September 23, 2011

ST. JOSEPH HEALTH SYSTEM

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9992-IFC2
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

P.O. Box 14132
Orange, CA 92863-1532

714.347.7500 Tel
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Re: Interim Final Rule defining Religious Employer Exception for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, RIN 0938-AQ07

Dear Sir or Madam,

I am writing you on behalf of St. Joseph Health System and its ministries ("SJHS") located in California and Texas concerning the Interim Final Rule on Preventive Services published in the Federal Register on August 3, 2011 (76 Fed. Reg. 46621). St. Joseph Health System is a ministry of the Sisters of St. Joseph of Orange, who trace their roots, back to 17th Century France and the unique vision of a Jesuit priest named Jean-Pierre Medaille. For nearly 100 years, the Sisters and their successors have had as their mission to extending the healing ministry of Jesus in the tradition of the Sisters of St. Joseph of Orange by continually improving the health and quality of life of people in the communities we serve.

As a member of the Catholic Healthcare Association of the United States ("CHA") and the Alliance of Catholic Healthcare in California ("Alliance"), SJHS would like to lend its strong support to both CHA's and the Alliance's comments which have been filed with you. SJHS will focus its comments on the adequacy of the "religious employer" exemption.

SJHS has long insisted on and worked for the right of everyone to affordable, accessible health care. We welcomed the enactment of the Patient Protection and Affordable Care Act (ACA), and support the ACA's requirement that preventive services, including certain preventive services for women, be provided at no cost to the individual. The religious and moral objections of the Catholic Church and others to contraception and sterilization are well known. The Interim Final Rule (IFR) acknowledges these objections and attempts to accommodate them by creating a religious employer exemption to the mandated coverage for contraceptive services. While we appreciate the recognition of the need for such an exemption, the proposed definition of religious employer is wholly inadequate to protect the conscience rights of Catholic hospitals and health care organizations in their role as employers like SJHS. It is imperative that the definition of religious employer in the regulation be broadened to provide sufficient conscience protections to religious institutional employers. As a Catholic health care provider, SJHS is committed to the healing ministry of Jesus Christ. Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of the human person and the sanctity of human life from conception to natural death. These values form the basis for our steadfast commitment to the compelling moral implications of our heath care ministry, whether it be caring with compassion for all persons, throughout all stages of life; insisting on the right of all to accessible, affordable health care; or defending and preserving the conscience

rights of health care providers, including but not limited to Catholic facilities. Consistent with our efforts to preserve the conscience rights of healthcare providers, we implore you to expand the proposed religious employer exemption to allow Catholic hospitals and health care providers to continue their ministry in fidelity to their religious beliefs and values.

Like California's statute, the proposed religious employer exemption in the IFR, would be available only to organizations that meet **all** of these 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; and (4) the organization is a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) and (iii) of the Internal Revenue Code of 1986, as amended. This definition is unacceptable for multiple reasons.

THE PROPOSED "RELIGIOUS EMPLOYER" EXEMPTION IS NOT CONSISTENT WITH CALIFORNIA'S MANDATE

First, it is important to note that while California was the first state to adopt this definition of "religious employer," its mandate is more narrowly focused than is HHS's mandate. California law requires healthcare and disability insurance plans to include coverage for prescription contraceptive methods **only if** they also provide coverage for outpatient prescription drug benefits.

In contrast, the proposed IFR mandate imposes a requirement that **all** types of health plans not only include all FDA-approved contraceptive methods, it also broadens the mandated services to include sterilization procedures, as well as patient education and counseling for all women with reproductive capacity. Moreover, at least one drug approved by the FDA for "contraceptive use," a close analogue to the abortion drug RU---486(mifepristone), can cause an abortion when taken to interrupt a pregnancy. We are deeply concerned with this approach taken by the Department of Health and Human Services (HHS) as described in the Health Resources and Services Administration's Guidelines on Women's Preventive Services: Required Health Plan Coverage (HRSA Guidelines) with respect to contraceptive services and sterilization.

Hence, the proposed IFR mandate goes beyond California's law, both in the scope of plans covered and in its mandated services. The mandate, with its broad inclusion of sterilization procedures and drugs that can cause abortion and its extremely limited — "religious employer" exemption, represents an unacceptable change in the protection of conscience that has long been afforded SJHS and other religious organizations in this country. Contrary to the implication contained in the IFR, the proposed exemption does **not** maintain the status quo, but instead attempts for the first time to force religious organizations to violate their conscience and provide coverage for items and services they believe to be morally objectionable.

THE PROPOSED EXEMPTION IS NOT CONSISTENT WITH EXISTING FEDERAL CONSCIENCE LAWS

Federal law provides broad conscience protections in the context of abortion and sterilization. Section 245 of the Public Health Service Act and the Weldon Amendment to the annual Labor,

Education and Health and Human Services appropriations legislation protect organizations from discrimination because they object to providing, paying for, covering, referring for or being trained to provide, abortions. Notably, the Church Amendment, which was enacted in 1973, forbids discrimination by recipients of federal funding against any entity that declines to perform or assist in an abortion or sterilization procedure on the basis of religious beliefs or moral convictions.

The proposed exemption is narrower than any conscience clause ever enacted in federal law and reflects an unacceptable change in federal policy regarding religious beliefs. Accordingly, the definition of religious employer should be rewritten to make clear that religious institutional employers, including SJHS and health care organizations, are exempt from any contraceptive mandate.

THE PROPOSED "RELIGIOUS EMPLOYER" DEFINITION RAISES SERIOUS CONSTITUTIONAL QUESTIONS

The proposed religious employer exemption raises several constitutional concerns under the Religion and Free Speech Clauses of the First Amendment. For example, the four criteria included in the exemption essentially define what the government views to be a "sufficiently religious" organization deserving of the exemption. Under this test, HHS has concluded that a religious organization that primarily serves and employs those who do not share its religious tenets is not a "religious employer." In doing so, the government is unconstitutionally parsing a bona fide religious organization into "secular" and "religious" components solely to impose burdens on the secular portion. This is particularly problematic as Catholic teaching calls SJHS to serve those in need and the most vulnerable regardless of their faith.

EXPANDING THE DEFINITION OF RELIGIOUS EMPLOYER

The IFR states that HHS will be accepting comments on the "religious employer" exemption "as well as those that have been developed under Title 26 of the United States Code." For the reasons described above, we believe that the proposed definition is unacceptable. We do agree, however, that Title 26 of the Internal Revenue Code (the "Code") contains concepts that are helpful in crafting an appropriate religious employer exemption in this context. Throughout the years, the Code has been a key area of federal law where Congress has sought to balance the church-state relationship. In doing so, Congress has rejected tests which turn on determining "how religious" an organization is (like the proposed religious employer exemption), and instead has adopted more objective standards. In fact, Congress has already dealt with this issue in the context of employer health plans offered by religious organizations in Section 414(e) of the Code, which was developed specifically to avoid church-state entanglements in religious governance relative to pension, health and welfare plans offered by religious entities.

For this reason, we strongly believe that the concepts contained in Section 414(e) are instructive for developing an appropriate religious employer exemption to the contraceptive mandate to be applied to employer health plans. To be clear, we are not suggesting that the exemption be applied only to plans that are "church plans" under Section 414(e), nor are we intending to impact the interpretation of Section 414(e) in the "church plan" context. Instead, we are suggesting that the principles that Congress developed in 1980 to define organizations that are "associated with a church" serve as an

appropriate model for the religious employer exemption applicable to the contraceptive mandate. Under those principles, an organization would be covered by the exemption if it "shares common religious bonds and convictions with a church." This definition would exempt from the contraceptive mandate SJHS and other Catholic hospitals and health care organizations as well as other ministries of the Church.

CONCLUSION

The proposed "religious employer" definition contained in the IFR is not drawn from current federal law, is inconsistent with federal conscience laws and raises constitutional questions. For the reasons detailed above, SJHS would request that the definition be rewritten using the principles behind Section 414(e) of the Internal Revenue Code. Under this approach, organizations and institutions that "share common religious bonds and convictions with a church" will qualify as a "religious employer" entitled to the exemption from the contraceptive mandate. This would cover SJHS, other Catholic healthcare providers as well as other ministries of the Catholic Church. We also ask you to ensure that the religious employer exemption applies to the full range of FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling required by the HRSA Guidelines.

Thank you in advance for your consideration of our request.

Sincerely,

Deborah A. Proctor

DEBORAH PROCTOR
President & CEO
St. Joseph Health System