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December 5, 2017

By electronic submission (http://www.regulations.gov)

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS–9940–IFC
P.O. Box 8016
Baltimore, MD 21244–8016

Re: Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA

To Whom It May Concern:

The Church Alliance submits this comment in response to the interim final rules (the "Rules") regarding religious exemptions and accommodations for coverage of certain preventive services under the Patient Protection and Affordable Care Act ("ACA") issued jointly by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (together, the "Departments") and published at 82 Fed. Reg. 47,792 (Oct. 13, 2017).

The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations, shown on the left side of this letterhead. As discussed in more detail below, the Church Alliance supports the religious liberty principle that no church plan should be forced to violate its religious beliefs in the provision of health benefits. Therefore, even though many Church Alliance members have no religious objection to providing the wide range of preventive services required by section 2713 of the ACA, the Church Alliance applauds the expansion of the religious exemption in the Rules, consistent with that religious liberty principle.

By way of background, the Church Alliance has submitted comments on five separate occasions regarding the ACA's preventive services coverage requirement (the "Coverage Requirement"):

- on September 28, 2011, on the interim final rules published at 76 Fed. Reg. 46,621 (Aug. 3, 2011);[1]
- on June 19, 2012, on the advance notice of proposed rulemaking published at 77 Fed. Reg. 16,501 (Mar. 21, 2012);[2]

[1] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Sept. 28, 2011), *available at* http://church-alliance.org/sites/default/files/images/u2/Comment_Letter_Contraceptive_Religious_Employer_09_28_11.pdf.
[2] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Jun. 19, 2012), *available at* http://church-alliance.org/sites/default/files/images/u2/Church_Alliance_Comment_on_ANPRM_on_Preventive_Services_June_2012.pdf.

- on April 8, 2013, on the notice of proposed rulemaking published at 78 Fed. Reg. 84,566 (Feb. 6, 2013);[3]
- on October 27, 2014, on the notice of proposed rulemaking published at 79 Fed. Reg. 51,092 (Aug. 27, 2014);[4] and
- on September 20, 2016, in response to the request for information on coverage for contraceptive services published at 81 Fed. Reg. 47,741 (Jul. 22, 2016).[5]

We appreciate this opportunity to build on our previous comments as the Departments consider religious exemptions and accommodations for coverage of certain preventive services under the ACA.

I. BACKGROUND ON THE CHURCH ALLIANCE

The Church Alliance represents 37 church benefits boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. The Church Alliance members provide employee benefit plans, including in many cases, medical coverage, to approximately one million participants (clergy and lay workers) serving over 155,000 churches, synagogues, and affiliated organizations. These medical programs are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 414(e) of the Internal Revenue Code (the "Code").

The contraceptive services requirement of section 2713 of the ACA has created challenges for some Church Alliance members. The plans of a few Church Alliance members, 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 so-called "morning-after pills" or "emergency contraceptives." Many of the health care plans associated with the members of the Church Alliance do not impose any specific restrictions on contraceptive coverage. However, the Church Alliance agrees that its members should not have to risk significant penalties in order to follow the religious beliefs of the churches with which they are associated.

II. INTERIM FINAL RULES

The Church Alliance is very grateful that the Departments have expanded the religious exemption in the Rules. As contrasted with earlier versions of regulations on the Coverage Requirement, the Rules no longer require a church or an employer associated with the church to choose between violating its religious beliefs and violating the law. The preamble to the Rules states that the exemption was expanded "among other reasons, to provide for participation in the health insurance market by certain entities or individuals free from penalties for violating sincerely held religious beliefs opposed to providing or receiving coverage of contraceptive services . . . ."[6] The Church Alliance supports that reasoning. We also commend the Departments for moving to a plan-based exemption, which the Church Alliance recommended in its prior comments.

As the Departments continue to work on the Rules, we would like to raise a few questions and technical suggestions for consideration.

[3] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Apr. 8, 2013), *available at* http://church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf.
[4] Letter from Church Alliance to Employee Benefits Security Admin. (Oct. 27, 2014), *available at* http://church-alliance.org/sites/default/files/images/u2/Comment-Letter-ACA-Preventive-Services-IFR-10-27-14.pdf.
[5] Letter from Church Alliance to Ctrs. for Medicare and Medicaid Servs. (Sept. 20, 2016), *available at* http://church-alliance.org/sites/default/files/images/u2/CA-Response-RFI-09-20-16.pdf.
[6] 82 Fed. Reg. 47,792, 47,815 (Oct. 13, 2017).

A. Clarify that an Employer Adopting an Exempt Plan Cannot Be Penalized

The preamble to the Rules makes clear that if a plan is exempt under 45 C.F.R. § 147.132, neither the plan sponsor, the plan, nor an issuer providing coverage in connection with the plan will be penalized as a result of the plan not providing contraceptive coverage:

> Section 147.132(a)(1) introductory text and (a)(1)(i), by specifying that ''[a] group health plan and health insurance coverage provided in connection with a group health plan'' is exempt ''to the extent the plan sponsor objects as specified in paragraph (a)(2),'' exempt the group health plans the sponsors of which object, and exempt their health insurance issuers from providing the coverage in those plans (whether or not the issuers have their own objections).[7]

While the Rules recognize that exempt plans may cover multiple employers, the Rules do not recognize that employers adopting such plans that are not themselves "plan sponsors" can be penalized $100 per day for each employee not provided contraceptive coverage.[8] Employers that are "so closely associated" with an exempt plan sponsor that they are permitted to participate in the sponsor's health plan should not be penalized.[9] Perhaps such employers avoid a penalty on account of Section 54.9815-2713T, which is added to 26 C.F.R. Part 54, but this is not clear. We suggest this be recognized (or clarified) in guidance.

B. Revocation of Accommodation

The preamble to the Rules states:

> If an eligible organization wishes to revoke its use of the accommodation, it can do so under these interim final rules and operate under its exempt status.[10]

However, it is unclear how such a revocation is to be accomplished, and whether the objecting organization must notify the applicable issuer and third party administrator in a particular way. The Church Alliance would appreciate the Departments' guidance on this question.

C. Certification or Documentation of Exemption

The preamble to the Rules states:

> The Departments invite public comment on whether exempt entities, or others, would find value either in being able to maintain or submit a specific form of certification to claim their exemption, or in otherwise receiving guidance on a way to document their exemption.[11]

The Church Alliance respectfully requests that the Departments refrain from specifying forms of certification to claim or maintain an exemption. It is our understanding, as stated in the preamble to the Rules, that "exempt entities will not be required to comply with a self-certification process."[12] Moreover, the Rules state that "the exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section [45 C.F.R. § 147.132] objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its

[7] *Id.* at 47,808.
[8] *See* 26 U.S.C. §§ 4980D(b) and (e)(1) (imposing the $100 per day tax for any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements) on the employer).
[9] 82 Fed. Reg. at 47,810.
[10] *Id.* at 47,813.
[11] *Id.* at 47,809.
[12] *Id.* at 47,808.

sincerely held religious beliefs."[13] We urge the Departments to refrain from issuing guidance on "a specific form of certification," because this guidance could be interpreted as setting a rigid standard or requirement, which may create Religious Freedom Restoration Act[14] concerns for some exempt entities. Such guidance would appear to us to be contrary to both the preamble to the Rules and the Rules themselves, which appear to condition exemption only on meeting the description in paragraph (a)(1) and objecting to certain coverage or payments based on religious beliefs, and do not include a certification.

However, the Church Alliance would find value in receiving guidance that is flexible on ways to document the religious exemption.

The Church Alliance is grateful for the expanded religious exemption in the Rules, but would welcome additional guidance on the issues we have described above. Should you have any questions or wish to discuss these issues further, please contact the undersigned at (202) 778-9000.

Sincerely,

Karishma S. Page
Partner,
K&L Gates LLP
On Behalf of the Church Alliance

[13] *Id.* at 47,835.
[14] 42 U.S.C. § 2000BB-1.