MODEL COMMENTS ON THE CONTRACEPTIVE COVERAGE ACCOMMODATION

[DATE]

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Subject: NPRM: Certain Preventive Services Under the Affordable Care Act, CMS-9968-P, Docket ID: CMS-2012-0031-63161

The following comments are submitted by [ORGANIZATION] in response to the Notice of Proposed Rulemaking (NPRM) on "Certain Preventive Services Under the Affordable Care Act," published in the Federal Register on February 6, 2013. [BRIEF DESCRIPTION OF ORGANIZATION].

The NPRM announces the Departments' proposals for changing the definition of a "religious employer" for purposes of an exemption, and implementing the "accommodation" for eligible organizations that object to coverage of contraceptive services – as required by the Affordable Care Act (ACA) – for religious reasons. Although both the exemption and the accommodation are not required by law, [ORGANIZATION] offers comments on the questions raised in the NPRM in order to ensure that the Departments structure both the exemption and the accommodation in a seamless way that does not unfairly disadvantage those individuals subject to it or harm their health.

A. Definition of "Religious Employers" Exemption

We believe that the Departments' change to the exemption for religious employers "would not expand the universe of employer plans that would qualify for the exemption."[1] In addition, we commend the Departments for proposing that each employer in any multiple employer plan must independently satisfy the requirements of the exemption. However, the women who get health insurance coverage through exempted entities will not receive contraceptive coverage without cost sharing. Therefore, we strongly urge the Departments to completely eliminate the exemption, and instead apply the accommodation to those entities that would fall under the exemption. Only this solution ensures that all women, no matter where they work, have seamless access to contraceptive coverage.

B. Definition of "Eligible Organization" for the Accommodation

We understand that the Departments have proposed a four-part test for determining which organizations are eligible for the accommodation.

- We strongly support the Departments' decision to limit the accommodation to non-profits. For-profit businesses exist to make money through commercial activity. Their purpose is profit, not religious exercise.

[1] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 at 8461 (Feb. 6, 2013).

- We strongly oppose the Departments' decision to offer the accommodation to organizations that refuse to cover only some contraceptives. This wrongly stigmatizes certain contraceptives as "abortifacients" and could create practical difficulties with implementation.
- The Departments must ensure that only organizations that prominently and consistently hold themselves out to the public, their employees, and students as religious may take advantage of the accommodation.
- The Departments must ensure that the self-certification process is robust and transparent, including by requiring eligible organizations to file the self-certifications of eligibility with the Departments.

Overall, we strongly urge the Departments to ensure that the four-part test is narrowly applied and fully enforced, so that as few women as possible are affected by it.

C. Implementation of the Accommodation

The Departments have offered different proposals for implementing the accommodation. We urge the Departments to implement the accommodation so that women receive seamless access to contraceptive coverage. Increased access to contraception is a matter of public health, as contraception advances women's and their families' health and lives. Contraception should not be stigmatized by isolating it from other coverage or services, nor should barriers be created to make accessing this care more difficult. Any other result would undermine Congress's determination that coverage of recommended preventive services without cost sharing is necessary to achieve basic health coverage for more Americans, and, in particular, to remedy discrimination against women in health care.

To that end, the Departments must:

- Clearly state in the rule that if the contraceptive coverage is not in place at the start of the plan year, the eligible organization will not be accommodated that year;
- Ensure that participants and beneficiaries subject to the accommodation receive timely, accurate, and clear notice about their contraceptive coverage without cost-sharing;
- Require that insurers and third-party administrators (TPAs) provide participants and beneficiaries with a single insurance card for both their employer-sponsored plan and their contraceptive coverage;
- Ensure that women in plans that are accommodated have the same legal protections as those in non-accommodated plans; and,
- Ensure that issuers providing the contraceptive coverage under the accommodation comply with the requirements of § 2713 of the Public Health Service Act and its implementing regulations and guidance.

Additionally, if the Departments move forward with the contraceptive-only policy as an excepted benefit, the Departments must ensure that all relevant protections apply, such as direct access to OB-GYN providers and HIPAA privacy and disclosure.

With respect to the mechanism through which self-insured plans will be accommodated, the Departments must implement the accommodation so that women receive seamless access to contraceptive coverage. The Departments must state that:

- It is a legal requirement that TPAs find issuers of the contraceptive coverage for "eligible organizations" with which they contract;
- Where an "eligible organization" shifts its legal responsibility to provide contraceptive coverage to TPAs and issuers, the TPAs and issuers take on the legal obligations of the employers as well; and,
- If an "eligible organization" does not have a third-party to provide coverage to its employees, it cannot be accommodated.

If the Departments proceed with their plan of adjusting the Federally-Facilitated Exchange user fees for issuers, we strongly urge that the Departments do so in a way that does not undermine any aspect of the Exchanges. Moreover, we urge the Departments to identify alternative sources of funding for issuers in the event that the Exchange user fees become an inadequate source. And as a matter of principle, it is unacceptable to take money that has been assessed for the specific purpose of ensuring that millions of Americans have access to health care coverage, and use it instead to underwrite the religious beliefs of the "eligible organizations."

D. Additional Issues

[ORGANIZATION] strongly supports the Departments'' statement that "the provisions of these proposed rules would not prevent states from enacting stronger consumer protections than these minimum standards."[2] State health insurance laws requiring coverage for contraceptive services that provide more access to contraceptive coverage than the federal standards would therefore continue under the proposed rules.

The Departments must clarify that other existing legal obligations specifically requiring contraceptive coverage, such as those arising from Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, continue to apply to those organizations that are exempted or accommodated.

Finally, the Departments must provide enforcement and oversight of the preventive services requirement overall, and of the religious employer exemption and the accommodation in particular.

In summary, in order to fulfill the promise of the preventive services provision of the health care law, women who are subject to an accommodation must have the same seamless access to no-cost contraceptive coverage as those who are not.

Sincerely,

[ORGANIZATION]

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[2] *Id*. at 8468.