

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.

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.

- 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.

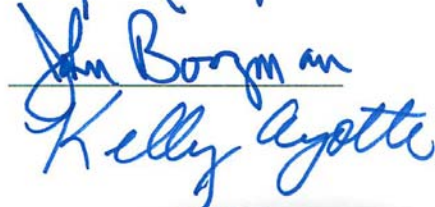
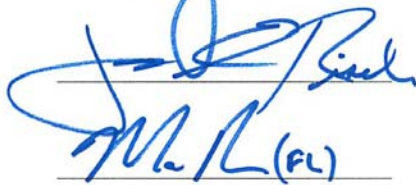
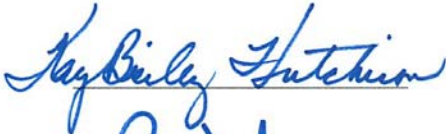
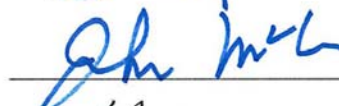
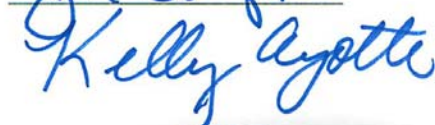
Sincerely,













Orrin G. Hatch
United States Senator



Mike Johanns
United States Senator

	
	
	
	
	
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In addition to Sens. Hatch and Johanns, the letter to Secretary Sebelius was signed by Sens. Marco Rubio (R-Florida), Roy Blunt (R-Missouri), Kay Bailey Hutchison (R-Texas), Pat Toomey (R-Pennsylvania), Ron Johnson (R-Wisconsin), Dan Coats (R-Indiana), Jim Risch (R-Idaho), Rand Paul (R-Kentucky), Jon Kyl (R-Arizona), Jerry Moran (R-Kansas), John Cornyn (R-Texas), John McCain (R-Arizona), Rob Portman (R-Ohio), John Boozman (R-Arkansas), Tom Coburn (R-Oklahoma), and Kelly Ayotte (R-New Hampshire), David Vitter (R-Louisiana), Pat Roberts (R-Kansas), Johnny Isakson (R-Georgia), John Hoeven (R-North Dakota), Mike Crapo (R-Idaho), John Thune (R-South Dakota), Lindsey Graham (R-South Carolina), Mike Enzi (R-Wyoming), Chuck Grassley (R-Iowa), and Jim Inhofe (R-Oklahoma).