



collegium

**AESCULAPIUM**

foundation, inc.

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September 28, 2011

**Submitted Electronically**

Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
Attention: CMS-9992-IFC2  
P.O. Box 8010  
Baltimore, MD 21244-8010

**Re: Interim Final Rule Relating to Coverage of Certain Preventive Services**

Dear Sir or Madam:

The Collegium Aesculapium Foundation, Inc. (“Collegium Aesculapium”) appreciates the opportunity to comment on the amendments to the interim final regulations (76 Fed. Reg. 46621 (Aug. 3, 2011)) regarding coverage of certain preventive health services under provisions of the Patient Protection and Affordable Care Act.

**Collegium Aesculapium**

The Collegium Aesculapium is a non-profit organization for practicing and retired physicians and other health care professionals. Members generally adhere to strong precepts of integrity and morality. They also strongly advocate religious liberty for all professionals. The Collegium Aesculapium functions on an international, national, and local level and focuses on educational and service-oriented activities, including giving direct medical attention and providing educational aid.

**Background**

With the exception of certain grandfathered health plans, the Patient Protection and Affordable Care Act (“PPACA”), Pub. L. No. 111-148, § 1001, will require group health plans and health insurance issuers to cover, without cost-sharing requirements, preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (“HRSA guidelines”). Included

among the HRSA guidelines is a coverage requirement for “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” HRSA, Women’s Preventive Services: Required Health Plan Coverage Guidelines, available at <http://www.hrsa.gov/womensguidelines/> (last visited Sept. 13, 2011). Interim final rules implementing this portion of the PPACA were published on July 19, 2010. 75 Fed. Reg. 41726 (July 19, 2010).

On August 3, 2011, the interim final rules were amended to “take[] into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate.” 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) [hereinafter the “Amended Regulations”].

The Amended Regulations provide HRSA additional discretion to exempt certain “religious employers” from the HRSA guidelines regarding contraceptive services. The Amended Regulations narrowly define a “religious employer” to be one that “(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 section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue Code].” *Id.*

### **The Amended Regulations Must Accommodate Important Religious Freedoms**

The Collegium Aesculapium understands the importance of access to medical care, particularly to underserved populations. In fact, the Collegium Aesculapium is committed to sponsoring activities that provide medical attention to such populations. As a group of health care professionals that choose to follow religious precepts, however, the Collegium Aesculapium also opposes public policies that weaken or impinge on religious freedoms guaranteed by the U.S. Constitution and existing federal conscience laws.

Health care professionals and institutional providers, including religiously affiliated health plans, should not be placed in a position in which they must choose between providing quality health care and covering items or services that a religious faith deems contrary to its tenets. The Amended Regulations raise serious Constitutional questions, and we direct your attention to comments submitted by other organizations that address these issues.<sup>1</sup> Even aside from these significant concerns, the religious exemption as drafted in the Amended Regulations still suffers from critical defects.

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<sup>1</sup> See, e.g., Comments submitted by the Office of General Counsel, United States Conference of Catholic Bishops (Aug. 31, 2011).

## **The Religious Exemption Is Not Required under the Amended Regulations**

While purporting to seek a religious accommodation, the preamble to the Amended Regulations does not *require* a religious exemption but only provides “*additional discretion*” to exempt certain religious employers from the HRSA guidelines regarding contraceptive services. The actual regulation notes only that the HRSA “*may*” establish exemptions with respect to religious employers – not that it “*shall*” or “*must*” establish such exemptions. Such flexibility leaves open the possibility that no religious accommodation will be made at all. This possibility undercuts the very concern which prompted the religious exemption in the first place.

## **The Definition of “Religious Employer” under the Amended Regulations Is Too Narrow**

The religious exemption contemplated by the Amended Regulations applies only to “religious employers,” which is defined very narrowly. The definition appears to embrace churches, but may not include universities, hospitals, social service agencies, or other health care providers who regularly serve persons or employ persons who do not share the religious views of these individuals or entities.

This narrow definition unfairly discriminates against those religiously affiliated entities that sponsor group health plans, and thus may be required to cover services that violate their religious tenets. Similarly, such a narrow definition would require individuals covered by such plans to contribute to the costs of services to which they are morally opposed. The “accommodation” envisioned by the Amended Regulations does not reach large numbers of religiously affiliated entities that help to expand access to health care or provide other critical services while adhering to religious tenets and principles that may not agree with covering contraceptive services, as defined broadly in the HRSA guidelines.

In addition, members of the Collegium Aesculapium regularly provide health care services to patients from health plans of all types. By requiring plans to provide services that violate the conscience of Collegium members, members may be discriminated against in employment and contracting with plans.

As the preamble to the Amended Regulations recognizes, it is important to take into account stakeholders’ religious beliefs, but the extremely narrow definition adopted by the Amended Regulations does not represent a reasonable religious accommodation.

## **Alternative Approaches to the Amended Regulations**

A variety of federal statutes and regulations recognize the importance of protecting the rights of health care professionals and other entities when the underlying activity would be contrary to the individual’s religious beliefs or moral convictions. For

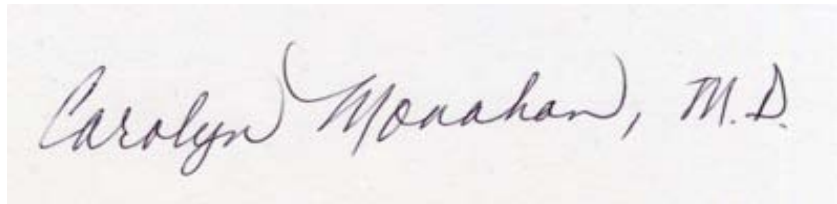
example, the Federal Employees' Health Benefits Plan ("FEHBP") regulation does not require providers and health plan sponsoring organizations "to discuss treatment options that they would not ordinarily discuss in their customary course of practice because such options are inconsistent with their professional judgment or ethical, moral or religious beliefs." 48 C.F.R. § 1609.7001(c)(7).

Similarly, Congress has approved regularly a religious exemption for health plans from the contraceptive coverage mandate in the FEHBP program. The current provision states that "[n]othing in this section shall apply to a contract with ... any existing or future plan, if the carrier for the plan objects to such coverage on the basis of religious beliefs." Consolidated Appropriations Act, Pub. L. No. 111-117, § 728. These provisions provide just one example of how the Amended Regulations might be changed to establish an exemption that is broader and represents a more reasonable religious accommodation.

### **Conclusion**

We thank you for the opportunity to comment on the Amended Regulations. For the reasons we have outlined, we believe that the Amended Regulations should be further reviewed and amended to exempt all stakeholders with religious or moral objections to the coverage requirement for contraceptives, sterilization and counseling as broadly defined by the HRSA guidelines.

Respectfully submitted,

A photograph of a handwritten signature in black ink on a light-colored background. The signature reads "Carolyn Monahan, M.D." in a cursive script.

Carolyn Monahan, M.D.  
Chair, Rights of Conscience Committee  
Collegium Aesculapium