THE NATIONAL CATHOLIC BIOETHICS CENTER

Upholding the Dignity of the Human Person in Health Care and Biomedical Research since 1972

Submitted Electronically

April 3, 2023

Centers for Medicare and Medicaid
Services Department of Health and Human
Services
Attention: CMS-9940-IFC
P.O. Box 8016
Baltimore, MD 21244-8016

Subj: Coverage of Certain Preventive Services Under the Affordable Care Act, RIN 0938-AU94, CNS-9903-P

Dear Sir or Madam:

The National Catholic Bioethics Center (Center) would like to provide public comment on the proposed rule, *Coverage of Certain Preventive Services Under the Affordable Care Act.*

The Center is a non-profit research and educational institute which for over fifty years has been committed to providing education, guidance, and resources to individuals, institutions, and the larger society, promoting the dignity of the human person in health care and biomedical research. Critical to upholding the dignity of the human person is respecting the conscience rights of individuals, including sponsors of agencies, institutions, and corporations, regardless of their religious affiliation, or whether they have no such affiliation or formal belief system. The Center provides educational programming and consultations to individuals and institutions, including health care institutions and health care providers, seeking its guidance in the domain of bioethics. The Center has been at the forefront of the effort to navigate the difficult waters of bioethical dilemmas in medicine, law, and culture. Not only have we taught thousands of students and completed tens of thousands of free consultations, but we also have assisted health care institutions and providers in addressing the most challenging bioethical questions which society has confronted, especially the escalating threats to the rights of conscience. Increasingly our consultation services are requested by those being subject to demands placed upon them as individuals, agencies, institutions, and corporations which violate their deeply held moral beliefs.

With this strong history of addressing these challenges, the Center wishes to endorse the public comment submitted by the U.S. Conference of Catholic Bishops, attached, and add the following public comments:

1. Rights of conscience do not have to be grounded in a belief in a deity to be valid and deserving of legal protection but can be based on moral beliefs. The U.S. Equal Opportunity Commission cites in its *Compliance Manual on Religious Discrimination*:

   Overview: Religion is very broadly defined for purposes of Title VII. The presence of a deity or deities is not necessary for a religion to receive protection under Title VII. Religious beliefs can include unique beliefs held by a few or even one individual; however, mere personal preferences are not religious beliefs. Individuals who do not practice any religion are also protected from discrimination on the basis of religion or lack thereof. Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer. [A. Definitions][1]

Title VII of the *Civil Rights Act* of 1964 prohibits such discrimination in employment.[2] This requirement, by government of employers, must be balanced by the same protections afforded to employers by the federal government, especially for sponsors of businesses who have no religious affiliation. The proposed rule, in fact, violates the conscience rights of such an employer with a deeply held moral belief concerning contraceptives and abortifacients by the very government charged with protecting such rights.

We ask you to review the Center's public comment to the U.S. Department of Health and Human Services Office for Civil Rights concerning the proposal, attached "Safeguarding the Rights of Conscience as Protected by Federal Statutes" [RIN 0945-AA18]

2. Concerning the Meaning and Purposes of "Preventive Services."

   The U.S. Conference of Catholic Bishops cites:

   The underlying justification for mandating coverage for preventive services can be determined from the plain language of the statute and its legislative history. In section 2713(a)(4) of the ACA [*Affordable Care Act*], 42 U.S.C. § 300gg-13(a)(4), Congress gave the Health Resources and Services Administration [HRSA] the discretion to specify that certain

[1] U.S. Equal Opportunity Employment Commission, *Compliance Manual on Religious Discrimination*, Section 12 Religious Discrimination (January 15, 2021), Section 12., A. Definitions. Available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#:~:text=Title%20VII%20requires%20employers%20to,undue%20hardship%20on%20the%20employer.

[2] 42 U.S.C. §§ 2000e - 2000e17 (as amended).

group health plans shall cover, "with respect to women, such additional preventive care and screenings … as provided for in comprehensive guidelines" supported by HRSA.

The inclusion of "as provided for" indicates that the Congress granted HRSA authority to determine the type and extent of coverage that it will prescribe in its guidelines, and the Department has consistently interpreted the laws to grant such authority. 83 Fed. Reg. 57536, 57540 (Nov. 15, 2018). This language indicates that the coverage requirement under the ACA defers to specific preventive care provisions included within HRSA's guidelines. The ACA does not mandate that the Guidelines must include coverage for contraception. 83 Fed. Reg. 57536, 57542 (Nov. 15, 2018). Thus, HRSA may use its discretion to consider public policy and promulgate guidelines that provide for exemptions in accordance with the *Religious Freedom Restoration Act* (RFRA), 83 Fed. Reg. 57536, 57540. For the reasons asserted by the U.S. Conference of Catholic Bishops, as attached, the HRSA Guidelines related to preventive care should not be interpreted to require coverage for contraceptives.

3. Concerning the Religious Exemption.

The U.S. Conference of Catholic Bishops cites:

> Nonetheless, the Departments suggest, though without details, that they may be open to mandating something like the much-contested religious accommodation.[3] In our view, this would be a huge mistake because it would lead to litigation similar to that brought to challenge the mandate and accommodation. That litigation has consumed nearly a decade. At some point, and we think the point is now, the Departments need to stop tinkering with these rules as each new innovation simply generates another round of litigation. One solution, as we have consistently recommended, is for the HRSA to exercise its discretion to remove contraceptives as a mandated item of coverage given the enormous controversy it has generated and the consequent drain on government and private resources.

The Center holds that this proposed solution is a valid one in light of RFRA, the federal statutory protections for conscience rights, and the Departments' prior acknowledgement that religious exemptions to coverage regulations are appropriate. 83 Fed. Reg. 57536, 57542 (Nov. 15, 2018).

[3] See 88 Fed. Reg. at 7249 ("The Departments also seek comment on whether and how the health insurance issuer, in instances in which it does not have its own religious objection to covering contraceptive services, should be required to provide the contraceptive coverage, and what guardrails should be in place to separate the issuer's coverage of contraceptive services from the coverage provided under the insured group health plan or student health insurance coverage."); *id*. at 7265 ("The Departments also considered an approach under which, if an objecting entity designs or contracts for a health plan without contraceptive coverage, the contraceptive coverage requirement would apply directly to the issuer.").

4. Concerning the Moral Exemption.

The U.S. Conference of Catholic Bishops cites:

> Assuming for argument's sake that a moral exemption is not legally required,[4] federal agency rulemaking is not limited to what is *already* required by law. Otherwise, federal rulemaking would be superfluous because it would only restate or mirror what the law already provides**.**

Indeed, the underlying contraceptive mandate is not legally required because Congress "did not intend to require entirely uniform coverage of preventive services." 82 Fed. Reg. 47838, 47840 (Oct. 13, 2017). As mentioned, the coverage requirement does not apply to grandfathered plans that were established before the coverage requirement. *Id.* The Supreme Court has expressed that "there is no legal requirement that grandfathered plans ever be phased out" and these plans may continue to be exempted from the coverage requirement.[5] Similarly, there is no legal requirement or basis for the moral exemption to the coverage requirement to be rescinded or "phased out" because the exemption is consistent with longstanding federal statutory conscience protections.

The U.S. Conference of Catholic Bishops cites further:

> In the 2017/2018 cycle of rulemaking, the Departments provided ample and persuasive reasons for adopting a non-religious moral exemption from the mandate when they proposed and adopted such an exemption. Among other things, the Departments cited federal statutory protections for moral-based exemptions, including many that are applicable in the health care context generally and to contraceptives specifically[6].

The Center concurs. For example, the Church Amendment provides that an exemption is necessary to "protect individuals and health care entities from being required to provide or assist sterilizations, abortions, or other lawful health services if it would violate their religious beliefs *or* moral convictions…."[7] The "lawful health services" mentioned in this provision should be interpreted to include the provision of contraception.

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[4] But see *March for Life v. Burwell*, 128 F. Supp. 3d 1116 (D. D.C. 2015) (holding that refusal to provide an exemption for moral objectors is unlawful).

[5] *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2764 n.1 (2014).

[6] The Departments correctly noted, for example, that Congress has stated its intent that any legislation enacted in the District of Columbia on the provision of contraceptive coverage "should include a 'conscience clause' which provides exceptions for religious beliefs *and moral convictions*," has protected individuals with religious *or moral objections* to prescribing contraceptives, and has protected applicants for family planning funds with a "religious *or conscientious* commitment" to offer only natural family planning. 83 Fed. Reg. at 57594 n.1 (emphasis added).

[7] 42 U.S.C. 300a-7.

Conclusion

The National Catholic Bioethics Center, in concurring with the U.S. Conference of Catholic Bishops, urges the U.S. Department of Health and Human Services (HHS), through HRSA, to reconsider and rescind the mandate requiring coverage of contraception or sterilization in health plans as part of "preventive services." These drugs, devices and procedures do not prevent a disease condition, but impede the healthy condition known as fertility, and pose significant risks of their own to women's lives and health. At a minimum, consistent with the abortion and non-preemption provisions of the ACA and the Weldon amendment,[8] HHS should not mandate coverage of any drug or device that can disrupt the development of an existing embryo, whose very presence represents an existing pregnancy.

As long as the mandate, or any portion of the mandate, remains in place, we support an exemption for all stakeholders with religious or moral objections. For these reasons, we support the Departments' proposal to retain the existing religious exemption, and we urge the Departments to retain the existing moral exemption.

Thank you for the opportunity to comment.

Sincerely,

Joseph Meaney, PhD
President.

[8] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. H, § 507(d) (stating that no Labor/HHS funds may be made available to any government agency that discriminates against any health plan on the basis that the plan does not cover abortion). The Obama administration concluded that the Weldon amendment, which has been included in every Labor/HHS appropriation since 2004, "remain[s] intact" after enactment of the ACA. Executive Order 13535 (Mar. 24, 2010), quoted in 82 Fed. Reg. at 47793.