

ONE HUNDRED FIFTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

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October 18, 2017

The Honorable Eric D. Hargan  
Acting Secretary  
U.S. Department of Health & Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Dear Acting Secretary Hargan:

We write regarding the Interim Final Rules (IFRs), published on October 6, 2017, which significantly broaden the exemption for certain organizations to comply with the contraceptive coverage requirements provided by the Affordable Care Act (ACA).<sup>1</sup> We have serious concerns about the rules, as they will drastically expand the number of employers eligible to seek exemptions to the contraceptive coverage guarantee and will imperil untold numbers of women's access to affordable contraception.

The ACA guarantees that women covered under employer-sponsored group health insurance plans will have access to all necessary "preventive care and screenings," including the full range of Food and Drug Administration (FDA)-approved contraceptives, without any cost-sharing obligations.<sup>2</sup> This preventive services requirement was instituted based upon a detailed and comprehensive report from the Institute of Medicine (IOM), now known as the National Academies of Medicine, which showed that such access is essential for women and their partners

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<sup>1</sup> Dep't of the Treasury, Dep't of Labor, Dep't of Health and Human Services, *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act*, 82 Fed. Reg. 47792 (Oct. 6, 2017) [hereinafter *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792]; Dep't of the Treasury, Dep't of Labor, Dep't of Health and Human Services, *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act*, 82 Fed. Reg. 47838 (Oct. 6, 2017) [hereinafter *Moral Exemptions and Accommodations*, 82 Fed. Reg. 47838].

<sup>2</sup> 42 U.S.C. § 300gg-13(a)(4).

to avoid unintended pregnancies and promote the best outcomes for women and their families.<sup>3</sup> The requirement was recently reaffirmed by the Women's Preventive Services Initiative, a panel of experts in women's health, and supported by the Department of Health and Human Services' Health Resources and Services Administration (HRSA) in December 2016.<sup>4</sup>

Since the implementation of this provision, the average percentage of out-of-pocket contraception costs for women has dropped by at least 20 percent.<sup>5</sup> Women are increasingly likely to choose long-acting, more effective methods of birth control,<sup>6</sup> and they are more likely to use shorter term methods, such as the pill, in a consistent manner.<sup>7</sup>

In light of this success, we are deeply disappointed by the Administration's decision to expand the exemption – a decision that broadens the category of organizations eligible for religious and moral exemptions to the birth control benefit. Specifically, the Administration's actions will permit exemptions for *any* non-profit or for-profit employer with religious beliefs that lead it to oppose the use of contraception, and to do so without requiring these employers to notify the Department of Health and Human Services (HHS or the Department) of their decision in a way that would enable HHS to ensure affected employees do not lose their coverage.<sup>8</sup> Additionally, the Administration also permits non-profits and for-profit employers with no publicly traded ownership who have unspecified non-religious moral objections to birth control coverage to qualify for an exemption as well.<sup>9</sup> Taken together, these two rules allow virtually any employer to interfere with contraception coverage.

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<sup>3</sup> Committee on Preventive Services for Women Board on Population Health and Public Health Practice, *Clinical Preventive Services for Women: Closing the Gaps*, Institute of Medicine of the National Academies (2011).

<sup>4</sup> Health Resources & Services Administration, Women's Preventive Services Guidelines (<https://www.hrsa.gov/womensguidelines2016/index.html>); see Women's Preventive Services Initiative, *Recommendations for Preventive Services for Women Final Report to the U.S. Department of Health and Human Services, Health Resources & Services Administration* (Dec. 2016).

<sup>5</sup> 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 (July 2015).

<sup>6</sup> Kaiser Family Foundation, *The Future of Contraceptive Coverage* (Jan. 2017) (<http://files.kff.org/attachment/Issue-Brief-The-Future-of-Contraceptive-Coverage>).

<sup>7</sup> Lydia E. Pace, Stacie B. Dusetzina, and Nancy L. Keating, *Early Impact of the Affordable Care Act on Oral Contraceptive Cost Sharing, Discontinuation, and Nonadherence*, Health Affairs (Sept. 2016).

<sup>8</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792.

<sup>9</sup> *Moral Exemptions and Accommodations*, 82 Fed. Reg. 47838.

While the Administration contends that these rules will not impact “over 99.9 percent of the 165 million women in the United States,”<sup>10</sup> the rule acknowledges that “[t]he Departments do not have sufficient data to determine the actual effect of these rules on plan participants and beneficiaries.”<sup>11</sup> We are concerned that the number of women affected by these rules could be much greater than the Administration has estimated.

Several aspects of the IFRs are particularly alarming. First, the rules reverse the Department’s previous position that the government has a compelling interest in ensuring that women have affordable access to all forms of FDA-approved contraception.<sup>12</sup> In doing so, the Administration argues that “there are multiple [f]ederal, [s]tate and local programs that provide free or subsidized contraceptives for low-income women.”<sup>13</sup> The interim final rules note that these programs include “Medicaid (with a 90 percent federal match for family planning services), Title X, community health center grants, and Temporary Assistance for Needy Families.”<sup>14</sup> However, the Administration’s proposed budget threatens significant cuts to Medicaid,<sup>15</sup> and in April, the President signed into law a provision which attempts to allow states to block certain health care providers from receiving Title X funds.<sup>16</sup> We fail to see how the Administration will ensure that women have coverage for contraception while at the same time proposing drastic cuts to the very programs that provide these services. Birth control is a critical preventive health tool for women that should not be singled out or treated differently from any other preventive health service. Birth control access and coverage is also essential to women’s equality, and to treat this care differently from other preventive services is discriminatory.

Additionally, the IFRs make the accommodation process optional, rather than mandatory, for any entity which claims an exemption based on a religious or moral objection to contraception.<sup>17</sup> In so doing, these rules make it extraordinarily difficult, if not impossible, for the government to offer affected employees appropriate alternative coverage. The Supreme

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<sup>10</sup> Dep’t of Health and Human Services, *Trump Administration Issues Rules Protecting the Conscience Rights of All Americans* (Oct. 6, 2017), <https://www.hhs.gov/about/news/2017/10/06/trump-administration-issues-rules-protecting-the-conscience-rights-of-all-americans.html>.

<sup>11</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47816.

<sup>12</sup> Notably, it reaches this conclusion notwithstanding Justice Kennedy’s express assertion in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_\_ (2014), stating that the contraception coverage requirement “furthers a legitimate and compelling interest in the health of female employees.”

<sup>13</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47803.

<sup>14</sup> *Id.*

<sup>15</sup> *Trump’s Budget Cuts Deeply into Medicaid and Anti-Poverty Efforts*, The New York Times (May 22, 2017).

<sup>16</sup> Pub. L. No. 115-23 (2017).

<sup>17</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792; *Moral Exemptions and Accommodations*, 82 Fed. Reg. 47838.

Court explicitly instructed the federal government and parties to the *Zubik v. Burwell* case to find a solution that would ensure women have seamless birth control coverage,<sup>18</sup> and these rules fail to do that. In fact, in January 2017, the Department explained that eliminating the requirement that organizations notify the federal government of their objections in writing would “hinder women’s access to care” and “undermine the statute’s goal of ensuring full and equal health coverage for women.”<sup>19</sup>

Moreover, we are dismayed by the Administration’s decision to style these regulations as “interim final rules,” meaning that they take effect immediately and are not subject to the mandatory notice and comment period required by the Administrative Procedure Act (APA).<sup>20</sup> Because of this, a woman who was assured birth control coverage on October 5, 2017 may now be unable to afford the medications and services on which she has come to rely. Nothing in the Administration’s justification of the rule suggests that it faces an emergency situation that warrants issuing a major overhaul of HHS policy without an adequate notice and comment period.

Finally, the IFRs rely upon several conclusions without sufficient evidence to support the Administration’s decision. For example, the Administration argues that it is difficult to link increased access to contraception to a decrease in unplanned pregnancies,<sup>21</sup> despite overwhelming evidence to the contrary.<sup>22</sup> The rule also implies that access to contraception might actually increase teen pregnancy rates,<sup>23</sup> even though teen pregnancy rates today, five years after the birth control benefit went into effect, are at the lowest they have ever been.<sup>24</sup> Additionally, the rule contends that contraceptive coverage may result in “risky sexual behavior in a negative way,” and suggests instead that the government should be promoting “sexual risk avoidance” rather than contraceptive access for teens.<sup>25</sup> And while the Administration acknowledges that there is a preventive services gap between men and women, the

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<sup>18</sup> *Zubik v. Burwell*, 578 U.S. \_\_; 136 S. Ct. 1557, 1560-61 (2016).

<sup>19</sup> U.S. Department of Labor, Employee Benefits Security Administration, FAQs About Affordable Care Act Implementation Part 36, Jan. 9, 2017 (<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf>).

<sup>20</sup> 5 U.S.C. § 553.

<sup>21</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47804.

<sup>22</sup> See Guttmacher Policy Review, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy Is Driving Recent Abortion Declines* (March 18, 2016).

<sup>23</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47804.

<sup>24</sup> Centers for Disease Control and Prevention, *Teen birth rates fall nearly 50 percent among Hispanic and black teens, dropping national teen birth rate to an all-time low* ([www.cdc.gov/media/releases/2016/p0428-teen-birth-rates.html](http://www.cdc.gov/media/releases/2016/p0428-teen-birth-rates.html)) (accessed August 18, 2017).

<sup>25</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47805.



Administration cannot identify how the preventive services gap will be impacted by loss of coverage for contraception.<sup>26</sup>

For these reasons, we are deeply troubled the decision to abruptly reverse HHS policy and evidence-based findings, and remain wholly unconvinced that the proposed changes are in the best interest of American women and their families.

We therefore request that you provide us with the following information by November 1, 2017:

1. A detailed analysis supporting the Administration's assertion that "over 99.9 percent" of women in the United States will not be affected by the interim final rules and how HHS plans to track the total number of women impacted as a result of these rules.
2. The Trump Administration has proposed well over \$800 billion in cuts to the Medicaid program over the next ten years. Analysts have raised concerns that these cuts will have an outsized impact on women, and in particular may lead states to be "much less likely to commit to providing" women with access to a full range of contraceptives.<sup>27</sup> Please provide an analysis of how women's access to contraception coverage will be impacted by the Administration's proposed budget for Medicaid and CHIP in relation to these interim final rules.
3. Any analysis of the expected impact of Title X restrictions on women's access to affordable contraception in relation to these interim final rules.
4. An explanation of how the Administration expects to ensure coverage for impacted women when organizations that decline to provide such coverage are not required to report their decision to HHS.
5. Justification for the Administration's decision to issue interim final rules on this matter, effective immediately, and not subject to the APA-required notice and comment period.
6. Any analysis supporting the Administration's claim that coverage for other preventive services will "diminish the cost gap" between women and men resulting from the loss of contraceptive coverage by objecting employers.<sup>28</sup>

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<sup>26</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47803.


<sup>27</sup> *Women will pay the steepest price for Trump's Medicaid Cuts*, Quartz Media (May 23, 2017).

<sup>28</sup> *Religious Exemptions and Accommodations*, 82 Fed. Reg. 47792, 47803.

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Your assistance in this matter is greatly appreciated. If you have any questions, please contact Jacquelyn Bolen or Christina Calce on the Democratic Committee staff at (202) 225-3641.

Sincerely,

  
Frank Pallone, Jr.  
Ranking Member

  
Gene Green  
Ranking Member  
Subcommittee on Health

  
Diana DeGette  
Ranking Member  
Subcommittee on Oversight  
and Investigations

  
Kathy Castor  
Vice Ranking Member