is the one federal courts use to determine whether a religious organization is exempt from the NLRA. As argued by AJCU, that definition is easy to understand and administer, and, more importantly, is based on objective and easily verifiable criteria, which means that governmental entities would not be in the constitutionally impermissible business of making a determination about whether a particular organization is sufficiently "religious" or not.

Third, the test of eligibility should not be if an institution has previously provided contraceptive coverages. AJCU's arguments about the development of moral doctrine, the difference in forms of contraception, and that the extension of contraception coverage may have been inadvertent are persuasive. As stated by AJCU, religious institutions should not be required to make an "all or nothing" choice to qualify for the accommodation.

Fourth, insurance companies and TPAs are not going to provide the services without cost. They are neither going to give up fees that they already earn through rebates, etc., nor bet that cost savings for other coverages will offset the cost of providing the contraceptive coverage. Those charges will, in fact, be passed on to the religious institutions. To believe otherwise is naïve, if not disingenuous.

Regis University requests that the Department carefully consider the objections toward the end of legally protecting the constitutional right of freedom of religion.

Very truly yours,

A handwritten signature in cursive script that reads "John P. Fitzgibbons, S.J." The signature is written in black ink and is positioned above the printed name.

John P. Fitzgibbons, S.J.
President

cc: Association of Jesuit Colleges & Universities
Association of Catholic Colleges and Universities

ASSOCIATION of
JESUIT COLLEGES
& UNIVERSITIES
AJCU

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XAVIER UNIVERSITY, OH

To: The Departments of Health & Human Services,
Treasury, and Labor

From: Association of Jesuit Colleges and Universities

Re: Response to Regulatory Advance NPRM on the
Patient Protection and Affordable Care Act, Code #
CMS-9968-ANPRM

Date: June 19, 2012

On behalf of the Association of Jesuit Colleges and Universities (AJCU) and its twenty-eight member institutions, we write to comment upon the Departments' Advanced Notice of Proposed Rulemaking (ANPRM), 77 Fed. Reg. 16501 (Mar. 21, 2012), regarding the "accommodation" that the Administration has offered to religious institutions that were excluded from the religious exemption for a "religious employer" set forth in the final rule mandating contraceptive coverage to employees and students, 77 Fed. Reg. 8725 (Feb. 15, 2012), codified at 45 C.F.R. § 147.130(a)(iv)(B).¹

¹ The rule finalized in February adopts the definition of "religious employer" that was first introduced in the interim rule published in August 2011. Under that definition, a "religious employer" as an organization that meets all of the following 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.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46621-01 (Aug. 11, 2011).

The AJCU continues to object strenuously to the Departments' decision to adopt an extremely narrow definition of "religious employer" in their February 2012 final rule and thus to exclude essentially all religious colleges and universities and scores of other faith-based institutions from the exemption to the contraceptive-coverage mandate. The begrudging scope of the exemption, which extends only those who primarily serve and employ members of their own faith and whose primary purpose is the inculcation of religious values, is unprecedented in federal constitutional and statutory jurisprudence and impermissibly infringes on the religious freedom of the member institutions of the AJCU and all other religiously affiliated organizations.

The AJCU requests that the Department reconsider its definition of "religious employer" and that the definition be broadened to include religious institutions that do not fall under that narrow definition. But should the Departments nonetheless persist in their current position, we believe that the "accommodation" must include at least the elements discussed below.

I. Non-Precedential Nature of the Final Rule's Definition of "Religious Employer"

The narrow definition of "religious employer" that the Departments adopted in the February 2012 final rule is unprecedented as a matter of federal law. Although variations of this phrase can be found in federal statutes and case law, we are aware of no definition of "religious employer" or "religious organization" in federal law that is so constricted and narrow. Nor are we aware of any definition that focuses explicitly on the religious affiliation of persons the organization employs and serves and on whether religious "inculcation" is the primary goal of the institution. Indeed, organizations like AJCU's member institutions (none of which would satisfy the four-part definition adopted in the February 2012 final rule) have long been considered by the federal government to be "religious" for a multitude of purposes, including for purposes of the Tax Code, 26 U.S.C. § 501(c)(3), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), the Fair Housing Act, 42 U.S.C. § 3604(a), and many other statutes.

We therefore concur with the Department's suggestion that the final rule regarding the "accommodation" should make clear that the narrow definition of "religious employer," that the Departments have adopted for the contraceptive-coverage mandate, is simply an *ad hoc* definition that should not be applied in any other context. To achieve this result, we suggest that the final rule contain the following language:

Whether an employer is designated as "religious" for these purposes of 45 C.F.R. § 147.130(a)(iv)(B) is not intended as a judgment about the mission, sincerity, or commitment of the employer and the use of such designation is limited to defining the class that qualifies for this specific exemption. The designation shall not be applied with respect to any other provision of the PHS Act, ERISA, the Internal Revenue Code, **or any other statute or regulation**, nor is this designation intended to set a precedent for any other purpose.

The language is consistent with language in the ANPRM about the non-precedential nature of the definition. *See* 77 Fed. Reg. at 16502. But it adds the bolded phrase above—"any other statute or regulation"—to make clear that the definition does not set a precedent in any other context.

II. Definition of "Religious Organizations" Eligible for the "Accommodation."

The ANPRM asks respondents to address the question, "What entities should be eligible for the new 'accommodation' (that is, what is a 'religious organization')?" 77 Fed. Reg. at 16504. The AJCU strongly urges the Departments to adopt a definition of "religious organization" that covers any non-profit

institution that is affiliated with an organized religion or otherwise has a religious character or mission.¹ Furthermore, the AJCU believes that the definition should be clear-cut, easy-to-administer and, most importantly, not entail governmental inquiry into an institution's religious character and practices. As the Supreme Court has explained, "the very process of inquiry" into such matters leads to unconstitutional government entanglement in religious affairs and is an affront to religious liberty. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). As the Supreme Court stated in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), "[T]he inquiry into [a religious school's] religious views . . . is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." A definition of "religious organization" that would require the Departments to inquire into an institution's degree of religiosity would raise very serious First Amendment concerns. Moreover, it would inevitably result in protracted and costly litigation over which institutions are "religious" and which are not. Both of these undesirable consequences should be avoided.

The most suitable definition of "religious organization" for the purposes of the "accommodation" is the one federal courts have used to determine whether a religious organization is exempt from the NLRA. This three-part test was largely drawn from Justice (then-Judge) Breyer's opinion for an equally divided court in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985) (en banc), and subsequently articulated by the U.S. Court of Appeals for the D.C. Circuit. See *Carroll College v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343-34 (D.C. Cir. 2002). Although the cases phrase the test in slightly different ways, the essence of the test is that an organization is a "religious organization" if it:

- (1) "holds itself out publicly as a religious institution," *University of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1344 (2002);
- (2) "is organized as a 'nonprofit,' " *id.* at 1343 (quoting *Bayamon*, 793 F.2d at 400); and
- (3) "is affiliated with . . . directly or indirectly . . . a recognized religious organization," *id.*

This definition has proven to be easy to understand and administer. Moreover, it is based on objective and easily verifiable criteria, which means that the Departments would not be in the constitutionally impermissible business of making determinations about whether a particular organization is sufficiently "religious" or not.

Just as important as the definition itself is the process by which the Department will determine whether an organization meets the definition (and thus qualifies for the "accommodation"). Bearing in mind the prudential and constitutional concerns discussed above, the AJCU suggests that the Departments allow organizations to self-certify that they meet the three-pronged test set forth above and that the Departments consider self-certification to be conclusive.

Any concern that the three-part test described above, combined with self-certification, would lead to institutions improperly availing themselves of the "accommodation" overlooks the practical consequences of that action. As one federal court explained in adopting the test, requiring a publicly available self-certification guarantees a "market check" on institutions' sincerity that will prove far more effective than a government inquiry. "While public religious identification will no doubt attract some

¹ Please note that the AJCU's comments about the definition of "religious organization" should not be construed as indicating its agreement with the Departments' apparent decision to limit the "accommodation" to "religious organization[s]." The AJCU supports religious liberty and freedom of conscience for all religiously objecting employers (including non-profit as well as for-profit entities) and individuals, not just those who would meet the three-part test set forth herein.

students and faculty to the institution, it will dissuade others. In other words, it comes at a cost. . . . Thus, the requirement of public identification helps to ensure that only *bona fide* religious institutions are exempted.” *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002).

III. The Design of the “Accommodation.”

The AJCU believes that the First Amendment and federal statutory law (namely, the Religious Freedom Restoration Act) require that religious organizations like its member institutions be treated no differently than organizations deemed to be exempt “religious employers” under the February 2012 rule. But again, should the Departments nonetheless persist in their present position, there are steps that they can take that would lessen, although not eliminate, the constitutionally impermissible burdens that the final rule places on the exercise of religious liberty. In that context, the AJCU suggests the following modifications to the proposed “accommodation.”

A. Eligibility.

If the certification requirements for the regulatory Safe Harbor (discussed in greater detail below) are any indication, the Departments intend to condition eligibility for the “accommodation” on an institution’s certifying that it has never offered contraceptive services as part of a given plan. See Memo from Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicare Services (CMS), *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers*, at 6 (Feb. 10, 2012) (requiring organizations to certify that “at any point from February 10, 2012 onward, contraceptive coverage has not been provided by the plan”). The AJCU strongly objects to this approach and recommends that *all* organizations that meet the three-part definition discussed above be eligible to take advantage of the “accommodation,” regardless of whether the organization has ever provided some of the mandated forms of contraceptive coverage in the past and regardless of whether it chooses to provide some, but not all, forms of such coverage in the future.

Simply put, the Departments should respect a religious institution’s right to change its mind about whether to provide contraceptive coverage in some or all of its plans. The devices and services covered by the mandate raise complex moral issues that require ongoing examination. The fact that a given institution may have, at some point in the past, provided some form of contraceptive coverage to employees or students, does not mean that the institution’s religiously based objection to providing such coverage in the future is somehow insincere and thus should not be respected. The institution’s decision to change its position could have been made for a whole host of reasons—perhaps the institution came under different leadership; perhaps new teachings from ecclesiastical authorities changed the moral calculus; or perhaps the institution simply reevaluated its previous position and decided that excluding contraceptive coverage was necessary in order to more closely align the institution’s conduct with its religious mission. Alternatively, the institution’s extension of contraceptive coverage may have been inadvertent. For example, it may have purchased an off-the-shelf plan from a private insurer without realizing that the plan covered contraceptive services.

Moreover, the AJCU recommends that a religious organization’s decision to include some forms of contraceptive coverage in a health plan not render that institution ineligible to invoke the “accommodation” to exclude other forms of contraceptive coverage in the same or a different plan. In other words, institutions should not be forced to make an “all or nothing” choice. Thus, although Catholic teaching forbids all non-natural forms of birth control, other faith traditions may draw the line differently and permit some forms of contraception while forbidding other forms, such as abortifacients and sterilization, on the ground that they are of a different moral character. The Departments should respect the diversity of religious traditions and the fact that differing moral judgments that may lead some religious institutions to provide their students and employees with coverage for some but not all forms of

birth control mandated by the February 2012 rule. Similarly, some religious organizations may conclude that it is appropriate to include various forms of contraceptive coverage in one type of plan (e.g., an employee plan), but not in other plans (e.g., a student plan). Thus, a religious organization should be allowed to cover certain forms of contraception in all or some of its plans while excluding others (such as abortifacients and sterilization procedures) in all or some of its plans and still remain eligible for the “accommodation.”

B. Clarification of the Safe Harbor Provision.

The Departments have suggested a Safe Harbor provision for those institutions or religious organizations that do not fall under the narrow definition of “religious employer.” Organizations taking advantage of the Safe Harbor would not need to comply with the contraceptive mandate until one year after the first plan year that starts after August 1, 2012. *See* 77 Fed. Reg. at 8726 (Feb. 15, 2012); Memo from Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicare Services (CMS), *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers* (Feb. 10, 2012). The AJCU suggests that the Safe Harbor provision be clarified and modified in the following ways.

First, and most importantly, the AJCU requests that the Safe Harbor be extended such so that religious organizations have until January 1, 2014 to comply with the mandate. An extension is warranted for two reasons.

- (a) Unlike employee health plans, whose plan years generally start on January 1, student health plans typically start their plan year when the Fall term begins in August. Thus, as a practical matter, the compliance deadline for student plans at the AJCU’s member institutions will come much sooner than the deadline for employee plans. For example, under the terms of the Safe Harbor as currently written, a student whose plan year begins on August 1 must be in full compliance with the mandate by August 1, 2013. By contrast, employee plans whose plan year begins on January 1 will not need to comply until January 1, 2014—i.e., one year after the start of the first plan year that begins after August 1, 2012. Synchronizing the compliance dates for student and employee plans will greatly reduce the administrative burden the mandate will impose on our member institutions.
- (b) Given that the new rule codifying the “accommodation” will not be finalized until well into 2013, educational institutions likely will have only a few months to arrange coverage options that comply with the new rule. An August 1, 2013 deadline would simply not leave sufficient time for the AJCU’s member institutions to adjust to the new rule. A January 1, 2014 compliance deadline therefore would be more realistic and far less burdensome.

Second, it is unclear where religious organizations wishing to take advantage of the Safe Harbor should submit the self-certification documents published by the Departments. The AJCU recommends that such organizations be deemed in compliance with the Safe Harbor upon mailing copies of the certification documents to their insurer/TPA.

Third, another point of ambiguity is the timing for self-certification. Subject to the adjustment in the compliance date requested above, the AJCU recommends that the deadline for submitting the self-certification documents to the insurer/TPA be the start of the first plan year that begins after August 1, 2012.

Fourth, consistent with the its recommendation on the eligibility requirements for the accommodation (discussed above), the AJCU recommends that the Departments revise the certification

requirements set forth in the February 10, 2012 guidance memo to allow *any* religious organization that does not meet the narrow definition of “religious employer” to invoke the Safe Harbor, regardless of whether it provided some form of contraceptive coverage to employees as of that date.

C. Cost Responsibility.

Under the proposed “accommodation,” issuers (and TPAs in the case of organizations that self-insure) will be required to provide contraceptive “coverage directly to the participants and beneficiaries covered under the organization’s plan with no cost sharing,” and “there [will] be no premium charge [to the religious organization] for the separate contraceptive coverage.” 77 Fed. Reg. at 16503.

The AJCU has serious concerns about the feasibility of this proposal. Unless premiums are frozen at current levels indefinitely, there can be no real assurance that issuers and TPAs will not somehow pass along the costs of contraceptive coverage to religious organizations, with the result that the organizations are in fact paying premiums and fees to subsidize contraceptive coverage. Issuers certainly would have an economic incentive to do so. Thus, a meaningful check on such cost-shifting behavior is needed.²

To that end, AJCU suggests that issuers and TPAs be required to certify annually to the Department and the religious organization, under penalty of perjury, that no portion of any premium or fee paid by a religious organization is being used or diverted, directly or indirectly, to fund contraceptive coverage, and further the issuer/TPA is not passing along the costs of providing contraceptive coverage to the organization in the form of increased premiums/administrative fees or through other direct or indirect means.

D. Types of Coverage.

The AJCU proposes that the religious organization have the discretion to insist that its issuer/TPA provide no coverage whatsoever for abortifacients and sterilization procedures, which implicate additional moral issues beyond those raised by traditional contraceptives.

In addition, the AJCU suggests that the proposed rule include language allowing the religious organization to insist that the issuer/TPA cover “contraceptive services including scientifically based natural family planning methods and associated services” which are, in fact, consistent with Catholic teaching.

E. Self-Insured Religious Organizations.

1. Funding Mechanism for Contraceptive Coverage to Student and Employees of Religious Institutions that Self-Insure.

The Departments have offered various suggestions for funding contraceptive coverage for employees and students at religious institutions that self-insure:

² Nothing in the AJCU’s comments should be understood to mean that its objection is based solely on the possibility that the religious organization will be forced to pay for contraceptive coverage and not also on its role in facilitating such coverage, without regard to whether the organization ultimately bears the cost of providing contraceptive coverage.

- “The third-party administrator could use revenue that is not already obligated to plan sponsors such as drug rebates, service fees, disease management program fees, or other sources.” 77 Fed. Reg. 16505;
- “[T]he third-party administrator [could] receive a credit or rebate on the amount that it pays under the reinsurance program under Affordable Care Act section 1341 in order to fund contraceptive coverage for participants and beneficiaries covered under the plan of a religious organization that sponsors a self-insured plan,” *id.*; or
- The Departments shall “require one or more of the insurers offering a multi-State plan [through an insurance exchange] . . . to provide, at no additional charge, contraceptive coverage to participants and beneficiaries covered under religious organizations’ self insured plans” with the cost of the contraceptive coverage being offset by a “credit against any user fees such an insurer would be required to pay in order to offer coverage on the Exchanges,” *id.*

77 Fed. Reg. 16505–06.

The AJCU does not support or endorse any of these alternatives. But, in any event, it suggests that, rather than mandate one particular funding mechanism, the Departments allow the religious organization itself to determine how coverage for its employees and students will be funded, choosing among the three options listed above, or another device of the organizations’ own choosing. With regard to the latter point, the AJCU suggests that the final rule contain the following language: “Institutions that are defined as a religious organization can create another option for self-insured plans so that the religious organization does not pay for or administer delivery of contraceptive services.”

2. Option to Switch to Self-Insured Plans.

Educational institutions can gain substantial cost savings by self-insuring their students and employees. The AJCU wants to be absolutely certain that the “accommodation” will not be read to limit the flexibility of its member institutions to convert fully insured plans for students or employees into self-insured plans. It therefore requests that the following language be included in the proposed rule: “Nothing would preclude a religious organization from switching from a health insurance issuer to a self-insured plan where a third party administrator is responsible for providing contraceptive coverage.”

* * *

AJCU requests that the Departments carefully consider its objections to and comments on the ANPRM and adopt a regulatory approach that fully respects the constitutionally protected religious liberty of AJCU’s member institutions.

Sincerely,



Rev. Gregory F. Lucey, SJ
President