UNION of ORTHODOX JEWISH CONGREGATIONS of AMERICA
800 Eighth Street, NW Washington, DC 20001

June 18, 2012

VIA FEDERAL EXPRESS

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9968-ANPRM
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: Advance Notice of Proposed Rulemaking Regarding Preventive Health Services
File Code CMS-9968-ANPRM

Dear Sir or Madam:

On behalf of the Union of Orthodox Jewish Congregations in America ("Orthodox Union"), we respectfully submit these comments on the Advance Notice of Proposed Rulemaking on preventative services ("ANPRM"), issued by the Departments of Health and Human Services, Labor and Treasury ("Departments"). 77 Fed. Reg. 16501 (March 21, 2012). The Orthodox Union is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 synagogues and their members.

Our organization neither opposed nor supported the enactment of the Affordable Care Act. Furthermore, we are not submitting these comments because of Orthodox Judaism's views regarding the contraceptive and other services that are the subject of the ANPRM. Nothing in these comments is intended to express Orthodox Judaism's views on these matters. Rather, we submit these comments because we believe that critical religious liberty issues are at stake.

The ANPRM represents a commendable effort to refine the Departments' February 2012 regulation to accommodate employers and colleges with religious objections to the preventive services mandate, and the approach outlined in the ANPRM may accommodate many such groups. There are also, however, groups whose religious principles will not be accommodated by the ANPRM approach. These groups should not be forced to choose between following their conscience and obeying the law. Our

nation's tradition of religious freedom and toleration – and the First Amendment– precludes the government from forcing employers and colleges to provide the preventive services in question, where doing so violates their religious conscience. Moreover, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et. seq., prohibits the federal government from implementing a policy which burdens the free exercise of religion unless the policy is serving a compelling state interest and the means of implementation are the least restrictive burden upon religious exercise.

As the Departments continue their rulemaking in this area, we urge that the narrow exemption for "religious employers" contained in the February 2012 regulation be reconsidered and enlarged to protect all religious organizations – not only houses of worship -- with a religious objection to the preventive services mandate.

In our comments, below, we explain that we are troubled by a regulation that creates an exemption only for religious organizations that are "religious enough" or that act in a government-approved way. But that is what would occur under the current regulation and the accommodation outlined in the ANPRM. Under the current regulatory approach, only insular religious institutions are exempt. Outward-oriented institutions that serve all mankind including members of different religions, would not be exempt and their concerns may not be satisfactorily addressed by the accommodation discussed in the ANPRM.

Having the government pick favorites among religious groups is of utmost concern to the Orthodox Union. Whether a religious organization operates a house of worship for fellow practitioners, or serves the wider community (such as by operating homeless shelters, schools, health care facilities, or soup kitchens), or does something else again, should make no difference. Each is entitled to the same quantum of religious liberty. That the Departments' regulatory approach would afford different religious organizations different levels of religious liberty is a worrisome development. The Orthodox Union respectfully submits that the Departments' regulatory approach, which discriminates among religious organizations, is contrary to our nation's Constitution, laws and tradition of protecting religious freedom.

Regulatory Background

As you know, on February 10, 2012, the Departments issued a final rule ("the Mandate") requiring that all non-grandfathered employer-offered health plans provide certain "preventive services" ("Mandated Services") without cost-sharing. The Mandated Services include all FDA-approved sterilization procedures, contraceptive methods, [1] and education and counseling for women with reproductive capacity regarding the sterilization procedures and contraceptive methods.

The Mandate contains a narrow and idiosyncratic "religious employer" exemption for an employer that:

[1] We understand that some religious groups are concerned that the list of FDA-approved contraceptive methods may include drugs that could terminate a fertilized egg by preventing its implantation in the uterus, and consider the term "abortifacient" to be a more apt term than "contraception" for such drugs.

1. has the inculcation of religious values as its purpose;

2. primarily employs persons who share its religious tenets;

3. primarily serves persons who share its religious tenets; and

4. is a non-profit organization under certain tax code sections.

45 C.F.R. § 147.130(a)(1)(iv)(B).

Also on February 10, 2012, HHS announced a "Temporary Enforcement Safe Harbor" for certain non-grandfathered religious entities for an additional year. The Departments will not enforce the Mandate, until August 1, 2013, against entities that fall within the safe harbor. To qualify under the Temporary Enforcement Safe Harbor, the organization must meet all the following criteria:

1. The organization is organized and operates as a non-profit entity;

2. From February 10, 2012 onward, the group health plan established or maintained by the organization has not provided any of the Mandated Services, because of the beliefs of the organization,

3. Certain notice must be given to health plan participants.

4. The organization certifies compliance with the three criteria listed above.

The Temporary Enforcement Safe Harbor also applies to student health insurance plans arranged by non-profit institutions of higher learning that meet comparable criteria.

The Mandate takes effect on August 1, 2012 for all organizations with non-grandfathered health plans that are: (i) not exempted under the narrow regulatory definition of "religious employer"; and (ii) do not qualify for the Temporary Enforcement Safe Harbor.

On March 21, 2012 the Departments issued the ANPRM giving notice of the Departments' intention to promulgate an "accommodation" regulation to "establish alternative ways" to fulfill the Mandate for certain "religious organizations." *See* 77 Fed. Reg. 16501, 16501 (March 21, 2012). The accommodation that the Departments intend to develop is an arrangement under which insurers could offer to religious organizations health plans that do not include the Mandated Services, while simultaneously requiring the insurer to provide the Mandated Services directly to health plan beneficiaries at no cost to the religious organization or beneficiary. The Departments intend to develop a similar accommodation as to employer self-insured health plans, under which religious organizations would not pay for the provision of Mandated Services, but third-party administrators would pay for the services at no cost to the religious organization or beneficiary.

The ANPRM solicits comments on a number of questions regarding how the accommodation should be designed and implemented, including what sorts of organizations should qualify for the accommodation, whether an organization that objects to only certain of the Mandated Services should be entitled to a form of accommodation, and questions concerning administration of the accommodation.

Comments

I. The Departments' Proposed Regulatory Approach Improperly Distinguishes Among Religious Entities, Favoring Some Over Others. The Departments Should Revise Their Regulatory Approach To Treat All Organizations With Religious Objections In The Same Manner.

Under the February 2012 Mandate regulation and the accommodation envisioned in the ANPRM, the Departments would divide employers and colleges with religious objections to the Mandate into at least two groups with varying levels of religious liberty protection:

1. Insular "Religious Employers" Receive Exemptions. Under the Mandate regulation, employers with the primary purpose of inculcating religious values, and that employ and serve primarily people who share the same religious tenets, would be exempt from the Mandate. These highly insular organizations are treated as "most worthy" of enjoying religious liberty.

2. "Religious Organizations" Would Not Be Entitled To An Exemption, But Would Qualify For An Accommodation. The ANPRM states that the Departments intend to issue a regulation that would define "religious organization" and provide an accommodation, along the lines described above. Thus, a "religious organization," once defined, will be one that does not qualify for the "religious employer" exemption, but will be eligible for the ANPRM accommodation, once it is developed.

3. Religious Institutions That Do Not Satisfy The To-Be Developed Regulatory Definition Of "Religious Organization" Would Be Subject To The Mandate, Notwithstanding Any Religious Objection. As noted, in the ANPRM, the Departments intend to issue a regulation creating a definition of "religious organization." Depending on the breadth or narrowness of that definition, it is possible that *bona fide* religious institutions might not satisfy the definition of "religious organization" and not qualify for the accommodation even though their religious views are no different from those of a "religious employer" or "religious organization."

Under this regulatory approach, the government views insular "religious employers" as most deserving of freedom and they will be exempt from the Mandate, followed by "religious organizations" (to be defined) which will be receive some form of accommodation but no exemption. And, depending, on the definition of "religious organization," there may even be a third category of *bona fide* religious institutions that

will not qualify as "religious organizations" and will receive no exemption and no accommodation.

The proposed regulatory approach will have the perverse effect of deterring people and institutions of faith from engaging with the broader society to work for its betterment. Many organizations faced to choose between religious principles and following the law, will follow their principles. They will be deterred from serving the public. They will limit their missions, and employ and serve only their own kind. The Departments' regulation is in conflict with our national creed of *e pluribus unum* – "out of many, one."

Even if some religious organizations bend to the Departments' will, being forced to do so will drive a wedge between the government and many of this country's most important and significant civil institutions. It would be very regrettable, and will engender a predictable and lasting bitterness, if the Departments finalize a regulation that forces good-hearted and religious citizens to choose between their conscience and the law. In the end, no one will benefit from a government that imposes that choice upon many of its kindest and most productive citizens.

Furthermore, a regulation that creates a hierarchy differentiating among religious entities is very problematic under our nation's laws, Constitution and heritage of religious liberty. Our laws may not recognize one religious belief as correct and another as a heresy. Nor may they favor some religious organizations over others. The quantum of religious freedom a group enjoys may not depend on whether the government approves of the group's activities or level of "religiousness."

Accordingly, in *University of Great Falls v. NLRB* , 278 F.3d 1335 (D.C. Cir. 2002), the D.C. Circuit reversed a National Labor Relations Board ruling that a Catholic university was not "Catholic enough" to qualify for a religious exemption from NLRB jurisdiction. In the NLRB's view, the institution had too many non-Catholic professors and students and its governance and curriculum were not sufficiently Catholic. *See id*. at 1340. The D.C. Circuit, however, flatly rejected the notion that a regulatory exemption may be available only to institutions that are "religious enough." The Court explained: "If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty. To limit the [religious] exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause . . . ." *Id*. at 1346.

Similarly, in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Court of Appeals held that a state scholarship program that made scholarships available to sectarian universities but not to "pervasively sectarian" universities was unconstitutional. Thus, while *University of Great Falls* demonstrates that the government may not discriminate against a religious organization that is not "religious

enough," *Colorado Christian University* demonstrates that the government may not discriminate against a religious organization that is "too religious."

These two cases illustrate that the government may not favor some religions, some beliefs, or some organizations, while disfavoring others. Having decided that some organizations deserve a religious exemption, the Departments may not take the further step of deciding which organizations deserve it and which do not.

Indeed, the United States Department of Justice made this very point in an *amicus curiae* brief in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011). In *Spencer*, the Ninth Circuit was considering whether an exemption for hiring practices under Title VII was limited to houses of worship or extended to other religious organizations. The Department of Justice brief explained that creating a religious exemption that favored some religious groups and not others posed Constitutional problems:

> To hold that [the Title VII religious exemption] is limited to churches also would create a serious Establishment Clause problem by discriminating among religious groups.… There appear to be numerous organizations, across a broad spectrum of faiths, that are organized for a religious purpose and have sincerely-held religious tenets, but are not houses of worship. To allow houses of worship to engage in religious-based employment practices, but deny equal privileges to other independent organizations that also have sincerely held religious tenets would unlawfully discriminate against religions, and give the former group a competitive advantage in the religious marketplace.

Brief of Amicus Curiae the United States Supporting Appellee, *Spencer v. World Vision, Inc.*, No. 08-35532 (9th Cir. Nov. 28, 2008) (citations omitted).

The Ninth Circuit agreed with the Department of Justice that limiting a religious exemption only to houses of worship poses Constitutional problems:

> Moreover, [limiting the Title VII religious exemption to houses of worship] potentially runs afoul of the Establishment Clause's core command of neutrality among religious groups. As the United States argues as amicus, interpreting the statue such that it requires an organization to be a 'church' to qualify for the exemption would discriminate against religious institutions which 'are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship.' It would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs.

Spencer, 633 F.3d at 728-29.

The Departments' regulatory approach, as reflected in the February 2012 regulation and the ANPRM, cannot be reconciled with the Department of Justice's position in *Spencer v. World Vision, Inc*., a position that the Ninth Circuit endorsed.

Finally, the Departments have stated that the narrow definition of "religious employer" and the definition of "religious organization" under development are "not intended to set a precedent for any other purpose." 77 Fed. Reg. at 16504. And the ANPRM states that "nothing in the final regulations or the forthcoming regulations is intended to differentiate among the religious merits, commitment, mission, or public or private standing of the organizations themselves." *Id*. Whatever the intent, however, the regulations do in fact serve as a precedent for others who would restrict religious liberty. Likewise, whatever the intent, the regulations do in fact differentiate among religious organizations. [2]

II. An Employer's Religious Exemption From The Mandate Does Not Improperly Subject Employees To Their Employer's Religious Views Or Necessarily Restrict Access To The Mandated Services

The Departments have explained their reason for distinguishing among religious organizations (and issuing a narrow exemption for "religious employer") on grounds that employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious objection to the use of contraceptive services. According to the Departments, "[i]ncluding these employers within the scope of the exemption would subject their employees to the religious views of the employer, limiting access to contraceptives, and thereby inhibiting the use of contraceptive services and the benefits of preventive care." 77 Fed. Reg. at 8728.

We respectfully disagree that organizations that take advantage of a religious exemption are "subject[ing] their employees to the religious views of the employer." An employer that decides not to subsidize an item or service that the employee may wish to use is not subjecting the employee to the employer's religious views. Employees of an exempted organization would still be free to obtain contraception and other preventive services, although at a higher out-of-pocket expense (as has been the case). In contrast, an employer that told an employee that she would lose her job if she used (or did not use)

[2] Congress has enacted a number of exemptions from statutes based on religious beliefs or moral convictions. We are unaware of any precedent in federal law to distinguish among religious groups under these exemptions. *See, e.g.*, 42 U.S.C. § 300a-7(b)(1)-(2) (hospital's or individual's receipt of federal funds may not require them to participate in abortion or sterilization procedures if doing so would be "contrary to his [or the entity's] religious beliefs or moral convictions"); 18 U.S.C. § 3597(b)(protecting rights for those who refuse to participate in executions or in the prosecutions of capital crimes if such participation would be "contrary to the moral or religious convictions" of the employee); 42 U.S.C. § 1395w-22(j)(3)(B) (precluding interpretation of Medicare statute as requiring Medicare managed care plans from providing coverage for counseling or referral services as to any plan that "objects to the provision of such services on moral or religious grounds").

contraceptives might be subjecting the employee to the employer's religious beliefs. Indeed, the imposition of beliefs occurring here is the Mandate. To the extent that the Departments are concerned about subjecting an employee to the employer's religious beliefs, we respectfully request that the Departments reconsider that logic.

By contrast, we see no religious liberty problem in the government making contraception and other preventive services available, at no cost to women, by means other than employer insurance programs. The government could increase access to the Mandated Services by directly compensating providers and pharmacies for these items and services, and require that the providers and pharmacies charge no copayment in order to be eligible for the government compensation. Alternatively, the government could directly provide contraception services, could impose mandates on contraceptive providers, or could issue tax credits or other subsidies to consumers of preventive services. These approaches would avoid restricting religious liberty interests, and may be required as "least restrictive alternatives" under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b)(2).

As quoted above, the Departments also express concern that fewer women will use contraceptive services and receive the benefits of preventive care if a religious exemption were provided to a broader set of religious organizations. However, employers with "grandfathered" plans and fewer than 50 employees are exempt from the Mandate, despite the Departments' interest in making the preventive services available at no cost to women through employers. Moreover, the Departments have pointed out that it costs employers less to provide health coverage with the Mandated Services than without them:

> [T]here are significant cost savings to employers from the coverage of contraceptives. A 2000 study estimated that it would cost employers 15 to 17 percent more not to provide contraceptive coverage in employee health plans than to provide such coverage, after accounting for both the direct medical costs of pregnancy and the indirect costs such as employee absence and reduce productivity. In fact, when contraceptive coverage was added to the Federal Employees Health Benefits Program, premiums did not increase because there was no resulting health care cost increase.

77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012) (footnotes and citations omitted). "Actuaries and experts have found that coverage of contraceptives is at least cost neutral when taking into account all costs and benefits in the health plan." *Id*.; *see also* 77 Fed. Reg. at 16506 ("Actuaries, insurers, and economists estimate that covering contraceptive services is at least cost neutral.")

Furthermore, "the cost savings of covering contraceptive services have already been recognized by States and within the health insurance industry." 77 Fed. Reg. at 8728. The Departments cite to a 2002 study finding that more than 89 percent of insured plans cover contraceptives, and a 2010 survey of employers that found that 85 percent of large employers and 62 percent of small employers offered coverage of FDA-approved

contraceptives." *Id*. In addition, 28 states have laws requiring health insurance issuers to cover contraceptives (with a variety of exemptions for religious entities and for self-insured employers).

Accordingly, given these financial incentives and the trend towards contraceptive coverage, only religious organizations with a serious religious objection will decline to include coverage for the Mandated Services. This may ameliorate the Departments' concern that fewer women will be able to obtain contraception and other preventive services at no cost.

Conclusion

We appreciate the Departments' effort to develop an accommodation that will satisfy the Departments' objective of increasing access to the preventive services while at the same time not violating the religious or moral conscience of certain employers. Developing such an option for those whose religious objections to the Mandate can be accommodated would be welcome.

However, we are deeply concerned by a regulatory structure under which two tiers of religious institutions will be designated by the federal government for differentiated religious liberty protections. If the First Amendment's pair of clauses guaranteeing the right of "free exercise" and prohibiting "establishment" of religion stand for anything, they stand for the protection of citizens against government compulsion to act contrary to conscience and for prohibiting government officials from parceling out religious protection subjectively.

We therefore urge the Departments to revise its regulations as we have stated herein and thereby serve its goals in a manner consistent with the Constitution and its principles.

Sincerely,

Yehuda Neuberger
Chairman, Public Policy

Nathan J. Diament
Executive Director for Public Policy