State Attorneys General

A Communication from the Chief Legal Officers of the Following States:

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March 26, 2013

BY ELECTRONIC DELIVERY AND FEDERAL EXPRESS

Secretary Kathleen Sebelius
Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9968-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Dear Secretary Sebelius:

Thank you for the opportunity to comment on your proposed amendments to RIN 0938-AR42, Coverage of Certain Preventive Services under the Affordable Care Act.

The proposed regulations selectively address faith and conscience-based objections to a government mandate that requires businesses and nonprofits to pay for insurance coverage for contraception and other reproductive services. They allow a limited few religious nonprofits, such as houses of worship, to avoid the "HHS mandate" altogether. The proposed regulations purport to allow a few other religious-affiliated nonprofits, such as Catholic Charities, to avoid paying directly for these reproductive services by requiring the insurance companies that cover the organizations' employees to provide "free" coverage. The proposed regulations provide no exception to the HHS mandate for for-profit business owners who object on conscience grounds.

We believe the proposed regulations do not remedy the legal infirmities in the original HHS mandate. As you know, the Religious Freedom Restoration Act or "RFRA," 42 U.S.C. § 2000bb, requires the federal government to use the least restrictive means to accomplish a compelling governmental interest. RFRA cuts across all federal regulations and requires "strict scrutiny" of all actions of the federal government that burden the exercise of religion. We see three problems with the proposed regulations under RFRA.

First, there is no compelling reason to refuse to extend to all religious-affiliated nonprofits the exception that is available to houses of worship. RFRA requires the federal government to demonstrate that the compelling-interest test is satisfied through application of the challenged law "'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

U.S. 418, 430-31 (2006). The government must show with particularity how its interest "would be adversely affected by granting an exemption." *Id.* at 431 (internal quotations omitted). The Supreme Court has held that this test is very difficult to meet when the government allows an exception to one group or person but not to others. *Id.* This is so because allowing an exception for one group "fatally undermines" the argument that the government has a compelling interest in denying others the same or similar exception. *Id.* at 434. The proposed regulations allow an absolute exception for some religious nonprofits and deny that exception to other groups without any compelling reason for distinguishing between the two groups.

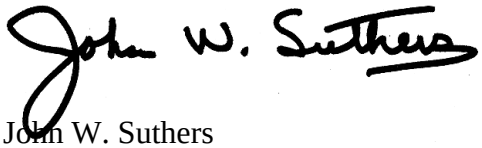
Second, the purported accommodation to allow certain nonprofits to shift costs onto insurance companies appears to be a shell game that does not alleviate the burden on the exercise of religion. We all know that insurance companies do not provide anything for free; the employers are still going to be paying for these services through increased premiums or otherwise even if the insurance company technically covers those products through a separate "free" policy. You have argued that insurers will gladly provide this coverage for free because overall health costs are purportedly reduced when an insured has access to free reproductive services. This proposition strikes us as highly unlikely. If insurers could reduce their costs by providing these services for free, then insurance companies would already be providing them for free; the entire regulation at issue would be unnecessary. The truth of the matter is that these services, like everything else, costs money. Just as they do now, insurance companies will recoup their increased costs by shifting the costs back to employers. The purported accommodation amounts to little more than an accounting gimmick.

Third, the government must provide a meaningful exception to the HHS mandate for for-profit business owners who object on conscience grounds, but the proposed regulations fail to address for-profit organizations at all. That failure is a particular problem under RFRA if one assumes that you are correct that your proposed "accommodation" for nonprofits would be costless. If you are correct that insurance companies will actually *benefit* by providing insurance coverage for free (which seems highly doubtful as explained above), then there is no compelling reason for you to limit this purported accommodation to nonprofits. Under your logic, insurers would benefit *even more* if insurance companies were required to provide insurance coverage for these services for free to the employees of all businesses, including the employees of for-profit businesses whose owners object to the HHS mandate. To be clear, we believe that the proposed cost-shifting "accommodation" does not satisfy RFRA and that appropriate religious exemptions must be provided for nonprofits and for-profits. But, even under your own logic, the proposed regulations would not be the least restrictive means of providing coverage for these services to the employees of for-profit businesses.

We fear that the HHS mandate is the first of many regulations under the Affordable Care Act that will conflict with legal protections for religious liberty and the right of conscience. We respectfully submit that RFRA requires you to adopt the broadest possible religious exceptions to the HHS mandate.

Respectfully submitted,

Luther Strange
Alabama Attorney General



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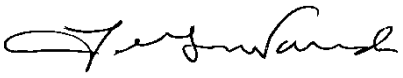

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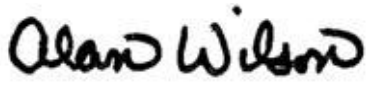

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