Catholic Health Association of the United States

A Passionate Voice for Compassionate Care

June 15, 2012

Marilyn Tavenner, Acting Administrator
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

Re: **CMS-9968-ANPRM**: Certain Preventive Services Under the Affordable Care Act: Advanced Notice of Proposed Rulemaking

Dear Ms. Tavenner:

On behalf of the Catholic Health Association of the United States (CHA), I am responding to the Advanced Notice of Proposed Rulemaking (ANPRM) issued on March 21, 2012 (77 Fed. Reg. 16501) by the Treasury Department, the Department of Labor and the Department of Health and Human Services concerning certain preventive services under the Affordable Care Act (ACA). CHA is the national leadership organization for the Catholic health ministry, consisting of more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities, and related organizations. Our ministry is represented in all 50 states and the District of Columbia, and one in every six patients in the United States is cared for in a Catholic hospital each year.

CHA 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 certain preventive services be available at no cost to the individual. We remain deeply concerned, however, with the approach the Administration has taken with respect to contraceptive services, especially abortifacient drugs[1] and sterilization.

The ANPRM is the latest in a series of rulemaking actions by the Departments to implement the ACA requirement that group health plans and health insurance issuers provide coverage for a range of preventive care services without cost sharing by the covered beneficiary, including a subset of women's preventive

[1] Among the drugs approved by the FDA for use as a contraceptive is ulipristal acetate, commonly known as "ella." Studies of ulipristal's mechanism of action have indicated that the drug can interfere with implantation of a fertilized egg. The Catholic Church considers a drug which interferes with the implantation of a fertilized egg to be abortifacient, based upon the known science of reproduction and the Church's belief that human life begins at the moment of fertilization.

care services as set forth in guidelines by the Health Resources and Services Administration (HRSA). On August 1, 2011 HRSA issued its Guidelines on Women's Preventive Services: Required Health Plan Coverage (HRSA Guidelines) requiring coverage without cost sharing of all Food and Drug Administration approved contraceptive methods, sterilization procedures and patient education and counseling for women of reproductive age. At the same time, the Departments issued an Interim Final Regulation (76 Fed. Reg. 46621) proposing to create an exemption to the contraceptive coverage requirement for certain religious employers, defining the term "religious employer" so narrowly as to exclude Catholic hospitals and health care organizations as well as other religious institutional employers. CHA objected strenuously to the inappropriately narrow definition in its comment letter date September 22, 2011 and objected again when it was announced in January 2012 that the Administration would not make any changes to the definition.

The final rule released on February 10, 2012 implemented the narrow religious exemption as proposed, but also indicated the Administration's intent to propose additional rules to implement the contraceptive coverage requirement in a way that would accommodate the concerns of nonexempt religious employers with objections to providing, paying for or referring for contraceptive coverage. While this new development seemed at the time to be a good first step, our examination and study of the proposal as outlined then and in the ANPRM has not relieved our initial concerns. Accordingly, for the reasons set forth below, we continue to believe that it is imperative for the Administration to abandon the narrow definition of "religious employer" and instead use an expanded definition to exempt from the contraceptive mandate not only churches, but also Catholic hospitals, health care organizations and other ministries of the Church[2]. If the government continues to pursue the policy that all employees should have access to contraceptive services, then it should find a way to provide and pay for these services directly without requiring any direct or indirect involvement of "religious employers," as broadly defined.

The Definition Of "Religious Employer" Must Be Broadened To Cover All Ministries Of The Church.

The Departments state in the ANPRM the two goals they seek to achieve:

- To maintain the provision of contraceptive coverage without cost sharing to individuals who receive coverage through non-exempt, non-profit religious

[2] As the representative of Catholic hospitals and health care providers, which will be impacted in their role as employers, CHA focuses its comments on this aspect of the APRNM. We acknowledge, but will not address here the issues about whether the mandate itself is constitutional and whether it should apply to other entities, such as, insurers or individuals. The United States Conference of Catholic Bishops has persuasively addressed these points it its comment letter.

organizations with religious objections to contraceptive coverage in the simplest way possible, and

- To protect such religious organizations from having to contract, arrange or pay for contraceptive coverage.

The most effective way to achieve the Departments' second stated goal would be to actually exempt objecting religious organizations from the mandate by expanding the definition of religious employer to include them. This approach would align the policy under the women's preventive care regulation with existing federal law on conscience protection. The exemption in the final rule is narrower than any conscience clause ever enacted in federal law and reflects an unacceptable change in federal policy regarding religious beliefs.

The ANPRM suggests that Code Section 414 could provide the basis for a definition of the organizations that would qualify for the proposed accommodation. We reiterate our suggestion contained in our September 22nd letter that the concepts contained in Section 414(e) be used instead to develop a broader and more appropriate religious employer exemption to the contraceptive mandate.[3] 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 Catholic hospitals and health care organizations as well as other ministries of the Church. To make it easier to understand our approach, we have drafted the following language:

§ 147.130

(a) * * *

(1) * * *

(IV) (B)(1) For purposes of this subsection, a "religious employer" is

(a) a church or a convention or association of churches (hereinafter included within the term "church") which is exempt from tax under 26 USC § 501; or

(b) an organization, whether a civil law corporation or otherwise, which is either controlled by or associated with a church.

[3] 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.

(2) For purposes of this subsection

(a) The term "church" includes a religious order or religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether a civil law corporation or otherwise.

(b) An organization is associated with a church if it shares common religious bonds and convictions with the church.

Making this change could help address the serious constitutional questions created by the Departments' current approach, in which the government essentially parses a bona fide religious organization into secular and religious components solely to impose burdens on the secular portion. To make this distinction is to create a false dichotomy between the Catholic Church and the ministries through which the Church lives out the teachings of Jesus Christ. Catholic health care providers are participants in the healing ministry of Jesus Christ. Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church and it's teachings about the dignity of the human person and the sanctity of human life from conception to natural death.

If The Government Insists That All Employees Have Access to Contraceptive Coverage Without Cost Sharing, Then It Should Provide And Pay for These Services Directly.

As noted above, the Departments' first goal as outlined in the ANPRM is to maintain the provision of contraceptive coverage without cost sharing to individuals who receive coverage through non-exempt, non-profit religious organizations with religious objections to contraceptive coverage *in the simplest way possible.* In the ANPRM, the Departments seek comments on (1) the approach of using the insurer to provide contraceptive coverage to beneficiaries of insured plans; and (2) several alternative approaches for implementing its intended accommodation for self-insured religious employers with objections to providing contraceptive coverage.

The more we learn, the more it appears that the ANPRM approaches for both insured and self-insured plans would be unduly cumbersome and would be unlikely to adequately meet the religious liberty concerns of all of our members and other Church ministries. Given this, if the Departments unfortunately continue to pursue the course that all employees must have access to contraceptive services without cost, then the government will need to develop a way to pay for and provide such services directly to those employees who desire such coverage without *any* direct or indirect involvement of religious employers

(under the expanded definition described above.) Precedent for federally provided access to contraception can be found in the Title X program and in the Medicaid family planning waivers. The ANPRM also suggests the possible creation of a program under which OPM provides contraceptive coverage through a multi-State policy offered on the State exchanges.

* * * *

In conclusion, for the reasons stated above and those included in our letter of September 22, 2011, we urge you at the very least to expand the definition of religious employer using the principles behind Section 414(e) of the Internal Revenue Code to make clear that religious employers, including Catholic hospitals and health care organizations, are exempt from the contraceptive mandate.

Sincerely,

Sr. Carol Keehan, DC
President and CEO

Robert V. Stanek
2011-2012 CHA Board Chairperson

Joseph R. Swedish
2012-2013 CHA Board Chairperson