



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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September 30, 2011

**Submitted Electronically**

Office of Health Plan Standards and Compliance Assistance  
Employee Benefits Security Administration  
Room N-5653  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210  
Attention: RIN 1210-AB44

**Re: Interim Final Rules on Preventative Services  
File Code RIN 1210-AB44**

Dear Sir or Madam:

I write on behalf of the 137 member and affiliate schools that comprise the U.S. constituency of the Council for Christian Colleges & Universities (CCCU) to express our grave concern about the August 3, 2011, amendment to the regulations entitled Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act (File Code RIN 1210-AB44). Requiring our members and affiliates to cover "preventative services," some of which are abortifacients, will force most if not all of our institutions to violate their religious consciences, given (1) the narrowness of the religious exemption and (2) the absence of any religious accommodation with respect to health plans provided to students. Violating our schools' consciences in this manner is not only unwarranted public policy but also an infringement of legal protections of religious freedom. We urge you in the strongest terms possible to drop the mandate. Barring that, we respectfully request that you dramatically expand the religious employer exemption as well as extend it to student health plans.

The mission of the CCCU is "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." Our members and affiliates share similar missions and are deeply religious institutions that incorporate Christian commitment into every aspect of their existence and operations. Despite their unmistakable religious character and their profound commitment to their religious mission, it is at best uncertain whether most CCCU schools would fall within the regulation's extremely anemic religious exemption.

Before I address our specific concerns with the exemption and the fact that even if expanded it would still leave our student plans subject to the mandate, allow me to explain why it is so important to our schools both theologically and legally that they

be exempted from the contraceptive mandate. First, we are fundamentally opposed to the idea that the government can mandate something so at odds with the religious beliefs of many without granting adequate religious and conscience protections mandated by the Constitution. Such action is also in violation of the Religious Freedom Restoration Act of 1993 (RFRA). This legislation forbids the federal government from substantially burdening religious exercise unless such burdens are the least restrictive means of achieving a compelling interest. There is little doubt that the mandate substantially burdens religious exercise. Likewise, the federal government lacks a compelling interest in forcing religious organizations to pay for abortifacients. Accordingly, the mandate plainly violates RFRA.

Further, our schools are firmly committed to being recognized as religious entities and being afforded their constitutional protections as such. Implicit in these regulations is the notion that there are tiers of religious organizations, some of which are religious enough to be afforded their religious freedoms and others that are not, essentially disregarding the religious character of non-church or non-church related institutions. We think this notion is troubling for a number of reasons. First, it violates the principle that “the government may not pick and choose among different religious organizations when it imposes some burden.” *Larson v. Valente*, 456 U.S. 228 (1982). Second, it places the government as the arbiter of such decisions and creates the exact interference with church by state that the constitution protects against as “[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 at 502 (1979).

As you know, the religious employer exemption to the contraceptive mandate states:

For the purposes of this subsection, a “religious employer” is 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 [referring to “churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order”].

Regarding the first factor, we object to the subjective inquiry that is unrelated to whether an organization is truly religious and also invites an unconstitutional inquiry into whether religious organizations are religious enough. While our institutions do infuse their religious values into every aspect of what they do, and though the United States Supreme Court has identified that “the *raison d’être* of

parochial schools is the propagation of a religious faith,” *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979), as these are also fully accredited, degree granting, institutions of higher learning, we are concerned whether the government agent tasked with determining whether a group meets the four requirements listed above would indeed find that our institutions meet the first requirement. The Supreme Court affirmed this concern when it said that “[t]he line” between secular and religious activities “is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.” In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987).

Also troubling is the consideration as to who will be tasked with making the final determination as to whether the “inculcation of religious values is the purpose of the organization.” The Department of Health and Human Services hardly seems like the appropriate place for such a determination to be made. The subjectivity of the factor itself seems to invite an unconstitutional inquiry into the legitimate religious nature of the organization that has been rejected by the Supreme Court. In *Mitchell v. Helms* the 530 U.S. 793, 828 (2000), the Court explained in its plurality decision “it is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.” Yet, with these regulations, HHS has set itself up to do exactly that; an inquiry that our institutions deeply object to.

In addition, we bear concerns about the factors deeming as a “religious employer” only those organizations that both employ and serve primarily co-religionists. While all CCCU members hire only professing and practicing Christians for all administrative and full-time faculty positions, our institutions have implemented different policies for hiring support staff and adjunct faculty that reflect their respective understanding of how best to accomplish their mission in light of their theological traditions. They also have differing policies regarding whether they enroll only Christian students or students from a particular church/denomination – most do not limit their enrollment to only Christian students but serve a broad range of students. The decisions made by each institution, however, reflect the different theological interpretations of the Christian faith, the Great Commission, and mission of their respective institution. These regulations, however, lead to the absurd results that those institutions whose theological interpretations happen to align with these regulations could be considered religious organizations while those that have a different theological understanding and mission could not. We are confident that this was not the intended outcome of these regulations, though it reflects another way the current religious exemption is flawed. Finally, these differences, of whether to hire and serve primarily co-religionists cannot simply be dismissed as neutral factors when there are legitimate religious principles that guide these decisions and “the prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.” *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

Lastly, the fourth requirement, that the organization meet specific IRS categories, is merely a formal categorization that governs disclosures and bears no actual relationship to the legitimate religious nature of an organization, yet it would disqualify most if not all of our members from being considered as “religious employers.” While many of our institutions are affiliated with larger church organizational or denominational structures, many are independent religious organizations. They are religious not because they are associated with a church or denomination but rather because of their legitimate religious beliefs and practices that are openly held out to the public as such – the critical legal characteristics of a religious entity.

We have a second concern, also deeply troubling to our institutions and critical to their integrity as religious institutions of higher education, that even if the exemption were to be expanded to be more inclusive of religious employers, the mandate will violate the conscience of our institutions as it relates to the healthcare plans that they offer to their students. The proposed exemption is for employer plans and does not appear to also include the student plans. Many of our schools object on religious grounds to being required to offer emergency contraceptives to their students, as it undermines the behavior code and violates the convictions of the school’s supportive community of faith. Moreover, the requirement to offer to students such services that are not offered to employees because they conflict with the school’s convictions creates an unacceptable internal conflict. It would mean that the school is required by the federal government to offer services to students that the school teaches are wrongful services. The federal government should not compel a school to violate its convictions in this way.

Given these considerations, we believe that the only full solution to the constitutional problems created by this proposed amendment is for the mandate to be eliminated altogether. But if the Department chooses to keep the mandate in place, we ask the department to exclude religious higher education and its students from the mandate by replacing the current proposed exemption with one that encompasses the whole range of religious employers, such as CCCU schools that serve students broadly, serve purposes in addition to religion (a liberal arts education), and are not derived from an organized church. Such exemption should also exempt student healthcare plans.

I appreciate your attention to this crucially important matter and am happy to speak with you or your department's representatives if that would be helpful.

Sincerely,

Paul R. Corts, Ph.D.  
President

cc: Joshua DuBois, Director, White House Office of Faith-Based and  
Neighborhood Partnerships