CHURCH ALLIANCE
Acting on Behalf of Church Benefits Programs

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BY ELECTRONIC DELIVERY

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

Re: CMS – 9931 – NC: Request for Information

Dear Sir or Madam:

The Church Alliance submits this comment letter in response to a request for information ("RFI") on coverage for contraceptive services. The RFI was issued jointly by the Department of the Treasury, the Department of Labor and the Department of Health and Human Services ("HHS") (together, the "Departments") and published at 81 Fed. Reg. 47741 (July 22, 2016).

The Church Alliance has commented four times previously on the topic of the contraceptive services mandate (the "Mandate") under the Affordable Care Act (ACA):

- on September 28, 2011, on the interim final rules published at 76 Fed. Reg. 46621 (Aug. 3, 2011);
- on June 21, 2012, on the advance notice of proposed rulemaking published at 77 Fed. Reg. 16501 (Mar. 21, 2012);
- on April 8, 2013 on the notice of proposed rulemaking published at 78 Fed. Reg. 84566 (Feb. 6, 2013); and
- on October 27, 2014 on the notice of proposed rulemaking published at 79 Fed. Reg. 51092 (Aug. 27, 2014).

Copies of these earlier comments are available at http://church-alliance.org/initiatives/comment-letters (last visited September 6, 2016).

Executive Summary

The Church Alliance recognizes the Departments' efforts to respond to the needs of the community of church-affiliated employers through two

means of "accommodating" eligible organizations that have a religious objection to providing some or all contraceptive services required by the Mandate. Additionally, the Church Alliance is grateful for the opportunity to respond to the RFI. As stated in the Church Alliance's prior comment letters, and for the reasons discussed in those prior letters, the Church Alliance again urges the Departments to expand the religious employer exemption from the Mandate to a broader group of church-affiliated employers that object to the Mandate, and suggests they at least expand it to all objecting employers that maintain or participate in "church plans", as defined in Internal Revenue Code ("Code") section 414(e) ("Church Plans"), through which they provide health coverage to their employees. This comment letter also comments on the procedure described in the RFI as a "Notification to Issuers without Self-Certification" ("Notification"). Finally, this letter contains other suggestions for alternatives that would be less restrictive alternatives to the current two means of "accommodating" eligible organizations.

I. BACKGROUND ON THE CHURCH ALLIANCE

The Church Alliance is an organization composed of the chief executives of thirty-seven church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The Church Alliance members, listed on the left of this letterhead, provide employee benefit plans, including in many cases health coverage, to approximately one million participants (clergy and lay workers) serving over 155,000 churches, synagogues and affiliated organizations. These health care plans generally are Church Plans.

All of the members of the Church Alliance share the common view that a church or an employer associated with a church ("church-affiliated employer") should not have to face the choice of violating its religious tenets and beliefs or violating the law in order to maintain a health care plan for its workers. This is true even though most of the health care plans associated with the members of the Church Alliance do not impose any specific restrictions on contraceptive coverage. A few programs, reflecting the religious beliefs of the churches with which they are associated, exclude coverage for all contraceptives. Other programs whose associated churches do not object to contraception but hold fundamental convictions against abortion, exclude coverage for contraceptives that are or could be abortifacients, such as the so-called "morning-after pills" or "emergency contraceptives."

II. EXPAND THE RELIGIOUS EMPLOYER EXEMPTION

The current religious employer exemption from the Mandate continues to exclude bona fide religious organizations, because the exemption continues to reference statutory exemptions set out in Code sections 6033(a)(3)(A)(i) and (iii) that were crafted for another purpose – specifically, to exempt churches, their integrated auxiliaries, conventions or associations of churches and the exclusively religious activities of a religious order from the annual Form 990 filing requirement under Code section 6033. For the reasons discussed in its prior comments, the Church Alliance again urges the Departments to expand the religious employer exemption, and suggests they extend it at least to all objecting employers that maintain or participate in Church Plans, through which they provide health coverage to their employees.

III. LESS RESTRICTIVE ALTERNATIVES TO PROVIDE CONTRACEPTIVES

The Supreme Court of the United States in *Zubik, et al. v. Burwell 136 S. Ct. 1557* (2016) stated that the parties to the case "should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560. In the RFI, the Departments specifically asked about an alternative described by the Supreme Court in *Zubik*, which is an alternative:

> "in which [objecting employers] would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds. [The employers] would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal government or to their employees. At the same time, [the employers'] insurance compan[ies] – aware that [the employers] are not providing certain contraceptive coverage on religious grounds – would separately notify [the employers'] employees that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by [the employers] and is not provided through the [employers'] health plan[s]."

RFI, page 47743.

The Church Alliance agrees that the above alternative described by the Supreme Court and repeated in the RFI would be acceptable for employers that are not exempted from the Mandate as religious employers if: 1) the scope of the organizations covered by this suggested approach would be broad enough to cover a wide array of church-affiliated employers, including at least all objecting employers providing insured health coverage through Church Plans, 2) the suggested approach would truly exempt the objecting employer, simply by the employer informing its insurer of its religious objection, 3) the contraceptive coverage truly is separate and independent from the coverage provided by the employer—in other words, it does not use the plan, does not involve the issuance of plan instruments, and does not use the plan's infrastructure or information, and 4) a suitable comparable accommodation or exemption also would be created for self-insured plans.

For objecting employers that participate in self-insured plans, the Church Alliance believes acceptable alternatives would be:

- As described above, the best alternative would be an expanded exemption for church-affiliated employers, expanded at least so objecting employers providing health coverage through Church Plans would be exempted from the Mandate.

- The Church Alliance suggests that if an objecting employer's self-insured plan has one or more third party administrators ("TPAs") that could provide separate cost-free contraceptive coverage to covered employees, the objecting employer could simply inform such TPAs of the employer's objection (which could be communicated in a variety of ways, including via the employer's contract with the TPA). Again, to be acceptable this coverage would have to be truly separate from the plan.

- Objecting employers with no such TPAs should be exempted from the Mandate, and the government could, by working with other third parties (such as insurers, other TPAs, health care providers, drug manufacturers or other nonprofits), provide separate contraceptive coverage to the employees of such employers.

    - Alternatively, such an objecting employer (with no TPA that could provide contraceptives) could inform HHS of its objection, with no further information being required from the objecting employer, and HHS then could work with third parties to offer such contraceptive services separately to the objecting employer's employees. With the information obtained from Internal Revenue Service (IRS) Forms 1095-B, 1095-C or W-2, HHS would be able to determine necessary information about the employees of such an employer, and offer such contraceptive coverage separately to such employees, at no cost to the objecting employer. Furthermore, because virtually everyone accessing prescription contraceptives will need to work with a doctor and pharmacy, the government could work with doctors and pharmacists to provide coverage "seamlessly" to women who want it.

The RFI specifically asked whether objecting organizations would have any objection to informing their issuers that they object to providing contraceptive coverage "on religious grounds". The Church Alliance states that it does not object to a requirement that such organizations that are not exempted from the Mandate as religious employers must inform their insurers (or TPAs, as applicable) that they object to providing contraceptive coverage "on religious grounds". Furthermore, the Church Alliance has no objection to a requirement that such a request be made in writing. However, the Church Alliance is concerned about (and some of its members object to) the requirement that the request be made via a particular form or in any way that the government will treat as allowing use of the health plan for purposes that violate the employer's religious beliefs, or otherwise creating new plan instruments to alter the plan. Furthermore, some objecting employers or administrators of self-insured plans of objecting employers may have already communicated such objections to their TPAs via contracts, formularies, set-up forms or otherwise, so a requirement that such a request be made via a particular form could cause uncertainty and possible penalties for such employers, with no added benefit to the Departments from the use of a particular form.

Importantly, the Church Alliance urges that an objecting employer that is not exempted as a religious employer and that participates in a multiple-employer Church Plan be exempted from the Mandate if either such employer, or another entity in the Church Plan (on behalf of such employer), communicates a religious objection to such employer's insurer or TPA. For example, churches that sponsor Church Plans or church-related administrators of such plans

providing health coverage should be allowed to inform an insurance company or TPA of an objection on behalf of many objecting employers, based on the religious beliefs of the church. It would create unnecessary paperwork and confusion, and may cause possible penalties for small employers with volunteer treasurers, if each such an objecting employer in a multiple-employer Church Plan would be required to separately inform the insurance company or TPA of its religious objection. Therefore, the Church Alliance strongly urges that a religious objection be allowed to be provided by another entity on behalf of an objecting employer in a multiple-employer Church Plan. In addition, the Church Alliance urges that such an objecting employer not be required to specifically grant written authority to the plan sponsor or plan administrator to object on its behalf, especially with a multiple-employer Church Plan, due to the added administrative burden this would impose on many small employers.

The Government could provide free contraceptive coverage in other ways without using eligible organizations' plans as a conduit, as the Church Alliance has suggested previously. More specifically, it could:

- provide tax incentives to consumers or producers of contraceptive products,

- "give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers." *Korte*, 735 F.3d at 686; *Roman Catholic Archdiocese of N.Y.*, 987 F. Supp. 2d 232 at 255-56;

- modify the eligibility requirements for existing federal programs that provide health care subsidies on a massive scale, such as the Title X family planning program and the Medicaid program, or any number of other federal programs that already provide cost-free contraceptives to women; or

- permit employees of objecting church-affiliated employers to purchase fully subsidized coverage (either for contraceptives alone, or full plans) on the state and federal exchanges established under the ACA.

To the extent these alternatives require a funding source, the government could use credits against Exchange user fees (which it is already using for the existing "accommodation") or credits against the Health Insurance Providers Fee. Using these sources to fund benefits on the Exchanges would actually be far simpler than the current approach of using them as tradeable credits for entities that are not on the Exchanges at all. There are no doubt other alternatives. While some eligible organizations may oppose some of these alternatives on policy grounds, all of them are "less restrictive" than the existing "accommodation" because they would deliver free contraception without forcing eligible organizations to violate their beliefs. Moreover, these alternatives are eminently workable because, as noted above, the Government's objectives could be achieved through minor regulatory tweaks to existing programs.[1] Even if a new regulatory program were necessary, the Government can hardly object, as it has shown its willingness to create (and repeatedly modify) such programs – by, among other things, establishing the

[1] This remains true even if legislative action would be necessary. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014) (describing less restrictive alternatives requiring congressional action).

infrastructure by which TPAs are compensated under the accommodation. 45 C.F.R. section 156.50; *Hobby Lobby*, 134 S. Ct. at 2781 (stating that "nothing in RFRA" suggests that a less restrictive means cannot involve the creation of a new program).

IV. CONCLUSION

As stated in the Church Alliance's prior letters, we suggest that the Departments expand the types of church-affiliated employers exempted from the Mandate, at least to exempt any objecting employer that provides health coverage through a Church Plan.

If the Departments will not expand the exemption, the Church Alliance respectfully requests that the Departments at least adjust the Notification described in the RFI in the following ways:

- Allow a wide range of objecting church-affiliated employers to inform their insurer or TPA(s) of their religious objections to the Mandate, with no further obligation on such objecting employers;

- Allow a multiple-employer Church Plan sponsor or church-affiliated administrator to inform the plan's insurer or TPA of the religious objection on behalf of all church-affiliated employers that have adopted the plan, or otherwise allow an objecting employer to communicate its objection through another entity;

- Clarify that the information provided to the insurer or TPA as to such a religious objection would serve to exempt the objecting employer from any obligation to provide contraceptive services, and any contraceptive services offered or provided would be provided through a separate policy with no connection or cost to the objecting employer; and

- Ensure that any contraceptive coverage provided in this manner be truly separate in that it not use the plan at all. This means it should not involve the issuance of new plan documents by the employer, and should not involve use of the plan or the plan's infrastructure or information.

Please contact the undersigned at 202-778-9128 if you have any questions or wish to discuss this matter further.

Sincerely,

Karishma S. Page

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On Behalf of the Church Alliance