

National
Family Planning
& Reproductive Health Association

September 20, 2016

VIA ELECTRONIC SUBMISSION

The Honorable Sylvia Burwell
Department of Health and Human Services
Centers for Medicare and Medicaid Services
Attention: CMS-9931-NC
P.O. Box 8010
Baltimore, MD 21244-1850

Re: **Comments on CMS-9931-NC, Coverage of Contraceptive Services**

Dear Secretary Burwell:

The National Family Planning & Reproductive Health Association (NFPRHA) writes in response to the Request for Information (RFI), Coverage for Contraceptive Services, published in the Federal Register on July 22, 2016 at 81 Fed. Reg. 47741 et seq. We appreciate the Department of Health and Human Services, Department of Labor, and the Department of the Treasury (collectively, “the Departments”) seeking input from a cross section of stakeholders in assessing whether there is a feasible alternative to the existing birth control coverage accommodation.

NFPRHA is a national membership organization representing providers and administrators committed to helping people get the family planning education and care they need to make the best choices for themselves and their loved ones. 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 50 states and the District of Columbia. Services are provided through state, county, and local health departments as well as hospitals, family planning councils, Planned Parenthoods, federally qualified health centers, and other private non-profit organizations.

NFPRHA is committed to increasing birth control access, and we unequivocally support the Affordable Care Act’s (ACA) birth control coverage requirement. We strongly believe that all people should have access to affordable birth control and that insurance coverage should provide for all FDA-approved contraceptive methods – just as insurance coverage extends to other preventive care. The benefits of birth control have been well documented. The Centers for Disease Control and Prevention (CDC) named birth control one of the top ten public health achievements in the past century,¹ and birth control is also widely credited for contributing to

¹ Guttmacher Institute, *Contraceptive Use in the United States, (2013)*, available at http://www.guttmacher.org/pubs/fb_contr_use.html

women's societal, educational, economic gains.² Currently more than 55 million women benefit from the preventive services requirement,³ and it is estimated that women saved more than \$1.4 billion in out-of-pocket costs on birth control pills in 2013 alone as a result of the birth control benefit.⁴ Many of these women rely on employer-sponsored insurance plans to get the coverage they are entitled to by law.

We appreciate the Departments' effort to solicit input on the accommodation in light of the Supreme Court's order in *Zubik v. Burwell*, and we continue to support the Departments in their efforts to ensure that women at accommodated entities receive seamless coverage of contraception without barrier or cost. As NFPRHA has stated in previous comments concerning the contraceptive coverage requirement and accommodation, safety-net programs like the Title X family planning program are not a viable alternative to employer-sponsored or other commercial insurance coverage. Title X is designed to subsidize a program of care for the poor and low-income women and men who rely on it, not to pay all of the cost of any service or activity. Further, Congress has never sufficiently funded the program, and at current funding levels it is only able to serve about one third of the women in need.

Throughout their work to implement the accommodation, the Departments have constantly kept women's health care access at the center of policymaking. We urge the Departments to continue to uplift that important principle in any future policymaking. To that end, our comments detail two of the questions posed in Section II of the RFI, A. 4. and B. 2., regarding how the proposed alternative accommodation procedures could impact women. While these questions pertain to group insurance plans, the same principles we articulate below also apply with respect to self-insured plans.

The Current Accommodation Satisfies the Religious Freedom Restoration Act

The current accommodation is fully consistent with the law and no further modifications are needed. Specifically, the accommodation does not violate the Religious Freedom Restoration Act (RFRA), as the objecting entities have claimed, because it does not substantially burden the employers' religious exercise, and it clearly advances a compelling government interest in ensuring access to birth control—a basic preventive health care service that is critically important for the reasons we've outlined above.⁵

In fact, all but one of the Courts of Appeals that have heard these challenges have held that the current accommodation does not substantially burden an individual's religious beliefs and, thus, does not violate RFRA. As the DC Court of Appeals explained, "[r]eligious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out."⁶ In its order in *Zubik*, the Supreme Court did not address these

² Sonfield, A., Hasstedt K., Kavanaugh, M., and Anderson, R. March 2013. "[The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children.](#)" *Guttmacher Institute*.

³ ASPE Data Point (May 14, 2015), available at <https://aspe.hhs.gov/sites/default/files/pdf/139221/The%20Affordable%20Care%20Act%20is%20Improving%20Access%20to%20Preventive%20Services%20for%20Millions%20of%20Americans.pdf>.

⁴ Nora V. Becker and Daniel Polsky, Women Saw Large Decrease In Out-Of-Pocket Spending For Contraceptives After ACA Mandate Removed Cost Sharing, *Health Affairs*, 34, no.7 (2015):1204-1211. Available at <http://content.healthaffairs.org/content/34/7/1204.full.pdf+html>.

⁵ Brief of National Health Law Program, et.al., as Amici Curiae in Support of the Government, *Zubik v. Burwell*, et. al., <http://www.nationalfamilyplanning.org/file/NHelpZubikAmicusBrief.pdf>.

⁶ *Priests for Life, et al. v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 246 (2014).

questions on the merits, and expressly left the lower courts free to uphold the accommodation yet again.

Moreover, as the administration has stated in its own filings and arguments, the current accommodation is the least restrictive means necessary to meet the compelling government interest of ensuring women receive comprehensive health insurance coverage, including seamless coverage of birth control without cost-sharing. Indeed, Justice Kennedy, in his *Burwell v. Hobby Lobby Stores, Inc.* concurrence, said that the least restrictive alternative available to requiring closely held for-profit employers that have religious objections to birth control to provide coverage directly is the accommodation available to religiously affiliated non-profit organizations.⁷

The Departments have made numerous attempts to address the concerns of objecting entities, even though there has never been a need to do so under RFRA. The objecting entities, however, have made clear time and again through their briefs and press statements that they will not be satisfied with any scenario in which the women enrolled in their plan receive the seamless coverage they are entitled to under the law. In other words, their goal is to prevent women from accessing contraception coverage—and in trying to block a benefit guaranteed by law, the objecting entities are discriminating against their female employees and students. It is not an employer or university's place to determine what health services an employee or student should or should not utilize. Each woman – regardless of where she works or goes to school – should be able to access the health care she needs and is entitled to under the law. The Departments should categorically reject any modification that would allow employers and universities to discriminate by imposing their religious beliefs on those enrolled in their health plan in order to take away a benefit guaranteed by law.

Moreover, making additional adjustments to the accommodation which are not required by RFRA would send the message that entities are entitled to cherry pick which laws they will or will not follow—even when they do so at the expense of their employees. This could embolden those who seek to discriminate beyond the birth control context, such as employers who demand exemptions from non-discrimination protections, with potentially serious consequences for women and LGBTQ people. Therefore, we strongly urge the Departments to reinforce the principle that religion cannot be used to discriminate by continuing to implement an accommodation that is narrow in scope and guarantees women's unimpeded access to the birth control benefits they are entitled to under the law.

The Proposals in the Request for Information Would Negatively Impact Women's Access to Birth Control

Because no additional modifications are required by RFRA, and even seemingly minor modifications could result in women losing seamless access to coverage, we urge the Departments to reject the proposed alternatives. However, if the Departments choose to amend the accommodation process, it is critical that women retain seamless access to contraception without cost-sharing or other barriers. A woman who obtains her health insurance coverage

⁷ 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.

through an accommodated entity should not be required to take any additional action to receive information about her coverage or obtain birth control.

A. 4. What impact would the alternative procedure described above have on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage for contraceptive services?

The Supreme Court asked parties to consider in their supplemental briefs a situation in which the employers do not need to provide written notice to HHS to invoke the accommodation. Instead, in the course of contracting with a health plan, the employers could verbally express their desire to have a plan that does not provide coverage of contraception. The Court asked whether such casual, unwritten “notice” is sufficient for an insurance plan to implement the accommodation and directly furnish contraception at no cost to employees. The RFI seeks input on this alternative proposal.

The alternative process should not be adopted because it is untenable and could destroy women’s seamless coverage of contraception. Clear notice is absolutely essential to the function of the birth control accommodation. First, it is unclear how health plans could accommodate verbally expressed objections without the usual required written and signed contracts. Doing away with written documentation would make it much more difficult for an eligible entity to communicate to its health plan which birth control methods need to be covered through the accommodation and would almost certainly give rise to more miscommunications and disputes between parties. For example, an eligible employer’s representative, such as a third party administrator, may misrepresent an employer’s wishes or falsely assert eligibility for the accommodation, resulting in a dispute that delays the process of arranging coverage for women. Rather than weakening the important notification step in the accommodation process, we support finding ways to strengthen the current EBSA Form 700 or written notice to HHS, such as by providing a checklist that requires entities to indicate those methods of contraception they do not want included in their health plan.

Not only would the alternative process be impractical and unworkable, it would hamper the Departments’ ability to conduct critical oversight and enforcement. In addition to being an integral component of the financing structures of the accommodation that make it possible for issuers and TPAs to provide contraception at no cost⁸, the written self-certifications are also an essential tool to ensure that plans actually provide women direct, continuous access to the full range of contraceptive methods without cost.

We also find suspect the notion that plaintiffs’ RFRA concerns will be resolved by the alternative proposal. It is unclear why plaintiffs, who have so far objected vociferously to even the minimally intrusive process of written self-certification, would draw such a sharp distinction between the current written and proposed alternative process. If history is any indication, an informal notice process will likely spark additional meritless litigation rather than put an end to

⁸ To offset costs associated with the provision of birth control not covered under the employer’s plan, current regulations allow health plans to receive an adjustment in their user fee. Third party administrators (TPAs) (and contracted pharmacy benefit managers (PBMs)) can also receive this reimbursement by entering into an arrangement with a health issuer eligible to receive the adjusted user fee. However, to maintain oversight of adjusted user fees, issuers, TPAs, and PBMs must present documentation to show that they are eligible for reimbursement, including the employer’s self-certification and the total dollar amount spent on contraceptive services. 78 Fed. Reg. 39870, 39882-39886 (Jul. 2, 2013); 26 C.F.R. § 54.9815-2713A(b)(3); 29 C.F.R. § 2590.715-2713A(b)(3); see also CMS, *FAQs for Federally-facilitated Marketplace (FFM) User Fee Adjustment Submission Requirements* (Aug. 22, 2016), available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FFM-UF_adjustment_FAQ_2015.pdf.

it. We implore the Departments not to weaken existing standards when doing so is unnecessary under the law and will likely only prolong efforts to block women's access to birth control.

B.2. What impact would this approach have on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage for contraceptive services?

The RFI seeks input on the plaintiffs' suggestions that health plans offer contraceptive-only policies instead of separate payments for contraceptive services, and that women take affirmative steps to enroll in those contraceptive-only policies. These alternative proposals are unfeasible, stigmatizing, and discriminatory. They directly undermine the contraceptive benefit, and would terminate seamless coverage of contraception. The Department must reject these proposals outright.

When the Departments proposed the birth control accommodation in February 2013, the Departments suggested that health insurance plans implement individual contraceptive-only policies.⁹ However, commenters noted that individual contraceptive-only policies would be extremely difficult – if not impossible – to administer. Some commenters raised concerns that contraceptive-only policies would be unenforceable under state law and that they would be unable to provide such policies to employees who resided or worked across state lines, while others noted that the lack of premiums associated with the health policies could cause financial challenges.¹⁰ In response, the Departments rejected its proposal and instead adopted the current accommodation, which requires issuers to provide separate payments. As the Departments noted in the final rule, the separate payment structure avoids the complications commenters addressed: it is simpler to implement, minimizes administrative and financial barriers, and still ensures that eligible employers' coverage excludes contraception.¹¹ The Departments should, again, reject this new iteration of the original proposal.

Moreover, the plaintiffs' proposal to have women separately enroll in these fictional, untenable contraceptive-only plans contravenes Congressional intent and eliminates seamless access to birth control without cost. Section 2713 of the Public Health Service Act (as added by Section 1001 of the ACA) intends to broaden access to coverage of contraceptive services and supplies. For the accommodation to be consistent with the law's intent, the Departments must make sure that the accommodation does not impose any additional hurdles or barriers that would prevent or delay access to contraception. Furthermore, seamless coverage is required by various laws prohibiting barriers to or discrimination in benefits and access to care. That any accommodation must be structured in such a way to provide seamless access to contraceptive coverage is not just necessary to fulfill the goals of the preventive services provision, but is also required by other provisions of the ACA and other federal laws prohibiting discrimination in benefits.¹²

⁹ 78 Fed. Reg. 8456, 8462-8463 (Feb. 6, 2013).

¹⁰ 78 Fed. Reg. 39870, 39876 (Jul. 2, 2013).

¹¹ *Id.*

¹² Section 1554 of the ACA, entitled Access to Therapies, prohibits the Secretary from promulgating "any regulation that— (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services." 42 U.S.C. § 18114 (2016).

A separate premium charge, enrollment period or delay in access to coverage, lack of accurate notice, loss of critical protections, or any other impediment built into the structure of the accommodation would create an unreasonable barrier and impede timely access to contraception.

Additionally, if the accommodation were structured in such a way as to erect additional hurdles or burdens on women's access to contraceptive coverage, it would allow the continuation of discriminatory health care policies and practices that place an unfair burden on women, contrary to various prohibitions on sex discrimination in the provision of health care programs and

On its face, a separate enrollment process means coverage is not seamless. The enrollment process itself could be a barrier, potentially involving a third party with whom enrollees are completely unfamiliar. And, it could be confusing and onerous for individuals to maintain information about two separate routes through which they obtain coverage of health services.

In addition, it is imperative that the Departments keep in mind that contraceptive-only policies could disrupt continuity of care and create a burdensome health care system for women. The majority of women rely on their family planning and sexual health provider as their main source of care,¹³ including contraceptive care, and utilize their insurance coverage for a wide range of services received from their health care provider. However, contraceptive-only policies might not have the same network of providers as the accommodated entity's plan. As a result, individuals who receive health insurance coverage through accommodated entities may have to receive contraceptive care from someone other than their regular provider, interrupting care continuity and impacting women's health care access overall.

The accommodation was specifically designed to guarantee that individuals who obtain their health insurance coverage through an accommodated entity have the same access to contraceptive services as they would should the accommodation not exist. As discussed above, alterations to the accommodation are not necessary to satisfy RFRA, however altering the accommodation as the plaintiffs propose undercuts the purpose of the accommodation. The Departments cannot follow the plaintiffs' approach and still maintain the integrity of the accommodation. We urge the Departments to ensure that any revisions to the accommodation do not result in barrier or delay to contraception.

Additional Comments on Modifications to the Accommodation

Finally, while the Departments should not modify the mechanics of the accommodation, if they do so, we strongly urge the Departments to maintain the other existing components of the accommodation. In particular, we ask that any future regulations maintain the notice requirements that ensure health plans notify individuals enrolled in the objecting employer's plan about the separate contraceptive coverage/payments at no cost and reiterate the policy that states may enact contraceptive coverage laws that are more protective of consumer access to contraceptive coverage. We also request a centralized enforcement entity within the Departments that can streamline the fragmented enforcement system that is currently based in different areas of the law and levels of government,¹⁴ conduct any audits necessary to ensure that processes are operating as intended under the law, serve as a repository for consumer complaints, and ultimately ensure women receive the birth control services they are entitled to without barrier or delay.

benefits, including Section 1557 of the ACA(42 U.S.C. § 18116 (2016)), Title VII (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.)), and Title IX(20 U.S.C. 1681 (1972)).

¹³ Perry Udem Research & Communication, "Women & OB/GYN providers," *Planned Parenthood Federation of America*, November 2013 http://www.plannedparenthood.org/files/4914/0656/5723/PPFA_OBGYN_Report.FINAL.pdf.

¹⁴ Depending on whether a health plan is self-insured or fully-insured, it may be governed by the Employee Retirement Income Security Act ("ERISA") or both ERISA and state insurance regulations. In addition, although states are responsible for enforcing plan coverage, HHS has authority to enforce PHSA, and the Internal Revenue Service ("IRS") is responsible for penalizing plans that do not comply with PHSA § 2713 (and other ACA requirements). In some cases, plans will be regulated by the Departments and/or state insurance regulators.

NFPRHA appreciates the opportunity to provide these comments. If you require additional information about the issues raised in this letter, please contact Mindy J. McGrath, Director of Advocacy & Communications at mmcgrath@nfprha.org or Robin Summers, Vice President of Health Care Strategy and Analysis at rsummers@nfprha.org.

Sincerely,

A handwritten signature in cursive script that reads "Clare M. Coleman". The signature is written in a dark ink and is positioned to the left of the typed name.

Clare Coleman
President & CEO