



October 21, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-P
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Submitted electronically via www.regulations.gov

Re: Coverage of Certain Preventive Services Under the Affordable Care Act,
CMS-9940-P, RIN 0938-AS50

The American Civil Liberties Union (ACLU) submits the following in response to the Notice of Proposed Rulemaking on “Coverage of Certain Preventive Services Under the Affordable Care Act,” published in the Federal Register on August 27, 2014. The proposed rule seeks comment on “potential changes to the definition of ‘eligible organization’ in the Departments’ regulations in light of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*”¹ These changes would allow certain for-profit entities to avail themselves of the accommodation currently available only to religiously affiliated non-profit organizations under the existing regulations. Because of the ACLU’s profound respect for and demonstrated commitment to both religious liberty and reproductive rights, the ACLU is particularly well-positioned to comment on the rule.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (Aug. 27, 2014) (to be codified as 26 C.F.R pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

The ACLU has a long, proud history of vigorously defending religious liberty and reproductive freedom. For nearly a century, the ACLU has fought ardently for the rights of free exercise and religious liberty² and has advocated for laws that heighten protections for religious exercise.³ At the same time, we have participated in nearly every critical case concerning reproductive rights to reach the Supreme Court, and we routinely advocate in Congress and state legislatures for policies that promote access to reproductive health care.

A. Background

1. Regulations implementing the Affordable Care Act's Women's Health Amendment

On August 1, 2011, the Department of Health and Human Services (HHS) issued interim final regulations implementing the Affordable Care Act's (ACA) Women's Health Amendment. The regulations provide that the women's preventive health services to be covered in all new plans without cost-sharing are those delineated in guidelines adopted by the Health Resources and Services Administration (HRSA). Those guidelines include all FDA-approved forms of contraception and sterilization.⁴ The regulation also included an exemption from the contraceptive coverage requirement for a narrow category of institutions, such as houses of worship.

On July 2, 2013, following notice and comment, the Departments of Health and Human Services, Treasury, and Labor (hereinafter "the Departments") implemented regulations to accommodate certain non-profit organizations with religious objections to contraception and modifying the exemption. The ACLU submitted comments to the agencies maintaining that the contraception coverage requirement is consistent with religious liberty protections and that no accommodation is necessary, but nonetheless emphasizing the importance of ensuring that the proposed accommodation ensure employees of the affected institutions receive seamless coverage.⁵

² See, e.g., *ACLU Defense of Religious Practice and Expression*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/aclu-defense-religious-practice-and-expression>.

³ Examples of legislation we have supported include the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc – cc-5, and the Workplace Religious Freedom Act, S. 3686 (2012).

⁴ See HEALTH RES. AND SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., WOMEN'S PREVENTIVE SERVICES: REQUIRED HEALTH PLAN COVERAGE GUIDELINES, <http://www.hrsa.gov/womensguidelines/>. To implement the Affordable Care Act's preventive services provision, the non-partisan Institute of Medicine (IOM) "review[ed] what preventive services are necessary for women's health and well-being" and developed recommendations for comprehensive guidelines. After an extensive science-based process, the IOM published *Clinical Preventive Services for Women: Closing the Gaps*, a report of its analysis and recommendations, on July 19, 2011. Among other things, the report recommended that the HRSA guidelines include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109-10 (2011). The HRSA guidelines reflect those recommendations.

⁵ See Comments from the ACLU on Certain Preventive Services Under the Affordable Care Act to Ctrs. for Medicare & Medicaid Servs. Dep't of Health and Human Servs. (April 8, 2013) *available at* https://www.aclu.org/files/assets/aclu_contraceptive_coverage_comments_cms-9968-p.pdf.

2. Current rulemaking to address recent Supreme Court cases

On June 30, 2014, the Supreme Court issued a ruling in *Burwell v. Hobby Lobby Stores, Inc.*,⁶ holding that the under the Religious Freedom Restoration Act of 1993 (RFRA), the ACA's contraceptive coverage requirement could not be applied to the plaintiffs, closely held for-profit corporations with objections to certain forms of contraceptive coverage based on their owners' sincerely held beliefs.⁷ In a majority opinion authored by Justice Samuel Alito, the Court held first that the contraception coverage requirement placed a substantial burden on these employers and second, that the federal government's interest in guaranteeing coverage for all FDA-approved contraceptive methods without cost sharing could be achieved in a less restrictive manner by, for example, offering those for-profit entities the option to use the accommodation already in place for eligible non-profit organizations with religious objections.⁸ Justice Kennedy filed a concurrence, clarifying that, in his opinion, the least restrictive alternative available to the government is the accommodation available for religiously affiliated non-profit organizations.⁹

We strongly disagree with the Court's analysis of the religious freedom issues in the case. This is the first time that the Court has ever allowed for-profit companies to use their religious beliefs to take away their employees' benefits guaranteed to them by law. In our view, the Court should have concluded that there is simply no substantial burden on employers, and ended the analysis there.¹⁰

In the wake of the Court's decision, Hobby Lobby, Mardel, and Conestoga Wood may now refuse their employees and dependents the health care benefit of contraception, which medical experts recognize as critical to ensuring women's health and well-being. As a result, the women employed there could be left with inadequate health insurance coverage which fails to meet their health care needs. Thus, we applaud the Departments for acting urgently to ensure these women have access to contraceptive coverage by extending the existing accommodation, previously available only to non-profits, to closely held for-profits like these companies.

The Departments have proposed a rule to determine, based on the factors relied upon in the Court's opinion in *Hobby Lobby*, which closely held for-profit entities will be eligible for the existing accommodation. The Departments simultaneously seek comment on an interim final rule¹¹ that adds an alternative process for eligible non-profits seeking that accommodation which, consistent with the Court's interim order in *Wheaton College v. Burwell*,¹² would allow those organizations to certify their objections to contraceptive coverage by notifying the government directly, rather than by notifying a third-party administrator or health insurance issuer. ACLU is

⁶ 134 S. Ct. 2751 (2014).

⁷ See *id.* at 2755.

⁸ See *id.* at 2779-80, 2782.

⁹ See *id.* at 2786-87 (Kennedy, J., concurring).

¹⁰ Brief for Am. United for Separation of Church & State et al. as Amici Curiae Supporting Appellants, Beckwith Elec. Co., Inc. v. Sebelius, No. 13-13879 (11th Cir. Oct. 28, 2013), available at https://www.aclu.org/sites/default/files/assets/beckwith_amicus_brief_0.pdf.

¹¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified as 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pt. 147).

¹² 134 S. Ct. 2806 (2014).

submitting comments separately to address the interim rule. However, we note the relevance of those comments here, because eligible for-profit entities, as defined by the Departments in this rule once finalized, will be able to avail themselves of the same accommodation as eligible non-profits. Given the expanding number of entities eligible to seek the accommodation, it is all the more imperative that the accommodation function such that employees at the affected institutions are ensured seamless coverage. Any other result would be an unacceptable imposition of religious beliefs on others, as well as a blow to gender equality and public health.

3. Putting *Hobby Lobby* into context: historical objections in the name of religion

Religiously based opposition to laws that address inequality is not unique to the Women’s Health Amendment. Similar claims about religious liberty infringements have arisen in the context, for example, of integration and equal pay laws:

In 1964, three African-American residents of South Carolina brought a suit against Piggie Park restaurants and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act of 1964’s public accommodations provision violated his religious freedom “since his religious beliefs compel[led] him to oppose any integration of the races whatever.”¹³

In 1976, Roanoke Valley Christian Schools added a “head of household” supplement to their teachers’ salaries—but only to heads of household as determined by their interpretation of Scripture. For Roanoke Valley, that meant married men. According to the church pastor affiliated with the school, “[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.”¹⁴ When sued under the Equal Pay Act, Roanoke Valley claimed a right to an exemption from equal pay laws because its “head-of-household practice was based on a sincerely-held belief derived from the Bible.”¹⁵

In the 1980s, Bob Jones University, a religiously affiliated college in South Carolina, wanted an exemption from a rule denying tax-exempt status to schools that practice racial discrimination. The “sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage,” and school policy prohibited interracial relationships or advocacy thereof. Bob Jones’s lesser known co-plaintiff, Goldsboro Christian Schools, even opposed integration of the classroom. According to their interpretation of the Bible, “[c]ultural or biological mixing of the races is regarded as a violation of God’s command.”¹⁶

¹³ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968).

¹⁴ *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

¹⁵ *Id.* at 1397.

¹⁶ *Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983).

In each of these cases, institutions tried to opt out of laws advancing equality, and each time their claims were rejected. Just as it was not a violation of religious freedom to require segregated institutions to integrate¹⁷ or schools to pay their employees equally despite their gender,¹⁸ it is not a violation of religious freedom to require that women have access to contraceptive coverage. *Hobby Lobby* breaks from the historic precedent, allowing employers to use their religious beliefs to deny their employees a benefit that they are guaranteed by law to receive.

* * *

We submit these comments to assist the Departments in crafting a clear and administrable rule to determine which for-profit entities are eligible for the accommodation, as well as requirements for how those entities should document and disclose their objections to contraceptive coverage. Underlying our comments is the imperative that employees and their dependents must be able to obtain seamless contraceptive coverage without cost-sharing. We thank the Departments for their continued commitment to ensuring that women have access to coverage, which furthers the compelling interests of protecting women’s health and ensuring women’s equality.

B. Defining Closely Held For-Profit Entities

The Departments seek to define “closely held entities” in light of the majority opinion in *Hobby Lobby* and for purposes of this accommodation only. In this context, the Departments must look to the Court’s opinion for guidance in crafting a definition to ensure it is appropriately measured. The majority opinion was not based on the fact that the companies were closely held—the Court did not rely on a statutory definition and the term itself lacks one single definition. The Court, instead, relied on the particular circumstances of the plaintiffs, and made clear that its opinion could only be read to apply to similar entities.¹⁹ Specifically, the majority focused on the fact that the plaintiffs—the Greens, owners of Hobby Lobby and Mardel, and the Hahns, owners of Conestoga Wood—solely owned and controlled their companies and operated them in accordance with their shared religious beliefs.²⁰

In so doing, the majority underscored that only a narrow subset of for-profit entities would actually be able to “agree to run a corporation under the same religious beliefs.”²¹ Thus, the Departments must ensure that the definition of “closely held for-profit entity” matches the

¹⁷ *Piggie Park Enters., Inc.*, 256 F. Supp. at 945.

¹⁸ *Shenandoah Baptist Church*, 899 F.2d at 1389 (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be “heads of households” could be held liable under equal pay laws); *see also* *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the “heads of households” violated Title VII).

¹⁹ *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

²⁰ Indeed, the Departments explain they seek to identify “for-profit entities controlled and operated by individual owners who likely have associational ties, are personally identified with the entity, and can be regarded as conducting personal business affairs through the entity.” Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118, 51,122 (Aug. 27, 2014) (to be codified as 26 C.F.R pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

²¹ *Hobby Lobby*, 134 S. Ct. at 2774.

factors identified by the majority opinion and is not broader. Permitting for-profit entities to take an accommodation in this manner is unprecedented and it would not be folly to suggest that other companies might attempt to inappropriately claim an accommodation. Also, a narrow definition is more appropriate than a broader one because the Court has held that accommodations of religious exercise must be measured.²²

Thus, the Departments should limit the definition of “closely held for-profit entity” for purposes of the accommodation to those able to demonstrate that: (1) no percentage of the entity’s shares are publicly traded and (2) there is a unity of interest among all equity holders and the closely held entity in furtherance of the equity holders’ religious beliefs, as evidenced by the equity holders’ unanimous agreement to operate the entity according to their shared religious beliefs.

Using the Court’s framework in crafting the rule will help to ensure that the scope of the rule is properly limited to the types of for-profit entities that the Court contemplated.

1. All of an entity’s shares are privately held, and subject to restrictions on transfer

Any rule should include as a matter of course that a for-profit entity seeking accommodation must be entirely privately held. In other words, the shares may not be publicly traded and may only be transferred in private transactions that would allow all equity holders the chance to affirm the purchaser’s shared beliefs. The entities at issue in *Hobby Lobby* are privately held,²³ and there is widespread agreement across state corporate law that “closely held” corporations must be privately held.²⁴ Further, without this factor, the other fails: in a publicly traded corporation, it is virtually impossible to demonstrate that religious beliefs are common to all shareholders, or that they drive the activities of the corporation. And if a transfer occurs without agreement to the shared principles defining the unity of interest, a corporation would no longer meet the strict standards set forth in *Hobby Lobby*.

2. The closely held for-profit entity is operated in furtherance of all equity holders’ shared religious beliefs, as demonstrated by their unanimous agreement to operate the entity according to those beliefs

A qualifying for-profit entity should be required to demonstrate a unity of interest between all equity holders²⁵ and the entity itself, in furtherance of their religious beliefs. The majority made clear that it sees the corporate entities at issue in *Hobby Lobby* as little more than extensions of the Hahn and Green families for purposes of RFRA and the entities could assert rights under

²² See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

²³ *Hobby Lobby*, 134 S. Ct. at 2774.

²⁴ See generally, Baruch Gitlin, *When is Corporation Close, or Closely-Held, Corporation Under Common or Statutory Law*, 111 A.L.R. 5th 207 (2003).

²⁵ “Equity holder” is defined as a natural person who directly (or indirectly through the ownership of equity interests in another entity that itself satisfies the closely held definition) holds interests, shares, participation, or rights in the entity, including any trust or the beneficial interests in such trusts.

RFRA because they represent individuals who all agreed to associate with a religious purpose.²⁶ Indeed, the opinion notes that “allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.”²⁷

Thus, in order to demonstrate that an entity is acting as a mere vehicle to further the goals of the small group of like-minded people who “own and control”²⁸ it, the Departments should require all equity holders to articulate a shared religious purpose.²⁹ To do this, the Departments should require the equity holders to provide unanimously adopted³⁰ statements of religious purpose or belief in publicly available documents that create, govern, operate, or guide the activities of the entity. These should include, ideally, founding documents, such as articles of incorporation or charters, operational documents like bylaws, unanimous shareholder consent resolutions, or operating agreements, or, if unavailable, guiding documents like mission or value statements.³¹ No matter the instrument, all equity holders must have unanimously adopted it in order for such a document to demonstrate, in an objective and administrable way, unity of religious beliefs and unity of interests between the equity holders and the entity. And any new shareholder, whether through new issuance or transfer, should be required to sign on to any such unanimously adopted instrument. Such unanimous agreement also helps to establish the sincerity of equity holders’ religious beliefs, which is prerequisite to any accommodation.³²

In *Hobby Lobby*, the Greens and Hahns supported the claim that they operate their businesses according to religious principles with documents agreed to by all equity holders. The Hahns, for example, adopted a “Vision and Values Statement” for Conestoga, in addition to a board-adopted “Statement on the Sanctity of Human Life.”³³ The Greens, similarly, have each signed a pledge to run the business in accordance with the family’s religious beliefs.³⁴ Hobby Lobby’s statement of purpose refers to “honoring the Lord” by “operating the company in a manner consistent with

²⁶ See *Hobby Lobby*, 134 S. Ct. at 2768 (Corporations are “simply a form of organization used by human beings to achieve desired ends.”).

²⁷ *Id.* at 2769.

²⁸ *Id.* at 2768; see also *id.* at 2774.

²⁹ A special challenge is presented when an entity includes owners that are either for-profit entities or trusts. In both cases, a shared identity is more difficult to establish. We would recommend excluding such entities from the accommodation, unless they can demonstrate that the underlying trust or for-profit entity has explicitly met the same requirements as the for-profit entity seeking the accommodation (that is, is non-public and has demonstrated unity of interest between all equity holders (to include trustees or beneficiaries in the case of a trust) and the closely held entity in furtherance of the equity holders’ religious beliefs).

Hobby Lobby is instructive here, as it is owned by a trust that satisfies the closely held definition in its own right: The trust is governed in accordance with the Greens’ religious principles. See *id.* at 2765 n.15.

³⁰ The concept of unanimous equity holder agreement is seen in state laws governing corporations. In *Hobby Lobby*, the majority cites to Delaware law, noting that stockholders can choose to manage a close corporation only “if all incorporators and subscribers or all holders of record of all of the outstanding stock, whether or not having voting power, authorize such a provision.” Del. Code. Ann., Tit. 8, Section 351 (2011). See also, e.g., MODEL BUS. CORP. ACT § 7.32 (2010).

³¹ This is not to suggest that the Departments should require any specific form or content, to include an explanation of what the equity holders’ religious beliefs are. Rather, the instrument need only include a factual statement reflecting that the entity is run in accordance with the shared religious beliefs of all the equity holders.

³² See, e.g., *Hobby Lobby*, 573 U.S. at 2774 & n.28.

³³ *Id.* at 2764-65.

³⁴ *Id.* at 2766.

Biblical principles.”³⁵ The Court also notes the importance of ownership approval and agreement in explaining which entities can avail themselves of RFRA—those that “agree to run a corporation under the same religious beliefs.”³⁶

Requiring unity will necessarily limit the accommodation to entities like Conestoga, in which five members of the Hahn family exercise sole ownership of their company.³⁷ Corporations with more equity holders will typically have more diverse interests and will be less likely to unanimously adopt and agree to adhere to corporate instruments that state a religious purpose.³⁸ As a corollary, if any shareholder does not concur in the statement of religious purpose, it logically follows that the corporate entity cannot be found to represent the unity of interest necessary to permit the accommodation.

C. Valid Corporate Action and Notification to the Departments

The Departments rightly propose that entities that fit the definition of “closely held” for purposes of the accommodation³⁹ and that wish to be released from the contraceptive coverage requirement in section 2713,⁴⁰ must take a separate corporate action in order to invoke the accommodation. And we agree with the Departments’ suggestion that they must then present the Departments with documentation of that action. This will ensure that the Departments are able to provide adequate oversight of the entities’ eligibility for the accommodation.

1. Equity holders must take a separate action to object to coverage of specific forms of contraception

The Departments should require that all equity holders unanimously certify⁴¹ their objection to coverage of some or all contraceptive methods in the entity’s insurance plan because such

³⁵ *Id.*

³⁶ *Id.* at 2774. The Court also notes the importance of ownership approval in determining when a corporation can stray from its usual profit-making goals, as it would be in adopting a religious purpose: “For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.” *Id.* at 2771.

³⁷ *Id.* at 2774.

³⁸ *See id.*

³⁹ Such a qualifying entity should be privately held, should have a demonstrated unity of interest between all equity holders and the closely held corporation in furtherance of the equity holders’ religious beliefs, and equity holders should unanimously agree to operate the entity according to their shared religious beliefs in publicly available documents. *See* discussion *supra* Part B.

⁴⁰ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32 (2010) (codified at 42 U.S.C. § 300gg-13).

⁴¹ The Court’s opinion in *Hobby Lobby* is grounded in the understanding that the closely held corporations could avail themselves of RFRA based on the beliefs of the families who own and control the entities. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014). Thus, the valid corporate action proposed by the Departments should be initiated by the equity holders.

Moreover, any accommodation should lift a substantial burden on religion, *see e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (quoting *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring)), and this resolution will help satisfy this requirement. Likewise, the unanimously adopted resolution will further demonstrate sincerity of religious beliefs.

coverage would violate the equity holders' religious beliefs,⁴² and direct the entity's board or managing body to take action to avail itself of the accommodation, in accordance with the entity's governing structure and applicable state law. The entity's board or officers must then take the appropriate action to assert the accommodation.

This process will ensure that the entity's corporate action to exclude birth control coverage and take up the accommodation is a reflection of the equity holders' shared beliefs.

2. Entities must notify the Departments

The Departments should reiterate that a qualifying closely held for-profit entity seeking to take advantage of the accommodation must use the self-certification process already used by non-profits to assert the accommodation.⁴³ In addition, the Departments should require a qualifying entity to provide documentation of the corporate action to take the accommodation, as well as publicly available organizational documents demonstrating a unanimous religious commitment (in support of its qualification for the accommodation, as discussed above).

This will aid the Departments in appropriate oversight and enforcement of the accommodation process. This serves a similar purpose as the requirement that eligible non-profit organizations hold themselves out as religious—ensuring that only qualifying entities avail themselves of the accommodation. But it necessarily involves a different procedure because the religious nature of a non-profit is more easily discernable than that of a closely held for-profit company. Take, for example, the plaintiff corporations in *Hobby Lobby*—one of the companies manufactures wood cabinets and the other operates a national crafts supply store chain. In neither case is it readily apparent that equity holders are exercising their religious beliefs through the company without additional documentation. Permitting for-profit entities to avail themselves of this type of accommodation is unprecedented and justifies such procedures.

If the Departments choose not to require documentation beyond self-certification, we ask the Departments to, at a minimum, clarify that the record retention requirements in current regulation extend to such supporting documentation and that documents should be made available to impacted beneficiaries upon request.

⁴² The Departments should only require a factual statement that equity holders object to coverage of some or all contraceptive methods in the entity's insurance plan because such coverage would violate the equity holders' religious beliefs and not establish any requirements about specific form or content.

⁴³ Eligible non-profit organizations self-certify by sending ESBA 700 form to their issuer or third-party administrator, and as of the interim final rule issued on August 27, 2014, they also have the option of provide written notice to HHS of their religious objection to cover contraception. Because the Departments are seeking only to change the definition of "eligible organization" in this proposed rule, we assume the Departments intend for closely held for-profit entities to follow the same process as eligible non-profit organizations and will permit entities the option to provide issuers or third-party administrators self-certification via the EBSA 700 form (amended to reflect the new "eligible organization" definition) or another form of self-certification.

D. Ensuring Access to Coverage

The Departments' first priority rightly is to ensure that any regulation is designed to guarantee that women have seamless access to contraceptive coverage, no matter where they work. This means making sure that qualifying closely held employers must use the accommodation if they wish to opt out of coverage, so that employees and their families aren't left without birth control coverage. It also means maintaining a system of oversight and enforcement for the accommodation generally, including both non-profits and now a limited number of closely-held for-profits, to ensure that the process functions properly.

First, the Departments should clarify in the final rule that in order to be in compliance with section 2713 of the Public Health Service Act, entities fitting the definition of "closely held" have two options: they must either provide coverage as required by the law, or use the accommodation by submitting the necessary documentation. An entity falling outside the definition in the final regulations shall be required to comply with the coverage requirement.

As the proposed rule expands the number of entities eligible for the accommodation, it is more important than ever that the Departments provide strong oversight and enforcement of every part of the accommodation process, from an entity's certification that it is eligible and has taken valid corporate action to the insurance issuer's implementation of a contraceptive coverage plan. This must include an easily accessible complaint process for employees who have inappropriately been denied coverage or who believe that their employer has wrongly claimed eligibility for the accommodation or the exemption. Creating a central oversight and enforcement body dedicated to the contraceptive coverage rule is particularly important because enforcement of section 2713 differs based on the source of insurance coverage.⁴⁴ This fragmented system already poses challenges for oversight and enforcement, and they are only amplified by the addition of closely held for-profit entities in the proposed rule.

These steps will help ensure that women are guaranteed coverage, and will enable the Departments to identify and address any systemic implementation problems.

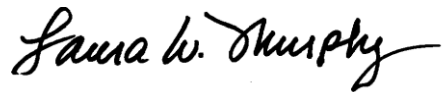
E. Conclusion

Contraception is a critical component of basic preventive care for women. Women need meaningful access to contraceptives to prevent unintended pregnancies, plan the size of their families, plan their lives, and protect their health. The Supreme Court's ruling in *Burwell v. Hobby Lobby* has left the women who work for Hobby Lobby, Conestoga Woods, and Mardel, among others, temporarily without contraceptive coverage. It is imperative that this proposed rule is finalized quickly in order to close that gap and ensure that they, and women at similar companies, are afforded the coverage required by section 2713 of the Public Health Service Act.

⁴⁴ Depending on whether a health plan is self-insured or fully insured, it may be governed by ERISA or both ERISA and state insurance regulations. Although states are responsible for enforcing the Public Health Service Act, HHS has authority to enforce the Public Health Service Act where a state is not substantially enforcing the law. In some cases, plans will be regulated by the Department of Labor, HHS, and/or state insurance regulators. Moreover, the Internal Revenue Service also has authority to penalize plans not complying with the ACA.

Anything less sacrifices women's health, women's equality, and true religious liberty—where no set of religious beliefs is privileged, imposed on others, or used as a license to discriminate.

Sincerely,

A handwritten signature in black ink, reading "Laura W. Murphy". The script is fluid and cursive, with the first name "Laura" being the most prominent.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink, reading "Georgeanne M. Usova". The signature is stylized with large, sweeping loops, particularly in the "G" and "M".

Georgeanne M. Usova
Legislative Counsel

A handwritten signature in black ink, reading "Dena Sher". The signature is more compact and less stylized than the others, with clear lettering.

Dena Sher
Legislative Counsel