Wheaton College
For Christ and His Kingdom

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September 27, 2011

The Honorable Phyllis C. Borzoi
Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, NW
Suite S-2524
Washington, DC 20210

Dear Assistant Secretary Borzoi,

I write to express concern about the August 3, 2011 amendment to the regulations entitled Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act (File Code CMS-9992-IFC2).

To be specific, I am concerned that the exemption created in this amendment is not adequate to exempt Wheaton College as a distinctively Christian institution and that fulfilling this mandate would be a violation of our rights of conscience as well as our First Amendment rights of free speech and expressive association.

Our mission is "to help build the church and improve society worldwide by promoting the development of whole and effective Christians through excellence in programs of Christian higher education." As a systemically religious institution, we incorporate our Christian faith into every facet of our work. Yet by the narrow definition outlined in these regulations it is far from certain that we would be considered a religious employer.

Before addressing specific concerns with the exemption—including the fact that it would still leave our student plans subject to the mandate—allow me to explain why it is so important to us philosophically, theologically, and legally that we be exempted from the contraceptive mandate. Implicit in the new regulations is the notion that there are tiers of religious organizations, some of which are religious enough to be afforded their religious freedoms and others of which are not, essentially disregarding the religious character of non-church institutions. We believe this notion violates the principle that "the government may not pick and choose among different religious organizations when it imposes some burden" (*Larson v. Valente,* 456 U.S. 228; 1982). Further, it establishes the government as the arbiter of such decisions and creates the exact interference with church by state that the Constitution protects against as "[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed

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by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions" (*NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 at 502; 1979).

We are fundamentally opposed to the idea that the government can mandate something so at odds with the religious beliefs of many namely, the mandated provision of contraception, including abortifacients, without granting adequate religious and conscience protections. The Supreme Court has held time and time again that without a compelling reason, the government must respect the religious beliefs and practices of religious organizations without judging the merits of those religious beliefs and practices. It is for such reason that Congress passed the Religious Freedom Restoration Act of 1993 (RFRA). This legislation excuses faith-based organizations from having to incur a substantial religious burden when such burden is imposed by a generally applicable law. Being mandated to provide and pay for a service that is so in opposition to the conscience of the organization is most certainly a burden and such application would most certainly violate RFRA.

Furthermore, to mandate that a religious institution adopt a practice to which it has a conscientious objection is a violation of that group's First Amendment freedom of speech (see e.g., *Keller v. State Bar of California*, 496 U.S. 1; 1990, which held that state bar members could not be compelled to finance political and ideological activities with which they disagree) and Freedom of Expression (see *Boy Scouts of America v. Dale*, 530 U.S. 640; 2000, which held that compelling an organization to do something that they had a conscientious objection to would violate their freedom of expressive association by forcing them to send a message to the world that they legitimize something they actually object to).

The exemption to the contraceptive mandate carved out for religious employers states:

> For the purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:
> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 603 3(a)(1) and section 603 3(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended 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.

Regarding the first factor, we object to the subjective inquiry that both is unrelated to whether an organization is truly religious and also invites an unconstitutional inquiry into whether religious organizations are sufficiently religious. We infuse our religious values into every aspect of what we do. Yet as a fully accredited, degree granting institution of higher learning, and as such we are concerned whether the government agent tasked with determining whether a group meets the four requirements listed above would indeed find that we meet the first requirement. This concern was affirmed by the Supreme Court when it said that ""[t]he line" between secular and religious activities "is hardly a bright one, and an organization might understandably be

concerned that a judge would not understand its religious tenets and sense of mission" (in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 13 327, 336; 1987).

We are also concerned with who will be tasked with making the final determination as to whether the "inculcation of religious values is the purpose of the organization." The Department of Health and Human Services hardly seems like the appropriate place for such a determination to be made. In fact, the subjectivity of the factor itself seems to invite an unconstitutional inquiry into the religiosity of the organization that has been rejected by the Supreme Court. In *Mitchell v. Helms* the 530 U.S. 793, 828 (2000), the Court explained in its plurality decision "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." Yet, with these regulations, HHS has set itself up to do exactly that: an inquiry to which we object.

The fourth element requires that our organization fall within specific categories of the IRS Tax Code. These categories, however, are merely intended to govern reporting requirements and bear no relationship to the legitimate religious nature of our institution, yet would disqualify us from being considered as a "religious employer." Wheaton College is not affiliated with a larger church organizational or denominational structure. This requirement serves to distinguish between the constitutional rights of churches and other religious organizations, a distinction the Supreme Court has repeatedly rejected.

Finally, we are concerned that the regulations as written will violate our conscience as it relates to the health care plan we offer our students. The exemption is for employer plans, but as written it does not appear to include student plans. This would force us to violate our religious convictions by offering emergency contraceptives to our students. It would also put us in the awkward position of offering a health care plan to our employees that is consistent with their religious convictions while offering another to our students that violates their religious convictions as expressed by every member of our campus in our Community Covenant.

In light of these considerations we have asked the Department of Health and Human Services to eliminate the mandate altogether. If the Department chooses to keep the mandate in place, we have asked the Department to expand the scope of the exemption to include all religious employers and also health care plans offered by religious organizations.

I appreciate your attention to this crucially important matter and am happy to speak with you or your department's representatives, as it relates to EBSA involvement, if that would be helpful.

Sincerely,

Philip G. Ryken
President

PGR:lw