August 26, 2011

Joshua DuBois, Executive Director
Office of Faith-Based and Neighborhood Partnerships
The White House
Washington, DC 20510

Dear Joshua:

As leaders in faith-based services, we ask for your support in defense of religious freedom for faith-based organizations. We are deeply disappointed that the Administration has chosen to adopt a religious exemption that, by all appearances, is narrower than any religious exemption ever previously adopted in Federal law.

We are referring to the exemption adopted in connection with the federal mandate that all health plans (except for grandfathered plans) cover a range of preventive services. It is good—we believe, constitutionally required—for the regulations to include an exemption for religious employers that have a sincere religious objection to coverage of a mandated service. However, the definition of an exempt religious employer should be replaced, for it is wholly inadequate, seriously underinclusive, and sets a dangerous Federal precedent. It should be scrapped and replaced.

The faith-based organizations and religious traditions represented by the undersigned leaders do not all share the same convictions about the moral acceptability of the mandated services. However, we do agree that the definition of religious employer that has been adopted is so narrow that it excludes a great many actual "religious employers" and probably most faith-based organizations that serve people in need, i.e., many of the religious employers whose conscientious objections supposedly are being honored. We believe it is detrimental to faith-based organizations, the services they deliver, and the people they serve if government decides to protect the religious freedom only of organizations that fit the narrow criteria set out in the amended regulations.

Those regulations define a "religious employer" as an organization that:

- "has the inculcation of religious values as its purpose";
- " primarily employs persons who share its religious tenets";
- "primarily serves persons who share its religious tenets"; *and*
- is a nonprofit organization under provisions of the Internal Revenue Code that refer to "churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order."[1]

Plainly, such a definition excludes many religious organizations. It excludes many if not most faith-based organizations that provide social services, health care, education, emergency shelter, relief and development, and the like—indeed, most if not all faith-based organizations that are not houses of worship, seminaries, or monasteries.

[1] 76 Fed. Reg. 46623 (August 3, 2011).

In other parts of Federal law, faith-based organizations that do not fit into those church-oriented Internal Revenue Code provisions are nevertheless considered to be authentic religious organizations (for example, they are religious employers for the purposes of the religious exemption of Title VII of the 1964 Civil Rights Act, 42 USC §2000e-1(a)). Further, many authentic religious organizations do, as an exercise of their own religious judgment, employ some or many persons who are not of like-minded religion (and they do not thereby become ineligible for the Title VII exemption).

Most important, the "purpose" of most faith-based service organizations is clearly not "the inculcation of religious values"—but rather the provision of one or several kinds of material or psychological service to others, albeit their provision of services is inspired and shaped by the religious convictions of the organization. And most faith-based service organizations, as a matter of religious conviction, do not "primarily serve[] persons who share [their] religious tenets"—rather, out of religious conviction they serve those of any or no faith who need their services.

Of course, some faith-based service organizations may serve primarily people of their own religion, e.g., camps, retirement homes, k-12 schools, colleges, broadcasters, and day care centers. Yet, even here "the inculcation of religious values" is an inaccurate description of most of their activities.

In sum, it is plain that most faith-based service organizations do not fit within the confines of the definition of "religious employer" that has been adopted. Such organizations will not be eligible for the religious exemption under the health insurance regulations. Rather, those regulations treat them as not being religious employers at all—that is, they treat them as secular organizations. This is a dangerous and damaging Federal policy.

It even cuts against a central policy of the faith-based initiative that you direct. A key requirement is that any organization that receives direct Federal funds "shall not, in providing services, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief."[2] The same principle is affirmed in President Obama's Executive Order setting out his "Fundamental Principles and Policymaking Criteria" for government partnerships with faith-based organizations.[3] And yet, to fit within the category of exempt "religious employers," a religious organization must instead "primarily serve[] persons who share its religious tenets."

Thus, with its narrow definition of "religious employer," the Federal government is telling faith-based service organizations: you may accept Federal funds, but then your conscientious scruples about what services your health insurance plan must cover will not be honored; or, the Federal government will honor your religious convictions about those services but at the expense of excluding your organization from taking part in Federally funded services.

---

[2] 45 CFR 87.2(e) (the HHS Equal Treatment regulations that apply to formula and block grants).
[3] Executive Order 13559 (Nov. 17, 2010), new Sec. 2(d).

The Federal agencies that chose this narrow definition of exempt religious employers claim that it is justified on the ground that it is the exemption used by "most States" with contraceptive mandates.[4] In fact, we are able to identify only three States (California, New York, and Oregon) that use this particular exemption to a contraceptive mandate. Even if it were used by more than these few States, that would not make it any more adequate and suitable for purposes of Federal law.

The agencies further claim that the narrow definition "reasonably balance[s] the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions."[5] Yet surely protection of conscience and safeguarding of religious freedom cannot be limited only to those employees "in certain religious positions" in a religious organization. Congress recognized this in 1972 when it expanded the original religious exemption in Title VII of the 1964 Civil Rights Act to its current definition that covers all employees of a religious employer.[6]

A major purpose of the White House Office of Faith-Based and Neighborhood Partnerships is to assist the Administration in understanding the unique character and capabilities of faith-based organizations and to implement policies that enable those organizations, along with other organizations, to collaborate with the government to serve people who need assistance.

We call on you and your office to vigorously advocate on behalf of faith-based organizations and against this inaccurately narrow and practically inadequate definition of "religious employer." Faith-based service organizations should not be denied protection of their collective conscience about health insurance coverage merely because they do not fit into the constrained framework of that definition. Neither should they be redefined by the Federal government as secular organizations or denied their religious freedom merely because they serve the public.

We are ready to work with your office and with other Federal officials and agencies to devise an accurate and acceptable religious exemption.

Thank you very much.

Sincerely,

Stanley W. Carlson-Thies, President, Institutional Religious Freedom Alliance

Anthony R. Picarello, Jr., General Counsel, U.S. Conference of Catholic Bishops

Stephan J. Bauman, President/CEO, World Relief

Bill Blacquire, President/CEO, Bethany Christian Services

---

[4] 76 Fed. Reg. 46623.
[5] *Id.*
[6] Section 702, Title VII of the 1964 Civil Rights Act, 42 USC §2000e-1(a).

Jim Liske, CEO, Prison Fellowship Ministries

John Ashmen, President, Association of Gospel Rescue Missions

Cary Humphries, COO, The Navigators

Leith Anderson, President, National Association of Evangelicals

Nathan J. Diament, National Director of Public Policy, Union of Orthodox Jewish Congregations of America

Rabbi Abba Cohen, Vice President for Federal Affairs and Washington Director, Agudath Israel of America

Tom Minnery, Senior Vice President, Government and Public Policy, Focus on the Family

Fred L. Potter, Christian Legal Society

Richard W. Garnett, Professor of Law & Associate Dean, Notre Dame Law School

Colby M. May, Director and Senior Counsel, Washington Office, American Center for Law and Justice

Gary M. Benedict, President, The Christian and Missionary Alliance

Ron Sider, President, Evangelicals for Social Action

The Rev. Luis Cortes, President, Esperanza

Rev. Samuel Rodriguez, President, National Hispanic Christian Leadership Conference

Bishop Dr. Ángel L. Núñez , Senior Vice-President of the National Hispanic Christian Leader ship Conference

Paul R. Corts, President, Council for Christian Colleges & Universities

Robert C. Andringa, Ph., President Emeritus, Council for Christian Colleges & Universities

Dr. Richard L. Gathro, Dean, Nyack College, Washington, D.C

Shirley A. Mullen, Ph.D., President, Houghton College

Gaylen Byker, President, Calvin College

William L . Armstrong, President, Colorado Christian University

Carl E. Zylstra, President, Dordt College

John C. Holmes, Director of Government Affairs, Association of Christian Schools International

Dr. David Hillis, President, Leadership Foundations

Andrew Sears, Executive Director, TechMission

Jay H. Van Groningen, Executive Director, Communities First Association

Jeff Martineau, Executive Director, The Hope Project

Karen Duer, Board Member, The Hope Project

Herbert Newell, Executive Director, Lifeline Children's Services

James Moynihan, President, OneChurch

Rev. Robert S. Paterson, Lead Pastor, New Hope Community Church

Stephen V. Monsma, Senior Research Fellow, The Henry Institute, Calvin College

Kirk Reber, Director of Communications and Development, Communities First Association

Wally Harrison, Pastor, Ecclesia

Karen Woods, Principal, Cornerstone Community Resources

Terri Rudacille, Principal, Cornerstone Community Resources

Dr. Larry Daugherty, Superintendent, Maranatha Academy

Case Hoogendoorn, Senior Partner Hoogendoorn & Talbot LLP, Chicago,IL.

Jeff Littlejohn, Executive Director, Imagine NW!

Suzanne Nelson, International Director, Music for Life Institute