

October 21, 2014

Administrator Marilyn Tavenner
Centers for Medicare & Medicaid Services
Department of Health and Human Services, Room 445-G
200 Independence Avenue SW
Washington, DC 20201

Submitted Electronically

Attention: CMS-9940-P

RE: Notice of Proposed Rulemaking for Coverage of Certain Preventive Services Under the Affordable Care Act.

Dear Administrator Tavenner:

The undersigned organizations are pleased to offer these comments on the proposed rule for Coverage of Certain Preventive Services Under the Affordable Care Act, from the Department of the Treasury, Department of Labor, and Department of Health and Human Services (“HHS”) (collectively “Departments”) published in the Federal Register on August 27, 2014.¹ We support the Administration’s continuing commitment to ensuring that women receive insurance coverage without cost-sharing of the full range of FDA-approved methods of contraception and related counseling.

While we appreciate the Departments’ proposals to define the “closely held” companies that could be eligible for the accommodation, the Departments’ proposals do not comport with the standards outlined in *Burwell v. Hobby Lobby Stores, Inc.*² In *Hobby Lobby*, the Supreme Court ruled that only certain “closely held” for-profit companies can establish a Religious Freedom Restoration Act (RFRA) claim to refuse to include contraceptive coverage in the employer-based health insurance plan. The standards proposed in the Notice for Proposed Rulemaking (NPRM) are overly-broad and would allow for-profit companies that do not meet the *Hobby Lobby* standard to refuse to comply with the contraceptive coverage requirement and be accommodated.

In addition, we appreciate the opportunity to provide information regarding the operation of the current accommodation to ensure it works as efficiently and effectively as possible given the changed definition of the eligible organizations and have responded to that request as well.

Background

The Patient Protection and Affordable Care Act (“ACA”) recognizes that preventive health services are critical to individual and community health, and that cost is often a barrier to accessing needed preventive services. By explicitly requiring that health insurance plans cover

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).

² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, Nos. 13-354, 13-356, 2014 WL 2921709 (June 30, 2014).

women’s preventive health services without cost-sharing,³ the ACA further acknowledges the traditional gap in health insurance coverage of women’s preventive health care needs and the critical role that such coverage can have in improving the health of a woman and her family. As such, we continue to strongly support the Departments’ regulation requiring that non-grandfathered health insurance plans cover women’s preventive health services—including contraception—without cost-sharing.⁴ The requirement is a significant step forward for millions of women who are currently insured or who will obtain health insurance under the ACA. Accordingly, we strongly supported the Departments’ original decision to require all for-profit entities to fully comply with Section 2713 of the Public Health Service Act.⁵

Unfortunately, the U.S. Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*⁶ undermines the contraceptive coverage regulation. In a 5-4 decision, the Supreme Court held—we believe wrongly—that the Religious Freedom Restoration Act (“RFRA”)⁷ allows a small subset of “closely held” corporate employers to deny women contraceptive coverage in employee health plans that cover all other essential medical services. The Court assumed that since the Departments could ensure these women get such coverage through an alternative method— i.e., through the accommodation—certain “closely held” corporations could refuse to provide health insurance that covers contraception. This decision means that – for now⁸ – women employed by Hobby Lobby, Mardel, and Conestoga Wood Specialties are left without insurance coverage of this health care service that ninety-nine percent of sexually active women use at some point in their lives. Not only are these women and covered female dependents harmed when they are denied coverage, but the lack of coverage could mean that some women do not get the birth control that is medically appropriate for them.

We appreciate the Departments acting with urgency to ensure that women affected by the Court’s decision have access to contraceptive coverage. The Departments’ decision to initiate rulemaking recognizes that all women—regardless of where they work—should have timely access to all FDA-approved methods of contraception without cost-sharing. We further strongly agree that the Departments’ rulemaking must be done “in light of the Court’s decision in *Hobby Lobby*,” i.e., it must fill the gap in coverage created by the Supreme Court’s decision.⁹ Bridging this gap in coverage requires the Departments’ rulemaking to reflect and respond to the Supreme Court’s reasoning in *Hobby Lobby*. Thus, the Departments should ensure that the existing

³ Patient Protection and Affordable Care Act (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010), § 1001, 42 U.S.C. § 300gg-13 (2012) (amending § 2713 of the Public Health Service Act (“PHS Act”)).

⁴ 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>.

⁵ Section 2713 of the Act requires “non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide benefits for certain preventive health services without the imposition of cost sharing.” These preventive health services include contraception. 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>.

⁶ *Hobby Lobby*, 134 S. Ct. 2751.

⁷ Religious Freedom Restoration Act (“RFRA”), Pub. L. No. 103-141, 42 U.S.C. § 2000bb-1 (2012).

⁸ Until the Departments put into place the accommodation for these eligible for-profit entities or Congress passes a law that fixes the decision, the employees who work for companies that have received a judicial order allowing them to refuse to comply with the requirement are denied coverage.

⁹ 79 Fed. Reg. *supra* note 1, at 51,118, 51,122.

accommodation (which is currently available for non-profit organizations)¹⁰ is only extended to companies that come within the ambit of the Court’s *Hobby Lobby* decision. An overly broad definition would be inconsistent with the majority’s ruling in *Hobby Lobby*.

As set forth below, the Departments’ proposed approaches do not fully reflect the Court’s holding and would therefore not achieve the Departments’ goals. The following approach more closely adheres to *Hobby Lobby*, and also ensures that women affected by the decision have insurance coverage of contraception without cost-sharing.

Hobby Lobby’s Central Holding

Hobby Lobby held that RFRA entitled three for-profit “closely held corporations, each owned and controlled by members of a single family” with sincere religious objection to contraceptive insurance coverage to refuse to cover contraception in their employer-based health insurance plan.¹¹ In reaching this holding, the Court concluded that the Government had a less restrictive means—the accommodation that had already been established for certain non-profit entities with religious objections to such coverage—for providing women insurance coverage of this service.

However, the Court did not define “closely held” corporation or rely on a statutory definition of the term in its decision. Indeed, there is no single, uniform definition of a “closely held” corporation under law.¹² It is possible to determine which for-profit companies can seek an accommodation under RFRA by looking to the facts and reasoning set forth in *Hobby Lobby*. At the heart of the decision is the Court’s conclusion that a corporation can rely on RFRA when there is unity of interest between the owners and the corporation such that the corporation’s business practices reflect and promote the owners’ religious beliefs. The Court accordingly considered a variety of indicia that established that the individuals who owned and controlled the companies at issue shared sincere religious beliefs—beliefs that could be attributed to the

¹⁰ The current accommodation allows non-profit entities that hold themselves out as a religious and have a religious objection to including contraception in their employee health insurance plans to opt out of that coverage. The Departments issued an Interim Final Rule in August 2014, augmenting the process by which entities can opt out of coverage. The Departments are currently accepting comments on the changes it made to the accommodation.

¹¹ *Hobby Lobby*, 134 S. Ct. at 2774.

¹² What follows is a sample of some states very different definitions of “closely held” corporation. See e.g., DEL. CODE ANN. tit. 8, § 342 (2014) (a close corporation is corporation in which “all of the corporation's issued stock of all classes, exclusive of treasury shares, shall be represented by certificates and shall be held of record by not more than a specified number of persons, not exceeding 30”); GA CODE ANN. § 14-2-902 (2014) (“A corporation having 50 or fewer shareholders may become a statutory close corporation by amending its articles of incorporation to include the statement required by subsection (a) of this Code section”); see also *Donohue v. Rodd Electrottype Co. of New England, Inc.*, 328 N.E. 2d 505, 511 (Mass. 1975) (“[A closely held corporation] has “no single, generally accepted definition.”); *Balvik v. Sylvester*, 411 N.W.2d 383, 386 (N.D. 1987) (“The typical attributes of a close corporation are that: (1) the shareholders are few in number, often only two or three; (2) the shareholders usually live in the same geographical area, know each other, and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and (4) there is no established market for the corporate stock.”); *Haefele v. Haefele*, 837 N.W.2d 703, 711 n.5 (Minn. 2013) (“Minn. Stat. § 518A.30 does not define “closely held corporation,” and the term is defined somewhat inconsistently in other Minnesota statutes.”). Compare MINN. STAT. § 176.011, subd 2a (2012) (defining a closely held corporation as “a corporation whose stock is held by no more than ten persons”), with MINN. STAT. § 302A.011, subd. 6a (2012) (defining a closely held corporation as “a corporation which does not have more than 35 shareholders”).

corporation because of the identity of interests.¹³ Only when the religion of the owners can be imputed to the corporation, can the corporation seek protection under RFRA; under these limited circumstances, allowing this protects the owners' sincere religious beliefs.¹⁴

Hobby Lobby, Mardel, and Conestoga Wood Specialties are each owned and controlled by a handful of members of a single family, all of whom have agreed to run their businesses in conformity with the owners' shared religious practice.¹⁵ Corporate documents reflected the agreements. Hobby Lobby's statement of purpose, for example, provided that the owners would "[h]onor[] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."¹⁶ Each family member also signed a "pledge to run the businesses in accordance with the family's religious beliefs."¹⁷ Conestoga Wood Specialties' "Vision and Values Statement" also explicitly affirmed that the company's business practices would "reflect [the owners'] Christian heritage."¹⁸ And, the company's board of directors adopted documents that also reflected the owners' religious beliefs.¹⁹ According to the Court, the companies' businesses practices further demonstrated that the families ran their companies in accordance with their shared religious beliefs.²⁰

While we appreciate the Departments' proposals to define the "closely held" companies that could be eligible for the accommodation, the Departments' proposals do not comport with the standards outlined in *Hobby Lobby*. The proposed standards would not adequately limit the scope of the regulations to the for-profit, "closely held" companies that the Court ruled can now establish a RFRA claim to refuse to include contraceptive coverage in the employer-based health insurance plan.

Neither proposed approach ensures that only "closely held" for-profit companies that operate according to the religious beliefs of their equity holders can opt out of the coverage requirement by using the accommodation.²¹ Indeed, under the Departments' second approach, 49% of the owners might not even agree to run a corporation according to sincere religious beliefs—the touchstone of any meritorious RFRA claim and the heart of *Hobby Lobby*. Accordingly, we suggest an alternative definition as set forth below.

¹³ *Hobby Lobby*, 134 S. Ct. at 2774 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.").

¹⁴ *See Id.* at 2768 ("A corporation is simply a form of organization used by human beings to achieve desired ends When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."). We disagree with Court's decision that corporations can exercise the religious beliefs of their owners, and in light of it, the Departments must ensure that women who work at these companies get the insurance coverage of contraception they are entitled to under law.

¹⁵ *Id.* at 2764-66.

¹⁶ *Id.* at 2766.

¹⁷ *Id.*

¹⁸ *Id.* at 2764.

¹⁹ *Id.*

²⁰ *Id.* at n. 28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.").

²¹ We note that state law definitions of a "close corporation" vary in the number of permissible owners, but the maximum in any state is 50. *See* MO. REV. STAT. § 351.755 (2014).

A. Definition of a “Closely Held” For-Profit Corporation Eligible for the Accommodation

As explained above, the Departments’ proposed standards do not adequately define the universe of for-profit, “closely held” companies, like Hobby Lobby, that can now establish a RFRA claim to refuse to include contraceptive coverage in employer-based health insurance plans. When the Court referred to “closely held” companies in its decision, the Court did not rely on a statutory definition and the term itself lacks one single definition. Instead, the Court relied on three main factors to reach its conclusion that certain “closely held” companies’ equity holders exercise their religious beliefs through their companies:²²

- 1) The companies were wholly owned by the individual plaintiffs;²³
- 2) The individual plaintiffs controlled the companies that they owned;
- 3) The individual plaintiffs operated the companies in accordance with their shared religious purpose, as reflected in the companies’ governing documents and demonstrated through operation of the companies.

In focusing on these factors, the majority provided a framework that the Departments should use to identify which “closely held” for profit companies would qualify for the accommodation. These factors establish that the owners unanimously agreed to operate their corporations based on the religious beliefs of the owners. This set of factors establishes that only a narrow subset of companies would actually be able to “agree to run a corporation under the same religious beliefs,” a prerequisite to a successful RFRA claim under the Hobby Lobby decision.²⁴ And thus, it is only this sub-set of “closely held” corporations that should be eligible for the accommodation.

As the majority’s rationale for according the corporations rights under RFRA was associational – the corporations could assert rights under RFRA because they represent the equity holders who all agreed to associate as business owners with a shared religious purpose – the same principle must be carried forward in the definition of the “closely held” entities who can claim the accommodation.

Based on this framework, we suggest the following as the definition for the for-profit closely held companies who are eligible for the accommodation.

1. None of the shares are publicly owned or offered

We support the Departments’ decision to exclude from the definition of an eligible for-profit any corporation with shares that are publicly traded or offered for public trading. A guiding principle in the *Hobby Lobby* decision was that the equity holders agree to operate their company with a

²² *Hobby Lobby*, 134 S. Ct. at 2764-75.

²³ Although Hobby Lobby and Mardel were owned by trusts, the majority noted that “[t]he Greens operate Hobby Lobby and Mardel through a management trust, of which each member of the family serves as trustee. The family provided that the trust would also be governed according to their religious principles.” *Id.* at n. 17. Therefore, for the purposes of the litigation, the individuals essentially solely owned these companies through the trusts that they maintained and required to be operated under the same religious beliefs of the members of the trust (which was then the same standard for the plaintiff companies).

²⁴ *Id.* at 2774.

religious identity.²⁵ Including publicly-traded companies in the definition of an eligible for-profit would likely include companies with shareholders who did not share a single religious purpose; the corporation would then not reflect the religious beliefs of all equity holders, as required by *Hobby Lobby*.²⁶

2. There is an expression of religious belief guiding the company's operation

Adherence to *Hobby Lobby* requires the Departments to focus on whether the equity holders are operating the corporation according to the equity holders' shared religious beliefs. Only when there is such a unity of interest between the equity holders and the for-profit entity, will the entity be able to make RFRA claims on behalf of the equity holders.

Unity of interest is a legal concept where different parties that would normally be treated as separate entities are so aligned that the law treats them as one.²⁷ The Court in *Hobby Lobby* concluded that the plaintiffs had such a unity of interest by establishing that they operated the company according to their religious beliefs.²⁸ Indeed, the families who owned the plaintiff corporations pledged to operate the company according to their religious beliefs, and operated their company in a manner that was dedicated to their "Christian heritage" and "in a manner consistent with Biblical principles."²⁹ Because of the close relationship between the owners and the companies they owned and controlled and that the companies' business practices reflected the individual owners' religious beliefs, the Court held that the companies could assert RFRA rights based on the religious beliefs of the companies' owners.

3. All equity holders must unanimously agree to express their shared religious beliefs

For the unity of interest to be sincerely reflected, all equity holders must unanimously agree that the company will be governed according to the religious beliefs of the equity holders.³⁰ Indeed, unanimous agreement is the only way to demonstrate that the "closely held" for-profit entity operates in accordance with the shared religious beliefs of all equity holders, as noted by the majority in *Hobby Lobby*.³¹

²⁵ *Id.* at 2774 ("These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.")

²⁶ *See Id.* at 2751.

²⁷ This "unity of interest" standard is supported by other areas of law. *See e.g.*, Conn. Gen. Stat. Ann. § 51-241 (West 2013) ("Where the court determines a unity of interest exists, several plaintiffs or several defendants may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly"); *Minifie v. Rowley*, 202 P. 673, 676 (Cal. 1921) ("that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased.")

²⁸ *Hobby Lobby*, 134 S. Ct. at n. 23. The majority relied on this factor to dispute the dissent's challenge that for-profit companies exist to make profit. The majority's response was "some for-profit corporations do seek 'to perpetuate the religious values shared' in these cases, by their owners." *Id.*

²⁹ *Id.*

³⁰ *See, e.g.*, MODEL BUS. CORP. ACT § 7.32.

³¹ The majority cites to Delaware law for incorporating a close corporation as representative of how state law would deal with equity holder disputes over the exercise of the equity holders' religious beliefs in operating the companies.

Accordingly, an eligible for-profit corporation is one where all equity holders unanimously agree to operate the corporation based on the equity holders' shared religious beliefs. This unanimous agreement must be reflected in the company's corporate documents. For the purposes of this definition:

- "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.
- "Corporate document" should be defined to include those documents that create or govern the entity. This includes, but is not limited to the charter, certificate or articles of incorporation or formation, bylaws, memorandum and articles of association, operating agreement, limited liability company agreement, partnership agreement, limited partnership agreement, limited liability partnership agreement, mission statements, or other similar constituent or organization documents.

B. 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 accommodation and who wish to be released from the contraceptive coverage requirement in Section 2713, must take a separate corporate action in order to invoke the accommodation in order to refuse to cover contraception in its health insurance plan. Also, we agree with the Departments' suggestion that they must then present the Departments with documentation of that action. Eligible entities must present the Departments with documentation of their qualification for the accommodation. This will ensure that the Departments are able to provide adequate oversight of the entity's decision making process and eligibility for the accommodation.

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

As explained in the section above, the equity holders in *Hobby Lobby* all agreed that they had a religious objection to covering contraception in the health insurance plans offered by their companies. Although we appreciate the Departments' proposal that the eligible entity take a valid corporate action to assert the "owners' religious objection to providing some or all

Hobby Lobby, 134 S. Ct. at 2775. The Delaware provision that the majority cites to relates to a decision by the equity holders regarding management of a close corporation. In the provision, the equity holders can decide to manage the corporation, instead of a board of directors managing the corporation. However, they can only elect to such management: "**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**...If the certificate of incorporation contains a provision authorized by this section, the existence of such provision shall be noted conspicuously on the face or back of every stock certificate issued by such corporation." DEL. CODE ANN. tit. 8, § 351(2011) (emphasis added). By citing to this specific provision, the majority suggests that as to fundamental operational questions – for example, whether the company is operated by a board or directly by the shareholders or whether to operate the company as to the equity holders' religious beliefs, unanimous agreement is appropriate.

contraceptive coverage,”³² the Departments must strengthen this process if it is to meet the *Hobby Lobby* standard by requiring unanimous action by the equity holders. This is what *Hobby Lobby* requires.

Accordingly, the eligible entities must complete a two-step process in order to avail itself of the accommodation:

1. First, all equity holders must unanimously certify—under penalty of perjury—that they each have religious objection to the entity covering contraception in its employer-sponsored plan. This certification must direct the entity’s board or leadership that manages the eligible entity to fulfill the equity holders’ intent in accordance with the entity’s governing structure and in accordance with state law. This step ensures that any subsequent corporate action to take up the accommodation is a reflection of the equity holders’ sincere religious beliefs.
2. Second, the entity’s board or leadership must take the required corporate action asserting the accommodation. This step would follow whatever state law requires for a board to take an action for the corporation.

Certification from each equity holder articulating religious objection to covering contraception is necessary to ensure that any corporate action to exclude contraceptive coverage is based on the shared, sincere religious beliefs all equity holders.³³ The Departments must ensure to include this certification requirement in the final rule.

2. Entities must notify the Departments or self-certify to qualify for the accommodation

The Departments must require an eligible for-profit entity seeking to take advantage of the accommodation to either self-certify to the insurer or TPA or notify HHS, as established in the accommodation for the eligible non-profit entities.³⁴

The Departments also invite comments “whether to require documentation of the decision-making process and disclosure of the [corporate action] decision.”³⁵ In addition to providing self-

³² 79 Fed. Reg. *supra* note 1, at 51,122.

³³ See *Hobby Lobby*, 134 S.Ct. at 2774 n.28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”) (citations excluded).

³⁴ Under the interim final rule issued on August 27, 2014, eligible non-profit organizations can submit self-certification via the ESBA 700 form and provide that form to their issuer or TPA, or 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,” we assume the Departments intend for eligible “closely held” for-profit entities to follow the same process as eligible non-profit organizations and will permit entities the option to self-certify via the ESBA 700 form (amended to reflect the new “eligible organization” definition), or a similar form where the entity certifies that it satisfies the criteria necessary to assert the accommodation because it meets the definition of an eligible entity and that it took the necessary steps to assert the accommodation. 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. pt. 2510, 2590, 45 C.F.R. pt. 147).

³⁵ 79 Fed. Reg. *supra* note 1, at 51,122.

certification or notification, the Departments should require a qualifying for-profit entity include the documentation of the corporate action and the documentation reflecting its qualification for the accommodation (i.e., the corporate documents defined above). In addition, the Departments should reiterate that the record retention requirements in current regulation extend to such supporting documentation.³⁶

Finally, in the event the eligible entity sends the self-certification and supporting documentation to its insurer or TPA, the insurer or TPA must forward that information to HHS. This step is necessary for HHS to properly oversee and enforce that qualifying entities are properly availing themselves of the accommodation. We similarly urge the Departments to adopt this step for the non-profit accommodation as well.

C. Enforcement and Oversight

As with the entire ACA, the proposal to expand the accommodation must include close oversight and enforcement by the Departments to ensure that plans and employers comply with the changes resulting from the final rule. The Departments must ensure that employers, TPAs, and issuers meet the requirements of the accommodation so that women have full access to the coverage guaranteed to them under the women's preventive health services coverage requirement. We urge the Departments to be vigilant in their oversight and enforcement efforts for the proposed expanded accommodation.

The Departments must maintain an oversight and enforcement entity specifically for the contraceptive coverage accommodation for both the eligible for-profits and non-profits and for the exemption. The Departments will not only be responsible for ensuring only qualified entities avail themselves of the accommodation or exemption, it will also serve as a place for women who believe their employer has wrongly claimed status as a "religious employer" or an "eligible organization" to file a complaint. Additionally, it is important to have a separate oversight and enforcement entity dedicated to the contraceptive coverage accommodation because enforcement of the contraceptive coverage requirement will differ based on the source of insurance coverage.³⁷

A centralized oversight and enforcement entity for the contraceptive coverage exemption and accommodation 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.

Further detail regarding enforcement will be forthcoming in comments to the Interim Final Rule issued by the Departments on August 27, 2014 regarding adjustments to the non-profit

³⁶ 26 C.F.R. § 54.9815-2713A(a)(4) (2014); 29 C.F.R. § 2590.715-2713A(a)(4) (2014); 42 C.F.R. § 147.131(b)(4) (2014).

³⁷ 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.

accommodation. We urge the Departments to consider these additional proposals and apply them to the accommodation for both the eligible non-profit and “closely held” for-profit entities.

D. Other Aspects of the Current Accommodation That Need to Be Modified, Enforced, or Reiterated In Light of the Addition to the Definition of Eligible Organization

We appreciate the Departments for seeking comment on other aspects of the current accommodation³⁸ that will be affected by expanding the definition of “eligible organization” to include “closely held” for-profit corporations as defined above. It is imperative that women continue to get the coverage guaranteed to them by the ACA despite the addition of more employers to the accommodation. The Departments’ final rule must ensure that systems are in place so that the accommodation process works effectively, that women receive seamless coverage, and that their legal protections remain in place.

1. The Departments must ensure that the accommodation is working as efficiently and effectively as possible so that women with accommodated plans do not face barriers to contraceptive coverage.

The Departments must ensure that the accommodation provides coverage of the full range of FDA-approved methods of contraception and related counseling 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 will get seamless access to contraception in a timely manner and without barrier.

2. Women with accommodated plans must receive seamless coverage of contraception with no cost sharing.

In keeping with the requirements of the ACA and the Departments’ goal that women have access to contraceptive coverage without cost sharing and the Supreme Court’s promise that extending the accommodation to “closely held” for-profit corporations would have “precisely zero” impact on women, it is critical that women with accommodated plans receive seamless coverage of contraception without cost-sharing. This means that plan beneficiaries should face no additional barriers to receiving coverage simply because the employer is accommodated.

(a) The Departments Should Reiterate That Plans Provided Through the Accommodation Must Comply with All Other Aspects of the Contraceptive Coverage Requirement.

³⁸ 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. pt. 2510, 2590, 45 C.F.R. pt. 147, 156).

Plans provided via the accommodation are subject to all of the legal standards for coverage of preventive services—and specifically for the coverage of contraceptives—under the Affordable Care Act. Contraceptives must be covered with no out-of-pocket payments just as they are in all non-grandfathered private plans.

(b) Contraceptive Coverage Must Be Accessible Regardless of a Beneficiary's Cultural or Racial Background, English Proficiency, Disability, Sexual Orientation, or Gender Identity.

The contraceptive coverage requirement applies to women of reproductive capacity. Accordingly, it is incumbent on the Departments to ensure that women—regardless of race, ethnicity, English proficiency, disability, sexual orientation, gender identity, or other such characteristics—do not face barriers to accessing it and should incorporate cultural competency in its rulemaking on the accommodation. Cultural competency “has a positive effect on patient care delivery by enabling providers to deliver services that are respectful of and responsive to the health beliefs, practices and cultural and linguistic needs of diverse patients.”³⁹

Barriers to health care exist for many groups. According to the American Journal of Public Health, “[p]eople of color frequently report higher prevalence of health conditions, such as diabetes and obesity. Low-income people of all races report worse health status than higher income people and differences by race and ethnicity persist even within income groups.”⁴⁰ Cultural competency is also key to LGBTQ individuals accessing health care. As the Human Rights Campaign states, “[a] provider’s lack of cultural competence has been shown to negatively affect not only provider-patient interaction and care-giving, but also the patient’s care seeking behavior.”⁴¹ Cultural competency is also critical “to ensure appropriate, culturally sensitive care to persons with congenital or acquired disabilities.”⁴²

In the final rule, the Departments should state that seamless coverage must include cultural competency measures, including but not limited to:

- Insurers and TPAs making the notice that employers have taken the accommodation be available in other languages so that limited-English proficient women are well informed about their legal right to contraceptive coverage;

³⁹ National Institutes of Health, *Cultural Competency*, <http://www.nih.gov/clearcommunication/culturalcompetency.htm> (last visited, Oct. 21, 2014).

⁴⁰ The Henry J. Kaiser Family Foundation, *Disparities in Health and Health Care: Five Key Questions and Answers* 1 (2012), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8396.pdf> (“Recent analysis estimates that 30% of direct medical costs for Blacks, Hispanics, and Asian Americans are excess costs due to health inequities and that the economy loses an estimated \$309 billion per year due to the direct and indirect costs of disparities.”).

⁴¹ Human Rights Campaign, *LGBT Cultural Competence*, <http://www.hrc.org/resources/entry/lgbt-cultural-competence> (last visited Oct. 20, 2014). According to the Centers for Disease Control, “Social inequality is often associated with poorer health status, and sexual orientation has been associated with multiple health threats. Members of the LGBT community are at increased risk for a number of health threats when compared to their heterosexual peers.” (Centers for Disease Control and Prevention, *About LGBT Health* (2014), <http://www.cdc.gov/lgbthealth/about.htm> (last visited Oct. 20, 2014)).

⁴² Gary E. Eddey and Kenneth L. Robey, *Considering the Culture of Disability in Cultural Competence Education*, 80 J. ASS’N AM. MED. C. 706 (abstract) (2005).

- Insurers and TPAs providing all information and assistance to beneficiaries in a manner that is accessible to those with disabilities;
- Insurers and TPAs providing notification to all beneficiaries in a manner that is sensitive to issues of confidentiality and does not actually reveal whether a beneficiary has used contraceptive coverage. We are concerned for the potential safety of women in relationships involving interpersonal violence whose partners are not aware of their contraceptive use.

(c) Plans May Not Create 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 the carriers' non-accommodated plans. Ultimately, the beneficiaries for both should receive 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 one card would reduce complications for health care providers and women receiving contraceptive coverage through the accommodation, thus helping to ensure seamless access to this critical benefit.

3. The Departments should reiterate their prior statements that the exemption and accommodation definitions have no precedential value, no impact on other existing legal obligations of the employers, and do not preempt state laws.

(a) The Definitions Have No Precedential Value and No Impact on Existing Legal Obligations of Employers.

We strongly supported the statement in the final rule establishing the current accommodation (the “July 2013 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.”⁴³

The rule continued:

“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. For example, nothing in these final regulations should be construed as affecting the interpretation of federal or state civil rights statutes, such as Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendment of 1972.”⁴⁴

⁴³ 78 Fed. Reg., *supra* note 38, at 39, 888.

⁴⁴ *Id.*

Given that the current proposed rule expands the accommodation to a larger group of employers, it is very important that the final rule reiterate that the definitions included in it have no precedential value, are for the sole purpose of determining which employers qualify for the accommodation, and that an employer's legal obligations under existing law is not changed in any manner. Such laws include, but are not limited to, those obligations under including but not limited to Employee Retirement Income Security Act of 1974 ("ERISA"),⁴⁵ ACA, Health Insurance Portability and Accountability Act of 1996 (HIPAA),⁴⁶ Title VII of the Civil Rights Act of 1964,⁴⁷ and Title IX of the Education Amendments of 1972.⁴⁸ Moreover, women who are not employed by these entities but are beneficiaries of the employers' health insurance plans also have legal protections that do not change under the accommodation.

In addition, to the extent that the proposed rule requires employers, issuers, and TPAs to fulfill various aspects of providing the coverage, employees and their eligible dependents must be able to exert their legal rights as participants and beneficiaries against all three parties to the extent that they are responsible. In other words, where the accommodation allows an employer to shift its responsibility to an issuer or TPA, the issuer or TPA assumes that employer's legal obligations.

Ultimately, the legal rights of women must not be undermined. Any other result would create a loophole in the critical network of federal and state laws that have been enacted to protect women. That would be an unacceptable result.

(b) The Federal Contraceptive Coverage Rule Provides A Floor And States Can Establish Stronger Consumer Protections.

We support the Departments' statement in the July 2013 final rule that:

“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.”⁴⁹

⁴⁵ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

⁴⁶ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

⁴⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., & 42 U.S.C.).

⁴⁸ 20 U.S.C. § 1681 (2012).

⁴⁹ 78 Fed. Reg., *supra* note 38, at 39,888.

As the Departments recognized in that July 2013 rule, twenty-eight states have existing legal requirements mandating coverage of contraception in health insurance plans.⁵⁰ Like the women's preventive health services required by the ACA, these state laws were enacted to remedy disparities in women's access to critical health care. These laws have gone a long way toward meeting women's unique health care needs and ensuring health benefits for both women and their families. Because RFRA does not apply to state laws and the Supreme Court was only considering RFRA's application to the federal contraceptive coverage requirement, the *Hobby Lobby* decision does not affect state contraceptive equity laws; these continue to exist as a separate legal requirement on plans governed by state law. The Departments should acknowledge this and reiterate their preemption statements again in this final rule.

4. Eliminating the exemption and replacing it with the accommodation would ensure that more women have access to this critical health service.

As stated in comments on the February 2013 proposed rule submitted by many of the undersigned organizations, we oppose the exemption that allows certain "religious employers" to exclude contraceptive services from their employees' health plans. This exemption means that women and their dependents who receive health coverage through these organizations will completely lose the contraceptive coverage and all of its concomitant benefits. Now that the Departments, in light of *Hobby Lobby*, are expanding the definition of eligible organizations to include certain "closely held" corporations, the Departments should replace the exemption with the accommodation. This would allow all women regardless of where they work to have access to contraceptive coverage with no cost sharing.

In closing, we support the Departments' goal of ensuring that all women – regardless of where they work – have coverage of contraceptives without cost-sharing. With the standards set forth above, the expansion of the accommodation to certain "closely held" for-profit corporations will meet this important goal that promotes women's health and equality.

Sincerely,

Advocates for Youth
American Association of University Women
American Civil Liberties Union
American Public Health Association
American Sexual Health Association
American Society for Emergency Contraception
Bend the Arc: A Jewish Partnership for Justice
Black Women's Health Imperative
Center for Reproductive Rights
Coalition of Labor Union Women
Colorado Health Initiative
Feminist Majority Foundation

⁵⁰ Certain Preventative Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,507-08 (proposed Mar. 21, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

Hadassah, The Women's Zionist Organization of America
Human Rights Campaign
Institute for Science and Human Values
Jacobs Institute for Women's Health
Jewish Women International
Lambda Legal
Maine Women's Lobby
Maryland Women's Coalition for Health Care Reform
MergerWatch Project
NARAL Pro-Choice America
National Abortion Federation
National Center for Lesbian Rights
National Consumers League
National Council of Jewish Women
National Family Planning and Reproductive Health Association
National Health Law Program
National Latina Institute For Reproductive Health
National Partnership for Women & Families
National Women's Law Center
Northwest Health Law Advocates
The Ovarian Cancer National Alliance
Planned Parenthood Federation of America
Population Connection Action Fund
Raising Women's Voices for the Health Care We Need
Religious Coalition for Reproductive Choice
Reproductive Health Technologies Project
Sexuality Information and Education Council of the U.S.
(SIECUS)
Southwest Women's Law Center
Unitarian Universalist Association
United Church of Christ, Justice and Witness Ministries
UniteWomen.org
Women's Law Project
WV Free