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August 22, 2011

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201

Submitted Electronically Via Regulations.gov

Re: Comments of HSLDA on File Code CMS-9992-IFC2, Interim Final Rule on Religious Exemption from Required Coverage of Preventive Services

Dear Secretary Sebelius:

Home School Legal Defense Association (HSLDA) is a national organization founded in 1983, which has as its primary purpose the protection of the right of parents to educate their children at home. We have over 80,000 members in all 50 states and the District of Columbia.

These comments are submitted pursuant to the Interim Final Rule published on August 3, 2011, at 76 Fed. Reg. 46621-01. In part, the Interim Final Rule established an exemption for certain religious employers from the requirement that health insurance plans – including those offered by employers – cover the full range of birth control drugs, as well as drugs which many believe to result in an abortion such as "Ella" and "the morning after pill."

HSLDA vigorously opposes the illegally narrow religious exemption created in the Interim Final Rule. This exemption requires that a religious organization show the following in order to receive an exemption:

(1) The inculcation of religious values is the purpose of the organization;

HOME SCHOOL LEGAL DEFENSE ASSOCIATION

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> (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; and
> (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.

This proposed religious exemption would apply almost exclusively only to houses of worship, and possibly some denominational seminaries. HSLDA believes that the religious exemption should be broadened.

The Problem: religious and conscientious objections to paying for certain drugs

Under the guidelines released on August 1, 2011 by the Health Resources and Services Administration (HRSA), most health insurance plans in the United States – including those offered by private employers – must provide full access to birth control drugs, as well as abortion-inducing drugs such as "Ella" and the "morning after pill." Numerous medical professional in the pro-life and medical communities believe that "Ella," the "morning after pill," and similar drugs have been shown to harm women, and actually kill the developing baby by starving it of nutrients.

As a result of the HRSA guidelines, employers who have a pro-life, religious, or other conscientious objection to facilitating the use of birth control drugs or abortion-inducing drugs are now required to provide the very drugs that they believe result in the death of a human being. According to the dictates of their conscience, this would be murder and sinful.

Birth control drugs and abortion-inducing drugs like "Ella" and the "morning after pill" are commercially available. Women who desire to use them can easily obtain these drugs. No one is trying to make it illegal for women to obtain or use these drugs. However, now that employers will be *required* to pay for these drugs, the religious and conscientious rights of employers are being trampled by these Guidelines and the narrow religious exemption. Numerous religious organizations will now have no choice but to either violate their religious and conscientious objections, or drop their health insurance coverage for their employees, leading to great hardship for millions of employees and their families around the nation.

Having set forth the problem, we will now demonstrate specifically how the proposed religious exemption is illegally narrow.

1. **The Proposed Religious Exemption violates the Religious Freedom Restoration Act**

Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress wanted to ensure that religious freedom maintained a constitutionally high degree of protection, and passed the RFRA, which President Clinton signed into law.

Although the U.S. Supreme Court ruled in *City of Boerne v. Flores*, 521 U.S. 507 (1997) that the RFRA was unconstitutional as applied to the states, it is still in force as applied to the federal government's actions. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

The RFRA reads at 42 U.S.C. § 2000bb-1:

> (a) in General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

It is impossible to see how HHS' proposed religious exemption will withstand scrutiny under the RFRA. HHS must draft a new religious exemption – one which protects the religious freedom rights of all employers – in order to avoid legal challenges and ultimately defeat for this illegally narrow proposed religious exemption.

2. <u>The Proposed Religious Exemption does not protect ordinary employers who have sincerely held religious beliefs</u>

The proposed religious exemption requires an employer to meet all four requirements of the religious exemption in order to be exempted from having to provide coverage for birth control and abortion-inducing drugs.

But the very first problem is readily apparent – there are many businesses whose owners have strong religious beliefs, but the business does not have the inculcation of religious values as its primary purpose and does not primarily employ persons who share its religious tenets.

Our nation was built on a foundation of religious freedom. Our founders fled to these shores so that they could worship (or not worship) according to the dictates of their conscience. The proposed religious exemption – by virtue of its narrowness – shows bigotry against men and women of faith. If a religious woman opens a construction company and her company prospers, she may decide to hire many more employees and offer health insurance. However, if her religious beliefs lead her to decide to not

cover birth control or abortion-inducing drugs, she will no longer be able to act on her religious beliefs. She will be forced to violate her conscience and ensure that these drugs are covered.

3. **The Proposed Religious Exemption does not protect religious organizations**

Unlike the scenario described above, there are many religious employers (religious or faith-based organizations, religious schools, colleges, and universities, etc.) which *do* meet the first two criteria of the proposed religious exemption: they have the inculcation of religious values as their primary purpose and primarily employ persons who share their religious tenets. For example, HSLDA would most likely meet these two requirements. Most religious schools and colleges meet these two requirements. And most religious organizations meet these two requirements.

Very few religious organizations meet the third requirement, however, which is that the entity primarily serves persons who share its religious tenets. This is because most religious employers are motivated by their faith to reach out to and serve people and groups who *do not* share their religious tenets. Every single major world religion teaches that adherents should help those who are suffering, or who are disadvantaged. Every single major world religion encourages adherents to be "Good Samaritans" to their neighbors and fellow citizens. And this is exactly the reason why the proposed religious exemption would fail to cover every single religious organization or entity other than churches and other houses of worship, and possibly some denominational seminaries.

4. **The Proposed Religious Exemption specifically *only* applies to churches and other houses of worship**

In addition to the problems raised above, the fourth provision of the proposed religious exemption makes it abundantly clear that only houses of worship meet the requirements. The fourth provision of the proposed religious exemption reads, "[t]he 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.

Section 6033(a)(3)(A)(i) applies to "churches, their integrated auxiliaries, and conventions or associations of churches." Section 6033(a)(3)(A)(iii) applies to "the exclusively religious activities of any religious order."

As a result, it does not matter that the previous three provisions of the proposed religious exemption would eliminate most religious employers, organizations, and others. The fourth provision makes it clear that the federal government only believes it is necessary to protect houses of worship.

This cannot be more wrong. As stated above, all religious and conscientious employers should be protected, not just churches and other houses of worship.

Conclusion: protect the freedom of religion and the freedom of conscience for all Americans

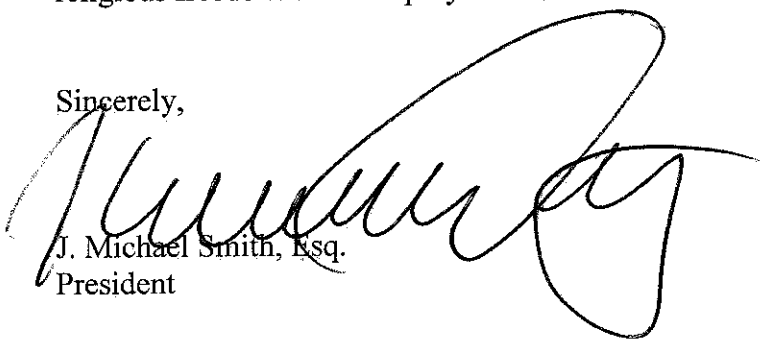
When Congress passed the Patient Protection and Affordable Care Act and President Obama signed the bill into law, the intent was to ensure that all Americans have health coverage, not to force religious employers into a Hobson's choice between violating their religious convictions or ending their insurance plans for employees.

In keeping with this intent, we urge HHS to withdraw the Interim Final Rule that created this illegally narrow religious exemption.

In its place, we urge HHS to adopt a robust religious exemption that will allow all employers who have religious and conscientious objections to providing birth control drugs or abortion-inducing drugs to their employees to opt out of the new HRSA guidelines. This religious exemption should also specifically exempt all religious organizations under section 501(c) of the IRS Code.

If HHS adopts these common sense suggestions for a new religious exemption, it will demonstrate that the Department and the Obama Administration want to protect the religious freedom of all employers in the United States.

Sincerely,



J. Michael Smith, Esq.
President