WASHINGTON
LEGISLATIVE OFFICE

October 27, 2014

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Preventive Services

Submitted electronically via www.regulations.gov

Re: Coverage of Certain Preventive Services Under the Affordable Care Act, EBSA-2014-0013-0002, RIN 1210-AB67

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The American Civil Liberties Union (ACLU) submits the following in response to the Interim Final Rule on "Coverage of Certain Preventive Services Under the Affordable Care Act," published in the Federal Register on August 27, 2014. The interim rule would "augment current regulations in light of the Supreme Court's interim order in connection with an application for an injunction in *Wheaton College v. Burwell*."[1] 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.

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 liberty[2] and has advocated

[1] Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 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).
[2] *E.g.*, *ACLU Defense of Religious Practice and Expression* , AMERICAN CIVIL LIBERTIES UNION, http://www.aclu.org/aclu-defense-religious-practice-and-expression.

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. Rules implementing the Affordable Care Act 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 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,[5] 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.[6] The accommodation allows eligible organizations to declare their refusal to cover contraceptives in their insurance plans. HHS and the Department of Labor issued a self-certification form, EBSA Form 700, to accomplish this. An objecting organization fills out and sends the form to its insurance issuers or third-party administrators (TPAs), which must then carry out its legal obligation to arrange for contraception coverage.

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[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) [hereinafter CLOSING THE GAPS]. The HRSA guidelines reflect those recommendations.

[5] ACLU submitted comments to the agencies on April 8, 2013, 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 ensures employees and students at the affected institutions seamless coverage. Comments from the ACLU on Coverage of 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.

[6] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) (to be codified as 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pt. 147, 156).

2. Current rulemaking to address recent Supreme Court cases

On July 3, 2014, the Supreme Court issued an interim order in *Wheaton College v. Burwell*,[7] a case in which a religiously affiliated college with religious objections to covering contraception in its health insurance plans challenged the requirement to use EBSA 700 to invoke the accommodation. Wheaton College's challenge was based on its view that filling out the form violates its religious beliefs because doing so facilitates contraceptive access for employees and students. Pending final disposition in the case, the Court enjoined enforcement of the accommodation as to the college, ordering that Wheaton need not utilize EBSA Form 700 and explaining that Wheaton College had already notified the government that it meets the accommodation's requirements. The Court further ordered that nothing stopped the government from relying on this information to facilitate coverage. According to the Court, this order "should not be construed as an expression of the Court's views on the merits" of the plaintiff's challenge to the accommodation.[8]

On August 27, the Departments published an Interim Final Rule to provide a process, consistent with the *Wheaton College* order, for eligible entities to provide notice of their objections to contraceptive coverage without using EBSA Form 700. The new rule allows entities to instead notify HHS in writing of their religious objection to coverage. Notice must include the name of the entity, basis on which it qualifies for the accommodation, its objection based on sincerely held religious beliefs, the name and type of health plan, and the name and contact information for any of the plan's TPAs and health insurance issuers.

The Departments simultaneously seek comment on a proposed rule that would change the "definition of 'eligible organization' in the Departments' regulations in light of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*."[9] ACLU is submitting comments separately on that proposed rule. However, we note the relevance of those comments here, because once finalized, that rule will allow certain for-profit entities to avail themselves of the accommodation discussed here, which is currently available only to certain nonprofit organizations with religious objections to contraceptive coverage.

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We support the Departments' alternative notification process as an appropriate response to the Supreme Court's order in *Wheaton College*, and submit these comments to explain why the alternative process, like the July 2013 self-certification process that came before it, does not violate religious liberty protections. Further, we comment on how the Departments can ensure that this rule will be implemented so as to provide seamless coverage to beneficiaries, including employees or students of eligible entities and their dependents, through effective oversight and enforcement. We thank the Departments for their continued commitment to ensuring that women have access to coverage without cost-sharing, which furthers the compelling interests of protecting women's health and ensuring women's equality.

[7] 134 S. Ct. 2806 (2014).
[8] *Id*. at 2807.
[9] Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094 (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).

B. The accommodation does not violate RFRA

Some opponents of the accommodation have argued that the current process violates the Religious Freedom Restoration Act (RFRA). It does not for two independent reasons: (1) compliance with a regulation that permits eligible entities with religious objections to affirmatively opt out of providing contraceptive coverage and inform third parties of their own legal obligations cannot be a substantial burden on the entities' religion; and (2) guaranteeing contraceptive coverage in health insurance plans furthers a compelling interest in promoting gender equality, reproductive autonomy, and religious liberty.

1. The accommodation does not impose a substantial burden in its original or augmented form

The existing accommodation process allows nonprofits that have objections to covering contraception to simply fill out a form saying they won't provide coverage and send it to their insurance providers or administrators. There is nothing in this process, which the U.S. Court of Appeals for the Seventh Circuit called "the opposite of cumbersome,"[10] that amounts to a substantial burden on religious exercise. Indeed, the only two circuit courts to consider claims that the accommodation process is a substantial burden and violates RFRA have rejected them.[11]

A regulation that authorizes an entity to opt out of an obligation to which it objects cannot be a substantial burden.[12] As the Seventh Circuit explained, it is "paradoxical and virtually unprecedented" for beneficiaries of an accommodation to claim that the accommodation itself imposes a substantial burden.[13] It in no way creates pressure to modify their behavior to violate religious beliefs.[14]

Nor is a substantial burden imposed by the fact that employees and students continue to have coverage for contraception, as a component of preventive care required by the ACA.[15] The Sixth Circuit explained that "[t]he government's imposition of an independent obligation on a third party does not impose a substantial burden on the appellants' exercise of religion." In other words, the government's requirement that TPAs and insurers provide coverage does not substantially burden the entities invoking the accommodation,[16] just like it's not a substantial burden on a wartime conscientious objector when the government drafts someone else to serve in his place.[17] Rather, these burdens are "incidental," because they result from independent governmental action that does not coerce anyone to violate his or her religious beliefs.[18]

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[10] Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 558 (7th Cir. 2014).
[11] *Id* at 554-60 (rejecting university's request for a preliminary injunction because it failed to establish a likelihood of success on the merits); Mich. Catholic Conference v. Burwell, 755 F.3d 372, 390 (6th Cir. 2014) (same).
[12] *See Univ. of Notre Dame*, 743 F.3d at 559 ("participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive").
[13] *Id*. at 557.
[14] *Mich. Catholic Conference*, 755 F.3d at 388.
[15] 42 U.S.C. §§ 300gg-1(a).
[16] *Mich. Catholic Conference*, 755 F.3d at 388-89.
[17] *Cf. Univ. of Notre Dame*, 743 F.3d at 556.
[18] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–51 (1988).

Further, an entity's "inability to 'restrain the behavior of a third party that conflicts with [its own] religious beliefs' does not impose a burden."[19] Just because an entity has the right to opt out of coverage for religious reasons, doesn't give it the right to prevent the government from requiring an insurance company to provide coverage or to compel the government and insurance company to "conform [their] conduct" to its religious beliefs.[20] The fact that government action "is offensive to [an individual's] religious sensibilities" does not automatically render the action a substantial burden.[21] Such is the case with the accommodation.

Finally, it should be noted that in *Burwell v. Hobby Lobby Stores, Inc*., the Court held that the accommodation was a less restrictive means of achieving the federal government's interest for the family-owned for-profit companies in that case.[22] 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.[23]

If the current procedure for the accommodation does not impose a substantial burden, surely, the augmented accommodation under the interim final rule, which provides entities with yet another option for declaring their refusal to cover contraceptives in their insurance plans, cannot impose a substantial burden.

2. Guaranteeing contraceptive coverage furthers a compelling interest

Guaranteeing contraceptive coverage in health insurance plans furthers three fundamental rights: gender equality, reproductive autonomy, and religious liberty.

a. Gender Equality

The ACA was designed to redress gender discrimination in health benefits. As Senator Barbara Mikulski, author of the provision on women's preventive services, noted: "Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . ."[24]

Omitting contraceptive coverage from a comprehensive benefits package is gender discrimination; it means men receive comprehensive health care coverage while women do not. Prescription contraceptives are a form of health care used only by women. The Equal Employment Opportunity Commission pointed this out over a decade ago. It explained that

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[19] *Mich. Catholic Conference*, 755 F.3d at 388 (quoting Mich. Catholic Conference v. Sebelius, 989 F.Supp.2d, 577, 587 (W.D. Mich 2013)).
[20] *Id. (*citing Bowen v. Roy, 476 U.S. 693, 699 (1986)); *Univ. of Notre Dame*, 743 F.3d at 552.
[21] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).
[22] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014).
[23] *See id.* at 2786-87 (Kennedy, J., concurring).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 case was wrongly decided: the Court should have concluded that the contraceptive coverage rule does not impose a substantial burden on employers in the first place, and ended the analysis there. *See* 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.
[24] 155 CONG. REC. S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski).

prohibitions on sex discrimination require employers to include contraceptive coverage when they offer coverage for comparable drugs and devices.[25] As one court explained, "carv[ing] out benefits uniquely designed for women" discriminates against them.[26]

In addition, without comprehensive coverage, women of childbearing age routinely pay more than men in health care costs. These costs are not insignificant, are a true barrier to women's access to effective birth control, and the financial barriers are aggravated by the fact that women typically earn less than men. The cost of contraceptive methods can cause women to have gaps in their use, or to use less effective methods with lower upfront costs like condoms, as opposed to more effective long-acting reversible methods like the IUD.[27] The contraceptive coverage rule helps to eliminate those disparities and their negative consequences. Indeed, a recent study shows that no-cost contraception is likely to significantly decrease unintended pregnancy rates by making long-acting methods more accessible.[28]

What is more, access to affordable and effective contraception, and thus control of childbearing, plays an important role in facilitating women's participation in all parts of society. When asked how birth control impacts their lives, women report that it has allowed them "to support [themselves] financially," "to stay in school," and "to get or keep [a] job or have a career."[29] Researchers have found that the availability of oral contraception has played a significant role in allowing women to attend college and choose post-graduate paths, including law, medicine, dentistry, and business administration.[30] Indeed, the ability to advance in the workplace through education or on-the-job training, because of the ability to control whether and when to have children, has narrowed the wage gap between men and women. One study shows that the birth control pill led to "roughly one-third of the total wage gains for women in their forties born in the mid-1940s to early 1950s."[31] In short, contraception helps women take control over their lives; inconsistent access undermines that.

The U.S. Supreme Court said it well: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their

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[25] Equal Employment Opportunity Commission, Decision of Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html ("Contraception is a means by which a woman controls her ability to become pregnant. . . . [Employers] may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices."); *see also* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001). *But see* In re Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 943 (8th Cir. 2007) (concluding that the Pregnancy Discrimination Act did not encompass contraceptives).

[26] *Erickson*, 141 F. Supp. 2d at 1271.

[27] Guttmacher Inst., Testimony before the Committee on Preventive Services for Women, Institute of Medicine 8 (Jan. 12, 2011), *available at* http://www.guttmacher.org/pubs/CPSW-testimony.pdf [hereinafter Guttmacher Testimony].

[28] Jeffrey F. Peipert, et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, OBSTETRICS & GYNECOLOGY (Dec. 2012).

[29] Jennifer Frost & Laura Duberstein Lindberg, Guttmacher Inst., *Reasons for using contraception: Perspectives of US women seeking care at specialized family planning clinics*, 87 CONTRACEPTION 465, 467(Apr. 2013).

[30] *See* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON., 730, 764 (2002), *available at* http://dash.harvard.edu/bitstream/handle/1/2624453/Goldin_PowerPill.pdf?sequence=4.

[31] Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, AM. ECON. J.: APPLIED ECON. 26-27 (2012), *available at* http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf.

reproductive lives."[32] Ensuring insurance coverage for contraception promotes equality on multiple, intersecting fronts. These are exactly the kinds of interests that are considered "compelling."[33]

b. Reproductive Autonomy

At the core of the right to privacy is every person's right to make the profound, life-altering decision of whether to become a parent. The "realm of personal liberty" includes a woman's right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[34] Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions.[35] Protecting access to reproductive health services is a compelling interest.[36]

Virtually all women of reproductive age have used birth control at some point.[37] Denial of contraceptive coverage causes some women to forgo birth control or use cheaper and less effective methods of birth control, resulting in unintended pregnancies.[38] Further, cost-sharing requirements pose substantial barriers to accessing this important care.[39] The contraceptive coverage requirement promotes women's interest in planning their families.[40]

c. Religious Liberty

Some religious doctrines oppose the use of contraception. Just as those religious tenets are entitled to respect, so too are contrary religious traditions, which hold that sexual intimacy need not be linked to procreation and that planning childbearing is a morally responsible act. In our constitutional system, the government is supposed to be a neutral actor, allowing individuals to follow their own religious or moral consciences. Ensuring contraceptive coverage in health

[32] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992).
[33] *See, e.g.*, E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1369 (9th Cir. 1986) (quoting E.E.O.C. v. Pac. Press Publ'g Assoc., 676 F.2d 1272, 1280 (9th Cir. 1982) (ending sex discrimination in employment is "equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions"); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (ensuring equal benefits to men and women promotes "interests of the highest order"); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (equality is a compelling government interest).
[34] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[35] Griswold v. Connecticut, 381 U.S. 479 (1965).
[36] Am. Life League, Inc. v. Reno, 47 F.3d 642, 655-56 (4th Cir. 1995); Council for Life Coal. v. Reno, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994).
[37] Guttmacher Testimony, *supra* note 27, at 7.
[38] *Id*. at 8.
[39] CLOSING THE GAPS, *supra* note 4, at 109.
[40] *See, e.g.*, 155 CONG. REC. at S12,025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer) ("These health care services include . . . family planning services."); *id*. at S12,027 (statement of Sen. Gillibrand) ("With [the WHA], even more preventive screening will be covered, including . . . family planning."); 155 CONG. REC. at S12,271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken) ("Under [the WHA], the Health Resources and Services Administration will be able to include other important services at no cost, such as . . . family planning"); *id*. at 12,274 (statement of Sen. Murray) ("We have to make sure we cover preventive services, and [the WHA] takes into account the unique needs of women. . . . Women will have improved access to . . . family planning services.").

insurance plans does just that—it allows every woman to decide for herself whether and when to use birth control.

C. The Departments must create a strong system of oversight and enforcement to ensure that women receive seamless coverage

In order to ensure that employees, students, and dependents can access the coverage guaranteed to them, the Departments should maintain an oversight and enforcement entity specifically for the contraceptive coverage rule, including its exemption and accommodation. This is more necessary than ever in light of the newly expanded set of entities eligible for the accommodation.[41]

Creating an oversight and enforcement entity dedicated to the contraceptive coverage rule is particularly important because enforcement of § 2713 of the Public Health Service Act (PHSA), which includes the contraceptive coverage requirement, differs based on the source of insurance coverage.[42] This fragmented system is not well-equipped to deal with the oversight and enforcement needs the proposed rule creates, and the addition of more eligible entities will only create additional challenges. A centralized entity will better enable the Departments to easily see and address any systemic implementation problems, ultimately ensuring that women receive seamless access to contraception via the accommodation.

In order to strengthen the Departments' oversight and enforcement, we recommend the following:

- An organizational structure to facilitate accountability:
    - The Departments should create a centralized entity to conduct oversight and enforcement of the contraceptive coverage rule, including the exemption and accommodation.
    - Each agency should designate a specific point-person at the agency who will be in charge of handling the responsibilities associated with the accommodation and exemption at that agency.

- Improved guidelines and information to aid in compliance:
    - For entities choosing to use the new accommodation procedure of directly notifying the Department of Health and Human Services, there must be a specific process, with clear timelines, by which HHS receives the notification from the employer and in turn notifies the plan.
    - Likewise, for self-insured plans, there must be a specific process in place with clear timelines for HHS notification of the Department of Labor.

[41] We maintain our position that the accommodation generally, as well as the modification introduced in the interim final rule, are unnecessary as both a legal and policy matter and that contraception should not be segregated from other health care.

[42] 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 PHSA, HHS has authority to enforce the PHSA 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.

- To avoid any coverage gaps resulting from inadequate information being provided by the eligible entity, the EBSA Form 700 and the model notification to HHS should include a list of FDA-approved methods of contraception. Without a way for the eligible entity to provide clear information, confusion may arise that could result in gaps in the coverage.

- Enhanced recordkeeping and eligibility requirements:
  - The Departments should require insurance issuers and TPAs to send ESBA 700s they receive to the Departments so that Departments have complete records[43] and can adequately ensure that employees and students and their dependents are receiving the coverage they are guaranteed under the rule.
  - The Departments should require an institution seeking the religious employer exemption[44] to certify with the Departments that the institution qualifies for the exemption.[45]

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[43] Requiring federal agency to be notified is common practice when organizations seek an exemption for religious reasons. *See, e.g.*, Dep't of Labor, Office of the Assistant Sec'y for Admin. and Mgmt. Grants—Religious Freedom Restoration Act Guidance, *available at* http://www.dol.gov/oasam/grants/RFRA-Guidance.htm (requiring an organization seeking a religious exemption to submit "a request for exemption to the Assistant Secretary charged with issuing or administering the grant"); Dep't of Justice, Certificate of Exemption, *available at* http://www.ojp.usdoj.gov/recovery/pdfs/arrasampleform.pdf; s*ee also, e.g.*, Internal Revenue Code Form 4361: Application for Exemption from Self-Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners, *available at* http://www.irs.gov/pub/irs-pdf/f4361.pdf (requiring ministers with religious objections to accepting public insurance to file certification with the government "under penalties of perjury").
Notification that an entity is taking an available accommodation does not involve an assessment of the entity's religious beliefs. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,095 (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). It merely facilitates transparency and guarantees that the Departments will be able to ensure compliance with the law. *See* PRESIDENTIAL ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, A NEW ERA OF PARTNERSHIPS: REPORT OF RECOMMENDATIONS TO THE PRESIDENT 137, n.52 (2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf (noting that the Supreme Court has held constitutional requirements for religiously affiliated institutions to submit written applications, signed assurances, and written reports, and that even government site visits, including unannounced monthly visits, of religiously affiliated institutions receiving government aid is constitutional). *See also* Mitchell v. Helms, 530 U.S. 793, 861-63 (2000) (O'Connor, J., concurring and controlling opinion); Agostini v. Felton, 521 U.S. 203, 234 (1997); Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 742-43 (1976).

[44] We believe that the Departments should extend the accommodation so that employees of "religious employers" receive access to contraceptive coverage. However, if the exemption remains intact, employers should at the very least cooperate with the government's record keeping requirements to allow for oversight.

[45] Churches regularly file routine paperwork with government agencies. *See, e.g.*, DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM SS-4: APPLICATION FOR EMPLOYER IDENTIFICATION NUMBER (application for an employer identification number for use by churches, among other institutions), *available at* http://www.irs.gov/pub/irs-pdf/fss4.pdf; INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 18, *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf (explaining that generally, "churches and religious organizations are required to withhold, report, and pay income and Federal Insurance Contributions Act (FICA) taxes for their employees"); DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 5578: ANNUAL CERTIFICATION OF RACIAL NONDISCRIMINATION FOR A PRIVATE SCHOOL EXEMPT FROM FEDERAL INCOME TAX, *available at* http://www.irs.gov/pub/irs-pdf/f5578.pdf (a church that operates a private school that teaches secular subjects must file this form to certify that it does not discriminate on the basis of race or ethnic origin).

- The Departments should require that entities complete the self-certification or submit notification to HHS annually, in connection with the start of the new plan year, in order to ensure that the entity still fits the definition of eligible entity. Changes in ownership and control of the entity may impact its eligibility to seek the accommodation or exemption.

- Additional channels for oversight:
  - A clear and accessible complaint process should be implemented so that women can easily file a complaint if they have been inappropriately denied coverage or believe that their employer or college has wrongly claimed eligibility for the exemption or the accommodation.
  - The oversight entity should conduct audits of the accommodation and enforcement process to ensure that entities claiming an exemption or accommodation are eligible to do so.[46]

- Robust transparency and public accountability measures:
  - The oversight and enforcement entity should collect and make publicly available all notifications sent to HHS (including those directly from eligible entities, as well as those sent by TPAs and insurers) and maintain a file of all entities invoking the exemption or accommodation.
  - HHS should maintain these records in a manner that allows the public to review them so that employees and prospective employees are able to understand the full extent of the compensation package provided by their employers as well as the source and terms of their coverage.[47]

[46] Verification of eligibility for accommodations and exemptions is routine. *See, e.g.*, Dep't of Labor form (exemption can be revoked if self-certification was untruthful or if there has been a material change of circumstances); Dep't of Justice form (exemption can be revoked if there is "good reason to question the [organization's] truthfulness in completing" self-certification). Because the test to become an "eligible organization" is based on objective criteria, this inquiry would not require the government to ask intrusive questions and thus would not lead to any impermissible inquiries into beliefs or practices. *See, e.g.* World Vision v. Spencer, 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J. concurring); Carroll College, Inc. v. NLRB, 558 F.3d 568 (D.C. Cir. 2009). Furthermore, the government "violates no constitutional rights by merely investigating the circumstances" of a claim. *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986). Determining whether an objection is religious and sincerely held is a well-established and routine inquiry. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 S. Ct. 2751, 2774 n.28. (2014); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006); Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 726 (1981); United States v. Seeger, 380 U.S. 163, 185 (1965).

[47] This would not be an unprecedented action for HHS to take in relation to entities which have been relieved of an obligation under the ACA. HHS has previously created a public website that lists all health plans that were granted waivers for complying with the ACA's annual limit requirement to ensure that information is readily available to plan enrollees and beneficiaries.

D. The Departments should take measures to ensure that the accommodation functions as efficiently and effectively as possible

The Departments' final rule must ensure that systems are in place so that the accommodation process works effectively, that women receive seamless coverage with no additional barriers, and that the beneficiaries' legal protections remain in place.

1. The Departments should ensure that changes to the non-interference provision do not hurt access to coverage

The Departments also request comment on the removal of language from the July 2013 final regulations commonly referred to as the "non-interference provision." That provision provides that eligible organizations "must not, directly or indirectly seek to interfere with a TPA's arrangements to provide or arrange for separate payments for contraceptive services," and "must not, directly or indirectly seek to influence a TPA's decision to make any such arrangements."[48] We urge the Departments to engage in careful monitoring to ensure that the change does not result in new obstructions to coverage, that employees or students and their dependents receive coverage in a seamless and timely manner, and that all parties comply with their lawful obligations. The Departments should clarify the affirmative obligation of TPAs to avoid undue delay in coverage and of eligible organizations to refrain from blocking any TPA's fulfillment of legal obligations to employees and students.

2. The Departments should extend the accommodation so that employees of "religious employers" receive access to contraceptive coverage

The Departments put the exemption in place to account for certain interests of churches and their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of religious orders that oppose the use of contraception to control fertility. The exemption's goal was not to punish the employees of those organizations by denying them health care coverage or forcing them to pay more for their health care. In insulating those institutions, however, their employees may suffer harm: women who follow their own conscience and seek to use contraception are denied equal health care coverage. Thus, employees should be entitled to alternative means of acquiring coverage for these essential health care services. A ready solution exists: the Departments should apply the accommodation to churches and their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of religious orders in lieu of the exemption.[49]

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[48] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,893 (July 2, 2013) (to be codified as 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pt. 147, 156).

[49] In the event that the Departments do not extend the protections of the accommodation to employees of institutions that are eligible for the religious employer exemption, the Departments should ensure that the religious employer exemption should not apply to contraception when it is prescribed for a non-contraceptive purpose. Contraception has an important role in women's preventive care beyond preventing unintended pregnancies. As the Institute of Medicine noted in its recommendations to HHS, "[l]ong-term use of oral contraceptives has been shown to reduce a woman's risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases." CLOSING THE GAPS, *supra* note 4, at 92. Contraception can also decrease the risk of ovarian cancer and eliminate menopause symptoms. Guttmacher Testimony, *supra* note 27, at 6; Dep't of Health & Human Servs., *Menopause Symptom Relief and Treatments* (Sept. 29, 2010), http://www.womenshealth.gov/menopause/symptom-

3. The Departments must assist issuers and TPAs with implementation of the final rule to ensure that the accommodation works smoothly

It is incumbent on the Departments to ensure that the accommodation does in fact provide coverage of the full range of FDA-approved contraceptives without cost sharing. This is particularly important given that when this rule is finalized the number of entities that can invoke the accommodation will grow. This not only means that the Departments must vigorously oversee and enforce the law (as discussed in Section C above), but that they are obligated to make sure that the systems are in place so that the accommodation functions as it is designed. For example, extending the accommodation to closely held for-profit entities could result in more accommodated self-insured plans, which would require more TPAs to provide or arrange for separate payments for contraceptive services without cost-sharing. As such, we ask the Departments make sure that TPAs have a sufficient number of issuers to contract with to provide for or arrange contraceptive services so that women can be assured seamless access to contraception in a timely manner and without barrier.

4. The Departments should ensure that coverage is accessible regardless of a beneficiary's cultural or racial background, English proficiency, disability, or sexual orientation

The contraceptive coverage requirement applies to women of reproductive capacity. It is incumbent on the Departments to ensure that women—regardless of race, ethnicity, English proficiency, disability, sexual orientation or other characteristics—do not face barriers to accessing it. Thus, we recommend:

- Notices provided by insurers and TPAs regarding the accommodation should be available in other languages so that limited-English proficient women are well informed about their legal right to contraceptive coverage.
- Insurers and TPAs should provide all information and assistance to beneficiaries in a manner that is accessible to those with disabilities.
- Notices provided by insurers and TPAs should be done in a manner that is sensitive to issues of confidentiality and does not actually reveal whether the individual insured has utilized contraceptive coverage.

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relief-treatment/. The Departments should clarify that the coverage exemption is limited to when contraception is used for contraceptive purposes, and that coverage may not be excluded from any plan for contraceptives prescribed by a health care provider for reasons other than contraceptive purposes, or when necessary to preserve the life or health of the individual. This protection for women's health is common in state contraceptive coverage laws. *See, e.g.*, CAL. INS. CODE § 10123.196(e) ("Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health of an insured."); *see also* ARIZ. REV. STAT. ANN. § 20-1402 (M) (2011); CONN. GEN STAT. ANN. § 38a-530e(d) (West 2009); HAW. REV. STAT. § 431:10A-116.7(d) (2010); ME. REV. STAT. ANN. tit. 24, § 2847-G(2) (2010); N.J. STAT. ANN. § 17B:27-46.1ee (West 2011); N.Y. INS. § 3221(1)(16)(C); N.C. GEN. STAT. ANN. § 58-3-178(e) (West 2010); W. VA. CODE ANN. § 33-16E-7(b) (2010).

5. The Departments should prohibit the creation of additional barriers to coverage for beneficiaries of accommodated plans

In addition, insurance carriers must not create separate rules for beneficiaries of accommodated plans that do not exist for the beneficiaries of their unaccommodated plans. Ultimately, the beneficiaries for both should be receiving the same coverage under the same terms. For example, insurers may not require beneficiaries to have two insurance cards—one for their contraceptive coverage and another for the rest of their prescription or health care coverage. Having two cards will make it more difficult for some women to access their coverage.

E. The Departments should clarify the scope of the rule and its relation to other laws

1. The Departments should reiterate that the exemption and accommodation definitions have no precedential value

We support the Departments' statement in the July 2013 final rule that the designation of an employer as an excepted or accommodated employer was "limited solely to defining the class of employers or organizations . . . . [that qualify] under these final regulations" and the "definition of religious employer or eligible organization in these final regulations should not be construed to apply with respect to, or relied upon for the interpretation of, any other provision of the PHS Act, ERISA, the Code or any other provision of federal law, nor is it intended to set a precedent for any other purpose."[50]

As the Departments separately consider a proposed rule that would expand the accommodation by making it available to certain closely held for-profit entities, it is particularly important that the final rule restates that the definitions and accommodation procedures will have no precedential value, and are intended only for the limited purposes described.

2. The Departments should clarify entities' responsibilities under § 2713 and other existing legal obligations

The Departments should reiterate the obligations under § 2713 of entities providing insurance coverage.[51] Specifically, entities qualified under the final regulation for the accommodation have two options: either to provide coverage as required by the law, or to submit the necessary documentation to invoke the accommodation. An entity not qualified by the terms of the final regulations shall be required to comply with the coverage requirement.

The Departments should also clarify that neither the exemption nor the accommodation alters any obligation requiring contraceptive coverage under other federal laws, including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

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[50] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg.at 39,888.

[51] Section 2713 requires non-grandfathered health plans to provide benefits for certain preventive health services, including contraception, without cost-sharing. U.S. Dep't of Health and Human Servs., Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines.

3. The Departments should reaffirm that states may enforce stronger protections

In the July 2013 final regulations that established the accommodation, the Departments clearly stated that the federal contraceptive coverage rule is a floor, not a ceiling:

> With respect to issuers subject to state law, insurance laws that provide greater access to contraceptive coverage than federal standards are unlikely to ''prevent the application of'' the preventive services coverage provision, and therefore are unlikely to be preempted by these final regulations. On the other hand, in states with broader religious exemptions and accommodations with respect to health insurance issuers than those in the final regulations, the exemptions and accommodations will be narrowed to align with those in the final regulations. This is consistent with the application of other federal health insurance standards.[52]

As the Departments recognized in that rule, twenty-eight states already require coverage of contraception in health insurance plans.[53] Some have exemptions that are similar to the religious employer exemption in the proposed rule; others draw different lines, including some that have no exemption at all. The Supreme Court's decision in *Hobby Lobby* does not change this: RFRA does not apply to state laws and the Supreme Court only considered RFRA's application to the federal contraceptive coverage requirement. State contraceptive equity laws continue to exist as separate legal requirements on plans governed by state law.

By contrast, the Affordable Care Act requires that a state insurance law that "prevent[s] the application of the [ACA] requirements" is preempted.[54] We strongly support the Departments' recognition that broader exemptions in state laws must be "narrowed to align with that in the final regulations."[55] By exempting additional employers, leaving women without coverage, those state laws prevent the application of the federal contraceptive coverage rule and are therefore preempted by it.

For these reasons, the Departments should reiterate earlier preemption statements in this final rule.

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[52] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,888.

[53] GUTTMACHER INST., STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES (2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

[54] Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,739 (July 19, 2010) (codified at 45 C.F.R. § 147.130).

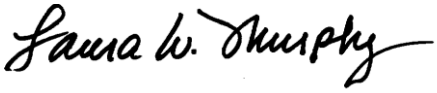
[55] Certain Preventive Services Under the Affordable Care Act, Fed. Reg. 16,501, 16,508 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

F. 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.

While we continue to maintain that neither the accommodation finalized in July 2013 nor the alternative process introduced in the interim final rule now before us is necessary, we ask that the Departments continue to ensure that all women insured by entities seeking accommodation receive seamless no-cost-sharing contraceptive coverage, as they would with no accommodation in place. 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,



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