



UNIVERSITY OF NOTRE DAME
OFFICE OF THE PRESIDENT

September 28, 2011

The Honorable Kathleen Sebelius
Secretary of Health and Human Services
Submitted electronically

Re: Interim Final Rules on Preventive Services
File Code CMS-9992-IFC2

Dear Madam Secretary,

In May of 2009, President Obama accepted an honorary degree and served as the principal speaker at the University of Notre Dame's commencement ceremony. As the University's president, I had the honor of introducing him and presenting him with a doctor of laws degree in recognition of his service to our nation and place in our history.

Our graduates received the President warmly, but there were many people of good faith who opposed my decision to recognize him. I stand by that decision, however, because it was important for us to hear his views, and for us to express ours – all in a spirit of civility that is increasingly lacking in our society. In my introduction, I made it clear how much we respect him, but that we also disagree on matters related to the sanctity of life. He, in turn, expressed his own views and promised to work together on matters with which we agree.

One of those areas of agreement is, as the president put it in his commencement address, "a sensible conscience clause," and that is the subject of this letter.

As Notre Dame's president, I am writing to urge you to broaden the proposed definition of "religious employer" to ensure conscience protections that will allow this university to continue its work as "a Catholic academic community of higher learning" – words taken directly from our mission statement.

Of course, Madam Secretary, as the daughter of a distinguished Notre Dame alumnus and faculty member, you are no stranger to our mission.

Surely you know that we welcome the Administration's decision to require health plans to cover women's preventive services, such as critical screenings that will make preventive care more widely available and affordable. However, I'm sure you also understand that the inclusion in that mandate of contraceptive services that the Catholic Church finds morally objectionable makes it imperative that the Final Rule include broader conscience protections. In their current form, these regulations would require us to offer our students sterilization procedures and prescription contraceptives, including pills that act after fertilization to induce abortions, and to offer such services in our employee health plans. This would compel Notre Dame to either pay for contraception and sterilization in violation of the Church's moral teaching, or to discontinue our employee and student health care plans in violation of the Church's social teaching. It is an impossible position.

While the Interim Final Rule acknowledges the need for conscience protections, the proposed religious exception falls far short of fulfilling this need. It allows that a "religious employer" is exempt from providing coverage of contraceptive services that are against its religious teaching, but it proposes a definition of a religious employer that is narrower than any conscience clause ever enacted in federal law. Indeed, the definition is not drawn from current federal law but instead is taken from the narrowest state definition of a religious employer – found only in three states in the nation. Consequently, Notre Dame and nearly all Catholic colleges and universities would not be considered religious employers.

May I suggest that this is not the kind of "sensible" approach the president had in mind when he spoke here. It runs contrary to a 40-year history of federal conscience statutes that have been in effect to protect individuals and organizations like ours from being required to participate in, pay for, or provide coverage for certain services that are contrary to our religious beliefs or moral convictions.

According to the proposed definition, only those organizations that "primarily serve persons who share its religious tenets" count as religious employers. Although our Catholic convictions inspire and motivate the educational mission of Notre Dame – and inform us about what we cannot ethically do – we nevertheless serve many others who do not share the Catholic faith. As Cardinal Keeler said of the Catholic schools in his diocese, many of which serve the poorest neighborhoods: "We do not educate our students because *they* are Catholic; we educate them because *we* are Catholic." We believe that an institution inspired by faith to serve beyond the limits of its religious denomination should not be judged less religious, and hence less worthy of an exemption.

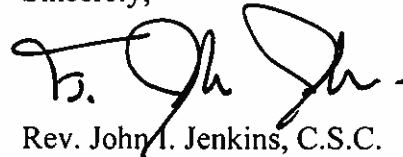
Therefore, Madam Secretary, on behalf of Notre Dame and other Catholic colleges and universities that share our mission and our moral convictions, I request that the definition be rewritten using the principles behind the "church plan" exemption found in section 414(e) of the Internal Revenue Code, which was developed specifically to avoid church-state entanglements in religious governance relative to pension, health and welfare plans offered by religious entities. This is the statute that should be used as a guide for determining the definition of a religious employer. Section 414(e) considers

whether an organization or institution “shares common religious bonds and convictions with a church” when determining if the organization qualifies as a “religious employer.” This definition more adequately defines religious employers to include all organizations that work in ministries of the church.

In his commencement address, President Obama recognized that a conscience clause must accommodate a number of considerations and the sometimes conflicting dictates of the consciences of various individuals and groups in our society. That balance is certainly not always easy to achieve, but I believe the definition I’m proposing will protect the consciences of many individuals and organizations that, inspired by faith, serve in ministries outside the narrow confines the proposed definition establishes. So I respectfully ask you to amend the regulations to broaden the exemption for religious institutions along the lines of the exemption in the Internal Revenue Code – an exemption that would have precedent in federal law and would apply to Catholic institutions of higher learning.

At its founding and throughout its history, our nation has exhibited a profound respect for the rights of conscience and for the work of religious organizations. I ask you to uphold and extend that proud, indispensable tradition by broadening the definition of religious employers and the scope of the exemption in these regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "J. I. Jenkins", with a stylized flourish at the end.

Rev. John I. Jenkins, C.S.C.
President
University of Notre Dame