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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
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February 8, 2012

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Sebelius,

I write to express my concerns with respect to your Department's January 20, 2012 press release discussing an as yet unreleased final regulation mandating that health insurance plans cover contraceptives for their enrollees. This unprecedented intrusion into the core functions of religiously affiliated employers raises serious procedural issues, as well as fundamental constitutional questions regarding the legality of these actions.

The January 20, 2012 press release ("press release") makes it clear that the Department will mandate, beginning in August 2013, that religiously affiliated schools, universities, hospitals and charities must provide free contraceptives to their employees and students. Such a requirement will force these institutions to violate basic precepts of their religious beliefs in order to comply with the regulation. Such a requirement is an unconscionable violation of the religious freedoms guaranteed by the First Amendment and the clear precedent recently expressed by the Supreme Court with regard to the rights of religious organizations.

In addition, the Department's announcement of this policy raises serious procedural concerns. To date, the Department has failed to promulgate a regulation to implement all of the policies described in the press release. At a minimum, this suggests that the Department ignored its responsibility to consider and respond to public comments in developing a final rule.

The press release specifically described a modification to the original interim final rule, delaying by one year the implementation of the new contraceptives mandate upon certain nonprofit employers. Other than delaying this flawed policy beyond the November elections, the information released to date by the Department provides no legal or policy basis for this action.

Both the Administrative Procedures Act and Congressional Review Act require that the executive branch engage in a defined rule making process, in part to ensure that Congress can carry out oversight over such regulatory actions. To date, the Department has failed to comply with these basic requirements with regard to this regulation.

Accordingly, I ask you to provide the following information by February 17, 2012:

- (1) A copy of the final rule discussed in your press release, including a preamble and all sections required by the Administrative Procedure Act (APA) and relevant Executive Orders;
- (2) A copy of the final rule discussed in your press release as transmitted to the Office of Information and Regulatory Affairs and any changes requested by OIRA (assuming that occurred);
- (3) A copy of all correspondence between HHS and OIRA on the press release and/or the final rule;
- (4) A copy of all correspondence between HHS and the White House regarding the press release and/or the final rule;
- (5) A list of all executive branch personnel involved in the drafting and finalization of the press release announcing the final rule;
- (6) A list of all meetings held with stakeholders from August 2011 through the present with regard to the interim final rules under RIN 0938-AQ07, including the dates, locations, attendees and topics, as well as a copy of all notes taken during those meetings as required under the APA;
- (7) The legal basis and rationale for the decisions described in the press release;
- (8) A copy of the comments received in response to the August 2011 Interim Final Rule and the July 2010 Interim Final Rule¹ in a searchable database as coded by HHS personnel for their review and development of the final rule; and
- (9) All documents, emails, and data pertaining to the cost benefit analysis and the economic impact analysis of implementing the anticipated final rule including the regulatory alternatives considered by the Administration.

I look forward to receiving answers to these questions.

Respectfully,



Enclosure

¹ Both interim final rules are listed under RIN 0938-AQ07. In the response, please include a description of how HHS is segregating and considering comments under both IFRs.