April 8, 2013

Submitted Electronically

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

Re: Notice of Proposed Rulemaking on Preventive Services
File Code No. CMS-9968-P

Dear Secretary Sibelius:

On behalf of Trinity International University ("TIU" or "Trinity"), we respectfully submit the following comments on the Notice of Proposed Rulemaking ("NPRM") on preventive services. 78 Fed. Reg. 8456 (Feb. 6, 2013).

Trinity International University "educates men and women to engage in God's redemptive work in the world by cultivating academic excellence, Christian faithfulness, and lifelong learning." Trinity views education as encompassing the whole person, including moral and spiritual dimensions, and the whole community, including not only students, but all our faculty and staff. At the heart of Trinity's mission lies its commitment to engage the culture for Jesus Christ. Engaging the culture is more than a remote intellectual exercise. It is an active living out of the doctrines and ethical teachings of our Christian faith. Thus, we strive for our behaviors to align with our teaching.

Identity of Trinity International University as a Religious Educational Institution
Trinity is a denominational school, established in 1897 by the Evangelical Free Church of America (EFCA). It includes undergraduate and graduate schools in Deerfield, Illinois, a law school in California, additional campuses in Chicago and Florida, and Trinity Evangelical Divinity School, "an evangelical learning community united around the gospel of the life, death and resurrection of Jesus Christ." Trinity holds daily chapel services; attendance is mandatory for undergraduates.

Trinity is also the home of The Center for Bioethics & Human Dignity, a Christian bioethics research center. The Center has historically opposed any destruction of human embryos, whether for research or reproductive purposes.

The *2012-2013 TIU Student Handbook,* which applies to undergraduates, states that practices that are specifically prohibited in Scriptures include premarital sex and abortion. The *TEDS/TGS Student Guide 2012-2013* applies the same standards to all graduate students, whether residing on or off campus.

Unlike many other universities that were founded by a Christian denomination, Trinity has not abandoned its roots, and retains a legal relationship with the EFCA. EFCA bylaws determine the composition of the Board of Regents, requiring that a majority are members in good standing of the EFCA. Trinity's president must be ordained by EFCA. EFCA must ratify the presidential search committee, and elects the president. A member of the Board of Regents serves on the Board of Directors of EFCA.

Yet, despite all these legal and organizational relationships with a church denomination, and Trinity's explicitly religious educational purposes, Trinity apparently would not be deemed a "religious employer" within the narrow provisions of the HHS mandate, discussed below.

General Objection To Mandate's Classification Of Pregnancy As A "Disease" To Be Prevented

As a Christian university deeply committed to the value of every human life, TIU strongly opposes any requirement that crosses the moral boundary regarding embryonic beings. Regardless of the circumstances of conception, the embryo's development and growth during pregnancy is a natural process, never a "disease" to be eliminated, or a costly societal burden. The U.S. Department of Health and Human Services' proposed rule mandates coverage, in private health plans, of, contraceptives, including some that may have an abortifacient effect, sterilization procedures and related education and counseling, as necessary "preventive care" for women. At its core, the HHS mandate treats pregnancy as a disease – which it is not -- and relies on the prevention of child-bearing as a healthcare cost savings. The administration's policy wrongly assumes that children are an economic and societal burden rather than a vibrant contribution to American society and our greatest natural resource, and is thus unwise, untrue and unprecedented. For this reason alone, TIU urges that the mandate be rescinded in its entirety.

The Proposed "Religious Employer" Definition Is Too Narrow; Improperly "Ranks" Religious Institutions And Objectors; And Is Unprecedented Under Federal Law

Despite its long-standing affiliation with the Evangelical Free Church of America and TIU's stated mission to educate men and women for faithful participation in God's redemptive work in the world, TIU apparently is not considered "religious enough" under the administration's proposed rulemaking to be exempted from providing insurance benefits that violate TIU's deeply held beliefs and principles. The sole

religious exemption provided under the proposed rule is narrowly crafted to only "exempt the group health plans of houses of worship." 78 Fed. Reg. at 8461. Even though Trinity has a chaplain and holds regular worship services, we are not confident that the administration, or any judicial interpretation of HHS's "religious employer" exemption, would deem Trinity to fit within the narrow confines of the definition. This illiberal "religious employer" exemption stands in stark contrast to the numerous secular exemptions granted by the administration for political, business or other "non-religious" reasons. Under the proposed rule, conscience protection is linked to the Internal Revenue Code and, specifically, to a subset of religious institutions exempted from filing IRS Form 990 under Section 6033(a)3)(A)(i) and (iii): churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of a religious order.

It is not automatically clear whether TIU meets the government's narrow definition of a "religious employer" or one of its integrated auxiliaries, but in any event, TIU objects to the proposed definition because it improperly creates an unconstitutional "ranking" of those persons the government considers worthy of religious freedom. TIU objects to the proposed rule's attempt to divide religious institutions – and their adherents – into a three-tiered classification of (i) "religious" (exempt); (ii) "not religious enough" ("accommodated"); and (iii) not worthy of religious freedom. By exempting only houses of worship and certain affiliated auxiliaries, the administration wrongly assumes that freedom of religion is limited to Sunday church services and does not extend to the freedom to live out those beliefs in daily life, as Jesus taught, and as the founding fathers intended in constitutionally protecting the "free exercise" of religion. The proposed definition also fails to take into account the religious and moral objections of individuals, business and secular organizations.

The proposed definition of a "religious employer" is unprecedented and provides the narrowest conscience protection in the health care context in federal law. As but one example, the Church Amendment of 1973, protects "the religious beliefs *or moral convictions*" of both individuals *and* entities from coercive government conduct that violates those beliefs. 42 U.S.C. §300a-7 (emphasis added). This historic and robust protection of conscience stands in stark contrast to the proposed rule's meager exemption for the limited number of religious institutions that satisfy Sections 6033(a)(1) or 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. TIU therefore urges the administration to reject the proposed overly narrow definition of a "religious employer" and instead frame an exemption to the mandate that, like the Church Amendment, protects both the religious *and* moral convictions of individuals *and* entities alike, irrespective of their tax, corporate or "for profit" status.

The Proposed "Accommodation" Is Too Narrow And Does Not Protect The Religious Freedom Of Objectors

Rather than exempt all individuals and entities with religious or moral objections to the mandate as has been provided historically by federal law, the administration instead proposes an "accommodation" for a limited group of religious objectors that satisfy the following criteria: (1) a "nonprofit entity" that (2) "holds itself out as a religious organization"; and (3) "opposes providing coverage for some or all of the contraceptive services . . . on account of religious objections." 78 Fed. Reg. at 8462. For those "eligible organizations," the proposed rule directs the issuer of the group plan "to ensure that the coverage for those contraceptive services . . . is not included in the group policy, certificate, or contract of insurance; . . . is not reflected in the group health insurance premium; and that no fee or other charge . . . is imposed on the eligible organization or its plan." The issuer of the "eligible organization's" group plan is then directed "to provide contraceptive coverage under individual policies . . . for plan participants and beneficiaries without cost sharing, premium, fee, or other charge." This accommodation attempts to shift the burden of compliance to the insurer, which does nothing to address the core concern. While it bears the appearance of accommodation, the reality is a disguised ….

The Proposed "Accommodation" Is Too Narrow And Improperly Creates A "Second Class" of Religious Objectors

The proposed accommodation improperly creates a "second class" of religious organizations entitled to lesser religious liberty; and fails completely to address the religious, moral or conscience objections of a vast majority of individuals, institutions and employers. No accommodation or exemption is provided for for-profit businesses or for those persons or entities that have moral or conscientious objections to the mandate. Individuals, including TIU's own employees, are automatically required to obtain coverage for themselves, their dependents and minor children whether they want – or object to – the contraceptives, abortifacients and sterilization procedures required by the mandate. Although Trinity does not object to the use of contraception by married couples, TIU stands with all individuals, organizations and businesses that have moral, conscience or religious objections to any or all of the contraceptives, abortifacients and sterilization procedures required by the mandate and urges the administration to expand the recognized exemptions to include and adequately protect the conscience and religious freedoms of every American – not just the narrow class of employers deemed to be sufficiently "religious" by the administration.

The Proposed "Accommodation" Improperly Purports To Decide For The Religious Objector What Involvement Should Satisfy Its Religious Convictions

The "accommodation" proposed in the NPRM does not alleviate the religious and moral objections to the mandate held by many religious institutions and individuals, including TIU. Like many Christian universities, TIU adheres to traditional Christian teachings on the sanctity of human life, beginning at conception, and believes and teaches that abortion constitutes the taking of innocent human life. Therefore, TIU objects to any drugs, procedures or services that can cause the death of a human embryo, including by preventing implantation of a fertilized egg. Mandated drugs such as levonorgestrel (for example, "Plan B®" and "Plan B® One-Step") and ulipristal acetate ("ella®") can prevent implantation of a human embryo. Religious objections to causing the death of an embryonic human being also extends to funding, sponsoring, or otherwise facilitating or advocating access to those drugs, procedures or services. The proposed accommodation improperly attempts to decide for these religious institutions and organizations, including TIU, what conduct or involvement in this process should or should not violate their religious convictions. It simply is not the role of government to be the religious conscience for its citizens.

The Proposed "Accommodation" Still Requires The Religious Objector To Be The Conduit For The Drugs And Services It Objects To On Religious Grounds

Moreover, the administration's proposal – to have the issuer of the group health plan automatically issue separate, individual contraceptive policies to plan participants without charge to them or the "eligible organization" that sponsors the group plan – still requires the "accommodated" organization to act as the conduit for providing the very drugs, procedures and services it objects to. Because the individual insurance policies are being provided to individuals by virtue of their participation in the group plan offered and purchased by the eligible organization with religious objections to the contraceptive mandate, the eligible organization's group plan is effectively operating as an *automatic trigger* for the objectionable contraceptive coverage. As a result, neither the "accommodated" organization nor its employees can effectively object to the mandate in accordance with their religious beliefs. In short, the proposed accommodation is no accommodation at all.

The absurdity and inadequacy of the government's proposed accommodation becomes evident by viewing its practical impact. For example, under the proposed rule, an employee of TIU who has signed the university's Statement of Faith and teaches at the divinity school that, in accordance with the university's and the individual's beliefs, human life is sacred and that even a very early abortion is an immoral taking of human life, would *automatically* receive, by enrolling in the university's group health plan, a separate individual "contraceptive" policy for drugs and procedures that both she and the university believe and teach are immoral and contrary to God's law as revealed in Holy Scripture. Nor can she refuse that coverage for herself or for her minor daughters,

who are now entitled under the proposed rule to free drugs and devices that are morally objectionable, and without parental consent. Not only does this violate the employee's and employer's religious freedoms, but also the employee's freedom to parent her minor children in a manner that she – and not the government – sees fit. The proposed accommodation also fails to take into account religious objections of health insurance issuers and plan administrators now required by the NPRM to automatically provide free "contraceptive" coverage.

The Proposed "Accommodation" Requires The Religious Objectors To Fund The Drugs And Services It Objects To On Religious Grounds

Furthermore, the funding link between the accommodated "eligible organization" and the contraceptive coverage it objects to is, in reality, much stronger and more direct than the administration claims. While the administration assumes that the cost of the separate contraceptive coverage will be "cost neutral because [the insurer] would be insuring the same set of individuals under both policies and would experience lower costs from improvements in women's health care and fewer childbirths," 78 Fed. Reg. at 8463, the fact remains that there is only one funding stream to pay for this coverage: the contributions made by the objecting employer and its employees who share the same moral concerns. Stated another way, as the purchaser of the group health plan, the eligible organization would ordinarily receive, in the form of reduced premiums, the benefit of cost savings under its plan. Instead, under the NPRM, the proposed accommodation would require the eligible organization to forego or forfeit reductions in its premiums resulting from cost savings under its group plan to pay for the separate contraceptive policies it objects to. Thus, the "accommodation" will require the eligible organization to effectively fund the very drugs and services it objects to on religious grounds.

The Mandate Violates Religious Freedom Guarantees In the First Amendment And Federal Law

The mandate, "Religious Employer" definition, and the proposed accommodation thus impose a substantial burden on the exercise of religious freedom of many Americans in violation of the First Amendment's Establishment and Free Exercise Clauses, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb ("RFRA").

The Mandate Violates Federal Law

In addition to its impermissible and unconstitutional burden on the religious freedom of Americans, the mandate's required coverage of abortifacient drugs and devices violates the provisions of the Affordable Care Act, the Weldon Amendment, and President Obama's Executive Order 13535. Specifically, Section 1303 of the Affordable Care Act states that "nothing in [the] title" of the Act, which includes the "preventive services" provision on which the mandate is based, "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its

essential health benefits for any plan year." Section 1303(B)(1)(A). The Act further provides that "the issuer" of a plan – and not the government – "shall determine whether or not the plan provides coverage of [abortion] services . . . " *Id.* Yet, this is precisely what the mandate purports to do by requiring mandatory coverage of drugs and services that many Americans, including TIU and its employees, deem to be morally objectionable.

The mandate also violates the Weldon Amendment, which prevents discrimination against any "institutional or health care entity" – including a "health insurance plan" – "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Applicable to any federal, state, or local government agency or program that receives funding under the Labor, Health and Human Services appropriation bill, the Weldon Amendment prohibits the HHS mandate of abortion coverage, and its imposition of crippling fines of $100 per employee per day. (26 U.S.C. § 4980D(b)).

The mandate also violates the administration's own, public assurances that the Affordable Care Act would not require coverage of abortion and that "longstanding Federal laws to protect conscience . . . remain intact." *See* Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," 75 Fed. Reg. 15599 (Mar. 24, 2010).

For all these reasons, TIU urges the administration to rescind the proposed mandate.

Respectfully submitted,

Jeanette L. Hsieh

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