

October 21, 2014

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9940-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Dear Administrator Tavenner,

On behalf of the more than 68 million Catholics in the United States, 63 percent of whom support coverage for birth control in private or government-run plans¹ and more than 80 percent of whom believe that using contraception is a moral choice,² we applaud the Departments of Health and Human Services, Labor and the Treasury (herein after “the Departments”) for seeking to protect religious freedom while preserving contraceptive coverage without cost-sharing for workers, students and dependents at religious nonprofit organizations and universities. We understand that this notice of proposed rulemaking represents an attempt by the Departments to respond to the decision made by the Supreme Court of the United States in *Burwell v. Hobby Lobby Stores, Inc.* However, just as that decision reflected a misguided interpretation of whose “religious liberty interests”—and whose conscience— require accommodation, we are concerned that this proposed rule perpetuates a troubling trend of prioritizing the illegitimate “religious liberty” claims of institutions over the true religious liberty rights and healthcare needs of individual workers and their dependents.

Extend the Accommodation to Include Women Left Out

During previous comment periods regarding the coverage of contraceptive services under the Affordable Care Act, we have registered our objections to granting any institution or organization permission to deny its workers contraceptive coverage, or to require workers to jump through burdensome hoops to obtain coverage. We remain convinced that completely excluding any woman from equal access to contraception undermines the government’s equally compelling interests of protecting religious liberty and advancing women’s equality, as this ignores the real religious liberty and healthcare needs of some women simply on the basis of how they receive their health insurance. By drawing arbitrary lines between those women whose consciences are worthy of respect and those deemed unworthy, we fear that the Departments have also opened themselves up to having that line redrawn by the Supreme Court, as occurred in *Burwell v. Hobby Lobby Stores, Inc.*

We continue to believe that the least restrictive means of advancing the critical ideals of religious liberty and women’s equality would be to require all employers to adhere to the same standards: to eliminate the exemption for certain religious institutions, the accommodation for certain religious nonprofit organizations and the new proposed accommodation for some for-profit corporations. Allowing employees, students and dependents the choice of whether or not to use contraception infringes on no one’s conscience and undermines no one’s health rights, but we cannot say the same for an approach that places institutions’ false claims of “conscience” ahead of the consciences of individuals whom our faith compels us to respect.

Failing this approach, we continue to strongly encourage the Departments to, at the very least, replace the exemption for religious institutions with an accommodation. We see no ethical, legal or moral reason for denying these employees and dependents the same protections for their own beliefs and healthcare needs enjoyed by their counterparts at nonprofit organizations or for-profit companies. The Departments continue to argue—and the Supreme Court itself stated in its opinion in *Burwell v. Hobby Lobby Stores, Inc.*—that the existing accommodation strikes an appropriate balance between respecting the beliefs of nonprofit executives and the healthcare needs of workers. But it is not clear, nor has it ever been clear, why the employees of religious institutions should not be afforded the same right to self-determination, or why an accommodation would infringe on the beliefs of employers at those institutions. Providing an employer with veto power over an employee’s conscience-based decision to use birth control is unjust in any context.

Defining a “Closely-Held” For-Profit Corporation

We do not think it is acceptable to redefine “religious liberty” to apply to the illegitimate “conscience” rights of institutions—whether for-profit or nonprofit. Furthermore, we believe that the proposed rules are premature, as Congress created the law that instigated federal contraceptive coverage regulations and it is Congress’s responsibility to amend that underlying code. Should the Departments seek to tailor accommodations as a response to the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, however, we strongly encourage them to define a “closely-held” for-profit corporation in the narrowest possible terms to avoid disrupting even more women’s access to contraceptive coverage as they find themselves left at the mercy of their employers’ beliefs.

In the proposed rules, the Departments offer several possible definitions for determining which for-profit companies may qualify for an accommodation in relation to contraceptive coverage. Each of these definitions relies on the number of owners, with some including the owners’ levels of involvement in the business, the owners’ levels of religious proselytizing through the business itself, or considerations regarding the number of company shareholders. Out of respect for common sense, true religious freedom and the spirit of the

law, we strongly encourage the Departments to add an additional set of considerations when defining a “closely-held” business: the number of its employees who will be affected by this new definition. We believe this number should be zero. We propose that, for the purposes of this specific law, a “closely held” company will be defined as only those that employ no one beyond its objecting owners. This would limit the effect of this law to solely impact the coverage of those who object to the use of contraception, and it would preserve the access to healthcare and religious liberty of workers—and other company co-owners—who do not agree.

Documenting Decision-Making and Disclosure of the Decision

We do not believe that any woman’s access to contraceptive coverage should be left up to a vote by her employers. There can be no “valid corporate action” to take away some workers’ religious liberty or healthcare rights—such actions are unjust and, as a result, inherently invalid. If company owners do make that unconscionable decision, however, we believe that the Departments must absolutely ensure that it not take place under a cloud of secrecy.

Employees have a right to know if their bosses assert that workers’ personal beliefs should be trumped by those of their employers, as do members of the public who may wish to do business with that company, other for-profit entities that may consider merging or otherwise contracting with a company, and prospective shareholders, to name some interested parties. To the Departments’ invitation for comments as to “whether to require documentation of the decision-making process and disclosure of the decision” we respond with a resounding “yes,” and request that this documentation and disclosure be publicly available and accessible.

Estimating the Number of Women Impacted

Without a definition of “closely held,” it is nearly impossible to estimate the number of participants and beneficiaries who would be impacted by the Departments’ extension of an accommodation to include some for-profit corporations. This impossibility also illustrates the crux of the issue: leaving women’s contraceptive coverage up to the whims of their employers leaves too much uncertainty regarding basic health and conscience rights—for both women and any government body attempting to codify discrimination. We remain steadfast in our conviction that women’s ability to follow their own consciences when deciding whether to use contraception must be respected, no matter where they work.

We are encouraged, however, that the Departments request estimates for the numbers of women likely to be effected by the proposed rule. It is critical that the Departments keep the people whose conscience and healthcare rights hang in the balance at the forefront of their decision-making. We strongly urge the Departments to consider the human impact on those not in a position of power under this rule—the women workers and dependents whose

religious liberty rights and healthcare needs could be harmed—as the deciding factor when determining how to define a “closely held” corporation for the purposes of this rule. If even one woman finds her conscience stymied, her religious liberty denied and her access to healthcare curtailed because of the Departments’ rules, that would be one woman too many.

We also concur with Justice Ruth Bader Ginsburg’s dissenting opinion in *Burwell v. Hobby Lobby Stores, Inc.*, that allowing some for-profit corporations to deny workers their religious liberty rights will open a Pandora’s box of potential discrimination, and that the number of employees who could be harmed is not to be underestimated. As Justice Ginsburg warned, such a stance “would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure.” As Justice Ginsburg also noted, a “closely held” corporation is also not necessarily “synonymous with small,” and enabling even a small corporation to discriminate against its employees will have a large impact on those workers’ lives.

Already, we know the impact that the exemption to contraceptive coverage requirements for certain religious institutions has had on some women’s lives. We therefore reiterate our request that the Departments reconsider their decision to leave some women completely out of the contraceptive coverage benefit, denying this equal access simply because of where they work. More than one woman has had her conscience ignored and human dignity disrespected because of that unjust exemption, and even one is too many, in our view.

For example, one group of individuals whom the federal government has left completely out of contraceptive coverage—those working for Catholic parishes across the United States—includes more than 160,000 workers. According to the United States Conference of Catholic Bishops: “The total number of people on parish staffs in the United States is estimated to be 168,448. This total includes ministry and non-ministry staff and volunteers.” The bishops’ conference also states that “the average parish has a total staff of 9.5 members with 5.4 individuals in ministry positions.”³

Who are we to decide which of these workers, their children or their spouses should be left without the means to make the conscience-based decision to use contraception?

State Law vs. Federal Regulations: Continue Non-Preemption Clause

One of the original promises of the Affordable Care Act was that people would be able to keep the insurance that they liked. We hope that this commitment will not be abandoned in the cases of those employees who are already accessing contraception through their insurance plans by virtue of state laws that demonstrate respect for the individual conscience.⁴ We also hope that the Departments will protect the consciences and religious liberty of individual employees in those states that already ensure greater protections and

access for employees than current federal proposals. Maintaining federal requirements as a floor rather than a ceiling, as the Departments have in previous rules regarding contraceptive coverage regulations, will at least guarantee that those employees who live in states that require contraceptive access regardless of policies implemented by their employer or insurer will not have their contraceptive coverage disrupted or, worse, eliminated, by more restrictive federal proposals.

Religious Liberty and Conscience Protections: Meant for the Individual

Contraceptive coverage for each woman, regardless of where she works, respects employees' individual rights—both of conscience and individual religious liberty. Contraceptive coverage requirements infringe on no one's conscience, demand no one change her or his religious beliefs, discriminate against no woman or man, put no additional economic burden on the poor, interfere with no one's medical decisions and compromise no one's health. Individuals, after all, have consciences and religious liberty. Institutions do not.

Catholic teaching reflects this understanding by prioritizing respect for the individual conscience in matters of moral decision-making. Our Catholic tradition also calls on us to honor religious liberty, which in its true sense honors individuals' rights to both the freedom of religion, along with the freedom from being forced to live by another's beliefs. Neither this freedom of conscience nor the freedom of religion should be misconstrued as extending to institutions.

The regulatory acrobatics requested by the Court and reflected here demonstrate a profound disregard for individual employees, who, unlike institutions, have tangible needs for healthcare access and religious liberty rights and who should be able to expect government protection for both. Ensuring contraceptive access for all women avoids the untenable position of allowing the Departments to determine which employees' consciences—and health—matter, simply on the basis of where they work.

The more than 530,000 full-time and 235,000 part-time employees at Catholic hospitals⁵ and their dependents should expect the same access to contraceptive coverage as other workers are guaranteed by law. The hundreds of thousands of employees at the 251 Catholic colleges and universities in the United States expect such access. The workers at Catholic Charities, at Hobby Lobby, at businesses and nonprofits large and small, secular and religious, all deserve equal respect for their consciences and their ability to make their own healthcare decisions without employer interference. Each of these workers stands to lose this coverage if the Departments do not ultimately ensure that their rights are always considered first and foremost, rather than continuing to bend to the will of unappeasable litigants.

We cannot accept the idea that certain women are somehow more deserving of healthcare coverage, their consciences more important than some others', simply because of where they

work. This is unjust. In keeping with our Catholic tradition's commitment to uphold the dignity of all people and our fundamental American value of equality under the law for all individuals, we cannot accept a second-class citizenship for any woman.

Conclusion: Ensure Access to Affordable Contraceptive Services for All

The court of Catholic public opinion stands firmly in favor of protecting timely, seamless contraceptive coverage for all women—not red tape. The majority of Catholics support equal access to the full range of contraceptive services and oppose policies that impede upon that access. Two-thirds of Catholic women (65 percent) believe that clinics and hospitals that take taxpayer money should not be allowed to refuse to provide procedures or medications based on religious beliefs.⁶ A similar number of Catholic voters, 63 percent, also believe that health insurance, whether private or government-run, should cover contraception.⁷ A strong majority (78 percent) of Catholic women prefer that their hospital offer emergency contraception for rape victims, while more than half (55 percent) want their hospital to provide it in broader circumstances.⁸ This support for the full range of contraceptive services is unsurprising, as restrictions like refusal clauses or prohibitive costs affect Catholics just as often as non-Catholics—and 99 percent of sexually experienced Catholic women have used a modern method of birth control,⁹ mirroring the rates of the population at large.

Expanding access to contraception by making it more affordable does make a difference in the lives of many women and their families. Each woman's ability to prevent unintended pregnancies, regulate health conditions, prevent sexually transmitted diseases and, in some cases, to avoid potentially life-threatening pregnancies, matters, and there is no acceptable religious or political justification to the contrary.

Coverage for contraceptive services and counseling also demonstrates sound judgment about the common good and complements our faith's social justice tradition. As Catholics, we are called to show solidarity with and compassion for the poor. Eliminating copayments for a full array of family planning methods makes these services more affordable for working women in the United States and allows greater access to the healthcare services that are best for them and for their families.

We ask that the Departments not grant institutions a free pass to trample employees' consciences and religious freedom; instead, we hope that you will demonstrate a commitment to the common good by protecting the individuals who stand to lose the most. Barring the complete rescission of the refusal clause for religious institutions or the accommodation for "religious organizations," we hope that the Departments will indeed ensure that contraceptive access is "affordable, accessible, meaningful and stable,"¹⁰ and that religious liberty is protected for all employees.

Therefore, we respectfully request that the Departments expand the “accommodation” for nonprofits and the proposed accommodation for some for-profit corporations to include currently exempted religious institutions. We further recommend that the Departments define “closely-held” corporations by first and foremost considering the employees who would be impacted by such a definition. We also strongly recommend that the Departments, in the interest of transparency and accountability, ensure that decision-making by corporations that qualify for the ultimate accommodation is documented and publicly available. Finally, we urge the Departments to continue the precedent, already established in previous rules regarding contraceptive coverage, of ensuring that federal contraceptive coverage regulations do not preempt state contraceptive coverage laws that guarantee greater protections for the consciences and healthcare needs of workers.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jon O'Brien". The signature is stylized and somewhat abstract, with the first name "Jon" and last name "O'Brien" clearly legible.

Jon O'Brien
President

¹ Belden, Russonello & Stewart, “Catholic Voters’ Views on Health Care Reform and Reproductive Health Care Services: A National Opinion Survey of Catholic Voters,” September 2009.

² Gallup News Service, “Gallup Poll Social Series: Values and Beliefs,” May 3-6, 2012.

³ Center for Applied Research in the Apostolate at Georgetown University, “Study Documents the ‘Supersizing’ the U.S. Catholic Parish Life,” July 15, 2011.

⁴ “Generally, Federal health insurance coverage regulation creates a floor to which States may add consumer protections, but may not subtract. This means that, in States with broader religious exemptions than that in the final regulations, the exemptions will be narrowed to align with that in the final regulations because this will help more consumers. Organizations that qualify for an exemption under State law but do not qualify for the exemption under the final regulations may be eligible for the temporary enforcement safe harbor. During this transition period, State laws that require contraceptive coverage with narrower or no religious exemptions will continue.” Federal Register, Vol. 77, No. 55, March 21, 2012, 16508.

⁵ Catholic Health Association of the United States, “Catholic Health Care in the United States,” January 2012.

⁶ Belden, Russonello & Stewart, “Religion, Reproductive Health and Access to Services: A National Survey of Women,” Catholics for Choice, April 2000.

⁷ Belden, Russonello & Stewart, “Catholic Voters’ Views on Health Care Reform and Reproductive Health Care Services,” Catholics for Choice, 2009.

⁸ Belden, Russonello & Stewart, “Religion, Reproductive Health and Access to Services: A National Survey of Women,” Catholics for Choice, April 2000.

⁹ US Centers for Disease Control and Prevention, National Survey of Family Growth, 2006-2010.

¹⁰ Federal Register, Vol. 77, No. 55, March 21, 2012, 16507.