

April 8, 2013

Department of Health and Human Services  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244-1850

Re: Comments on Proposed Rule, "Coverage of Certain Preventive Services Under the Affordable Care Act," (CMS-9968-P)

Dear Secretary Sebelius:

The National Family Planning & Reproductive Health Association (NFPRHA) is pleased to respond to the proposed rule issued by the Department of the Treasury, Department of Health and Human Services (HHS), and the Department of Labor modifying the contraceptive coverage requirement in the Affordable Care Act (ACA).

NFPRHA is a national membership organization representing the nation's family planning providers – nurse practitioners, nurses, administrators and other key health care professionals. NFPRHA's members operate or fund a network of nearly 5,000 health centers and service sites that provide high-quality family planning and other preventive health services to millions of low-income, uninsured, or underinsured individuals in 49 states, the District of Columbia, Puerto Rico, and Guam.

Under the proposed rule, HHS seeks to both clarify the requirements for organizations that qualify for the exemption to the contraceptive coverage requirement and create an accommodation for religiously affiliated organizations who object to covering contraception in their health insurance plan.<sup>1</sup>

NFPRHA does not support the contraceptive coverage requirement accommodation as it creates a barrier to care for the employees and plan beneficiaries of the organizations eligible for the accommodation. However, given that HHS is providing an accommodation, NFPRHA believes the

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<sup>1</sup> "Coverage of Certain Preventive Services Under the Affordable Care Act, Proposed Rule." *Federal Register* 78:25 (February 6, 2013) p. 8459.

policies outlined below should be included in the final rule to ensure contraceptive access for the millions of women who could be unfairly subjected to the accommodation despite the intent of the law to provide access to women's preventive health services through the ACA.<sup>2</sup>

1. NFPRHA asks that HHS adopt a final rule that allows a narrow group of religiously affiliated organizations to take advantage of the accommodation.
2. NFPRHA asks that HHS publish a final rule requiring employers that choose the accommodation to deliver timely, accurate, and clear information about the contraceptive coverage without cost-sharing to their employees.
3. NFPRHA asks that HHS draft a final rule that promotes access to comprehensive and seamless coverage of contraception for employees (and other plan beneficiaries) who work for organizations that are eligible for the accommodation, including self-insured organizations.
4. NFPRHA asks that HHS adopt a final rule that prohibits religious employers from carving out specific contraceptive methods from plan beneficiaries' coverage.
5. NFPRHA asks that HHS publish a final rule containing protections for employees and other plan beneficiaries of employers who are eligible and avail themselves of the accommodation.

### ***Organizations Eligible for the Accommodation***

NFPRHA asks HHS to publish a final rule that accomplishes the goal of expanding contraceptive coverage to all women without cost-sharing. HHS should not publish any rules or guidance to accommodate additional organizations with objections to such coverage, which would limit access to the benefit. The final rule should not allow private, for-profit entities whose owners or leadership oppose contraception to be eligible for the accommodation. For-profit businesses exist to make money through commercial activity, not to exercise religion.

Contraception is basic, preventive health care that improves the lives and health of women, children, and families. Reducing unplanned pregnancy through the use of contraception improves maternal and child health. Without contraceptive coverage, plan beneficiaries will be at risk for unintended pregnancies and higher rates of poor maternal and infant health outcomes.<sup>3</sup>

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<sup>2</sup> "Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated into ERISA and the [tax] Code, requires that 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." "Coverage of Certain Preventive Services Under the Affordable Care Act, Proposed Rule." *Federal Register* 78:25 (February 6, 2013) p. 8457.

<sup>3</sup> Guttmacher Institute, *Testimony of Guttmacher Institute, Submitted to the Committee on Preventive Services for Women, Institute of Medicine*, January 12, 2011, accessed March 2012, <http://www.guttmacher.org/pubs/CPSW-testimony.pdf>.

By separating contraception from other preventive health benefits, the accommodation erects a barrier for women attempting to access the benefit in a timely and seamless manner. 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, the accommodation will result in contraception being treated differently from all other basic preventive health care.

### ***Notice to Plan Beneficiaries***

NFPRHA strongly urges HHS to include language in the final rule that requires employers to provide timely, accurate, and clear information about the coverage of contraception without cost-sharing to plan beneficiaries. Beneficiaries should not be penalized or have less access to the benefit because their employer has taken advantage of the accommodation. NFPRHA members serve women who lack access to routine care and are eager to obtain comprehensive coverage under the ACA. Unfortunately, some women may fail to get the care they need if they are denied adequate information detailing their ability to access the contraceptive benefit.

The proposed rule recognizes the importance of providing plan participants and beneficiaries notice about contraceptive coverage without cost-sharing by requiring plan issuers to provide such notice for insured and self-insured group plans.<sup>4</sup> However, the proposed rule's notice requirements should be strengthened. Both employers *and* third-party administrators (TPAs), that may be responsible for administering the coverage, should be required to provide timely, clear, and accurate notice. Notification should inform beneficiaries that they are entitled to insurance coverage of contraceptive devices and services and that the coverage will be provided through a separate plan issuer.

NFPRHA agrees with HHS that TPAs and health insurance issuers should provide notice that the employees and other plan beneficiaries will be receiving contraceptive coverage from a separate insurance issuer – not the employer. Additionally, HHS should require that the employer provide notice to their employees – at the time of employment or plan enrollment – that their primary plan does *not* cover contraceptives and a separate company will be providing that coverage for the employee and/or beneficiaries. The proposed rule only requires that employers provide written notice to plan participants and beneficiaries.<sup>5</sup> However, to reach every participant and beneficiary, HHS should require health insurance issuers and TPAs to use multiple methods of providing notice, including written notice (mail and/or in person), email, and phone calls.

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<sup>4</sup> "Coverage of Certain Preventive Services Under the Affordable Care Act, Proposed Rule." *Federal Register* 78:25 (February 6, 2013) p. 8464.

<sup>5</sup> *Ibid.*

### ***Seamless Coverage, Including Self-Insured Employers***

HHS should make it clear in the final rule that regardless of the entity providing the coverage, contraceptive coverage plans must comply with all the requirements of Section 2713, the ACA, and the regulations and guidance that have been issued regarding both.

NFPRHA urges HHS to adopt the following principles that apply specifically to “eligible organizations” that are self-insured:

TPAs must be legally required to find and contract with an issuer: In the proposed rule, HHS contemplates plans both where the TPA is required to contract with an issuer, and where the TPA does so voluntarily. NFPRHA urges HHS to adopt a final rule that states that, if a TPA chooses to contract with an organization eligible for the accommodation, it is legally required to arrange for an issuer to provide the contraceptive coverage with no co-pay once the TPA receives a self-certification. Under this plan, TPAs would be compensated by a reasonable charge from the issuer. If TPAs are not legally required to do this, seamless coverage cannot be guaranteed.

If no issuers are willing to provide the coverage, the federal government must ensure that the coverage is provided: The accommodation will only work if issuers are willing to provide this benefit. Although issuers will probably be willing to do so, the final rule must include a “back-up plan” to ensure that the accommodation will work. Otherwise, beneficiaries, employers and TPAs will all be negatively impacted. To that end, NFPRHA asks HHS to work on a plan for such a situation – for example, HHS could work with the Office of Personnel Management to require that at least one multi-state plan (MSP) will be available to provide this coverage.

### ***Prohibit Employers from Carving out Specific Types of Contraceptives***

NFPRHA strongly urges HHS to prohibit employers from excluding specific types of contraceptives from employer sponsored coverage. If an employer qualifies for the accommodation it must refuse to cover all methods. Employers should not be able to refuse to cover the contraceptives deemed unacceptable to them. Doing so would be administratively complex, impractical, and would undermine the goal of the contraceptive coverage requirement.

The Institute of Medicine (IOM) report recommended that health plans cover “the full range of Food and Drug Administration–approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity” and “[a]t least one

well–woman preventive care visit annually for adult women.”<sup>6</sup> To permit a bifurcation of contraceptive coverage by some religious employers is in direct contradiction with the IOM’s recommendations. It would be an administrative challenge for health insurance issuers and TPAs working with multiple religious organizations to design numerous plans with various permutations of contraceptive coverage and inevitably increase the potential for confusion among beneficiaries. Moreover, allowing employers to cover only certain types of contraceptives based on medically inaccurate perceptions about particular methods could have adverse policy implications for women’s ability to access a wide range of methods in the future.

### ***Oversight and Enforcement***

HHS should establish enforcement policies for organizations claiming the accommodation. Without proper oversight and enforcement, organizations that are ineligible under the proposed rule may incorrectly relinquish their legal responsibility to provide their employees and plan beneficiaries with contraceptive coverage. Moreover, organizations claiming the accommodation may assume that they have completed their legal responsibility once they self–certify with a TPA or plan issuer, however, HHS should not grant the accommodation to the employer until the TPA or plan issuer makes the coverage available to employees and other plan beneficiaries. HHS should also hold the TPA legally responsible to find a contraceptive–only plan once the employer self–certifies that they are eligible for the accommodation.

The proposed rule states that an eligible organization will self–certify that it meets the necessary criteria for the accommodation, and will maintain the self–certification in its records. HHS suggests that this will allow for examination upon request “while avoiding any inquiry into the organization’s character, mission, or practices.”<sup>7</sup> Simply maintaining the self–certification in the organization’s records, however, would be insufficient in terms of ensuring transparency and for enforcement purposes. NFPRHA recommends that the final rule require an eligible organization seeking to take advantage of the accommodation to file the appropriate form with HHS – to allow for necessary oversight and enforcement. In addition, employer certifications filed with the government will allow employees and prospective employees to understand the full extent of where they get their coverage. HHS should also have the authority to question and verify a certification; such verification of accommodations is routine.<sup>8</sup>

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<sup>6</sup> Institute of Medicine, *Clinical Preventive Services for Women, Closing the Gaps*, accessed March 2012, [http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief\\_updated2.pdf](http://www.iom.edu/~media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf)

<sup>7</sup> “Coverage of Certain Preventive Services Under the Affordable Care Act, Proposed Rule.” *Federal Register* 78:25 (February 6, 2013) p. 8462.

<sup>8</sup> See, e.g., Department of Labor form (exemption can be revoked if self–certification was untruthful or if there has been a material change of circumstances); Department of Justice form (exemption can be revoked if there is “good reason to question the [organization’s] truthfulness in completing” self–certification).

NFPRHA urges HHS to create a more robust and transparent self-certification process for the employers who are eligible for the accommodation. This is necessary if women are going to be fully informed about the coverage that they will be receiving and so that HHS can provide adequate oversight. The administration's stated goal is to guarantee contraceptive access for all women. Thus HHS should be responsible for ensuring all employees and plan beneficiaries of organizations seeking the accommodation receive the coverage that is required by ACA.

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NFPRHA appreciates the opportunity to comment on the proposed rule from the Department of Health and Human Services, the Department of the Treasury, and the Department of Labor modifying the new contraceptive coverage requirement in the ACA. If you require additional information about the issues raised in this letter, please contact Nicolette Paterson at [npaterson@nfprha.org](mailto:npaterson@nfprha.org) or 202-293-3114.

Sincerely,

A handwritten signature in dark ink, appearing to read "Clare M. Coleman", with a stylized flourish at the end.

Clare Coleman,  
President & CEO