United States Senate

WASHINGTON, DC 20510

October 6, 2011

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

Dear Secretary Sebelius:

In July you received a letter urging you to consider carefully the economic and constitutional concerns associated with the Department of Health and Human Service's ("Department") implementation of the Institute of Medicine's ("IOM") recommendations for federally mandated preventive health services.[1] Specifically, that letter urged you to take deliberate account of the threat that adoption of mandates regarding coverage of contraceptives, sterilization, and abortifacient drugs, poses for religious persons and institutions given our Constitution's strong commitment to religious liberty and free exercise. Your response to that letter, justifying your hasty adoption of IOM's recommendations, was deeply divisive and suggests a remarkable failure on the part of the Obama Administration to provide adequate protections for religious citizens and organizations.[2]

The fact is — confirmed in the comments that you have received both to the Interim Final Rules (IFRs) published on July 19, 2010 and the amendment to those IFRs published on August 1, 2011 — your adoption of IOM's recommendations without amendment threatens the ability of many religious employers to continue to offer health coverage to their employees consistent with their beliefs. Moreover, it jeopardizes essential constitutional rights to religious liberty and personal conscience by forcing employees to subsidize coverage that violates their faith. Given the significance of your action and the inadequacy of your earlier response to these concerns, we write again to seek greater clarity on a number of matters regarding your Department's analysis of this matter and its impact on core constitutional values.

First, in your response to the earlier Senate inquiry, you go to great lengths to place responsibility for your action on the determination of IOM. You note that HHS sought an "independent analysis" from IOM, and that IOM "has a long history of providing objective expert guidance to federal agencies." IOM, in turn, relied on "independent physicians, nurses, scientists, and other experts" in making their recommendations regarding preventive services for women. Whatever the merits of your description of IOM's objectivity, relying on IOM does not absolve you of your own obligation as a public servant, and a Senate-confirmed executive branch officer, to consider the ramifications that IOM's recommendations would have on religious persons and institutions.

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[1] United States Senator Orrin G. Hatch to the Honorable Kathleen Sebelius, July 29, 2011.
[2] The Honorable Kathleen Sebelius to United States Senator Orrin G. Hatch, September 12, 2011.

Second, your defense of the process that led to your adoption of IOM's recommendations requires further explanation. Again, given the issues at stake, you had been asked to proceed cautiously and deliberately before adopting IOM's recommendations regarding women's preventive services. Instead, your Department chose to adopt those recommendations just weeks after their initial publication. The fact that you received feedback regarding preventive services for women following the publication of the IFRs in July 2010 did not preclude you from having a more robust consideration of views on that matter following the amendment to the IFRs on that subject in July 2011. The Administrative Procedures Act's requirement that federal agencies use a transparent process of public notice and comment is particularly important when it comes to issues that fundamentally affect individual liberties and human life. While we understand that the August 1, 2011 IFR was an amendment to the July 19, 2010 IFR, the IOM recommendations that formed the foundation of the August 2011 amendment were not even available for the public to comment on until days before HHS issued the amendment. In a democracy it is critical that citizens have an opportunity for full public comment before government agencies issue legally binding regulations, and we are extremely disappointed that you chose to deny the American people the opportunity to comment on the critical issues in this IFR. For an Administration that purports to support honest and open government, this is simply the latest broken promise in a dismal track record.

Furthermore, your description of the comments that you had received regarding women's preventive services is so removed from our experience that it demands an explanation. You stated that "[m]ost commenters, including some religious organizations" supported inclusion of contraceptive services, while "[o]ther commenters expressed concerns that guidelines including coverage of contraceptive services could impinge upon the religious freedom of certain religious employers." You seem to suggest that most religious persons had no concerns with any requirement that contraceptive services would be included, but this hardly squares with the public feedback that we are hearing from religious persons and institutions. For example, the Bishops of the Kansas Catholic Conference made their position clear in a letter to HHS last month concluding that the mandate is "profoundly deficient in terms of medical, moral, and constitutional good sense." They also state that the mandate "should be rescinded entirely and immediately." This sentiment is shared by dozens of churches and religious institutions representing millions of citizens. Your conclusion that "these services are covered by most health plans" elides over the key concern about whether and why health plans by religious institutions and for religious persons do not in fact cover many of these services. It seems possible that your impression of the impact of this rule on religious freedom may be owing to a small sample size, since the opportunity for public comment on the IOM recommendations lasted less than two weeks.

We also have real concerns about your assertion that "[t]hese guidelines do not include abortifacient drugs." The question of whether certain contraceptives act as abortifacients is a matter that has been subject to vigorous debate. Major religious denominations have come down squarely on the other side, arguing with significant evidence that drugs such as Plan B and Ella are abortion-inducing. Yet as FDA drugs designated for "emergency," they will be included under the new "preventive services" mandate. It seems clear to us that first IOM, and then the Department, chose to listen to only one perspective in this debate — that of groups and individuals supporting abortion. The IOM recommendations became the product of intense lobbying by special interest groups, such as Planned Parenthood, that stand to gain financially from them. Given the controversy surrounding these IOM recommendations, and the process that led to them, your assertion that the IFRs do not require coverage of abortifacient drugs is lacking.

Ultimately, our concern is with the lack of due consideration given by you and your Department to the adverse impact that IOM's recommendations would have on our core constitutional value of religious liberty. Though the IFRs' "religious exemption" purports to protect religious organizations, health care professionals, and health care plans, it is clear that this protection falls well short of securing this constitutional right. The Department can state that these guidelines address the concerns of religious Americans, but the barrage of criticism leveled at the "religious exemption" by those who would be subject to this rule suggest that they fall far short of securing the essential constitutional guarantees of our First Amendment.

To address these concerns, we request that you redraft the Required Health Plan Coverage Guidelines for Women's Preventive Services so that it is consistent with long-standing constitutional principles respectful of human life, individual liberties, and personal conscience. Additionally, we respectfully request that you provide us with the following information:

1) Any correspondence (including phone logs, emails, written notes, or electronic documents) generated with respect to the decision to include contraceptive services (including abortifacient drugs) as part of preventive services and whether that decision violated President Obama's Executive Order 13535 where he stated that "longstanding Federal laws to protect conscience will remain intact" and his public statements that "federal conscience laws would remain in place under health reform.[3]" This includes correspondence between HHS employees (including both career employees and political appointees and employees of the HHS Office of General Counsel), or between or among HHS, the Department of the Treasury, the Department of Labor, the Office of the White House Counsel, the Office of White House Political Affairs, and the Executive Office of the President.

2) Any analysis generated, requested, or obtained by HHS regarding the First Amendment implications of free exercise of religion with respect to the provisions of this regulation and existing federal conscience laws.

3) Any correspondence (including phone logs, emails, written notes, or electronic documents) generated with respect to the decision regarding the inclusion of abortifacient contraceptives as preventive services, including correspondence between HHS employees (including both career employees and political appointees and employees of the HHS Office of General Counsel), or between or among HHS, the Department of the Treasury, the Department of Labor, the Office of the White House Counsel, the Office of White House Political Affairs, and the Executive Office of the President.

4) Any analysis generated, requested, or obtained by HHS regarding the definition of religious employer.

5) The timeline anticipated for HRSA to issue more specific guidance to the public about which religious employers are exempt from the Guidelines regarding contraceptive services and an explanation of how HRSA will take into account the religious beliefs of certain religious employers.

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[3] Press Release, The White House, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), available at www.whitehouse.gov/the_press_office/Remarks-bythe-President-to-a-Joint-Session-of-Congress-on-Health-Care/.

6) Any analysis generated, requested or obtained by HHS regarding the impact of inclusion of the full scope of the IOM recommendations on the cost of the average person's health insurance premiums.

We are deeply disappointed with the Department's decision to issue these IFRs without adequate public comment or due consideration of the concerns of religious institutions and citizens. Your decision to do so not only undercuts our nation's commitment to democracy and representative government, but the substance of your decision jeopardizes our nation's longstanding commitment — enshrined in the First Amendment — to religious liberty and free exercise. As the Bishops of the Kansas Catholic Conference recently wrote, "[i]t was precisely against this sort of heavy-handed exercise of federal power that the First Amendment was written." We concur with this sentiment.

Thank you for your prompt attention to this matter. We would appreciate a response to this letter by October 21, 2011.

Sincerely,

Orrin G. Hatch
United States Senator

Mike Johanns
United States Senator

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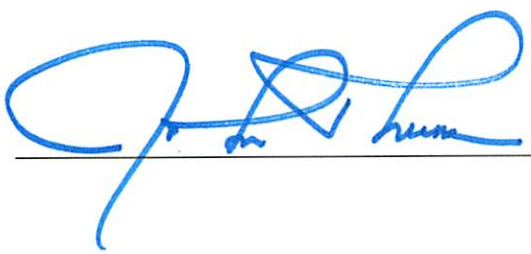
Jerry Moran