

October 21, 2014

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

RE: Notice of Proposed Rulemaking, “Coverage of Certain Preventive Services Under the Affordable Care Act,” (CMS-9940-P)

Dear Administrator Tavenner:

The National Family Planning & Reproductive Health Association (NFPRHA) is pleased to respond to 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

NFPRHA is a national membership organization representing the broad spectrum of family planning administrators and providers who serve the nation's low-income, underinsured, and uninsured women and men. NFPRHA's members operate or fund a network of nearly 5,000 safety-net health centers and service sites that provide high-quality family planning and other preventive health services to millions of individuals in all 50 states and the District of Columbia, Puerto Rico, and Guam.

We thank the administration for its continuing commitment to ensuring that all women—regardless of where they work—have coverage of contraceptives without cost-sharing. While we appreciate the Departments' efforts to ensure that women harmed by the US Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,² have insurance coverage of contraception, we think that the Departments' proposed approaches do not fully reflect the Court's holding and would therefore not achieve the Departments' goals. We accordingly propose an alternative approach that more closely adheres to *Hobby Lobby* and ensures that women affected by the decision have access to contraception without cost-sharing.

¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (Aug. 24, 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).

Background

The Affordable Care Act (ACA) recognizes that contraception is basic, preventive health care that improves the lives and health of women, children, and families. The contraceptive coverage requirement is a historic achievement, enabling millions of women to choose the best contraceptive method for them without cost barriers. As such, we continue to strongly support the Departments' regulation requiring that new health insurance plans cover women's preventive health services, including contraception, without cost-sharing,³ and we strongly supported the Departments' original decision to require all for-profit organizations to fully comply with Section 2713 of the Public Health Service Act. Contraception should not be stigmatized by isolating it from other coverage or services, nor should hurdles exist which make securing access to this care more difficult.

Unfortunately, in *Hobby Lobby*⁴ the Supreme Court held—we believe wrongly—that the Religious Freedom Restoration Act (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. In reaching this holding, the Court concluded that the government had a less restrictive means of achieving its goal—the accommodation that had already been established for certain non-profit entities with religious objections to such coverage.

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. However, it is possible to determine which for-profit companies can seek an exemption 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 corporation because of the identity of interests. 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.

We believe that Departments' 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. 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.

³ 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>.

⁴ 134 S. Ct. 2751 (2014).

A. Definition of A “Closely Held” For–Profit Corporation 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. 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*.

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, which would establish unity of interest. 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.

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. 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*.

B. Valid Corporate Action and Notification to the Departments

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

We propose the Departments require the following process to be completed on an annual basis in order to assert the accommodation:

1. First, all equity holders must unanimously agree to take formal action (e.g., adopt a resolution) that sets forth the equity holders’ objection to cover some or all contraceptive methods in the eligible entity’s insurance plan because such coverage would violate the equity holders’ religious beliefs. This action 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 corporation 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.

2. Entities must notify the Departments

The Department must require an eligible for-profit entity seeking to take advantage of the accommodation to either self-certify to the insurer or third-party administrators (TPA) or notify HHS, as established in the accommodation for the eligible non-profit entities. In addition to providing self-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). If the Departments choose not to require documentation beyond self-certification or notification, we ask the Departments to clarify that the record retention requirements in current regulation extend to such supporting documentation.

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.

D. Other Aspects of the July 2013 Final Regulations That Need to Be Modified, Enforced or Reiterated In Light of the Addition to the Definition of Eligible Organization

We applaud the Departments for seeking comment on other aspects of the current accommodation 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 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 the beneficiaries' legal protections remain in place.

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

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—including ensuring that there are enough TPAs to provide contraceptive coverage for self-insured plans.

2. **Women with accommodated plans must receive seamless coverage of contraception with no co-pay.**

In keeping with 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 Section 2713.**

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 Section 2713 of 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 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, gender identity, or other such characteristics -- do not face barriers to accessing it. 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."⁵ Cultural

⁵ 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

competence 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.”⁶ Cultural competency is also critical “to ensure appropriate, culturally sensitive care to persons with congenital or acquired disabilities.”⁷

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;
- 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.

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.”)

⁶ 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 and Prevention, “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)).

⁷ Gary E. Eddey and Kenneth L. Robey, *Considering the Culture of Disability in Cultural Competence Education*, 80 J. ASS’N AM. MED. C. 706 (2005).

3. The Departments' should reiterate their statements from the July 2013 rule 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.

It is critical that the Departments reiterate their statements from the July 2013 final rule that the definitions in the exemption and accommodation do not impact any other legal rights or legal obligations. Given that the current proposed rule expands the accommodation to a larger group of employers it is very important that the final rule reiterate these standards. These statements include:

- The designation of an employer as an excepted or accommodated employer has no precedential value and that the use of those designations is limited to the accommodation;
- The designation could not be construed to effect the legal obligations that employers have under other laws, including but not limited to Employee Retirement Income Security Act of 1974 (“ERISA”),⁸ ACA, Health Insurance Portability and Accountability Act of 1996 (HIPAA),⁹ Title VII of the Civil Rights Act of 1964,¹⁰ and Title IX of the Education Amendments of 1972.¹¹
- The federal regulations do not preempt state laws and the contraceptive rule provides a floor for coverage which states can exceed with stronger consumer protections. 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.

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

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 that receive health coverage through these organizations will completely lose the contraceptive coverage and all of its concomitant benefits. Now that the Departments are expanding the definition of eligible organizations to include 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.

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⁸ 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.).

⁹ 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.).

¹⁰ 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.).

¹¹ 20 U.S.C. 1681 (1972).

NFPRHA appreciates the opportunity to comment on the proposed rule from the Department of the Treasury, Department of Labor, and Department of Health and Human Services to define the “closely held” companies that could be eligible for the accommodation. If you require additional information about the issues raised in these comments, please contact Robin Summers at rsummers@nfprha.org or 202-286-6877.

Sincerely,

A handwritten signature in cursive script that reads "Clare M. Coleman". The signature is written in a dark ink and is positioned above the printed name.

Clare Coleman,
President & CEO